STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

State of Wisconsin

Respondent.

v.

STEVEN A. AVERY, SR.,

Petitioner.

Case No. 05 CF 381

MOTION FOR LEAVE TO FILE MR. AVERY'S SECOND AMENDED NOTICE OF MOTION AND THIRD MOTION FOR POSTCONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06 AND § 805.15

PLEASE TAKE NOTICE that the Petitioner, Steven A. Avery ("Mr. Avery"), by and through his current postconviction attorneys, Kathleen T. Zellner and Associates, P.C. and Steven G. Richards, respectfully moves this Court for leave to file the attached second amended motion and exhibits incorporated herein as "Exhibit A" and in support thereof states as follows:

1. Current counsel has spoken twice with the current Manitowoc Clerk of Court, April Higgins, about the history of the Avery case filings at Manitowoc. Ms. Higgins explained that the Manitowoc record index is confusing but can be explained by the fact that when Manitowoc enacted electronic filing in 2013-2014 many of the Avery court filings were scanned but not in order of the court proceedings. One small example of this confusion is the record index numbering system order goes from 819 to 817 to 633 to 394, there are many more examples of this non-sequential numbering making it challenging to locate documents. Additionally, handwritten document numbers were placed at the bottom of the documents before 2014. Mr.

Avery is providing this court with parallel citations to the Manitowoc Record Index, the Appellate Record and separate appendices to eliminate any possible confusion for this Court about Mr. Avery's citations.

2. Therefore, Mr. Avery moves this court for leave to file his second amended motion and exhibit with the correct citations to the Manitowoc Record Index.

Respectfully Submitted,

KATHLEEN T. ZELLNER
Admitted Pro Hac Vice
IL Bar No. 6184574
Kathleen T. Zellner & Associates, P.C.
4580 Weaver Parkway, Suite 204
Warrenville, IL 60555
Telephone: (630) 955-1212
Email: attorneys@zellnerlawoffices.com

STEVEN G. RICHARDS
WI Bar No. 1037545
(Local Counsel)
Everson & Richards, LLP
127 Main Street
Casco, Wisconsin 54205
Telephone: (920) 837-2653
Email: sgrlaw@yahoo.com
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that January 24th, 2023, a true and correct copy of Defendant Steven Avery's Motion for Leave to File Mr. Avery's Second Amended Notice of Motion and Third Motion for Post-Conviction Relief Pursuant to Wis. Stat. § 974.06 and § 805.15 Pursuant to Wisconsin Statute 806.07 (1)(a) was furnished via electronic mail and by Federal Express, postage prepaid to:

Ms. Lisa E.F. Kumfer
Ms. Tiffany Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707
kumferle@doj.state.wi.us
wintertm@doj.state.wi.us

Honorable Judge Angela W. Sutkiewicz
Circuit Court Judge
Sheboygan County Courthouse
615 North 6th Street
Sheboygan, WI 53081

Kathleen T. Zellner
Admitted pro hac vice
Kathleen T. Zellner & Associates, PC
4580 Weaver Parkway, Suite 204
Warrenville, Illinois 60555
(630) 955-1212
attorneys@zellnerlawoffices.com

Steven G. Richards
State Bar No. 1037545
Everson & Richards, LLP
127 Main Street
Casco, Wisconsin 54205
(920) 837-2653
sgrlaw@yahoo.com

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN	)	
	)	
Respondent	)	
	)	
-v-	)	Case No.: 05-CF-381
	)	
STEVEN A. AVERY	)	
	)	
Petitioner	)	

SECOND AMENDED NOTICE OF MOTION AND THIRD MOTION FOR POST-CONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06 AND § 805.15

KATHLEEN T. ZELLNER
Lead Counsel
DOUGLAS H. JOHNSON
KATHLEEN T. ZELLNER &
ASSOCIATES, P.C.
4580 Weaver Parkway, Suite 204
Warrenville, IL 60555
(630) 955-1212

Counsel for Petitioner

STEVEN G. RICHARDS
Local Counsel
Casco, Wisconsin 54205
(920) 837-2653
Atty#: 1037545

Local Counsel for Petitioner

STATE OF WISCONSIN **CIRCUIT COURT** **MANITOWOC COUNTY**

State of Wisconsin *Respondent.*	)	
v.	)	Case No. 05 CF 381
STEVEN A. AVERY, SR., *Petitioner.*	)	

SECOND AMENDED NOTICE OF MOTION AND THIRD MOTION FOR POSTCONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06 AND § 805.15

PLEASE TAKE NOTICE that the Petitioner, Steven A. Avery ("Mr. Avery"), by and through his current postconviction attorneys, Kathleen T. Zellner and Associates, P.C. and Steven G. Richards, respectfully moves this Court pursuant to Wis. Stat. § 974.06 for an Order vacating the judgment of his convictions and sentence and ordering a new trial. In the alternative, he asks that this Court grant a new trial in the interests of justice pursuant to Wis. Stat. § 805.15 or its inherent authority because the real controversy was not fully tried. In support of his second amended motion, Mr. Avery states as follows:

Mr. Avery requests an evidentiary hearing and that he be produced for that hearing.

INTRODUCTION

Two new witnesses have emerged in Mr. Avery's case with new and compelling evidence about a murder mystery that has intrigued a worldwide audience. The rush to judgment and tunnel vision that led to the arrest, prosecution and conviction of Mr. Avery is exposed by

these new witnesses who provide new and undisputed evidence that directly links Bobby Dassey ("Bobby") to the murder of Teresa Halbach and the framing of Mr. Avery. Furthermore, this new evidence allows for a reconsideration of the real motive of this crime, as being a sexual homicide, which was the culmination of an obsession by Bobby with viewing thousands of images of violent, deviant pornography. On October 31, 2005 the obsessive fantasies of Bobby became a horrible reality when Teresa Halbach was brutally assaulted and murdered by two rifle shots to her skull. Her body was mutilated as were many of the female subjects in the Dassey computer images. Bobby was in possession of the Halbach vehicle, which contained the crucial evidence of this terrible crime: Ms. Halbach's blood, key, electronic devices, and license plate (which was concealed in another salvage car) and Mr. Avery's carefully deposited blood on the seats and dash and DNA on the hood latch. By being in possession of the vehicle Bobby was able to control the direction of the investigation. He planted the vehicle on the Avery property after he deposited Mr. Avery's blood and DNA in it. He had Ms. Halbach's key and electronic devices which ended up in Mr. Avery's bedroom and burn barrel. Bobby did all of this to exculpate himself and to frame his uncle, Mr. Avery. Mr. Avery does not have to prove who committed this terrible crime to receive relief. This is not his intent or purpose. However, he does have a right to prove he did not receive a fair trial. The new evidence, which establishes that Bobby meets all of the *Denny* criteria to be a third party suspect, and the evidence of two *Brady* violations demonstrate that Mr. Avery was deprived of a constitutionally guaranteed right to present a complete defense to the charges against him. *See Holmes v. South Carolina,* 547 U.S. 319, 324 (2006); *State v. Pulizzano,* 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), *citing Chambers v. Mississippi,* 410 U.S. 284, 294–95 (1973).

STATEMENT OF THE CASE

1. This case began in early November 2005 with the disappearance of Teresa Halbach, a twenty-five-year-old professional photographer. Ms. Halbach was reported missing on November 3, 2005. Volunteer searchers found Ms. Halbach's Toyota RAV-4 on the forty-acre site of Avery's Auto Salvage, a salvage yard business where Mr. Avery and other family members lived and worked on November 5, 2005. Ms. Halbach had photographed vehicles at this site previously, per Mr. Avery's request. According to State witness Bobby, Ms. Halbach was last seen walking towards Mr. Avery's trailer on October 31, 2005.

2. After finding Ms. Halbach's RAV-4, law enforcement 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 Ms. Halbach's; Mr. Avery's and Ms. Halbach's blood in the RAV-4; the remnants of electronic devices and a camera, the same models as Ms. Halbach's, in a burn barrel; Ms. Halbach's RAV-4 key in Mr. Avery's bedroom, with Mr. Avery's DNA on it; Mr. Avery's DNA on the hood latch of the RAV-4 (deposited, the State later claimed by Mr. Avery's "sweaty hands"); and a bullet in Mr. Avery's garage, containing Ms. Halbach's DNA.

PROCEDURAL HISTORY

I. THIRD PARTY SUSPECTS

3. On July 10, 2006, before Mr. Avery's trial, the trial court entered an order entitled "Order Regarding State's Motion Prohibiting Evidence of Third Party Liability" ("Denny Motion"). The order specified that if the defendant intended "to suggest that a third party other than Brendan Dassey is responsible for any of the crimes charged, the defendant must notify the Court and the State" of such intention at least 30 days prior to the start of the trial. The trial court further ordered that the defendant would be subject to the standards relating to the admissibility

of any third party liability evidence pursuant to *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

4. In light of the court's order, on January 10, 2007, Mr. Avery filed the "Defendant's Statement on Third Party Responsibility." There, Mr. Avery stated that he did not kill Ms. Halbach, and that there was "at least a reasonable possibility that one or more unknown others, present at or near the Avery Salvage Yard on the afternoon of October 31, 2005, killed her." Mr. Avery identified several persons as potential alternative perpetrators: Scott Tadych; Andres Martinez; Robert Fabian; Charles and Earl Avery; and the Dassey brothers. Mr. Avery argued that *Denny* did not apply to the circumstances in his case, and that as a result, he should not be bound by the three-part test set forth in *Denny*. He further argued that even if *Denny* did apply to his case, he should be permitted to introduce evidence at his trial of several alternative perpetrators in this case.

5. On January 30, 2007, the trial court entered its "Decision and Order on Admissibility of Third Party Liability Evidence." The court held that Denny's "legitimate tendency" test applies to any evidence the defendant wished to present regarding potential third parties who might have been responsible for Ms. Halbach's murder. The trial court found that "[i]n the absence of motive, it certainly may be more difficult for the defendant to offer evidence which is relevant and material connecting a third person to the crime. The court simply finds nothing in the offer made by the defendant that goes beyond the level of speculation." **(Doc. 490:1-15)** (238:1–15). **(App. 1-15)**[1].

[1] Current counsel has spoken twice with the current Manitowoc Clerk of Court, April Higgins, about the history of the Avery case filings at Manitowoc. Ms. Higgins explained that the Manitowoc record index is confusing but can be explained by the fact that when Manitowoc enacted electronic filing in 2013-2014 many of the Avery court filings were scanned but not in order of the court proceedings. One small example of this confusion is the record index numbering system order goes from 819 to 817 to 633 to 394, there are many more examples of this non-sequential numbering making it challenging to locate documents. Additionally,

II. VERDICT

6. On March 18, 2007, Mr. Avery was convicted, following a jury trial, of first degree intentional homicide, contrary to Wis. Stat. § 940.0l(l)(a) and felon in possession of a firearm contrary to Wis. Stat. § 941.29(2)(a). (**Doc. 541; 543**). The jury found Mr. Avery not guilty of mutilation of a corpse. **(Doc. 542).** (719:3). **(App. 16).**

III. POSTCONVICTION AND DIRECT APPEAL

7. On June 29, 2009, prior postconviction counsel filed a motion for postconviction relief on Mr. Avery's behalf, pursuant to § 809.30(2)(h) seeking a new trial on grounds that: (1) the trial court improperly excused a deliberating juror; and (2) the trial court improperly excluded evidence of third party liability. **(Doc. 634:1-28; 636:1-31).** (429:1–28; 427:1–31). **(App. 17-75)**.

8. On January 25, 2010, the motion for postconviction relief was denied by the Honorable Patrick L. Willis in a written order. Regarding the issue of Bobby's third party liability, Judge Willis' found: "The only evidence offered by the defendant to show motive on the part of Bobby Dassey consisted of evidence allegedly supporting a motive to frame Steven Avery. No evidence is offered to suggest Bobby Dassey had a motive to murder Teresa Halbach." Judge Willis concluded, "The evidence offered against Bobby Dassey probably did meet the opportunity and direct connection to the crime requirements of the legitimate tendency test because of his presence on the property at the time Teresa Halbach was there. However, without

---

handwritten document numbers were placed at the bottom of the documents before 2014. Mr. Avery is providing this court with parallel citations to the Manitowoc Record Index, the Appellate Record and separate appendices to eliminate any possible confusion for this Court about Mr. Avery's citations.

any showing of motive, third party evidence against Bobby Dassey is precluded under *Denny*." **(Doc. 660: 1, 95-96).** (453:1, 95-96). **(App. 76-78).**

9. On December 14, 2011, the Wisconsin Supreme Court denied Mr. Avery's petition for review, pursuant to § 808.10. **(Doc. 698:1).** (470:1). **(App. 79).**

10. On February 14, 2013, Mr. Avery filed his first and only *pro se* collateral postconviction motion, pursuant to Wis. Stat. § 974.06. **(Doc. 702:1-41).** (496:1–41). **(App. 80-120).** The motion was denied by the Honorable Judge Angela Sutkiewicz on November 23, 2015.

11. On October 11, 2019, current postconviction counsel appealed the circuit court's denial of Mr. Avery's second postconviction motion and all of its supplements. He filed motions to stay and remand concerning two additional claims. At the Appellate Court's direction, Mr. Avery raised his claims in his motions to the circuit court as supplemental postconviction motions. The circuit court denied his motions to supplement. On April 12, 2021, Mr. Avery filed a motion to stay and remand and the Appellate Court denied it.

IV. THE APPELLATE COURT'S JULY 28, 2021 DECISION

12. On July 28, 2021, the Appellate Court issued a per curiam opinion, upholding the circuit court's summary denial of Mr. Avery's claims raised in his § 974.06 postconviction motion and two supplemental motions, holding: "Avery's § 974.06 motions are insufficient on their face to entitle him to a hearing." *State v. Avery*, 2022 WI App 7, 400 Wis. 2d 541, 970 N.W.2d 564 (herein "Opinion"). **(Doc. 1056). (App. 121-68).**

V. PETITION FOR REVIEW

13. On November 17, 2021, the Wisconsin Supreme Court denied Mr. Avery's petition for review.

VI. THE APPELLATE COURT RESERVED MR. AVERY'S ABILITY TO

FILE A SUCCESSIVE § 974.06 MOTION ON CERTAIN CLAIMS

14. On April 12, 2021, during the pendency of Mr. Avery's appeal, Mr. Avery filed a motion with the Appellate Court to stay his appeal and remand for evaluation of a new claim. The Appellate Court acknowledged this claim, stating the following:

> 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 Mr. Avery 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 Ms. Halbach's death, while on his paper route in the early morning hours, he spotted a shirtless Bobby Dassey and an unidentified older man pushing Ms. Halbach's vehicle down Avery Road towards the junkyard. Mr. Sowinski further attested that, after he delivered the paper, Bobby Dassey attempted to block his exit, causing him to swerve and drive into a shallow ditch. Mr. 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.[2]

(Doc. 1056:46). (Opinion, pg. 46, ¶76). **(App. 166).**

15. Further, in its July 28, 2021 opinion, the Appellate Court advised:

> 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 the circuit court should resolve on a standalone basis through a new WIS. STAT. § 974.06 motion.
>
> 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

[2] Mr. Avery's current postconviction counsel has investigated the matter further to learn that Mr. Sowinski did not contact Mr. Avery's trial attorneys as he originally believed and stated in his original affidavit, but rather that he emailed the Innocence Project in 2016 after watching Making a Murderer, Season 1. His email was never passed along to any of Mr. Avery's attorneys. Mr. Sowinski's first attempt to contact Mr. Avery's current postconviction attorneys was in December of 2020, after Mr. Avery filed his second postconviction motion in 2017. Further, Mr. Sowinski's memory was refreshed, with a recorded dispatch that was recently discovered, in that he made the call to the Manitowoc Sheriff's Office on November 6, 2005.

> 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.

(Doc. 1056:46-47) (Opinion, pgs. 46-47, ¶¶77-78). **(App. 166-67).**

16. The Appellate Court reserved Mr. Avery's ability to file a successive § 974.06 motion on the claim in his most recent filing concerning the new witness who came forth on April 11, 2021. (Motion #6) **(Doc. 1056:2, 33, 41).** (Opinion, ¶1 and notes 18, 26). **(App. 122, 153, 161).** Specifically, the Appellate Court instructed the following:

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

(Doc. 1056:41). (Opinion, pg. 41, note 26, emphasis added). **(App. 161).**

17. Regarding certain claims Mr. Avery raised in his motion to reconsider the circuit court's October 3, 2017 order denying his second postconviction motion and its two supplements, the Appellate Court found that:

> Neither we nor the circuit court have squarely considered whether these claims are procedurally barred under ***Escalona-Naranjo*** or whether Avery pled sufficient materials entitling him to a hearing. 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.

(Doc. 1056:33). (Opinion, pg. 33, note 18). **(App. 153).** Thus, the new material that Mr. Avery raised in his motion to reconsider and its supplements was never ruled upon by the circuit court.

EVIDENCE SUPPORTING MR. AVERY'S THIRD § 974.06 POSTCONVICTION MOTION

I. NEWLY DISCOVERED EVIDENCE: NEW WITNESS PROVIDES DIRECT CONNECTION BETWEEN BOBBY AND THE HALBACH MURDER AND PLANTING EVIDENCE TO FRAME MR. AVERY

18. Mr. Avery's new witness, Mr. Thomas Sowinski ("Mr. Sowinski"), contacted Mr. Avery's current postconviction counsel in December of 2020. Mr. Avery had already filed his appeal on October 11, 2019. Mr. Sowinski stated that he had witnessed Bobby and one other individual, a bearded man, pushing Ms. Halbach's RAV-4 onto the Avery Salvage Yard in the early morning hours of November 5, 2005.[3] Mr. Sowinski claimed that he had reported this information to the Manitowoc Sheriff's Office.

19. On April 11, 2021, Mr. Sowinski provided an affidavit to Mr. Avery's current postconviction counsel, stating the following:

> Mr. Sowinski was a motor-route driver for Gannett Newspapers, Inc. and delivered papers to the Avery Salvage Yard in the early morning hours of November 5th of 2005. Prior to delivering the newspapers to the Avery Salvage Yard, he turned onto the Avery property and witnessed two individuals, a shirtless Bobby Dassey ("Bobby") and an unidentified older male suspiciously pushing a dark blue RAV-4 down Avery Road towards the junkyard. The RAV-4 did not have its lights on. Mr. Sowinski drove past the two men and delivered newspapers to the Avery mailbox, and then he turned around and drove back towards the exit. When he reached the RAV-4 still over there, Bobby Dassey attempted to step in front of his car to block him from leaving the property. Mr. Sowinski came within 5 feet of Bobby Dassey and his headlights were on Bobby during this entire time, then Sowinski swerved into a shallow ditch to escape Bobby and exit the property. Mr. Sowinski states in his affidavit that he called out "Paperboy, gotta go" because he was afraid for his safety. He further stated that Bobby Dassey looked him in the eye and did not appear happy to see Mr. Sowinski there. After Mr. Sowinski learned that Teresa Halbach's car was found later in the day on November 5, 2005, he realized the significance of what he had observed and immediately contacted the Manitowoc Sheriff's Office.

---

[3] Throughout this motion, the information Sowinski provided will be referred to as "the Sowinski evidence" which is contained in two affidavits cited throughout this motion as **"Exhibit F" (Doc. 1071)** and **"Exhibit 1 to Mr. Avery's Motion for Remand and Stay of Appeal."**

(*See* Exhibit 1 to Mr. Avery's Motion for Remand and Stay of Appeal, Mr. Sowinski's original affidavit). **(App. 169-72).** The following day, April 12, 2021, Mr. Avery filed a motion for remand and stay of appeal to the Appellate Court containing Mr. Sowinski's original affidavit.

20. The Sowinski evidence provided by Mr. Sowinski to Mr. Avery's current postconviction counsel is newly discovered evidence, which provides the missing direct connection between Bobby and Ms. Halbach's murder making him a *Denny* suspect.

21. The discovery of new evidence may constitute a sufficient reason for a second or subsequent postconviction proceeding under Wis. Stat. § 974.06. *See State v. Love*, 2005 WI 116, ¶¶21, 56, 284 Wis. 2d 111, 700 N.W.2d 62. To prevail, however, the movant must carry the burden of proving that the evidence at issue is newly discovered. In most cases, to obtain relief based on newly discovered evidence, a convicted person must establish by clear and convincing evidence 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. If the person satisfies those four requirements, then the circuit court must determine whether a reasonable probability exists that a different result would be reached in a new trial. *State v. Wilder*, No. 2020AP2043, 2022 Wisc. App. LEXIS 300, at *1 (Ct. App. Apr. 5, 2022).

1) The Sowinski Evidence was Discovered After Mr. Avery's Conviction

22. Mr. Avery did not have the Sowinski evidence before Mr. Sowinski came forward to Mr. Avery's current postconviction counsel in April of 2021. Mr. Sowinski attempted to contact the Innocence Project, and not Mr. Avery's trial defense counsel, via email in 2016 regarding the evidence he had, to no avail, and had not previously provided it to Mr. Avery's counsel. Rather, the Sowinski evidence was reported to the Manitowoc Sheriff's Office by Mr. Sowinski but the evidence was suppressed from Mr. Avery by the prosecution.

2) Mr. Avery was Not Negligent in Seeking the Evidence

23. Neither Mr. Avery nor his counsel were on notice that Mr. Sowinski had any knowledge about Bobby's actions on November 5, 2005. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 442 (2000) (finding that Williams had not failed to use diligence in pursuit of a juror misconduct claim where "[t]he trial record contains no evidence which would have put a reasonable attorney on notice that [Juror] Stinnett's non-response was a deliberate omission of material information.").

3) The Evidence is Material to an Issue in Mr. Avery's Case

24. The Sowinski evidence is material to several issues in Mr. Avery's case. Most importantly, it is material for establishing Mr. Avery's defense, that is, that a third party committed the crime against Ms. Halbach. It is material for establishing the direct link to Bobby as a third party *Denny* suspect and to opening the door to reconsidering the 'Velie CD' as establishing a sexual motive for the murder. Additionally, the Sowinski evidence is material to the evidence in the RAV-4 being planted by Bobby, including Mr. Avery's blood and DNA. The RAV-4 also contained the Halbach vehicle key and Ms. Halbach's electronic devices which were discovered in Mr. Avery's bedroom and burn barrel, respectively. Further, the Sowinski evidence is material to impeach Bobby's trial testimony that Ms. Halbach never left the Avery property, and that she was last seen walking towards Mr. Avery's trailer.

25. Bobby was the State's primary witness against Mr. Avery. During his opening statement, Prosecutor Kratz explicitly informed the jury of the significance of Bobby's putative observations on the date of Ms. Halbach's disappearance:

> You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive.

(Doc. 589:104). (696:104). **(App. 173).** Bobby's testimony was the most determinative of Mr. Avery's guilt[4] because the State used it to establish that Ms. Halbach never left the Avery property alive. **(Doc. 589:103-04).** (696:103–04). **(App. 174-75).**

26. At trial, Bobby testified that he observed Ms. Halbach's light-green or teal-colored SUV pull up in his driveway at 2:30 p.m. on October 31, 2005. **(Doc. 581:36)** (689:36). **(App. 176).** Bobby then observed Ms. Halbach exit her vehicle and start taking pictures of his mom's maroon van right in front of his trailer. **(Doc. 581:37)** (689:37). **(App. 177).** Bobby testified that he then observed Ms. Halbach walking towards the door of Mr. Avery's trailer. **(Doc. 581:38)** (689:38). **(App. 178).**

27. The following exchange occurred between Prosecutor Kratz and Bobby:

> Q: After seeing this woman walking toward your Uncle Steven's, did you ever see this woman again?
>
> A: No.

(Doc. 581:39) (689:39). **(App. 179)**.

Applicable Law re Denny

28. 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. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

29. To support the introduction of third party perpetrator evidence there must be a legitimate tendency that the third person could have committed the crime. The defendant need not establish the guilt of the third party to the level that would be necessary to sustain a

[4] Bobby was 1 of only 2 witnesses whose testimony the jury requested to review during deliberations. **(Doc. 538:1-2)** (384:1–2). **(App. 180-81).**

conviction. However, evidence that simply affords a possible ground of suspicion against another person should not be admissible. *State v. Wilson*, 2015 WI 48, ¶1, 362 Wis. 2d 193, 199, 864 N.W.2d 52.

30. "The 'legitimate tendency' test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." *Denny*, 120 Wis. 2d at 624 (citation omitted).

The Denny Requirements Are Now Satisfied

A) Bobby's Motive to Commit the Murder of Teresa Halbach

31. Under the motive prong, the court must question whether "the alleged third party perpetrator [had] a plausible reason to commit the crime?" *State v. Wilson*, 2015 WI 48, ¶57, 362 Wis. 2d 193, 219, 864 N.W.2d 5222; *see also State v. Griffin*, 2019 WI App 49, ¶8, 388 Wis. 2d 581, 589, 933 N.W.2d 681.

32. A defendant's motive to commit a homicide is widely considered to be relevant. *State v. Wilson*, 2015 WI 48, ¶62, 362 Wis. 2d 193, 220, 864 N.W.2d 52. The admissibility of evidence of a third party's motive to commit the crime charged against the defendant is similar to what it would be if that third party were on trial himself. *Id.* ¶63, 221.

33. Other acts evidence may be admitted when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Wis. Stat. § 904.04(2).

34. Law enforcement considered pornography as evidence of motive in Ms. Halbach's murder. The clear working theory of the investigators was that the murder of Ms. Halbach was motivated by a sexual assault. Pursuant to that theory, the Dassey computer was

seized by law enforcement on April 21, 2006. **(Doc. 281:31-32[5])** (632:31-32; Search Warrant) **(App. 182-83).**

35. Evidence of Bobby's motive to commit Ms. Halbach's murder is contained on the hard drive of the Dassey computer—namely, the material contained on the 'Velie CD.' The Appellate Court acknowledged this evidence could be relevant for establishing the motive element of the *Denny* test if the new evidence directly connecting Bobby was raised. Specifically, the Appellate Court stated:

> "[T]he evidence [Sowinski's 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."

(Opinion, pg. 41, note 26). **(App. 161).**

36. Detective Velie's forensic examination of the Dassey computer searched for specific words the user had searched. Detective Velie selected the specific words and conducted a search for those words. There were 2,632 search results for the following words: "blood" (1); "body" (2,083); "bondage" (3); "bullet" (10); "cement" (23); "DNA" (3); "fire" (51); "gas" (50); "gun" (75); "handcuff" (2); "journal" (106); "MySpace" (61); "news" (54); "rav" (74); "stab" (32); "throat" (2); and "tires" (2). These selected words establish a direct link between the specific evidentiary items related to the Halbach murder and the searches performed on the Dassey computer. The 'Velie CD' contains the State's "recovered" pornography images relevant and material to the Halbach murder. The 'Velie CD' refined the 14,099 images on the 7 DVDs that trial defense counsel received in discovery and recovered 1,625 violent pornographic images, *which had been deleted*. The "recovered porn" depicted violent images of the torture and mutilation of young females. **(Doc. 964:23, 25)** (741:23, 25). (emphasis added). **(App. 184-85).**

---

[5] The Search Warrant is an attachment to Mr. Avery's Motion because it is not otherwise found in the circuit court record.

37. Brad Dassey ("Brad"), Barb's step-son and the half-brother of Bryan, Bobby, Blaine, and Brendan, avers that he had a conversation with Barb, in which she indicated that she had hired someone to remove evidence from the Dassey computer. (*Id.* ¶3). The authorities interviewed Brad after he reported this information, but he was not called as a witness, by either side, to testify at Mr. Avery's or Brendan's trials. (*Id.* ¶¶ 8-9). **(Doc. 281:35-36)** (632:35-36, Affidavit of Brad Dassey). **(App. 355-56).** This is corroborated by the law enforcement report, which states that on June 6, 2006, Special Agent Fassbender and Investigator Weigert interviewed Brad who provided this information about the Dassey computer deletions. (Thomas Fassbender DCI Report No. 05-1776/284 attached and incorporated herein as **"Group Exhibit A-1" (Doc. 1066**).

38. The new forensic examination of the Dassey computer corroborates the affidavit of Brad. Mr. Hunt, in his computer examination, detected eight periods in 2005, close to the date of the murder, for which files are missing and "presumably deleted from the Dassey computer:" August 23-26; August 28-September 11; September 14-15; September 24-October 22; October 23-24; October 26-November 2; November 4-13; and November 15-December 3. **(Doc. 284:38-39)** (633:38-39, Supplemental Affidavit of Gary Hunt). **(App. 186-87).**

39. In reviewing images contained on the Velie disc, Special Agent Thomas Fassbender made the following observations: (1) "Photographs of both Teresa Halbach and Steven Avery with an apparent date of April 18, 2006"; (2) "There were numerous images of nudity, both male and female, to include pornography. The pornography included both heterosexual, homosexual, and bestiality. There were images depicting bondage, as well as possible torture and pain. There were also text images with the name, 'Emily.' There were images depicting potential young females, to include an infant defecating. There were images of injuries to humans, to include a decapitated head, a badly injured and bloodied body, a bloody

head injury, and a mutilated body"; and (3) "The disc received from Detective Velie, as well as the hardcopy pages of instant message conversations were maintained in S/A Fassbender's possession." (Thomas Fassbender DCI Report No. 05-1776/304 is attached and incorporated herein as **"Group Exhibit A-2" (Doc. 1066)**).

40. There is sufficient evidence that it was only Bobby who had access to the Dassey computer during the day on weekdays between approximately 7:00 a.m. to 3:30 p.m. **(Doc. 965:69-70; 614:27-37, 39; 581:35, 599:56-57, 228:28-29; 284:47, 131, 970:12)** (737:69–70; 636:27-37, 39; 689:35; 705:56-57; 630:28-29; 633:47; 400:131; 743:12). **(App. 188-209)**. Barb's work schedule was from 6:00 a.m. until 4:30 p.m. every day Monday through Thursday of every week. **(Doc. 228:160)** (630:160). **(App. 210).** Brendan and Blaine would get picked up by the school bus at Avery Road between 7:08 a.m. and 7:13 a.m. and dropped off at the same place between 3:30 p.m. and 4:00 p.m. **(Doc. 228:158)** (630:158) **(App. 211).** Therefore, Barb, Blaine, and Brendan—the three other individuals living at the Dassey residence are excluded from even having access to the Dassey computer at the times most of the violent searches occurred.

41. Moreover, 128 searches for the most violent porn images primarily occurred on weekdays when only Bobby was in the Dassey residence. **(Doc. 614:27-37, 39; 581:35; 599:56-57; 228:28-29; 284:47; 965:164; 967:154; 970:12)** (636:27–37, 39; 689:35; 705:56-57; 630:28-29; 633:47; 737:164; 739:154; 743:12). **(App. 212-32)**. It is undisputed that Mr. Avery never accessed the Dassey computer. He did not have the password for the Dassey computer, nor did he possess a key to the Dassey residence, which was locked when no one was home. **(Doc. 614:89-90).** (636:89–90) **(App. 233-34).** The only time Mr. Avery ever entered the Dassey residence was when one of the Dassey family members was home. Mr. Avery worked at the Avery Salvage Yard, during the weekdays, from 8:00 a.m. to 5:00 p.m. **(Doc. 614:6, 91).** (636:6, 91). **(App. 235-36).** Moreover, Mr. Avery would be eliminated from all but 15 of the 128

(11.7%) searches for the most violent porn images, at issue, simply by having been arrested on November 9, 2005. **(Doc. 228:85; 614:33-37).** (630:85; 636:33-37). **(App. 218-22).** Brendan would be eliminated from all but 26 of the 128 (20.3%) searches for the most violent porn images, at issue, simply by having been arrested on March 1, 2006. **(Doc. 614:33-37)** (636:33-37). **(App. 218-22).**

42. Bobby testified that on October 31, 2005 he was the only person home between 6:30 a.m. and when he claims he left to go hunting at 2:45 p.m. **(Doc. 591:41)** (697:41). **(App. 238).** Therefore, it is undisputed that Bobby was the only person home on October 31 when searches were made on the Dassey computer at 7:00 a.m., 9:33 a.m., 10:09 a.m., 1:08 p.m., and 1:51 p.m. prior to Ms. Halbach's arrival at the Avery Salvage Yard. **(Doc. 281:37-38)** (632:37-38, Affidavit of Gary Hunt) **(App. 239-40).** The timing of these internet searches on October 31 directly contradicts Bobby's trial testimony that on that day he was asleep from 6:30 a.m. to 2:30 p.m. **(Doc. 284:38-39; 581:35)** (633:38–39; 689:35). **(App. 241-43).**

43. On November 17, 2017, in an interview of Bobby by State investigators, Bobby claimed that the Dassey computer was located "on a desk in the living room at the time." When Bobby was asked if the Dassey computer was ever located in his bedroom, he stated, "It was not." **(Doc. 965:64-65)** (737:64–65). **(App. 244-45).** Bobby's statement is directly contradicted by the crime scene footage taken by Sgt. Tyson on November 12, 2005, which shows the Dassey computer was located in Bobby's bedroom. **(Doc. 965:170; 991:1-2)** (737:170; 763:1–2). **(App. 246-48)**. Bobby's statements are further contradicted by his brother, Blaine, who stated in his affidavit to current postconviction counsel on June 25, 2018, that the Dassey computer was located in Bobby's room and Bobby was the primary user of it. **(Doc. 965:165-66)** (737:165–66). **(App. 249-50).**

44. Wis. Stat. § 904.04(2)(a), provides that "[e]vidence of other crimes [and/or] wrongs [and/or] acts . . . when offered . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" is admissible.

45. The depicted acts in the violent pornography Bobby was viewing are sufficiently similar to the violent murder of Ms. Halbach.

46. The evidence of Bobby's searches for violent pornographic images is not so remote in time as to be inadmissible but rather, so close in time to Ms. Halbach's murder that the searches are direct evidence of Bobby's motive to kill Ms. Halbach.

47. The 1,625 previously deleted but recovered images of violent pornography could have established motive for trial defense counsel's *Denny* motion. The court in *Dressler v. McCaughtry*, 238 F.3d 908, 910, 913–14 (7th Cir. 2001), held that the "acts" admitted pursuant to § 904.04(2)(a) were the defendant's possession of the pornographic videotapes and pictures. Those images depicting intentional violence were admitted as evidence of the defendant's motive, intent, and plan to murder the victim.

48. The defendant in *Dressler* argued that the videotapes and pictures were irrelevant and constituted inadmissible propensity evidence. The Seventh Circuit disagreed, stating:

> The fact that [the defendant] maintained a collection of videos and pictures depicting intentional violence is probative of the State's claim that he had an obsession with that subject. A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs are relevant.

Id. at 914.

49. The *Dressler* court held that, although evidence of the general character of a defendant is inadmissible to prove he acted in conformity therewith, the above exception from § 904.04(2) was deemed to apply. *Id.*

50. *Dressler* is persuasive authority that the same result should occur here. Ms. Halbach was killed in a violent manner. Maintaining the violent porn images is probative to establish that Bobby had an obsession with violence and therefore was more likely to commit murder. The violent porn images are relevant to Bobby's motive and would have resulted in trial defense counsel being able to establish his motive for Ms. Halbach's murder to meet the *Denny* standard.

51. As Mr. Avery's sexual homicide expert, Ann Burgess, PhD ("Dr. Burgess"), opines in her affidavit, submitted previously to this Court, there is a well-established causal connection between pornography consumption and violent behaviors. **(Doc. 966:2-8)** (738:2-8, Affidavit of Ann Burgess, PhD). **(App. 251-57).**

52. In Mr. Avery's motion to reconsider this Court's prior decision, former FBI agent and police procedure expert, Gregg McCrary ("Mr. McCrary"), submitted an affidavit wherein he described his opinion that the searches for violent, underage, and child pornography, combined with the images of and searches for dead bodies, "reflects a co-morbidity of sexual paraphilias." It is the opinion of Mr. McCrary that "Bobby Dassey was becoming obsessively deviant in his viewing of violent pornography" in the weeks before Ms. Halbach's murder. **(Doc. 228:117-19)** (630:117-19, Affidavit of Gregg McCrary at ¶¶ 3, 4.). **(App. 258-60).**

B) Bobby's Opportunity to Commit the Murder of Teresa Halbach

53. The second prong of the *Denny* test—the opportunity prong—asks: "[C]ould the alleged third party perpetrator have committed the crime, directly or indirectly? In other words, does the evidence create a practical possibility that the third party committed the crime?" *Wilson*, 362 Wis. 2d 193, ¶58.

54. As a legal concept, "opportunity" appears in the Wisconsin Statutes in the context of "other acts" evidence. *State v. Wilson*, 2015 WI 48, ¶¶ 66-67, 362 Wis. 2d 193, 221-22, 864 N.W.2d 52 (citing Wis. Stat. § 904.04(2)):

> (2) OTHER CRIMES, WRONGS, OR ACTS. . . . [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Emphasis added.)

55. The case law as well as § 904.04(2) permits the introduction of other acts evidence to show a person's (whether a party or third person) "opportunity" to engage in certain conduct. "Opportunity" is a broad term . . . ; proof of opportunity may be relevant to place the person at the scene of the offense (time and proximity) or to prove whether one had the requisite skills, capacity, or ability to carry out an act. . . . It is incumbent on the proponent, however, to show the relevance of the "opportunity" evidence. 7 Wis. Prac., Wis. Evidence § 404.7 (3d ed.) (footnotes omitted).

56. According to the trial court, Mr. Avery's trial defense counsel has already established that Bobby had the opportunity to commit the murder of Ms. Halbach. **(Doc. 660:1, 95-96)** (453:1, 95-96). **(App. 261-63).** The Sowinski evidence greatly strengthens the opportunity argument because Bobby is in possession of Mr. Halbach's vehicle, where her murder likely occurred.

C) Bobby's Access to Items of Evidence to Frame Mr. Avery

57. Additionally, the defense theory was that Mr. Avery was framed by evidence being planted in Ms. Halbach's car and Mr. Avery's trailer and burn barrel.

58. The Sowinski evidence that Bobby was in possession of Ms. Halbach's vehicle provides the opportunity/access to the items that were used "in the frame-up." *State v. Wilson*,

2015 WI 48, ¶68, 362 Wis. 2d 193, 222, 864 N.W.2d 52. The specific items that were planted and used in the frame-up of Mr. Avery were Mr. Avery's blood in Ms. Halbach's vehicle, Ms. Halbach's RAV-4 key in Mr. Avery's bedroom, and Ms. Halbach's electronic devices in Mr. Avery's burn barrel.

D) Bobby Had Access to Mr. Avery's Blood

59. Mr. Avery told law enforcement in a recorded interview that his finger, which had been cut open prior to October 31, 2005, re-bled on November 3, 2005, and dripped blood in his bathroom sink and on the bathroom floor. **(Doc. 935:6; 937:1-2)** (646:6; 648:1–2). **(App. 264-66).** In Mr. Avery's trial, Rollie Johnson, the owner of Mr. Avery's trailer, testified that he observed that the cut on Mr. Avery's finger was present prior to October 31, 2005. **(Doc. 606:176)** (712:176). **(App. 267).** Mr. Avery consistently expressed his belief to his attorneys and the media that his blood found in Ms. Halbach's vehicle was planted and that it came from his bathroom sink. **(Doc. 179:22)** (604:22). **(App. 271).**

60. Mr. Avery's claim that he bled into his bathroom sink and on the floor was corroborated by the fact that law enforcement found some of his blood around his bathroom sink and on his bathroom floor. **(Doc. 179:22-30)** (604:22-30). **(App. 271-79).**

61. In the early evening of November 3, 2005, Sergeant Andrew Colborn ("Sgt. Colborn") came to the Avery Salvage Yard and spoke to Mr. Avery. After meeting with Sgt. Colborn, Mr. Avery went to his vehicle and drove to the Dassey residence. Barb, Blaine, and Bobby were home at the time.

62. Mr. Avery provided an affidavit on June 29, 2018. He stated the following in his affidavit regarding the events of the evening of November 3, 2005:

> I stopped at my sister, Barb Dassey-Janda's ("Barb"), property and broke open a cut on the outside of the middle finger of my right hand as I was attempting to unhitch her trailer for her. . . . I went to Barb's door to see if any of her sons wanted to go with me to Menards.

> Bobby and Blaine were home. I asked Bobby and Blaine if they wanted to go with me and my brother, Chuck, to Menards. I told both of them that a law enforcement officer had just left the property after asking me questions about Ms. Halbach's visit to photograph Barb's van on October 31, 2005. I noticed that Bobby was immediately nervous after I mentioned the visit by the officer. He said that he could not go with me to Menards and that he had "things to do." There is no doubt in my mind that Bobby saw that my finger was bleeding. My memory is that Blaine said that he wanted to go to Menards and he went with Chuck and me. Prior to leaving for Menards, I returned to my trailer to put tape on my bleeding finger. A large amount of blood dripped onto the rim and sink and the floor of the bathroom. I did not wash away or wipe up because Chuck was waiting for me to go to Menards in Manitowoc with him. While we were leaving Avery property, driving a flatbed to Menards in Manitowoc, I saw taillights in front of my trailer. The taillights were further apart and higher off the ground than sedan taillights. I told my brother, who was driving, about the taillights. We turned around and drove to my trailer, but the vehicle was gone. On November 4, I woke up at 6:00 a.m. and went into the bathroom to take a shower. I saw that most of the blood on my sink, which I had not cleaned up the previous night, was gone. It seemed to me that the blood had been cleaned up. After reviewing more case documents and thinking about what happened on November 3, 2005, I do not believe that law enforcement broke into my trailer and took blood from my sink and planted it in Ms. Halbach's vehicle.

(Doc. 965:3-5) (737:3-5) **(App. 280-82).**

63. According to Mr. Avery, he left his door unlocked when he went to Menards; however, the Dasseys also had a key to his residence. **(Doc. 965:3-5)** (737:3-5) **(App. 280-82).**

64. Mr. Avery told law enforcement and trial defense counsel that, as he was leaving his property around 7:00 p.m. on November 3, 2005, and exiting onto Highway 147, he observed tail lights of a vehicle close to his trailer. **(Doc. 179:80)** (604:80). **(App. 283).** Mr. Avery also told trial defense counsel that he noticed that his blood had been removed from his sink when he entered his bathroom, early in the morning on November 4, 2005. **(Doc. 179:27; 935:6)** (604:27; 646:6). **(App. 284-85).**

E) Bobby's Direct Link to the Murder of Ms. Halbach

65. The third, and final, prong of the *Denny* test asks whether there is "evidence that the alleged third party perpetrator actually committed the crime, directly or indirectly?" *Wilson*, ¶ 59.

66. The Sowinski evidence demonstrates that Bobby could have committed the murder because he is in possession of Ms. Halbach's vehicle, where the murder likely occurred as evidenced by Ms. Halbach's blood in the vehicle. The vehicle is a key piece of evidence in the crime. *See, e.g., State ex rel. Koster v. McElwain*, 340 S.W. 3d 221, 249 (Mo. App. 2011) (evidence of third party guilt admissible when an alternative suspect "became connected to a key piece of evidence in the crime-the victim's purse where the canceled checks were found.").

67. The new evidence that Ms. Halbach's vehicle was returned to the Avery Salvage Yard from a different location is corroborated by the fact that a witness saw a vehicle similar to Halbach's leave the property on October 31. In Mr. Avery's trial, Mr. Leurquin, a propane driver, testified that he saw a green, midsize SUV leaving the Avery Salvage Yard driving towards Highway 147 between 3:30 and 4:00 pm on October 31. He informed law enforcement about this when he was stopped at a roadblock a few days later and had heard about the news of Ms. Halbach being missing. **(Doc. 606:128-29, 137)** (712:128-29, 137). **(App. 286-88).**

68. Further, it is corroborated by Bobby's brother Blaine's account. On June 25, 2018, Bobby's brother, Blaine, provided Mr. Avery's current postconviction counsel with an affidavit attesting, "On October 31, 2005 when the school bus driver brought Brendan and me home as we traveled west on STH 147 I saw Bobby on STH 147 in a bluish or greenish vehicle heading towards Mishicot. Bobby was not driving his black Blazer. Bobby was not home the rest of the evening while I was home." **(Doc. 965:164-67)** (737:164-67, Affidavit of Blaine Dassey, ¶ 20). **(App. 289-92).** Bobby's trial testimony contradicts Blaine's affidavit because Bobby testified that he was home at 5 p.m. **(Doc. 581:39, 41)** (689:39, 41) **(App. 293-94).**

69. Bobby was with Michael Osmunson ("Osmunson") when Ms. Halbach's vehicle was discovered on November 5, 2005. **(Doc. 591:24-25)** (675:24-25). **(App. 295-96).** Current postconviction counsel's investigator met with and interviewed Osmunson about whether he was

the individual with Bobby pushing the RAV-4 onto the Avery Salvage Yard. The interview was conducted because Osmunson fit the height, weight, and beard description provided by Mr. Sowinski of the individual helping Bobby push the car. When Osmunson was asked if he was the individual who helped Bobby push the vehicle on the Avery Property on November 5, 2005, Osmunson responded that he "could not remember" if he was that individual. (Affidavit of Steve Kirby attached and incorporated herein as **"Exhibit B."** **(Doc. 1067)**)

70. Further evidence of Bobby's dishonesty, Bobby never reported to law enforcement the alleged statement Mr. Avery said to Bobby and Osmunson about "whether they wanted to help him get rid of a body." **(Doc. 591:30; 228:75-83)** (697:30; *see also* 630:75-83; Combined reports re-interviews of Bobby Dassey) **(App. 297-306)**. This was a major issue at trial. Trial defense counsel moved for a mistrial pointing out that they had never been apprised of Bobby's new claim. During Bobby's direct-examination, Prosecutor Kratz asked Bobby: "Now, Bobby, on the third of November, that would be a Thursday, I believe, do you recall having a conversation with your Uncle Steven regarding a body?" and Bobby responded, "Yes." **(Doc. 581:47)** (689:47) **(App. 307).** On cross-examination, Bobby testified that Mr. Avery stated this remark about getting rid of a body, in jest, on November 3, 2005 when he and Osmunson were in his garage. **(Doc. 591:27-28)** (697:27-28) **(App. 308-09)**. However, Osmunson told law enforcement that Mr. Avery made such a statement to them on Thursday, November 10, 2005 (the only time Osmunson was at the Dassey residence between October 31st and November 11th) when he and Bobby were inside the Dassey garage and Mr. Avery came over. **(Doc. 228:84)** (630:84). **(App. 310).** This claim is unequivocally false, since Mr. Avery was arrested on November 9, 2005. **(Doc. 228:89)** (630:89, Arrest Warrant). **(App. 311).**

71. Remarkably, Osmunson stated to law enforcement that he first learned about the missing girl on Tuesday, November 1, 2005, when Ms. Halbach had not yet been reported missing. **(Doc. 228:84)** (630:84) **(App. 312).**

72. Further, the record reveals that Osmunson and Bobby were either suspiciously calling each other repeatedly or with each other at relevant times after Ms. Halbach's murder. Bobby's phone records reflect that on October 31, 2005, there were 7 phone calls between Bobby and Osmunson occurring between the following times in the morning and evening: 6:12 a.m.; 6:36 a.m.; 3:56 p.m.; 3:57 p.m.; 4:53 p.m.; 5:10 p.m.; and 6:01 p.m. Bobby's phone records reveal that Bobby called Osmunson a total of 66 times from October 24, 2005 to November 9, 2005. **(Doc. 965:73-75)** (737:73-75). **(App. 313-15)**.

73. The Sowinki evidence is newly discovered and directly links Bobby to Ms. Halbach's murder because as previously stated Ms. Halbach's RAV-4 was a key piece of evidence in her murder.

4) The Evidence is Not Cumulative

74. The Sowinski evidence provides, for the first time, the "missing" direct connection to Bobby as a third party suspect for Ms. Halbach's murder and is therefore not cumulative.

Reasonable Doubt as to Mr. Avery's Guilt

75. If the defendant satisfies all four criteria of newly discovered evidence, the reviewing court then examines whether it is reasonably probable that, had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 48, 750 N.W.2d 42. This presents a question of law. *Id.*, ¶33. A reasonable probability of a different outcome exists if there is a reasonable

probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt. *Id.*

76. Overwhelming evidence against the defendant may not serve as the basis for excluding evidence of a third party's opportunity (or direct connection to the crime): "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

77. If Bobby is established as a viable third party *Denny* suspect, the forensic evidence in this case is completely undermined. The newly discovered evidence that Bobby was in possession of Ms. Halbach's vehicle means that he had opportunity and access to plant evidence in the vehicle and from the vehicle. Because Bobby has been directly linked to the murder of Ms. Halbach there is a reasonable inference that he planted the bones in Mr. Avery's burn pit.

78. This new evidence creates a reasonable probability that, had the jury heard the new evidence, it would have had a reasonable doubt as to the defendant's guilt. Therefore, Mr. Avery should be granted a new trial. *See State v. Vollbrecht*, 2012 WI App 90, ¶37, 344 Wis. 2d 69, 100, 820 N.W.2d 443.

II. *BRADY* VIOLATION RE THE SOWINSKI EVIDENCE

79. The Sowinski evidence is not only newly discovered evidence but it also meets the criteria for a *Brady* violation.

80. After Mr. Sowinski contacted Mr. Avery's current postconviction counsel and provided the newly discovered evidence, Mr. Avery's current postconviction counsel, through its investigator, submitted its second Public Records Request pursuant to the Freedom of Information Act for audio recordings of incoming and outgoing phone calls and/or radio

dispatches between November 3, 2005 and November 9, 2005 that relate to the Halbach case. (*See* Affidavit of James R. Kirby attached and incorporated herein as **"Exhibit C" (Doc. 1068)).** The FOIA-produced audio recordings did not contain the Sowinski call on November 6 at 10:28 p.m. nor did they contain any dates or times of the calls produced.

81. In May of 2022, Mr. Avery's current postconviction counsel received the previously suppressed Sowinski call to the Mantiwoc Sheriff's Office which contained a partial recording of the suppressed call to the Manitowoc Sheriff's Office on November 6, 2005. For the first time, current postconviction counsel received the exact dates and times of the Manitowoc County Sheriff's Office incoming calls. Attached and incorporated herein as **"Exhibit D" (Doc. 1069)** is a track timestamp record from the disclosure provided in May of 2022.

82. As part of its further investigation, Mr. Avery's investigator interviewed Mr. Sowinski's ex-girlfriend, whom he was dating at the time of the November 5, 2005 incident. Mr. Sowinski's ex-girlfriend, Devon Novak, corroborated Mr. Sowinski's account of what he had witnessed and what he had relayed to law enforcement. Further, Ms. Novak recognized and identified Mr. Sowinski's voice on the recording, played to her by the investigator, of a phone call made to the Manitowoc Sheriff's Office on November 6, 2005 at 10:28 p.m. (Affidavit of Ms. Devon Novak is attached and incorporated herein as **"Exhibit E" (Doc. 1070)**).

83. Mr. Avery's investigator also interviewed Mr. Sowinski again and played the same audio recording of the phone call that was made to the Manitowoc Sheriff's Office on November 6, 2005 at 10:28 p.m.. Mr. Sowinski identified his voice in the audio recording of the phone call from November 6, 2005. (Supplemental Affidavit of Mr. Thomas Sowinski's is attached and incorporated herein as **"Exhibit F" (Doc. 1071)**).[6]

[6] After realizing that he did not contact Mr. Avery's trial defense counsel, but rather contacted the Innocence Project in 2016, Mr. Sowinski provided current defense counsel with his new affidavit which also corrects his prior affidavit submitted in Mr. Avery's motion to stay and remand to the

84. The recording of Mr. Sowinski's call was never disclosed by the State to Mr. Avery's trial defense counsel prior to or during the trial. Pre-trial, trial defense counsel made two specific requests, pursuant to Wis. Stats. § 971.23(1)(h), for all exculpatory evidence and/or information within the possession, knowledge, or control of the State which would tend to negate the guilt of the defendant, or which would tend to affect the weight or credibility of the evidence used against the defendant, including any inconsistent statements. **(Doc. 255:3-9)** (26:3–9). **(App. 357-363).** A second request was made by trial defense counsel for *Brady* material immediately before trial on January 18, 2007. **(Doc. 467:1-6)** (225:1–6). **(App. 364-369).** (Affidavits of Mr. Avery's trial defense counsel, Mr. Dean Strang and Mr. Jerome Buting are attached and incorporated herein as "**Group Exhibit G**," **(Doc. 1072)** including an attached exhibit of trial defense counsel's July 24, 2006 letter to Prosecutor Kratz requesting all audio tapes).

Applicable Law re *Brady*

85. In *Brady*, the Supreme Court held that the prosecution violates an accused's constitutional right to due process of law by failing to disclose evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This rule encompasses evidence known to police investigators, but not to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). To comply with *Brady*, the prosecutor has a duty to learn of favorable evidence known to other government actors, including the police. *Kyles*, 514 U.S. at 437. "Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Wearry v. Cain*, 577 U.S. 385, 395, n. 8 (2016).

Appellate Court, in which Mr. Sowinski stated that he contacted Mr. Avery's trial defense attorneys.

86. There can be a due process violation "irrespective of the good faith or bad faith of the prosecution." *Id.* (quoting *Brady,* 373 U.S. at 87). "The prosecution's duty to disclose evidence favorable to the accused includes the duty to disclose impeachment evidence as well as exculpatory evidence." *Id.* (citing *Strickler v. Greene*, 527 U.S. 263, 280 (1999)).

87. To establish a *Brady* violation, a defendant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to an issue at trial. *State v. Harris*, 2004 WI 64, ¶ 13, 272 Wis. 2d 80, 680 N.W.2d 737 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

88. The State never disclosed the Sowinski evidence or the Sowinski call to Mr. Avery's current or past counsel. (*See* **Exhibits C, Group G.**) **(Doc. 1068, 1072)**

89. The defense never received a law enforcement report of the Sowinski evidence provided to the Manitowoc Sheriff's Office in November of 2005. (*See* **Exhibits C, F, Group G**). **(Doc. 1068, 1071, 1072).** The Sowinski evidence is corroborated by the partial recording of his attempt to report the evidence to the Manitowoc Sheriff's Office prior to his call being transferred.

90. There is no recording or law enforcement report of the remainder of Mr. Sowinski's call that Mr. Avery's current postconviction counsel, through reasonable diligence, has been able to locate through its Public Records Requests.

91. In *Banks v. Dretke,* 540 U.S. 668, 696 (2004), the United States Supreme Court instructed, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."

92. Further, the Wisconsin Supreme Court in *State v. Wayerski,* 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468 (2019), has specifically rejected the imposition of a reasonable diligence standard on trial defense counsel. The Wisconsin Supreme Court specifically stated:

> This court has never analyzed a *Brady* claim through the lens of "reasonable diligence" and we decline to adopt that requirement now, due to its lack of grounding in *Brady* or other United States Supreme Court precedent.

Id., at 25.

93. The *Wayerski* court specifically overruled prior Wisconsin cases which have imposed a requirement of exclusive possession and control of the material evidence by the State. The court specifically stated:

> There is no express support in the United States Supreme Court's *Brady* jurisprudence for the limitation that only favorable, material evidence in the "exclusive possession and control" of the State must be turned over to satisfy the due process obligations enunciated in *Brady*. This limitation further thwarts the purpose of the State's obligation under *Brady*: to prevent the State from withholding favorable, material evidence that "helps shape a trial that bears heavily on the defendant" and "casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice." *Brady*, 373 U.S. at 87-88. We hereby overrule the holding set forth in *Nelson*, 59 Wis. 2d 474, and its progeny that favorable, material evidence is only suppressed under *Brady* where the withheld evidence is in the State's "exclusive possession and control."

Id., at 23.

94. There is no duty for the defense to seek out information that has not been disclosed. However, Mr. Avery's current postconviction counsel has made diligent efforts to obtain any and all information regarding the Sowinski evidence, including re-requesting all incoming calls to the Manitowoc Sheriff's Office from the relevant time period.

95. The following timeline illustrates the diligence demonstrated by Mr. Avery's current postconviction counsel in investigating and corroborating the evidence that Mr. Sowinski provided to the Manitowoc Sheriff's Office on November 6, 2005:

- **December 26, 2020 at 10:42 p.m.**
  - Mr. Sowinski emailed stevenaverylawyers@gmail.com a summary of what he had observed on November 5, 2005. The subject line of his email was: "We need to talk!"
- **Investigation of Thomas Sowinski's Credibility**
  - Mr. Avery's current postconviction counsel conducted an investigation of Mr. Sowinski which included gathering information about the following: his date of

birth, relatives, employment history, telephone numbers, email addresses, possible criminal record, possible civil record, and car and home ownership.
    - Mr. Avery's current postconviction counsel confirmed that Mr. Sowinski had worked for the Manitowoc Herald Times during the relevant time period. Financial documents dating 2005-2006 as well as newspaper articles from 2005-2006 listed Mr. Sowinski as a paper carrier of the Manitowoc Herald Times.
    - Mr. Avery's current postconviction counsel contacted Mr. Avery's trial defense counsel, Mr. Buting, who confirmed that Mr. Avery's trial counsel had not received any emails from Mr. Sowinski.
    - Mr. Avery's current postconviction counsel reviewed all discovery and FOIA requests made by prior counsel and current postconviction counsel to the Manitowoc Sheriff's Office. Any information relating to the Sowinski evidence was encompassed within those requests and should have been produced but was not.
- **April 7, 2021**
    - Mr. Avery's current postconviction counsel sent and delivered a letter to Mr. Sowinski through a local investigator in Denver, Colorado (where Mr. Avery's current postconviction counsel determined that Mr. Sowinski resided), requesting that Mr. Sowinski contact Mr. Avery's current postconviction counsel's office immediately.
- **April 8, 2021**
    - Mr. Avery's current postconviction counsel and her clerks had telephone contact with Mr. Sowinski and arranged a time to speak to him further.
- **April 9, 2021**
    - Mr. Avery's current postconviction counsel and clerks conducted a phone interview of Mr. Sowinski.
    - Mr. Avery's current postconviction counsel prepared an affidavit for Mr. Sowinski based on his statements in that interview.
    - Mr. Sowinski indicated that he was going to be visiting family in Manitowoc on April 10, 2021.
- **April 10, 2021**
    - Postconviction counsel's Investigator Steven Kirby met Mr. Sowinski, in person, in Manitowoc for an interview and reviewed his affidavit with him. The affidavit described the evidence Mr. Sowinski reported to the Manitowoc Sheriff's Office about what he observed on the Avery property while delivering newspapers on November 5, 2005 as well as the actions he took afterwards. (His affidavit included a map indicating where he observed the two males pushing the RAV-4).
    - After reviewing his affidavit and making any necessary changes, Mr. Sowinski executed the affidavit before a Wisconsin notary.
- **April 12, 2021**
    - Mr. Avery's current postconviction counsel filed Defendant-Appellant's Motion to Stay Appeal and Remand the Cause to supplement his postconviction motion with a new witness affidavit establishing a *Brady* violation and a new third party *Denny* suspect.
- **August 28, 2021**
    - Mr. Avery's current postconviction counsel listened to all audio recordings in its possession from discovery as well as its own investigation and determined there

was **no** recording matching the description Mr. Sowinski provided to the Manitowoc Sheriff's Office.

- **March 15, 2022**
  - Mr. Avery's current postconviction counsel, through its investigators, submitted the following three new public records requests to the Manitowoc County Sheriff's Office:
    - The first request sought *copies of any non 911 recordings in your possession of incoming telephone calls to the Manitowoc County Sheriff's Joint Dispatch Center between the dates of November 3, 2005 at 12:01 AM through November 9, 2005 at 11:59 PM.*
    - The second request sought *copies of incoming and outgoing telephone call logs of the recorded Manitowoc County Sheriff's Joint Dispatch calls between the dates of November 3, 2005 12:01 AM through November 9, 2005 11:59 PM that relate to the Teresa Halbach investigation. Information should include date, time and telephone numbers involved in the calls.*
    - The third request sought *copies of audio recordings of incoming and outgoing calls and/or radio dispatches between the dates of November 3, 2005 12:01 PM through November 9, 2005 11:59 PM that relate to the Teresa Halbach investigation.*
- **May 3, 2022**
  - In response to Mr. Avery's current postconviction counsel's March 15, 2022 Public Records Request through its investigator, for the first time, recordings were provided to Mr. Avery's current postconviction counsel, who thoroughly reviewed and listened to all the audio recordings and located one of interest, which took place on November 6, 2005 at 10:28 p.m. For the first time, the time and date of the calls were revealed on the track files. (*See* **Exhibit D**) (**Doc. 1069**).
- **August 6, 2022**
  - Current postconviction counsel's Investigator Steven Kirby met with Mr. Sowinski's former girlfriend, Ms. Novak on August 6, 2022 and played for her the audio recording from November 6, 2005 at 10:28 p.m. Ms. Novak identified the voice on the call as Mr. Sowinski's. Ms. Novak provided Mr. Avery's current postconviction counsel with an affidavit regarding her voice identification and her recollection of being with Mr. Sowinski when he placed the November 6 call to the Manitowoc Sheriff's Office. (*See* **Exhibit E**) (**Doc. 1070**).
- **August 6, 2022**
  - Current postconviction counsel's Investigator Steven Kirby met with Mr. Sowinski and played for him the audio recording from November 6, 2005 at 10:28 p.m. Mr. Sowinski identified the voice on the call as his. Mr. Sowinski provided Mr. Avery's current postconviction counsel with an affidavit regarding his voice identification. (*See* **Exhibit F**) (**Doc. 1071**).

96. As stated above, after a very thorough investigation of Mr. Sowinski individually and of the accuracy of the information he provided as the Sowinski evidence, Mr. Avery's current

postconviction counsel determined that the Sowinski evidence necessitates filing a third § 974.06 motion.

97. In order for the defendant to prevail on the third component of the *Brady* analysis, the suppressed evidence must be material. *See State v. Harris*, 2004 WI 64, ¶15, 272 Wis. 2d 80, 98, 680 N.W.2d 737 (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

98. In *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), the Court noted, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." A "reasonable probability" is lower than a preponderance of evidence standard. It is demonstrated where the defense shows that the failure "undermine[d] confidence" in the conviction. *Youngblood v. West Virginia,* 547 U.S. 867, 869–70 (2006).

99. Mr. Avery's conviction for first degree intentional homicide was, in large part, based on trial defense counsel's unsuccessful efforts to name a third party *Denny* suspect that met all of the *Denny* requirements. The Sowinski evidence meets the *Denny* requirements and makes Bobby a third party *Denny* suspect in the murder of Ms. Halbach. Also, the Sowinski evidence meets the *Denny* requirements of establishing Bobby as having framed Mr. Avery for the murder. Bobby's possession of Ms. Halbach's vehicle gave him access and opportunity to plant Mr. Avery's blood and DNA and to remove evidence from the vehicle and plant it in Mr. Avery's bedroom (Ms. Halbach's key) and burn barrel (Ms. Halbach's electronic devices). The Sowinski new and material evidence was suppressed when the Manitowoc Sheriff's Office failed to disclose the November 6, 2005 10:28 p.m. audio recording pursuant to defense discovery

requests. The disclosure of the audio recording would have led to the identification of Mr. Sowinski and the evidence he has provided which directly connects Bobby to the murder and the framing of Mr. Avery. **(Doc. 610:35-40)** (715:35-40). **(App. 316-21).** The Sowinski evidence is both material and favorable to Mr. Avery's case.

100. The Sowinski evidence is material because it makes Bobby a third party *Denny* suspect in the murder as well as the source of the planted evidence that was used to convict Mr. Avery. The Sowinski evidence also impeaches Bobby's testimony and refutes the State's theory that Ms. Halbach's RAV-4 never left the Avery property and that Mr. Avery was the last person to see Ms. Halbach alive. Further, "materially favorable" evidence not only includes exculpatory evidence, but also evidence that is impeaching of a prosecution witness. *Bagley*, 473 U.S. at 676. Evidence tending to demonstrate the lack of credibility of a prosecution witness is material, especially where the prosecution's case depends on the credibility of that witness. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

101. Bobby was the State's primary witness against Mr. Avery at his trial. During his opening statement, prosecutor Kratz explicitly informed the jury of the significance of Bobby's putative observations on the date of Ms. Halbach's disappearance: "You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive." **(Doc. 589:104)** (696:104). **(App. 322).** Bobby testified that he observed Ms. Halbach's vehicle pull up in his driveway at 2:30 p.m. on October 31, 2005. Bobby then observed Ms. Halbach exit her vehicle and start taking pictures of his mom's maroon van right in front of his trailer. Bobby testified that he observed Ms. Halbach walking towards the door of Mr. Avery's trailer. He testified that he never saw her again after that. He then testified that he took a three- or four-minute shower and then left his trailer to go hunting. Bobby walked to his Chevy Blazer, which was parked between the trailer and garage. He testified that as he walked to his vehicle, he

observed Ms. Halbach's vehicle still parked in the driveway. He further testified that he did not see Ms. Halbach or any signs of her. **(Doc. 581:36-40)** (689:36-40). **(App. 323-27).**

102. Contrary to Bobby's trial testimony that Ms. Halbach was still on the Avery property when Bobby left "to go bow-hunting," Bryan, Bobby's brother, told law enforcement that Bobby saw Ms. Halbach leave the Avery property on October 31, 2005. On November 6, 2005, special agents with the Wisconsin DOJ Division of Criminal Investigation interviewed Bryan. When the investigators asked Bryan about the events of October 31, 2005, he told the investigators that he was not at home during the day other than waking up and going to work. He told the investigators the following:

> Bryan said he heard from his mom and Steven that Halbach was only at their residence about 5 minutes. He heard she just took the photo of the van and left. Bryan said the investigators should also talk to his brother Bobby, because he saw her leave their property.

The State was in possession of this report at the time of Mr. Avery's trial. Despite knowing this information, the State presented false testimony from Bobby. **(Doc. 228:28-29; 227:33-39; 284:5)** (630:28-29, 11/6/05 DCI report; 631:33–39; 633:5). **(App. 328-37)**.

103. On October 16, 2017, Bryan provided current postconviction counsel with an affidavit confirming that Bobby told him he saw Ms. Halbach leave the Avery property on October 31, 2005. In his affidavit, Bryan stated as follows:

> On or about November 4, 2005, I returned to my mother's trailer to retrieve some clothes, and I had a conversation with my brother, Bobby, about Teresa Halbach. I distinctly remember Bobby telling me, "Steven could not have killed her because I saw her leave the property on October 31, 2005."

Bryan provided Mr. Avery's current postconviction counsel with this affidavit after Mr. Avery's second postconviction motion was filed and the circuit court ruled on it. **(Doc. 228:30-31)** (630:30–31, Affidavit of Bryan Dassey) **(App. 338-39).**

104. The Appellate Court highlighted the importance of the Sowinski evidence when it stated the following in its July 28, 2021 Opinion:

> 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. *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.

(Doc. 1056:40-41). (Opinion, pgs. 40-41). **(App. 160-61).** While the Appellate Court determined that Mr. Avery did not have sufficient evidence to meet the *Denny* requirements to admit evidence at trial that Bobby could have killed Ms. Halbach, it also advised that the Sowinski evidence could be that missing "direct connection." **(Doc. 1056:41).** (Opinion, pg. 41, note 26). **(App. 161).**

105. Because the Sowinski evidence was suppressed, trial defense counsel was not able to establish Bobby as a third party *Denny* suspect or impeach Bobby's trial testimony as the State's primary witness. As a result, Mr. Avery did not receive a fair trial. Mr. Avery had a constitutionally guaranteed right to present a complete defense to the charges against him. *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006); *State v. Pulizzano,* 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), *citing Chambers v. Mississippi,* 410 U.S. 284, 294–95 (1973).

106. Prior to the discovery of the Sowinski evidence, the Appellate Court stated that impeaching Bobby would not have undermined the cumulative effect of the "significant forensic (and other) evidence implicating Avery in a crime committed on his property." **(Doc. 1056:42).** (Opinion, pg. 42 ¶ 68). **(App. 162).** However, the discovery of the Sowinski evidence, transforms this evidence from "implicating" Mr. Avery to implicating Bobby in the murder and planting

evidence to frame Mr. Avery. Even if this Court determines that the evidence "implicating" Mr. Avery remains significant, it is unconstitutional to refuse to allow a defendant to present a defense simply because the evidence against him is overwhelming. *State v. Wilson*, 2015 WI 48, ¶61, 362 Wis. 2d 193, 220, 864 N.W.2d 52. Because of the existence of the new Sowinski evidence, Mr. Avery must be allowed to present a defense based upon it.

107. A reasonable probability of a different result exists if the suppressed information undermines confidence in the verdict. *Kyles*, 514 U.S. at 434. The suppressed Sowinski call undermines confidence in Mr. Avery's verdict. Its disclosure would have led to the discovery of the Sowinski evidence, which establishes Bobby as a third party *Denny* suspect in both the murder and planting of evidence to frame Mr. Avery. It also impeaches Bobby's trial testimony which he fabricated in order to exculpate himself and frame Mr. Avery for the murder of Ms. Halbach.

Mr. Avery is not procedurally barred from raising his Brady claim

108. A motion for relief under § 974.06 "is a part of the original criminal action . . . and may be made at any time." Wis. Stat. § 974.06(2). However, a defendant must meet certain requirements:

> All grounds for relief available to a person under this section must be raised in his or her 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.

Wis. Stat. § 974.06(4) (emphasis added); *State v. Allen*, 2010 WI 89, ¶23, 328 Wis. 2d 1, 12-13, 786 N.W.2d 124.

109. In *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157, 164 (1994), the Wisconsin Supreme Court held that any claim that could have been raised on direct appeal or in a previous Wis. Stat. § 974.06 (1999-2000) postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason. *Id.* ¶ 15. The *Escalona-Naranjo* doctrine provides that a ground for relief raised by the defendant in a later-filed § 974.06 motion may be summarily denied by the trial court in its discretion, without a decision on the merits of the claim, if the ground for relief could have and should have been raised in the original, supplemental, or amended § 974.06 motion.

110. 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). *See State v. Romero-Georgana,* 2014 WI 83, ¶37, 360 Wis. 2d 522, 543, 849 N.W.2d 668.

111. On April 12, 2021, Mr. Avery filed the Sowinski motion to stay his appeal and remand for evaluation of a new claim. The Appellate Court determined that "the circuit court should resolve on a standalone basis" the Sowinski motion "through a new Wis. Stat. § 974.06 motion." **(Doc. 1056:46).** (Opinion, pg. 46, ¶ 77). **(App. 166).** The Appellate Court also stated that "[p]ursuant 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." **(Doc. 1056:47).** (Opinion, pg. 47, ¶ 78). **(App. 167).**

112. Current postconviction counsel could not have brought the Sowinski motion filed with the Appellate Court prior to April 12, 2021 and the current motion prior to May of 2022. Therefore the motions could not have been filed in any prior proceeding, including the filing of the June 2017 second postconviction motion. The Sowinski evidence relayed by Mr. Sowinski to the Manitowoc Sheriff's Office was never provided to Mr. Avery's prior counsel by the State.

The Sowinski evidence was only discovered by Mr. Avery's current postconviction counsel after being alerted to its existence by Mr. Sowinski in December of 2020. Current postconviction counsel had to then thoroughly investigate and corroborate Mr. Sowinski and the Sowinski evidence. As Paragraph 83 above illustrates, Mr. Avery's current postconviction counsel was diligent in investigating and corroborating Mr. Sowinski and the Sowinski evidence.

113. The Sowinski evidence provided to the Manitowoc Sheriff's Office on November 6, 2005 was unknown to Mr. Avery and undiscoverable at the time of Mr. Avery's 2017 postconviction motion, 2013 postconviction motion, direct appeal, and 2007 trial. It could not have been known or discovered by Mr. Avery because Mr. Sowinski had not come forward to Mr. Avery's current postconviction counsel until April of 2021 and the State had suppressed the audio recording of his November 6, 2005 phone call to the Manitowoc Sheriff's Office reporting his observations on November 5, 2005.

114. Therefore, the Sowinski evidence was unknown at the time of Mr. Avery's conviction; was not discoverable by reasonable diligence, and was not under the control or knowledge of Mr. Avery at any time prior to Mr. Sowinski contacting Mr. Avery's current postconviction counsel in December of 2020.

115. It is axiomatic that the discovery of a *Brady* violation *subsequent* to filing a motion pursuant to § 974.02 (or § 974.06) constitutes a sufficient reason for failing to raise the issue in a prior motion. *See State v. Allen*, 2010 WI 89, ¶¶ 44, 81, 328 Wis. 2d 1, 21, 786 N.W.2d 124 (noting a defendant's unawareness of the legal basis of his claim may constitute a sufficient reason in satisfaction of § 974.06); *see also State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶54, 354 Wis. 2d 626, 648, 847 N.W.2d 805 (the defendant's unawareness of the factual basis of his claim was "inextricably intertwined" with the legal basis of his claim).

116. Even if the court determines there is not a *Brady* violation, the Sowinski evidence qualifies as newly discovered evidence as described above. Mr. Avery has a sufficient reason for not having brought forth the newly discovered evidence (*see infra*, Argument II) because Mr. Avery did not know and could not have known about the Sowinski evidence until Mr. Sowinski came forward in December of 2020 after Mr. Avery's appeal was pending. See *Williams v. Taylor*, 529 U.S. 420, 442 (2000).

117. Therefore, this Court should find that Mr. Avery is not procedurally barred from raising his newly discovered evidence claim or his new *Brady* claim regarding the Sowinski evidence.

III. A SECOND *BRADY* VIOLATION RE HALBACH'S RAV-4

118. Kevin Rahmlow ("Mr. Rahmlow") came forth to Mr. Avery's current postconviction counsel with new information in July of 2017. Mr. Rahmlow provided an affidavit and supplemental affidavit to current postconviction counsel. Because Mr. Avery's second postconviction motion was filed in June of 2017, these affidavits were filed in Mr. Avery's motion to reconsider the circuit court's October 2017 ruling denying his second postconviction motion. **(Doc. 228:18; 394:2-7)** (630:18; 634:2-7). **(App. 340-51).**

119. In Mr. Rahmlow's affidavits, Mr. Rahmlow described observing Ms. Halbach's RAV-4 parked at the turnaround at STH 147 and the East Twin River Bridge on November 3 and 4, 2005. Mr. Rahmlow describes, in his affidavit, reporting his observation to a Manitowoc Sheriff's deputy he encountered on November 4, 2005 at the Cenex station on STH 147 in Mishicot. No law enforcement report was ever generated by this Manitowoc Sheriff's deputy memorializing the conversation between Mr. Rahmlow and this deputy.

120. Mr. Rahmlow's observation of Ms. Halbach's RAV-4 on November 3 and 4, 2005 is material to trial defense counsel's theory that evidence was planted to frame Mr. Avery. If the

RAV-4 was spotted at the turnaround on Highway 147 on November 3 and 4, 2005, then it must have been moved and planted on the Avery property before it was discovered on November 5, 2005. Clearly, this information supports trial defense counsel's theory that the RAV-4 was planted on the Avery salvage yard before it was discovered there on November 5, 2005. Mr. Rahmlow's observations, on November 3 and 4, 2005, of the Halbach vehicle at the turnabout off of STH 147 is corroborative of Mr. Sowinski's observation of the RAV-4 being pushed down Avery Road, which directly intersects STH 147, in the early morning hours of November 5, 2005. Both witnesses support trial defense counsel's theory that the RAV-4 was planted.

121. Prosecutor Kratz admitted in his closing that the RAV-4 "couldn't be driven into that property unless somebody knew that property . . . ." **(Doc. 610:54)** (715:54). **(App. 352).** The only other evidence presented by the State that the RAV-4 never left the Avery property after October 31, 2005, was Bobby's testimony that the RAV-4 was still present when he left the Avery property at 2:45 p.m. **(Doc. 591:44)** (697:44). **(App. 353).**

122. Trial defense counsel had no evidence from witnesses that the RAV-4 was planted and simply argued in the closing that there were "lots of ways to get in and. . . for someone to plant the vehicle." **(Doc. 610:182)** (715:182). **(App. 354)**.

Mr. Avery is not procedurally barred from raising his Brady claim

123. In the Appellate Court's July 2021 Opinion, the Appellate Court noted that in Mr. Avery's motion for reconsideration, he raised the issue that "the State withheld evidence that Halbach's vehicle was seen on the street days after her disappearance." **(Doc. 1056:33).** (Opinion, pg. 33, note 18). **(App. 153).** The Appellate Court declined ruling on the issue but advised the following:

> 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.

(*Id.*)

124. Clearly, current postconviction counsel could not have included Mr. Rahmlow's affidavits in its June 7, 2017 filing on behalf of Mr. Avery since Mr. Rahmlow had not yet come forward with evidence that establishes a *Brady* violation. **(Doc. 228:18-23)** (630:18–23). **(App. 340; 370-374).** There is no way that Mr. Rahmlow could have been discovered by prior defense counsel or current postconviction counsel because no law enforcement reports were prepared about his conversation with the Manitowoc sheriff's deputy, nor did he appear in any other law enforcement reports in the Halbach murder investigation. He had never been a customer at the Avery Salvage Yard, and he had no connection to the family besides being acquainted with Mr. Tadych's brother.

125. Mr. Avery was unable to discover the *Brady* violation with reasonable diligence prior to the filing of his second postconviction motion in June of 2017 because Mr. Rahmlow did not come forward to Mr. Avery's counsel until after June of 2017. He came forward in July of 2017. It would be impossible for Mr. Avery to have raised his *Brady* claim without Mr. Rahmlow first coming forward to current post-conviction counsel.

126. Therefore, Mr. Avery has a sufficient reason for not raising this issue previously pursuant to *Escalona-Naranjo*.

IN THE ALTERNATIVE, MR. AVERY IS ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE PURSUANT TO WIS. STAT. § 805.15

127. Alternatively, Mr. Avery is entitled to a new trial in the interest of justice. If this Court were to conclude that this new evidence warrants a new trial in the interest of justice, this Court need not resolve whether the new evidence satisfies the test for granting a new trial based upon newly discovered evidence.

128. Wis. Stat. § 805.15(1) establishes that the standard for granting a new trial, under circumstances such as these, is whether this new trial would advance the interest of justice: "A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law of the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice." (§ 805.15(1)) (emphasis added).

129. Courts may grant a new trial in the interest of justice whenever, either: (1) the real controversy was not fully tried, or (2) it is probable that justice was for any reason miscarried. *State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). In the first circumstance, when the real controversy has not been fully tried, the court may grant a new trial without considering whether the outcome would probably be different on retrial. *Id.* at 160.

130. The Wisconsin Supreme Court has established that new evidence can provide the basis for a new trial in the interest of justice. In *State v. Armstrong*, the court ordered a new trial in the interest of justice because new DNA tests established that biological evidence asserted by the State at trial as having come from Armstrong could not have come from him. 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98. Because "the jury was not given an opportunity to hear important testimony that bore on an important issue in the case," the court found that "the real controversy was not fully tried" and thus ordered a new trial. *Id.* at ¶ 181; *see also Hicks*, 202 Wis. 2d at 161, 440 (a new trial was necessary in the interest of justice because the jury did not hear important DNA evidence and heard evidence which was later shown to be inconsistent with the DNA evidence). Similarly, in *Garcia v. State*, the court ordered a new trial because all of the material evidence was not presented to the jury, and "the integrity of our system . . . should afford a jury the opportunity to hear and evaluate the evidence . . . ." 73 Wis. 2d 651, 652, 245 N.W.2d 654, 654 (1976).

131. As argued above the new Sowinski and Rahmlow evidence is material, and needs to be presented to a jury. The evidence refutes the State's theory that there were no third party suspects and no evidence was planted to frame Mr. Avery. The jury never heard this evidence and heard evidence that has now been refuted by this new evidence.

AN EVIDENTIARY HEARING IS REQUIRED

132. "[T]he circuit court must hold a hearing when the defendant has made a legally sufficient postconviction motion, and has the discretion to grant or deny an evidentiary hearing even when the postconviction motion is legally insufficient." *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 579, 682 N.W.2d 433, 438.

133. The Wisconsin Supreme Court in *State v. Allen* determined that a motion contains sufficient material facts, for an evidentiary hearing, if it includes, "the name of the witness (who), the reason the witness is important (why, how), and facts that can be proven (what, where, when) . . . and would entitle a defendant to a hearing." *Id.* ¶ 24, 586, 442.

134. Mr. Avery has sufficiently pled the name of the witness (Mr. Sowinski) and the reason Mr. Sowinski is important (he provides evidence material and favorable to Mr. Avery by directly connecting Bobby to the Halbach murder as a third party suspect and connecting Bobby to planting evidence to frame Mr. Avery). All corroborating materials have been identified, attached and incorporated into this motion (affidavits, law enforcement reports, trial testimony). These corroborating materials demonstrate that Bobby is a third party *Denny* suspect because he had motive, opportunity, and is directly linked to Ms. Halbach's murder. Additionally, he is a *Denny* suspect who is directly linked to planting evidence to frame Mr. Avery by having access to key evidence of the crime because of his possession of the Halbach vehicle. Additionally, a new *Brady* violation has been identified as described previously in this motion. Sec. II. ¶ 79-126.

135. Similarly, Mr. Avery has sufficiently plead the name of the witness (Mr. Rahmlow) and the reason Mr. Rahmlow is important (he provided evidence material and favorable to Mr. Avery that refutes the State's theory and impeaches Bobby that the Halbach vehicle never left the Avery property). Also, Mr. Rahmlow describes a new *Brady* violation. A law enforcement report was never made of Mr. Rahmlow's conversation with a Manitowoc Sheriff's deputy on November 4, 2005 about Rahmlow spotting the RAV-4 in a location away from the Avery property. If trial defense counsel had had this information they would have been able to refute the State's theory and impeach Bobby.

136. The Sowinski and Rahmlow evidence would have been material and favorable to trial defense counsel because it would have undermined confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Youngblood v. West Virginia,* 547 U.S. 867, 869–70 (2006). Because of the suppression of this evidence, Mr. Avery did not receive a fair trial. Mr. Avery had a constitutionally guaranteed right to present a complete defense to the charges against him. *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006); *State v. Pulizzano,* 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), *citing Chambers v. Mississippi,* 410 U.S. 284, 294–95 (1973).

137. If this Court is disinclined to believe the Sowinski or Rahmlow new evidence, the Court must hold a hearing before making any credibility determinations. *See State v. Allen*, 2004 WI 106, at ¶12, 274 Wis.2d 568, 682 N.W.2d 433 (citing *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207 (holding that when credibility is an issue, it is best resolved by live testimony)).

CONCLUSION

Mr. Avery respectfully requests that this Court grant him one of the following alternate remedies: (1) Grant an evidentiary hearing; (2) grant this Amended Motion for Postconviction

Relief by ordering a new trial; and (3) grant the requested relief and grant any and all relief this Court deems appropriate.

Dated this 24th day of January, 2023

Respectfully Submitted,

KATHLEEN T. ZELLNER
Admitted Pro Hac Vice
IL Bar No. 6184574
Kathleen T. Zellner & Associates, P.C.
4580 Weaver Parkway, Suite 204
Warrenville, IL 60555
Telephone: (630) 955-1212
Email: attorneys@zellnerlawoffices.com

STEVEN G. RICHARDS
WI Bar No. 1037545
(Local Counsel)
Everson & Richards, LLP
127 Main Street
Casco, Wisconsin 54205
Telephone: (920) 837-2653
Email: sgrlaw@yahoo.com
Attorneys for Petitioner

EXHIBITS
GROUP A1 & A2

Wisconsin DOJ Division of Criminal Investigation

ACISS Investigative Report

Report Number: 05-1776/284 Report Date: 06/13/2006

Primary Information	
Report Number:	05-1776/284
Report Date:	06/13/2006
Type Of Report:	Investigative
Description:	TERESA MARIE HALBACH: Interview with Brad A. Dassey
Dissemination Code:	Agency
Reporting LEO:	Fassbender, Thomas J (Appleton Special Assignments / Wisconsin DOJ Division of Criminal Investigation)
Approval Status:	Approved
Approved Date:	06/15/2006
Approved By:	Kelly, Carolyn S (Madison Arson / Wisconsin DOJ Division of Criminal Investigation)

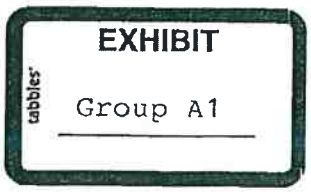
Related Subjects

Name	Type	Sex	Race	DOB	Relationship
Dassey, Brad A	Person	Male	Unknown	11/1/1983	Interviewed
Avery, Steven Allen Sr	Person	Male	White	7/9/1962	Mentioned
Dassey, Brendan R	Person	Male	White	10/19/1989	Mentioned
Dassey, Peter	Person	Male	Unknown	—	Mentioned
Halbach, Teresa Marie	Person	Female	White	3/22/1980	Mentioned
Janda, Barbara Ellen	Person	Female	White	11/7/1964	Mentioned

Record Status Information	
Record Origination Operator:	Price, Denise (Criminal Investigation / Wisconsin DOJ Division of Criminal Investigation)
Record Origination Date:	06/13/2006 13:40
Last Update Operator:	Kelly, Carolyn S (Madison Arson / Wisconsin DOJ Division of Criminal Investigation)
Last Update Date:	06/15/2006 10:06

Reporting LEO	Date	Supervisor	Date
Fassbender, Thomas J (Appleton Special Assignments / Wisconsin DOJ Division of Criminal Investigation)		Kelly, Carolyn S (Madison Arson / Wisconsin DOJ Division of Criminal Investigation)	6/15/2006

Narrative begins on the following page.



Wisconsin Division of Criminal Investigation Case Report
Case/Report Number: 05-1776/284

On Tuesday, June 6, 2006, at 2:04 p.m., S/A Thomas J. Fassbender and Investigator Mark Wiegert, of the Calumet County Sheriff's Department interviewed Brad A. Dassey, DOB 11/01/1983. The investigators made contact with Dassey at his residence, 1425 N 9th, #8, Manitowoc, WI. The investigators identified themselves to Dassey and Dassey agreed to answer questions and he accompanied the investigators to Investigator Wiegert's vehicle where the interview took place. Dassey advised he is half brothers with Brendan Dassey and stated that his father, Pete Dassey, is their common father.

Dassey confirmed that he had contacted the District Attorney regarding Barbara Janda having contacted him about re-formatting her computer hard drive. Dassey advised that Janda had contacted him and asked him if everything is gone from a hard drive when it is re-formatted. Dassey advised that Janda actually had someone else re-format it, but Dassey advised he did not know who did it. Dassey advised the other person re-formatted her computer hard drive for something like $15 and she didn't think he know what he was doing.

Dassey advised according to Janda, investigators came out and took her computer about a week after she had it re-formatted. Dassey advised that Janda told him about the investigators taking the computer approximately one week after they had taken the computer. Dassey advised that Janda did not tell him what was on her computer.

Dassey told the investigators that he wrote a letter to the Halbach's. Dassey advised he told Brendan about the letter he wrote just this past Sunday. Dassey advised that Janda also saw the letter. Dassey provided a copy of the letter he wrote. In the letter, Dassey essentially expressed his sympathy to them for the loss of Teresa and wrote a prayer for them. In the letter, he wrote that he is not like Brendan, Janda or Steven Avery.

Prior to concluding the interview, S/A Fassbender provided Dassey with his business card. The interview was concluded at 2:18 p.m.

At approximately 2:34 p.m., S/A Fassbender received a telephone call from Dassey. Dassey advised that he had spoken with Janda to try and find out who re-formatted her computer hard drive. Dassey advised she told him that Michael J. Kornely gave her phone numbers of individuals to contact and that Cornelli knows who the individual was. Dassey advised that after concluding his call with Janda, Janda called back and asked why he wanted to know.

At approximately 3:01 p.m., Dassey again telephoned S/A Fassbender. Dassey advised that he had contacted Cornelli, who said that he referred Janda to Milwaukee PC.

Wisconsin Division of Criminal Investigation Case Report
Case/Report Number: 05-1776/284

Electronically attached to this supplemental report is a copy of Dassey's letter to the Halbach's and a copy will be submitted to DCIR.

05-1776/284

family.

Dear Lord, thou art heaven. Amen, your [illegible] grace, your hand of love, your hand of deliverance and peace. Please guide me into this prayer as I speak it to the Halbach's Lord because I am writing it through YOU all mighty God! You are in control of the Heavens, you are in control of our lives and you are also in control of all that is evil in this world. Lord God just let the Halbach's know that you are there for them. You WON'T let them down. You WILL bring them justice! You WILL bring them PEACE o Lord. You WILL protect them from all that is evil Lord. Place your hand upon their hearts Lord and sooth them, sooth every nook and cranny in their heart, mind, body and soul Lord. I pray that you give them the mind, the peace and love they deserve Lord. I pray that you keep their family together. I pray that you give them HOPE for the future Lord that they will [illegible] move on and not forget about Teresa but remember the awesome memories they've shared together as a family. I pray that you watch over them and I pray that you keep them calm. Love this family like you've never loved before all mighty God. In Jesus name I pray, AMEN!

I was very afraid to contact you, Halbach family, due to the fact that I am indeed a Dassey through marriage. My real mom and my real dad were never married, so all my Dassey brothers are half brothers. Barb Janda is my step mom. Pete Dassey is my real dad.

[illegible] much [illegible] that's all I pretty much [illegible] believe, in spirits or whatever but I tell something [illegible] hard for me to be out there. I'm sure you could imagine.

I just wanted to leave off with my sympathy I have for you and I wanted you to [illegible] pray for you all as well as my church family in Two Rivers. If you ever have a [illegible] contact me.

With Love,
Brad Dassey
djdassey@sbcglobal.net

Wisconsin Case Management

ACISS Investigative Report

Report Number: 05-1776/304 Report Date: 12/07/2006

Primary Information

Report Number:	05-1776/304
Report Date:	12/07/2006
Type Of Report:	Investigative
Description:	TERESA MARIE HALBACH: Examination of Brendan Dassey Computer
Occurence From:	04/21/2006 00:00
Occurence To:	12/30/1899 00:00
Dissemination Code:	Agency
Reporting LEO:	Fassbender, Thomas J (Appleton Special Assignments / Wisconsin Department of Justice DCI)
Approval Status:	Approved
Approved Date:	12/12/2006
Approved By:	Kelly, Carolyn S (Madison Arson / Wisconsin Department of Justice DCI)

Related Subjects

Name	Type	Sex	Race	DOB	Relationship
Avery, Marie F	Person	Female	White	6/14/1987	Mentioned
Fabian, Danny	Person	Male	Unknown	---	Mentioned
Janda, Barbara Ellen	Person	Female	White	11/7/1964	Mentioned
Walker, Emily A.	Person	Female	White	6/2/1987	Mentioned
Avery, Steven Allen Sr	Person	Male	White	7/9/1962	Person of Interest
Dassey, Brendan R	Person	Male	White	10/19/1989	Person of Interest

Record Status Information

Record Origination Operator:	Price, Denise (Criminal Investigation / Wisconsin Department of Justice DCI)
Record Origination Date:	12/07/2006 08:24
Last Update Operator:	Kelly, Carolyn S (Madison Arson / Wisconsin Department of Justice DCI)
Last Update Date:	12/12/2006 14:20

Reporting LEO	Date	Supervisor	Date
Fassbender, Thomas J (Appleton Special Assignments / Wisconsin Department of Justice DCI)		Kelly, Carolyn S (Madison Arson / Wisconsin Department of Justice DCI)	12/12/2006

Narrative begins on the following page

Wisconsin Division of Criminal Investigation Case Report
Case/Report Number: 05-1776/304

On Friday, April 21, 2006, pursuant to search warrant, S/A Thomas J. Fassbender and Investigator Mark Wiegert, of the Calumet Count Sheriff's Department seized a personal computer CPU and 12 CD-R's from the residence of Barbara Janda.

On Saturday, April 22, 2006, S/A Fassbender transferred said items to Detective Mike Velie, of the Grand Chute Police Department for forensics examination.

On Thursday, May 11, 2006, Detective Velie returned said items to S/A Fassbender for subsequent return to Barbara Janda. S/A Fassbender subsequently received from Detective Velie materials pertaining to his computer analysis of the hard drive and CD-R's. This included numerous hard copy pages of instant message conversations from the hard drive; and a CD titled "Dassey's Computer, Final Report, Investigative Copy." The CD contained information on web sites and images from the harddrive. Also provided by Det. Velie were 6 DVD+R's containing a copy of the harddrive. S/A Fassbender examined the items received and made the following observations:

On February 28, 2006, there was an instant message conversation between an individual, using the screen name "nigerforlife," believed to be Brendan Dassey, and an individual using the screen name "pickup my hand break my fingers and when they feel numb i'll let you know i will scream until i'm out of breath,"(Danny_fabian6495269747, believed to be Danny Fabian). During said conversation, Fabian asked Dassey why detectives wanted to speak with Fabian's brother and Dassey stated they just wanted to ask him why Dassey was losing weight.

On February 28, 2006, there was an instant message conversation between Dassey and an individual using the screen name "i gottta make it to heaven fo goin through hell" (slowmotion4ya1091495196), believed to be Emily, a recent girlfriend of Dassey's. During said conversation, Emily asked "Do you think he is guilty?" Dassey responded, "Ya Yea," Emily then asked, "Why do you," and Dassey responded, "I don't know enough to say."

On March 4, 2006, there was an instant message conversation between an individual using Dassey's screen name of "nigerforlife," who identified themselves as "Brendan's mom," and the person utilizing the screen name, "EMILY," believed to be Emily. During said conversation, Emily advised that her mother doesn't want her to be involved with this and she apologizes for that. Barbara Janda responded, "He's not a bad person, his uncle is."

On February 28, 2006, there was an instant message conversation between Dassey and an individual using the screen name, "~jr mofia~nices!!!!bitches, bitches every where i look there is bitches!!!julie i love u to deth!!" (super_hotty_6924154349921), believed to be Travis Fabian. During said conversation, Dassey asked Fabian if he thought Steven was guilty and Fabian responded, "idk," (for

Wisconsin Division of Criminal Investigation Case Report
Case/Report Number: 05-1776/304

I don't know), "y." Fabian then asked Dassey if he felt Avery was guilty. Dassey responded, "Ya Emily asked that to me". Fabian asked what Dassey said and Dassey wrote, "Ya," and "Yea". Fabian then repeated, "You saed Ya he's guilty".

On February 28, 2006, there was an instant message conversation between Dassey and an individual using the screen name, "Friendship is long lost love, that you wish you'll be able to overcome," (wingless-angel-2006173960984), believed to be Marie Avery. During said conversation, Dassey asked Marie Avery if she thought Steven was guilty and Marie Avery responded, "Yes yes yes y es yes yes yes finaty". Dassey then wrote, "So do I now of the evidence they got".

In reviewing the images contained on the disc marked final report, S/A Fassbender made the following observations:

Photographs of both Teresa Halbach and Steven Avery with an apparent date of April 18, 2006.

There were numerous images of nudity, both male and female, to include pornography. The pornography included both heterosexual, homosexual and bestiality. There were images depicting bondage, as well as possible torture and pain. There were also text images with the name, "Emily". There were images depicting potential young females, to include an infant defecating. There were images of injuries to humans, to include a decapitated head, a badly injured and bloodied body, a bloody head injury, and a mutilated body.

The disc received from Detective Velie, as well as the hardcopy pages of instant message conversations were maintained in S/A Fassbender's possession.

EXHIBIT B

STATE OF WISCONSIN : CIRCUIT COURT: MANITOWOC COUNTY

STATE OF WISCONSIN, Plaintiff, v. STEVEN A. AVERY, Defendant.	)	Case No. 05-CF-381 Honorable Judge Angela Sutkiewicz, Judge Presiding

AFFIDAVIT OF STEVEN KIRBY

Now comes your affiant, Steven Kirby, and under oath hereby states as follows:

1. Your affiant is of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. Your affiant is of sound mind and is not taking any medication nor has your affiant ingested any alcohol that would impair your affiant's memory of the facts stated in this affidavit.
2. Your affiant is the Chairman of Edward R. Kirby & Associates, Inc., a professional investigations firm located in Elmhurst, Illinois. Your affiant is a private investigator, licensed in Illinois and Wisconsin, with over forty years' experience. I have worked with Kathleen T. Zellner & Associates, P.C., on numerous cases in the past.
3. On February 16, 2022, your affiant interviewed Michael Osmunson outside of his residence at 955 Main Street, Mishicot. Jim Kirby was also present and witnessed the interview and Osmunson's responses.
4. Your affiant asked him if he ever helped Bobby Dassey push a car down the road leading to the Avery Salvage yard. He replied, "I don't recall." Your affiant then asked him if by saying he didn't recall, if in fact he could have helped Dassey push a car down that road in

EXHIBIT

B

November of 2005 but just forgot if he did. He replied, "I don't remember." At the conclusion of the interview, your affiant told him that your affiant wanted to be sure that he was not denying ever pushing a car with Dassey towards the Avery property but that he just couldn't recall if he did or did not. For the third time replied, "I don't recall."

5. In regard to the phone calls on October 31, 2005 to and from Bobby Dassey's phone number, he said he didn't recall making or receiving calls from Dassey that morning. When he was shown the print out of the message units, he said that 920-973-0514 was his number in 2005 and recognized 920-973-1742 as Bobby Dassey's number. He stated that the early morning call could have been about hunting but he didn't know for sure. When asked if he went hunting with Bobby that day he said that he didn't as he took his brother trick or treating. When asked about the multiple calls to and from Bobby Dassey between 3:56 P.M. and 6:02 P.M. on 10/31/05 he said that he couldn't explain them other than that "Bobby often doesn't answer his own phone."

FURTHER AFFIANT SAYETH NAUGHT

Steven Kirby

Subscribed and sworn before me
this 11 day of August, 2022.

Notary Public

OFFICIAL SEAL
SCOTT T PANEK
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 5/21/2025

EXHIBIT C

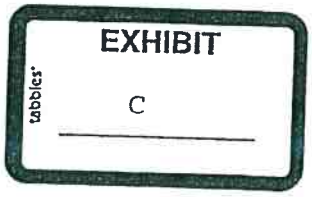
STATE OF WISCONSIN: CIRCUIT COURT: MANITOWOC COUNTY

STATE OF WISCONSIN, Plaintiff, v. STEVEN A. AVERY, Defendant.	)	Case No. 05-CF-381 Honorable Judge Angela Sutkiewicz, Judge Presiding

AFFIDAVIT OF JAMES R. KIRBY

Now comes your affiant, James R. Kirby, and under oath hereby states as follows:

1. Your affiant is of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. Your affiant is of sound mind nor has your affiant ingested any alcohol that would impair your affiant's memory of the facts stated in this affidavit.
2. Your affiant is the president of Edward R. Kirby & Associates, Inc., a professional investigations firm located in Elmhurst, Illinois. Your affiant is a licensed private investigator and have been licensed since 1988. Your affiant is currently licensed in Illinois and Wisconsin.
3. On March 20, 2018, your affiant submitted a Public Records Request to the Manitowoc County Sheriff's Office which read: *seeking any non-911 recordings in your possession of incoming phone calls to the Manitowoc County Joint Dispatch Center from/on November 3, 2005 and November 5, 2005.*



4. Your affiant subsequently received a package in the mail from the Manitowoc County Sheriff's Office, which included two CDs and a letter dated April 12, 2018 addressed to me signed by Larry Ledvina, Deputy Inspector, Manitowoc County Sheriff's Office stating:

> *"We have received and reviewed your request for any non (911) recordings in your possession of incoming calls to the Manitowoc County Joint Dispatch Center from/on November 3, 2005 and November 5, 2005. The dates in question are outside of our recording system storage. But in the timeframe you requested recording for, copies were made of this timeframe due to a different records request and we therefore have some of these recordings. The recordings we have are just recordings. They are date range of recordings. They are not broken down by date and time. I have two CDs enclosed that are responsive to your request:*
>
> *Phone number 683-4201 dated 2005 1103-1105*
> *Phone number 683-4202 dated 2005 1103-1112*

5. These CDs were delivered to the office of Kathleen T. Zellner subsequent to your affiant receiving them.

6. On March 15, 2022, Investigator Katherine McGovern of your affiant's office submitted three public records requested to the Manitowoc County Sheriff's Office. The first request sought *copies of any non 911 recordings in your possession of incoming telephone calls to the Manitowoc County Sheriff's Joint Dispatch Center between the dates of November 3, 2005 at 12:01 AM through November 9, 2005 at 11:59 PM.* The second request sought *copies of incoming and outgoing telephone call logs of the recorded Manitowoc County Sheriff's Joint Dispatch calls between the dates of November 3, 2005 12:01 AM through November 9, 2005 11:59 PM that relate to the Teresa Halbach investigation. Information should include date, time and telephone numbers involved in the calls.* The third request sought *copies of audio recordings of incoming and outgoing calls and/or radio dispatches between the dates of November 3, 2005 12:01 PM through November 9, 2005 11:59 PM that relate to the Teresa Halbach investigation.*

7. On April 18, 2022, Katherine McGovern from your affiant's office received an email from Amanda Mathiebe of the Manitowoc County Sheriff's Office regarding these requests. In this email, Amanda Mathiebe replied that she was updating Ms. McGovern regarding her requests of copies of incoming/outgoing telephone call logs, she responded that these records do not exist.
8. In reference to the request for copies of audio recordings of incoming and outgoing phone calls, she attached an invoice in the amount of $360.00 for these records. She requested your affiant's office remit payment so that she may begin working on copying these records. Your affiant's office subsequently paid the invoice for the requested amount.
9. On May 3, 2022 your affiant's office received thirty-five CDs marked as containing audio recordings from the Manitowoc County Sheriff's Office. On May 3, 2022, your affiant delivered the 35 CDs to the office of Kathleen T. Zellner.
10. A recording of a phone call from November 6, 2005 at 10:28 p.m., which was contained within one of the 35 CDs produced from your affiant's second Public Records Request, was discovered by your affiant and the office of Kathleen T. Zellner. Your affiant listened to this call.
11. Your affiant listened to the two CDs produced to your affiant after your affiant's first Public Records Request to the Manitowoc County Sheriff's Office in March of 2018.
12. The recording of the November 6, 2005 phone call in which Mr. Sowinski's voice was identified was not in the initial discs provided to your affiant following your affiant's March 20, 2018 Public Records Request.

FURTHER AFFIANT SAYETH NAUGHT

James R. Kirby

Subscribed and sworn before me
this 9 day of August, 2022.

Notary Public

OFFICIAL SEAL
SCOTT T PANEK
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 5/21/2025

EXHIBIT D

EXHIBIT

tabbies

D

EXHIBIT E

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN, Plaintiff, v. STEVEN A. AVERY, Defendant.	)	Case No. 05-CF-381 Honorable Judge Angela Sutkiewicz, Judge Presiding

AFFIDAVIT OF DEVON NOVAK

Now comes your affiant, Devon Novak, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. I have resided in Manitowoc, Wisconsin for over 17 years.
3. In 2005, I was in a relationship with Thomas Sowinski and residing with Thomas Sowinski and his son at 4221 Highway R, Manitowoc, Wisconsin.
4. Around the time that it became known that Teresa Halbach was missing, Thomas Sowinski provided me with information of an unusual nature relating to the case. One morning, after his paper route delivery, during the week that Ms. Halbach disappeared, Mr. Sowinski told me the following event had occurred: He had been delivering papers, and he saw two men pushing a car down a road. The men gave him dirty looks. Later, while watching the news, Mr. Sowinski saw Ms. Halbach's car and realized it was the same car that the men were pushing down a road.

5. Thomas Sowinski reported what he told me about the incident to the Manitowoc County Sheriff's Department. I know that he called them because either I was there when he reported it or he reported making the call to me immediately after making the call.
6. On August 6 2022, I spoke to Steven Kirby, an investigator on behalf of Steven Avery. Mr. Kirby asked me to listen to a voicemail recording of a call between a woman named Carla from Manitowoc County Sheriff's Department and a male calling in to speak to someone about the Teresa Halbach case. Mr. Kirby asked me if I recognized the voice of the male on the phone in the recorded call, and I recognized that the male in the call was Thomas Sowinski. (Attached and incorporated herein as Group Exhibit "A" is the phone call and a transcript of the phone call).
7. Nothing has been promised or given to me in exchange for this affidavit.

FURTHER AFFIANT SAYETH NAUGHT

Devon Novak

State of Wisconsin
County of MANITOWOC

Subscribed and sworn before me
this 6th day of AUGUST, 2022.

BERNARD R STANGEL
Notary Public
State of Wisconsin

Notary Public

My Commission Expires:
JUNE 28, 2026

EXHIBIT A

Transcript of Phone Call

MCSD Manitowoc County Sheriff's Department. This is Carla. Can I help you?

Male Uh...I...I...I don't know if I...if it's good information...bad information. Who do I talk to about this... the girl who is missing from Hillbert.

MCSD I can have you speak with my shift commander. Can you hold on a moment?

Male Thank you

MCSD Sure

MCSD (Unintelligible)...I'm going to transfer you to the shift commander. You'll be talking with Sgt. (unintelligible). Okay?

Male Thank you.

MCSD Okay.

(Call being transferred. Ringing.)

Sgt. (Unintelligible)

MCSD Scott, when I hang up it's a man on the phone who thinks he has some maybe more leads. He wants to speak with somebody on the case.

Sgt. Alright.

(End of call)

EXHIBIT F

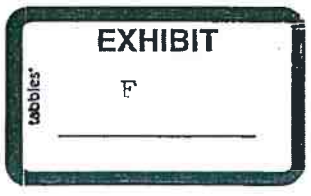
STATE OF WISCONSIN: CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

AFFIDAVIT OF THOMAS SOWINSKI

Now comes your affiant, Thomas Sowinski, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. I resided in Manitowoc, Wisconsin for over 20 years.
3. I mistakenly stated in ¶ 7 of my prior affidavit filed with the appellate court that I contacted "Avery's trial attorneys to inform them of what I saw." My prior affidavit is attached and incorporated herein as "**Exhibit A**."
4. After reviewing materials, my recollection was refreshed that I did not actually contact Mr. Avery's trial defense counsel, Mr. Buting and Mr. Strang. I realized after looking though my emails that rather than contacting Mr. Avery's trial attorneys, I had contacted the Innocence Project in New York and I never heard back. My email to Innocence Project is attached herein as "**Exhibit B**."



5. I met with Investigator Steven Kirby for Mr. Avery's postconviction counsel on August 6, 2022. He played a phone call recording to me (Attached and incorporated herein as **"Exhibit C"** is the transcript and recording). I recognize my voice on the phone call made to the Manitowoc Sheriff's Office, which I described in my prior affidavit (Ex. A).
6. After listening to the first part of my call to the MSO, I refreshed my recollection that a woman answered the phone, and that she transferred me to a male officer. I then provided the information stated in my prior affidavit. I mistakenly recalled in my prior affidavit (¶ 6) that I had only spoken to a female officer, but after my recollection was refreshed by listening to a recording of the first part of my call, I realized that I also spoke to a male officer.
7. Nothing has been promised or given to me in exchange for this affidavit.

FURTHER AFFIANT SAYETH NAUGHT

Thomas Sowinski

Thomas Sowinski

State of Wisconsin
County of MANITOWOC

Subscribed and sworn before me
this 6 day of August, 2022.

Notary Public

BERNARD R STANGEL
Notary Public
State of Wisconsin

My Commission Expires:
JUNE 29, 2026

EXHIBIT A

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. I resided in Manitowoc, Wisconsin for over 20 years.
3. In 2005, I was employed as a motor route driver at Gannett Newspapers, Inc. and delivered papers in and around the Avery Salvage Yard. While delivering papers, I drove my personal car, which was a tannish-gold 4-door sedan. I cannot recall the make and model of the car at this time.
4. On Saturday, November 5, 2005, I was delivering papers on the Avery Salvage Yard in the early morning hours before sunrise. I drove down Highway 147 and turned left onto Avery Road. Soon after I turned onto Avery Road, I witnessed an individual who I later realized was Bobby Dassey and another unidentified older male pushing a dark blue RAV-4 down Avery Road on the right side towards the junkyard. Bobby Dassey was

shirtless, even though it was early November. The second man appeared to be in his 50's or early 60's, had a long grey beard, was wearing a worn puffy jacket, had a larger frame, and was around 6 feet in height. The RAV-4 did not have its lights on. Attached and incorporated herein as Exhibit A are photographs marked where I saw the RAV-4.

5. I drove down Avery Road towards the mailboxes, left the Herald Times in the mailbox, and turned back around. I felt very afraid as I approached the two individuals because Bobby Dassey attempted to step in front of my car, blocking my exit. I was within 5 feet of Bobby Dassey and my headlights were on the entire time. The older man ducked down behind the open passenger door. I swerved to the right and drove in the shallow ditch to avoid hitting Bobby Dassey. I called out, "Paperboy. Gotta go" because I was afraid for my safety. Bobby Dassey looked me in the eye, and I could tell with the look in his eyes that he was not happy to see me there. I knew that Bobby Dassey and the older individual were doing something creepy.
6. After I learned that Teresa Halbach's car was found on November 5, 2005, I contacted the Manitowoc Sheriff's Office and spoke to a female officer. I reported everything I have stated in this affidavit to the officer. The officer said, "We already know who did it." I provided my phone number and they said they would contact me soon. I never heard back from the police.
7. After watching Season 1 of Making a Murderer, I contacted Avery's trial attorneys to inform them of what I saw. I never heard back.
8. Nothing has been promised or given to me in exchange for this affidavit.

FURTHER AFFIANT SAYETH NAUGHT

Thomas Sowinski

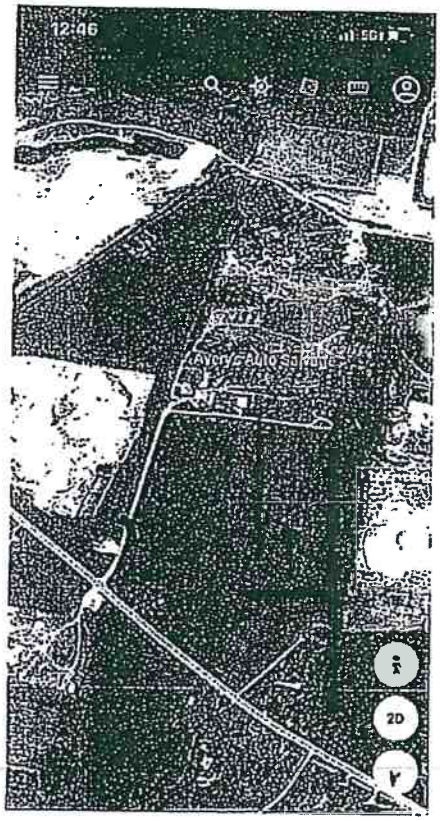
State of Wisconsin
County of MANITOWOC

Subscribed and sworn before me
this 10 day of April, 2021.

Notary Public

My Commission Expires: 7/29/2022

JAMES R KIRBY
Notary Public
State of Wisconsin



Avery's Auto Salvage
Salvage yard in Manitowoc County, Wisconsin

EXHIBIT
A

EXHIBIT B

Gmail

Kathleen Zellner <attorneys@zellnerlawoffices.com>

FW: Avery Sowinski email

Jim Kirby <jkirby@kirbyinvestigations.com>
To: Kathleen Zellner <attorneys@zellnerlawoffices.com>

Tue, Apr 13, 2021 at 3:18 PM

From: Thomas Sowinski <tquest87@yahoo.com>
Sent: Tuesday, April 13, 2021 3:17 PM
To: Jim Kirby <jkirby@kirbyinvestigations.com>
Subject: Fw: Avery

Sent from Yahoo Mail for iPhone

Begin forwarded message:

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

EXHIBIT C

Transcript of Phone Call

MCSD Manitowoc County Sheriff's Department. This is Carla. Can I help you?

Male Uh...I...I...I don't know if I...if it's good information...bad information. Who do I talk to about this... the girl who is missing from Hillbert.

MCSD I can have you speak with my shift commander. Can you hold on a moment?

Male Thank you

MCSD Sure

MCSD (Unintelligible)...I'm going to transfer you to the shift commander. You'll be talking with Sgt. (umintelligible). Okay?

Male Thank you.

MCSD Okay.

(Call being transferred. Ringing.)

Sgt. (Unintelligible)

MCSD Scott, when I hang up it's a man on the phone who thinks he has some maybe more leads. He wants to speak with somebody on the case.

Sgt. Alright.

(End of call)

EXHIBITS
GROUP G

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005- CF-381

STEVEN A. AVERY,

Defendant.

AFFIDAVIT OF DEAN A. STRANG

I, Dean A. Strang, first duly sworn on oath, hereby state as follows:

1. I was counsel with Jerome Buting for Steven Avery during much of the pretrial phase, at trial, and at sentencing in this case, from spring 2006 to June 2007.

2. I have reviewed Mr. Buting's affidavit of August 11, 2022. My recollection and understanding comports with his as to everything that he addresses in that affidavit. Within the scope of my personal knowledge, I agree with and confirm his affidavit.

Dated this 12th day of August, 2022.

Dean A. Strang

EXHIBIT
tabbies
Group G

Subscribed and sworn before me, the undersigned
Notary Public of the State of Wisconsin,
this 12 day of August, 2022.

R. Richard Resch

Notary Public
State of Wisconsin

My commission ~~expires~~: is permanent

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005- CF-381

STEVEN A. AVERY,

Defendant.

AFFIDAVIT OF DEAN A. STRANG

I, Dean A. Strang, first duly sworn on oath, hereby state as follows:

1. I was counsel with Jerome Buting for Steven Avery during much of the pretrial phase, at trial, and at sentencing in this case, from spring 2006 to June 2007.

2. I have reviewed Mr. Buting's affidavit of August 11, 2022. My recollection and understanding comports with his as to everything that he addresses in that affidavit. Within the scope of my personal knowledge, I agree with and confirm his affidavit.

Dated this 12th day of August, 2022.

Dean A. Strang

Subscribed and sworn before me, the undersigned
Notary Public of the State of Wisconsin,
this 12 day of August, 2022.

R. Richard Resch

Notary Public
State of Wisconsin

My commission ~~expires~~: is permanent

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005 CF 381

STEVEN A. AVERY,

Defendant.

AFFIDAVIT OF JEROME F. BUTING

STATE OF WISCONSIN)
)SS
COUNTY OF WAUKESHA)

I, Jerome F. Buting, first duly sworn on oath, hereby state as follows:

1. I was counsel with Dean Strang for Steven Avery during much of the pretrial phase, at trial, and at sentencing in this case, from spring 2006 to June 2007. In general and as relevant here, I was familiar with all information disclosed by law enforcement and the prosecution to me, Mr. Strang, and any other member of what I call here "Mr. Avery's defense team" during the time that Mr. Strang and I represented Mr. Avery.

2. Mr. Strang and I repeatedly requested notice of all exculpatory or potentially exculpatory information and otherwise discoverable information and material from the prosecutors and the Manitowoc County Sheriff's Department. This included reports of any tips from citizens and

"audio tape copies of dispatch or all other communications relevant to law enforcement operations involved in the search for and investigation of Teresa Halbach's disappearance, for the period of November 3, 2005 through November 12, 2005." An example is my July 24, 2006, letter, attached as Exhibit A to this affidavit.

3. I received a CD-ROM that purported to contain all Manitowoc County Sheriff's Department dispatch calls related to the Halbach investigation covering the period November 3, 2005, through November 12, 2005. That CD-ROM was at some point turned over to Mr. Avery's successor counsel. I have recently reviewed the handwriting on a copy of that CD-ROM which I recognize as my handwriting. I am informed, and believe in part based on my own recollection, that this copy of the CD-ROM came from my files on Mr. Avery's case. I recognize my handwritten note on the CD-ROM which refers to one call on that recording, an untimed call to a dispatcher from then-Sgt. Andrew Colborn requesting information on a license plate of Teresa Halbach. That CD-ROM copy and my handwriting on it confirm my recollection that I listened to all of the calls recorded on that CD-ROM.

4. I have recently re-listened to all of the recordings on that CD-ROM that I received during my representation of Mr. Avery and I compared it to another CD-ROM that Mr. Avery's current counsel provided to me. Upon

information and belief, she received this CD-ROM as a response to a recent open records request. On the newly disclosed CD-ROM there is an additional call from a citizen tipster that was not included in the audio recordings that I received during Mr. Avery's representation. I have been informed that the caller on this recording is an individual later identified as Thomas Sowinski. The Avery defense team was not given the audio of his call, his identity as a potential witness or other information which we could have investigated and used at trial.

5. The newly received CD-ROM that current counsel for Mr. Avery has shared with us, which includes a call purported to be from Mr. Sowinski, indicates that the caller was transferred to an investigator, Sgt. Scott Senglaub. By inference, Sgt. Senglaub spoke to the caller as the recording shows that the dispatcher connected the caller to him. Neither I nor Mr. Avery's defense team ever was given a recording, a report, notes, or any other notice of a conversation between Thomas Sowinski and Sgt. Scott Senglaub of the Manitowoc County Sheriff's Department.

6. At the time we were requesting discovery and disclosure of exculpatory information, Mr. Strang and I were using a private investigator, Conrad O. (Pete) Baetz. We would have had him follow up on the call from Mr. Sowinski, had we known about it.

7. Had Mr. Strang and I known before Mr. Avery's trial about any information that a person had reported two men pushing an SUV on the Avery property in the darkness before the reported discovery of Ms. Halbach's Toyota RAV-4 SUV on the Avery Salvage Yard property, we would have pursued that information diligently, with Mr. Baetz and otherwise.

8. Had Mr. Strang and I received or known before Mr. Avery's trial about Thomas Sowinski's telephone call with the dispatcher, which shows that she transferred that call to Sgt. Scott Senglaub, we would have made a specific request for further information about the substance of that call from Sgt. Senglaub.

9. Although the new CD-ROM reveals that Thomas Sowinski indeed did call the dispatcher during the timeframe of the CD-ROM given to Mr. Avery's trial counsel, Mr. Sowinski's call was not included on the pretrial discovery CD-ROM.

10. As to the call from Andrew Colborn described in paragraph 3 above, neither the prosecution, the Manitowoc County Sheriff's Department, nor any agent or agency of the State of Wisconsin ever disclosed to me or the defense team the date and time at which that call was made. Like many other recorded calls that were disclosed to us, the audio record of that call from Andrew Colborn had no timestamp or other documentation of the time of the call

when it was disclosed to me and the defense team for Mr. Avery. We thus had no way to challenge or disprove any claim that Mr. Colborn might make about the specific timing of that call.

Dated this 12th day of August, 2022.

Jerome F. Buting

Subscribed and sworn to before me, the undersigned
Notary Public of the State of Wisconsin,
this 12 day of August, 2022.

Notary Public
State of Wisconsin

My commission ~~expires:~~ is permanent

Law Offices

BUTING & WILLIAMS, S.C.

Jerome F. Buting*
Kathleen B. Stilling

400 N. Executive Drive, Suite 205
Brookfield, Wisconsin 53005-6029
Telephone: (262) 821-0999
Facsimile: (262) 821-5599

*Also admitted to practice in the District of Columbia

Dudley A. Williams

6165 N. Green Bay Avenue
Glendale, Wisconsin 53209-3813
Telephone: (414) 247-8600
Facsimile: (414) 247-8655

July 24, 2006

Via Facsimile Transmission Only

Special Prosecutor Kenneth Kratz
Calumet County District Attorney's Office
206 Court Street
Chilton, Wisconsin 53014-1127

FILE: M05-2467
DATE: 8/7/06
COPIES TO: SLC MBV JRE LLB JRW KBO MTR GSZ RNS SAH WLN

Re: State of Wisconsin vs. Steven Avery
Manitowoc County Case No. 05-CF-381

Dear Mr. Kratz:

I am writing to follow-up on some discovery issues in this matter. There are a number of items we do not have yet, and as I have gone through the discovery already provided, I have tried to make note of them. Most are referred to in discovery, but some are independent of that. By copy of this letter, I am also notifying Inv. Wiegert for his convenience as I assume he will assist you in responding to your request, as well as Norm Gahn since some of my requests concern Crime Lab DNA testing.

Please locate and produce the following:

(1) Audio tape copies of dispatch or all other communications relevant to law enforcement operations involved in the search for and investigation of Theresa Halbach's disappearance, for the period of November 3, 2005 through November 12, 2005. This would include anything recorded on any type of media by law enforcement or public safety agent. This should include, but is not limited to, radio communication, both voice and data, routinely recorded by any agency, on any and all frequencies available to law enforcement or public safety units assigned to the search and/or investigation. It should also include data or message transmissions made by and between any law enforcement or public safety agency pertinent to the search and investigation activities, via computer or teletype, and communication between any law enforcement or public safety agency and civilian assets, such as aircraft or ground vehicles involved in the search and investigation activities.

EXHIBIT
tabbies
A

MOS-2467

I made a similar, though perhaps not as detailed, request about one month ago and I believe Mark Wiegert spoke to Dean and he is working on this already.

(2) A listing of all Calumet and Manitowoc County Sheriff Department personnel involved in this investigation which includes their officer, personnel or squad number. This is so we can decipher who did what in reports that just refer to, for instance, "801 did arrive and ... ." Most reports we have received are easy to decipher but some, like the "log-in sheets" from officers checking people in and out are prepared strictly by reference to a number rather than a name.

(3) ~~Crime Lab "bench notes" for all analysts who have or will be preparing reports.~~ We received only part of Sherry Culhane's notes so far, and none from ballistics, identification, blood pattern analysis and others in the Crime Lab who have prepared reports. Also Sherry Culhane's last submission of bench notes only goes to early April (see her correspondence to you dates April 12, 2006). She has obviously done many examinations since then and must have generated many more pages in her file.

(4) Crime Lab (Madison office) error logs and other records of contamination of evidence by analysts' own DNA or other types of contamination revealed by the lab's testing process and proof of any and all corrective action taken by the lab once errors are detected. Please provide such records for the time period of January 1, 2004 to the present date.

(5) Copies of the electronic/computer data files from DNA testing in this case, as my expert needs to see the raw data himself. They should be copied onto write-only CD media. Specifically, we request, for AB1 310, 3100, or 3130 data the following:

a. Genescan project data files (electronic)
b. Genescan sample data files (electronic)
c. Genescan analysis parameters data files (electronic)
d. Genescan matrix data files for the instrument(s) used in this case (electronic)
e. Genescan injection list data files (electronic)
f. Genotype files (electronic)

(6) Reports of the Crime Lab's proficiency tests and documentation of any corrective action taken whenever proficiency testing discrepancies are detected, for the last five year period to date. Such testing and records shall include those indicated in the *DNA Advisory Board Quality Assurance Standards for Forensic DNA Testing Laboratories*, Standards No. 13.1 and 14.1.

(7) Another copy of the audio-tape interview of Brendon Dassey from February 27, 2006. The CD previously provided of this recording cannot be read by any computer in Dean's or my offices, so I assume it was just a defective "bum."

MDS-2467

(8) Copies of all video recordings made of the RAV-4 at its location when discovered at the Avery Salvage Yard.

(9) Copies of any and all video recordings made of the interior of Steven Avery's trailer, garage, or vehicle. (I believe the reports reference Sgt. Tyson making such a recording.)

(10) Copies of any and all video recording(s) of the burn barrels as well as the burn pit before it was altered by investigators' digging.

(11) Copies of any other video recordings made at the Avery Salvage property, with the exception of an 8mm recording of a view of the pit from the Radant property, and an 8mm recording of the conveyer area. To date, those are the only video recordings I think we have received concerning the Avery property.

(12) Copies of Orville Jacob's phone and visiting audio recordings and visitation logs for the entire length of time when he was housed together with Steven Avery.

(13) Copies of all (unedited) fly-over videos recorded from aerial searches on November 4, 2005 and November 6, 2005. We currently have a spliced copy on a DVD which is obviously from several different dates, times, or aircraft with no separation or designation as to their date and time. Thus I assume there must be a master copy of the complete videos.

(14) Crime Lab field response team reports from Ertl and Zheng (or other Crime Lab personnel) which describe their involvement at the Avery property and the transfer of the RAV-4 from the Avery property to whatever location it was next taken. Please also include reports which explain where and under what conditions the RAV-4 was kept up to the point Sherry Culhane began her examination on November 7, 2005 at approximately 11:00 a.m.; and

(15) Finally, I note that Calumet County Sheriff's Department report nos. 239 and 243 refer to detailed measurements and diagrams being taken of Steven Avery's residence and garage for possible court diagrams or 3-D representations. If those are available, I would appreciate an opportunity to view them at your earliest convenience.

MDS-2467

Please contact me if you have any questions or difficulty complying with this discovery request.

Very truly yours,

Jerome F. Buting

JFB:jlh
cc: Investigator Mark Wiegert (via USPS)
ADA Norm Gahn (via USPS)
A.A.G. Tom Fallon (via USPS)
Atty Dean Strang (via USPS)

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN	)	
	)	
Respondent	)	
	)	
-v-	)	Case No.: 05-CF-381
	)	
STEVEN A. AVERY	)	
	)	
Petitioner	)	

SEPARATE APPENDIX TO THIRD MOTION FOR POST-CONVICTION RELIEF

VOLUME I (APP 1 TO APP 140)

KATHLEEN T. ZELLNER
Lead Counsel
DOUGLAS H. JOHNSON
KATHLEEN T. ZELLNER &
ASSOCIATES, P.C.
4580 Weaver Parkway, Suite 204
Warrenville, IL 60555
(630) 955-1212

Counsel for Petitioner

STEVEN G. RICHARDS
Local Counsel
Casco, Wisconsin 54205
(920) 837-2653
Atty#: 1037545

Local Counsel for Petitioner

PEOPLE -v- STEVEN AVERY
INDEX TO APPENDIX
VOLUME I OF III

DATE **PAGE**

VOLUME II OF III

VOLUME III OF III

Case 2005CF000381 Document 1078 Filed 08-16-2022 Page 7 of 145

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
JAN 30 2007
CLERK OF CIRCUIT COURT

Case No. 05 CF 381

STEVEN A. AVERY,
Defendant.

DECISION AND ORDER ON ADMISSIBILITY OF THIRD PARTY LIABILITY EVIDENCE

The court previously issued its "Order Regarding State's Motion Prohibiting Evidence of Third Party Liability ("Denny" Motion)" on July 10, 2006. That order provided in part as follows:

> "Should the defendant, as part of his defense, intend to suggest that a third party other than Brendan Dassey is responsible for any of the crimes charged, the defendant must notify the Court and the State at least thirty (30) days prior to the start of the trial of such intention. In that event, the defendant will be subject to the standards relating to the presentation of any such evidence established in State v. Denny, 120 Wis. 2d 614 (Ct. App. 1984)."

Pursuant to the court's July 10, 2006 order, the defendant filed "Defendant's Statement on Third-Party Responsibility" on January 8, 2007. The State filed its "Memorandum to Preclude Third Party Liability Evidence" on January 12, 2007. The court heard oral argument on the third party liability issue at a hearing on January 19, 2007.

204
(1)

Case 2005CF000381 Document 1113 Filed 01-15-2023 Page 8 of 145

While the parties dispute its applicability to the defendant's offer of proof, the leading Wisconsin case on the issue third party liability evidence is *State v. Denny*, 120 Wis. 2d 614 (Ct. App. 1984).[1] The defendant in that case, Kent Denny, was charged with first-degree murder. At trial, he claimed that he had no motive to murder the victim, but that a number of other individuals did. The trial court refused to allow the defendant to present such evidence because it was not accompanied by any evidence that the other individuals had an opportunity to commit the crime or a direct connection to it. The Court of Appeals upheld the trial court's refusal to admit the evidence. In its decision, the court adopted what is known as the "legitimate tendency" test. Under that test, a defendant seeking to introduce evidence asserting the motive of a third party or parties to have committed the crime must produce evidence that such party or parties had the opportunity to commit the crime and that there is some evidence which is not

[1] The defendant has alternately claimed that the Wisconsin Supreme court has or has not adopted the *Denny* legitimate tendency test. In the defendant's June 26, 2006 Defendant's Response to State's Motion to Prohibit Evidence of Third Party Liability (*Denny* Motion), defense counsel recognized that "*Denny* has been adopted by the Wisconsin Supreme Court and Avery acknowledges its application in this case should he seek to introduce evidence of third party liability for Teresa Halbach's death. *See, State v. Knapp*, 265 Wis. 2d 278, 351-52, 666 N.W. 2d 881 (2003), *vacated on other grounds*, 542 U.S. 952 (2004), *reaffirmed on remand*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W. 2d 899." at p. 3. By January 8, 2007, however, the defendant had come to the conclusion that "the Wisconsin Supreme Court has never adopted *Denny*." Defendant's Statement on Third-Party Responsibility at p. 3. The court believes the defendant had it right the first time. The Wisconsin Supreme Court ruled in *Knapp* as follows:

> "The general rule, adopted by this court, concerning the issue is that evidence tending to prove motive and opportunity to commit a crime regarding a party other than the defendant can be excluded when there is no direct connection between the third party and the alleged crime." (Citing *Denny*) 265 Wis. 2d at 351.

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 8 of 145

remote in time, place or circumstances to directly connect any third party to the crime.

The defendant in this case initially acknowledged "that the *Denny* rule must be satisfied should he decide to offer third-party liability evidence, other than against Dassey." Defendant's Response to State's Motion to Prohibit Evidence of Third-Party Liability (*Denny* motion) dated June 26, 2006 at p. 1. The defendant now claims, however, that *Denny* is not applicable to this case and that the defendant should be permitted to introduce evidence of potential third party liability on the part of a number of individuals evaluated solely on the basis of its admissibility under §§904.01, 904.02, and 904.03.

The defendant argues that *Denny* does not apply because while the defendant in *Denny* argued that third persons had a motive to commit the crime, "Avery does not propose to suggest that anyone had a motive to kill Teresa Halbach." Defendant's Statement on Third-Party Responsibility, p. 3. The defendant further argues that since the prosecution is not required to prove motive as an element of any of the crimes with which he is charged, he should not be required to prove motive as a prerequisite to submitting evidence of third party liability.

The defendant is correct that since he is not seeking to prove motive on the part of any other third party, this case is not squarely on all fours with *Denny*. *Denny* was not required to specifically address the issue of whether proof of

Case 2005CF000381 Document 1113 Filed 08-16-2022 Page 10 of 145

motive is a prerequisite to offering third party liability evidence because the defendant offered to show motive as part of his offer of proof. This court cannot conclude, however, that the distinction on the issue of motive means that *Denny* is not controlling in this case. *Denny* required a defendant offering third party liability evidence to show proof of motive, opportunity and a direct connection to the crime. It does not follow that if a defendant is unable to show motive, he is somehow freed from the requirements of the legitimate tendency test. In fact, the most logical reading of *Denny* is that all three facets of the legitimate tendency test must be met for third party liability evidence to be admissible. *Denny* specifically held "our decision establishes a bright line standard requiring that three factors be present, i.e., motive, opportunity and direct connection." *Denny* at 625. The evidence offered by the defendant in *Denny* was ruled inadmissible because it demonstrated motive, but not opportunity or direct connection. There is nothing in the decision to suggest that a defendant who demonstrates opportunity and direct connection is somehow excused from demonstrating motive.

The defendant asserts that *Denny* should not control because no one had a motive to commit the charged crimes. The defense does not provide support for this novel proposition. The court does not view the Amended Complaint as alleging a motiveless series of crimes. Although the court has gleaned from representations made by counsel in the course of these proceedings that evidence

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 11 of 145

obtained by the State subsequent to the filing of the Amended Complaint may affect the precise version of what it intends to prove happened, the court does not accept the unsupported statement that no one had a motive to commit the crimes.

The defendant argues that a Wisconsin Supreme Court decision, *State v. Scheidell*, 227 Wis. 2d 285 (S. Ct. 1999) is more analogous to this case than *Denny* and should guide the court's analysis. The defendant in *Scheidell* was charged with attempted sexual assault for having allegedly broken into the residence of a woman in his apartment building through an open window in the early morning hours. The victim testified that her assailant straddled her body while she was in bed in her bedroom, struck her in the face a number of times and tried to pull off her underpants. She testified she identified the defendant, who was wearing a ski mask with holes for his eyes and mouth, as Scheidell and asked him by name what he was doing a number of times. Each time she addressed him by name the assailant hesitated briefly, then struck her again. Eventually, she was able to reach a pistol from her dresser and succeeded in getting the assailant to leave. The assailant never said a word during the entire attack. At trial, the defendant sought to admit evidence of a somewhat similar attack against a different victim committed approximately five weeks later while the defendant was being held in jail. The Supreme Court ruled that the *Denny* legitimate tendency test should not apply the facts in *Scheidell* because where the identity of the third party is

unknown, "it would be virtually impossible for the defendant to satisfy the motive or opportunity prongs of the legitimate tendency test of *Denny*." *Id.* at 296. The court concluded that *Denny* did not apply to other acts evidence committed by an unknown third party. Rather, the court reasoned that when a defendant offers other acts evidence committed by an unknown third party, the court should apply the *Sullivan* other acts evidence test, and balance the probative value of the evidence, considering the similarities between the other act and the crime charged, against the considerations found in §904.03. *Id.* at 310.

The court finds the defendant's argument that *Scheidell* is closer to the facts in this case than *Denny* to be unpersuasive. As pointed out by the State, this case does not involve any unknown third parties. The defendant does not offer any evidence to suggest that some unknown third party committed the crimes charged. The defendant has identified a number of persons by name who he claims were on or near the Avery property on October 31, 2005 and would have had an opportunity to commit the crime. Another distinction is that Avery is not seeking to offer any other acts evidence. Rather, he wishes to offer direct evidence that one or more identified third persons may have actually committed the crime. This is exactly what the defendant in *Denny* attempted to do. Also significant is the fact that while the defendant is *Scheidell* did not know the name of the third party, he did have evidence that the third party had motive, based on his alleged commission

Case 2005CF000381 Document 1073 Filed 03-16-2023 Page 13 of 145

of a similar crime. While the facts in *Denny* may not be precisely on point with those of this case, they are far more applicable to this case than the facts in *Scheidell*.

The court concludes that the defendant's offer of third party liability evidence must be measured by the legitimate tendency test established in *Denny*. The defendant knows the identity of third parties who may have had an opportunity to commit the crimes. They are identified in his pleading. Unlike the defendant in *Scheidell*, he is not precluded from determining whether any of them may have had a motive to do harm to Teresa Halbach. He simply acknowledges that he has no evidence to offer that other persons with opportunity had the motive to commit the crimes. Thus, if the *Denny* legitimate tendency test applies as it was originally established in *Denny*, and the court concludes that it does, none of the offered evidence is admissible because the defendant does not contend any of the other persons present at the Avery property on October 31, 2005 had a motive to murder Teresa Halbach or commit the other crimes alleged to have been committed against her.

The court acknowledges the remote possibility that an appeals court could choose to distinguish *Denny* and conclude that under some circumstances a defendant could meet the legitimate tendency test by producing evidence of such probative value as it relates to opportunity and direct connection to the crime that

proof of motive is not required. The court is not aware of any decision from any jurisdiction which so holds, but an argument could be made that despite *Denny's* "bright line standard" that "three factors be present," strong evidence of opportunity and direct connection to the crime might make up for the lack of motive evidence. After all, *Denny*, while adopting the legitimate tendency factors from *People v. Green*, 609 P.2d 468, 480 (Cal. 1980), declined to adopt *Green's* conclusion that the evidence submitted be "substantial," in recognition of Wisconsin's more liberal policy on the admission of relevant evidence. *Denny, supra,* at 622-623. Allowing for the possibility an appellate court might permit the defendant to meet the legitimate tendency test requirements by offering other evidence of sufficient opportunity and a direct connection to the crime in the absence of a demonstration of motive, the court will individually examine the persons identified by the defendant who could potentially be responsible for Teresa Halbach's homicide and the evidence the defendant proposes to offer with respect to each person, keeping in mind the admonition of *Denny* that "evidence that simply affords a possible ground of suspicion against another person should not be admissible." *Denny, supra*, at 623.

The opening sentence of the defendant's "Alternative *Denny* Proffer" suggests the weakness of his argument:

> "If the court does conclude instead that *Denny* applies here, then Avery identifies each customer or family friend and each

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 15 of 145

> member of his extended family present on the Avery salvage yard property at any time during the afternoon and early evening on October 31, 2005, as possible third-party perpetrators of one or more of the charged crimes."

This offer appears to be an example of the dangers warned of by the court in *Denny*:

> "Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased – degenerating the proceedings into a trial of collateral issues." *Denny*, *supra*, at 623-624.

In this case, the defendant has not identified a large group of people with motive, but rather a large group of people with opportunity. The danger of degenerating the proceedings into a trial of collateral issues remains the same.

1. Scott Tadych. The facts offered by the defendant in support of his argument that Scott Tadych may have potential liability are found at pages 10 and 11 of the Defendant's Statement on Third-Party Responsibility. The offer of proof does not show a correlation between the time Scott Tadych was present on the property and the time Teresa Halbach was reported by others to have been on the property. Other parts of the defendant's offer of proof place Teresa Halbach on the property at about 3:30 p.m. Her business of photographing Steven Avery's vehicle would have been completed well before 5:15 p.m. had the crimes against her not taken place, yet the only proof offered is that Tadych didn't get on the scene until 5:15 p.m. Any claim by Tadych that he saw a fire behind the defendant's trailer

Case 2005CF000381 Document 1073 Filed 09-16-2022 Page 13 of 145

would appear to be more consistent with the State's theory of the crime than any liability on the part of Mr. Tadych. The defendant does not explain the relationship of the other facts recited to the crime. In the absence of motive, certainly something more would be required than what is alleged to take the information out of the category of speculation. Did Mr. Tadych know who Teresa Halbach was? Did Mr. Tadych know that she would be on the premises on that day? Is there any other evidence that would "directly connect" him to the crime? These questions are not addressed in the defendant's offer of proof.

2. Andres Martinez. The facts offered by the defendant in support of his argument that Andres Martinez may have potential liability are found at pages 11 through 14 of the Defendant's Statement on Third-Party Responsibility. The offer includes evidence that Mr. Martinez can be a violent man, as reflected in the reported November 5, 2005 attack on his girlfriend with a hatchet. There are also indications that he gave conflicting statements to the police department concerning his acquaintance with the defendant and what he knew or did not know about the crimes. Conspicuously missing from the offer is any indication that Mr. Martinez had any opportunity to do harm to Teresa Halbach, let alone a motive to do so. He denies being at the Avery salvage yard on October 31 and the court sees nothing in the offer of proof to indicate that any other person places him on the property on October 31. In addition, there is no indication that he knows who Teresa Halbach

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 16 of 145

was or that she would be present on the property on October 31. Again, the offer falls clearly within the range of speculation and far short of meeting the legitimate tendency test, either as specifically stated in *Denny* or as it might be otherwise conceivable applied.

3. James Kennedy. Mr. Kennedy was listed as a third party having potential liability in the defendant's statement, but at oral argument the court was informed by defense counsel that Kennedy himself would not be a suspect, but might be offered as a witness to provide testimony against others. Therefore, the court does not address an offer of proof against James Kennedy as the court understands an offer of proof is not being made.

4. Charles Avery. The evidence proffered against Charles Avery is found at pages 15 and 16. Charles Avery, one of the defendant's brothers, allegedly was present on the salvage yard property on October 31, 2005. While he did not know Teresa Halbach by name, he allegedly knew "the photographer" was expected to be visiting the property on October 31. The defendant indicates that James Kennedy arrived at the Avery Salvage Yard property around 3:00 p.m. and no one was in the office, which was unusual. After about five minutes, Charles Avery appeared from the back of the building. The court is left to speculate how this somehow "directly connects" Charles Avery to the crime. The defendant attempts to derive significance from the fact Charles Avery's trailer home was the

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 18 of 145

closest one to the location where Teresa Halbach's vehicle was found, but doesn't say what the distance was. It's the court's recollection from the Preliminary Examination that the trailer homes are not that far from each other and that none of them were very close to the site where the vehicle was found. In any event, the court cannot draw any significance from the facts offered. This is also true for the statement that Earl Avery told police that Charles Avery had spoken to a woman associated with Auto Trader magazine at a time not specified by the defendant. The facts listed arguably show that Mr. Avery would have had an opportunity to commit the crime, but there is no suggestion he had any motive to do so, nor is there any evidence to directly connect him to the crime.

5. Robert Fabian and Earl Avery. What would be an offer of proof against Robert Fabian and Earl Avery is summarized at pages 16 and 17. As near as the court can tell, the only evidence that might tie Robert Fabian to the crime is that he may have used a .22 caliber rifle while rabbit hunting that afternoon and a bullet from a .22 caliber rifle is alleged to have struck Teresa Halbach. There is no evidence relating to motive, opportunity or any other type of direct connection to the crime. The court is not sure that the defense actually intends to offer third-party evidence against Mr. Fabian, but if he does, his offer falls far short.

With respect to Earl Avery, there is no suggestion that he knew who Teresa Halbach was during her lifetime. The defendant asserts that Earl Avery returned to

Case 2005CF000381 Document 1070 Filed 05-16-2012 Page 18 of 146

the salvage yard driving a flatbed car hauler which could have been used to move Ms. Halbach's Toyota to the place where it was found. There is no evidence offered to suggest that Ms. Halbach's Toyota RAV 4 was not driven to the place where it was found. The defendant does not offer any evidence to suggest it was moved to the place where it was found by a flatbed car hauler. It is alleged that Earl Avery's whereabouts in the salvage yard are unknown until Fabian arrived to hunt rabbits with him late in the afternoon, but there is no suggestion why that would be unusual. The Avery salvage yard is a large parcel of property. The defendant attributes significance to the fact that a .22 caliber rifle would be appropriate for hunting rabbits and it was a .22 caliber rifle bullet that the State asserts was fired into Teresa Halbach's body. There is no suggestion, however, of any evidence to dispute the State's claim that ballistic evidence matches the bullet to a weapon possessed by Steven Avery. Viewing Earl Avery's possible use of a .22 caliber rifle in light of Holmes v. South Carolina, 126 S. Ct. 1727 (2006), the fact that the State will be introducing evidence that the .22 caliber bullet came from a weapon owned by Steven Avery does not alone prevent the defendant from introducing evidence to the contrary. However, for any weapons owned by other persons to be of any more than speculative significance, the court would expect at least evidence that they were tested and could not be ruled out as the weapon from

Case 2005CF000381 Document 1078 Filed 01-13-2023 Page 30 of 140

which the .22 caliber bullet found was fired. Otherwise, evidence concerning those weapons would bring only confusion and add nothing to the search for truth.

The defendant also makes reference to a golf cart belonging to his mother which Earl Avery drove at about 3:30 in the afternoon on October 31 and the fact that a cadaver dog later "alerted" on a golf cart. The defendant does not elaborate on the significance of the dog "alerting" on the golf cart, what role the defendant asserts the cart may have had in the commission of the crimes, or whether the golf cart used by Earl Avery is the one which was alerted on. The defendant indicates that Earl admitted driving past the location where Teresa Halbach's Toyota was later discovered, but in the absence of any indication as to what time her vehicle was placed at the location where it was found, that fact does not appear to have any special significance.

6. Dassey Brothers. A summary of the offered evidence against Blaine, Bobby, and Bryan Dassey, all Bryan Dassey's brothers, is found at pages 18 and 19 of the Defendant's Statement on Third Party Responsibility. The summary suggests that Blaine, Bobby, and Bryan Dassey may all have been present on the Avery property at or about the time Teresa Halbach is alleged to have been killed. However, along with no allegation of any motive, the facts presented by the defendant do not suggest any direct connection that any of the Dassey brothers would have to the crime, other than the fact they happened to be on the Avery

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 20 of 145

property. In the absence of any allegation regarding motive, mere opportunity is insufficient to justify admission of the third party liability evidence.

In summary, with the exception of Scott Tadych and Andres Martinez, the other persons identified by the defendant may have had an opportunity to commit some or all of the crimes charged in the sense that they were near the alleged crime scene at the time of the alleged crimes. The defense fails to offer any meaningful evidence, however, to suggest that any of the persons named were directly connected to the crimes in any way. In the absence of motive, it certainly may be more difficult for the defendant to offer evidence which is relevant and material connecting a third person to the crime. The court simply finds nothing in the offer made by the defendant that goes beyond the level of speculation.

ORDER

The defense is precluded from offering any direct evidence that a third party, other than Brendan Dassey, participated in the commission of the crimes charged in the Amended Information.

Dated this 30th day of January, 2007.

BY THE COURT:

Patrick L. Willis,
Circuit Court Judge

Case 2005CF000381 Document 1113 Filed 08-13-2022 Page 22 of 145

I will ask the foreperson to present the verdicts to the bailiff so that they may be brought forward.

At this time the Court will read the verdicts. On Count 1, the verdict reads as follows: We, the jury, find the defendant, Steven A. Avery, guilty of first degree intentional homicide as charged in the first count of the Information.

On Count 2, the verdict reads: We, the jury, find the defendant, Steven A. Avery, not guilty of mutilating a corpse as charged in the second count of the Information.

On Count 3, the verdict reads: We, the jury, find the defendant, Steven Avery, guilty of possession of a firearm as charged in the third count of the Information.

The verdict on Count 1 is signed by the foreperson of the jury, dated today. The other verdicts are also signed by the foreperson of the jury.

At this time the Court is going to poll the jurors. I will ask the media folks to cut the audio at this time.

Mr. Slaby, were the verdicts as read by the Court, and are they still now, your verdicts

Case 2005CF000381 Document 1073 Filed 06-16-2022 Page 22 of 145

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY
BRANCH I

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

WIS. STAT. § 809.30(2)(h) POSTCONVICTION MOTION

PART I: FILED UNDER SEAL

The defendant, Steven A. Avery, by his undersigned attorneys, moves the court pursuant to Wis. Stat. § 809.30(2)(h) for an order vacating his convictions and granting a new trial. The following is shown in support of this motion:

1. Mr. Avery was convicted, following a jury trial, of first-degree intentional homicide contrary to Wis. Stat. § 940.01(1)(a) and felon in possession of a firearm contrary to Wis. Stat. § 941.29(2)(a). The jury found Mr. Avery not guilty of mutilation of a corpse. A fourth count of false imprisonment was dismissed by the court before the case went to the jury.

2. The court imposed a life sentence on the homicide with no opportunity for release on supervision and a ten-year concurrent sentence on the other count. Mr. Avery filed a timely notice of intent to seek postconviction relief from the judgments of conviction entered on June 1, 2007.

3. Subsequently, the court of appeals extended the time for filing a postconviction motion under § 809.30(2)(a) until July 6, 2009.

350
(1)

Case 2005CF000381 Document 1070 Filed 09-19-2022 Page 23 of 146

I. THE REMOVAL OF THE JUROR DURING DELIBERATIONS AND SUBSTITUTION OF AN ALTERNATE JUROR INTO THE JURY PANEL VIOLATED MR. AVERY'S CONSTITUTIONAL AND STATUTORY RIGHTS AND REQUIRES REVERSAL OF HIS CONVICTIONS.

A. Relevant facts.

Facts currently of record

4. The jury was sequestered for the first time during closing arguments on March 14, 2007, and the jury began deliberations the next day. Of the additional jurors selected during *voir dire*, one, N.S., remained at the end of trial. When the case was submitted to the jurors, the court ordered the additional juror retained and sequestered separate from the deliberating jurors. (Transcript of March 15, 2007, pp. 122-23).

5. During the evening after the first day of deliberations, the court excused a deliberating juror, R.M. At a hearing held the next day, after the juror had been discharged, the court briefly recapped on the record what had occurred the night before:

> Last evening, sometime around 9 p.m., the Court received a telephone call from Sheriff Pagel indicating that one of the jurors had presented a request to a – one of the supervising deputies over at the hotel, to be excused because of an unforeseen family emergency.

(Transcript of March 16, 2007, p. 4). The court said that upon receipt of this information it contacted Attorney Kratz and both defense counsel by telephone conference call, and counsel authorized the court to "speak with the juror individually and excuse the juror if the information provided to the Court was verified." (*Id.* at 4-5). The court reported that it "did verify that information with the juror and excused the juror last evening." (*Id.* at 5).

Case 2005CF000381 Document 1078 Filed 08-16-2022 Page 25 of 140

6. In a sealed file memo dated March 16, 2007, the court elaborated on the information it had placed on the record. The court noted that in its conversation with Sheriff Pagel the court learned that R.M.'s stepdaughter was involved in a traffic accident the evening of March 15, in which her vehicle was totaled. The court received no information about any injuries. In addition, the court was told that R.M.'s wife was unhappy about the amount of time her husband had been away because of the trial and was embarrassed by news reports at the time of *voir dire* that R.M. was living off his wife's trust fund. According to the memo, when the court spoke with R.M. by telephone, he sounded depressed and was speaking quietly and slowly. In the conversation, R.M. confirmed the information that Pagel had provided to the court. R.M. mentioned his wife's upset over earlier media reports of the trust fund and the strain the trial placed on their marriage. According to the memo, the court's "reading, without pressing him with questions too specific, was that he felt the future of his marriage was at stake if he was not excused." The court told R.M. that was all it needed to know, and he was excused and driven to his car.

7. At a meeting in chambers the next morning, the court and counsel determined they had three options as follows: declare a mistrial; proceed with 11 jurors; or substitute into the deliberating jury the one additional juror, with the instruction that the jury begin deliberations anew. (Transcript of March 16, 2007, pp. 5-7). After discussing those options with his counsel that morning, hours after R.M. had been discharged, Mr. Avery agreed to proceed with the third option. (*Id.* at 7-8).

8. The court informed the jury that because one of its members had been excused due to "an unforeseen family emergency", N.S. would be participating in the deliberations. (*Id.* at 9-10). The court instructed the jurors to

Case 2005CF000381 Document 1073 Filed 08-15-2022 Page 26 of 145

begin the deliberations anew, including the election of a foreperson, and each of the 11 jurors answered "Yes" when asked if he or she would follow that instruction. (*Id.*).

Facts to be established at postconviction hearing

9. The defendant expects to establish at a postconviction hearing that, in fact, there was no family emergency when the court spoke with Juror R.M. on the evening of March 15, 2007. R.M.'s wife had not called R.M. or a bailiff that evening to report an accident or other emergency. Rather, the court had granted jurors permission to make calls home to their families while sequestered. After dining with the other members of the jury following the first day of deliberations, R.M. exercised that privilege and called home and spoke with his wife.

10. It is expected that Juror R.M. will testify that he felt discouraged that evening, but his mood was attributable more to what was occurring on the jury than at home. R.M. was frustrated because another juror, C.W., appeared close-minded during deliberations. According to R.M., in the initial vote taken that first day, C.W. was among a minority voting guilty, and R.M. was with those voting not guilty. At dinner, when R.M. commented that the process was stressful and weighing on him, C.W. told R.M. that if he couldn't handle it, he should tell them and get off. R.M. felt intimidated by C.W. and believed that C.W. wanted him off the jury.

11. After dinner, when R.M. called his wife, she mentioned that her 17-year-old daughter had been in an accident. She provided no details. In fact, there was no accident; his stepdaughter had merely had car trouble. R.M. knew his wife was tired of the trial and had earlier been upset by a press report that he lived off her trust fund. In their conversation that evening, his wife did not tell him to come home. Mostly, R.M. was stressed by his exchange with Juror C.W.

Case 2005CF000381 Document 1073 Filed 01-19-2023 Page 27 of 145

12. Following his call home, R.M. told a bailiff and then Sheriff Pagel that he had a family emergency. R.M. provided few details. In the phone conversation with the judge, which lasted less than five minutes, the judge did not ask if the stepdaughter had been injured in the accident or whether she was hospitalized.

B. Mr. Avery's constitutional and statutory rights were violated when the court discharged a deliberating juror without cause and without following the mandated procedures.

13. The court violated Mr. Avery's federal and state constitutional rights when it discharged a deliberating juror without conducting an on-the-record *voir dire* of the juror in the presence of the defendant and counsel, and without a record establishing cause for discharging the juror. Although the court has discretion to discharge a juror for cause during deliberations, the court must make "careful inquiry" into a juror's request to be excused and "exert reasonable efforts to avoid discharging the juror." ***State v. Lehman***, 108 Wis. 2d 291, 300, 321 N.W.2d 212 (1982). The inquiry should be made "in the presence of all counsel and the defendant." ***Id.***

Procedural errors

14. The court's communication with Juror R.M. outside the presence of Mr. Avery and his attorneys violated both his right to be present at trial and his right to counsel, as guaranteed by Article I, § 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

The constitutional right to be present and assisted by counsel applies when a court communicates with deliberating jurors. ***State v. Anderson***, 2006 WI 77, ¶¶43 & 69, 291 Wis. 2d 673, 717 N.W.2d 74; ***State v. Burton***, 112 Wis. 2d 560, 565, 334 N.W.2d 263 (1983); ***State v. Koller***, 2001 WI App 253, ¶62, 248 Wis. 2d 259, 635 N.W.2d 838. The right to be present with counsel also applies to

Case 2005CF000381 Document 1073 Filed 09-15-2022 Page 26 of 145

a court's individual *voir dire* of a juror. ***State v. Tulley***, 2001 WI App 236, ¶6, 248 Wis. 2d 505, 635 N.W.2d 807; ***State v. David J.K.***, 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994); *see also* Wis. Stat. § 971.04(1)(c) (defendant shall be present at *voir dire* of jury).

Mr. Avery had a constitutional and statutory right to be present and assisted by counsel when the court conducted a *voir dire* of a deliberating juror who, according to information from the sheriff, was seeking to be excused. To satisfy constitutional and statutory guarantees, the court's communication with Juror R.M. should have occurred in the presence of Mr. Avery and his counsel, as well as counsel for the state, and should have been on the record. *See* Wis. Stat. § 805.13(1) (Once the jury is sworn, "all statements or comments by the judge to the jury … relating to the case shall be on the record."). The court's communication with Juror R.M. outside the presence of Mr. Avery and his attorneys violated Mr. Avery's constitutional and statutory rights.

15. Mr. Avery's right to be present and assisted by counsel during the court's *voir dire* of Juror R.M. was not waived by counsel's agreement that the court speak with the juror.

Waiver of the right to counsel must be made personally on the record by the defendant and must be knowing, voluntary and intelligent. ***State v. Ndina***, 2009 WI 21, ¶31, __ Wis. 2d __, 761 N.W.2d 612; ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Where, as here, the record contains no such colloquy, the defendant did not waive his right to have the assistance of counsel during the court's communication with the juror. ***Anderson***, 2006 WI 77, ¶73. His attorneys' decision to authorize the court to *voir dire* Juror R.M. in their absence could not waive Mr. Avery's right to have counsel present. Indeed, Mr. Avery was not aware that counsel had agreed to the private *voir dire* until the

Case 2005CF000381 Document 1073 Filed 0..-16-2022 Page 29 of 145

following day, after the juror was questioned and discharged by the court. Mr. Avery did not personally and knowingly waive his right to have counsel present during the *voir dire* of Juror R.M.

Similarly, the failure of a defendant or his counsel to object to a court's communication with deliberating jurors in the defendant's absence does not constitute waiver of the defendant's right to be present. *Anderson*, 2006 WI 77, ¶¶63-64; *see also Tulley*, 2001 WI App 236, ¶6 (the right to be present during *voir dire* "cannot be waived"); *State v. Harris*, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999). Here, counsels' agreement that the court communicate with the juror was made without consultation with Mr. Avery. At no point did Mr. Avery agree to waive his right to be present during the *voir dire* of Juror R.M.

The record does not establish cause for discharging the juror

16. The information the court obtained from Juror R.M., as set forth in the court's memo, does not constitute cause for discharging the juror. Excusing the deliberating juror without cause violated Mr. Avery's right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution, and Mr. Avery's right to a unanimous verdict by a 12-person jury guaranteed by Article I, § 7 of the Wisconsin Constitution and Wis. Stat. § 756.06(2)(a). The removal of Juror R.M. without legal justification, that is, without cause required to discharge a deliberating juror, violated Mr. Avery's right to a jury trial as the constitutions guarantee, specifically, his right to a unanimous verdict by the 12 impartial jurors to whom the case was submitted.

The right to a fair and impartial jury entitles a defendant in a criminal case to have his trial completed by a particular tribunal, the one selected to determine his guilt or innocence. *Peek v. Kemp*, 784 F.2d 1479, 1484 (11th Cir.

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 29 of 145

1986). In some instances, that right must be subordinated to the public's interest in fair trials designed to end in jury verdicts. *Id.*, *citing* ***Wade v. Hunter***, 336 U.S. 684, 689 (1949). Accordingly, while the issue must be approached with "extreme caution", a court may discharge a deliberating juror for "cause". ***Lehman***, 108 Wis. 2d at 300. However, "it would be prejudicial and constitutionally deficient for a trial judge to excuse a juror during deliberations 'for want of any factual support, or for a legally irrelevant reason.'" ***Peek***, 784 F.2d at 1484, *quoting* ***Green v. Zant***, 715 F.2d 551, 555 (11th Cir. 1983). While a court may dismiss an ill or otherwise incapacitated juror, it has "no discretion whatever to dismiss such a juror who is *not* in fact ill or otherwise incapacitated." ***Green***, 715 F.2d at 556. To do so infringes the defendant's right to have his guilt or innocence decided by a unanimous vote of the 12 impartial jurors to whom the case was submitted.

The court had no authority to discharge Juror R.M. because the information provided to the court, as reproduced in the court's memo, does not provide cause for discharging him one day into deliberations. While the court believed that R.M.'s stepdaughter had been involved in an accident that totaled her car, the court had no information that she had been injured. *Contrast* ***United States v. Chorney***, 63 F.3d 78, 81 (1st Cir. 1995) (cause established where juror's son was killed in construction accident); ***United States v. Doherty***, 867 F.2d 47, 71 (1st Cir. 1989) (cause existed to excuse juror who was extremely upset because ex-wife had died leaving him with two small children).

Although R.M. apparently told the court that he had some marital problems before trial and the trial put an extra strain on the relationship, he had spent just one night away from his wife and family due to the trial, as the jury had only been subject to sequestration beginning the day before. The juror referred to his wife being upset by media reports about his wife's trust fund, but those reports

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 31 of 145

had occurred five weeks earlier, at the time of the original *voir dire*. His wife's unhappiness with the news coverage did not constitute reason to excuse him from jury service. While, according to the court's memo, the juror sounded depressed and spoke quietly and slowly, the court could not assess the juror's facial expressions or body language because the communication occurred by telephone. The court's "reading" was that R.M. felt that the future of his marriage was at stake if he was not excused, but the court came to that conclusion "without pressing him with questions too specific ...." (Memo, p. 2). The court did not satisfy its "affirmative duty" to make sufficient inquiry into the circumstances to determine whether the juror, in fact, was unable to continue to serve. ***United States v. Araujo***, 62 F.3d 930, 934 (7th Cir. 1995).

A family member's auto accident, without any indication of a medical emergency, and strain on a marriage, without more, are not cause for discharging a juror during deliberations. *See* ***United States v. Patterson***, 26 F.3d 1127, 1129 (D.C. Cir. 1994) (conviction reversed where judge excused juror who was having chest pains and needed to see a doctor, where judge did not attempt to learn "the precise circumstances or likely duration of the twelfth juror's absence"); ***United States v. O'Brien***, 898 F.2d 983, 985-86 (5th Cir. 1990) (cause established where juror's psychiatrist confirmed that juror, who had previously been hospitalized for depression, was in no condition to continue).

Discharge without cause is structural error

17. The court's removal of Juror R.M. during deliberations without an on-the-record *voir dire* establishing cause and without the presence of Mr. Avery and his counsel is structural error requiring reversal of Mr. Avery's convictions. Denial of the right to an impartial jury is structural error that is not subject to a harmless error analysis. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987); *State v.*

Case 2005CF000381 Document 1073 Filed 01-10-2023 Page 31 of 145

Tody, 2009 WI 31, ¶44, __ Wis. 2d __, 764 N.W.2d 737. Similarly, denial of a defendant's state constitutional right to the unanimous verdict by a jury of 12 requires automatic reversal of the defendant's convictions. *State v. Hansford*, 219 Wis. 2d 226, 243, 580 N.W.2d 171 (1998); *State v. Cooley*, 105 Wis. 2d 642, 645-46, 315 N.W.2d 369 (Ct. App. 1981) (reversal where defendant did not personally agree to proceed with 11 jurors); *State v. Lomagro*, 113 Wis. 2d 582, 590, 335 N.W.2d 583 (1983) (right to unanimous verdict).

Dismissal of Juror R.M. without cause and without complying with the mandated procedure resulted in Mr. Avery losing his right to a jury as contemplated by the federal and state constitutions, that is, a unanimous verdict from an impartial jury of 12 persons to whom the case was submitted. Once Juror R.M. was discharged, only 11 deliberating jurors remained, and Mr. Avery's trial would not be completed by the 12 who had been selected to determine his guilt or innocence. Denial of Mr. Avery's right to a unanimous verdict from an impartial jury of 12 is structural error requiring reversal without inquiry into harmless error. *United States v. Curbelo*, 343 F.3d 273, 285 (4th Cir. 2003) (removal of juror without cause falls into a special category of errors that defy analysis by harmless-error standards); *Araujo*, 62 F.3d at 937 (convictions reversed where court lacked cause for excusing deliberating juror); *United States v. Ginyard*, 444 F.3d 648, 655 (D.C. Cir. 2006) (same).

In the alternative, failure to follow the mandated procedure was prejudicial

18. Even if discharge of the juror on the existing record were not deemed a structural error, the court's failure to follow the proper procedure before discharging Juror R.M. was prejudicial because, in fact, no cause existed to remove the juror.

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 33 of 145

Mr. Avery expects to establish that, in fact, there was no family emergency. Juror R.M. was not ill or otherwise incapacitated. His wife was not ill, and his stepdaughter was neither ill nor injured. There had been no accident, just car trouble. While the trial may have placed some strain on R.M.'s marriage, his wife was not demanding that he come home, and his marriage was not on the brink of collapse. Juror R.M.'s stress and frustration stemmed much less from his family situation than from what had occurred during deliberations and, in particular, from his verbal exchange with another juror.

Removal of a juror is improper if there is any reasonable possibility that its impetus was a problem among jurors due to their differing views of the merits of the case. ***United States v. Symington***, 195 F.3d 1080, 1085-87 (9th Cir. 1999); ***United States v. Samet***, 207 F. Supp. 2d 269, 281-82 (S.D. N.Y. 2002) (juror could not be removed for cause where she became "unhinged" by the process of deliberation, in particular, by her status as a holdout); ***Williams v. State***, 792 So. 2d 1207, 1210 (Fla. 2001) (spectre of jury taint particularly grave where "the removed juror's incapacitation arises directly from participation in the deliberative process"). Here, the true impetus for Juror R.M.'s discharge was his distress over the attitude of another juror who held a view of the evidence contrary to his. R.M. felt intimidated and discouraged by this other juror, stemming from the juror's conduct during deliberations and his comment at dinner essentially goading R.M. to get off the jury. The court had no authority to discharge R.M. Rather, the juror should have been reminded, following an on-the-record *voir dire* with the defendant and counsel present, that "holding to [his] convictions is an essential part of [his] duty as a juror ..." *Samet*, 207 F. Supp. at 275 n.3.

The erroneous removal of the deliberating juror violated Mr. Avery's fundamental rights and requires that his convictions be vacated.

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 33 of 145

C. The court had no authority to substitute an alternate juror once deliberations had begun.

19. Even if Juror R.M. was lawfully discharged, which Mr. Avery disputes, his convictions still cannot stand because the option selected after the juror was removed – substitution of the alternate – is not permitted by the governing statute. In *Lehman*, 108 Wis. 2d at 305-06, the supreme court concluded that the relevant statute in effect at that time, Wis. Stat. § 972.05 (1979-80), was silent as to whether the legislature approved of the substitution of an alternate juror after deliberations had begun. In the face of an ambiguous statute, the court held that a circuit court had three options if a regular juror were discharged after deliberations had begun, as follows: (1) obtain a stipulation by the parties to proceed with fewer than 12 jurors; (2) obtain a stipulation by the parties to substitute an alternate juror; or (3) declare a mistrial. *Id.* at 313. Here, the parties chose the second option. However, as shown below, the governing statute is no longer silent – it prohibits substitution of an alternate once deliberations have begun. Consequently, the court had no authority to substitute the alternate when Juror R.M. was discharged, Mr. Avery's consent to that procedure was legally invalid, and to proceed in that manner was reversible error.

20. The legislature responded to *Lehman* by repealing § 972.05 and creating language in provisions governing civil and criminal trials that required the discharge of any alternate, or "additional" jurors as they were then labeled, when a case is submitted to the jury. 1983 Wis. Act 226 §§ 1, 5 & 6. Specifically, with respect to criminal trials, the legislature created Wis. Stat. § 972.10(7) as follows:

> 972.10 (7) If additional jurors have been impaneled under s. 972.04 (1) and the number remains more than required at final submission of the cause, the court shall determine by lot which jurors shall not participate in deliberations and discharge them.

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 35 of 146

1983 Wis. Act 226 § 6.[1] In 1996, the supreme court amended the civil trial provision, Wis. Stat. § 805.08(2), to allow a circuit court to keep additional jurors until the verdict is rendered, so as to allow for replacement of a juror who becomes unable to complete deliberations. SCO 96-08 ¶46. Significantly, while the supreme court made a technical change in the parallel criminal provision, § 972.10(7),[2] it did *not* alter the language requiring the circuit court to discharge any additional jurors at final submission of the cause. *Id.* at ¶59. Accordingly, the governing statute, now and at the time of Mr. Avery's trial, requires the court to discharge any additional jurors when the case is submitted to the jury. The court had no authority to substitute Juror N.S. during deliberations, as she should have been discharged once deliberations began. *See, e.g.*, ***United States v. Neeley***, 189 F.3d 670, 681 (7th Cir. 1999) (where federal rule at the time required discharge of alternates when deliberations began, court construed rule as forbidding the practice of recalling alternates);[3] ***Commonwealth v. Saunders***, 686 A.2d 25, 27 (Pa. 1996) (state statute that required alternates discharged when jury retired to deliberate barred substitution of alternate juror during deliberations); ***People v. Burnette***, 775 P.2d 583, 586-87 (Colo. 1989) (same).

21. As a matter of law, Mr. Avery could not validly consent to substitution of an additional juror during deliberations. It is well established that the right to a jury trial as guaranteed by Article I, § 7 of the Wisconsin Constitution cannot be waived without statutory authorization. In ***Jennings v. State***, 134 Wis.

[1] The legislature rejected a proposed amendment that would have allowed substitution of an alternate if during deliberations a juror died or was discharged. Assembly Amdt. 1 to 1983 SB 320.

[2] The word "impaneled" was changed to "selected".

[3] Fed. R. Crim. P. 24(c) was subsequently amended to allow alternates to be retained so they could replace a discharged juror during deliberations.

Case 2005CF000381 Document 1078 Filed 08-18-2022 Page 35 of 146

307, 309-10, 114 N.W. 492 (1908), the supreme court deemed invalid a defendant's agreement to proceed with 11 jurors when one failed to appear for deliberations because no statute at that time allowed for waiver of a 12-person jury. And the supreme court held that a defendant could not validly waive the right to a jury trial altogether where no statute authorized the waiver. *State v. Smith*, 184 Wis. 664, 672-73, 200 N.W. 638 (1924). Accordingly, a criminal defendant may not validly consent to a procedure that diminishes his constitutional right to a jury trial unless a statute expressly authorizes that procedure. *State v. Ledger*, 175 Wis. 2d 116, 127, 499 N.W.2d 198 (Ct. App. 1993) (defendant could agree to a 13-member jury because it enlarged his jury trial right).

Mr. Avery could not validly consent to substitution of an additional juror during deliberations because that procedure is not authorized by statute and it diminished, rather than enlarged, his right to a jury trial as contemplated by the Wisconsin Constitution. Specifically, he lost his right to a unanimous verdict by the jury of 12 to whom his case was submitted. *Hansford*, 219 Wis. 2d at 241 (jury of 12 guaranteed); *Lomagro*, 113 Wis. 2d at 590 (unanimous verdict guaranteed). Indeed, in *Lehman*, the court discussed how those rights are jeopardized by post-submission substitution, given that the "eleven regular jurors will have formed views without the benefit of the views of the alternate juror, and the alternate juror who is unfamiliar with the prior deliberations will participate without the benefit of the prior group discussion." *Lehman*, 108 Wis. 2d at 308. Even if upon substitution the jury is instructed to begin deliberations anew, the continuing jurors may still be influenced by the earlier deliberations and the newer juror may be intimidated due to their status as a newcomer to the deliberations. *Id.* at 312. Nor will the new juror have had the benefit of the discharged juror's views. *Burnette*, 775 P.2d at 588; *see also People v. Ryan*, 224 N.E.2d 710, 713

(N.Y. 1966) ("once the deliberative process has begun, it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous deliberations ...").

22. Even if as a matter of law a defendant could validly consent to post-submission substitution of an alternate, Mr. Avery's consent was invalid because it was not knowing, voluntary and intelligent. A defendant's waiver of his fundamental right to a jury trial as guaranteed by the state and federal constitutions must be made personally by the defendant, and the court must engage in an on-the-record colloquy with the defendant establishing that the waiver is made knowingly, voluntarily and intelligently. *State v. Anderson*, 2002 WI 7, ¶23, 249 Wis. 2d 586, 638 N.W.2d 301. These requirements apply not only to a complete waiver of the right to a jury trial but also to a defendant's consent to a procedure that diminishes his right to a jury trial as contemplated by the federal or state constitution. *Cooley*, 105 Wis. 2d at 645-46 (consent to proceed with 11 jurors).

In its colloquy with Mr. Avery on the morning after Juror R.M. had been discharged, the court told Mr. Avery that he had "the right to require a jury of 12 and the right to request a mistrial if the juror is excused." (Transcript of March 16, 2007, p. 8). But the court failed to advise Mr. Avery that substitution of the alternate was an option not permitted by law. And the court did not expressly advise Mr. Avery that by agreeing to that option, he was giving up his right to a unanimous verdict by the 12 jurors to whom the case had been submitted. *See State v. Resio*, 148 Wis. 2d 687, 696-97, 436 N.W.2d 603 (1989) (to validly waive jury trial defendant must be advised of unanimity requirement). Accordingly, the record fails to establish that Mr. Avery's consent to substitution was an "intentional relinquishment ... of a known right or privilege." *Anderson*, 249 Wis. 2d 586, ¶23. In fact, when Mr. Avery agreed to substitution and to forego a

Case 2005CF000381 Document 1113 Filed 08-16-2022 Page 18 of 149

mistrial, he did not understand that substitution was an impermissible option or the rights that he was giving up.

In addition, Mr. Avery's consent was not voluntary because it was obtained after the deliberating juror was removed. By that point, he had already lost what the constitution guarantees, that is, the right to a unanimous verdict by the 12 impartial jurors who were selected to determine his guilt or innocence.

23. In ***Lehman***, 108 Wis. 2d at 313, the supreme court held it is reversible error for a circuit court to substitute an alternate juror for a regular juror after deliberations have begun, absent express statutory authority or the defendant's consent. Since ***Lehman***, the legislature has expressly forbidden juror substitution during deliberations in criminal cases and, accordingly, the defendant cannot consent to substitution. Consequently, as argued above, Mr. Avery's consent was invalid as a matter of law. In the alternative, as also argued above, Mr. Avery's consent was invalid because it was not knowing, voluntary and intelligent. Either way, Mr. Avery did not validly consent to substitution of the additional juror, and, consequently, the supreme court's rule of automatic reversal applies.

D. If Mr. Avery's claims challenging the removal of the deliberating juror and substitution of the alternate were waived, which he disputes, the claims should be reached as plain error, in the interest of justice or ineffective assistance of counsel.

24. For the reasons argued above, Mr. Avery's claims were not waived by counsel's agreement that the court speak privately with Juror R.M. and remove him if the information provided by the sheriff was verified, or by counsel's agreement to substitute an alternate juror once Juror R.M. was removed. However, if this or a higher court were to find waiver, the claims should nevertheless be reached as plain error, in the interest of justice or ineffective assistance of counsel.

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 38 of 145

Plain error and interest of justice

25. Some errors, such as occurred here, are so plain and fundamental that the court should grant a new trial despite the defendant's failure to timely object to the error. ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. The removal of a deliberating juror without cause and substitution of an alternate who should have been discharged are errors so fundamental and disruptive of a defendant's constitutional rights that a new trial is warranted under the plain error doctrine or by the court invoking its authority to grant a new trial in the interest of justice under Wis. Stat. § 805.15(1).

26. Under the plain error doctrine in Wis. Stat. § 901.03(4), a conviction may be vacated when an unobjected to error is fundamental, obvious and substantial. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "'[W]here a basic constitutional right has not been extended to the accused,' the plain error doctrine should be utilized." *Id.*, *quoting* ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984).[4]

In ***United States v. Essex***, 734 F.2d 832, 843-45 (D.C. Cir. 1984), the court held that the district court's removal of a deliberating juror without cause was plain error requiring reversal of the defendant's conviction. "The obvious and substantial right of appellant that was denied is her right to a *unanimous* verdict by the *jury of 12* who heard her case and began their deliberations." *Id.* at 844

[4] Some authority suggests that § 901.03(4) is limited to unobjected to evidentiary errors. *Waukesha Co. Dept. of Social Services v. C.E.W.*, 124 Wis. 2d 47, 55, 368 N.W.2d 47 (1985). However, appellate courts have applied the plain error doctrine to more than evidentiary errors. *Jorgenson*, 310 Wis. 2d 138, ¶¶29-32 (convictions reversed under § 901.03(4) for errors that include prosecutorial misconduct in closing argument); *State v. Street*, 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996) (arguably improper closing argument analyzed under plain error doctrine); *see also State v. Mayo*, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115 (supreme court "has not articulated a bright-line rule for what constitutes plain error").

Case 2005CF000381 Document 1073 Filed 08-15-2022 Page 40 of 145

(emphasis in original). Moreover, no further prejudice need be shown than the fact that the district court removed the deliberating juror without cause, thereby denying the defendant her constitutional right to a unanimous verdict by the 12 jurors to whom the case was submitted. *Id.* at 845. Mr. Avery's constitutional right to a jury trial as contemplated by the state and federal constitutions was violated by the removal of Juror R.M. without cause. The error was not only fundamental, obvious and substantial, the resulting prejudice is inherent and structural so that the state could not meet its burden of proving beyond a reasonable doubt that the error was harmless.

Similarly, substitution of the alternate juror during deliberations was plain error. In a case also involving the substitution of a juror during deliberations, the New Jersey Supreme Court applied plain error to reverse the defendant's convictions even though the defendant at trial specifically sought removal of the juror and substitution of an alternate after the jury had returned with partial verdicts. ***State v. Corsaro***, 526 A.2d 1046, 1052 (N.J. 1987). The court's reasoning is equally applicable here.

> In light of the centrality of jury deliberations to our criminal justice system, errors that could upset or alter the sensitive process of jury deliberations, such as improper juror substitution, 'trench directly upon the proper discharge of the judicial function'; for this reason such errors are 'cognizable as plain error notwithstanding their having been precipitated by a defendant at the trial level.'

Id. at 1051, *quoting* ***State v. Harper***, 128 N.J. Super. 270, 278 (App. Div. 1974). As argued above, the court had no authority to substitute the alternate juror once deliberations had begun, and the supreme court's rule of automatic reversal applies. Particularly given the fundamental jury trial rights at stake, reversal of Mr. Avery's convictions under the doctrine of plain error is warranted.

27. In the alternative, the court should use its discretionary reversal authority under § 805.15(1) because the errors prevented the real controversy from

Case 2005CF000381 Document 1078 Filed 08-18-2022 Page 41 of 145

being fully and fairly tried. The court has broad discretion to order a new trial where the controversy was not fully or fairly tried, "regardless of the type of error involved" and without any showing as to the likelihood of a different result on retrial. ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991). The real controversy was not fully and fairly tried because the errors affected "the very essential duty of having the jury deliberate upon the evidence and agree upon a verdict respecting the defendant's guilt or innocence ..." ***Jennings***, 134 Wis. at 309. The errors deprived Mr. Avery of his right to a unanimous verdict from an impartial jury of 12 persons to whom the case was submitted. The controversy was not fully and fairly tried because of the disruption to perhaps the most critical phase of the trial, the jury's deliberation.

Ineffective assistance of counsel

28. Mr. Avery was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Trawitzki***, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801.

29. Counsel performed deficiently in three respects: (1) by authorizing the court to conduct a private *voir dire* of a deliberating juror without counsel and Mr. Avery present, despite case law clearly granting Mr. Avery the right to be present and assisted by counsel (*see* ¶14); (2) by authorizing the court to discharge Juror R.M. if, in its private *voir dire*, the court verified the information provided by Sheriff Pagel, even though the case law shows that the information the court obtained from the sheriff and communicated to counsel did not constitute cause for removing a deliberating juror (*see* ¶16); and (3) by entering into a stipulation, and advising Mr. Avery to enter into a stipulation, allowing the court to substitute an

alternate juror after Juror R.M. was removed, a procedure that is not permitted by statute (*see* ¶¶19-20).

An attorney's performance is deficient if it falls below an objective standard of reasonableness. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Counsels' performance was objectively unreasonable because all three decisions were contrary to the governing law. ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305 (failure to understand and apply relevant statute was deficient as a matter of law). Nor could the decisions be deemed reasonable strategic or tactical choices. To be reasonable, counsel's strategic decision must be based upon knowledge of all facts and all law that may be available. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

Each decision – to forego an on-the-record *voir dire*, to agree to Juror R.M.'s discharge, to substitute an alternate in lieu of a mistrial – was made without full knowledge of the available facts. After all, the purpose of an on-the-record *voir dire* would have been to obtain facts necessary to determine why Juror R.M. was seeking to be discharged and, in light of the facts gathered, whether removal of that juror was in Mr. Avery's interest. A properly conducted *voir dire* would likely have shown not only that removal of R.M. would be improper because his discontent stemmed from the deliberative process, but also that removal would result in the defense losing a favorable juror. The decision to substitute the alternate was equally ill-informed as counsel had lost the opportunity to assess the relative value to the defense of Juror R.M. versus the alternate.

In addition, counsels' decision, and advice to Mr. Avery, to forego a mistrial and, instead, substitute the alternate was made with the erroneous belief that substitution was legally permissible. Mr. Avery expects counsel to testify that had they known that upon Juror R.M.'s discharge the options were either a mistrial

Case 2005CF000381 Document 1079 Filed 08-18-2022 Page 42 of 145

or to proceed with 11 jurors, counsel would not have recommended that Mr. Avery proceed with 11 jurors and, instead, would have sought a mistrial.

30. In some instances, prejudice is presumed once deficient performance is established. *State v. Smith*, 207 Wis. 2d 258, 278, 558 N.W.2d 379 (1997) (prejudice presumed where attorney deficient in failing to object to prosecutor's breach of the plea agreement); *see also State v. Behnke*, 155 Wis. 2d 796, 806-07, 456 N.W.2d 610 (1990) (prejudice presumed where counsel absent from reading of verdict); *State v. Johnson*, 133 Wis. 2d 207, 223-24, 395 N.W.2d 176 (1986) (prejudice presumed where counsel deficiently failed to raise issue of client's competency to stand trial). Part of the rationale behind presuming prejudice is the difficulty measuring the harm caused by the error or ineffective assistance. *Smith*, 207 Wis. 2d at 280.

Removal of a deliberating juror without cause is the sort of error that has repercussions which are necessarily unquantifiable and indeterminate. *Curbelo*, 343 F.3d at 281. That error, along with the erroneous substitution of an alternate, taints the process by which guilt was determined. The errors inherently cast doubt on the reliability of the proceeding. Accordingly, Mr. Avery is not required to prove actual prejudice. *Id.* at 285; *Essex*, 734 F.2d at 845 ("In cases involving secret jury deliberations it is virtually impossible for a defendant to demonstrate actual prejudice."); *see also Owens v. United States*, 483 F.3d 48, 66 (1st Cir. 2007) (prejudice presumed where counsel failed to object to closure of jury selection because denial of right to a public trial is structural error).

31. In the alternative, if prejudice is not presumed, Mr. Avery is still entitled to relief because the errors undermine confidence in the reliability of the proceedings. The prejudice test in an ineffective assistance claim focuses not on the outcome of the trial but on the reliability of the proceedings. *Love*, 284 Wis.

2d 111, ¶30. The reliability of the proceedings is undermined by the truncated deliberations during which a juror who by statute should have been discharged was swapped for a juror who was discharged without cause. The precise impact of the improper tinkering with the jury during deliberations can never really be known. What is known is that confidence in the reliability of the proceedings is undermined.

II. SHERIFF PAGEL'S PRIVATE COMMUNICATION WITH R.M. CONSTITUTED ERROR AND REQUIRES REVERSAL OF MR. AVERY'S CONVICTIONS.

32. In addition to the above-described errors relating to the court's removal of Juror R.M. without cause, the circumstances leading up to R.M.'s removal also constitute error warranting reversal of Mr. Avery's convictions. Specifically, R.M.'s removal was facilitated by Sheriff Pagel, an interested party to the litigation who was not an officer charged with protecting the jury's sequestration.

33. After deliberations had begun, on the evening of March 15, 2007, Juror R.M. contacted one of the supervising deputies at the hotel where the jurors were sequestered, and asked to be excused because of a family emergency. The deputy did not contact the court, however. Rather, the deputy contacted Sheriff Pagel who came to the hotel where the jurors were sequestered. Once there, Sheriff Pagel spoke with R.M. and then phoned Judge Willis. Sheriff Pagel spoke to the judge with R.M. standing by, and related to the judge that R.M.'s daughter had been in a car accident. Judge Willis contacted counsel and then spoke directly with Juror R.M. Juror R.M. was then excused.

34. By this point in the trial, the jurors were sequestered. Under Wis. Stat. § 972.12, this meant that the jurors were to be kept together and communications prevented "between the jurors and others."

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 43 of 145

35. Wisconsin Statute § 756.08(2) further explains the duty to protect jurors from communications with "outsiders" during its deliberations:

> When the issues have been submitted to the jury, a proper officer, subject to the direction of the court, shall swear or affirm that the officer will keep all jurors together in some private and convenient place until they have agreed on and rendered their verdict, are permitted to separate or are discharged by the court. While the jurors are under the supervision of the officer, he or she may not permit them to communicate with any person regarding their deliberations or the verdict that they have agreed upon, except as authorized by the court.

36. Even though the jurors were sequestered, the officer with whom R.M. spoke that night contacted Sheriff Pagel instead of contacting Judge Willis directly. Sheriff Pagel's involvement in R.M.'s removal as a juror was error.

37. The United States Supreme Court has emphasized the importance of protecting jurors from other persons during their deliberations. In 1892, the Court wrote that:

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. United States, 146 U.S. 140, 150 (1892).

38. The Court reaffirmed *Mattox* in *Remmer v. United States*, 347 U.S. 227 (1954), plainly stating that it is improper for any person to communicate with a juror if that communication is not made pursuant to order of the court. Further, any such communication is "presumptively prejudicial:"

> In any criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229.

39. Wisconsin courts have recognized the importance of preserving the jury's independence from outside influences, particularly during its deliberations.

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 46 of 145

For example, in ***State v. Yang***, 196 Wis. 2d 359, 538 N.W.2d 817 (Ct. App. 1995), the court disapproved of allowing a law enforcement witness to act as an officer in charge of the jurors. The court stated that a trial court "should not permit an officer to serve as a bailiff who has investigated the underlying crime in a case." ***Id.*** at fn. 1. The court continued: "Once a bailiff is sworn, it is imperative that he or she be the only officer having contact with the jurors until the jury has reached a verdict or is discharged by the court." ***Id.***

40. While recognizing the holdings in ***Mattox*** and ***Remmer***, Wisconsin courts have nevertheless departed from Supreme Court precedent in that Wisconsin courts have required the defendant to show prejudice. That is, while the Supreme Court presumes prejudice when there is contact from an outsider with a juror, Wisconsin courts have required the defendant to show prejudice. Thus, in ***State v. Dix***, 86 Wis. 2d 474, 273 N.W.2d 250 (1979), the court relied on the Supreme Court's language in ***Remmer*** regarding the impropriety of private communications with a juror, but stated that the defendant must show probable prejudice before a new trial will be ordered. ***Id.*** at 490-491. In ***Dix***, the trial judge had spoken with a juror (whom the judge did not recognize to be a juror) about a mutual acquaintance. Further, the bailiffs were said to have made improper comments to some jurors. The court concluded that the contacts were improper, but that there was no showing of probable prejudice to the defendant.

41. Mr. Avery contends that Sheriff Pagel's private communication with R.M. constituted the type of improper communication condemned in ***Remmer*** and ***Mattox***. Sheriff Pagel was not a deputy sworn to keep the jury sequestered. Indeed, it would have been improper for Sheriff Pagel to act as such an officer because he was an interested party in this case. He supervised officers who were investigators in the case, and his Department was supposed to be the chief county-

level investigative law enforcement agency in the case. Members of his agency were witnesses for the prosecution. As in *Yang*, Sheriff Pagel should have had no contact with jurors given his alignment with the prosecution.

42. Sheriff Pagel's communication with R.M. falls within the prohibited contact standard articulated in *Remmer*. His contact with juror R.M. was private; that is, his contact was outside the presence of the court, at least initially, and was outside the presence of the parties or the defendant.

43. His contact was also "about the matter pending before the jury" because it related to whether a juror would or could continue to deliberate. As discussed above, R.M.'s request to be excused from the jury was as much about his frustrations and concerns about the deliberations themselves as it was about any personal problems he was having.

44. And, at least the initial communications between R.M. and Sheriff Pagel was without the knowledge or instruction by the court. Instead, Sheriff Pagel was brought into the proceedings by a deputy charged with keeping the jury free from outside influences.

45. Mr. Avery does not concede that he must show prejudice as seemingly required in *Dix* and *Shelton v. State*, 50 Wis. 2d 43, 183 N.W.2d 87 (1971), because these cases are irreconcilable with *Remmer* and *Mattox*. Under *Remmer* and *Mattox*, prejudice must be presumed when there is communication between a person and a juror during deliberations. Nevertheless, as shown above, the communications between R.M. and Sheriff Pagel were prejudicial to Mr. Avery because they led to a change in the make-up of the jury. This is not a case where a deputy contacts the jury about ordering a meal, for example, without the express authority of the trial judge. Rather, what occurred here was a private communication between a juror and a third person that led to the removal of that

Case 2005CF000381 Document 1073 Filed 08-10-2022 Page 46 of 145

juror. Even if Sheriff Pagel did not explicitly encourage R.M.'s removal, his participation in the private communications is inseparable from the juror's ultimate removal. When Sheriff Pagel talked to R.M. and heard his story, he responded by calling the court. Then R.M. heard Sheriff Pagel repeat his concerns to the judge. By that time, R.M. was locked into his story. In a short time span, R.M. went from talking to a deputy to the Sheriff to the judge in charge of the trial, each time reinforcing his story of his "family emergency." The result of these communications was a change in the make-up of the jury which, as argued above, was prejudicial to Mr. Avery.

46. Sheriff Pagel's private communication with Juror R.M. constituted error that warrants reversal of Mr. Avery's convictions. Sheriff Pagel's private contact with R.M. which resulted in his discharge from the jury constitutes plain error. A "plain error" is an "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." ***Jorgensen***, 2008 WI 60 at ¶ 21. An error is plain when it involves a basic constitutional right that has not been extended to the accused. ***Id.*** A plain error affects the substantial rights of the defendant and permits a trial to proceed in violation of a fundamental condition necessary for a fair trial. ***Virgil v. State***, 84 Wis. 2d 166, 193, 267 N.W.2d 852 (1978).

47. Here, the error was plain because it involved Mr. Avery's basic constitutional right to an impartial jury of the 12 jurors who commenced deliberations. After private communication between the Sheriff and a juror, that juror was discharged without cause. That is plain error.

48. Sheriff Pagel's private contact with juror R.M. also permitted the trial to proceed in violation of a fundamental condition necessary for a fair trial. As noted above, the United States Supreme Court presumes that when a juror has

Case 2005CF000381 Document 1073 Filed 09-15-2022 Page 48 of 145

private contact with someone outside the jury during deliberations, that contact constitutes prejudicial error. *See* ***Remmer***. That the jury's deliberations are a critical part of the defendant's right to a fair trial is beyond dispute. Where, as here, there is contact that results in removal of the juror involved, the defendant's constitutional right to a jury trial of 12 impartial jurors is implicated.

49. Additionally, as with Mr. Avery's lack of knowing and voluntary consent to excuse R.M. as argued above, by the morning after R.M. was excused, Mr. Avery had already lost what the constitution guarantees, that is, the right to a unanimous verdict by the 12 impartial jurors who were selected to determine his guilt or innocence.

50. Although counsel did not object to Sheriff Pagel's role in excusing Juror R.M., the court should nevertheless reverse Mr. Avery's convictions based upon the Sheriff's private communication with Juror R.M. because counsel did not have an opportunity to object when it really mattered. That is, Sheriff Pagel spoke to R.M. before the court or any of the attorneys were aware of the contact. Therefore, there was no opportunity for anyone to block the private communication between Sheriff Pagel and R.M. before it happened. Requiring an objection at trial allows the trial judge to avoid or correct an error. *Vollmer v. Luety*, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990). Here, however, there was no opportunity to avoid or correct an error because once Sheriff Pagel spoke with Juror R.M. without the court's knowledge, R.M.'s removal was set in motion.

51. As argued above, removal of a deliberating juror without cause is the sort of error that has repercussions which are necessarily unquantifiable and indeterminate. The juror's removal in this case was set in motion by a deputy who then contacted Sheriff Pagel, even though Sheriff Pagel was aligned with the prosecution and had not been sworn to assist the court in sequestering the jury.

Case 2005CF000381 Document 1073 Filed 08-18-2022 Page 50 of 146

Sheriff Pagel should never have had private contact with Juror R.M., and his contact ultimately resulted in R.M.'s discharge from the jury. Sheriff Pagel's role in Juror R.M.'s removal was error that warrants reversal of Mr. Avery's convictions.

Case 2005CF000381 Document 1073 Filed 03-16-2022 Page 51 of 145

PART II: NOT FILED UNDER SEAL

III. THE COURT'S "DENNY" RULING DEPRIVED MR. AVERY OF A FAIR TRIAL.

Introduction

52. Prior to trial, the defense sought to introduce evidence that other persons may have been responsible for Teresa Halbach's murder. The parties briefed whether such evidence was admissible under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), and the court ruled that the defense would be barred from presenting evidence that a person other than Brendan Dassey was responsible for the crimes.

53. Mr. Avery renews his claim here that he was entitled to introduce evidence and to argue that other persons may have been responsible for Ms. Halbach's death. He argues below that *Denny* is inapplicable, and that even if it is applicable, the court erred in barring Mr. Avery from presenting third party liability evidence.

Procedural history

54. On July 10, 2006, the court entered a pre-trial order entitled "Order Regarding State's Motion Prohibiting Evidence of Third-Party Liability ("Denny" Motion)". The order specified that if the defendant intended "to suggest that a third party other than Brendan Dassey is responsible for any of the crimes charged, the defendant must notify the Court and the State" of such intention at least 30 days prior to the start of the trial. The court further ordered that the defendant would be subject to the standards relating to the admissibility of any third party liability evidence pursuant to *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

Case 2005CF000381 Document 1113 Filed 08-16-2022 Page 52 of 145

55. In light of the court's order, on January 10, 2007, Avery filed the "Defendant's Statement on Third-Party Responsibility." Mr. Avery there stated that he did not kill Teresa Halbach, and that there was "at least a reasonable possibility that one or more unknown others, present at or near the Avery Salvage Yard on the afternoon of October 31, 2005, killed her." Mr. Avery identified several persons as potential alternative perpetrators: Scott Tadych; Andres Martinez; Robert Fabian; Charles and Earl Avery; and the Dassey brothers. Mr. Avery argued that ***Denny*** did not apply to the circumstances in his case, and that as a result, he should not be bound by the three-part test set forth in ***Denny***. He further argued that even if ***Denny*** did apply to his case, he should be permitted to introduce evidence at his trial of several alternative perpetrators in this case.

56. On January 30, 2007, the court entered its "Decision and Order on Admissibility of Third Party Liability Evidence." The court held that ***Denny***'s "legitimate tendency" test applies to any evidence the defendant wished to present regarding potential third parties who might have been responsible for Ms. Halbach's murder. (Court's order of 1/3/07 at 7).

57. Despite this ruling, the court analyzed Mr. Avery's offer of proof regarding third party responsibility to determine whether it might meet an alternative "legitimate tendency" test. That is, the court looked at the defendant's proffer to see whether it stated evidence of such probative value of opportunity and direct connection to the crime that proof of motive is not required. (*Id.* at 7-8).

58. The court ruled that under either the ***Denny*** test or its modified alternative legitimate tendency test, Mr. Avery was barred from presenting evidence of the possible culpability of any third party other than Brendan Dassey.

Case 2005CF000381 Document 1073 Filed 09-16-2022 Page 53 of 146

A. The *Denny* decision.

59. The defendant in ***Denny*** was charged with homicide. He sought to introduce evidence that he had no motive to kill the victim, but that "any one of a number of third parties had motive and opportunity" to kill the victim in his case. ***Denny***, 120 Wis. 2d at 617. The court prohibited Denny from presenting any evidence that others might have had a motive to kill the victim, ruling it irrelevant. ***Id.*** at 621. The court of appeals affirmed, and articulated a test for the admissibility of this type of third-party responsibility evidence, which it termed the "legitimate tendency" test. The test, the court said, is a bright-line test which involves three factors which the defendant must show: motive; opportunity; and a direct connection between the third person and the crime charged. ***Id.*** at 625.

60. The trial court erred when it concluded that ***Denny*** applies to Mr. Avery's case. ***Denny*** is inapplicable to Mr. Avery's case for four reasons. First, ***Denny*** applies only to those situations where the defendant seeks to introduce evidence of other possible perpetrators' motives to commit the crime, and where the defendant has no such motive. Second, ***Denny*** should not be applied in this case because it is a state evidentiary rule which conflicts with Mr. Avery's constitutional rights. Third, ***Denny*** cannot act as a bar to Mr. Avery's production of evidence because the state opened the door to such evidence. And fourth, ***Denny*** should not apply because it was wrongly decided.

B. *Denny* does not apply to the facts in this case.

61. As noted above, the defendant in ***Denny*** sought to present evidence that others had a motive to kill the victim, but that he had no such motive. He argued that if he could show a motive by others to kill the victim, he could "establish the hypothesis of innocence." ***Id.*** at 622. The trial court barred this

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 54 of 145

evidence, and the court of appeals affirmed. The court of appeals warned that if it approved of Denny's attempt to show these other individuals' motives to harm the victim, "a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased—degenerating the proceedings into a trial of collateral issues." *Id.* at 623-24.

62. The *Denny* court's concern that a defendant could turn a trial into a parade of witnesses who had animus towards the deceased, even when they had no other connection to the victim, is unfounded here because no person had a specific motive to harm Ms. Halbach as there was in *Denny*. Unlike Denny, Mr. Avery did not seek to prove that others had animus towards Ms. Halbach. *Denny* must be limited to its facts. It is appropriately applied where the defendant seeks to introduce evidence of others' motives to kill the victim, but it is a poor fit where motive is not at issue. The court's concern that a defendant would turn a trial into a parade of witnesses who had a motive to harm the victim is simply inapplicable here. As trial counsel argued, *Denny* should not control the presentation of evidence here because *Denny* was a "motive" or animus case, and Mr. Avery's case is not.

63. In addition, *Denny* is not a good fit to Mr. Avery's case because here, unlike *Denny*, there was a finite universe of actors identified by the defense who could have been responsible for Ms. Halbach's death. Denny argued that he should be able to present evidence that the victim had angered various people because of his drug dealing ventures, and thus had a number of enemies. Such a claim opened up the possibility of a wide range of third parties, some of whom the defendant did not name. Not so here where the defense could identify individuals with the opportunity to kill Halbach, and where there was at least circumstantial evidence to link them to her.

Case 2005CF000381 Document 1073 Filed 12-16-2022 Page 55 of 145

64. Mr. Avery's argument that *Denny* is inapplicable to the facts of this case is not unique. Our appellate courts have declined to apply *Denny* in a number of cases where the defendant points to a third party as the one responsible for the crime. For example, in *State v. Oberlander*, 149 Wis. 2d 132, 438 N.W.2d 580 (1989), where the defendant wanted to present other acts evidence of a third party who might have committed the crime with which the defendant was accused, the court simply applied a relevancy test. In *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997), where the defendant claimed he was being framed for a crime that never happened, the supreme court held that *Denny* does not apply. Instead, the court applied the balancing test of Wis. Stat. § 904.03. The court stated that existing rules of evidence would ensure that the jury is not confused, or its attention diverted to collateral issues. "As there is neither a legal basis nor a compelling reason to apply the legitimate tendency test under the circumstances of this case, we hold that the legitimate tendency test is not applicable to the introduction of frame-up evidence." *Id.* at ¶19. And, the court specifically declined to consider whether the legitimate tendency test is "an appropriate standard for the introduction of third-party defense evidence." *Id.* at 705, fn. 6. In *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), where the defendant tried to show that another unknown person committed the crime in light of a unique *modus operandi*, the supreme court held that the other acts standard of Wis. Stat. § 904.04 applies instead of the *Denny* standard. *Id.* at 296-97. And in *State v. Falk*, 2000 WI App 161, 238 Wis. 2d 93, 617 N.W.2d 676, the court ruled that *Denny* did not apply to the defense attempt to introduce evidence of a known alternative perpetrator. In *Falk*, the defendant was accused of child abuse, and he wanted to introduce evidence that the true perpetrator was his wife. The trial court excluded the evidence, but the court of appeals concluded the trial court was

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 56 of 145

wrong in applying *Denny*. The court of appeals agreed with the defendant that "*Scheidell* countenances an examination of the legitimate tendency test to determine whether it fits in fact situations that differ from those in *Denny*..." *Id.* at ¶34. The court concluded that the facts before it did not fit the *Denny* framework because of the limited number of people who could have committed the offense. Where the number of people who had the opportunity to commit the crime was small, the court said that *Denny* does not apply.

> In this case—and in most if not all cases where child abuse is the charged offense—there are only a few persons who could possibly have committed the crime besides the accused, because only a few persons have the necessary opportunity: the parent or parents, the babysitter or caregiver, and a limited number of other relatives or friends. ***Therefore, the need to prevent evidence showing that large numbers of others had a motive to commit the crime is not a concern as it was in Denny.*** In addition, direct evidence connecting one of those few persons to the particular abuse charged, such as witnesses other than the child victim or physical evidence, will likely be lacking. In this case, for example, only four persons had the opportunity to injure Laura given the parameters established by the medical testimony. We therefore conclude that the *Denny* legitimate tendency test is not applicable in this case, and to the extent the trial court relied on it in excluding the proffered evidence, it erred.

Id. at ¶34 (emphasis added).

As in *Falk*, Mr. Avery identified a fairly limited number of possible alternative perpetrators. Therefore, the *Denny* framework does not apply to this case.

In sum, the courts have declined to apply *Denny* to a number of third-party liability cases. Likewise, *Denny* should not apply to Mr. Avery's case.

C. *Denny* does not apply here because it is a state evidentiary rule which conflicts with Mr. Avery's constitutional rights.

65. Second, *Denny* should not be applied because it is a state evidentiary rule which conflicts with Mr. Avery's constitutional right to present a defense.

66. The state has broad latitude to establish rules excluding evidence from criminal trials. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). This

latitude has limits, however, because a defendant is also guaranteed the constitutional right to present a complete defense. ***Id.***; ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). Both the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant a "meaningful opportunity to present a complete defense." ***Holmes***, 547 U.S. at 324; ***State v. St. George***, 2002 WI 50, ¶14, 252 Wis. 2d 499, 512, 643 N.W.2d 777. The constitutional right to present a defense includes the right to the effective cross-examination of witnesses against the defendant, and the right to introduce favorable testimony. ***Pulizzano***, 155 Wis. 2d at 645-646; ***St. George***, 2002 WI 50 at ¶14.

67. Assuming *arguendo* that ***Denny*** applies in this case, the trial court's ruling deprived Mr. Avery of his constitutional right to present a defense. He was prevented from advancing a key claim in defending himself against the state's charges: that another individual or individuals were responsible for Ms. Halbach's death. Had Mr. Avery been able to introduce evidence that others may have been responsible for Ms. Halbach's death, counsel would have tried the case differently. They would have called other witnesses, cross-examined witnesses differently, and made a different opening statement and closing arguments to the jury.

68. Mr. Avery's defense at trial was that an unknown person had killed Teresa Halbach, and that the police had framed Mr. Avery for the crime by planting his blood in Ms. Halbach's car and by planting her car key in Mr. Avery's residence. The court's ***Denny*** ruling forced Mr. Avery to limit his frame-up claim to the police. It is anticipated that at a postconviction hearing, trial counsel will testify that had the court ruled that Mr. Avery could present evidence of other potential perpetrators, he would not have been so limited in his defense. Mr. Avery could have presented evidence that others had the motive and the means

Case 2005CF000381 Document 1073 Filed 03-10-2022 Page 58 of 146

to frame him for Ms. Halbach's death, and that specific other individuals may have killed Ms. Halbach.

69. For example, other individuals, such as Charles and Earl Avery, could have planted the evidence which proved so damning to Mr. Avery' defense. As was shown at trial, Steven had cut his finger, it was bleeding, and Charles and Earl could have planted his blood in the car. Once the court excluded Mr. Avery's third-party liability evidence, it meant that his frame-up defense was limited to law enforcement, who the jury would have been less inclined to suspect than Mr. Avery's brothers. Had Mr. Avery been able to argue his brothers killed Ms. Halbach and then framed him for it, counsel could have argued that police had not framed Mr. Avery, but rather, that they willingly followed their tunnel vision, encouraged by the true killers, to conclude that Mr. Avery was the guilty party.

70. The trial court's ***Denny*** ruling also made it easier for the state to suggest to the jury that if Mr. Avery was claiming the police framed him, the police must also have killed Ms. Halbach. A difficulty with Mr. Avery's defense was that it relied upon a theory that Ms. Halbach's killer or killers were not the same people as those who framed him. As long as the defense maintained that the police did not kill Ms. Halbach, but that they framed Mr. Avery, the defense needed to try to explain how the police would have known she was dead when they framed Mr. Avery. As it was, the defense was vulnerable to the state's claim that if the police were framing Mr. Avery, the defense must be insinuating that the police killed Ms. Halbach. That difficulty would have been obviated had the defense been able to argue that Charles and/or Earl Avery killed Ms. Halbach and framed Mr. Avery for the crime. Even if the jury was inclined to believe that the police framed Mr. Avery for a crime he did not commit, the jury was not going to believe that the police had actually killed Ms. Halbach. Indeed, although

Case 2005CF000381 Document 1073 Filed 03-13-2022 Page 58 of 145

Mr. Avery consistently maintained at trial that the police did not kill Ms. Halbach, without being able to present evidence of other possible perpetrators, the jury was really left with only two possible killers: the police or Steven Avery.

71. In addition to unfairly limiting Mr. Avery's theory of defense, the court's ***Denny*** ruling impermissibly infringed upon his right to cross-examine the witnesses against him. Cross-examination is implicit in the constitutional right of confrontation, and is essential to the accuracy of the "truth determining process." ***Chambers v. Mississippi***, 410 U.S. 284, 295 (1973), *quoting* ***Dutton v. Evans***, 400 U.S. 74, 89 (1970), *et al*. The denial of the right of cross-examination means the defendant has lost the ability to subject the witness' "damning repudiation and alibi to cross-examination." ***Chambers***, 410 U.S. at 295. The defendant is unable to "test the witness' recollection, to probe into the details of his alibi, or to 'sift' his conscience so that the jury might judge for itself whether [the witness'] testimony was worth of belief." ***Id.***

72. In ***Denny***, it appears the defendant sought to produce motive witnesses. By contrast, in this case, the *state* called as witnesses three of the individuals Mr. Avery identified in his proffer: Scott Tadych; Bobby Dassey; and Robert Fabian. The trial court's ***Denny*** ruling prevented Mr. Avery from exercising his constitutional right to confront these witnesses.

73. The court's ***Denny*** ruling meant that Mr. Avery was barred from exploring one of the biggest motives for these witnesses to lie on the stand: that one or more of these individuals was guilty of the crime. If one or more of these witnesses were guilty of Ms. Halbach's homicide, or had participated in framing Mr. Avery for the crime, they would have had every incentive to point the finger at Mr. Avery. They would have had strong motive to convict Mr. Avery in order to save themselves. As the Minnesota Supreme Court stated in *State v. Hawkins*,

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 60 of 146

260 N.W.2d 150, 158 (Minn. 1977): "where the third person is a state's witness with a possible motive to convict the defendant to save himself, the rule admitting otherwise competent evidence of a third person's guilt is especially applicable."

74. Mr. Avery was also unable to test the witness's recollection if the questions strayed into prohibited ***Denny*** territory. For example, Mr. Avery could not impeach Scott Tadych with inconsistencies in his recollection of his whereabouts on October 31, 2005. Had Mr. Avery been able to point the finger at Tadych, he could have shown that Tadych had a motive to lie about when he saw a bonfire, how big the bonfire was, and when and whether he had actually seen "Prison Break" that night. Although Mr. Avery could point out the inconsistencies in Tadych's testimony, he was barred from connecting up the inconsistencies with the possibility that Tadych had killed Ms. Halbach.

75. Counsel's cross-examination of Bobby Dassey was also curtailed by the trial court's ***Denny*** ruling. But for the court's ruling, counsel would have cross-examined Bobby Dassey much more aggressively. For example, counsel would have handled Dassey's testimony about Mr. Avery's "joke" regarding disposing of a body much differently. But for the court's ***Denny*** ruling, defense counsel could have directly confronted Bobby about the "joke" and suggested that Bobby invented this conversation to point the finger at Mr. Avery to divert suspicion from himself. Additionally, counsel could have cross-examined Bobby Dassey regarding his mutual alibi with Scott Tadych.

76. The court's pre-trial ruling prevented counsel from questioning Fabian about the cadaver dog "hitting" on the golf cart that he and Earl Avery drove around the Avery Salvage Yard, shooting rabbits.

Case 2005CF000381 Document 1113 Filed 01-16-2022 Page 61 of 145

77. Finally, the court's pre-trial ruling prevented defense counsel from directly questioning these witnesses about whether they were responsible for Ms. Halbach's death.

78. The trial court's *Denny* ruling also infringed upon Mr. Avery's right to present favorable evidence. For example, the court's order prevented Mr. Avery from introducing evidence that Bobby Dassey had his own .22 Marlin gun, the same model believed to have been the murder weapon in this case. The ruling prevented Mr. Avery from calling Earl and Charles Avery as witnesses to question their whereabouts on October 31, 2005, and whether they knew Teresa Halbach was coming that day. Earl Avery was said to know every single car on the Avery Salvage Yard property. Defense counsel could have called him to question why he did not notice Ms. Halbach's badly concealed vehicle on the property, even though it was alleged to have been there for days before it was found by the Sturms. Counsel could have introduced evidence of Tadych's character for violence and lack of truthfulness, or of Charles Avery's prior aggressive conduct with women who had visited the Avery Salvage Yard in the past.

79. The court's ruling also affected counsels' opening statement and closing arguments. As argued above, had counsel not been limited by the *Denny* ruling, it would not have needed to rely exclusively on its police frame-up defense. Rather, the defense counsel could have argued that the police indeed had investigative tunnel vision, but that they were simply fooled into thinking that Mr. Avery was the perpetrator, rather than that they actively framed him.

80. The court's ruling also affected the defense closing argument. During his argument, Attorney Buting suggested Bobby Dassey had killed Teresa Halbach. The state vigorously objected, asked for an admonishment, and defense counsel had to backtrack from that argument. (Transcript of March 14,

pp. 214-222). Clearly, the defense was unable to argue that other specific individuals may have been responsible for Ms. Halbach's death. While the defense was able to elicit small bits of testimony to try to impeach the state's witnesses, counsel could not tie those pieces of evidence into a theory for the jury to consider that an alternative perpetrator, such as Bobby Dassey, was guilty of Ms. Halbach's murder.

81. In sum, the court's ***Denny*** ruling impermissibly infringed upon Mr. Avery's right to cross-examination, compulsory process, and the right to present a complete defense. Even if ***Denny*** is an appropriate limiting evidentiary rule, here its application deprived Mr. Avery of his constitutional right to present a defense.

D. Mr. Avery should have been permitted to present evidence of alternative perpetrators because the state opened the door to this evidence.

82. Third, ***Denny*** should not have barred Mr. Avery from introducing evidence of possible other perpetrators because the state opened the door to such evidence.

83. Sherry Culhane, the Technical Unit Leader in the DNA Unit at the Wisconsin State Crime Laboratory (Crime Lab), testified on the state's behalf. She testified that buccal swabs from Barb Janda, Bobby, Brendan and Brian Dassey, and Earl, Chuck, Delores and Allen Avery were all submitted to the crime lab, and that she had prepared DNA profiles based upon these standards. (Transcript of February 23, 2007, pp. 128-132).

84. Culhane further testified, upon the state's questioning, that she tested various pieces of evidence, obtained DNA profiles from those pieces of evidence, and then compared those profiles against not only Steven Avery's profile, but against the other profiles she developed as well. For example, she compared the

Case 2005CF000381 Document 1079 Filed 08-16-2022 Page 60 of 145

DNA on the key against the profiles of Allen Avery, Brian Dassey, Brendan Dassey, Barb Janda, Bobby Dassey, Earl Avery, Chuck Avery and Delores Avery. (*Id.*, at 183-184).

85. Culhane testified that she compared the DNA profile obtained from a blood stain in Ms. Halbach's car against all of the standards she received at the crime lab, and that the profile was not consistent with any standard she received except for Steven Avery's. (*Id.* at 186-187).

86. The state moved into evidence various crime lab reports, such as Exhibit 315, which contains the profiles developed for Barb Janda, Bobby Dassey, Earl Avery, Charles Avery, Delores Avery, and eliminates them as possible sources from evidence obtained in this case. (*Id.* at 201).

87. Thus, the state elicited evidence in its case-in-chief that other individuals on the Avery property had been eliminated by DNA evidence as perpetrators. As soon as the state introduced evidence that other individuals had been excluded as the DNA source for incriminating pieces of evidence, the state opened the door for the defense to counter with evidence that those individuals and others could have been the true perpetrators of the crimes in this case. Having obtained a ruling that the defense could not introduce evidence of other potential perpetrators, the state could not introduce evidence that others were excluded without opening the door to the previously barred ***Denny*** evidence. *See* McCormick, Evidence, Vol. 1 at §57 (Sixth Ed.), on "curative admissibility"; ***United States v. Bolin***, 514 F.2d 554, 558 (7th Cir. 1975).

E. *Denny* should not apply because it was wrongly decided.

88. Trial counsel argued that, while *Denny* is good law, it is inapplicable under the facts of this case. In spite of this concession, Mr. Avery now maintains that *Denny* was wrongly decided and should be overruled. He recognizes,

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 34 of 145

however, that this court lacks the authority to overrule ***Denny***. Nevertheless, he raises the issue to preserve it for appellate review.

89. Although the Wisconsin Supreme Court fleetingly seemed to approve of the ***Denny*** decision in ***State v. Knapp***, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881, in its previous decisions on third-party liability the court specifically stated it would not reach the issue of whether ***Denny*** applies to third party liability cases where motive is not at issue. (*See* ***State v. Richardson***, and ***State v. Scheidell***, discussed above).

90. And, ***People v. Green***, the California case upon which the Wisconsin Court of Appeals rested its decision, has been modified. The California Supreme Court in ***State v. Hall***, 718 P.2d 99 (1986), said that third-party culpability evidence should be treated like any other evidence: "if relevant it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion." Whether the third-party culpability evidence is believable is not a question for the judge; it is a question for the jury. ***Id.***

91. In addition to ***Hall***, other courts apply the principles of our evidentiary rules of Wis. Stat. §§ 904.01 and 904.03 rather than a sort of super-relevancy test as embodied in *Denny*. In ***Beaty v. Kentucky***, 125 S.W.2d 196 (2003), the court held it was error to exclude third-party liability evidence because the defense theory was not so unsupported that it would confuse or mislead the jury. The court reminded that it is up to the jury to decide if the alleged alternative perpetrator defense is credible. And in ***Winfield v. United States***, 676 A.2d 1 (D.C. Ct. App. 1996), the court criticized the trial judge's analysis which it said seemed to reflect "the lingering notion in our decisions that relevance means something different as regards evidence that a third party committed a crime than it

Case 2005CF000381 Document 1073 Filed 03-16-2022 Page 65 of 146

does in other contexts." The court said: "We now make clear that it does not." *Id.* at 8-9.

92. Further, *Denny* imposes an unreasonably high burden on a defendant to present relevant evidence in his or her defense. Instead of the legitimate tendency test declared by the court of appeals, the defendant should be bound only by the relevancy standard in Wis. Stat. §§ 904.01 and 904.03. Otherwise, the right to present a defense, to compulsory process, and to confrontation are unreasonably burdened. A defendant is denied due process when he is required to shoulder a burden the state is not required to shoulder.

93. Because *Denny* was wrongly decided, and should be overturned, it should not have been applied in this case.

F. The court also erred when it applied an alternative "legitimate tendency" test.

94. As noted above, the court barred Mr. Avery from presenting evidence of alternative perpetrators pursuant to *Denny*. Nevertheless, the court went on to apply a different type of legitimate tendency test in the event a reviewing court would hold that the three-part *Denny* test is inapplicable. The court applied a legitimate tendency test supposing that a defendant could produce such compelling opportunity and direct connection evidence that proof of motive would not be required. (*See* trial court's decision filed January 30, 2007).

95. Just as Mr. Avery argues that the three-apart *Denny* rule should not apply and that *Denny* was wrongly decided, the trial court's alternative two-part legitimate tendency test is inapplicable as well. An examination of the roots of *Denny* shows why.

96. *Denny's* legitimate tendency test was based on an early United States Supreme Court case, *Alexander v. United States*, 138 U.S. 353 (1891). Although

the Court in *Alexander* used the phrase "legitimate tendency," it did not adopt a two or three factor test combining motive, opportunity and a direct connection to the crime, or some combination thereof. Instead, the Court looked at whether the third party's acts and statements in that particular case were so remote or insignificant as to have no legitimate tendency to show that he could have committed the crime. In other words, were the third party's acts and statements too remote and insignificant to have any probative value. This test is essentially the same as the well-recognized balancing test in Wis. Stat. § 904.03. The *Alexander* holding is significantly different from the *Denny* three-part test. Despite its stated intention to follow *Alexander*, the court in *Denny* failed to do so. Instead of adopting a fluid test that would review each case under its own facts, and to then determine whether there is any legitimate tendency to show that the third party could have committed the crime in keeping with *Alexander*, the court erroneously adopted a bright-line three-part test.

97. Similarly, the court here erred in applying a two-factor test, combining opportunity with direct connection to the crime. Following *Alexander*, the court should have applied the relevancy rules in Wis. Stat. §§ 904.01 and 904.03. The court should have examined whether the totality of the facts would tend to show that one or more others named by Mr. Avery could have committed the crimes in this case. No rule of super-relevancy should have been applied.

G. The evidentiary test to be applied here should have been the relevancy tests of Wis. Stat. §§ 904.01 and 904.03, rather than *Denny*.

98. Wisconsin Statute § 904.01 defines relevant evidence, and Wis. Stat. § 904.03 provides for the exclusion of evidence, even when relevant, on grounds of "prejudice, confusion, or waste of time." That is, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." These two evidentiary rules should have controlled to what extent Mr. Avery was permitted to present third-party responsibility evidence.

99. Had the court applied Wis. Stat. §§ 904.01 and 904.03, evidence of third-party responsibility of Scott Tadych, Bobby Dassey, and Charles and Earl Avery would have been admissible.

100. Any evidence which tended to prove that Mr. Avery was not responsible for Teresa Halbach's death would be relevant under Wis. Stat. § 904.01. Relevance is defined broadly, and there is a strong presumption that proffered evidence is relevant. ***Richardson***, 210 Wis. 2d at 707. Relevant evidence is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Given that the state had the burden of proving Mr. Avery committed the homicide in this case, it follows that any evidence he could present which tended to make it less probable that he committed the homicide is relevant. And any evidence Mr. Avery could present which would lead the trier of fact to conclude that another individual committed the crimes in this case would be relevant. As the court said in *State v. Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977), "where the issue is whether in fact the defendant killed the deceased, evidence tending to prove that another committed the homicide is admissible."

101. Evidence which showed that a third party was responsible for Teresa Halbach's death would also have been admissible under the balancing test in Wis. Stat. § 904.03. Such evidence was probative in that it tended to show that Steven Avery was not guilty of the crimes charged. The probative value is not

Case 2005CF000381 Document 1113 Filed 01-19-2023 Page 68 of 145

outweighed by prejudice because different interests are involved when it is the state who seeks to introduce evidence as opposed to the defendant. The prejudice, if there is any, would be to those persons identified by the defense as possible perpetrators. But they were not parties to the action; they were not represented by the state. Thus, the prejudicial effect of introducing evidence against them was nonexistent. And, this evidence would not have confused the jury or diverted it to collateral issues. It was clear that this case was about whether Steven Avery killed Teresa Halbach. In order to defend himself, he needed to be able to show that others had just as much opportunity to kill her as he did. Some of the relevant witnesses were called by the state. Additional witnesses called by Mr. Avery would not have unduly prolonged the trial. The jurors would not have been confused or diverted to collateral issues. Rather, they would have had a more complete picture of the facts in their task.

H. If *Denny* applies, Mr. Avery's offer of proof met the *Denny* three-part test as to Scott Tadych, Charles and Earl Avery, and Bobby Dassey.

102. If the court still concludes that *Denny* applies to Mr. Avery's proposed third-party liability evidence, the court erred in ruling the evidence barred under the *Denny* standard. The court's application of *Denny* was unreasonably strict. With respect to motive, the court unreasonably focused only on one type of motive, and that was who would have a motive to harm Teresa Halbach. The court failed to look at an equally important motive, which is the motive to frame Steven Avery for a crime he did not commit. The court also was unreasonably strict in examining other individuals' connection to the crime. A connection to the crime does not require the level of proof to convict, but only such evidence as would cast doubt on Mr. Avery's culpability. Where, as here, others have some type of motive, opportunity, and some connection to the crime,

Mr. Avery should have been permitted to introduce evidence of others' potential culpability. As the court said in ***Beaty v. Kentucky***, the trial court may infringe upon the defendant's right to introduce evidence that another person may be culpable only when the defense theory is "unsupported," "speculative," and so "far-fetched" that it could confuse or mislead the jury. ***Beaty***, 125 S.W. 3d at 207.

Scott Tadych

103. Scott Tadych had sufficient motive, opportunity and a direct connection to the crime such that Mr. Avery should have been allowed to introduce third-party responsibility evidence relating to him.

104. Tadych's motive to kill Ms. Halbach is his violent and volatile personality. According to Tadych's co-workers, Tadych is a short-tempered and angry person capable of murder (Calumet County Sheriff's Department interview, 3/30/06; pp.719-722). Tadych was described as a chronic liar who blows up at people, "screams a lot" and is a "psycho." Another co-worker described Tadych as "not being hooked up right" and someone who would "fly off the handle at everyone at work." (Calumet County Sheriff's Department interview 3/31/06, p. 726).

105. Tadych's previous experiences with the court system show him to be a violent and impulsive person, particularly towards women. In 1994, he was charged in Manitowoc County with criminal trespass and battery. The criminal complaint (Case No. 94-CM-583) alleged that Tadych went to the home of Constance Welnetz at about 3:00 a.m. and knocked on her bedroom window. Welnetz was asleep with Martin LeClair. Welnetz then heard a loud knock on the back door. As she was calling the police, Tadych walked into her home and stated to her: "You will die for this, bitch." In the meantime, LeClair had gone outside to confront Tadych, and Tadych had hit him, knocking him briefly unconscious.

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 70 of 146

106. In 1997, the state charged Tadych with recklessly causing bodily harm to Welnetz's son, Ryan, as well as disorderly conduct and damage to property. The complaint alleged that Tadych had accused Welnetz of seeing another man. When she told Tadych to leave, he swung at her and missed, then "went out of control," (see complaint in Case No. 97-CF-237). He pushed and punched Welnetz repeatedly, tried to push her down the basement stairs, pulled her hair, and also punched Ryan Welnetz, then 11 years old. Tadych went outside and ripped the CB out of Welnetz's truck. He damaged other property as well.

107. In 1998, the state charged Tadych with trespass and disorderly conduct for entering the home of Patricia Tadych—his mother—without permission. (Case No. 98-CM-20). When Tadych found that his mother had moved some of his fishing equipment, and that some equipment was missing, he began to yell at her, calling her a "fucker," a "bitch" and a "cunt." Tadych shoved her, nearly causing her to fall.

108. In 2001, Constance Welnetz filed a petition for a temporary restraining order from Tadych (Case No. 01-CV-3). In her petition, Welnetz stated that Tadych had called her repeatedly at work within short periods of time, threatened to "kick her ass," to "turn her over to social services" and to make her life "miserable." He called her a "fucking cunt bitch." He went to her home and pushed his way into her home. He left the home on one occasion only after she picked up the phone to call the police, but then he spit on her car and tried all the car doors to get in. When Welnetz left in her car, Tadych followed her. At one point, Tadych phoned Welnetz and told her that if she would not talk to him and give him "another chance" he would ruin her life and hurt her because she was a "worthless piece of shit."

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 71 of 146

109. And in 2002, Tadych again assaulted Welnetz (Case No. 02-CM-449). After Welnetz had tried to "kick Tadych out of her residence" for yelling at her son, Tadych shoved Welnetz against the wall, took her phone and threw it on the floor so she could not call the police. Tadych also twice punched Welnetz in the shoulder with a closed fist.

110. Tadych would also have had a motive to frame Steven Avery. At the time of Ms. Halbach's murder, Tadych was dating Barb Janda, who lived next door to Steven Avery, and who is the mother of Bobby, Blaine, Brendan and Bryan Dassey. If Tadych killed Ms. Halbach, or if one of the Dassey boys had killed her, Tadych would have had a motive to frame someone else for the crime, and Steven Avery would have been a convenient choice for a frame-up.

111. Tadych also had opportunity to kill Ms. Halbach. Janda and Tadych are now married. As her then-boyfriend, Tadych would have been on the property numerous times, and would have had easy access to the property.

112. Tadych testified that he was at the Janda home twice on October 31, 2005. It was Janda's van that Teresa Halbach had come to photograph, and so Barb, and likely Tadych, knew Ms. Halbach would be coming to the yard to photograph the van. Because of the close proximity of the Janda and Steven Avery residences, anyone at the Janda home could see the van and Teresa Halbach coming to photograph the van. Indeed, Bobby Dassey testified that he saw her taking pictures of his mother's car.

113. Tadych also had a direct connection to the crime. Tadych's alibi for the time at which it is believed that Ms. Halbach was killed is Bobby Dassey, who is now Tadych's step-son. Bobby Dassey and Scott Tadych are mutual alibis in this case. Each states that he saw the other while driving, on their way to hunt. (Of course, that they saw each other while driving does not mean that one of them

could not have had a restrained Teresa Halbach in his car at that time). No one else can vouch for their whereabouts during that afternoon.

114. Another co-worker of Tadych reported that Tadych had approached him to sell him a .22 rifle that belonged to one of the Dassey boys. (Calumet County Sheriff's Department report of 3/30/06, p. 725-726). A .22 rifle was believed to be the murder weapon in this case.

115. Additionally, a co-worker stated that Tadych had left work on the day that Steven Avery was arrested, and that he was a "nervous wreck" when he left. Further a co-worker stated that Tadych had commented that one of the Dassey boys had blood on his clothes, and that the clothes had "gotten mixed up with his laundry." (Calumet County Sheriff's Department report of 3/2/06, p. 687).

116. Applying these facts to the three-factor test in ***Denny***, the court erred in concluding it was insufficient to meet the standard for admissibility. Evidence relating to Tadych was relevant because it tended to prove that Mr. Avery was not the guilty party. It would not have confused the jury or unduly prolonged the trial. Likewise, there was no risk that the jury would be misled or confused had Mr. Avery been able to introduce evidence of Scott Tadych's culpability. It was up to the jury, not the court, to decide whether to believe Tadych might have been responsible for the crime.

Charles Avery

117. Charles Avery also potentially had the motive to kill Teresa Halbach. Charles Avery had assaulted his former wife and had an aggressive history with women who came to the Avery Salvage Yard. In 1999, the state charged Charles with sexual assault by use of force of his then wife Donna. The complaint alleged (Case No. 99-CF-155) that Charles had held Donna down and had sexual

Case 2005CF000381 Document 1073 Filed 01-18-2023 Page 73 of 145

intercourse with her against her will. The complaint also stated that Donna reported that Charles had tried to strangle her with a phone cord, and told her that "if she did not shut up he would end it all."

118. In another criminal complaint filed the same day (Case No. 99-CM-361), Donna Avery stated that Charles had contacted her even though there was a domestic abuse injunction in place. According to the complaint, Charles entered Donna's residence without her permission, that he followed her when she left, and that he again entered her residence without her permission later that night, ripping the phone from her hands when she tried to call the police. Charles also blocked the door when Donna attempted to leave.

119. Charles Avery's aggression extended to women who were customers of the Avery Salvage Yard. For example, Investigator John Dedering of the Calumet County Sheriff's Department interviewed Zina Lavora who had had her car towed by the Avery Salvage business. After the tow, Charles Avery began sending her flowers and repeatedly asking her to go out on dates, which she found to be disturbing. He sent candy to her home, and on one occasion, he rang her doorbell and left her a long gift-wrapped box with a $100 bill. He continued to call her over the next three weeks, and she reported to her co-workers that she was afraid of him. (Calumet County Sheriff's Department report of 11/8/05, p. 159).

120. Another woman who had been a customer had a similar experience with Charles Avery. The same Sheriff's Department report contains a statement by Judith Knutsen that she bought a part for her car through the Avery Salvage Yard. A few months later, in October of 2005, the Avery business towed her car. On October 30, 2005, Knutsen's supervisor gave her a note that she should go to the property the next day to pick up the belongings from her car. She did not go. On November 2, 2005, she phoned the business and spoke with Charles Avery.

Charles told her he had been to her house the previous day to drop off her belongings, and then proceeded to ask Knutsen out for dinner. She refused. Then on November 4, 2005, Charles went to Knutsen's home with her personal belongings which he said he had sorted from her car.

121. Other stories of Charles' aggressive history with women exist. Gary and Daniel Lisowski spoke with law enforcement about Charles. Daniel Lisowski was then dating a young woman whose mother was a single mother. Lisowski reported that Charles had driven by this woman's house repeatedly, would call her to ask her out, and would tell her on the phone that he had seen her in her bathing suit as he had driven by. (DCI Report, Bate stamp 0231).

122. Charles Avery also had a motive to frame Steven Avery for Ms. Halbach's murder, namely jealousy for Steven over money, a share of the family business, and over Jodi Stachowski. When Steven Avery returned to the Salvage Yard after his exoneration, it meant that the Avery Salvage Yard business would no longer be run by just Charles and Earl Avery as Allen Avery was involved less and less in the business. It meant that Steven Avery would also be part of the business. Thus, what looked like a half share in the family business was likely to be a third share with Steven's arrival. Carla Avery, Charles' daughter, told police that Charles "puts up" with Steven working at the yard, but that he does not really want him to work there. (DCI Report, Bate stamp 0657).

123. Steven Avery also looked to be in line to receive a large sum of money as a result of his exoneration. That money may have caused jealousy to Charles that would cause him to want to see Steven off the Avery Salvage Yard. He may even have believed that if Steven were again sent to prison, his lawsuit proceeds might go to him and the other Avery family members.

Case 2005CF000381 Document 1073 Filed 01-13-2022 Page 75 of 145

124. Charles Avery had also frightened Jodi Stachowski, Steven Avery's girlfriend at the time of Ms. Halbach's murder. While she was in jail, Stachowski had told another woman that she was afraid of Charles, and that shortly after Stachowski and Steven began dating, Charles had come over to Steven's home with a shotgun because he was angry that they were dating. (DCI Report at Bate stamp 0685). Stachowski told this woman that she "was freaked out by Chuckie," and that she had once awoken to find Chuckie in her residence that she shared with Steven. (*Id.*) .

125. Charles also had opportunity to kill Ms. Halbach. As one of the Avery brothers, he was on the property daily, and would have been aware of anyone coming from Auto Trader to photograph cars on the lot. Robert Fabian told police that Charles had asked Steven if "the photographer" had come yet to the yard on October 31, 2005. (Calumet County Sheriff's Department report of 11/10/05, p. 208). On November 6, 2005, Charles told law enforcement that he recalled Steven may have left work to "go and meet with a girl to take some pictures." (DCI Report at Bate stamp 0371).

126. Charles also had a means to frame Steven. For example, after Steven cut his finger, Charles could have smeared Steven's blood from a rag in Ms. Halbach's car. He could have planted the key in Steven's room. Getting rid of Steven would only improve Charles' situation at the Avery Salvage Yard.

127. The location of Charles' residence on the property is suspicious as well. His trailer is located next to the office and the main entrance to the business, so he would be most likely to see people coming to do business at the yard. His trailer is also the closest of any of the residences to the location where Ms. Halbach's car was found. Also, unless Ms. Halbach's car was driven into the

Case 2005CF000381 Document 1078 Filed 08-16-2022 Page 75 of 145

pit from the rear Radant quarry area, anyone driving her car down to where it was ultimately found would have driven past Charles' trailer.

128. Charles Avery told law enforcement that he spends a "considerable amount of time working in the pit area" and yet he did not notice Ms. Halbach's car. (DCI Report at Bate stamp 0370). He lives alone, and stated he saw no one on the night of October 31, 2005, so he does not have an alibi for that night. (DCI Report at Bate stamp 0371). Charles has access to firearms as he is a hunter and uses the pit when he wants to sight in his guns. (DCI Report at Bate stamp 0374).

129. More information connecting Charles Avery to Ms. Halbach's disappearance and murder may have been obtained had the police not had such tunnel vision in its investigation and had they not been so free with information with Charles about the investigation. The police reports show that law enforcement repeatedly told Charles Avery that Steven was the perpetrator of these crimes, and they told Charles Avery about important aspects of the investigation. For example, an officer with the Marinette County Sheriff's Department told Charles that they had found the key to Ms. Halbach's Toyota in Steven's bedroom, and that they believed that Steven kept the key so he could later move the car from the salvage yard to the shop where he could strip it to ready it for crushing. (DCI Report at Bate stamp 0308). The officer also told Charles that they had found bones and teeth in the burn pit behind Steven's house. (DCI Report at Bate stamp 0309). In a later interview, police told Charles that they believed Steven had opened the road from the Radant Gravel Pit into the Avery Salvage Yard so he could drive Ms. Halbach's car to the back row of the yard. (DCI Report at Bate stamp 0355). The officer told Charles that he "understood how unsettling this must be for Chuck, but he needs to face the fact that his brother killed Halbach." (DCI Report at Bate stamp 0354).

130. This focus on Steven to the exclusion of other suspects like Charles illustrates the failing of the ***Denny*** rule. Here, the police developed only that evidence to support its conclusion that Steven was the perpetrator, and failed to develop evidence to link others, such as Charles, to the crimes. Because the state is in charge of an investigation that will ultimately support its case, it will not be inclined to develop evidence which might assist the defense in suggesting that another individual is the guilty party. Thus ***Denny*** poses a nearly insurmountable hurdle to a defendant attempting to show a third party is responsible for a crime.

Earl Avery

131. Much of the same evidence relevant to Charles Avery would apply to Earl Avery as well. Steven's return meant that Earl's share of the family business may have gone from one-half to one-third. Earl stated to the police his willingness to give information incriminating to Steven, saying that "even if my brother did something, I would tell." (Calumet County Sheriff's Department report at p. 75). Earl's wife was said to have greatly disliked Steven. Earl was on the yard as well, and so would have had access to both Ms. Halbach and to a bloody towel with which to plant Steven's blood in her car.

132. Earl Avery had also been previously charged with sexual assault. In 1995, the state charged Earl Avery with sexually assaulting his two daughters. (Case No. 95-CF-240).

133. Earl Avery also had the means to kill Teresa Halbach. He and Robert Fabian shot rabbits on the Salvage Yard grounds, riding around the property on a golf cart. They were hunting rabbits with guns on the day that Ms. Halbach disappeared.

134. Earl admitted driving the golf cart past where Ms. Halbach's car was found, and although Earl's friend Robert Fabian would say that Earl knew every

Case 2005CF000381 Document 1078 Filed 03-13-2022 Page 78 of 146

car on the lot, Earl claimed he did not see Ms. Halbach's car. (Calumet County Sheriff's Department Report at p.74-75) (DCI Report at Bate stamp 0330). Although he and Steven were sighting in their guns in the pit on November 4, 2005, he claimed he did not see Ms. Halbach's car. (Calumet County Sheriff's Department report of 11/5/05 at p. 80). Further, a cadaver dog alerted on a golf cart parked in a small garage behind the main residence on the salvage yard property. (Great Lakes Search and Rescue Canine, Inc., Report, Narrative at 2).

135. Earl also knew that Ms. Halbach was coming to the yard on October 31, 2005. He was familiar with the Auto Trader magazine, and Steven had commented to him on October 31st that he had to go home because someone was meeting him from the magazine. (DCI Report at Bate stamp 1278-79).

136. Further, Earl hid from the police when they came to take a DNA sample on November 9, 2005. When the investigators went to his home, he hid in an upstairs bedroom under some clothes. (Calumet County Sheriff's Department report at 194).

137. Both Earl and Charles Avery would have known more about the Avery Salvage Yard than anyone else. They had taken over the day-to-day running of the business as their father, Allen Avery, spent more and more time at their property up north. They had the means and the opportunity to kill Ms. Halbach, to move her car, to plant evidence to incriminate Steven, and then to leave the car so that it would be discovered in a search. This is sufficient connection to the offense to warrant allowing the jury to decide whether it was credible or not to suspect Charles and Earl Avery.

Bobby Dassey

138. Finally, Mr. Avery should have been able to introduce evidence that Bobby Dassey was a possible alternative perpetrator. If Bobby's brother Brendan

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 79 of 143

or his soon-to-be stepfather Scott Tadych were involved in the crimes, Bobby would have had a motive to frame Mr. Avery for the crimes.

139. Further, there is some evidence that Bobby did not like Steven Avery. Bobby stated that Steven would lie in order to "stab ya in the back," and that Steven had done this to him in the past. (Calumet County Sheriff's Department report at 92).

140. Bobby also had opportunity as he was at home at the time that Ms. Halbach was on the property. Given that Ms. Halbach was coming to photograph his mother's car, Bobby would have known that Ms. Halbach was coming to the property. Bobby admitted he saw Ms. Halbach and her car as he looked out of the window of his residence. Bobby also had the means to shoot Ms. Halbach; he is a hunter and thus would have access to weapons.

141. Bobby's explanation of his movements on October 31, 2005, is also suspicious. He claimed to have gone hunting after having seen Ms. Halbach on the property, and said that Scott Tadych would say that he and Scott passed each other on the highway on the way to hunting. Strangely, Bobby told the police that Tadych "would be able to verify precisely what time he had seen Bobby." (Calumet County Sheriff's Department report at 91). He did not explain why that time would be so important that Tadych would be able to tell the police precisely what time they had seen each other. In addition, Bobby stated that he had taken a shower before he went hunting, and then Barb Janda said he had taken a shower after returning from hunting. (DCI Report at Bate stamp 0213).

142. A physical examination of Bobby showed that he had scratches on his back. (*Id.*). He told law enforcement that the scratches were from a puppy (*Id.*). The examining physician stated that the scratches looked recent, and that it was unlikely they were over a week old. (*Id.*).

Case 2005CF000381 Document 1079 Filed 09-16-2022 Page 79 of 145

143. Thus, there is circumstantial evidence tying Bobby Dassey to Ms. Halbach's murder. He admitted to seeing her on the day she disappeared; he had a motive to frame Steven for the crimes; he had the means to kill Ms. Halbach; his leaving and return from his residence is only corroborated by Scott Tadych who saw him driving down the road; he had scratches on his back which he stated were from a puppy; and as Ms. Halbach had been to the property before, Bobby would have been familiar with her. He had sufficient motive, opportunity and connection to the crimes that the court erred in precluding the defense from producing evidence and arguing Bobby was true perpetrator.

144. In sum, the court should have allowed Mr. Avery to introduce evidence and argue from that evidence that other persons could have been responsible for the murder of Ms. Halbach, namely Scott Tadych, Charles or Earl Avery, or Bobby Dassey.

CONCLUSION

For the reasons argued above, Steven Avery, by his attorneys, respectfully requests that the court schedule a hearing to hear evidence and argument, and that the court enter an order vacating the judgments of conviction and granting a new trial.

Dated this 26th day of June, 2009.

Respectfully submitted,

SUZANNE L. HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179
(608) 267-5177
hagopians@opd.wi.gov

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032
(608) 267-2879
askinsm@opd.wi.gov

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862

Attorneys for Defendant

Case 2005CF000381 Document 1070 Filed 08-16-2022 Page 82 of 146

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

STEVEN A. AVERY,
Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
JAN 25 2010
CLERK OF CIRCUIT COURT

Case No. 05 CF 381

DECISION AND ORDER ON DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

The defendant, Steven A. Avery, was convicted following a jury trial on charges of party to the crime of first degree intentional homicide and felon in possession of a firearm on March 18, 2007. On June 29, 2009 the defendant filed a motion for postconviction relief seeking a new trial on grounds that (1) the court improperly excused a juror during the course of the jury's deliberations, and (2) the court improperly excluded evidence of third party liability. The defendant's argument includes a claim of ineffective assistance of counsel. An evidentiary hearing on the defendant's postconviction motion was held on September 28, 2009. Following that hearing the court received written briefs from both parties.

FINDINGS OF FACT

From evidence introduced at the postconviction motion hearing and the court record in this case, the court makes the following factual findings:

370

Case 2005CF000381 Document 1073 Filed 01-13-2023 Page 95 of 146

two prongs of the legitimate tendency test. Without any admissible evidence of motive, however, the defendant's attempt to meet the *Denny* requirements fails.

Bobby Dassey. The only evidence offered by the defendant to show motive on the part of Bobby Dassey consisted of evidence allegedly supporting a motive to frame Steven Avery. No evidence is offered to suggest Bobby Dassey had a motive to murder Teresa Halbach. Avery suggests that if Brendan Dassey, Bobby's brother, or Scott Tadych were involved in the crimes, Bobby would have had a motive to help them frame Steven Avery for the crimes, presumably based on his relationship with his brother and Scott Tadych. The defendant also offers that Bobby did not like Steven Avery and stated that Steven "would lie in order to 'stab ya in the back.'" Defendant's postconviction motion at p. 57. The speculation that if Brendan Dassey or Scott Tadych had committed the crimes, Bobby Dassey would have had a motive to frame Steven Avery, unsupported by any evidence whatsoever, is too speculative to meet the motive requirement. Likewise, even if Bobby Dassey thought his Uncle Steven was a liar, that is not enough to constitute motive to commit murder. The connection is simply too tenuous. Avery's proffered evidence is not sufficient to show that Bobby Dassey had motive to murder Teresa Halbach.

The evidence offered against Bobby Dassey probably did meet the opportunity and direct connection to the crime requirements of the legitimate

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 84 of 145

tendency test because of his presence on the property at the time Teresa Halbach was there. However, without any showing of motive, third party evidence against Bobby Dassey is precluded under *Denny*.

In conclusion, the court stands by its original determination that the defendant was not entitled to introduce *Denny* evidence against any third party because he acknowledged at the time that he could not demonstrate any party had a motive to kill Teresa Halbach. The additional arguments and offers of proof Avery now raises in his postconviction motion were waived by not being presented to the court in a timely manner. Even if those arguments and offers of proof have not been waived, they are still not sufficient to justify the admission of direct third-party liability evidence under *Denny* against Scott Tadych, Charles Avery, Earl Avery or Bobby Dassey.

G. If Denny does not apply, what rules determine the admissibility of Avery's proffered third-party evidence?

For reasons already stated the court concludes that, despite Avery's claimed inability to demonstrate a motive on the part of anyone else to murder Teresa Halbach, his offer of third-party liability evidence is subject to the legitimate tendency test established by the court in *Denny*. Like the defendant in *Denny*,

Case 2005CF000381 Document 1073 Filed 09-16-2022 Page 85 of 145

OFFICE OF THE CLERK
Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688
TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

December 14, 2011

To:

Hon. Patrick L. Willis
Manitowoc County Circuit Court Judge
1010 S. 8th Street
Manitowoc, WI 54220-5380

Lynn Zigmunt
Manitowoc County Clerk of Circuit Court
1010 S. 8th Street
Manitowoc, WI 54220-5380

Martha K. Askins
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Jerilyn Dietz
District Attorney
206 Court Street
Chilton, WI 53014

Thomas J. Fallon
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

*Additional Parties listed on Page Two

You are hereby notified that the Court has entered the following order:

No. 2010AP411-CR State v. Avery L.C.#2005CF381

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Steven A. Avery, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

A. John Voelker
Acting Clerk of Supreme Court

Doc. 698

386
(1)

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

STEVEN AVERY,
Defendant-Appellant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
FEB 14 2013
CLERK OF CIRCUIT COURT

Case No.:

EVIDENTIARY HEARING REQUESTED

MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06

PLEASE TAKE NOTICE that the defendant-appellant, Steven Avery (hereinafter "Avery"), *pro se*, respectfully moves this Court pursuant to Wis. Stat. § 974.06, for the entry of an order vacating the judgment of conviction and sentence and ordering a new trial and granting him such relief as the Court may deem appropriate.

Avery requests an evidentiary hearing on this motion, and that he be allowed to appear in person or by telephone for this hearing.

STATEMENT OF THE CASE AND FACTS

On October 31st, 2005 Avery met with Teresa Halbach (hereinafter "Halbach") at or near his home to have a vehicle his sister wanted to sell photographed for Auto Trader magazine.

On November 3rd, 2005 Karen Halbach (Halbach's mother) contacted the Calumet County Sheriff's Department. Karen Halbach stated that Halbach had not been seen or heard from since October 31st. Karen Halbach said it was unusual for her daughter not to have had personal or telephone contact with her family or friends for this length of time. Karen Halbach stated that her daughter was driving a 1999 Toyota Rav 4, dark blue in color.

On November 4th, 2005 Manitowoc County Sheriff's Department interviewed Avery at his home. Avery candidly answered questions and allowed the investigator to search his residence.

On November 5th, 2005 the Manitowoc County Sheriff's Department requested Calumet County Sheriff's Department lead the investigation on behalf of the Manitowoc County Sheriff's Department under the doctrine of mutual aid. This was because Avery had a $36,000,000 law suit against Manitowoc County for having previously put Avery in prison illegally.

On November 5th, 2005 officers received information from volunteer searchers that they had located a vehicle matching the description of the vehicle owned by Halbach at Avery Auto

390

Salvage. The volunteers were able to gain access to the property through an employee of Avery Auto Salvage. The volunteers provided a partial description of the vehicle's VIN#. Taking this as confirmation that Halbach's vehicle was on the property Calumet County investigators entered Avery Auto Salvage, without a warrant, and began to investigate. Avery's curtilage is located adjacent to the Avery Auto Salvage property.

Soon after, on that same date, a search warrant was sought and obtained. This was the first of many search warrants in this case. Every one of the warrants were issued from judges, but the warrant applications were not presented to these judges. Instead, the actual prosecutor in the case, Kenneth Kratz, signed off on the affidavits. There is no indication in the record that any of the issuing judges ever saw or read these affidavits.

Among these warrants was a warrant issued on November 5th, 2005 that authorized the search of Avery's residence, which was a single-family trailer, Barb Janda's trailer, and the rest of the 40-acre salvage yard. (101:225; 125; 21-2; 337-133). The warrant authorized police to search for Halbach, her vehicle, clothing and camera equipment, forensic evidence and weapons or instruments capable for taking human life. (337:134). A vehicle identified as Halbach's RAV-4 was subsequently obtained. From the pictures taken by the State, there is no indication that this vehicle was sealed prior to being sent to the state crime lab in Madison (hereinafter "lab").

On that same day a warrant was issued to obtain Avery's vehicle and a tow truck belonging to Avery Auto Salvage.

The State charged Avery with first degree intentional homicide, mutilation of a corpse and felon in possession of a firearm. (26). The charges related to the October 31, 2005, death of Halbach.

While being housed in the Calumet County jail ("jail"), Avery met with his attorneys and his private investigator. The jail engaged in active monitoring of his conversations with his attorneys and his investigator. See Exhibits 1, 2, and 3. His attorneys never challenged the information provided them in Exhibit 1. However, Avery only found out about the monitoring by four jail workers through an open records request after his conviction was final.

After nearly five weeks of trial testimony, the case was submitted to the jury. (328:122-23). At that point, the jurors had been sequestered just one day. (327:226). The court retained the remaining alternate juror and ordered her sequestered separate from the deliberating jurors.

Case 2005CF000381 Document 1073 Filed 03-16-2023 Page 88 of 145

(*Id.*). Juror M. was one of the 12 jurors to whom the case was submitted. (362:12). In a preliminary vote taken during the first day of deliberations, Juror M. voted not guilty. (362:18).

During the evening after the first day of deliberations, the court received a call from Calumet County Sheriff Gerald Pagel indicating that Juror M. had asked to be excused. (329:4). The next day, after Juror M. was discharged, the court prepared a memorandum describing the information he received from Pagel, which is included in a traffic accident, totaling her vehicle, although there was no information about any injuries. Further, the juror's wife was upset about the accident and the amount of time he had been away from the family because of the trial. There was a "suggestion" that they had some marital difficulties before the trial. (*Id.*)

After speaking with Pagel, the court called the district attorney and both defense counsel, who authorized the court to speak with the juror and excused him "if the information provided to the court was verified." (329:4-5).

The court spoke with Juror M. by telephone. None of the court's conversations that evening – with Pagel, the attorneys and the juror – was on the record. The court described its conversation with Juror M. in the memo. (359:2).

When Juror M. arrived home, he learned there was no accident, but rather, his stepdaughter had car trouble. (326:29). At the postconviction hearing, Juror M. testified he had called his wife after dinner following the first day of deliberations to "check in" with her, not because he had any information about a family emergency. (362:20-21). When he spoke with the judge he was uncertain about what was happening at home, but he was also frustrated with the deliberations. (362:59, 68-69). He was disturbed by one juror's comment made at the outset of deliberations that Avery was "fucking guilty." (*Id.* at 18, 36). He was also upset that, when he expressed to another juror at dinner that he was frustrated with the deliberations, the juror who had pronounced Avery "fucking guilty" responded in a sarcastic tone: "If you can't handle it, why don't you tell them and just leave." (*Id.* at 16, 34).

On the morning after Juror M.'s removal, Judge Willis and counsel met in chambers. (329). Avery was not present. Relying on *State v. Lehman*, 108 Wis. 2d 291 (1982), the court and counsel agreed there were three options: proceed with 11 jurors; substitute in the alternate

Case 2005CF000381 Document 1073 Filed 08-10-2022 Page 89 of 145

with directions that the jury begin deliberations anew; or declare a mistrial. (329:5; 362:96-97, 209; 370:4; App. 150).

In a subsequent 20-minuet meeting with his attorneys Avery learned Juror M. had been let go. (362:99-100, 211). Counsel explained the three options and advised Avery to substitute in the alternate juror and turn down a mistrial. (362:100-01, 211-12). Avery took their advice. Defense counsel testified that, had they recommended a mistrial, Avery would have chosen a mistrial. (362:191).

When Avery was brought to court, Judge Willis engaged in a colloquy with him about the stipulation to substitute the alternate. (329:7-8). The court then informed the remaining jurors that one had been excused and that an alternate would take his place. (329:9-10). The court instructed the jurors to begin deliberations anew. (362:11). The newly-constituted jury returned with verdicts after three more days of deliberations. (331:3-5). The court subsequently sentenced Avery to life imprisonment. (288, 289).

Avery filed a postconviction motion seeking a new trial. (350; 351). He argued he had been deprived of a fair trial based on the handling of the jury once deliberations had begun, as well as the trial court's denial of the opportunity to present third-party liability evidence. (*Id*). Following an evidentiary hearing, Judge Willis filed a written decision and order denying Avery's claims. (370; App. 147-252).

Avery appealed, raising the same issues as those in postconviction motion. In addition, he argued the trial court had erred when it denied his pre-tiral motion to suppress as evidence the key found in Avery's bedroom. The court of appeals affirmed Avery's convictions in a decision recommended for publication. (App. 101-44). The Supreme Court of Wisconsin denied review.

AS GROUNDS THEREFORE, Avery states as follows:

ARGUMENT

I. AVERY WAS DENIED HIS RIGHTS UNDER ARTICLE ONE, § 7 OF THE WISCONSIN CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO COUNSEL

Case 2005CF000381 Document 1073 Filed 09-15-2022 Page 89 of 145

LEGAL STANDARD

A. The Right to Confer in Private

The Article 1, §7 and Sixth Amendment right to counsel protects the integrity of the adversarial system of criminal justice by ensuring that all persons accused of crimes have access to effective assistance of counsel for their defense. The right is grounded in "the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense." *United States v. Levy*, 577 F.2d 200, 209 (CA3 1978). Although the right to counsel under these constitutional provisions is distinguishable from the attorney-client privilege, the two concepts overlap in many ways.

The Sixth Amendment is meant to assure fairness in the adversary criminal process. *United States v. Cronic*, 466 U.S. 648, 656 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.* at 655 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Because this "very premise" is the foundation of the rights secured by the Sixth Amendment, where the Sixth Amendment is violated, "a serious risk of injustice infects the trial itself." *Id.* at 656 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980)).

The right to counsel exists in order to secure the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); see also *Estelle v. Williams*, 425 U.S. 501, 503 (1976). It follows that the "benchmark" of a Sixth Amendment claim is "the fairness of the adversary proceeding." See *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (citing *Strickland*, 466 U.S. at 695). The Supreme Court has therefore declared that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658. At the same time, however, "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Strickland*, 466 U.S. at 692. This is particularly true with regard to "various kinds of state interference with counsel's assistance." *Id.*; see also *Perry v. Leeke*, 488 U.S. 272, 279-80 (1989) (stating that the Supreme Court has "expressly noted that direct governmental interference with the right to counsel is a different matter" with regard to whether prejudice must be shown, and collecting representative cases where prejudice

Case 2005CF000381 Document 1073 Filed 01-18-2023 Page 91 of 146

need not be proved); *Cronic*, 466 U.S. at 658 & n. 24 (citing cases in which the Court has discussed circumstances justifying a presumption of prejudice).

The right to counsel would be meaningless without the protection of free and open communication between client and counsel. See *Id.* The United States Supreme Court has noted that "conferences between counsel and accused ... sometimes partake of the inviolable character of the confessional." *Powell v. Alabama*, 287 U.S. 45, 61 (1932). See also *State v. Penrod*, 892 P.2d 729, 731 (Oregon 1995) ("We believe that confidentiality is inherent in the right to consult with counsel; to hold otherwise would effectively render the right meaningless. Accord *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963) ("it is universally accepted that effective representation cannot be had without such privacy"); *see also* cases collected in 5 ALR3d 1360 (1963)).

The right to counsel includes "the right to private consultation with the attorney." *In the Matter of Fusco v. Moses*, 304 N.Y. 424, 433 (1952). Indeed, the very essence of the Sixth Amendment right to effective assistance of counsel is privacy of communication with counsel. *Glasser v. United States*, 315 U.S. 60 (1942); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *United States v. Rosner*, 485 F.2d 1213 (CA2 1973); *State v. Milligan*, 40 Ohio St. 3d 341 (1988). It is clear "that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." *Coplon v. United States*, 191 F.2d 749, 757 (CADC 1951). See *Geders v. United States*, 425 U.S. 80 (1976); *Hoffa v. United States*, 385 U.S. 293 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Rosner*, 485 F.2d 1213 (CA2 1973), cert. denied, 417 U.S. 950 (1974); *United States v. Brown*, 484 F.2d 418 (CA5 1973), cert. denied, 415 U.S. 960 (1974); *Caldwell v. United States*, 205 F.2d 879 (CADC 1953). "As was said by Judge DESMOND in *People v. McLaughlin*, (291 N.Y. 480, 482-283): 'To give it [the right to counsel] 'life and effect *** it must be held to confer upon the relator every privilege which will make the presence of counsel upon the trial a valuable right, and this must include a private interview with his counsel prior to the tiral.'" *Fusco*, 304 N.Y., at 433. See also *State v. Sugar*, 84 N.J. 1, 12-13 (New Jersey 1980); *State v. Holland*, 147 Ariz. 453 (Arizona 1985); *McNutt v. Superior Court*, 133 Ariz. 7 (Arizona 1982).

In *Ellis v. State*, 2003 ND 72, ¶9, the Court stated,

> An essential element of an accused's Sixth Amendment right to assistance of counsel is the privacy of communications with counsel. *State v. Clark*, 1997 ND 199, ¶4 (quoting *United States v. Brugman*, 655 F.2d 540, 546 (CA4 1981). There is a legitimate public interest in protecting confidential communications

between an attorney and a client, see *Clark*, at ¶14 (quoting *State v. Red Paint*, 311 N.W. 2d 182, 185 (N.D. 1981)), and the attorney-client relationship extends to communications between the client and the attorney or the attorney's representative. *See* N.D.R.Ev. 502. See also *State v. Copeland*, 448 N.W.2d 611, 614-16 (N.D. 1989); *Red Paint*, at 184-85.

The Sixth Amendment imposes an affirmative obligation on the State to respect and preserve an accused's choice to seek assistance of counsel, and "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton*, 474 U.S. 159, 171 (1985). See also *Arizona v. Warner*, 150 Ariz. 123, 127-28 (1986); *Wilson v. Superior Court*, 70 Cal. App.3d 751 (1977); *Barber v. Municipal Court*, 24 Cal.3d 742 (1979).

The guarantees of the Sixth Amendment right to assistance of counsel recognize the obvious but important truth that "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty ..." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Without the guiding hand of counsel, an innocent defendant may lose his freedom because he does not know how to establish his innocence. *Powell v. Alabama*, 287 U.S. 45, 69 (1932); see *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972). Because the assistance of counsel is essential to insuring fairness and due process in criminal prosecutions, a convicted defendant may not be imprisoned unless counsel was available to him at ever "critical" point following "the initiation of adversary judicial criminal proceedings," *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). See e.g., *Scott v. Illinois*, 440 U.S. 367 (1979); *Moore v. Illinois*, 434 U.S. 220 (1977); *Argersinger*, supra; *United States v. Wade*, 388 U.S. 218 (1967); *Massiah*, 377 U.S. 201; *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Because the Constitution requires the assistance of counsel and not merely his physical presence, counsel must be effective as well as available. *Cuyler v. Sullivan*, 446 U.S. 335, 344-345 (1980); *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The right to counsel would be an empty assurance if a formal appearance by an attorney were sufficient to satisfy it. *Avery v. Alabama*, 308 U.S. 444, 446 (1940); see *Cuyler*, supra, at 344-45. The circumstances under which a lawyer provides counsel must not "preclude the giving of effective aid in the preparation and tiral of the case." *Powell*, supra, at 71. "A defense attorney's representation must be 'untrammeled and unimpaired' ..." *State v. Bellucci*, 81 N.J. 531, 538 (New Jersey 1980); see *Glasser*, 315 U.S. at, 70 (1942). If

Case 2005CF000381 Document 1073 Filed 09-16-2022 Page 93 of 145

counsel is not "reasonably competent," *Cuyler*, 446 U.S. at 344; See *McMann*, 397 U.S. at 770-71, or if counsel's ability to be a vigorous partisan has been curtailed, *Bellucci*, 81 N.J. at 540-41, then the assistance provided is not constitutionally adequate. Attorney-client conversations are constitutionally protected and cannot be invaded by the State, *In re Bull*, 123 F. Supp. 389 (D. Nev. 1954); *Cory*, supra, 62 Wash.2d 371. "A defendant and his attorney must be afforded the opportunity to discuss freely and confidentially." *Stuart v. State*, 801 P.2d 1283 (Idaho 1990).

The United States Supreme Court in *Hoffa v. United States*, 385 U.S. 293 (1966), though not finding it warranted in that case, recognized: "it is possible to imagine a case in which the prosecution so pervasively insinuated itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment." *Id.* at 416. The factual circumstances in at least six cases have been held to require dismissal of charges because of the surreptitious interception of attorney-client communications by government agents. See *Cory*, 62 Wash.2d 371, *Graddick v. State*, 408 So.2d 533 (Alabama 1981), *United States v. Orman*, 417 F. Supp. 1126 (D.C. Colo. 1976), *Barber*, 24 Cal.3d 742, *United States v. Peters*, 468 F. Supp. 364 (S.D. Florida 1979), and *Levy*, 577 F.2d 200.

B. Balancing Tests Where the Right to Private Consultation is Infringed Upon

There are no Wisconsin cases that Avery can find that he can point to to inform the Court on this particular point, therefore this appears to be a case of first impression for the Wisconsin courts. Other jurisdictions have addressed this point at length. A clear split exists between the various jurisdictions however, so Avery has compiled the following authorities.

It has been noted in an annotation, *Scope and Extent, and Remedy or Sanctions for Infringement of Accused's Right to Communicate with this Attorney*, 5 A.L.R.3rd 1360, 1365:

> One class of cases in which the courts have had little difficulty in trying to strike a balance between liberty and authority involves "eavesdropping" on counsel-client conversations, either by electronic devices installed in conference rooms or by means of paid informers who gain access to the privileged communications of the defense. In such instances, courts have not hesitated to rule as unconstitutional and in violation of the attorney-client privilege such underhanded methods of the prosecution.

As the Court in *United States v. Rosner*, 485 F.2d 1213, 1227 (CA2 1973):

> In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government.

> ...
> When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge Cardozo's phrase. (*People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).) It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others. See Mr. Justice Holmes dissenting in *Olmstead v. United States*, 277 U.S. 438, 469 (1928).

The majority of the United States Supreme Court cases have rejected the contention that electronic surveillance of attorney-client communications was *per se* prejudicial under *Black v. United States*, 385 U.S. 26 (1966), *O'Brien v. United States*, 386 U.S. 345 (1967), and *Weatherford*, 429 U.S. 545, and will not automatically require a new trial. The Supreme Court ruled that "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." The trial court must make a "'judicial determination'" (most likely a "taint hearing" as described in *Alderman v. United States*, 394 U.S. 165 (1969), of the effect of the overheard conversations on the conversations on the conviction, and if there was "'use of evidence that might otherwise be inadmissible'" the conviction should be reversed for a new tiral. *Id.* at 552.

Upon a showing of probable interception of attorney-client communications by State agents, the Court should require the prosecutor to take affirmative steps to determine the existence of such surveillance and certify his actions and findings to the Court. See, e.g., *United States v. Alter*, 492 F.2d 1016 (CA9 1973). If there has been surreptitious interception of the defendant's attorney-client communications, the trial court should grant broad discovery of the logs, summaries, reports, recordings and transcripts of the intercepted communications. *United States v. Fannon*, 435 F.2d 364 (CA7 1970). If the governmental agency or agent refuses to disclose that information, the pending charges must be dismissed. *Alderman*, supra; *United States v. Seale*, 461 F.2d 345 (CA7 1972).

In light of *Weatherford*, it appears that the petitioner must show (1) a surreptitious electronic interception (2) by government agents (3) of attorney-client communications (4) involving defense plans and strategy or facts concerning the offense charged or under investigation. Proof of these facts is sufficient to raise a presumption of prejudice because the violation of the accused's constitutional right to private communications with his attorney "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser*, supra.

The burden of persuasion should then shift to the State[1] to prove that such interception was not prejudicial, for "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it is harmless beyond a reasonable doubt." ***Chapman v. California***, 386 U.S. 18 (1967). However, "[o]ver time, the rule that began to emerge would have required either a showing of deliberate prosecutorial misconduct or prejudice, but not both. See *State of South Dakota v. Long*, 465 F.2d 65 (1972) ("It is certainly true that where there is gross misconduct on the part of the Government, no prejudice need be shown.") (citing *Black*, 358 U.S. 26, ***O'Brien***, 386 U.S. 345, ***Caldwell***, 205 F.2d 879, ***Coplon***, 191 F.2d 749; ***Fajeriak v. State***, 520 P.2d 759 (Alaska 1974) ("Following *Coplon*, courts have agreed that proof of deliberate eavesdropping upon attorney-client communications automatically invalidates a conviction. The United States Supreme Court implicitly adopted this rule in ***Black v. United States***.")." ***State v. Quattlebaum***, 338 S.C. 441, 447 (2000).

The ***Quattlebaum*** court went on to state:

> *Weatherford* is inapplicable to the case *sub judice*, where a member of the prosecution team intentionally eavesdropped on a confidential defense conversation. We conclude, consistent with existing federal precedent, that a defendant must show either deliberate prosecutorial misconduct *or* prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. The content of the protected communication is not relevant. The focus must be on the misconduct. In cases involving unintentional intrusions into the attorney-client relationship, the defendant must make a prima facie showing of prejudice to shift the burden to the prosecution to prove the defendant was not prejudiced.

Id. at 448-49. *See also United States v. Davis*, 646 F.2d 1298, 1303 n.8 (CA8 1981) (stating no prejudice need be shown where there is gross misconduct by government).

Further, California has noted that *Weatherford* may not be appropriate to guide a state in its balancing test. The California Supreme Court stated in *Barber*, 24 Cal.3d 742:

> It is irrelevant to the reasons underlying the guarantee of privacy of communication between client and attorney that the state is intruding for one purpose rather than for another. "[T]he purpose and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives, and actions." (*In re Jordan*, [7 Cal.3d 930] at 940.) The chilling effect of full

[1] See also *State v. Penrod*, 892 P.2d 729, 732 (1995) (stating "when a defendant contends that his or her right to a confidential conversation with counsel has been unreasonably restricted, it is incumbent upon the state to show that the restriction was justified by the need to collect evidence..."); *State v. Milligan*, 40 Ohio St. 3d 341, 345 (Ohio 1988) ("the burden is upon the state, after a prima facie showing of prejudice by the defendant, to demonstrate that the information gained was not prejudicial to the defendant. See *Commonwealth v. Manning*, 373 Mass. 438, 442-443 (Mass. 1977)").

Case 2005CF000381 Document 1073 Filed 05-16-2022 Page 96 of 146

> and free disclosure by a client would be the same, whatever the state's asserted purpose for intruding. The intruding state agent by his presence will be privy to confidential communications. Aware of this possibility, a client will be constrained in discussing his case freely with his attorney.

Id. at 753. The Court went on to state:

> Not only is *Weatherford* inapposite, it cannot be used as authority to justify the police action here since the right to privacy of communication between an accused and his attorney has consistently been grounded on California law.

Id. at 755.

In like fashion, the 10th Federal Circuit Court of Appeals stated in *Shillinger, v. Haworth*, 70 F.3d 1132 (CA10 1996):

> Given the Supreme Court's consideration of the requirements of "effective law enforcement" and the absence of purposeful misconduct under the circumstance in *Weatherford*, commentators and courts have suggested that in cases where the prosecution acts intentionally and without legitimate purpose, such intrusions might not wholly governed by the *Weatherford* decision. Specifically, *Weatherford* may not dictate a rule that would require a showing of prejudice in cases where intentional prosecutorial intrusions lack a legitimate purpose. *See Briggs v. Goodwin*, 698 F.2d 468, 493 n. 22 (D.C. Cir.). (noting that "[a] deliberate attempt by the government to obtain defense strategy information or to otherwise interfere with the attorney-defendant relationship through the use of an undercover agent may constitute a *per se* violation of the Sixth Amendment."), reh'g granted, opinion vacated, and on reh'g, 712 F.2d 1444 (D.C. Cir. 1983), cert. denied, 464 U.S. 1040, (1984); *United States v. Morales*, 635 F.2d 177, 179 (CA2 1980) ("[B]ecause the ... evidence ... does not disclose an intentional, governmentally instigated intrusion upon confidential discussions between appellants and their attorneys, the evidence does not support appellants' claim of a *per se* violation of their right to counsel."); 2 Wayne R. LaFave & Jerold H. Isreal, *Criminal Procedure* § 11.8, at 75 (1984) ("*Weatherford's* conclusion that a state invasion of the lawyer-client relationship does not violate the Sixth Amendment unless there is at least a realistic likelihood of a governmental advantage arguably was limited to case in which there was a significant justification for the invasion.").

The *Shillinger* Court went on to state:

> Because we believe that a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a *per se* violation of the Sixth Amendment. In other words, we hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the tiral process must be presumed. In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct. We also note that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692.

Id. at 1142.

Case 2005CF000381 Document 1079 Filed 08-16-2022 Page 97 of 145

The Third Circuit has adopted the rule that intentional intrusions by the prosecution constitute *per se* violation of the Sixth Amendment. *See United States v. Costanzo*, 740 F.2d 251, 254 (CA3 1984), cert. denied, 472 U.S. 1017 (1985); *Levy*, 577 F.2d at 210. The Second and District of Columbia Circuits, on the other hand, have recognized that prejudice may not be required when an intrusion is intentional, but have not specifically decided. See *Briggs*, 698 F.2d at 493 n. 22; *Morales*, supra, 653 F.2d at 179. The First, Sixth, and Ninth Circuits have held that something beyond the intentional intrusion itself is required to rise to the level of a Sixth Amendment violation. See *United States v. Mastroianni*, 749 F.2d 900, 907 (CA1 1984) (holding that even in the context of an intentional intrusion lacking any justification, "[a] Sixth Amendment violation cannot be established without a showing that there is a 'realistic possibility of injury' to defendants or 'benefit to the State' as a result of the government's intrusion," but placing a "high burden" on the state to rebut the defendant's prima facie showing of prejudice) (quoting *Weatherford*, 429 U.S. at 558); *United States v. Steele*, 727 F.2d 580, 586 (CA6 1984) ("Even where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted.") (citing *Morrison*, 449 U.S. at 365-66); *United States v. Glover*, 596 F.2d 857, 863-64 (CA9) (holding that even in the context of an intentional intrusion into the attorney-client relationship, that "distinction [does not] overshadow [] an important principle to be read from [*Weatherford*]: that the existence or nonexistence of prejudicial evidence derived from an alleged interference with the attorney-client relationship is relevant in determining if the defendant had been denied the right to counsel") cert. denied, 444 U.S. 857, and cert. denied, 444 U.S. 860 (1979).

Under 9th Federal Circuit Court of Appeals precedents, "improper interference by the government with the confidential relationship between a criminal defendant and his counsel violated the Sixth Amendment only if such interference 'substantially prejudices' the defendant." *United States v. Danielson*, 325 F.3d 1054, 1069 (CA9 2002) (citing *Williams v. Woodford*, 306 F.3d 665, 683 (CA9 2002). "'Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial.'" *Id.* (citing *Williams*, 306 F.3d at 682).

Case 2005CF000381 Document 1073 Filed 06-16-2022 Page 13 of 145

"In cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle. In such cases, it will often be unclear whether, and how, the prosecution's improperly obtained information about the defendant's trial strategy may have been used, and whether there was prejudice. More important, in such cases the government and the defendant will have unequal access to knowledge. The persecution team knows what it did and why. The defendant can only guess." ***Danielson***, 325 F.3d at 1070.

Danielson set forth that once a defendant can show that there has been prejudice "the government ... must show that all the evidence it introduced at trial was derived from independent sources, and that all of its pre-trial and trial strategy was based on independent sources. Strategy in this context is a broad term that includes, but is not limited to, such things as decisions about the scope and nature of the investigation, about what witnesses to call (and in what order), about what questions to ask (and in what order), about what lines of defense to anticipate in presenting the case in chief, and about what to save for possible rebuttal." *Id.* at 1074.

C. Fashioning a Remedy.

It is fortunate in this instance that Wisconsin case law contains a reference to one of the most cited cases that gives guidance on the issue of remedy. In the concurrence to ***State v. Hoyt***, 21 Wis. 2d 310 (1963) Justice Gordon restates the guiding words of *Cory*, 382 Pac. 2d 1019, 1022 (Wash 1963):

> There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first. If the defendant's right to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first. And if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try he case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's tiral strategy.

In *Levy*, 577 F.2d 200, the Court stated:

> Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is.
>
> ...
>
> ... it is unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 98 of 145

> benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself.
> ...
> At that point a trial court applying an actual prejudice test would fact the virtually impossible task of reexamining the entire proceeding to determine whether the disclosed information influenced the government's investigation or presentation of its case or harmed the defense in any other way.

Id. at 208.

> ... the interests at stake in the attorney-client relationship are unlike the expectations of privacy that underlie the fourth amendment exclusionary rule. The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free tow-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fat finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of a defendant's disclosure to counsel must be insulated from the government. No sever definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We thing that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

Id. at 209. As in *Cory*, *Levy* came to a similar consideration as to why a case that involved actual disclosure of defense strategy cannot be retried:

> The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprises which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses. More important, public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain. At leas in this case, where the trial has taken place, we conclude that dismissal of the indictment is the only appropriate remedy.

Id.

However, the Court in *State v. Milligan*, 40 Ohio St. 3d 341 (1988), stated, "It is our view that neither mere suppression nor automatic dismissal is appropriate in every case irrespective of the circumstances." The only cases resulting in dismissal of the prosecution have involved the disclosure of trial strategy, *Levy*, 577 F.2d 200; *Peters*, 468 F. Sup. 364; *Orman*,

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 100 of 146

417 F. Supp. 1126; *Barber*, 24 Cal.3d 742; *Cory*, 62 Wash.2d at 377 (1963), or interference with the ability of a defendant to place trust and confidence in his attorney, *United States v. Morrison*, 602 F.2d 529, 533 (CA3 1979), *Barber*, 24 Cal.3d at 750-51, 756. Thus, there appears to be agreement that dismissal of a prosecution is the appropriate remedy for official intrusion upon attorney-client relationships only where it destroys that relationship or reveals defendant's trial strategy.

In California, the state Supreme Court stated, "The exclusionary remedy is also inadequate since there could be no incentive for state agents to refrain from such violations. Even when the illegality is discovered, the state would merely prove its case by the use of other, untainted evidence. The prosecution would proceed as if the unlawful conduct had not occurred." *Barber*, 24 Cal. 3d at 759. See also, *Cory*, 382 Pac. 2d at 1022, *State v. Holland*, 147 Ariz. 453, 456 (Arizona 1985); *Commonwealth v. Manning*, 373 Mass. 438, 442-445 (1977).

In *United States v. Morrison*, 449 U.S. 361 (1980), the Supreme Court considered whether dismissal of the defendant's indictment with prejudice was an appropriate remedy for the intentional intrusion upon her Sixth Amendment rights by federal law enforcement agents. Recognizing "the necessity for preserving society's interest in the administration of criminal justice," the Court enunciated the following standard: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional volition and should not unnecessarily infringe on competing interests." *Id.* at 364. The Court went on to describe how similar constitutional violations have generally been remedied:

> [W]hen before trial but after the institution of adversary proceedings, the prosecution had improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted...
>
> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.

Id. at 365 (citing *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Massiah*, 377 U.S. 201).

Morrison makes clear that evidence obtained through an intentional and improper intrusion into a defendant's relationship with his attorney, as well as any "fruits of [the prosecution's] transgression," see *id.* at 366, must be suppressed in proceedings against him.

At the same time, such an intrusion could so pervasively taint the entire proceeding that a court might find it necessary to take greater steps to purge the taint. The court may, for instance, require retrial by a new prosecutor, see, e.g. ***United States v. Horn***, 811 F. Supp. 739, 752 (D. N. H. 1992) (removing the lead prosecutor form the case and ordering her "not to discuss the documents with any prosecutor or witness in this case and not to participate further in any way, directly or indirectly, in the trial preparation or trial of this case"), rev'd in part, 29 F.3d 754 (CA1 1994). Additionally, dismissal of the indictment could, in extreme circumstances, be appropriate. Cf. ***California v. Trombetta***, 467 U.S. 479, 486-87 (1984) (noting that dismissal of the indictment might be appropriate when the government permanently loses potentially exculpatory evidence); ***United States v. Bohl***, 25 F.3d 904, 914 (CA10 1994) (dismissing the indictment because of the government's destruction of potentially exculpatory evidence).

ARGUMENT

Avery's defense team included attorneys Strang and Bueting and investigator Baetz. Any discussions with these persons were protected by the oldest legal privilege known to American law, the attorney-client privilege. However, far more importantly, the Sixth Amendment protects any discussions concerning strategy. The Sixth Amendment right to counsel includes the right to private consultation. Moreover, the denial of that right is a denial of the right to counsel, a structural defect that is not subject to harmless error analysis.

A. THE JAIL MONITORED THE CONVERSATIONS BETWEEN AVERY AND HIS DEFENSE TEAM CREATING A CHILLING EFFECT ON COMMUNICATIONS ON JULY 20th, 2006.

In the present case, Avery and Baetz had been warned by a jail worker on July 20th, 2006 that they were being recorded. This act alone had a chilling effect on Avery's Sixth Amendment rights. Avery was unable to offer full and frank information and could not be probed by his investigator for pertinent information that would or could have aided Avery's investigative efforts. Exhibit 1 is a Memorandum that existed in Avery's attorney's control. Therefore, failure to raise this issue pretrial was ineffective assistance of counsel. *Strickland*, 466 U.S. at

Case 2005CF000381 Document 1076 Filed 03-16-2023 Page 102 of 146

686. Indeed, the failure to seek out evidence of other recordings or to obtain the recording of this conversation was improper on the part of Avery's defense.

B. THE STATE WAS CONTINUALLY MONITORING AVERY'S PROTECTED CONVERSATIONS WITH HIS DEFENSE TEAM

There is evidence that the statement made on July 20th, 2006 was not mere threat or bluster on the part of this jail worker. After his conviction Avery was able to obtain through an open records request two documents that may have been discoverable but it is certain that the State didn't furnish them to Avery based on his discovery request and that would seem to end any requirement to investigate their existence on the part of Avery or his legal team. Indeed, the recording of privileged attorney-client conversations violates the privilege under both federal and Wisconsin law but, as noted above, where the Sixth Amendment is involved the State has an affirmative obligation to protect Avery's rights. It would be unreasonable to think that his protected conversations were being observed, much less that the content in any way was being relayed to the prosecution.

What Exhibits 2 and 3 show is that *four* officers did just that. On March 17th, 2007 they proved that the warning given Baetz was far from a passing remark, innocuous or otherwise. Further, these two incidents show a pattern of monitoring of which many of Calumet County's jail workers were aware.

C. MONITORING OF AVERY'S ATTORNEY-CLIENT CONVERSATIONS IN THE JAIL

The issue of whether it is improper to monitor the private conversations between a pretrial detainee and his defense team has been well settled. In cases that go back to 1963, there has been extensive commentary on the evils of this practice.

In *Cory*, 62 Wash.2d 371, the Washington State Supreme Court took up the issue of eavesdropping on the confidential conversations between counsel and client in a jail. The Court quoted ***Caldwell***, 92 U.S. App. D.C. 355, 205 F.2d 879, noting, "high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel." *Id.* at 374-75. The Court condemned the actions of the sheriff's office stating, "Not only was the conduct of the sheriff's office in violation of the constitutional provision assuring the right to counsel, but also of the statutory law." ***Id.*** at 378. The Court went on to quote ***People v. Cahan***, 44 Cal. (2d) 434 (1955), where that Court stated, "It is morally incongruous for the state to flout constitutional rights and at the same time demand

Case 2005CF000381 Document 1070 Filed 08-19-2022 Page 102 of 145

that its citizens observe the law..." *Cory*, 62 Wash.2d at 378. The *Cory* Court finally completed its condemnation of the sheriff department's action by labeling it "the odious practice of eavesdropping on privileged communication between attorney and client" *id.*, and that it was "shocking and unpardonable conduct ..."

In *Black*, 385 U.S. 26, the United States Supreme Court reversed a conviction because federal agents placed a bug in a hotel suite and recoded conversations between Black and his attorney. *Id.* at 27-28. These were reduced to notes and used by the prosecution in trial preparation. *Id.* The High Court concluded, "In view of these facts it appears that justice requires that a new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible." *Id.* at 28-29.

In *State v. Sugar*, 84 N.J. 1 (1980), the New Jersey Supreme Court took up the issue of the recording of a criminal defendant's conversation with his attorney by way of a concealed microphone in the interview room they used. *Id.* at 5. The Court summed up the issue stating, "The question presented is whether the flagrantly illegal conduct of the officers irreparably impaired defendant's rights to the effective assistance of counsel and to a trial uncorrupted by public prejudice." The Court characterized the State's actions by stating, "Our present concern is the outrageous character of the illegal eavesdropping." *Id.* at 7. The Court went to understandable lengths to voice its disgust stating, "We are outraged. We are compelled to say exactly that." *Id.* at 12. "The fact that the individuals responsible for invading defendant's privacy are law enforcement officials heightens our concern and sparks our sense of outrage. It is a 'fundamental precept that courts may not abide illegality committed by the guardians of the law.' *State v. Molnar*, 81 N.J. 475, 484 (1980)." *Id.* at 14. The Court decided that the single incident, though likely criminal, *Id*, was no threat to the case. *Id.* at 15.

In *State v. Quattlebaum*, 338 S.C. 441 (2000), the South Carolina Supreme Court was confronted with a single incident of surreptitious monitoring of confidential attorney-client consultation. That instance was strikingly similar the events of March 17th, 2007 in the present case. "While appellant and his attorney conferred, several sheriffs' officers and a deputy solicitor were present in the detectives office where the privileged conversation between appellant and his attorney was monitored and recorded." *Id.* at 444. The *Quattlebaum* Court addressed the issue of the State's intentional interference with the Sixth Amendment guarantee of private consultation stating, "The integrity of the entire judicial system is called into question

Case 2005CF000381 Document 1073 Filed 03-15-2021 Page 101 of 145

by conduct such as that engaged in by he deputy solicitor and investigating officers of this case." *Id.* at 449. The Court reversed the conviction. *Id.* at 454. Though it has not yet been established how high up information was passed in the present case, the involvement of the lead investigator's agents is established in the exhibits.

As noted, in the present case the State definitely had been monitoring the protected conversations between Avery and his defense team on at least two occasions. Further, a jail worker clearly stated that *all* conversations in the particular room were being recorded. There can be no doubt that what the monitoring officers at least saw was passed on to Sheriff Pagel. Even if it were true that there were no recordings of the audio portion of any given conversation, the fact that the room was watched is important. Attorneys write things down. Notes prepared in the course of preparing for trial or for the purposes of investigation are protected under the work product doctrine. More importantly, the notes contain strategy. The surreptitious obtaining of defense strategy by the state is grounds for mistrial.

D. REQUEST FOR A HEARING

In *United States v. DiDomenico*, 78 F.3d 294 (1996), the defendants and their attorney met in a federal holding facility in a bugged room. The question of whether the prosecution's lack of involvement was discussed, the Court stated, "even if the prosecution team was not complicit in the bugging, the defendants' right to counsel may have been infringed. It is one federal government after all. If the director of the MCC ordered the bugging, there would be a serious issue of the infringement of that right even if the fruits of the buffing were not turned over to the prosecutors." *Id.* at 301.

Avery asserts that he has presented prima facie evidence that his Sixth Amendment right to private consultation with counsel has been violated. He further asserts that that violation appears far more widespread than the exhibits he has presented, as evidenced by the statement made to Baetz. See Exhibit 1. Therefore, Avery respectfully requests that this Court allow Avery to engage in post-conviction discovery and that a hearing be held to supplement the record.

II. AVERY WAS DENIED HIS RIGHTS UNDER FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE STATE COMMENTED ON HIS SILENCE IN CLOSING ARGUMENTS

Doc. 702

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 105 of 145

LEGAL STANDARD

Direct comment on a defendant's failure to testify is forbidden by the Fifth Amendment. *Griffin v. California.*, 380 U.S. 609 (1965). A prosecutor's indirect commentary that the government's evidence on an issue is "uncotradicted," undenied," "unrebutted," "undisputed," etc., will be a violation of the defendant's Fifth Amendment rights if the only person who could have contradicted, denied, rebutted or disputed the government's evidence was the defendant himself. *Freeman v. Lane*, 962 F.2d 1252, 1261 (CA7 1992); *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1302 (CA7 1985); *United States v. Buege*, 578 F.2d 187 (CA7), cert. denied, 439 U.S. 871 (1978); *United States v. Fearns*, 501 F.2d 486, 490 (CA7 1974); *United States v. Handman*, 447 F.2d 853, 855 (CA7 1971).

ARGUMENT

On the 23rd day of the trial Attorney Kratz made reference in his closing arguments to facts presented "contested." **Tr. 4-14-2007, P.55.** Attorney Strang objected to this and asked to be heard on the issue later. The judge then reminded the jury that closing arguments are merely argument and not facts.

Specifically, attorney Kratz stated:

> The facts in this case, as presented, and as I will present to you, are very much so uncontested, uncontroversial, at least most of the facts in this case are uncontroverted.

Tr. 4-14-2007, P.33, Lines 18-21. Attorney Strang's commentary outside the presence of the jury was:

> I initially interrupted Mr. Kratz's argument, reluctantly, and trying to be polite and somewhat circumspect about my comment that it was unwise and improper to describe facts as uncontested. I waited until we got to the PowerPoint slide that said fact number four, and by my recollection, that was the fourth time that the - - counsel for the State returned to the theme of an uncontested fact.
>
> As I say, I was trying to be circumspect, but the concern, of course, was that this comes too close to commenting on the decision of the defendant not to take the stand. Or, for that matter, not to offer witnesses that he did not. Mr. Kratz, in

> responding to my objection I think made the problem substantially worse. I don't have committed to memory, we could go back to the court reporter's notes if we need to, but the rejoinder from counsel for the State was that, you know, if you remember a witness being called, or if you remember someone saying this didn't happen, something to that effect, well, then that's fine, but of course, the suggestion was not called and no one did speak up to contest the fact.
>
> Doesn't warrant a mistrial, but comes way too close to commenting on the Fifth Amendment privilege not to testify and I think warrants some curative step, either by counsel himself, or by the Court, or both.

Tr. 4-14-2007, P.70-71.

> Mr. Avery knows where Teresa's phone is, but Mr. Avery is also - - has the ability to think ahead, has the ability to know that these pone records may, in fact, be gleaned, or may, in fact, be reviewed at some point in the future. And so, although he doesn't block, because there is no reason to block the 4:35 call, he still calls Teresa Halbach. And you can see, or you can ask for those records if you need to.

Tr. 4-14-2007, P.94, Lines 5-14.

The State clearly argues that Avery had technical knowledge of investigation via voicemail systems and that he had created a plan to use the investigative process the State would employ as an alibi. Though attorney Kratz doesn't actually stat this is "uncontested" his phrasing is clear. Without having any foundation in the record to support his speculation that Avery knew how investigators "ask for those records" attorney Kratz made his assertion.

Defense counsel didn't object.

Avery contends that this was a disjointed and disguised continuation of the Stat's effors to implicate his silence. Avery didn't have to prove his innocence. And he's not required to contest anything. The State doesn't get to forma a conclusory argument around his silence. More importantly, the State cannot argue facts not in the record. Whether Avery knew about a State investigator's ability to retrieve voicemail wasn't established. This fact would be necessary for Avery to form the alleged plan to create this "alibi." Only Avery could actually testify to his knowledge. He hadn't take the stand and attorney Kratz's argument was a clear implication of

Case 2005CF000381 Document 1073 Filed 01-19-2023 Page 107 of 146

Avery's silence. A reasonable juror could have found that Avery had premeditated the murder down to the *last* detail. The detail of an alibi.

III. AVERY WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO A TRIAL BY AN UNBIASED JUDGE

LEGAL STANDARD

The Due Process Clause guarantees litigants an impartial judge, reflecting the principle that "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). Where the judge has a direct, personal, substantial, or pecuniary interest, due process is violated. *Bracy v. Gramley*, 520 U.S. 899 (1997); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Ward v. Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971); *In re Murchison*, 349 U.S. at 137-39.

It is presumed that judges are honest, upright individuals and that they rise above biasing influences. *Tumey*, 273 U.S. at 532; *Withrow v. Larkin*, 421 U.S 35, 47 (1975); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *Tezak v. United States*, 256 F.3d 702, 718 (CA7 2001); *Del Vecchio v. Illinois Dep't of Corr.*, 31 F.3d 1363, 1375 (CA7 1994) (en banc). This presumption however is rebuttable. Sometimes, "the influence is so strong that we may presume actual bias." *Del Vecchio*, 31 F.3d at 1375; see also *Withrow*, 421 U.S. at 47. In rare cases, there may even be evidence of actual bias. See *Bracy*, 520 U.S. at 905; *Bracy v. Schomig*, 286 F.3d 406, 411 (CA7 2002) (en banc).

To prove disqualifying bias, a petitioner must offer either direct evidence of "a possible temptation so sever that we might presume an actual, substantial incentive to be biased." *Del Vecchio*, 31 F.3d at 1380. Absent a "smoking gun," a petitioner may rely on circumstantial evidence to prove the necessary bias. *Bracy*, 286 F.3d at 411-12, 422 (Posner, J., concurring in part, dissenting in part), and at 431 (Rovner, J., concurring in part, dissenting in part).

The absence of any objection warrants that the reviewing court follow "the normal procedure in criminal cases," which "is to address waiver within the rubric of the ineffective assistance of counsel." *State v. Erickson*, 227 Wis.2d 758, 766 (1999) (citing *Kimmelman v.*

Morrison, 477 U.S. 365, 374 (1986); ***Lockhart v. Fretwell***, 506 U.S. 364, 380 n.6 (1993) (Stevens, J. dissenting); ***State v. Smith***, 207 Wis. 2d 258, 237 (1997); ***State v. Vinson***, 183 Wis. 2d 297, 306-07 (Ct. App. 1994)).

The right to counsel includes the right to effective assistance of counsel. , 466 U.S. 668, 686 (citing ***McMann v. Richardson***, 397 U.S. 759, 771 n.14). In order to find that counsel rendered ineffective assistance, the defendant must show that counsel's representation was deficient. ***Strickland***, 446 U.S. at 687. The defendant must also show that he was prejudiced by the deficient performance. ***Id.***

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. ***Id.***, at 688. The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, at 694.

A claim of ineffective assistance of counsel can only be resolved with an evidentiary hearing. ***State v. Machner***, 92 Wis. 2d 797, 804 (1979); ***Massaro v. United States***, 538 U.S. 500 (2003).

Where there is a structural error, such as judicial bias, harmless error analysis is irrelevant. See ***Edwards v. Balisok***, 520 U.S. 641, 647 (1997); ***Bracy***, 286 F.3d at 414; ***Cartalino v. Washington***, 122 F.3d 8, 9-10 (CA7 1997).

ARGUMENT

The Honorable Judge Willis presided over Avery's trial process starting at his initial appearance and preliminary hearing and ending with his sentencing.[2] He also issued several warrants in the case. At the preliminary hearing on December 6th, 2005 Judge Willis determined, as a matter of fact, that there had probably been a crime of murder and that Avery probably committed the crime. **Tr. 12-06-2005, Pages 180-81.** Avery argues that Judge Willis could not preside over the trial as he had already determined that Avery was guilty.

SCR 60.04(4) states in relevant part:

> Except as provided in sub. (6) for waiver, a judge shall recuse himself ... in a proceeding where the facts and circumstances the judge knows or reasonably should know establish knowledge about judicial ethics standards and the justice system and aware of the facts and

[2] Judge Willis also presided over the post-conviction relief hearing and made the ruling on that request.

Case 2005CF000381 Document 1070 Filed 08-15-2022 Page 108 of 145

> circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:
>
> (f) The judge, while a judge ... has made a public statement that commits, or appears to commit, the judge with respect to any of the following:
> 1. An issue in the proceeding.
> 2. The controversy in the proceeding.

In the preliminary hearing a judge is going further than making a finding of law. He is deciding facts and expressing his opinion of those facts. He is making a public statement that "commits, or appears to commit," him to an issue. That issue is the controversy at the very heart of the charges. He is stating that he believes that **1)** a crime has been a committed and **2)** that the defendant committed it.

Though it is true that the judge's determination is that there was merely probable cause that Avery was guilty and not that he was guilty beyond a reasonably doubt, this is still a finding of fact and an opinion of the outcome of the dispute. As SCR 60.04(4)(f) and **Wis. Stat. § 757.19** make clear judge Willis was required to recuse himself. This failing on his part negates Avery's entire trial and requires a reversal.

The same sentiment was echoed in ***Franklin v. McCaughtry***, 398 F.3d 955 (CA7 2005):

> We are not saying that due process would be offended if a judge presiding over a case expressed a general opinion regarding a law at issue in a case before him or her. *Withrow*, 421 U.S. at 48-49; see *Del Vecchio*, 31 F.3d at 1377 n.3. The problem arises when the judge has prejudged the facts or the outcome of the dispute before her. In those circumstances, the decisionmaker "cannot render a decision that comports with due process." *Baran v. Port of Beaumont Navigation Dist. Of Jeffery County Tex.*, 57 F.3d 436, 446 (CA5 1995); [citations omitted]. Here, the only inference that can be drawn from the facts of record is that Judge Schroeder decided that Franklin was guilty before he conducted Franklin's trial. This is clear violation of Franklin's due process rights.

Id., at 962. As with the judge in *Franklin*, Judge Willis was on record having decided the facts and outcome. From that point forward there was no decision that Judge Willis could make that wouldn't be colored by his preconceived notion that Avery was, in fact, guilty.

The language found in *Franklin* and in SCR 60.04(4) combine to show that Judge Willis was required to recuse himself. However, Avery never objected to Judge Willis continuing to

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 110 of 145

preside over his trial. Therefore, Avery may have to establish that this failure to request recusal or a change of venue was the result of ineffective assistance of trial counsel.

Avery asserts that failure to request a change of venue or to request that Judge Willis recuse himself fell below professional norms. As ***Franklin*** points out, when a "judge has prejudged the facts or the outcome of the dispute before [him]" he "'cannot render a decision that comports with due process.'" ***Franklin***, 398 F.3d at 962. There is no reasonable strategy that can be pointed to in allowing a trial to go forward under such circumstances.

Avery also asserts that the result was that he was prejudiced. As ***Franklin*** points out, "the only inference that can be drawn from the facts of record is that [the judge] decided that [Avery] was guilty before he conducted [Avery's] trial." In such a situation prejudice is presumed, as judicial bias is never open to harmless error analysis. ***Edwards***, 520 U.S. at 647; ***Bracy***, 286 F.3d at 414.

Avery also directs the Court's attention to **Wis. Stat. § 971.05** which states in relevant part:

> If the defendant is charged with a felony, the arraignment may be in the trial court or the court which conducted the preliminary examination or accepted the defendant's waiver of the preliminary examination.

Clearly the Wisconsin legislature noted that the "court which conducted the preliminary examination" cannot be the trail court. The language of the statute clearly delineates the difference between the two courts with the word "or." (i.e.: "... the arraignment may be in the trial court or the court which conducted the preliminary examination..." ***Id.*** (emphasis added)). It is a "well-settled rule as to construction of statutes requires every word to be given force if possible..." ***Mutual Life Ins. Co. v. Cohen***, 179 U.S. 262, 269 (1900). In other words, Courts are required wherever possible, "to give force to each word in every statute (or constitutional provision). ***United States v. Menasche***, 348 U.S. 528, 538-539, 99 l. Ed. 615, 75 S. Ct. 513 (1955); see ***Marbury v. Madison***, 5 U.S. (1 Cranch.) 137, 174, 2 L. Ed. 60 (1803)." *Silveira v. Lockyer*, 312 F.3d 1052, 1069 n.24 (CA9 2002).

Given that judge Willis had clearly put on record, as was intended in the judicial process of finding probable cause, that he believed that Avery was in fact guilty of the murder of Teresa Halbach there can be no way that Avery could receive a fair trail. This clearly violated his due process rights as laid out in both the United States and Wisconsin Constitutions. As a result, he had a structural defect that removes any harmless error analysis from the equation.

Case 2005CF000381 Document 1073 Filed 04-10-2022 Page 111 of 145

In like fashion to ***Franklin***, Avery had a trial that violated due process. Therefore, Avery respectfully requests that his conviction be overturned and a new trial with a judge that has not already determined that he is guilty preside.

However, Avery did fail to move for a change of venue or to request that judge Willis recuse himself. As a result of this ineffective assistance of counsel in failing to make such motions or requests Avery requests an evidentiary hearing under ***State v. Machner***, to supplement the record.

Avery further notes that his post-conviction counsel failed to raise the issue in his petition for post-conviction relief. Therefore, a ***Machner*** hearing is also necessary to establish if it was unreasonable for his post-conviction counsel to fail to raise this issue and if this failure prejudiced him.

IV. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO A POST-CONVICTION HEARING BY AN UNBIASED JUDGE

In like fashion to the obvious denial of his rights to a fair and impartial tribunal in his trial, Avery was entitled to an unbiased judge in his post-conviction relief proceedings. His attorneys failed to request that judge Willis should have recused himself or to request a change of venue.

Avery again requests an evidentiary hearing under ***State v. Machner***, to show that it supplement the record. This is also necessary to establish if it was unreasonable for his post-conviction counsel to fail to raise this issue and if this failure prejudiced him.

V. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO SUPPRESS EVIDENCE

LEGAL STANDARD

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

Case 2005CF000381 Document 1073 Filed 01-18-2023 Page 112 of 146

searched, and the persons or things to be seized." Fourth Amendment of the United States Constitution.

In *Wilson v. Layne*, 526 U.S. 603 (1999), the United States Supreme Court commented on the history and content of the Fourth Amendment as follows:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.). In his *Commentaries on the Laws of England*, William Blackstone noted that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it be violated with impunity" agreeing herein with the sentiments of antient Rome .... For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." William Blackstone, 4 Commentaries on the Laws of England 223 (1765-1769).

Id. at 609-10.

> The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home: "The right of the people to be secure in his persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV (Emphasis added.) See also ***United States v. United States District Court***, 407 U.S. 297, 313 (1972) ("Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is Directed").

Id. at 610.

ARGUMENT

A. THE WARRANTS WERE VOID FOR LACK OF A COURT SEAL

Writs are required to have a seal of the court, pursuant to **Wis. Stat. § 753.04**, and public documents not under seal are not self-authenticating, pursuant to **Wis. Stat. § 909.02(2)**; in turn, those public documents under seal are self-authenticating. **Wis. Stat. § 909.02(1)**. Because the warrant lacks a seal it is not a valid warrant.

There is a long history in the United States and in Wisconsin of using seals on warrants. In 1977 the Wisconsin Constitution was amended, removing the Constitutional provision in Article VII § 17, requiring all writs and processes issued from a court to have a seal of the court. In that same year Wis. Stat. §§ 753.04 and 753.30 were enacted. **Wis. Stat. § 753.04** lays out

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 113 of 145

the requirement that writs have a seal of the court and Wis. Stat. § 753.30(3)1 lays out the procedure and rules for having writs and processes sealed.

Indeed, the requirement that writs have seals has been in force since Wisconsin became a state. The history of the legal requirement is reflected in ***Leas & McVitty v. Merriam***, 132 F. 510, 5-6 (W.D. V.A. 1904), where the Court stated "In *Ins. Co. v. Hallock*, 6 Wall. 556-558 [73 U.S. 556 (1867)], it said: 'The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one.'" And this reflects the thinking of the people of the state at the time that Wisconsin adopted statehood. That the legislature shifted the requirement from the constitution to the statutes does not remove the requirement.

Further, the Wisconsin State Constitution provides that common law is still in force, unless otherwise stated by law. Wis. Const. Article XIV § 13. And **Wis. Stat. § 939.10** expressly points out that, though common law crimes are abolished, common law rules are preserved. The United States Supreme Court has pointed out that "... there was no settled rule at common law invalidating warrants not under seal *unless* the magistrate issuing the warrant had a seal of office or a seal was required by statute ..." ***Starr v. United States***, 153 U.S. 614, 619 (1894) (emphasis added). **Wis. Stat. § 753.05** places a requirement for the Wisconsin Circuit Courts to have seals. Further, **Wis. Stat. § 889.08(1)** points out that a "certificate must be under seal of the court" in order for it to be held as evidence outside of the court that issued it.

The legislative intent is found in the phrasing of **Wis. Stat. § 753.04**. Indeed, the legislature selected to distinguish all writs in general from writs of certiorari. The first sentence of the statute begins with the words "All writs ..." and the second sentence of the statute begins "All writs of certiorari ..." A search warrant has classically been referred to as a "writ of assistance" (Black's law dictionary, 8th Edition at page 1641) and falls under the definition of "writ" as laid out in Black's law dictionary, 8th Edition at page 1640.

The plain language reading of the statute requires that "All writs issued from the circuit court shall be ... sealed with the seal of the court..." Shall is mandatory language, all writs must have a seal of the court, and a search warrant is a writ.

This is not an issue that can be considered a singular incident. This warrant cannot be said to have a mere defect that doesn't affect Avery's rights. In the criminal case against Avery

there were several warrants that had a seal of the court on it. Therefore, this isn't a form over substance issue. This is a habitual ignoring of the well established law Federal common law and State law that warrants that issue without a court seal are void. Avery asserts that only if these officers hadn't habitually ignored the statutory and common law requirement that this issue would be without merit.

Further, similarly situated persons are afforded the statutory protections of the statutory and common law requirements pointed to above in the State of Wisconsin and under long standing common law as asserted by the United States Supreme Court. And Avery has a right to protections created by state law under the Fourteenth's Amendment's procedural Due Process clause. By failing to follow the legal requirements for issuance of a search warrant in Wisconsin Avery's equal protection and due process rights were violated.

B. THE WARRANTS WERE VOID BECAUSE THERE WAS NO RECORD

The warrants are defective because there is no indication that the affidavit was ever seen by the issuing judge. The affidavit is witnessed by the actual prosecutor in the case, attorney Kratz. **Wis. Stat. § 968.23** gives an example of an affidavit for a warrant. At the bottom of the example the legislature took the time to put in the text "..., Judge of the ... Court." Clearly the legislature saw that the United States Constitution requires that a neutral magistrate be *accountably* placed between the State and a defendant. Without a way of knowing that the judges were actually involved in the process of establishing probable cause the procedure was invalid and the warrants are illegal.

In ***Franks v. Delaware***, 438 U.S. 154 (1978), the Supreme Court recognized that the pre-search proceeding was *ex parte* and that a defendant could challenge the information placed before the court. ***Id.*** at 169. Holding an evidentiary proceeding with the actual prosecutor doesn't meet the mandates of the Constitution. See ***Coolidge***, 403 U.S. at 450, 454-55; ***Johnson v. United States***, 333 U.S. 10 (1948); ***Camara v. Municipal Court of San Francisco***, 387 U.S. 523 (1967).

The affidavits for the search warrants act as the only record for the issuance of those warrants. In the present case the judges signed none of the affidavits therefore there is no record

Case 2005CF000381 Document 1073 Filed 03-16-2022 Page 115 of 145

that they saw them. In other words, there is no record. And without a record, there is no court of record.

VI. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ARGUE A BREAK IN THE INTEGRITY OF THE STATE'S CHAIN OF CUSTODY OF HIS AND HALBACH'S VEHICLE

LEGAL STANDARD

Physical evidence is admissible when the possibility of misidentification or alteration is "eliminated, not absolutely but as a matter of reasonable probability." *United States v. Allen*, 106 F.3d 695, 700 (CA6 1997) (citations omitted). Merely raising the possibility of tampering or misidentification is insufficient to render evidence inadmissible. *United States v. Kelly*, 14 F.3d 1169, 1175 (CA7 1994).

"[T]he prosecution's chain-of-custody evidence must be adequate." *United States v. Ladd*, 885 F.2d 954, 957 (CA1 1989). A break in the chain of custody goes to the weight of the evidence. *United States v. Sparks*, 2 F.3d 574, 582 (CA5 1993); *United States v. Levy*, 904 F.2d 1026, 1030 (CA6 1990), cert. denied, 498 U.S. 1091 (1991). Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly. *United States v. Aviles*, 623 F.2d 1192, 1197-98 (CA7 1980).

All the government must show is that reasonable precautions were taken to preserve the original condition of evidence; an adequate chain of custody can be shown even if all possibilities of tampering are not excluded. *Aviles*, 623 F.2d at 1197. In *Aviles*, the Court concluded that since the seals on the evidence bags were intake when the bags were opened by the chemist who would analyze the evidence, the trial court could reasonably find that the narcotics evidence was in the same condition as when it was purchased.

ARGUMENT

The seals on the doors to Avery's vehicle were broken prior to being taken to the crime lab. Conversely, there were no seals placed on the doors of Halbach's Rav-4. Avery argues that the seals on the doors were either nonexistent or broken. This shows that there was a break in the chain of custody that the jury should have been made aware of.

Case 2005CF000381 Document 1071 Filed 03-16-2022 Page 113 of 143

VII. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE CHARGE OF FELON IN POSSESSION OF A FIREARM WASN'T SEVERED

LEGAL STANDARD

Joinder is improper when the State joins a strong evidentiary case with a much weaker case in hope that cumulation of evidence will lead to conviction in both cases. *Sandoval v. Calderon*, 231 F.3d 1140 (CA9 2000).

The statutes governing joinder of crimes in Wisconsin state:

> **Wis. Stat. § 971.12 Joinder of crimes and defendants.**
> (1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count from each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more case or transactions connected together or constitution parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.
>
> (3) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials or courts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates anther defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.
>
> (4) TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendant, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such complaint, information or indictment.

Whether severance should be granted lies within the discretion of the circuit court. See *State v. Nelson*, 146 Wis. 2d 442 (1988); *State v. Hoffman*, 106 Wis. 2d 185, 209 (1982) (dealing with substantial prejudice).

ARGUMENT

When Avery was first arrested it was for the charge of Felon in Possession of a Firearm. Eventually that charge expired due to a procedural requirement since the State failed to bring Avery to have a probable cause hearing inside the statutory time limit. Avery was subsequently charged with First Degree Intentional Homicide and Mutilation of a Corpse. Eventually the State recharged the dismissed Felon in Possession of a Firearm charge and it was joindered without objection.

At trial Avery stipulated to the element of being a felon. In so doing Avery introduced evidence against himself that would normally not be introduced to a jury unless he took the stand. The jury was then aware of the fact, by Avery's own admission, that he had been previously convicted of an "infamous crime."

The joindering of this charge was unfair and should have been challenged.

VIII. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL WHEN THEY FAILED TO ARGUE THAT HE WAS ENTITLED TO A NEW TRIAL DUE TO RETROACTIVE MISJOINDER

LEGAL STANDARD

Dismissal of some counts charged in the indictment does not automatically warrant reversal of convictions reached on remaining counts. See *United States v. Pelullo*, 14 F.3d 881, 897 (CA3 1994); *United States v. Friedman*, 845 F.2d 535, 581 (CA2 1988). The Wisconsin Court of Appeals stated the following concerning retroactive misjoinder, in *State v. McGuire*, 204 Wis. 2d 372, 380-81 (Ct. App. 1996):

> We conclude that where an appellate court has determined that conviction on one or more counts should be vacated, even if the defendant did no move for severance before the trial court, the defendant is entitled to a new trial on the remaining counts if the defendant shoes compelling prejudice arising form the evidence introduced to support the vacated counts. We adopt the three-factor analysis or [*United States v.*] *Vebeliunas* [, 76 F.3d 1283, 1293 (CA2 1996)] as the proper method for making this determination.
>
> The three factors to determine whether there is prejudicial spillover are:
> (1) Whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count;
> (2) The degree of overlap the similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and
> (3) The strength of the case on the remaining count.

In *United States v. Lane*, 474 U.S. 438, 449 (1986) the United States Supreme Court stated:

> [A]n error involving misjoinder 'affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750 at 776 (1946).

In *United States v. Pigee*, 197 F.3d 879 at 891 (CA7 1999), the court stated:

> We review the defendant's claim of misjoinder de novo. See *United States v. Sill*, 57 F.3d 553, 557 (CA7 1995). However, "a misjoinder 'requires reversal only if the misjoinder results in actual prejudice because it had substantial and

injurious effect or influence in determining the jury's verdict.'" *United States v. Schweihs*, 971 F.2d 1302, 1322 (CA7 1992), quoting *United States v. Lane*, 474 U.S. 438, 449.

ARGUMENT

In the present case Avery had been charged with mutilation of a corpse. The State's contention was that he destroyed the body of Halbach to cover for his crime. But the State failed to prove its case beyond a reasonable doubt here. Nonetheless, the State had presented evidence that supported this charge that could reasonably have influenced the jury to find Avery guilty on the charge he was convicted of. As a result, Avery is entitled to a new trial that is free of this noncumulative evidence that prejudiced him.

IX. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO DEVELOP AN ARGUMENT BASED ON AVAILABLE INFORMATION THAT THE STATE HAD PLANTED EVIDENCE

Avery's defense attorneys failed to develop evidence that the camera found in a burn barrel on or near his property had been taken from on John Campion. Further, that the tire that was supposedly burnt in the burn barrel couldn't have fit into that barrel. Finally, that a rubber tire burns too hot to leave the plastic components and the aluminum can seen in the evidence pictures in the form it was in. See Exhibits 4 through 10.

Avery asserts that there is evidence available to show that this tire hadn't burnt the contents of the barrel. Most important is that a tire burns exceptionally hot. The components and the can in the barrel would have been destroyed. Anyone whose burnt an aluminum can in a camp fire knows that it becomes ash from a wood fire alone. The idea that a tire fire would do less is absurd.

This opens up the finding of the "evidence" to attack. The State's contention being absurd, Mr. Campion's story becomes plausible. See Exhibits 11 and 12. The State could easily have burnt the phone and other evidence and planted it in the burn barrel.

As Avery had asserted the affirmative defense that he was being framed, it is only reasonable to present evidence and argument that the defense is valid.

Case 2005CF000381 Document 1073 Filed 03-16-2022 Page 118 of 145

X. AVERY WAS DENIED DUE PROCESS BECAUSE THE COURT WAS INCOMPETENT TO HEAR AN APPOINTED SPECIAL PROSECUTOR

LEGAL STANDARD

A circuit court has subject matter jurisdiction, conferred by the state constitution, to consider and determine any type of action; have, failure to comply with a statutory mandate may result in a loss of competency which can prevent a court from adjudicating a specific case before it. *State v. Kywanda F.*, 200 Wis.2d 26, 33 (1996).

Failure to comply with a statutory mandate may result in a loss of competency to proceed in a particular case. *State v. Zanelli*, 212 Wis. 2d 358, 365 (Ct. App. 1997). The Wisconsin Supreme Court has stated that a circuit court's "failure to follow plainly prescribed procedure which we consider central ... renders it incompetent..." *Arreola v. State*, 199 Wis. 2d 426, 441 (Ct. App. 1996).

ARGUMENT

On April 20th, 2006 judge Willis signed an Appointment of Special Prosecutor under Chapter 978 to allow attorney Thomas J. Fallon to act as special prosecutor on the case. See Exhibit 13. The "OATH TO CONSENT TO SERVE" was not signed by attorney Fallon. Therefore, the court was not competent to hear him under law. Avery's conviction must be overturned as this violated his procedural due process rights. Failure to object or otherwise raise this issue was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to ineffective assistance of post conviction counsel.

XI. AVERY WAS DENIED DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO HAVE AN UNBIASED JURY

LEGAL STANDARD

Under the United States Constitution a criminal defendant in a state court is guaranteed an impartial jury by the Sixth Amendment as applied to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Ristaino v. Ross*, 424 U.S. 589, 595 1976); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Principles of due process alos guarantee a defendant a fair trial by a panel of impartial jurors. In Wisconsin a defendant is entitled to a trial

Case 2005CF000381 Document 1078 Filed 08-16-2022 Page 120 of 145

by an impartial jury as a matter of state constitutional law under Sec. 7, art. I of the Wisconsin Constitution.

Wis. Stat. § 805.08 (1) states in relevant part:

> Qualifications, examination. The court shall examine on oath each person who is called as a juror to discover wither the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused.

ARGUMENT

A. A JURY FROM MANITOWOC COUNTY HAS A PRESUMPTIVE FINANCIAL INTEREST IN THE OUTCOME

Avery had a multi-million dollar lawsuit pending against Manitowoc County at the time that he was charged and brought to trial. The people of the county, who made up the jury that judged him, were liable to him if he won. Arguably, he was in an excellent position to do just that. His suit focused on the wrongful acts of law enforcement that were discovered due to the efforts of the innocent Project and revealed that his DNA did not match what was found on the victim.

Ultimately, the people of Manitowoc County would be forced to pony up for the wrong that was done to Avery. It may be true that their insurance would cover some or even all of the damages that Avery would have been awarded, however, that wouldn't mean that the people of the county wouldn't have been free of a financial hurt. Indeed, whatever isn't covered by the County's insurance would have been paid directly from the County itself. Further, the insurance rates would have gone up. The jury was composed of a group of twelve persons with a direct financial interest in the outcome. The jury's bias is evident and the case must be overturned.

Failure to raise and argue this issue was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

B. JUROR WARDMAN SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Wardman was a volunteer with the Manitowoc County Sheriff's Department and his son was a sergeant with the department as well. This connection statutorily precluded him from being a juror. Failure to move to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

C. JUROR MOHR SHOULD HAVE BEEN STRUCK FOR CAUSE.

Case 2005CF000381 Document 1113 Filed 08-16-2022 Page 121 of 145

Juror Mohr was married to the temporary Clerk of Court called in to relieve the work load created by Avery's trial. There was a great deal of concern on the part of the State concerning the implications of maintaining this person as a juror. In particular, the State was concerned that juror Mohr's participation would cause the case to be overturned due to his probable sympathy or additional knowledge of the inner workings of the Clerk of Court's office. The defense argued for maintaining juror Mohr despite the fact that he was acquainted with nearly every person that worked in the office.

There was also concerns that juror Mohr's wife had volunteered information concerning her personal knowledge of the vial of blood found in the Clerk's office. It should be noted that the fact that juror Mohr's wife had volunteered any such information is indicative of her inability to remain tight lipped concerning personal knowledge of evidence even when her husband is a juror. Further, it seems clear that the Mohr couple were lacking in the needed ethical boundaries that a Clerk of Court and a juror would have to have. Be it because they are just an open couple that freely speak or there is a dysfunctional and unhealthy lack of proper boundaries is irrelevant. For whatever reason Mrs. Mohr had shared information that was relevant to the outcome of this case.

Under the circumstances, it is clear that juror Mohr had personal relationships with several persons that worked in the Clerk of Court's office. The fact that they were merely acquaintances is irrelevant, given that his wife clearly spoke freely of her exposure to sensitive evidence. It is reasonable to infer from this that she also spoke about her coworkers in a positive light. Further, juror Mohr would be inclined to view them in a positive light regardless given that they must be persons of the same general personality as his wife. In other words, he would be inclined, as people are, to grant them deference by association. This was not explored nearly enough. And both the State and the judge shared reservations concerning keeping juror Mohr for trial.

Failure to agree to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

D. JUROR TEMME SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Temme had a professional relationship with Manitowoc County District Attorney Rohrer and Manitowoc County Clerk of Court Lynn Zigmunt. She had worked as a legal

Case 2005CF000381 Document 1073 Filed 01-19-2023 Page 122 of 145

assistant some years earlier with them, knew them on a first name basis, and felt that she could casually engage in conversation with them at any moment. Under these circumstances she should have been struck for cause.

Juror Temme was very clear that she believed that law enforcement officers are less likely to lie under oath than other persons. Indeed, she believed that they are inherently more honest than other persons and always be honest in their answers. She also was clear that there were no circumstances under which they would not be honest, in her mind.

In this juror's mind law enforcement officials are inherently "upstanding." She had a personal relationship with persons who work in the justice system. Her feelings and beliefs were unlikely to be overcome by a jury instruction, no matter what her answer was. Personal beliefs such as these are not fair or impartial. They don't protect a criminal defendant's constitutional rights to an unbiased jury.

Failure to agree to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

E. JUROR NELESEN SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Nelesen had a bias toward the State. He stated that he would be reluctant not to consider Avery's decision not to testify as the Court would instruct him. That is, he would view the right not to take the stand as an indication of guilt.

Further, he stated that he believed that law enforcement was less likely to lie under oath than other persons. Despite the fact that juror Nelesen eventually stated that he would try to view officers as just as likely to lie as anyone else, his initial reaction is very telling. He, in fact, has a friend who is a law enforcement officer. He already believed that a criminal defendant who wouldn't take the stand was trying to hide something. And he was also biased toward law enforcement officers as inherently more honest under oath than the average person.

Finally, this juror expected Avery to show who the actual killer was in this case. As noted by the court, Avery has no such burden under law. But this juror not only believed that law enforcement was more honest than most people but that they make less mistakes. This is evident in that this juror expected Avery to present more than just evidence of his actual innocence, he expected Avery to prove who the actual killer was. This bias, in conjunction with other biasing considerations noted herein, work to show that this juror was in fact a pro law

enforcement person who very much believes that when a person is accused by law enforcement he is more than just probably guilty. His personal philosophy was unlikely to be overcome by a jury instruction no matter what he said. It is clear by the shear number of biasing influences he spoke of that he had deeply rooted feelings on these issues. Under such circumstances, the presumption that a juror will follow a court's instructions should have been considered rebutted.

Failure to move to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

CONCLUSION

For the forgoing reasons Avery respectfully requests that this Honorable Court grant him the relief requested.

Respectfully submitted this 10 day of February, 2013.

Steven Avery

Steven Avery #122987
Wisconsin Secure Program Facility
P.O. Box 9900
1101 Morrison Dr.
Boscobel, WI 53805

Case 2005CF000381 Document 1113 Filed 01-24-2023 Page 124 of 145

CERTIFICATE OF SERVICE

I certify and state under penalty of perjury that on this day I served a copy of the within MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06 on the plaintiff at the address listed below, by way of prepaid first class mail;

District Attorney Mark Rohrer,
°/° Manitowoc County District Attorney's Office
325 Courthouse
1010 South 8 th Street
Manitowoc, WIS. 54220

Dated 2-10-2013

Steven Avery

Steven Avery # 122987
Wisconsin Secure Program Facility
P.O. Box 9900
1101 Morrison Dr.
Boscobel, Wis. 53805

Case 2005CF000381 Document 1073 Filed 01-18-2023 Page 125 of 145

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

STEVEN AVERY,
Defendant-Appellant.

APPENDIX TO DEFENDANT-APPELLANT'S MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06

391
(1)

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 125 of 145

EXHIBIT LIST

EXHIBIT NUMBER	EXHIBIT DESCRIPTION
1	Memorandum from Conrad Baetz to defense attorneys
2	Jail Inquiry concerning jail workers observing defense
3	Memo from Sheriff Pagel concerning Exhibit 3
4	Picture of burn barrel from distance
5	Picture of burn barrel with tire rim
6	Picture of burn barrel with tire rim
7	Picture of edge of tire rim
8	Picture of contents of burn barrel
9	Picture of contents of burn barrel
10	Picture of contents of burn barrel
11	E-mail to Baetz about Mr. Campion
12	E-mail from Baetz about Mr. Campion
13	Chapter 978 from
14	Personnel Commitee October 10, 2006? 9:00am Juror Wife Moho
15	Excused Juror March 16, 2007, 2 pages
16	Right doors no evidence tape on
17	Rear Cargo Door no evidence tape on
18	Left Door no evidence tape on
19	Left Door no evidence tape on
20	Right Door no evidence tape on
21	Front Hood no evidence tape on
22	Front Hood no evidence tape on
23	Dark cant see
24	No evidence tape on Vehicle
25	Dark cant see Time 17:38:15 on 2005-11-5
26	Dark cant see no evidence tape on Vehicle
27	My car Hood Seal Broken
28	Trunk lid Seal Broken
29	Right Door is good Seal
30	Left Door is Broken Seal

(2)

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).

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 128 of 145

No. 2017AP2288-CR

¶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.

[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

[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

> 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,

[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

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 132 of 145

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

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 134 of 145

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).

Case 2005CF000381 Document 1075 Filed 03-16-2022 Page 135 of 145

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

Case 2005CF000381 Document 1073 Filed 01-18-2023 Page 135 of 145

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.

Case 2005CF000381 Document 1073 Filed 03-10-2022 Page 137 of 145

¶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

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 138 of 145

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)

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 141 of 146

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

---

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.

Case 2005CF000381 Document 1073 Filed 08-16-2022 Page 142 of 145

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

Case 2005CF000381 Document 1072 Filed 08-18-2022 Page 143 of 146

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

[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.").

Case 2005CF000381 Document 1073 Filed 06-14-2022 Page 144 of 145

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.

Case 2005CF000381 Document 1073 Filed 08-15-2022 Page 145 of 145

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

Case 2005CF000381 Document 1073 Filed 01-18-2023 Page 145 of 146

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

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN	)	
	)	
Respondent	)	
	)	
-v-	)	Case No.: 05-CF-381
	)	
STEVEN A. AVERY	)	
	)	
Petitioner	)	

SEPARATE APPENDIX TO THIRD MOTION FOR POST-CONVICTION RELIEF

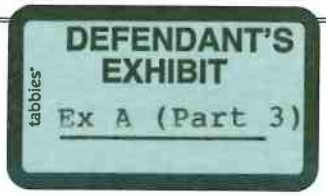
VOLUME II (APP 141 TO APP 288)

KATHLEEN T. ZELLNER
Lead Counsel
DOUGLAS H. JOHNSON
KATHLEEN T. ZELLNER &
ASSOCIATES, P.C.
4580 Weaver Parkway, Suite 204
Warrenville, IL 60555
(630) 955-1212

Counsel for Petitioner

STEVEN G. RICHARDS
Local Counsel
Casco, Wisconsin 54205
(920) 837-2653
Atty#: 1037545

Local Counsel for Petitioner



PEOPLE -v- STEVEN AVERY
INDEX TO APPENDIX
VOLUME I OF III

VOLUME II OF III

VOLUME III OF III

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

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 5 of 164

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

Case 2005CF000381 Document 1056 Filed 01-13-2023 Page 10 of 15

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]

[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.

Case 2005CF000381 Document 1074 Filed 01-19-2023 Page 15 of 154

¶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."

[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.

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

[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.

Case 2005CF000381 Document 1074 Filed 02-10-2023 Page 19 of 164

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

[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

---

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.

[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.

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 23 of 154

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

[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.)

Case 2005CF000381 Document 1074 Filed 02-15-2022 Page 25 of 154

¶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

[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

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 28 of 154

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.

Case 2005CF000381 Document 1074 Filed 09-16-2022 Page 33 of 154

¶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.

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. I resided in Manitowoc, Wisconsin for over 20 years.
3. In 2005, I was employed as a motor route driver at Gannett Newspapers, Inc. and delivered papers in and around the Avery Salvage Yard. While delivering papers, I drove my personal car, which was a tannish-gold 4-door sedan. I cannot recall the make and model of the car at this time.
4. On Saturday, November 5, 2005, I was delivering papers on the Avery Salvage Yard in the early morning hours before sunrise. I drove down Highway 147 and turned left onto Avery Road. Soon after I turned onto Avery Road, I witnessed an individual who I later realized was Bobby Dassey and another unidentified older male pushing a dark blue RAV-4 down Avery Road on the right side towards the junkyard. Bobby Dassey was EXHIBIT

shirtless, even though it was early November. The second man appeared to be in his 50's or early 60's, had a long grey beard, was wearing a worn puffy jacket, had a larger frame, and was around 6 feet in height. The RAV-4 did not have its lights on. Attached and incorporated herein as **Exhibit** A are photographs marked where I saw the RAV-4.

5. I drove down Avery Road towards the mailboxes, left the Herald Times in the mailbox, and turned back around. I felt very afraid as I approached the two individuals because Bobby Dassey attempted to step in front of my car, blocking my exit. I was within 5 feet of Bobby Dassey and my headlights were on the entire time. The older man ducked down behind the open passenger door. I swerved to the right and drove in the shallow ditch to avoid hitting Bobby Dassey. I called out, "Paperboy. Gotta go" because I was afraid for my safety. Bobby Dassey looked me in the eye, and I could tell with the look in his eyes that he was not happy to see me there. I knew that Bobby Dassey and the older individual were doing something creepy.
6. After I learned that Teresa Halbach's car was found on November 5, 2005, I contacted the Manitowoc Sheriff's Office and spoke to a female officer. I reported everything I have stated in this affidavit to the officer. The officer said, "We already know who did it." I provided my phone number and they said they would contact me soon. I never heard back from the police.
7. After watching Season 1 of Making a Murderer, I contacted Avery's trial attorneys to inform them of what I saw. I never heard back.
8. Nothing has been promised or given to me in exchange for this affidavit.

FURTHER AFFIANT SAYETH NAUGHT

Thomas Sowinski

State of Wisconsin
County of MANITOWOC

Subscribed and sworn before me
this 10 day of April, 2021.

Notary Public

My Commission Expires: 7/29/2022

JAMES R KIRBY
Notary Public
State of Wisconsin

Avery's Auto Salvage
Salvage yard in Manitowoc County, Wisconsin

EXHIBIT
A

shower and left to go deer hunting, bow hunting, about 15 minutes later. You are going to hear from Bobby that when he left 15 minutes later, Teresa's SUV was there, but Teresa was nowhere to be found.

You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive. You are going to hear from other citizens like that, other people that will help place this case into context for us.

Juries are triers of fact. You don't decide what the law is, the judge does that. But you decide what the facts of the case are. And the facts in this case aren't just going to point to who did it; it's not just a who done it case. It's a what happened and where it happened and when it happened.

But we're also going to provide you evidence, not just that Steven Avery did it, but to the exclusion of other people as well. In other words, positive evidence about who done know it, but also negative evidence of why that necessarily excludes others. And so you get to find those facts and at the end of this case, you

understand where some of these evidence -- or some of this evidence was found.

Finally, the kinds of witnesses that you are going to hear from, include citizens and law enforcement officers and records kinds of people; although, most of those will be agreed to between Mr. Strang and us, as well as expert witnesses.

You will hear from various kinds of citizens like Bobby Dassey, who is one of the sons of Barb Janda, who you will hear testimony about, that at about 2:45 on the 31st of October, Bobby saw a young girl drive up to the Avery property.

Bobby Dassey saw this young girl, later identified as Teresa Halbach, get out of her teal, or blue, or green colored SUV and actually take pictures of the van that her mom had for sale. Bobby Dassey is going to tell you, that after looking out the window and after seeing Teresa Halbach take these photographs of this vehicle and finish her job, that Teresa walked towards Steven Avery's trailer.

You will hear evidence that she was walking towards the main entrance of Steven Avery's trailer and that Bobby thereafter took a

shower and left to go deer hunting, bow hunting, about 15 minutes later. You are going to hear from Bobby that when he left 15 minutes later, Teresa's SUV was there, but Teresa was nowhere to be found.

You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive. You are going to hear from other citizens like that, other people that will help place this case into context for us.

Juries are triers of fact. You don't decide what the law is, the judge does that. But you decide what the facts of the case are. And the facts in this case aren't just going to point to who did it; it's not just a who done it case. It's a what happened and where it happened and when it happened.

But we're also going to provide you evidence, not just that Steven Avery did it, but to the exclusion of other people as well. In other words, positive evidence about who done know it, but also negative evidence of why that necessarily excludes others. And so you get to find those facts and at the end of this case, you

still sleeping? Or did you wake up?
A I was up by 2:30, yeah.
Q At 2:30, did you see something?
A Yes.
Q What did you see?
A I seen a vehicle pull up in our driveway.
Q Do you recall which window you were looking from?
A Through the front window, in front of the kitchen table.
Q Bobby, could you describe that vehicle for the jury please?
A It was a light green SUV, like a "teal" color.
Q How do you know that it was about 2:30 in the afternoon?
A Because I was going hunting that night, so that was the time I wanted to get up. I got up at "two".
Q All right. From which way did this blue or teal SUV drive in, as you were looking out the window?
A Toward the west it would be.
Q Can you tell the jury please from which direction your uncle's trailer is from your house?
A The west.
Q Did you know what kind of SUV it was?
A Not at the time.
Q All right. After seeing that vehicle driving up

Case 2005CF000381 Document 1111 Filed 01-24-2023 Page 43 of 151

the roadway, tell the jury what you saw then?

A I seen Teresa Halbach get out of the vehicle, and started taking pictures.

Q What was she taking pictures of?

A A maroon van.

Q A what?

A A maroon van.

Q Can you tell us about this vehicle? Where was it parked?

A It was parked right in front of our house.

Q Now you told this jury it was Teresa Halbach that had taken the pictures. How do you know that?

A Now, I know that. At the time, I didn't.

Q What did this woman look like?

A She was about maybe five-eight. She had brown, shorter-like hair. She had a black coat on, that went past the hips.

Q Was she wearing pants, or a skirt?

A She was wearing pants.

Q Now, about this van, what can you tell the jury about that van?

A It was a 1989 Plymouth Voyager. It had lots of miles on it. It was my mom's van. She had it for a couple of years. I don't know really much more about it.

Q All right. As you were looking out the window, you said that you saw a woman taking pictures. Can you describe that please?

A Well, I seen her take one picture of the front of the van. Then I went in and took a shower.

Q Okay. After seeing her taking some pictures, did you see her do anything else?

A She started -- Before I got in the shower, she actually started walking over to Steven's trailer.

Q You could see that from your location?

A Yeah. Through the window, yeah.

Q You said, "walking toward Steven's trailer". What does that mean?

A She walked toward it, to the door.

Q How close to the door did she get, before you stopped watching?

A Maybe 25 yards.

Q Did you see her enter your uncle's trailer?

A No.

Q Why not?

A Because I wanted to take a shower. I didn't pay no attention to it.

Q All right. Was there anybody with her at that time?

A No.

Q Was there anybody outside, or making contact with her, outside by the vehicle?
A No.
Q After seeing this woman walking toward your Uncle Steven's trailer, did you ever see this woman again?
A No.
Q How long was it that you were in the shower? Do you remember?
A Maybe three minutes, or four minutes.
Q Okay. What did you do then?
A Got dressed, and left, to go hunting.
Q Now, when you left to go hunting, did you have a vehicle on the premises?
A Yes.
Q Can you tell the jury what kind of vehicle it was?
A A black Chevy Blazer.
Q Where was that parked?
A It was parked right between the house and the garage.
Q About what time do you think you left to go hunting?
A Probably twenty to three, quarter to three.
Q Quarter to three? Bobby, how do you know that was the time? Why is that time important as it

PATRICK L. WILLIS, CIRCUIT JUDGE

MANITOWOC COUNTY COURTHOUSE
1010 SOUTH 8TH STREET, BOX 2000
MANITOWOC, WISCONSIN 54221-2000
PHONE (920) 683-2758

DIANE TESHENECK
REPORTER — (920) 683-4043

CIRCUIT COURT
BRANCH 1

State of Wisconsin v. Steven A. Avery

Case No. 05 CF 381

Re: Jury Question No. 1

Dear Jury Members:

This is in response to your request for a transcript of Bobby Dassey's testimony.

As the court has instructed you:

"You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. You may ask to have specific portions of the testimony read to you. You must continue to rely primarily on your memory of the evidence and testimony introduced during the trial."

The court does not have and cannot provide you with a transcript of Bobby Dassey's entire testimony. If you can identify a specific portion of his testimony, the court will attempt to address your request.

Please do not disclose the state of your deliberations in any such request.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
MAR 16 2007
CLERK OF CIRCUIT COURT

Judge Patrick L. Willis

3/16/07

254
(1)

Could we please read
of hear a transcript
of Bobby Dassey's testimony?

Thank You

Dan

3/16/07
1:29 pm

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
MAR 16 2007
CLERK OF CIRCUIT COURT

(2)

384-2

05-1174/273

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

SEARCH WARRANT

TO THE SHERIFF OR ANY CONSTABLE OR ANY PEACE OFFICER OF SAID COUNTY:

WHEREAS, Special Agent Tom Fassbender of the Wisconsin Department of Justice, being duly sworn, has this day complained, in writing, to the said Court, that on April 21, 2006, in and upon certain premises located at 12930A Avery Road, Town of Gibson, County of Manitowoc, State of Wisconsin, occupied and maintained by Barbara Janda (DOB: 11-07-1964), and also occupied by Brendan R. Dassey (DOB: 10-19-1989), evidence more particularly described as follows:

> a single family trailer with gray vinyl siding with maroon shutters. The numbers 12930A are located on the front of the residence. 12930A Avery Road has a detached garage with gray siding, two white garage doors and white trim around the windows and doors.

There are now located and concealed certain things, to-wit:

> A computer currently located in the residence at 12930A Avery Road in the Town of Gibson, County of Manitowoc, State of Wisconsin, which items to be searched are more particularly described as:
>
> Electronic processing and storage devices, central processing units; internal and peripheral storage devices such as fixed disks, external hard disks, floppy disk drives and diskettes, tape drives and tapes, optical storage devices or other memory devices; peripheral input/output devices such as keyboards, mouse, printers, video display monitors, optical readers, digital/photograph scanners and related communication devices such as modems together with system documentation, operating logs and documentation, software and instruction manuals and password documentation. Also included would be CD roms and all records, whether stored on paper, on magnetic media such as tape, cassette, disk, diskette or on memory storage devices such as optical disks, or any other storage media together with indicia of use, ownership, possession or control of such records;
>
> Personal records and information, as well as computer hardware and magnetic media capable of storing data which may be utilized to store information including but not limited to, personal activities, criminal activities, electronic and e-mail communications; images of sexually explicit material including, but not limited to, images, records and messages;

which things may constitute evidence of crimes committed, including but not limited to: violations of sec. 940.01, 940.225, 940.30, 940.31 Wis. Stats., and prays that a Search Warrant be issued to allow officers to seize the computer and peripheral devices.

NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to search said residence for said evidence, and if the same or any portion thereof are found, to safely process, search and keep said material so long as necessary for the purpose of being produced as evidence on any trial or until further order of the Court.

EXHIBIT
2

STATE7087

Dated this 21 day of April, 2006.

/s/ JLF

JUDGE
MANITOWOC COUNTY, WISCONSIN

ENDORSEMENT

Received by me, _____, April_____, 2006.

at _____ o'clock ____M.

_____

a. Information about the acquisition of the Seagate 40 GB HDD S/N 5LAG2KR6 removed from an HP Pavilion computer tower, along with photos and evidence intake forms;

b. 14,099 images recovered from the computer categorized as "Recovered Images"

c. 1,625 additional images categorized as "Recovered Pornography;"

d. 2,632 search results for terms:

i. Blood (1 result);
ii. Body (2083 results);
iii. Bondage (3 results);
iv. Bullet (10 results);
v. Cement (23 results);
vi. DNA (3 results);
vii. Fire (51 results);
viii. Gas (50 results);
ix. Gun (75 results);
x. Handcuff (2 results);
xi. Journal (106 results);
xii. MySpace (61 results);
xiii. News (54 results);
xiv. Rav (74 results);
xv. Stab (32 results);
xvi. Throat (2 results); and
xvii. Tires (2 results).

e. 317 entries identified as Internet History;

f. 9 documents identified as "Nigerforlife Chat Logs" as well as parsed "MSN Chat Logs;" and

g. Miscellaneous data retrieved from the Windows Registry.

Inspector and all twelve CD's contained audio files on each of the CD's. That information was also recorded and attached to the final report."

Conclusion

22. 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 Velic's opinion, were relevant to the investigation of Ms. Halbach's murder.

23. 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.

FURTHER AFFIANT SAYETH NAUGHT

Gary Hunt

State of Illinois
County of Cook

Subscribed and sworn before me
this 2 day of July, 2018.

Notary Public

OFFICIAL SEAL
SCOTT T PANEK
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES 02/13/21

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

SUPPLEMENTAL AFFIDAVIT OF GARY HUNT

Now comes your affiant, Gary Hunt, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge and to a reasonable degree of certainty in the field of computer science. The factual statements herein are true and correct to the best of my knowledge, information, and belief.
2. In my original affidavit (Exhibit Q to Motion for Reconsideration), I made a typographical error at ¶ 11(c). My affidavit should read: "On September 18, 2005, between 5:57 AM and 10:04 AM, the HP_Owner user conducted 75 unique Google searches."
3. Using 2017 technology, I have detected eight periods in 2005 when computer records are missing and presumably deleted from the Dassey computer: August 23-26; August 28-September 11; September 14-15; September 24-

October 22; October 23-24; October 26-November 2; November 4-13; and November 15- December 3.

4. On October 31, 2005, the Dassey computer was used to access the internet at 6:05 a.m., 6:28 a.m., 6:31 a.m., 7:00 a.m., 9:33 a.m., 10:09 a.m., 1:08 p.m., and 1:51 p.m.

FURTHER AFFIANT SAYETH NAUGHT

Gary Hunt

Subscribed and sworn before me
this 30th day of October, 2017.

Notary Public

OFFICIAL SEAL
DARA STIGDON
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires Oct 28, 2019

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
LCA17-009022

TYPE OF ACTIVITY: Interview of Bryan J. Dassey

DATE OF ACTIVITY: 11/03/17

REPORTING OFFICER: Special Inv. John Dedering

On Friday, 11/03/17 at 0959 hours, I (Special Inv. JOHN DEDERING of the CALUMET COUNTY SHERIFF'S DEPARTMENT), along with Sgt. Inv. ERIC VOLAND of the CALUMET COUNTY SHERIFF'S DEPARTMENT, interviewed BRYAN J. DASSEY, DOB 07/15/85, at his residence of 1516 Crystal Spring Road, Two Rivers, Wisconsin, 54241. BRYAN's current phone number is 920-973-2125.

BRYAN was initially reluctant to be interviewed concerning this matter and indicated he was not much of a witness and really had nothing to offer. BRYAN ultimately agreed to let us speak with him for approximately ten minutes.

BRYAN started out the interview by stating that he had never trusted law enforcement and was in fear of law enforcement even while we were seated at his dining room table. BRYAN stated, while he has no criminal record, this was just something he could not get past. BRYAN stated he had a lot of exposure to dishonest law enforcement in the past.

I questioned BRYAN regarding his affidavit, which is incorporated with this report. I asked BRYAN to review the affidavit to ensure that it was accurate. BRYAN stated that he, in fact, had reviewed the affidavit before signing it. BRYAN stated the signing was done with a notary at WELLS FARGO BANK in Two Rivers. I asked BRYAN if the individuals he talked with concerning the affidavit seemed pushy and overbearing to him and he indicated they were not. I asked BRYAN if the individuals had attempted to put words in his mouth and he indicated they had not.

I asked BRYAN about the statement of "on or about 11/04/05" and he indicated that he meant he recalled BOBBY telling him concerning seeing TERESA HALBACH driving away from the AVERY property sometime during the week of 10/31/05 through 11/06/05.

I asked BRYAN to describe his normal day and specifically if he had any recollections of 10/31/05. BRYAN indicated he normally left for work at approximately 0600 hours and then would come back to his mother's trailer to shower, change clothes and then leave for his girlfriend's residence. BRYAN stated he was not home on 10/31/05, other than waking up, leaving for work and returning to clean up after work. BRYAN stated he had no other memory of 10/31/05.

BRYAN indicated he has basically been on his own since he was approximately 17 and one-half years old. BRYAN indicated the reason he did not spend any time around his mother's, BARBARA JANDA, residence was that he could not stand SCOTT TADYCH and was not

EXHIBIT
14

737-69

Case 2005CF000381 Document 1074 Filed 03-18-2022 Page 53 of 154

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
LCA17-009022

happy with his mother's conduct of still being married while being involved with SCOTT. BRYAN stated he spent enough time at his mother's residence to clean up and then leave on the majority of the days.

I asked BRYAN if he could remember what day the deer carcass was placed in the DASSEY garage and he indicated he could not remember.

I asked BRYAN about the statement concerning BOBBY DASSEY indicating he had seen TERESA leave the AVERY property. BRYAN stated he could not remember where the conversation took place and further indicated that he could not recall if it was in person or over the phone. BRYAN indicated it was sometime within the week of 11/04/05. I asked BRYAN if the conversation took place before or after TERESA's car was found and he indicated that he was unsure about that. I asked BRYAN if BOBBY could have possibly said that he left and not TERESA. BRYAN indicated he was sure BOBBY said he saw TERESA leave.

I, again, asked BRYAN if he had any recollection of when and where this conversation took place and he indicated he was not at all sure. BRYAN stated he remember "bits and pieces." At one point during the conversation, BRYAN made the statement that if "he did it he should stay in prison and if not, someone is still out there who needs to answer for this."

I asked BRYAN how long he would stay at his mother's residence if he was not sleeping there. BRYAN indicated he would basically just clean up and go. BRYAN stated sometimes he would have a meal but indicated that did not happen very often. I asked BRYAN if he could recall whether he had seen BOBBY at the residence on Halloween, 10/31/05. BRYAN stated he could not recall if he was even there on Halloween. BRYAN stated it was common to see BOBBY because he believed that, at that time, BOBBY was working second shift.

I asked BRYAN where the computers were located in his mother's house. BRYAN stated he had no idea. I asked BRYAN how many computers were at his mother's residence and BRYAN had no idea about that either. BRYAN stated, however, he recalled one laptop computer being at the residence.

I asked BRYAN if he had been at STEVEN AVERY's bonfire anytime on 10/31/05 and he indicated "no." I asked BRYAN if he recalled seeing smoke coming from behind STEVEN's garage on 10/31/05 and he indicated he "did not recall." I asked BRYAN if he recalled saying that STEVEN seemed odd during the time they were in Crivitz on 11/04/05 through 11/06/05. BRYAN indicated it was not unusual for STEVEN to act odd, which he attributed to being incarcerated for something he had not done.

I asked BRYAN about him stating that STEVEN "freaked out" when he heard authorities were coming to the cabin in Marinette. BRYAN stated he had no memory of this statement.

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff.	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz.
STEVEN A. AVERY.	)	Judge Presiding
	)	
Defendant.	)	

SECOND SUPPLEMENTAL AFFIDAVIT OF GARY HUNT

Now comes your affiant, Gary Hunt, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge and to a reasonable degree of certainty in the field of computer science. The factual statements herein are true and correct to the best of my knowledge, information, and belief.

Steven Avery's computer

2. I have reviewed a computer forensic report of Steven Avery's computer prepared by Detective Mike Velie of the Grand Chute Police Department Based upon my review of Det. Velie's report, I can find no records of internet searches for pornographic and/or sexual images being accessed. Specifically, based upon my review of the internet browser, cache, and cookie history

EXHIBIT

outlined in Det. Velie's report of Steven Avery's computer, no apparent searches for pornographic and/or sexual images were made and no websites with apparent pornographic and/or sexual content were accessed. (Internet History Report of Steven Avery's computer and computer forensic report of Detective Velie, attached and/or incorporated herein as Group Exhibit 11).

Dassey computer

3. I have conducted further analyses of the internet records from the Dassey computer, specifically the searches performed on a weekday between the hours of 6:00 a.m. and 3:45 p.m.:

   a. 667 searches related to sexual content were performed on weekdays from 6:00 a.m. to 3:45 p.m. 562 of the searches were performed on 10 weekdays: 8/16/2005 (4 searches); 9/13/2005 (12 searches); 2/23/2005 (48 searches); 3/29/2006 (37 searches); 3/30/2006 (23 searches); 4/3/2006 (93 searches); 4/5/2006 (96 searches); 4/6/2006 (14 searches); 4/13/2006 (39 searches); 4/19/2006 (196 searches). (Spreadsheet listing weekday from 6:00 a.m. to 3:45 p.m. searches attached and incorporated herein as part of Group Exhibit 12 to this affidavit);

4. I identified the following categories of searches:

   a. 22 search terms describing forcing sex toys and objects into vaginas;

   b. 37 searches for terms describing violent accidents, specifically violent car crashes with images of dead bodies;

c. 13 searches for terms describing drowned, dead, or diseased female bodies; and

d. 65 searches for terms describing the infliction of violence on females, including fisting and images of females in pain.

(Spreadsheets listing searches for categorized terms, attached and incorporated herein as Group Exhibit 18).

5. I would like to clarify my opinion regarding the images of Teresa Halbach stored on the Dassey computer as expressed in ¶ 11(e) of my original affidavit. The primary purpose of my opinion was to refute the assertion made by Special Agent Thomas Fassbender in his report labeled #05-1776/304, wherein he stated that the photographs of Teresa Halbach and Steven Avery had an "apparent date of April 18, 2006." Based upon my examination of the Dassey computer, there is no evidence that the images of Teresa Halbach which I discovered were saved to the Dassey computer on April 18, 2006. Det. Velie did not provide copies of the images he discovered. If they are indeed the same images, Det. Velie could not have determined the images' original path, file name, and created, accessed, or modified timestamps.

6. Additionally, in my supplemental affidavit, I made a typographical error when correcting ¶ 11(c) of the original affidavit. My affidavit should read "On

September 18, 2005, between 5:57AM and 10:04 PM, the HP_Owner user conducted 75 unique Google searches."

FURTHER AFFIANT SAYETH NAUGHT

Gary Hunt

State of Illinois
County of Cook

Subscribed and sworn before me
this 16th day of November, 2017.

Notary Public

OFFICIAL SEAL
DARA STIGDON
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires Oct 26, 2019

Verbatim

Group Exhibit 11 to Second Supplemental Affidavit of Gary Hunt

EXHIBIT
Hunt
Group 11

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 61 of 154

Category A — Search terms describing forcing sex toys and objects into vaginas

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
1	big things in pussy	http://images.google.com/images?q=big+things+in+pussy+&btnG=Se	4/13/2006 13:22	Thursday
2	big things in pussy	http://images.google.com/images?q=big+things+in+pussy+&svnum=1	4/13/2006 13:23	Thursday
3	big woman naked	http://images.google.com/images?q=big+woman+naked&svnum=108	4/20/2006 12:40	Thursday
4	huge dildo in pussys	http://images.google.com/images?q=huge+dildo+in+pussys&svnum=	4/13/2006 13:24	Thursday
5	huge dildo in pussys	http://images.google.com/images?q=huge+dildo+in+pussys&svnum=	4/13/2006 13:24	Thursday
6	huge dildo in pussys	http://images.google.com/images?q=huge+dildo+in+pussys&svnum=	4/13/2006 13:26	Thursday
7	streaching pussy	http://images.google.com/images?q=streaching+pussy&svnum=10&h	4/19/2006 11:40	Wednesday
8	stretching pussy	http://images.google.com/images?svnum=10&hl=en&safe=off&sa=X&	4/19/2006 11:41	Wednesday
9	stretching pussy toys	http://images.google.com/images?q=stretching+pussy+toys&svnum=	4/19/2006 11:42	Wednesday
10	woman dildo	http://images.google.com/images?svnum=10&hl=en&lr=&q=woman+	8/14/2005 8:39	Sunday
11	womans dildo	http://images.google.com/images?svnum=10&hl=en&lr=&q=womans	8/14/2005 8:38	Sunday
12	woman's dildo	http://images.google.com/images?svnum=10&hl=en&q=woman%27s	8/14/2005 8:38	Sunday
13	woman's dildo	http://images.google.com/images?svnum=10&hl=en&lr=&q=woman%	8/14/2005 8:39	Sunday
14	slut useing sex objects	http://images.google.com/images?q=slut+useing+sex+objects&svnum	9/14/2005 19:47	Wednesday
15	slut sex objects	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	9/14/2005 19:48	Wednesday
16	Extreme anal toys	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	4/18/2006 16:57	Tuesday
17	Extreme anal toy	http://images.google.com/images?q=Extreme+anal+toy&btnG=Searcl	4/18/2006 17:00	Tuesday
18	Extreme anal toys	http://images.google.com/images?q=Extreme+anal+toys&svnum=10&	4/18/2006 17:00	Tuesday
19	Extreme anal toy	http://images.google.com/images?q=Extreme+anal+toy&svnum=10&	4/18/2006 17:03	Tuesday
20	object pussy	http://images.google.com/images?q=object+pussy&svnum=10&hl=en	4/18/2006 17:10	Tuesday
21	streching pussy	http://images.google.com/images?q=streching+pussy&svnum=10&hl=	4/18/2006 17:16	Tuesday
22	stretching pussy	http://images.google.com/images?svnum=10&hl=en&safe=off&sa=X&	4/18/2006 17:17	Tuesday

EXHIBIT
Hunt
Group 12

Category B — Searches for terms describing violent accidents

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
1	accident	http://images.google.com/images?q=accident&svnum=10&hl=en&lr=	4/16/2006 10:17	Sunday
2	car accident	http://images.google.com/images?q=car+accident&btnG=Search&svn	4/16/2006 10:16	Sunday
3	fast accident	http://images.google.com/images?q=fast+accident&svnum=10&hl=er	4/16/2006 10:17	Sunday
4	fast car accident	http://images.google.com/images?svnum=10&hl=en&lr=&newwindo	4/16/2006 10:17	Sunday
5	ford empo car accident	http://images.google.com/images?q=ford+empo+car+accident&svnur	4/16/2006 10:16	Sunday
6	ford tempo accident	http://images.google.com/images?q=ford+tempo++accident&svnum=	4/16/2006 10:17	Sunday
7	ford tempo car accident	http://images.google.com/images?svnum=10&hl=en&newwindow=1	4/16/2006 10:16	Sunday
8	race car accident	http://images.google.com/images?q=race+car+accident&svnum=10&	4/16/2006 10:15	Sunday
9	race car accidents	http://images.google.com/images?svnum=10&hl=en&newwindow=1	4/16/2006 10:14	Sunday
10	race car accsidents	http://images.google.com/images?q=race+car+accsidents&svnum=10	4/16/2006 10:14	Sunday
11	seeing bones hot girls	http://images.google.com/images?svnum=10&hl=en&safe=off&q=see	2/23/2006 12:20	Thursday
12	seening bones hot girls	http://images.google.com/images?q=seening+bones+hot+girls&svnur	2/23/2006 12:20	Thursday
13	tempo car accident	http://images.google.com/images?q=tempo+car+accident&svnum=10	4/16/2006 10:16	Sunday
14	car accidents	http://images.google.com/images?svnum=10&hl=en&safe=off&q=car	2/22/2006 20:14	Wednesday
15	car accidents	http://images.google.com/images?svnum=10&hl=en&safe=off&q=car	2/22/2006 20:14	Wednesday
16	car accidents	http://images.google.com/images?q=car+accidents&svnum=10&hl=en	2/22/2006 20:15	Wednesday
17	car accidents	http://images.google.com/images?q=car+accidents&svnum=10&hl=en	2/22/2006 20:15	Wednesday
18	car accidents	http://images.google.com/images?q=car+accidents&svnum=10&hl=en	2/22/2006 20:18	Wednesday
19	car accident	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	2/22/2006 20:25	Wednesday
20	car accident	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	2/22/2006 20:25	Wednesday
21	alive skeleton	http://images.google.com/images?q=alive+skeleton&hl=en	9/17/2005 20:24	Saturday
22	alive skeleton	http://images.google.com/images?q=alive+skeleton&hl=en	9/17/2005 20:24	Saturday
23	alive skeleton	http://images.google.com/images?q=alive+skeleton&svnum=10&hl=en	9/17/2005 20:24	Saturday
24	alive skeleton	http://images.google.com/images?q=alive+skeleton&svnum=10&hl=en	9/17/2005 20:24	Saturday
25	alive skeleton	http://images.google.com/images?q=alive+skeleton&svnum=10&hl=en	9/17/2005 20:24	Saturday
26	alive skeleton	http://images.google.com/images?q=alive+skeleton&svnum=10&hl=en	9/17/2005 20:24	Saturday
27	skeleton	http://images.google.com/images?q=skeleton&hl=en	9/17/2005 20:24	Saturday
28	skeleton	http://images.google.com/images?q=skeleton&hl=en	9/17/2005 20:25	Saturday

Category C — Searches for terms describing drowned or dead female bodies

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
1	drawned girls	http://images.google.com/images?q=drawned+girls&svnum=10&hl=e	4/19/2006 10:43	Wednesday
2	drawned pussy	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	4/19/2006 10:48	Wednesday
3	drowned	http://images.google.com/images?q=drowned&svnum=10&hl=en&lr=	4/19/2006 10:47	Wednesday
4	drowned girl	http://images.google.com/images?q=drowned+girl&svnum=10&hl=er	4/19/2006 10:44	Wednesday
5	drowned girl	http://images.google.com/images?q=drowned+girl&svnum=10&hl=er	4/19/2006 10:45	Wednesday
6	drowned girl nude	http://images.google.com/images?q=drowned+girl+nude&svnum=10(	4/19/2006 10:44	Wednesday
7	drowned girls	http://images.google.com/images?svnum=10&hl=en&safe=off&sa=X&	4/19/2006 10:43	Wednesday
8	drowned pussy	http://images.google.com/images?svnum=10&hl=en&safe=off&sa=X&	4/19/2006 10:48	Wednesday
9	deseised girls	http://images.google.com/images?q=deseised+girls&svnum=10&hl=e	2/27/2006 19:07	Monday
10	dessesed girls	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	2/27/2006 19:07	Monday
11	diseased girls	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	2/27/2006 19:08	Monday
12	diseased girl	http://images.google.com/images?q=diseased+girl&svnum=10&hl=en	2/27/2006 19:09	Monday
13	rotton	http://images.google.com/images?hl=en&lr=&safe=off&q=rotton&sa=	2/19/2006 21:30	Sunday

Category D -- Searches for terms describing the infliction of violence on females, including fisting and images of females in pain

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
1	fist	http://images.google.com/images?svnum=10&hl=en&lr=&newwindo	4/9/2006 11:02	Sunday
2	fist	http://images.google.com/images?svnum=10&hl=en&lr=&newwindo	4/9/2006 11:02	Sunday
3	fist fucking sluts	http://images.google.com/images?q=fist+fucking+sluts&hl=en	9/15/2005 7:54	Thursday
4	fist fucky	http://images.google.com/images?q=fist+fucky&svnum=10&hl=en&lr	4/9/2006 11:01	Sunday
5	fist fucky	http://images.google.com/images?q=fist+fucky&svnum=10&hl=en&lr	4/9/2006 11:01	Sunday
6	fist sex	http://images.google.com/images?q=fist+sex&svnum=10&hl=en&lr=&	9/13/2005 8:14	Tuesday
7	fist sex	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	9/13/2005 8:14	Tuesday
8	fisting	http://images.google.com/images?q=fisting&svnum=10&hl=en&lr=&l	4/9/2006 11:02	Sunday
9	fisting	http://images.google.com/images?q=fisting&svnum=10&hl=en&lr=&r	4/9/2006 11:02	Sunday
10	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/30/2006 9:21	Thursday
11	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/30/2006 9:21	Thursday
12	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/30/2006 9:22	Thursday
13	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/30/2006 9:22	Thursday
14	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/30/2006 9:21	Thursday
15	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/30/2006 9:21	Thursday
16	girls moon face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/20/2006 16:34	Monday
17	hot girls moon	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/20/2006 16:34	Monday
18	girls groming face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/20/2006 16:35	Monday
19	girls mooning	http://images.google.com/images?q=girls+mooning&svnum=10&hl=e	3/20/2006 16:38	Monday
20	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:10	Tuesday
21	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:10	Tuesday
22	fist fuck	http://images.google.com/preferences?q=fist+fuck&hl=en&lr=	3/28/2006 16:10	Tuesday
23	fist fuck	http://images.google.com/preferences?q=fist+fuck&hl=en&lr=	3/28/2006 16:10	Tuesday
24	fist fuck	http://images.google.com/setprefs?hl=en&lang=all&safe=off&num=1	3/28/2006 16:10	Tuesday
25	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10	3/28/2006 16:11	Tuesday
26	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10	3/28/2006 16:15	Tuesday
27	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:15	Tuesday
28	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:15	Tuesday
29	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:16	Tuesday
30	fist fuck	http://images.google.com/advanced_image_search?q=fist+fuck&svnu	3/28/2006 16:17	Tuesday
31	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:17	Tuesday
32	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&start=40&	3/28/2006 16:17	Tuesday

Case 2005CF000381 Document 1111 Filed 01-24-2023 Page 66 of 149

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
33	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&start=40&	3/28/2006 16:17	Tuesday
34	fist fuck	http://images.google.com/preferences?q=fist+fuck&hl=en&lr=&safe=	3/28/2006 16:17	Tuesday
35	fist fuck	http://images.google.com/preferences?q=fist+fuck&hl=en&lr=&safe=	3/28/2006 16:17	Tuesday
36	fist fuck	http://images.google.com/setprefs?hl=en&lang=all&safe=images&nu	3/28/2006 16:17	Tuesday
37	fist	http://images.google.com/images?q=fist+&svnum=10&hl=en&lr=	3/28/2006 16:18	Tuesday
38	fist	http://images.google.com/images?q=fist+&svnum=10&hl=en&lr=	3/28/2006 16:18	Tuesday
39	Girl action hert	http://images.google.com/images?q=Girl+action+hert&svnum=10&hl	3/29/2006 16:11	Wednesday
40	Girl action hert	http://images.google.com/images?q=Girl+action+hert&svnum=10&hl	3/29/2006 16:11	Wednesday
41	Girl action hert	http://images.google.com/images?q=Girl+action+hert&svnum=10&hl	3/29/2006 16:11	Wednesday
42	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:12	Wednesday
43	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:12	Wednesday
44	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:12	Wednesday
45	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/29/2006 16:12	Wednesday
46	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/29/2006 16:12	Wednesday
47	Girl hurt	http://images.google.com/images?q=Girl+hurt&svnum=10&hl=en&lr=	3/29/2006 16:13	Wednesday
48	Girl hurt	http://images.google.com/images?q=Girl+hurt&svnum=10&hl=en&lr=	3/29/2006 16:13	Wednesday
49	Girl hurt	http://images.google.com/images?q=Girl+hurt&svnum=10&hl=en&lr=	3/29/2006 16:13	Wednesday
50	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/29/2006 16:13	Wednesday
51	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/29/2006 16:13	Wednesday
52	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/29/2006 16:13	Wednesday
53	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/29/2006 16:14	Wednesday
54	Girl moning face\	http://images.google.com/images?q=Girl+moning+face%5C&svnum=1	3/29/2006 16:16	Wednesday
55	Girl moning face\	http://images.google.com/images?q=Girl+moning+face%5C&svnum=1	3/29/2006 16:16	Wednesday
56	Girl moning face\	http://images.google.com/images?q=Girl+moning+face%5C&svnum=1	3/29/2006 16:16	Wednesday
57	Girl moning face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:17	Wednesday
58	Girl moning face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:17	Wednesday
59	Girl moning face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:17	Wednesday
60	girl guts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:29	Wednesday
61	girl guts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:29	Wednesday
62	girl guts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:29	Wednesday
63	girl gut	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:30	Wednesday
64	girl gut	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:30	Wednesday
65	girl gut	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:30	Wednesday

at the Dassey residence. Bobby's younger brothers, Blaine and Brendan, were at school, Bobby's mother was at work, his older brother, Bryan, no longer lived at the residence, and Tom Janda, who moved out on October 15, 2005, was at work.

4. Based upon Mr. Hunt's findings, 667 sexual image searches were performed on weekdays from 6:00 a.m. to 3:45 p.m. Of those searches, 562 were performed on 10 weekdays: 8/16/2005 (4 searches); 9/13/2005 (12 searches); 2/23/2005 (48 searches); 3/29/2006 (37 searches); 3/30/2006 (23 searches); 4/3/2006 (93 searches); 4/5/2006 (96 searches); 4/6/2006 (14 searches); 4/13/2006 (39 searches); 4/19/2006 (196 searches).

5. The 562 searches on 10 days demonstrate the obsessively compulsive nature of Bobby Dassey's internet searches and his fascination with sexual acts that involve the infliction of pain, torture and humiliation on females and an equally disturbing fascination with viewing dead female bodies.

6. The internet searches done on the Dassey computer, which were focused on viewing images in which pain, torture, humiliation and death are inflicted upon women, should have raised a red flag about Bobby's involvement in Ms. Halbach's murder. Bobby cannot be excluded from the following searches:

   a. 22 search terms describing forcing sex toys and objects into vaginas;

   b. 28 searches for terms describing violent accidents, specifically violent car crashes with images of dead bodies;

Case 2005CF000381 Document 1074 Filed 08-15-2022 Page 35 of 154

at that time?
A Yes, I was. I worked at Fischer Hamilton's, third shift.
Q What time would you start work on any day?
A I would start at ten at night and work until six in the morning.
Q On October thirty-first of 2005, could you tell the jury if you were home during the daytime hours?
A Yes, I was.
Q And how late, or how long were you home until?
A I was home until 2:30 that day.
Q What were you doing before 2:30?
A I was sleeping.
Q When you say "2:30", are you talking about the afternoon or morning?
A In the afternoon.
Q To your knowledge, Bobby, was anybody else at home with you?
A No.
Q Do you remember anything unusual that happened at about 2:30 that afternoon?
A A vehicle had drove up, and started taking pictures of the van.
Q All right. Let's back up just a minute. Were you

Case 2005CF000381 Document 1074 Filed 08-18-2022 Page 56 of 154

my grandma's house, right there.
Q. Same place?
A. Mm-hmm.
Q. You have to say yes or no.
A. Yes.
Q. Now, your trailer is a little bit west, or a little bit further down from that intersection; do you know why the bus picks you up and drops you off up near your grandma's trailer?
A. I'm not sure.
Q. They just do?
A. Yeah.
Q. Blaine, how do you get to and from the bus from your house?
A. I walk down the road.
Q. Okay. Now, back in October of 2005, was there somebody else in your house who also went to school with you?
A. Yes.
Q. Who was that?
A. Brendan.
Q. And who's Brendan?
A. My brother.
Q. At Mishicot School, Blaine, do you know about what time school lets out?

A. 3:05.
Q. And after school lets out, and I'm going to specifically ask you about October 31st of 2005; do you remember what time you came home that day?
A. 3:40.
Q. 3:40? That's 20 to 4 in the afternoon; is that right?
A. Yup.
Q. You have to answer out loud?
A. Yes.
Q. Do you remember coming home that day, Blaine?
A. Yes.
Q. And could you tell the jury how you got home that day?
A. The school bus.
Q. And did anybody come home on the school bus with you?
A. Yes, Brendan.
Q. After you and Brendan got home, at about 3:40, can you tell the jury what you did, please?
A. We walked down the road.
Q. And why don't you use your laser pointer again and tell the jury, when you walked down the road, where did you walk?
A. Down here, right there.

On Sunday, November 6, 2005, at approximately 12:20 p.m., S/A Kim J. Skorlinski and S/A Debra K. Strauss interviewed Bryan J. Dassey, DOB 07/15/1985, the nephew of Steven Avery, regarding this investigation. Bryan lives with his mother, Barbara Janda, and three brothers on the Avery Auto Salvage property. His house is adjacent to Steven's house. Prior to the interview, Bryan was driving Steven's blue 1993 Pontiac Grand Am and was stopped by the Marinette County Sheriff's Department pursuant to a search warrant for that vehicle.

At first Bryan said he did not know anything about what was going on, but then agreed to talk to the special agents. During the interview, S/A Skorlinski and Bryan sat in the front seat of S/A Skorlinski's state vehicle and S/A Strauss sat in the backseat. S/A Skorlinski explained to Bryan the search warrant for the Pontiac Grand Am, and he stated he understood why the car had to be seized. He said he and his brother Brendan were on their way to a local store, Tall Oaks, to buy soda when they were stopped.

Bryan said he rode up to the Avery residence at N9493 Highline Road, Town of Stephenson (Crivitz), on Saturday morning, November 5, 2005, with Steven and his grandmother, Delores Avery. He said when they got to the residence, his grandfather, Allan Avery; and his uncle, Charles "Chuck" Avery; and his brother, Brendan were already there. Bryan said his grandfather came to the residence on Thursday night, November 3, 2005, and Chuck and Brendan came on Friday night, November 4, 2005. Bryan said the plan was for all family members to stay at the residence until today and then travel back to their residences at Avery's Auto Salvage in Two Rivers, Manitowoc County.

S/A Skorlinski asked how he could contact Bryan's mother, Barb, and he said S/A Skorlinski said he could call her on her cell phone, 920-973-1740, or else her boyfriend, Scott's cell phone (b/t/b Scott Tadych), 920-973-2222. Bryan said his mom and step-dad are getting a divorced. He said his biological dad is not around much.

Bryan lives at Avery's Auto Salvage property with his mom, and brothers Brendan (15½ years old), Blaine (16 years old) and Bobby (19 years old). Bryan said he is not around the residence or the auto salvage yard much because he works at Woodland Face Veneer, Two Rivers. He said he leaves for work at 6:00 a.m. and then after work he is usually at his girlfriend's house until late in the evening.

Bryan was asked about the other vehicles at the Avery residence on Highline Lane, and he said Chuck's flatbed tow truck and Allan's Chevrolet pick up truck are still there. Byran was asked about a black Ford pick up truck at Steven's residence at the auto salvage yard. He said that pick up truck is owned by Steven and should be at the residence because Steven drove his Pontiac Grand Am.

Bryan was asked about the events of Monday, October 31, 2005, which was Halloween. He said

he was not home at all during that day, except for waking up and going to work. Bryan said he got home sometime after supper, but could not recall when that was. He was asked why the Avery family members chose to come to their residence on Highline Lane this weekend, and he said they were going to butcher chickens and cut firewood. Bryan was asked about a deer they had hanging at their residence at the auto salvage yard. He said Bobby picked up that deer from a car/deer accident and it is hanging in the garage at his mom's house. Bryan believed this accident occurred on Friday night, November 4, 2005. Brayn said he is not certain, because he stayed with his girlfriend Friday night and did not get home until about 5:30 a.m. on Saturday, November 5, 2005.

Bryan said he heard from his mom and Steven that Halbach was only at their residence about 5 minutes. He heard she just took the photo of the van and left. Bryan said the investigators should also talk to his brother Bobby, because he saw her leave their property.

Bryan was asked about access into the back of the salvage yard, and he said anyone can drive a car back there. He said a car can be driven through Radant Sand and Gravel pit to the back of the salvage yard. He recalled a time when 4 kids were caught driving back there.

Bryan said he also heard that his uncle, Earl Avery and his brother-in-law, Bob, were hunting rabbits in the salvage yard on Wednesday, November 2, 2005, and they did not see Halbach's vehicle in the back of the salvage yard.

The interview was terminated at approximately 1:00 p.m., however, Bryan remained in S/A Skorlinski's vehicle until Investigators Tony O'Neill and Todd Baldwin, of the Marinette County Sheriff's Department, had completed their interview of Brendan. When that was completed, both Bryan and Brendan were transported back to the Avery residence at Highline Lane, which was approximately 1:45 p.m.

Case 2005CF000381 Document 1074 Filed 03-10-2023 Page 72 of 154

which was near the entry door. BARBARA JANDA sat at a chair with her back to the entryway door while S/A Holmes sat on JANDA's right side and S/A Kapitany sat on JANDA's left side.

For clarity purposes within this report, the JANDA and AVERY family members will be referred to by there first names throughout this report.

INITIAL STATEMENTS MADE BY BARBARA JANDA

Initially when the agents met with JANDA at the Y-Go-By Restaurant, S/A Holmes asked JANDA if she knew why the agents wanted to speak to her. JANDA told the agents that she believed the agents wanted to speak with her regarding the girl who was missing who took pictures "out there." JANDA told the agents she believed that the girl had been missing since Monday (10/31/2005), but that BARBARA was working on Monday. JANDA also told the agents that she believed that the girl was at "our house, I guess" on Monday when BARBARA was at work.

BARBARA told the agents that she believed her brother, STEVEN AVERY, was being framed for the missing woman's disappearance.

S/A Holmes told BARBARA that the agents appreciated her meeting with them. S/A Holmes also told BARBARA that law enforcement officers would be interviewing a lot of people regarding TERESA M. HALBACH'S (DOB: 03/22/1980) disappearance, and that the investigation was not focused on STEVEN AVERY. S/A Holmes told BARBARA that the investigation was focused on finding HALBACH first, and then learning what might have happened to HALBACH. BARBARA stated that she understood.

BARBARA JANDA'S WORK SCHEDULE

S/A Holmes asked JANDA to provide the agents with her work schedule beginning on Monday, 10/31/2005, and ending on Friday, 11/04/2005. JANDA stated that her normal work schedule was from 6:00 a.m. until 4:30 p.m. every day Monday through Thursday of every week. JANDA believed that she went to work at 5:30 a.m. on Monday, 10/31/2005. BARBARA stated that she always ended her work day at 4:30 p.m. and that she was usually always home at her residence by 5:00 p.m. at the latest.

BARBARA JANDA'S CHILDREN

S/A Holmes asked BARBARA if anyone lived with her at her residence on Avery Drive. BARBARA told the agents that all of her kids lived with her. S/A Holmes asked BARBARA if she could give the names of all of her children to the agents as well as their contact information. BARBARA provided the following names to the agents.

CALUM COUNTY SHERIFF'S DEPARTMENT

Page
486
File Number

Complaint No.
05-0157-955

WIEGERT: OK. Who do you all live with Brendan?

BRENDAN: My mom and my three brothers.

WIEGERT: Your mom and your three brothers? What are your three brothers' names?

Blaine, Bobby and Bryan.

WIEGERT: OK. Who lived next door to you?

BRENDAN: Steven.

WIEGERT: Steven who?

BRENDAN: Avery.

WIEGERT: OK. And how is he related to you.

BRENDAN: Um, my sister's brother.

WIEGERT: So that makes him what to you?

BRENDAN: My uncle.

WIEGERT: OK. Well what we want to talk to you about Brendan, like we had talked about before, is October 31st of 2005. OK. Do you remember that day?

BRENDAN: Yeah.

WIEGERT: OK. Tell us about that day when you came home from school, OK? Let's start with when you came home from school. How did you get home from school?

BRENDAN: I got off the bus at 3:45 and I walked, I seen a jeep down by our house and I went into my house and I played Playstation 2 for two hour, three hours. I ate at 8:00 and I got a phone from Steven, a phone call from Steven and he asked me if I wanted ta go to the bonfire next to Dassey's garage and I said yeah and then he told me to bring the golf cart over so I did and then he drove us, drove me around to find some stuff and I got the van seat and some wood and I seen her toe when I, when we dropped the, the seat off and later on, I seen her forehead and her belly.

WIEGERT: OK. I'm just gonna stop you there. You said when you got home, you saw her jeep. Whose jeep was that do you think?

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

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

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

which was near the entry door. BARBARA JANDA sat at a chair with her back to the entryway door while S/A Holmes sat on JANDA's right side and S/A Kapitany sat on JANDA's left side.

For clarity purposes within this report, the JANDA and AVERY family members will be referred to by there first names throughout this report.

INITIAL STATEMENTS MADE BY BARBARA JANDA

Initially when the agents met with JANDA at the Y-Go-By Restaurant, S/A Holmes asked JANDA if she knew why the agents wanted to speak to her. JANDA told the agents that she believed the agents wanted to speak with her regarding the girl who was missing who took pictures "out there." JANDA told the agents she believed that the girl had been missing since Monday (10/31/2005), but that BARBARA was working on Monday. JANDA also told the agents that she believed that the girl was at "our house, I guess" on Monday when BARBARA was at work.

BARBARA told the agents that she believed her brother, STEVEN AVERY, was being framed for the missing woman's disappearance.

S/A Holmes told BARBARA that the agents appreciated her meeting with them. S/A Holmes also told BARBARA that law enforcement officers would be interviewing a lot of people regarding TERESA M. HALBACH'S (DOB: 03/22/1980) disappearance, and that the investigation was not focused on STEVEN AVERY. S/A Holmes told BARBARA that the investigation was focused on finding HALBACH first, and then learning what might have happened to HALBACH. BARBARA stated that she understood.

BARBARA JANDA'S WORK SCHEDULE

S/A Holmes asked JANDA to provide the agents with her work schedule beginning on Monday, 10/31/2005, and ending on Friday, 11/04/2005. JANDA stated that her normal work schedule was from 6:00 a.m. until 4:30 p.m. every day Monday through Thursday of every week. JANDA believed that she went to work at 5:30 a.m. on Monday, 10/31/2005. BARBARA stated that she always ended her work day at 4:30 p.m. and that she was usually always home at her residence by 5:00 p.m. at the latest.

BARBARA JANDA'S CHILDREN

S/A Holmes asked BARBARA if anyone lived with her at her residence on Avery Drive. BARBARA told the agents that all of her kids lived with her. S/A Holmes asked BARBARA if she could give the names of all of her children to the agents as well as their contact information. BARBARA provided the following names to the agents.

211

On Monday, November 7, 2005, at approximately 10:11 a.m., S/A Debra K. Strauss and S/A Lisa Wilson interviewed Blaine A. Dassey, DOB 12/03/1988. Dassey is currently in 11th grade at Mishicot High School. Dassey lives with his mother, Barbara Dassey (a/k/a Barbara Janda), 12930A Avery Road, Two Rivers, WI. This interview was conducted at the residence of Michael J. Kornely, DOB 10/27/1949, located at 104 Lilac Avenue, Francis Creek, WI, 920-684-7309. Dassey has been staying with Kornely since Friday, 11/04/2005. The purpose of this interview was to obtain information Dassey would have regarding his activities during the week of 10/31/2005.

For the purposes of this interview, the Averys and Dasseys will be referred to by their first names.

Blaine said on Monday, 10/31/2005, he got out of bed at 6:30 a.m. like he normally does. The bus picks him and his brother, Brendan Dassey (Brendan), up at the end of the gravel driveway sometime between 7:08 and 7:13 a.m. Blaine was asked if he was one of the first to be picked up by the bus driver or the last, and Blaine responded he was somewhere in the middle. Blaine was asked if he knew the name of his bus driver and he said he did not. Blaine described his bus driver as a young, nice female. Blaine thought he rode on Bus #3 but he was not sure. Blaine's school day starts at 8:00 and concludes at 3:05 p.m. Blaine described this day as a normal school day, with nothing out of the ordinary occurring. Blaine stated that, when school was over, he and Brendan rode the bus home and they were dropped off sometime between 3:30 and 4:00 p.m. Blaine said he and Brendan were dropped off at the same spot where they are picked up. Blaine was asked to describe where the bus drops him off and picks him up, and Blaine responded it was where the red/black Blazer is currently located.

Kornely stated that on some occasions, when Blaine arrived home from school, Blaine will call him. Blaine normally calls Kornely sometime between 3:40 and 3:50 p.m.

Blaine was asked if he recalled seeing anyone on the Avery property when he got off the bus on the afternoon of Monday, 10/31/2005. Blaine responded "not really." When asked what he meant by "not really," Blaine said he did not see anybody.

On 10/31/2005, the red/ black Blazer and the Monte Carlo were for sale at the end of the driveway. Blaine said he can recall those vehicles being there.

Blaine indicated when he got off the bus, he and Brendan walked directly to their house. Blaine said he did not talk to anyone except for Brendan, he did not see anyone, he does not recall seeing a vehicle that does not normally belong in the driveway, and he did not see Steve Avery (Steve).

When Blaine and Brendan walked into their house, Bobby Dassey (Bobby) was sleeping in his bedroom. Blaine explained that he and Brendan coming home woke Bobby up.

At approximately 5:00 that evening, Blaine received a telephone call from his friend, Jason Kresco.

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

SECOND SUPPLEMENTAL AFFIDAVIT OF GARY HUNT

Now comes your affiant, Gary Hunt, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge and to a reasonable degree of certainty in the field of computer science. The factual statements herein are true and correct to the best of my knowledge, information, and belief.

Steven Avery's computer

2. I have reviewed a computer forensic report of Steven Avery's computer prepared by Detective Mike Velie of the Grand Chute Police Department Based upon my review of Det. Velie's report, I can find no records of internet searches for pornographic and/or sexual images being accessed. Specifically, based upon my review of the internet browser, cache, and cookie history

EXHIBIT

outlined in Det. Velie's report of Steven Avery's computer, no apparent searches for pornographic and/or sexual images were made and no websites with apparent pornographic and/or sexual content were accessed. (Internet History Report of Steven Avery's computer and computer forensic report of Detective Velie, attached and/or incorporated herein as Group Exhibit 11).

Dassey computer

3. I have conducted further analyses of the internet records from the Dassey computer, specifically the searches performed on a weekday between the hours of 6:00 a.m. and 3:45 p.m.:

   a. 667 searches related to sexual content were performed on weekdays from 6:00 a.m. to 3:45 p.m. 562 of the searches were performed on 10 weekdays: 8/16/2005 (4 searches); 9/13/2005 (12 searches); 2/23/2005 (48 searches); 3/29/2006 (37 searches); 3/30/2006 (23 searches); 4/3/2006 (93 searches); 4/5/2006 (96 searches); 4/6/2006 (14 searches); 4/13/2006 (39 searches); 4/19/2006 (196 searches). (Spreadsheet listing weekday from 6:00 a.m. to 3:45 p.m. searches attached and incorporated herein as part of Group Exhibit 12 to this affidavit);

4. I identified the following categories of searches:

   a. 22 search terms describing forcing sex toys and objects into vaginas;

   b. 37 searches for terms describing violent accidents, specifically violent car crashes with images of dead bodies;

Case 2005CF000381 Document 1074 Filed 09-15-2022 Page 80 of 154

c. 13 searches for terms describing drowned, dead or diseased female bodies; and

d. 65 searches for terms describing the infliction of violence on females, including fisting and images of females in pain.

(Spreadsheets listing searches for categorized terms, attached and incorporated herein as Group Exhibit 13).

5. I would like to clarify my opinion regarding the images of Teresa Halbach stored on the Dassey computer as expressed in ¶ 11(e) of my original affidavit. The primary purpose of my opinion was to refute the assertion made by Special Agent Thomas Fassbender in his report labeled #05-1776/304, wherein he stated that the photographs of Teresa Halbach and Steven Avery had an "apparent date of April 18, 2006." Based upon my examination of the Dassey computer, there is no evidence that the images of Teresa Halbach which I discovered were saved to the Dassey computer on April 18, 2006. Det. Velie did not provide copies of the images he discovered. If they are indeed the same images, Det. Velie could not have determined the images' original path, file name, and created, accessed, or modified timestamps.

6. Additionally, in my supplemental affidavit, I made a typographical error when correcting ¶ 11(c) of the original affidavit. My affidavit should read "On

September 18, 2005. between 5:57AM and 10:04 PM, the HP_Owner user conducted 75 unique Google searches."

FURTHER AFFIANT SAYETH NAUGHT

Gary Hunt

State of Illinois
County of Cook

Subscribed and sworn before me
this 16th day of November. 2017.

Notary Public

OFFICIAL SEAL
DANA STIGDON
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires Oct 28, 2019


Group Exhibit 11 to Second
Supplemental Affidavit
of Gary Hunt


EXHIBIT
Hunt
Group 11


Verba
Group Exhibit 12 to Second
Supplemental Affidavit of
Gary Hunt


EXHIBIT
Hunt
Group 12

Category A — Search terms describing forcing sex toys and objects into vaginas

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
1	big things in pussy	http://images.google.com/images?q=big+things+in+pussy+&btnG=Se	4/13/2006 13:22	Thursday
2	big things in pussy	http://images.google.com/images?q=big+things+in+pussy+&svnum=1	4/13/2006 13:23	Thursday
3	big woman naked	http://images.google.com/images?q=big+woman+naked&svnum=10	4/20/2006 12:40	Thursday
4	huge dildo in pussys	http://images.google.com/images?q=huge+dildo+in+pussys&svnum=	4/13/2006 13:24	Thursday
5	huge dildo in pussys	http://images.google.com/images?q=huge+dildo+in+pussys&svnum=	4/13/2006 13:24	Thursday
6	huge dildo in pussys	http://images.google.com/images?q=huge+dildo+in+pussys&svnum=1	4/13/2006 13:26	Thursday
7	streaching pussy	http://images.google.com/images?q=streaching+pussy&svnum=10&h	4/19/2006 11:40	Wednesday
8	stretching pussy	http://images.google.com/images?svnum=10&hl=en&safe=off&sa=X&	4/19/2006 11:41	Wednesday
9	stretching pussy toys	http://images.google.com/images?q=stretching+pussy+toys&svnum=	4/19/2006 11:42	Wednesday
10	woman dildo	http://images.google.com/images?svnum=10&hl=en&lr=&q=woman+	8/14/2005 8:39	Sunday
11	womans dildo	http://images.google.com/images?svnum=10&hl=en&lr=&q=womans	8/14/2005 8:38	Sunday
12	woman's dildo	http://images.google.com/images?svnum=10&hl=en&q=woman%27s	8/14/2005 8:38	Sunday
13	woman's dildo	http://images.google.com/images?svnum=10&hl=en&lr=&q=woman%	8/14/2005 8:39	Sunday
14	slut useing sex objects	http://images.google.com/images?q=slut+useing+sex+objects&svnum	9/14/2005 19:47	Wednesday
15	slut sex objects	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	9/14/2005 19:48	Wednesday
16	Extreme anal toys	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	4/18/2006 16:57	Tuesday
17	Extreme anal toy	http://images.google.com/images?q=Extreme+anal+toy&btnG=Searcl	4/18/2006 17:00	Tuesday
18	Extreme anal toys	http://images.google.com/images?q=Extreme+anal+toys&svnum=10&	4/18/2006 17:00	Tuesday
19	Extreme anal toy	http://images.google.com/images?q=Extreme+anal+toy&svnum=10&	4/18/2006 17:03	Tuesday
20	object pussy	http://images.google.com/images?q=object+pussy&svnum=10&hl=en	4/18/2006 17:10	Tuesday
21	streching pussy	http://images.google.com/images?q=streching+pussy&svnum=10&hl=	4/18/2006 17:16	Tuesday
22	stretching pussy	http://images.google.com/images?svnum=10&hl=en&safe=off&sa=X&	4/18/2006 17:17	Tuesday

Category B — Searches for terms describing violent accidents

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
1	accident	http://images.google.com/images?q=accident&svnum=10&hl=en&lr=	4/16/2006 10:17	Sunday
2	car accident	http://images.google.com/images?q=car+accident&btnG=Search&svn	4/16/2006 10:16	Sunday
3	fast accident	http://images.google.com/images?q=fast+accident&svnum=10&hl=en	4/16/2006 10:17	Sunday
4	fast car accident	http://images.google.com/images?svnum=10&hl=en&lr=&newwindow	4/16/2006 10:17	Sunday
5	ford empo car accident	http://images.google.com/images?q=ford+empo+car+accident&svnum	4/16/2006 10:16	Sunday
6	ford tempo accident	http://images.google.com/images?q=ford+tempo++accident&svnum=	4/16/2006 10:17	Sunday
7	ford tempo car accident	http://images.google.com/images?svnum=10&hl=en&newwindow=1	4/16/2006 10:16	Sunday
8	race car accident	http://images.google.com/images?q=race+car+accident&svnum=10&	4/16/2006 10:15	Sunday
9	race car accidents	http://images.google.com/images?svnum=10&hl=en&newwindow=1	4/16/2006 10:14	Sunday
10	race car accsidents	http://images.google.com/images?q=race+car+accsidents&svnum=10	4/16/2006 10:14	Sunday
11	seeing bones hot girls	http://images.google.com/images?svnum=10&hl=en&safe=off&q=see	2/23/2006 12:20	Thursday
12	seening bones hot girls	http://images.google.com/images?q=seening+bones+hot+girls&svnum	2/23/2006 12:20	Thursday
13	tempo car accident	http://images.google.com/images?q=tempo+car+accident&svnum=10	4/16/2006 10:16	Sunday
14	car accidents	http://images.google.com/images?svnum=10&hl=en&safe=off&q=car	2/22/2006 20:14	Wednesday
15	car accidents	http://images.google.com/images?svnum=10&hl=en&safe=off&q=car	2/22/2006 20:14	Wednesday
16	car accidents	http://images.google.com/images?q=car+accidents&svnum=10&hl=en	2/22/2006 20:15	Wednesday
17	car accidents	http://images.google.com/images?q=car+accidents&svnum=10&hl=en	2/22/2006 20:15	Wednesday
18	car accidents	http://images.google.com/images?q=car+accidents&svnum=10&hl=en	2/22/2006 20:18	Wednesday
19	car accident	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	2/22/2006 20:25	Wednesday
20	car accident	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	2/22/2006 20:25	Wednesday
21	alive skeleton	http://images.google.com/images?q=alive+skeleton&hl=en	9/17/2005 20:24	Saturday
22	alive skeleton	http://images.google.com/images?q=alive+skeleton&hl=en	9/17/2005 20:24	Saturday
23	alive skeleton	http://images.google.com/images?q=alive+skeleton&svnum=10&hl=e	9/17/2005 20:24	Saturday
24	alive skeleton	http://images.google.com/images?q=alive+skeleton&svnum=10&hl=e	9/17/2005 20:24	Saturday
25	alive skeleton	http://images.google.com/images?q=alive+skeleton&svnum=10&hl=e	9/17/2005 20:24	Saturday
26	alive skeleton	http://images.google.com/images?q=alive+skeleton&svnum=10&hl=e	9/17/2005 20:24	Saturday
27	skeleton	http://images.google.com/images?q=skeleton&hl=en	9/17/2005 20:24	Saturday
28	skeleton	http://images.google.com/images?q=skeleton&hl=en	9/17/2005 20:25	Saturday

Category C — Searches for terms describing drowned or dead female bodies

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
1	drawned girls	http://images.google.com/images?q=drawned+girls&svnum=10&hl=e	4/19/2006 10:43	Wednesday
2	drawned pussy	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	4/19/2006 10:48	Wednesday
3	drowned	http://images.google.com/images?q=drowned&svnum=10&hl=en&lr=	4/19/2006 10:47	Wednesday
4	drowned girl	http://images.google.com/images?q=drowned+girl&svnum=10&hl=en	4/19/2006 10:44	Wednesday
5	drowned girl	http://images.google.com/images?q=drowned+girl&svnum=10&hl=en	4/19/2006 10:45	Wednesday
6	drowned girl nude	http://images.google.com/images?q=drowned+girl+nude&svnum=10(	4/19/2006 10:44	Wednesday
7	drowned girls	http://images.google.com/images?svnum=10&hl=en&safe=off&sa=X&	4/19/2006 10:43	Wednesday
8	drowned pussy	http://images.google.com/images?svnum=10&hl=en&safe=off&sa=X&	4/19/2006 10:48	Wednesday
9	deseised girls	http://images.google.com/images?q=deseised+girls&svnum=10&hl=e	2/27/2006 19:07	Monday
10	dessesed girls	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	2/27/2006 19:07	Monday
11	diseased girls	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	2/27/2006 19:08	Monday
12	diseased girl	http://images.google.com/images?q=diseased+girl&svnum=10&hl=en	2/27/2006 19:09	Monday
13	rotton	http://images.google.com/images?hl=en&lr=&safe=off&q=rotton&sa=	2/19/2006 21:30	Sunday

Category D -- Searches for terms describing the infliction of violence on females, including fisting and images of females in pain

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
1	fist	http://images.google.com/images?svnum=10&hl=en&lr=&newwindo	4/9/2006 11:02	Sunday
2	fist	http://images.google.com/images?svnum=10&hl=en&lr=&newwindo	4/9/2006 11:02	Sunday
3	fist fucking sluts	http://images.google.com/images?q=fist+fucking+sluts&hl=en	9/15/2005 7:54	Thursday
4	fist fucky	http://images.google.com/images?q=fist+fucky&svnum=10&hl=en&lr	4/9/2006 11:01	Sunday
5	fist fucky	http://images.google.com/images?q=fist+fucky&svnum=10&hl=en&lr	4/9/2006 11:01	Sunday
6	fist sex	http://images.google.com/images?q=fist+sex&svnum=10&hl=en&lr=&	9/13/2005 8:14	Tuesday
7	fist sex	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	9/13/2005 8:14	Tuesday
8	fisting	http://images.google.com/images?q=fisting&svnum=10&hl=en&lr=&r	4/9/2006 11:02	Sunday
9	fisting	http://images.google.com/images?q=fisting&svnum=10&hl=en&lr=&r	4/9/2006 11:02	Sunday
10	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/30/2006 9:21	Thursday
11	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/30/2006 9:21	Thursday
12	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/30/2006 9:22	Thursday
13	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/30/2006 9:22	Thursday
14	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/30/2006 9:21	Thursday
15	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/30/2006 9:21	Thursday
16	girls moon face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/20/2006 16:34	Monday
17	hot girls moon	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/20/2006 16:34	Monday
18	girls grooming face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/20/2006 16:35	Monday
19	girls mooning	http://images.google.com/images?q=girls+mooning&svnum=10&hl=e	3/20/2006 16:38	Monday
20	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:10	Tuesday
21	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:10	Tuesday
22	fist fuck	http://images.google.com/preferences?q=fist+fuck&hl=en&lr=	3/28/2006 16:10	Tuesday
23	fist fuck	http://images.google.com/preferences?q=fist+fuck&hl=en&lr=	3/28/2006 16:10	Tuesday
24	fist fuck	http://images.google.com/setprefs?hl=en&lang=all&safe=off&num=1	3/28/2006 16:10	Tuesday
25	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10	3/28/2006 16:11	Tuesday
26	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10	3/28/2006 16:15	Tuesday
27	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:15	Tuesday
28	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:15	Tuesday
29	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:16	Tuesday
30	fist fuck	http://images.google.com/advanced_image_search?q=fist+fuck&svnu	3/28/2006 16:17	Tuesday
31	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&hl=en&lr=	3/28/2006 16:17	Tuesday
32	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&start=40&	3/28/2006 16:17	Tuesday

Case 2005CF000381 Document 1111 Filed 01-24-2023 Page 87 of 154

	Search Term	URL	Date/Time - (mm/dd/yy)	Day of Week
33	fist fuck	http://images.google.com/images?q=fist+fuck&svnum=10&start=40&	3/28/2006 16:17	Tuesday
34	fist fuck	http://images.google.com/preferences?q=fist+fuck&hl=en&lr=&safe=	3/28/2006 16:17	Tuesday
35	fist fuck	http://images.google.com/preferences?q=fist+fuck&hl=en&lr=&safe=	3/28/2006 16:17	Tuesday
36	fist fuck	http://images.google.com/setprefs?hl=en&lang=all&safe=images&nu	3/28/2006 16:17	Tuesday
37	fist	http://images.google.com/images?q=fist+ &svnum=10&hl=en&lr=	3/28/2006 16:18	Tuesday
38	fist	http://images.google.com/images?q=fist+&svnum=10&hl=en&lr=	3/28/2006 16:18	Tuesday
39	Girl action hert	http://images.google.com/images?q=Girl+action+hert&svnum=10&hl	3/29/2006 16:11	Wednesday
40	Girl action hert	http://images.google.com/images?q=Girl+action+hert&svnum=10&hl	3/29/2006 16:11	Wednesday
41	Girl action hert	http://images.google.com/images?q=Girl+action+hert&svnum=10&hl	3/29/2006 16:11	Wednesday
42	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:12	Wednesday
43	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:12	Wednesday
44	Girl action hurts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:12	Wednesday
45	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/29/2006 16:12	Wednesday
46	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/29/2006 16:12	Wednesday
47	Girl hurt	http://images.google.com/images?q=Girl+hurt&svnum=10&hl=en&lr=	3/29/2006 16:13	Wednesday
48	Girl hurt	http://images.google.com/images?q=Girl+hurt&svnum=10&hl=en&lr=	3/29/2006 16:13	Wednesday
49	Girl hurt	http://images.google.com/images?q=Girl+hurt&svnum=10&hl=en&lr=	3/29/2006 16:13	Wednesday
50	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/29/2006 16:13	Wednesday
51	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/29/2006 16:13	Wednesday
52	Girl hurts	http://images.google.com/images?q=Girl+hurts&svnum=10&hl=en&lr	3/29/2006 16:13	Wednesday
53	Girl hurting	http://images.google.com/images?q=Girl+hurting&svnum=10&hl=en&	3/29/2006 16:14	Wednesday
54	Girl moning face\	http://images.google.com/images?q=Girl+moning+face%5C&svnum=	3/29/2006 16:16	Wednesday
55	Girl moning face\	http://images.google.com/images?q=Girl+moning+face%5C&svnum=	3/29/2006 16:16	Wednesday
56	Girl moning face\	http://images.google.com/images?q=Girl+moning+face%5C&svnum=	3/29/2006 16:16	Wednesday
57	Girl moning face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:17	Wednesday
58	Girl moning face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:17	Wednesday
59	Girl moning face	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:17	Wednesday
60	girl guts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:29	Wednesday
61	girl guts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:29	Wednesday
62	girl guts	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:29	Wednesday
63	girl gut	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:30	Wednesday
64	girl gut	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:30	Wednesday
65	girl gut	http://images.google.com/images?svnum=10&hl=en&lr=&safe=off&q	3/29/2006 16:30	Wednesday

at the Dassey residence. Bobby's younger brothers, Blaine and Brendan, were at school, Bobby's mother was at work, his older brother, Bryan, no longer lived at the residence, and Tom Janda, who moved out on October 15, 2005, was at work.

4. Based upon Mr. Hunt's findings, 667 sexual image searches were performed on weekdays from 6:00 a.m. to 3:45 p.m. Of those searches, 562 were performed on 10 weekdays: 8/16/2005 (4 searches); 9/13/2005 (12 searches); 2/23/2005 (48 searches); 3/29/2006 (37 searches); 3/30/2006 (23 searches); 4/3/2006 (93 searches); 4/5/2006 (96 searches); 4/6/2006 (14 searches); 4/13/2006 (39 searches); 4/19/2006 (196 searches).

5. The 562 searches on 10 days demonstrate the obsessively compulsive nature of Bobby Dassey's internet searches and his fascination with sexual acts that involve the infliction of pain, torture and humiliation on females and an equally disturbing fascination with viewing dead female bodies.

6. The internet searches done on the Dassey computer, which were focused on viewing images in which pain, torture, humiliation and death are inflicted upon women, should have raised a red flag about Bobby's involvement in Ms. Halbach's murder. Bobby cannot be excluded from the following searches:

   a. 22 search terms describing forcing sex toys and objects into vaginas;

   b. 28 searches for terms describing violent accidents, specifically violent car crashes with images of dead bodies;

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 89 of 149

at that time?
A Yes, I was. I worked at Fischer Hamilton's, third shift.
Q What time would you start work on any day?
A I would start at ten at night and work until six in the morning.
Q On October thirty-first of 2005, could you tell the jury if you were home during the daytime hours?
A Yes, I was.
Q And how late, or how long were you home until?
A I was home until 2:30 that day.
Q What were you doing before 2:30?
A I was sleeping.
Q When you say "2:30", are you talking about the afternoon or morning?
A In the afternoon.
Q To your knowledge, Bobby, was anybody else at home with you?
A No.
Q Do you remember anything unusual that happened at about 2:30 that afternoon?
A A vehicle had drove up, and started taking pictures of the van.
Q All right. Let's back up just a minute. Were you

Case 2005CF000381 Document 1111 Filed 01-24-2023 Page 91 of 154

my grandma's house, right there.
Q. Same place?
A. Mm-hmm.
Q. You have to say yes or no.
A. Yes.
Q. Now, your trailer is a little bit west, or a little bit further down from that intersection; do you know why the bus picks you up and drops you off up near your grandma's trailer?
A. I'm not sure.
Q. They just do?
A. Yeah.
Q. Blaine, how do you get to and from the bus from your house?
A. I walk down the road.
Q. Okay. Now, back in October of 2005, was there somebody else in your house who also went to school with you?
A. Yes.
Q. Who was that?
A. Brendan.
Q. And who's Brendan?
A. My brother.
Q. At Mishicot School, Blaine, do you know about what time school lets out?

A. 3:05.
Q. And after school lets out, and I'm going to specifically ask you about October 31st of 2005; do you remember what time you came home that day?
A. 3:40.
Q. 3:40? That's 20 to 4 in the afternoon; is that right?
A. Yup.
Q. You have to answer out loud?
A. Yes.
Q. Do you remember coming home that day, Blaine?
A. Yes.
Q. And could you tell the jury how you got home that day?
A. The school bus.
Q. And did anybody come home on the school bus with you?
A. Yes, Brendan.
Q. After you and Brendan got home, at about 3:40, can you tell the jury what you did, please?
A. We walked down the road.
Q. And why don't you use your laser pointer again and tell the jury, when you walked down the road, where did you walk?
A. Down here, right there.

Case 2005CF000381 Document 1074 Filed 01-24-2023 Page 93 of 154

On Sunday, November 6, 2005, at approximately 12:20 p.m., S/A Kim J. Skorlinski and S/A Debra K. Strauss interviewed Bryan J. Dassey, DOB 07/15/1985, the nephew of Steven Avery, regarding this investigation. Bryan lives with his mother, Barbara Janda, and three brothers on the Avery Auto Salvage property. His house is adjacent to Steven's house. Prior to the interview, Bryan was driving Steven's blue 1993 Pontiac Grand Am and was stopped by the Marinette County Sheriff's Department pursuant to a search warrant for that vehicle.

At first Bryan said he did not know anything about what was going on, but then agreed to talk to the special agents. During the interview, S/A Skorlinski and Bryan sat in the front seat of S/A Skorlinski's state vehicle and S/A Strauss sat in the backseat. S/A Skorlinski explained to Bryan the search warrant for the Pontiac Grand Am, and he stated he understood why the car had to be seized. He said he and his brother Brendan were on their way to a local store, Tall Oaks, to buy soda when they were stopped.

Bryan said he rode up to the Avery residence at N9493 Highline Road, Town of Stephenson (Crivitz), on Saturday morning, November 5, 2005, with Steven and his grandmother, Delores Avery. He said when they got to the residence, his grandfather, Allan Avery; and his uncle, Charles "Chuck" Avery; and his brother, Brendan were already there. Bryan said his grandfather came to the residence on Thursday night, November 3, 2005, and Chuck and Brendan came on Friday night, November 4, 2005. Bryan said the plan was for all family members to stay at the residence until today and then travel back to their residences at Avery's Auto Salvage in Two Rivers, Manitowoc County.

S/A Skorlinski asked how he could contact Bryan's mother, Barb, and he said S/A Skorlinski said he could call her on her cell phone, 920-973-1740, or else her boyfriend, Scott's cell phone (b/f/b Scott Tadych), 920-973-2222. Bryan said his mom and step-dad are getting a divorced. He said his biological dad is not around much.

Bryan lives at Avery's Auto Salvage property with his mom, and brothers Brendan (15½ years old), Blaine (16 years old) and Bobby (19 years old). Bryan said he is not around the residence or the auto salvage yard much because he works at Woodland Face Veneer, Two Rivers. He said he leaves for work at 6:00 a.m. and then after work he is usually at his girlfriend's house until late in the evening.

Bryan was asked about the other vehicles at the Avery residence on Highline Lane, and he said Chuck's flatbed tow truck and Allan's Chevrolet pick up truck are still there. Byran was asked about a black Ford pick up truck at Steven's residence at the auto salvage yard. He said that pick up truck is owned by Steven and should be at the residence because Steven drove his Pontiac Grand Am.

Bryan was asked about the events of Monday, October 31, 2005, which was Halloween. He said

he was not home at all during that day, except for waking up and going to work. Bryan said he got home sometime after supper, but could not recall when that was. He was asked why the Avery family members chose to come to their residence on Highline Lane this weekend, and he said they were going to butcher chickens and cut firewood. Bryan was asked about a deer they had hanging at their residence at the auto salvage yard. He said Bobby picked up that deer from a car/deer accident and it is hanging in the garage at his mom's house. Bryan believed this accident occurred on Friday night, November 4, 2005. Brayn said he is not certain, because he stayed with his girlfriend Friday night and did not get home until about 5:30 a.m. on Saturday, November 5, 2005.

Bryan said he heard from his mom and Steven that Halbach was only at their residence about 5 minutes. He heard she just took the photo of the van and left. Bryan said the investigators should also talk to his brother Bobby, because he saw her leave their property.

Bryan was asked about access into the back of the salvage yard, and he said anyone can drive a car back there. He said a car can be driven through Radant Sand and Gravel pit to the back of the salvage yard. He recalled a time when 4 kids were caught driving back there.

Bryan said he also heard that his uncle, Earl Avery and his brother-in-law, Bob, were hunting rabbits in the salvage yard on Wednesday, November 2, 2005, and they did not see Halbach's vehicle in the back of the salvage yard.

The interview was terminated at approximately 1:00 p.m., however, Bryan remained in S/A Skorlinski's vehicle until Investigators Tony O'Neill and Todd Baldwin, of the Marinette County Sheriff's Department, had completed their interview of Brendan. When that was completed, both Bryan and Brendan were transported back to the Avery residence at Highline Lane, which was approximately 1:45 p.m.

which was near the entry door. BARBARA JANDA sat at a chair with her back to the entryway door while S/A Holmes sat on JANDA's right side and S/A Kapitany sat on JANDA's left side.

For clarity purposes within this report, the JANDA and AVERY family members will be referred to by there first names throughout this report.

INITIAL STATEMENTS MADE BY BARBARA JANDA

Initially when the agents met with JANDA at the Y-Go-By Restaurant, S/A Holmes asked JANDA if she knew why the agents wanted to speak to her. JANDA told the agents that she believed the agents wanted to speak with her regarding the girl who was missing who took pictures "out there." JANDA told the agents she believed that the girl had been missing since Monday (10/31/2005), but that BARBARA was working on Monday. JANDA also told the agents that she believed that the girl was at "our house, I guess" on Monday when BARBARA was at work.

BARBARA told the agents that she believed her brother, STEVEN AVERY, was being framed for the missing woman's disappearance.

S/A Holmes told BARBARA that the agents appreciated her meeting with them. S/A Holmes also told BARBARA that law enforcement officers would be interviewing a lot of people regarding TERESA M. HALBACH'S (DOB: 03/22/1980) disappearance, and that the investigation was not focused on STEVEN AVERY. S/A Holmes told BARBARA that the investigation was focused on finding HALBACH first, and then learning what might have happened to HALBACH. BARBARA stated that she understood.

BARBARA JANDA'S WORK SCHEDULE

S/A Holmes asked JANDA to provide the agents with her work schedule beginning on Monday, 10/31/2005, and ending on Friday, 11/04/2005. JANDA stated that her normal work schedule was from 6:00 a.m. until 4:30 p.m. every day Monday through Thursday of every week. JANDA believed that she went to work at 5:30 a.m. on Monday, 10/31/2005. BARBARA stated that she always ended her work day at 4:30 p.m. and that she was usually always home at her residence by 5:00 p.m. at the latest.

BARBARA JANDA'S CHILDREN

S/A Holmes asked BARBARA if anyone lived with her at her residence on Avery Drive. BARBARA told the agents that all of her kids lived with her. S/A Holmes asked BARBARA if she could give the names of all of her children to the agents as well as their contact information. BARBARA provided the following names to the agents.

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN	)	
	)	
v.	)	Case No. 05 CF 381
	)	
STEVEN A. AVERY	)	

AFFIDAVIT OF BLAINE DASSEY

Now comes your affiant, Blaine Dassey, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information and belief. I am of sound mind and I am not taking any medication, nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.

2. In October 2005, I lived with my mother and brothers at 12930A Avery Road, Two Rivers, WI 54241. My brothers' names are Brendan, Bryan, and Bobby Dassey. Brendan and I shared a bedroom. Bobby had his own bedroom. Bryan kept some clothes at the house but lived with his girlfriend and was rarely at the residence. Tom Janda had moved out of the residence in early 2005.

3. When none of us were home, the residence was always locked.

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 97 of 154

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
LCA17-009022

BARBARA indicated she never saw TOM view pornography on the computer.

BARBARA stated TOM moved out of the residence on 10/15/05 and went to a residence somewhere in Manitowoc. BARBARA stated TOM knew the doors to her residence would be unlocked. BARBARA stated TOM was not welcomed on the property by BARBARA, but TOM used to visit BARBARA's parents after she and TOM separated. BARBARA also stated that TOM would go "up north" with her parents. BARBARA indicated her parents did not like and still do not like SCOTT TADYCH.

Case 2005CF000381 Document 1074 Filed 08-18-2022 Page 97 of 194

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

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

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

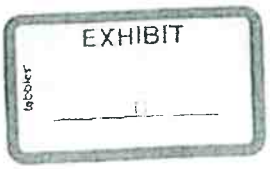
STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN, Plaintiff, v. STEVEN A. AVERY, Defendant.	)	Case No. 05-CF-381 Honorable Judge Angela Sutkiewicz, Judge Presiding

SUPPLEMENTAL AFFIDAVIT OF STEVEN A. AVERY, SR.

Now comes your affiant, Steven A. Avery, Sr., and under oath hereby states as follows:

1. I am the defendant in this case. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. Bobby Dassey, in his November 5, 2005 police interview, lied when he denied having ever seen Teresa Halbach before October 31, 2005. (SAO 1295). I distinctly remember that every time Teresa Halbach came to our property to photograph vehicles, Bobby would always say, "I see that your girlfriend was over yesterday," the following day.
3. After I moved into my trailer, I never entered my sister Barb's residence at 1290 A Avery Road when no one else was home. The only occasions when I was in Barb's residence were when I had been admitted into the residence by Barb or one of my nephews. I did not have a key to Barb's residence, and the residence was locked when no one was home.



Case 2005CF000381 Document 1074 Filed 01-18-2023 Page 100 of 154

4. I was aware that my sister Barb had a computer in her trailer. I was present one time when Barb turned on the computer which was in Bobby's room. Another woman, whom I did not know, was present at the time.

5. I never turned on Barb's computer and used her computer in any way. I did not have the password for the computer. On one occasion, I observed Blaine on the computer communicating with his girlfriend.

6. I had my own computer with internet service. There would be no reason that I would need to be on Barb's computer.

7. My computer was never used to do Google searches. My girlfriend, Jodi, and my sister, Barb, did Yahoo searches. I was present with my sister, Barb, who did a search of dating sites for my brother, Chuck, and for property. The only other searches were done by my girlfriend, Jodi. At no time were searches ever done on my computer for images of Teresa Halbach or images of violent pornography.

8. The only adult films I have ever viewed were on DirecTV. On my computer, the only nude photographs I had were ones uploaded by my girlfriend of her and me.

9. After I was arrested, the authorities put an inmate in my cell who was trying to get me to make incriminating statements. I have reviewed the police report of Orville Jacobs. The statements in that report are false. I never told Mr. Jacobs that my sister, Barb, had porn on her computer or that there would be trouble if the porn were found. I know that my attorneys told me they wanted to inspect the Dassey computer and immediately after that telephone conversation with them, the Dassey computer was seized by the authorities. (Attached and incorporated herein as Exhibit A is the 4/14/06 CCSD report

Case 2005CF000381 Document 1074 Filed 03-13-2022 Page 101 of 134

towards the Dassey residence in his green truck on several occasions during the time period. Mr. Avery never accessed the Dassey computer and did not have the password for the computer. Mr. Avery did not have a key to the Dassey residence and the residence was locked when no one was home. Mr. Avery only entered the residence with permission of a Dassey family member. Mr. Avery worked during the weekdays from 8:00 a.m.to 5:00 p.m. The Supplemental Affidavit of Steven A. Avery is attached and incorporated herein as **Exhibit D**, at ¶¶ 3, 5, 10.[1]

Mr. Buting describes the significance of the State's concealment of Detective Velie's "Final Report" in his affidavit. At the time the voluminous discovery was tendered on December 14, 2006, defense counsel was preparing to litigate a *Denny* motion to introduce evidence of third-party suspects at Mr. Avery's trial. Judge Willis ruled against the defense on this *Denny* motion because the defense failed to present any evidence of the motive for the murder. Had the defense been able to use Detective Velie's report to link Bobby Dassey to the violent, sexual, and deceased body images on the Dassey computer, the defense would have been able to establish sexual assault as the motive for Ms. Halbach's murder.

Violent, Sexual, and Deceased Body Images on the Dassey Computer Were Admissible Evidence in Mr. Avery's Trial to establish the Denny requirement of Motive

[1] Mr. Avery has given an affidavit wherein he states that he never made statements to Orville Jacobs about pornography on Barb's computer. Mr. Jacobs was planted in Mr. Avery's cell by law enforcement and Mr. Avery did not communicate with him about his case. Mr. Avery's attorneys wanted to inspect the Dassey computer and told him so in a telephone conversation. The Dassey computer was seized shortly after this telephone conversation. *See* Supplemental Affidavit of Steven Avery, Exhibit D at ¶ 9.

Case 2005CF000381 Document 1074 Filed 09-19-2022 Page 101 of 154

STATE5682-83).

10. My work schedule at the salvage yard was from 8:00 a.m. until 5:00 p.m., Monday through Friday. Several times when I was at work, I noticed Scott Tadych enter the property in his green truck and proceed to Barb's trailer, where Bobby was at home.

11. I am aware that Prosecutor Kratz has said that I was sweating a lot on October 31, 2005, because I had raped and murdered Ms. Halbach in my bedroom. Mr. Kratz's story is completely and totally false. I never harmed Ms. Halbach in any way. There was no forensic evidence in my trailer that would have shown that a rape and murder occurred there, so Mr. Kratz had to drop the rape charge. Mr. Kratz changed the story to say that the murder of Teresa Halbach was in my garage. Mr. Kratz said I shot Ms. Halbach in the head after carrying her to the garage. After carrying her to the garage, Mr. Kratz said that I threw Teresa Halbach into the rear of her vehicle, then took her out of the vehicle, shot her in the head on my garage floor, put her on a creeper, and threw her body into my fire pit where I started a huge bonfire. Mr. Kratz's ridiculous story is totally false.

12. In order to support his false story, Mr. Kratz added the detail that I was sweating a lot on October 31, 2005, when I supposedly propped a car hood and put branches on Ms. Halbach's vehicle to conceal it. Mr. Kratz's claim about me concealing the vehicle is totally false, and his claim about me sweating a lot is totally false. I did not drink alcohol or take medication which may have caused me to sweat. I did not sweat when I did manual labor for up to eight hours a day at the salvage yard. On October 31, 2005, the outside temperature was about 48 to 50 degrees, so there was no heat which would cause me to sweat.

Q. And then your mom had a bolt action .22 rifle in her bedroom, right?
A. Yes.
Q. You kept your Marlin .22 semi-automatic in your bedroom?
A. Yes.
Q. Mr. Dassey, just to finish, are you quite sure now whatever details you don't remember of Halloween, 2005, today, are you quite sure now that you woke up and got up sometime by 2:30, or a little before?
A. Yes.
Q. You said yesterday that Blaine and Brendan were still in high school, got home usually what, 3:40, 3:45, somewhere in there?
A. Yes.
Q. And that was regular every day?
A. Yes, every day.
Q. Because they took a school bus to and from school?
A. Yes.
Q. School lets out at the same time, the bus runs the same route, that they were pretty regular.
A. Yes.
Q. And are you quite sure that Blaine and Brendan,

Case 2005CF000381 Document 1074 Filed 03-16-2022 Page 104 of 157

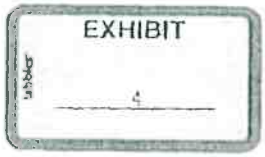
STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

SUPPLEMENTAL AFFIDAVIT OF GARY HUNT

Now comes your affiant, Gary Hunt, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge and to a reasonable degree of certainty in the field of computer science. The factual statements herein are true and correct to the best of my knowledge, information, and belief.
2. In my original affidavit (Exhibit Q to Motion for Reconsideration), I made a typographical error at ¶ 11(c). My affidavit should read: "On September 18, 2005, between 5:57 AM and 10:04 AM, the HP_Owner user conducted 75 unique Google searches."
3. Using 2017 technology, I have detected eight periods in 2005 when computer records are missing and presumably deleted from the Dassey computer: August 23-26; August 28-September 11; September 14-15; September 24-



Case 2005CF000381 Document 1074 Filed 10-16-2017 Page 106 of 151

October 22; October 23-24; October 26-November 2; November 4-13; and November 15- December 3.

4. On October 31, 2005, the Dassey computer was used to access the internet at 6:05 a.m., 6:28 a.m., 6:31 a.m., 7:00 a.m., 9:33 a.m., 10:09 a.m., 1:08 p.m., and 1:51 p.m.

FURTHER AFFIANT SAYETH NAUGHT

Gary Hunt

Subscribed and sworn before me
this 30th day of October, 2017.

Notary Public

OFFICIAL SEAL
DARA STIGDON
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires Oct 28, 2019

Case 2005CF000381 Document 1071 Filed 09-16-2022 Page 107 of 151

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

SUPPLEMENTAL AFFIDAVIT OF GARY HUNT

Now comes your affiant, Gary Hunt, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge and to a reasonable degree of certainty in the field of computer science. The factual statements herein are true and correct to the best of my knowledge, information, and belief.
2. In my original affidavit (Exhibit Q to Motion for Reconsideration), I made a typographical error at ¶ 11(c). My affidavit should read: "On September 18, 2005, between 5:57 AM and 10:04 AM, the HP_Owner user conducted 75 unique Google searches."
3. Using 2017 technology, I have detected eight periods in 2005 when computer records are missing and presumably deleted from the Dassey computer: August 23-26; August 28-September 11; September 14-15; September 24-

EXHIBIT

October 22; October 23-24; October 26-November 2; November 4-13; and November 15- December 3.

4. On October 31, 2005, the Dassey computer was used to access the internet at 6:05 a.m., 6:28 a.m., 6:31 a.m., 7:00 a.m., 9:33 a.m., 10:09 a.m., 1:08 p.m., and 1:51 p.m.

FURTHER AFFIANT SAYETH NAUGHT

Gary Hunt

Subscribed and sworn before me
this 30th day of October, 2017.

Notary Public

OFFICIAL SEAL
DARA STIGDON
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires Oct 28, 2019

at that time?
A Yes, I was. I worked at Fischer Hamilton's, third shift.
Q What time would you start work on any day?
A I would start at ten at night and work until six in the morning.
Q On October thirty-first of 2005, could you tell the jury if you were home during the daytime hours?
A Yes, I was.
Q And how late, or how long were you home until?
A I was home until 2:30 that day.
Q What were you doing before 2:30?
A I was sleeping.
Q When you say "2:30", are you talking about the afternoon or morning?
A In the afternoon.
Q To your knowledge, Bobby, was anybody else at home with you?
A No.
Q Do you remember anything unusual that happened at about 2:30 that afternoon?
A A vehicle had drove up, and started taking pictures of the van.
Q All right. Let's back up just a minute. Were you

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
LCA17-009022

to his vehicle and he did not see her when he got into his vehicle. BOBBY stated he had no idea who she was so he really did not pay a lot of attention. BOBBY stated the vehicle was still there when he left to go hunting. BOBBY stated he did not hear anything during the time when he was walking to his vehicle. BOBBY indicated he did not see TERESA leave the property. BOBBY was asked if he ever saw TERESA after he saw her walking toward STEVEN's trailer and he stated he had never seen her after that. BOBBY stated he never saw TERESA leave the property.

BOBBY then drew a map of the area where he witnessed these events and a copy can be found attached to this report.

BOBBY stated he did not recall seeing anyone when he got home from hunting, but when he left to go to work at 2120 to 2125 hours, he saw a fire behind STEVEN's garage and two people were standing by the fire. BOBBY indicated he was unsure who these two people were. BOBBY was asked if he saw TERESA's vehicle when he got back from hunting. BOBBY stated her vehicle was gone from the area where he saw it parked earlier when he returned from hunting at approximately 5:30 p.m.

BOBBY was asked if he remembered at any time talking to BRYAN DASSEY about TERESA leaving. BOBBY stated he never talked with BRYAN about seeing TERESA leave. BOBBY stated he never talked with BRYAN at any time about this. BOBBY was asked why BRYAN would say something like this and BOBBY responded, "Your guess is as good as mine." BOBBY stated he has no idea why BRYAN had stated that he had said this. BOBBY stated he never talked to BRYAN about these matters at all.

BOBBY stated he spoke with his mother about the fact that he had seen someone taking pictures of the van. BOBBY stated this was within a day or two of 10/31/05. BOBBY stated he recalled asking his mother why she was selling the van, as it was pretty much junk.

BOBBY was asked if he used the computer and the internet, while he was living at his mother's residence. BOBBY stated he did not recall, but stated, "If I did, it wasn't often." Initially, BOBBY indicated he did not recall if they had the internet at his mother's residence. BOBBY stated the tower computer was the only computer in the residence "I think." BOBBY stated everyone was on the computer, but he stated BLAINE and BRENDAN were the main users, as they used it for games. BOBBY stated he thought the computer was on a desk in the living room at the time.

BOBBY was asked if he ever downloaded or viewed pornography on his mother's computer. BOBBY stated he never downloaded any pornography. BOBBY stated he may have watched porn at some point on it, but indicated "I don't know." BOBBY stated there were five guys with access to the computer and he doesn't know if they would have downloaded or viewed pornography. I asked BOBBY who the fifth person was. BOBBY identified his brothers, BLAINE, BRENDAN, BRYAN, himself and TOM JANDA, as being the individuals with access

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
LCA17-009022

to the computer. BOBBY stated he did not use the computer much, as he was working third shift at the time.

BOBBY was asked where his mother's computer was located in his mother's residence in October, 2005. BOBBY stated he thought it was in the living room. BOBBY was asked if it was ever in his bedroom and he stated it was not. BOBBY stated he had a 10'x12' bedroom and there was not much room in the bedroom after putting in dressers and beds. BOBBY stated he thought he shared the bedroom with his brother, BRYAN. BOBBY stated BRYAN eventually moved to the downstairs portion of the residence and this may have taken place before 10/31/05.

I asked BOBBY how he got along with TOM JANDA and he stated he got along with TOM, but he did not get along with SCOTT TADYCH at this time. BOBBY stated SCOTT did not like kids. BOBBY indicated that he believed TOM JANDA moved out of BARBARA's residence sometime in September. BOBBY stated SCOTT TADYCH did not come over to his mother's residence very often, but that BARBARA would go to SCOTT's residence.

BOBBY was asked if STEVEN had internet at his residence and he indicated he was not certain. BOBBY stated he was not at STEVEN's residence that often.

BOBBY was asked if he knew who created the folder with the page depicting STEVEN and TERESA's photographs. BOBBY indicated he knew how to create folders, but he had no idea as to who created those folders. BOBBY was specifically asked who created "TERESA" and "HALBACH" and "DNA" folders that were on the computer and he stated he had no idea who did this. BOBBY was asked if he did it and he indicated, "No."

BOBBY was asked if he ever hunted on the RADANDT property or gravel pit or in the area off Kuss Road in Two Rivers. BOBBY was unfamiliar with where I was talking about when I mentioned Kuss Road. I then produced a map that I had from the JOSH RADANDT interview and showed him where Kuss Road was located. BOBBY indicated he had never hunted on the RADANDT property or in the gravel pit. BOBBY stated he had never hunted on the area off of Kuss Road.

I asked BOBBY if he ever met RYAN HILLEGAS and SCOTT BLOEDORN. BOBBY stated he had never met RYAN or SCOTT and did not know either of them.

BOBBY was asked why he and SCOTT TADYCH were being singled out as suspects and he indicated "I don't know." BOBBY then indicated he thought it was perhaps because he and SCOTT testified at STEVEN's trial.

I asked BOBBY if he had made anything up or had lied during his testimony. BOBBY stated everything he had said was true and he had no reason to lie during the trial.

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 110 of 149

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff

vs.

CLERK'S CERTIFICATE
CASE NO: 2005 CF 381
APPELLATE COURT NO.: 17 AP 2288

STEVEN A. AVERY,
Defendant.

FILED

SEP 25 2018

CLERK OF CIRCUIT COURT
MANITOWOC COUNTY, WI

TO: Clerk of Court of Appeals
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

I hereby transmit the record in the above-entitled case compiled pursuant to Rule 809.15. The original file is an electronic file. Pursuant to Rule 809.15(4)(a), this record does include items that are not electronically maintained and must be sent by traditional methods.

- Envelope containing VHS video tape of 5 stories on Avery case and CD Rom copies of taped telephone call from the 'Sturms' to Sheriff Pagel;
- Envelope containing DVD of narrative of Tim Austin, DVD with final version of animations and reconstruction report images-4X6 prints;
- Envelope containing CD Rom bearing four recorded interviews conducted primarily by the Marinette County Sheriff's Department;
- Envelope containing CD Rom containing audio recordings on recorded phone lines from Manitowoc County Sheriff's Department;
- Envelope containing VHS tape of Teresa Halbach investigation press conference published by WFRV.com;
- White binder containing photographs;
- Black binder containing documents/diagrams;
- White binder containing photographs;

- Black binder containing documents/diagrams;
- Five CD's that are part of the Amendments & Supplements to Motion for Reconsideration and Motion to Vacate;
- DVD's and jump drive containing exhibits from postconviction motion filed on 06-06-17;
- CD containing videos showing views from the north facing windows of the Dassey-Janda residence.
- CD containing Cellcom tower maps with distances relative to the Kuss Rd/Hwy Q intersection and Bobby's hunting spot;
- DVD of Dassey-Janda trailer and garage walk through video by Sgt. Tyson;
- DVD of Detective Velie Final Report Investigative Copy with Bates numbering (AverySupp0001-AverySupp02449)
- CD of Detective Velie report disk contents AverySupp2450-6545;
- CD-Exhibit 4: Audio of Bobby's 11-17-17 Calumet County interview

Dated: September 25, 2018

Submitted by,

Roberta Brice

Roberta Brice
Deputy Clerk of Court – Criminal Unit
Manitowoc County Clerk of Court Office
1010 South 8th Street
Manitowoc, WI 54220
(920) 683-4034

cc: Thomas Fallon, Ass't. Attorney General
Kathleen Zellner, Defense counsel

4. My uncle Steven Avery ("Uncle Steven") only came to the residence when my mother and his sister Barb was home. I never remember my uncle Steven entering the residence when my mother was not home.

5. I remember that my Uncle Steven had cut his finger 1-2 weeks before October 31, 2005.

6. I remember, on October 31, 2005, seeing my Uncle Steven carry a white plastic bag to his burn barrel. I did not see a fire in the burn barrel. However, the police pressured me into saying that there was a fire in the burn barrel and visible smoke coming from the burn barrel. My testimony about the fire and smoke coming from the burn barrel was not true.

7. I remember, on October 31, 2005, seeing a bonfire behind my Uncle Steven's garage that was about 3-feet high. The police tried to pressure me into saying that the flames of the bonfire were much higher, so at trial I testified that the flames of the bonfire were 4-5 feet high but that testimony was not true. The police put the height of the flames "in my head and I agreed to it."

8. On October 31, 2005, I was with Brendan up until I left to go trick-or-treating. I distinctly remember Brendan wanted to use the computer at slightly before 5 p.m. because I wanted to make a phone call and his use of the dial-up internet computer would have prevented me from doing that. I know that Brendan was not at Uncle Steven's trailer up until I left to go trick-or-treating.

9. There was only one computer at the residence and it was always in Bobby's room sitting near a desk.

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 114 of 154

10. The computer had a password.

11. The computer had an AOL dial-up internet connection.

12. Bobby was the primary user of the computer.

13. At no time did I ever do searches for pornographic images or words related to pornography, words related to violence, words related to death, words related to mutilations, words related to torture, words related to guns or knives, words related to Teresa Halbach, words related to Steven Avery, words related to DNA, or words related to dead, mutilated or dismembered female bodies.

14. At no time did I ever create a folder for Teresa Halbach, my Uncle Steven, DNA, or news stories on the murder.

15. The only time I used the computer was to do my homework and occasionally send instant messages.

16. I remember my mother Barb hiring someone to "reformat the computer" but I'm not sure who that person was.

17. I do not have any personal knowledge of who made the appointment with AutoTrader to have my mother's van photographed but I did help clean the van so that it could be sold.

18. At the time, my family had two burn barrels located behind our house.

19. I was familiar with the gravel pits to the south of the Avery salvage yard but I did not go to the gravel pits to hunt. I stopped hunting when I was 22.

20. On October 31, 2005 when the school bus driver brought Brendan and me home as we travelled west on STH 147 I saw Bobby on STH 147 in a bluish or

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 117 of 154

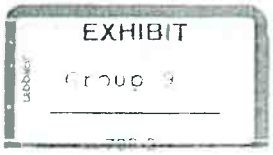
STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

AFFIDAVIT OF ANN BURGESS, DNSc.

Now comes your affiant, Ann Burgess, Ph.D., and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my education, experience, and training in the field of psychiatric nursing. All of the opinions offered within this affidavit are based upon a reasonable degree of scientific certainty in the field of psychiatric nursing.
2. I have been recognized by courts as an expert in the areas of child pornography, crime classification, offender typology, rape victims, rape trauma, and serial offenders. Attached and incorporated herein as Exhibit A is a copy of my curriculum vitae.
3. I have published extensively, including co-authoring 24 books, 30 book chapters, and over 164 peer-reviewed articles. The most relevant books to the issues in the Steven Avery case are *Sexual Homicide: Patterns and*



Case 2005CF000381 Document 1074 Filed 08-18-2022 Page 116 of 164

Motivations, *The Crime Classification Manual*, *Understanding Violence Against Women*, *Violence Through a Forensic Lens*, and *Forensic Science Lab Manual*. The most relevant articles are listed in my CV, including: "The presumptive role of fantasy in serial sexual homicide" in the American Journal of Psychiatry, and "Internet Patterns of Federal Offenders" in the Journal of Forensic Nursing.

4. I was retained by the law firm of Kathleen T. Zellner and Associates, P.C. to review materials prepared by computer forensic analyst Gary Hunt ("Mr. Hunt"), including Motion to Supplement Exhibit 8, which extracted, categorized, and documented the violent pornographic images, word and internet searches for pornography and deceased and dismembered female bodies, and sexual MSN messages that were sent to under-age females. It is my understanding that all of this evidence was found on the Dassey computer and preserved in 7 DVDs containing a forensic image of the computer, and a CD containing a forensic analysis performed by Detective Michael Velie of the Grand Chute Police Department.
5. I am familiar with, and have reviewed, the most current literature on the relationship between pornography consumption and violent behaviors. Attached incorporated herein as Exhibit B is a sample of 5 key articles of 30 years of empirical research that clearly establishes the relationship between pornography consumption and rape and other violence towards women.
6. A recent meta-analysis by Wright, Tokunaga, and Krause (2016), analyzing 22 studies from 7 different countries, revealed that pornography consumption

Case 2005CF000381 Document 1074 Filed 09-19-2022 Page 119 of 151

was associated with sexual aggression in both men and women in the United States and internationally.

7. Both experimental and non-experimental studies have confirmed the relationship between pornography and violence. Experimental studies have shown that male participants who are exposed to pornography endorse increased rape fantasies, willingness to rape, aggression against females, and acceptance of rape myths. (Allen, De'Alessio, & Brezgel, 1995; Malamuth et al. 2000). Further, a meta-analysis by Hald, Malamutu, and Yuen (2010) showed a significant positive association between pornography use and attitudes supporting violence against women in non-experimental studies.
8. Use of sexually violent pornography as well as acceptance of interpersonal violence against women has been shown to be related to self-reported likelihood of raping or using sexual force (Demare, Briere, & Lips, 1988).
9. According to a survey conducted at a rape crisis center, almost a third of women who had been raped indicated that their abuser used pornography (Bergen & Bogle, 2000).
10. In the book *Sexual Homicide: Patterns and Motives*, which I co-authored with FBI Agents Robert K. Ressler and John E. Douglas, one chapter focused on "Preoccupation with Murder: Pattern Responses." As a part of this chapter, we interviewed 36 sexual murderers and we concluded that, as a group, they had several traits in common: 1) They had a long standing pre-occupation and preference for a very active fantasy life; 2) They were preoccupied with violent, sexualized thoughts and fantasies. In my opinion, in reviewing Mr.

Case 2005CF000381 Document 1074 Filed 09-19-2022 Page 125 of 154

Hunt's affidavits, the obvious preoccupation with violent pornography, which includes torturing young females and dismembering and/or mutilating female bodies, overtime would result in a "justification for killing." (*Sexual Homicide: Patterns and Motives*, p. 35).

11. My opinion is based, in part, upon a review of sexual images contained in the Dassey CD and 7 DVDs, Mr. Greg McCrary's Second Supplemental Affidavit (Motion to Supplement Exhibit 24), and Mr. Hunt's analysis of the internet searches, including the timing and frequency of the searches, as well as description of the violent pornographic images.

12. I agree with Mr. McCrary that law enforcement should have considered that the Teresa Halbach murder was a "sexually motivated homicide." (Exhibit 24, ¶ 9). The Dassey computer examination by Mr. Hunt also revealed that Bobby Dassey ("Bobby") was untruthful when he testified that he had been asleep on October 31, 2005 until 2:30 p.m. I also agree with Mr. McCrary that Bobby should have been considered "a prime suspect because of his untruthful statements during the investigation, combined with the nature of his internet searches." (Exhibit 24, ¶ 9).

13. Specifically, Mr. Hunt describes the following categories of searches:

    a. 22 search terms describing forcing sex toys and objects into vaginas;

    b. 37 searches for terms describing violent accidents, specifically violent car crashes with images of dead bodies;

    c. 13 searches for terms describing drowned, dead, or diseased female bodies;

d. 65 searches for terms describing the infliction of violence on females. including fisting and images of females in pain.

14. Further, Mr. Hunt determined that 562 of searches were performed on 10 weekdays: 8/16/2005 (4 searches); 9/13/2005 (12 searches); 2/23/2005 (48 searches); 3/29/2006 (37 searches); 3/30/2006 (23 searches); 4/3/2006 (93 searches); 4/5/2006 (96 searches); 4/6/2006 (14 searches); 4/13/2006 (39 searches); 4/19/2006 (196 searches). Mr. Hunt described folders created on the Dassey computer entitled, "Teresa Halbach," "Steven Avery," and "DNA."

15. The Dassey computer reveals significant searches for teenage pornography. It is my understanding that, under Wisconsin law. that the person performing these searches would be in violation of the Wisconsin statute governing child pornography (W.S.A.948.12). The CD contains references to these child pronography images (AverySupp 00028-30, 36, 43, 45, 46, 47, 48, 49, 86, 127, 148, 154-58, 160-190, 193, 213, 214-16, 219, 270, 286, 288-90, 297, 302, 340, 366, 395-96, 410, 414, 419, 429, 439-40). The CD contains numerous references to teenage pornography. (AverySupp 807-10, 813, 818, 830, 920-22, 924, 927, 933, 944, 945). The CD also contains conversations between Bobby and 14 and 15 year old girls. Bobby identifies himself and states that he is 19 years old. The conversation has explicit sexual content. (Hunt 51-55). Additionally, in that conversation, Bobby asks that the girls "flash" him using a webcam. (Hunt 54). The searches speak to the compulsive nature of the offender, specifically the sadism as the fantasy life translates into the compulsion to act out the sadistic fantasy, e.g., a sexual

homicide. A person obsessed with violence is more likely to commit a murder than someone not so obsessed.

16. The images on the CD also contain blindfolded (AverySupp 103) and bound (AverySupp 78, 116-17, 395, 435) girls, dismembered bodies (AverySupp 247), and bestiality (AverySupp 315). All of these images display a fascination with dominance, control, and mutilation, which is characteristic of many sexual homicides. The mutilation of Ms. Halbach's body is consistent with a fascination with the morbid images found on the Dassey computer of dead and dismembered human bodies.

17. I have also reviewed Steven Avery's second supplemental affidavit, which is **Motion to Supplement Exhibit 11**, in which he describes Bobby commenting on Teresa Halbach after each appointment that she had at the Avery Salvage Yard. Specifically, Mr. Avery says that Bobby would say, "I see that your girlfriend was here again." Since Bobby was never present when Ms. Halbach was on the property, Mr. Avery concluded that he must have been watching her from a window. Clearly, Bobby had developed an unhealthy obsession with Ms. Halbach. It is also significant that Bobby has always maintained that he did not know that Ms. Halbach was coming to the property, but there is a conflicting report from the Wisconsin Public Defender Office dated November 23, 2005 in which Bobby admitted that he knew Ms. Halbach was coming to the property that day. (**Motion to Supplement Exhibit 10**).

18. The Dassey computer examination by Mr. Hunt revealed 8 significant periods of deletions related to the times that Ms. Halbach visited the Avery property.

(Exhibit 24, ¶ 7). It is not unusual for an organized offender would try to cover up his fantasies by deleting files from a computer. Furthermore, I agree with Mr. McCrary that it is "highly significant in any investigation if there is an attempt to delete or destroy records." (Exhibit 24, ¶ 7). Clearly, the person deleting or destroying records has to be considered as a suspect in any homicide investigation.

19. The offender in the Halbach murder would be classified as an organized offender who plans, thinks things through and tries to cover his tracks by deleting incriminating files, interjecting himself into the investigation as a primary witness for the State, misleading the investigators about the timeline and events surrounding the murder, and would be very likely to attempt to plant evidence and frame another for the murder. The offender would keep secret his commission of the sadistic murder of Ms. Halbach.

20. The police should have considered Bobby a prime suspect in the murder of Ms. Halbach and should not have eliminated him as quickly as they did.

FURTHER AFFIANT SAYETH NAUGHT

Ann Burgess

Ann Burgess

State of Massachusetts
County of Suffolk

Subscribed and sworn before me
this 5 day of July, 2018.

LAWRENCE J BAILEY
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
July 22, 2022

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN, Plaintiff, v. STEVEN A. AVERY, Defendant.	)	Case No. 05-CF-381 Honorable Judge Angela Sutkiewicz, Judge Presiding

SUPPLEMENTAL AFFIDAVIT OF GREGG McCRARY

Now comes your affiant, Gregg McCrary, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. I have reviewed new evidence in the above-captioned case. Specifically, I have reviewed the forensic computer examiner's report of the images found on the Dassey computer (Ex. 1) and the testimony of Bobby Dassey (Ex. 2). I have also been provided with a graph prepared by Kathleen T. Zeller & Associates (Ex. 3). The graph illustrates the timeline of the pornographic searches and, based upon other evidence, restricts this computer activity to Bobby Dassey.
3. I have reviewed the Wisconsin DOJ report summarizing the forensic computer examination of the Dassey computer (Ex. 4). It is my opinion based upon this report, in addition to the report of Kathleen T. Zellner & Associates forensic computer examiner,

EXHIBIT
S

Case 2005CF000381 Document 1074 Filed 01-16-2023 Page 125 of 154

that Bobby Dassey's internet searches reflects a co-morbidity of sexual paraphilias. The sexual and violent content he was searching for and viewing should have alerted investigators to Bobby Dassey as a possible perpetrator of Teresa Halbach's murder.

4. Based upon the computer activity logged on September 18, 2005, it is my opinion that Bobby Dassey was becoming obsessively deviant in his viewing of violent pornography. On that date, there were 75 searches of violent, child, or underage pornography that start at 5:57 a.m. and continue to 10:04 p.m. The content of these images, combined with the obsessive use of the computer to view these images, and Bobby Dassey's entanglement in the investigation into the murder of Teresa Halbach should have alerted the investigators to Bobby Dassey as someone having an elevated risk to perpetrate a sexually motivated violent crime such as the violent crime perpetrated on Teresa Halbach.
5. The fact that Bobby Dassey became the key witness for the prosecution and that his testimony placed Teresa Halbach on the property, "walking over to Steven's trailer" after she completed her assignment, interjected him into the prosecution in a way that should have raised the suspicions of reasonably trained detectives if that testimony is untrue. Based upon the affidavit of Bryan Dassey, it appears that Bobby Dassey's testimony was untrue.
6. In my opinion, a prudent investigator would have considered Bobby Dassey a suspect and would have investigated him as such. There is no evidence that authorities ever investigated, much less eliminated, him as a suspect or investigated the discrepancies in his trial testimony.

Case 2005CF000381 Document 1074 Filed 06-16-2022 Page 101 of 154

FURTHER AFFIANT SAYETH NAUGHT

Gregg McCrary

State of [illegible]
County of [illegible]

Subscribed and sworn before me
this [illegible] day of [illegible], 2017.

MERRITT STEPHENS
Notary Public
Reg. #332290
Commonwealth Of Virginia
My Commission Expires June 30,201[illegible]

Notary Public

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN, Plaintiff,

vs.

STEVEN A. AVERY, Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
JAN 25 2010
CLERK OF CIRCUIT COURT

Case No. 05 CF 381

DECISION AND ORDER ON DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

The defendant, Steven A. Avery, was convicted following a jury trial on charges of party to the crime of first degree intentional homicide and felon in possession of a firearm on March 18, 2007. On June 29, 2009 the defendant filed a motion for postconviction relief seeking a new trial on grounds that (1) the court improperly excused a juror during the course of the jury's deliberations, and (2) the court improperly excluded evidence of third party liability. The defendant's argument includes a claim of ineffective assistance of counsel. An evidentiary hearing on the defendant's postconviction motion was held on September 28, 2009. Following that hearing the court received written briefs from both parties.

FINDINGS OF FACT

From evidence introduced at the postconviction motion hearing and the court record in this case, the court makes the following factual findings:

370

1

two prongs of the legitimate tendency test. Without any admissible evidence of motive, however, the defendant's attempt to meet the *Denny* requirements fails.

Bobby Dassey. The only evidence offered by the defendant to show motive on the part of Bobby Dassey consisted of evidence allegedly supporting a motive to frame Steven Avery. No evidence is offered to suggest Bobby Dassey had a motive to murder Teresa Halbach. Avery suggests that if Brendan Dassey, Bobby's brother, or Scott Tadych were involved in the crimes, Bobby would have had a motive to help them frame Steven Avery for the crimes, presumably based on his relationship with his brother and Scott Tadych. The defendant also offers that Bobby did not like Steven Avery and stated that Steven "would lie in order to 'stab ya in the back.'" Defendant's postconviction motion at p. 57. The speculation that if Brendan Dassey or Scott Tadych had committed the crimes, Bobby Dassey would have had a motive to frame Steven Avery, unsupported by any evidence whatsoever, is too speculative to meet the motive requirement. Likewise, even if Bobby Dassey thought his Uncle Steven was a liar, that is not enough to constitute motive to commit murder. The connection is simply too tenuous. Avery's proffered evidence is not sufficient to show that Bobby Dassey had motive to murder Teresa Halbach.

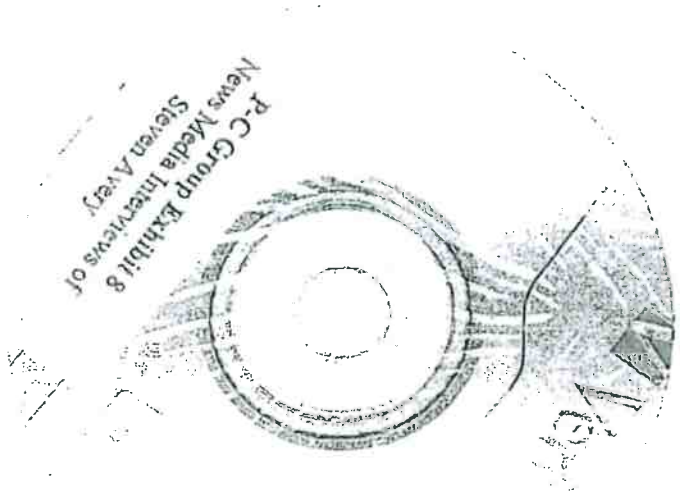
The evidence offered against Bobby Dassey probably did meet the opportunity and direct connection to the crime requirements of the legitimate

tendency test because of his presence on the property at the time Teresa Halbach was there. However, without any showing of motive, third party evidence against Bobby Dassey is precluded under *Denny*.

In conclusion, the court stands by its original determination that the defendant was not entitled to introduce *Denny* evidence against any third party because he acknowledged at the time that he could not demonstrate any party had a motive to kill Teresa Halbach. The additional arguments and offers of proof Avery now raises in his postconviction motion were waived by not being presented to the court in a timely manner. Even if those arguments and offers of proof have not been waived, they are still not sufficient to justify the admission of direct third-party liability evidence under *Denny* against Scott Tadych, Charles Avery, Earl Avery or Bobby Dassey.

G. If Denny does not apply, what rules determine the admissibility of Avery's proffered third-party evidence?

For reasons already stated the court concludes that, despite Avery's claimed inability to demonstrate a motive on the part of anyone else to murder Teresa Halbach, his offer of third-party liability evidence is subject to the legitimate tendency test established by the court in *Denny*. Like the defendant in *Denny*,



STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff

vs.

STEVEN A. AVERY,
Defendant.

CLERK'S CERTIFICATE
CASE NO: 2005 CF 381
APPELLATE COURT NO. : 17 AP 2288

FILED
DEC 18 2017
CLERK OF CIRCUIT COU
MANITOWOC COUNTY, '

TO: Clerk of Court of Appeals
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

I hereby transmit the record in the above-entitled case compiled pursuant to Rule 809.15. The original file is an electronic file. Pursuant to Rule 809.15(4)(a), this record does include items that are not electronically maintained and must be sent by traditional methods.

- **Envelope containing VHS video tape of 5 stories on Avery case and CD Rom copies tape of telephone call from the 'Sturms' to Sheriff Pagel;**
- **Envelope containing DVD of narrative of Tim Austin, DVD with final version of animations and reconstruction report images-4X6 prints;**
- **Envelope containing CD Rom bearing four recorded interviews conducted primarily by the Marinette County Sheriff's Department;**
- **Envelope containing CD Rom containing audio recordings on recorded phone lines from Manitowoc County Sheriff's Department;**
- **Envelope containing VHS tape of Teresa Halbach investigation press conference published by WFRV.com;**
- **White binder containing photographs;**
- **Black binder containing documents/diagrams;**
- **White binder containing photographs;**
- **Black binder containing documents/diagrams;**

Case 2005CF000381 Document 1074 Filed 03-16-2022 Page 130 of 154

- **Five CD's that are part of the Amendments & Supplements to Motion for *Reconsideration and Motion to Vacate*;**
- **DVD's and jump drivecontaining exhibits from postconviction motion filed on 06-06-17.**

Dated: December 18, 2017

Submitted by,

Roberta Brice

Roberta Brice
Deputy Clerk of Court – Criminal Unit
Manitowoc County Clerk of Court Office
1010 South 8th Street
Manitowoc, WI 54220
(920) 683-4034

cc: *Thomas Fallon, Ass't. Attorney General*
Kathleen Zellner, Defense counsel

Case 2005CF000381 Document 1071 Filed 09-19-2022 Page 130 of 154

A Could have been.
Q Do you remember, Mr. Johnson, being interviewed by law enforcement officers in this case?
A Yes, I do.
Q And do you remember being interviewed on February 6 of 2006?
A Yes. That was at my house in Jackson.
Q Okay. At that time, Mr., uh, Johnson, do you remember telling law enforcement officers that you must have seen Steven Avery just prior to October 31 of 2005?
A Yes, I do, because he had a cut on his hand.
Q Who's he?
A Steve.
Q Can you describe that cut for us, please?
A I can't even -- It's not uncommon to have your hands cut in the junkyard, but I can't -- it was across -- it was a pretty nasty gash.
Q Across which finger? Do you remember?
A I think it was across the knuckle or the hand. I can't swear to it.

ATTORNEY BUTING: Record should reflect the witness was pointing to the, um -- Do that again, sir?

ATTORNEY KRATZ: Well, no, I asked him

Case 2005CF000381 Document 1074 Filed 04-19-2022 Page 137 of 154

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN, Plaintiff, v. STEVEN A. AVERY, Defendant.	)	Case No. 05-CF-381 Honorable Judge Angela Sutkiewicz, Judge Presiding

AFFIDAVIT OF STEVEN A. AVERY, SR.

Now comes your affiant, Steven A. Avery, Sr., and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. I told my trial defense lawyers that my blood in the RAV had been taken from my sink.
3. Whenever I had to crush a vehicle, I used a front-end loader. I would not keep a key for any vehicle that I intended to crush. Even if I did not use a loader to move a vehicle, I would not need the key to start it because I could hot-wire it.
4. I made a number of appointments for AutoTrader photo shoots with Teresa Halbach before October 31, 2005. On days when we had scheduled appointments, Teresa Halbach would call me if she was running late.

EXHIBIT 4

Case 2005CF000381 Document 1074 Filed 01-16-2023 Page 133 of 164

5. No guns were shot in the garage except Rollie Johnson's .22 rifle. I know that Rollie would shoot his rifle into gopher holes near the garage door. Sometimes bullet fragments and shell casings ended up on the floor of the garage. Sometimes, Jodi Stachowski would fire Rollie Johnson's Marlin .22 caliber rifle into the floor of the garage.
6. There were seven burn barrels on the Avery property. Barb had four, Chuck had one, Allan and Delores had one, and I had one.
7. The back panel of Roland Johnson's wooden record case in my bedroom was not loose. in early November 2005. Whoever damaged that piece of furniture did it after I left the Avery property on November 5. The back of that piece of furniture was held on by nails and was very sturdy.
8. I noticed my toothbrush was missing in photographs taken by investigators (Trial exhibit 206). My toothbrush must have been taken from my bathroom after law enforcement began their occupation of the Avery property on November 5, 2005.

Events of October 31, 2005

9. When I called AutoTrader on October 31, 2005, at 8:12 a.m., I told the receptionist that the appointment was for Barbara Janda. I told her my sister's full name, not her first initial, because Barb owned the minivan to be listed in AutoTrader. I told the AutoTrader employee that the appointment was at 12932 Avery Road.
10. I called AutoTrader at 11:04 a.m. on October 31, 2005, to find out if the appointment was that day. I again told the AutoTrader employee my sister Barb's full name because Barb owned the vehicle to be listed in AutoTrader. I did the same when I listed a vehicle owned by Thomas Janda in AutoTrader. The AutoTrader employee told me that the

Case 2005CF000381 Document 1074 Filed 03-16-2023 Page 139 of 154

photographer was coming to the property around 2:00 p.m. I told the AutoTrader employee that the photographer should come to 12932 Avery Road.

11. Sometimes, I used the *67 features when I made calls from my cell phone. When I called Ms. Halbach at 2:24 p.m. before she arrived and 2:35 p.m. on October 31, 2005, after she left, I dialed *67 so that if Ms. Halbach did not answer, she would not see my number and feel like she had to return my call. I called at 2:24 p.m. to see when she would get there, but she didn't answer the call.

12. Ms. Halbach got to our property around 2:31 p.m. When I looked out of the window of my trailer, I saw her taking a picture of my sister's van. I put on my shoes to go outside and pay her. I saw her start to walk toward my trailer when I was going outside, but when she saw me she waved and turned around and walked to her car. I went over to her car and I remember she was sitting in the driver's seat with door open and the engine was running. I went over and handed her $40.00 in cash for the ad. She gave me an AutoTrader magazine and drove away. I remember she turned left on Highway 147 from Avery Road.

13. I noticed that the exterior of her car was very clean. There were no visible dirt or mud stains and it looked clean. Her driver's side parking light was not broken. Ms. Halbach got to our property within a few minutes after I called her at 2:24 p.m.

14. I looked at the AutoTrader magazine that Ms. Halbach gave me and saw that they had front loaders for sale. I called at 2:35 p.m. to see if she could come back to take a picture of a front loader I wanted to sell in AutoTrader magazine. I hung up before Ms. Halbach picked up the phone.

15. When I called Teresa Halbach at 4:35 p.m. on October 31, 2005, I got an automatic message that said that her voice mailbox was full. I told Jodi this information in one of our phone calls that evening. I called at 4:35 p.m. to set up an appointment for the front loader.

16. I had a bonfire on October 31, 2005. The fire started around 7:00 p.m. The fire burned for about two or two and a half hours. I invited my nephew, Brendan, to come over. Brendan went home before Jodi called at 8:57 p.m. The fire burned quickly because we were burning brush. I used gas to start the fire. By the time Jodi Stachowski called at 8:57 p.m., the fire was almost over.

17. I would burn trash from my kitchen, like plastic milk jugs and boxes, in the burn barrel north of my trailer every two weeks. I did not use gas or any other fuel to start the fire. I used a lighter and some brush to start the fire. I did not burn garbage in my burn barrel on the evening of October 31, 2005. I had burned garbage a week before Halloween and did not have enough trash on Halloween to warrant burning garbage. When I burned garbage a week before Halloween, Robert Fabian, my brother Earl's brother-in –law, had come over to shoot rabbits with Earl. They drove up to my trailer in my mother's golf cart and we made small talk. I know that Robert Fabian testified that this event took place on Halloween, but I know that it took place a week before because I did not burn any garbage in the burn barrel north of my house on Halloween.

Events of November 3, 2005

18. On the evening of November 3, 2005, Manitowoc County Sheriff's Department Sergeant Colborn visited the Avery property to ask if I knew anything about the disappearance of

Teresa Halbach.

19. After that conversation, I drove my Pontiac Grand Am from my parents' residence to its usual parking spot outside of my garage. I got out of my car and walked to my sister's trailer, which was right next to mine. There, I broke open a cut on the outside of the middle finger of my right hand as I was attempting to unhitch my sister Barb's trailer. Before going to my trailer to put masking tape on my finger, I went into my Pontiac to grab my phone charger. I dripped blood in my Pontiac on the gearshift and other places. Anyone who looked through the windows of my Pontiac could have seen the blood on the gearshift, and known there was a cut on my hand. I left my Pontiac unlocked.

20. Then, I entered my trailer through the south door because it was closest to the bathroom. I did not lock the south door of my trailer after I entered through it. A large amount of blood dripped onto the rim and sink and the floor of the bathroom. I did not wash away or wipe up because my brother Chuckie was waiting for me to go to Menards in Manitowoc with him. I think I left somewhere between 7:15 and 7:30 p.m. I quickly wrapped my finger in duct tape and left the trailer to meet Chuckie. I left through the front door of my trailer.

21. I tried to tell my trial defense attorneys about the blood in the sink. They did not listen to me and told the jury the blood came from a blood tube at the Courthouse.

22. While Chuckie and I were leaving Avery property, driving a flatbed to Menards in Manitowoc, I saw taillights in front of my trailer. The taillights were further apart and higher off the ground than sedan taillights. I told my brother, who was driving, about the taillights. We turned around and drove to my trailer, but the vehicle was gone.

Case 2005CF000381 Document 1071 Filed 01-13-2023 Page 142 of 154

23. I believe the vehicle was facing my trailer from the northwest. The vehicle would be facing this direction if it drove to my trailer from Kuss Road east across the field between Kuss Road and my trailer. The shape of the taillights was like a RAV-4, not a police squad car. They were wider apart and higher off the ground.

24. After leaving Menards, Chuckie and I stopped by the Manitowoc County Jail, where I left some money for Jodi. By the time we got home, sometime around 10:00 or 10:30 p.m., I was real tired. I went into my trailer through the front door and went straight to bed. I did not go back into my bathroom on November 3.

25. I did not call the AutoTrader office on November 3, 2005. I did not tell anyone that Ms. Halbach missed our October 31 appointment. I told every person who asked whether Ms. Halbach made our October 31 appointment that she arrived between 2:00 p.m. and 2:30 p.m., completed the appointment, and left shortly after.

Events of November 4, 2005

26. On November 4, I woke up at 6:00 a.m. and went into the bathroom to take a shower. I saw that most of the blood on my sink, which I had not cleaned up the previous night, was gone. It seemed to me that the blood had been cleaned up. I did not clean the blood and none of my family members had been in my trailer.

27. Two police officers in an unmarked car were by my trailer when I went to my trailer on a golf cart on the morning of November 4. They asked me if they could search my trailer. I let them search my trailer. After they left, I locked my trailer and went back to work.

28. I smelled cigarette smoke in my trailer on November 4. This was very strange because I did not smoke and Jodi, who lived with me, did not smoke. I thought that because my

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 143 of 154

trailer smelled like smoke, someone else had been in my trailer and I said that in one of my interviews.

29. My brother Chuck called me on the evening of November 2005 and told me that there were headlights down by his house. I checked my phone records and know that he called my at 7:20 p.m. I went down by his trailer but didn't see any headlights.

Events of November 5, 2005

30. Early in the morning on November 5, 2005, before I left for the family property in Crivitz, WI, I opened the south door of my trailer and observed pry marks near the door latch. I left for the family cabin in Crivitz shortly after that.

Events of November 9, 2005

31. During the physical examination of my body on November 9, 2005, the nurse took two swabs near my groin at the request of Calumet County Investigator Wiegert. I saw the nurse who took the groin swabs hand them to Investigator Wiegert. As I was being taken out of the exam room by Agent Fassbender and the nurse, I saw Investigator Wiegert pretend to put the swabs in the hospital-type waste basket but I did not actually see the swabs leave his hands and fall into the basket.

Pro Se Post-Conviction Proceedings

32. When I was preparing my *pro se* post-conviction motion, I did not have any way to contact labs because I could not get in contact with an attorney. I sent letters to labs whose addresses I could find. When labs did write back, they told me they could not help because I did not have an attorney. Many attorneys informed me that they would not represent me. Some law firms even returned my letters without opening and reading

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 144 of 154

them. I sent letters to and called attorneys in Wisconsin, Illinois, Minnesota, and Iowa. Some of the attorneys told me that my case was too hard for them to take. I had no money to get an attorney, investigator, or independent lab. I even wrote to Dean Strang's ex-wife for held because she was an investigator. She did not write back.

33. One of my attorneys, Steven Glynn, told me that being my lawyer would hurt his law firm.

34. I dropped out of high school after 11th grade to help out with the family business. I had always been in special education classes.

35. Prison law library only had Lexis Nexis. I had no other way to look at case law or get an investigator.

Correspondence with Ken Kratz

36. Ken Kratz, the prosecutor from my 2007 criminal trial, contacted me in 2013. He wanted to meet with me to talk about writing a book together. Copies of the letters Mr. Kratz wrote me and I wrote Mr. Kratz are attached as Exhibit A to this affidavit.

Current Post-Conviction Proceedings and Testing

37. I really wanted every form of testing suggested by my current post-conviction counsel. For example, I did brainwave testing to see if I was lying. I would not do these tests if I were guilty. I have nothing to hide because I did not kill Ms. Halbach.

38. My current attorney, Kathleen Zellner, brought a Toyota key with her when visiting me. She told me to hold it in my hand for twelve minutes, which I did.

Case 2005CF000381 Document 1074 Filed 08-16-2022 Page 140 of 149

Steven Avery

Steven Avery

Subscribed and Sworn

to before me this 23rd

day of November, 2016.

Notary Public

Expires 8-26-2020

Case 2005CF000381 Document 1074 Filed 08-18-2022 Page 140 of 151

4. During the week, Bobby was the only person home at the Dassey residence between 6 a.m. and 3:15 p.m.

5. I never turned on Barb's computer and used her computer in any way. I did not have the password for the computer. On one occasion, I observed Blaine on the computer communicating with his girlfriend.

6. I had my own computer with internet service. There would be no reason that I would need to be on Barb's computer.

7. My computer was never used to do Google searches. My girlfriend, Jodi, and my sister, Barb, did Yahoo searches. I was present with my sister, Barb, who did a search of dating sites for my brother, Chuck, and for property. The only other searches were done by my girlfriend, Jodi. At no time were searches ever done on my computer for images of Teresa Halbach or images of violent pornography.

8. The only adult films I have ever viewed were on DirecTV. On my computer, the only nude photographs I had were ones uploaded by my girlfriend of her and me.

9. I believe that my nephew, Bobby Dassey ("Bobby") and Scott Tadych ("Tadych"), my sister's third husband, are involved in the murder of Teresa Halbach ("Ms. Halbach") for the following reasons:

a. On the evening of November 3, 2005, after I left my mother's place, I stopped at my sister, Barb Dassey-Janda's ("Barb"), property and broke open a cut on the outside of the middle finger of my right hand as I was attempting to unhitch her trailer for her.
b. I went into my Pontiac, parked on my driveway, to grab my phone charger. I dripped blood in my Pontiac on the gearshift and other places. Anyone who looked through the windows of my Pontiac could have seen the blood on the gearshift, and known there was a cut on my hand. I left my Pontiac unlocked.

Case 2005CF000381 Document 1076 Filed 08-1[illegible] Page 147 of 154

c. After reviewing police reports and thinking about the fact that Blaine Dassey ("Blaine") went with Chuck Avery ("Chuck") and me to Menards, I remembered that I went to Barb's door to see if any of her sons wanted to go with me to Menards.

d. Bobby and Blaine were home. I asked Bobby and Blaine if they wanted to go with me and my brother, Chuck, to Menards. I told both of them that a law enforcement officer had just left the property after asking me questions about Ms. Halbach's visit to photograph Barb's van on October 31, 2005. I noticed that Bobby was immediately nervous after I mentioned the visit by the officer. He said that he could not go with me to Menards and that he had "things to do." There is no doubt in my mind that Bobby saw that my finger was bleeding. My memory is that Blaine said that he wanted to go to Menards and he went with Chuck and me.

e. Prior to leaving for Menards, I returned to my trailer to put tape on my bleeding finger. I entered my trailer through the south door because it was closest to the bathroom. I did not lock the south door of my trailer after I entered through it. A large amount of blood dripped onto the rim and sink and the floor of the bathroom. I did not wash away or wipe up because Chuck was waiting for me to go to Menards in Manitowoc with him. I think I left somewhere between 7:15 and 7:30 p.m. I quickly wrapped my finger in duct tape and left the trailer to meet Chuck. I left through the front door of my trailer.

f. While we were leaving Avery property, driving a flatbed to Menards in Manitowoc, I saw taillights in front of my trailer. The taillights were further apart and higher off the ground than sedan taillights. I told my brother, who was driving, about the taillights. We turned around and drove to my trailer, but the vehicle was gone.

g. On November 4, I woke up at 6:00 a.m. and went into the bathroom to take a shower. I saw that most of the blood on my sink, which I had not cleaned up the previous night, was gone. It seemed to me that the blood had been cleaned up. After reviewing more case documents and thinking about what happened on November 3, 2005, I do not believe that law enforcement broke into my trailer and took blood from my sink and planted it in Ms. Halbach's vehicle. I believe that Bobby removed the blood from my sink and planted it in the RAV-4. Law enforcement would not remove the blood from the sink because they would not know that the blood belonged to me and would believe that it belonged to Ms. Halbach. Only the killer would know that the blood did not belong to Ms. Halbach and only someone who saw my finger bleeding would know that the blood was mine, so, I think that the only person who was there and knew my finger was bleeding and could have gotten into my trailer was Bobby. He would have taken the blood to frame me and save himself. Bobby drove his Blazer to the front of my trailer and it was his Blazer taillights that I observed as Chuck

Case 2005CF000381 Document 1074 Filed 08-15-2022 Page 143 of 150

turned on STH 147. I do not believe that the vehicle could have come from any other location than the Dassey-Janda place because the vehicle was gone in the two minutes it took Chuck, Blaine, and I to return to my trailer. The vehicle had to already be on the property when we left, and Bobby's vehicle was the only vehicle that was present at the time we left. I believe that my trailer door was unlocked, but, even if it were locked, the Dasseys had a key to my trailer at their place.

h. In my prior Supplemental Affidavit, at paragraphs 14-17, I stated that Bobby lied about leaving the Avery Salvage Yard ("ASY") **prior** to Ms. Halbach. As I have stated in my Supplemental Affidavit, Bobby left the ASY property immediately **after** Ms. Halbach in his black Blazer. (See R. 636:92, at ¶¶ 14-17). Bobby lied at trial when he testified for the State that he left the property before Ms. Halbach.

i. I reviewed Bobby's November 17, 2017 interview with Special Investigator John Dedering ("Inv. Dedering") of the Calumet County Sheriff's Department. In the November 17, 2017 report, Bobby misrepresented the location of Ms. Halbach's vehicle when she was photographing Barb's van. Bobby misrepresented in his map that Ms. Halbach's car was parked east of Barb's van. In fact, Ms. Halbach's car was parked in such a position that Barb's van would have obstructed Bobby's view of at least part of Ms. Halbach's activities at the van and her walking towards my trailer. (Attached and incorporated as **Exhibit A** is a copy of my correction of the location of Ms. Halbach's vehicle in relation to Barb's van).

j. As I have stated in my Supplemental Affidavit, Bobby commented to me every time Ms. Halbach visited the property, with words to the effect of "I see that your girlfriend was over yesterday." (See R. 636:89, at ¶ 2).

k. Bobby misrepresented that he did not know Ms. Halbach was coming to take photographs on October 31, 2005. Current post-conviction counsel provided me with a copy of my cell phone records. Reviewing those records refreshed my recollection about the fact that I spoke to Bobby around 8:39 a.m. and told him to get the battery in the van charged because the photographer was coming to take pictures of the van. Current post-conviction counsel provided me with a transcript of my November 6, 2005 interview with Marinette County Sheriff's Department. After reading the transcript, my recollection was refreshed that I stopped by Barb's residence and talked to Bobby around 11 a.m. I specifically recall talking to Bobby about charging the van, and I believe that we actually tried to charge the van.

l. In one of his first police interviews, Bobby said he had seen me, and not Ms. Halbach, walking back to my trailer which is true. I came out the door and walking to Ms. Halbach's vehicle to pay her on October

Case 2005CF000381 Document 1074 Filed 05-16-2022 Page 149 of 154

Marinette County Sheriff's Department
Investigations Division
Original Report

Date: November 7, 2005
Page: 2 of 6

Officer: Sgt. Michael Sievert
Case: 05-4120

Avery was there, and he said yes; however, he didn't want to come out. Mr. Avery then went back into the cabin, and came out a short time later and told me that Steven would like to see me inside the cabin. I did go inside the cabin, and I introduced myself to Steven Avery. I explained to him that we were looking for a missing person and that since he was the last person to see her, we had been requested by the Manitowoc Sheriff's Department to try to get some more information to locate this female.

At that time, Steve Avery agreed to talk with us, and he went out with Detective O'Neill to his unmarked police vehicle. I then asked Charles Avery to come outside and talk with me. Charles and I went to my black F150 pickup truck, which is an unmarked police vehicle. At the time of this interview and the second interview, I had very limited knowledge of what was going on in Manitowoc County. I did obtain the first statement from him, which reads as follows:

> *I am the owner of Avery's Auto Salvage in Two Rivers Wisconsin. I was at the salvage yard the day the girl came to take a picture of the Dodge mini-van. Steven went down to the trailer house that he is staying in with the girl. I don't know the girl's name but she is the one who normally came to take pictures. I don't know if Steven was in the girl's vehicle or if he took his own. Steve was gone for about 10 minutes and I did not see the girl after they went to take the pictures or before. I asked Steven where he went and he told me to take pictures with the girl to place in a magazine to sell the van. Steven told me that the girl left. Just Steve, my brother Earl and I were at the salvage yard that day.*
>
> END OF STATEMENT (please find a copy of that original statement attached to this report)

After about 10 minutes, I then made contact with Charles Avery and obtained a second statement which reads as follows:

> *On Thursday 11-03-05 around 6:30 p.m. Steven and I were going to Menards and Steven saw taillights by the trailer that he is staying in. I turned around on Jambo Creek Road. We went back and pulled into my sister's driveway. I did not see the taillights. Steven checked around by his trailer but didn't find anything. I stayed by my sister's house. If there was a vehicle back there the only road out was past my sister Barbara's house. A vehicle could get out by driving across the field.*
>
> *On Friday 11-04-05 when I was leaving to come up to the cabin in Marinette County I saw headlights behind my house on Avery Road, I called Steven and asked him to check it out. Steven called me back and said he didn't find anything.*

Case 2005CF000381 Document 1074 Filed 01-18-2023 Page 150 of 154

23. I believe the vehicle was facing my trailer from the northwest. The vehicle would be facing this direction if it drove to my trailer from Kuss Road east across the field between Kuss Road and my trailer. The shape of the taillights was like a RAV-4, not a police squad car. They were wider apart and higher off the ground.

24. After leaving Menards, Chuckie and I stopped by the Manitowoc County Jail, where I left some money for Jodi. By the time we got home, sometime around 10:00 or 10:30 p.m., I was real tired. I went into my trailer through the front door and went straight to bed. I did not go back into my bathroom on November 3.

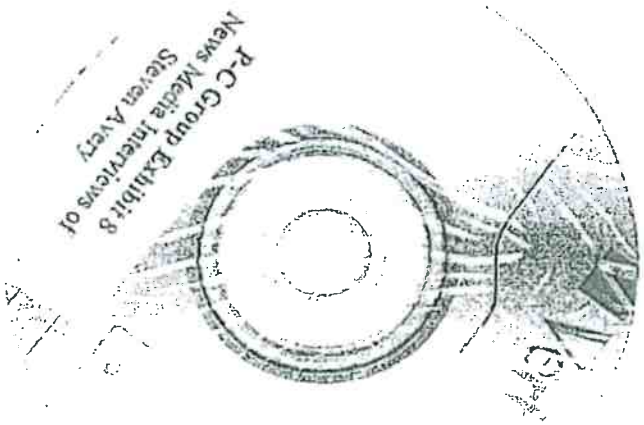
25. I did not call the AutoTrader office on November 3, 2005. I did not tell anyone that Ms. Halbach missed our October 31 appointment. I told every person who asked whether Ms. Halbach made our October 31 appointment that she arrived between 2:00 p.m. and 2:30 p.m., completed the appointment, and left shortly after.

Events of November 4, 2005

26. On November 4, I woke up at 6:00 a.m. and went into the bathroom to take a shower. I saw that most of the blood on my sink, which I had not cleaned up the previous night, was gone. It seemed to me that the blood had been cleaned up. I did not clean the blood and none of my family members had been in my trailer.

27. Two police officers in an unmarked car were by my trailer when I went to my trailer on a golf cart on the morning of November 4. They asked me if they could search my trailer. I let them search my trailer. After they left, I locked my trailer and went back to work.

28. I smelled cigarette smoke in my trailer on November 4. This was very strange because I did not smoke and Jodi, who lived with me, did not smoke. I thought that because my



FILED

DEC 15 2017

CLERK OF CIRCUIT COURT
MANITOWOC COUNTY, WI

seeing any particular vehicle that later it became of interest of -- to you?

A Uh, yes. I recall seeing a green SUV.

Q Okay. When you say "a green SUV", um, how big was it?

A Uh, midsize SUV. Not the large size.

Q What kind of vehicle do you have?

A I have a Tahoe.

Q And is that a full size --

A Uh, generally speaking, yeah.

Q Okay. And the -- and the vehicle you saw, was it as big as that? Or smaller? Or what?

A It was smaller.

Q Okay. Um, so tell us what you saw?

A I seen a vehicle pass by the front of my truck, and I just glanced up, and it was just a green SUV, and that -- that's all.

Q Well, which direction was it going?

A Back towards Avery Road. So that would be to the north. I mean, towards 147.

Q Can you just show us on the -- with your pointer, and -- and just with your pointer kind of draw direction -- the direction that it was going? So did it look like it was going into the Avery Auto Salvage area or out of the Avery --

A It was leaving.
Q Okay. And are you familiar with the Avery Auto Salvage?
A Yes.
Q Do you know them personally?
A Uh, somewhat.
Q Are you -- Would you consider yourself a friend of any of the Averys?
A No.
Q Have you ever done business there?
A I was there, yes.
Q How many times?
A Um, three or four times.
Q Okay. Um, and did you happen to see which direction that green SUV went when it got to the intersection of Highway 147?
A No, I didn't pay attention.
Q Did there come a time when this, um -- this recollection that you have became of interest or importance?
A Uh, not necessarily. I -- I mean, I -- I -- At first, I said I recalled seeing a green SUV, but that was about it. I -- I didn't think nothing of it.
Q Okay. Well, let -- let me -- I'm -- Let me ask it this way: Did you later learn or see any kind

Case 2005CF000381 Document 1074 Filed 12-15-2022 Page 154 of 174

Q Or how he got your name to call?
A He got my name from that -- that check-in log I think.
Q Okay. You mean the -- the -- the roadblock?
A Yes.
Q And did you tell him what you saw?
A Yes.
Q What did you tell him?
A That it was possible that I seen a -- Well, I told him that I seen a green SUV leave, but I wasn't sure if it was hers or not.
Q All right. Did you tell him what time?
A Uh, yeah.
Q And --
A Yes.
Q -- I'm not sure you told us what time. What time was it on the 31st?
A In between 3:30 and 4.
Q And how do you know that?
A Because that's when I loaded my truck.
Q All right. Thank you. That's all I have, sir.
THE COURT: Mr. Fallon?
ATTORNEY FALLON: Yes. I'm going to try this mike if it doesn't work. Test. Test. Try it again.

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN	)	
	)	
Respondent	)	
	)	
-v-	)	Case No.: 05-CF-381
	)	
STEVEN A. AVERY	)	
	)	
Petitioner	)	

SEPARATE APPENDIX TO THIRD MOTION FOR POST-CONVICTION RELIEF

VOLUME III (APP 289 TO APP 374)

KATHLEEN T. ZELLNER
Lead Counsel
DOUGLAS H. JOHNSON
KATHLEEN T. ZELLNER &
ASSOCIATES, P.C.
4580 Weaver Parkway, Suite 204
Warrenville, IL 60555
(630) 955-1212

Counsel for Petitioner

STEVEN G. RICHARDS
Local Counsel
Casco, Wisconsin 54205
(920) 837-2653
Atty#: 1037545

Local Counsel for Petitioner

PEOPLE -v- STEVEN AVERY
INDEX TO APPENDIX
VOLUME I OF III

VOLUME II OF III

VOLUME III OF III

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN	)	
	)	
v.	)	Case No. 05 CF 381
	)	
STEVEN A. AVERY	)	

AFFIDAVIT OF BLAINE DASSEY

Now comes your affiant, Blaine Dassey, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information and belief. I am of sound mind and I am not taking any medication, nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.

2. In October 2005, I lived with my mother and brothers at 12930A Avery Road, Two Rivers, WI 54241. My brothers names are Brendan, Bryan, and Bobby Dassey. Brendan and I shared a bedroom. Bobby had his own bedroom. Bryan kept some clothes at the house but lived with his girlfriend and was rarely at the residence. Tom Janda had moved out of the residence in early 2005.

3. When none of us were home, the residence was always locked.

EXHIBIT
Group 19

4. My uncle Steven Avery ("Uncle Steven") only came to the residence when my mother and his sister Barb was home. I never remember my uncle Steven entering the residence when my mother was not home.

5. I remember that my Uncle Steven had cut his finger 1-2 weeks before October 31, 2005.

6. I remember, on October 31, 2005, seeing my Uncle Steven carry a white plastic bag to his burn barrel. I did not see a fire in the burn barrel. However, the police pressured me into saying that there was a fire in the burn barrel and visible smoke coming from the burn barrel. My testimony about the fire and smoke coming from the burn barrel was not true.

7. I remember, on October 31, 2005, seeing a bonfire behind my Uncle Steven's garage that was about 3-feet high. The police tried to pressure me into saying that the flames of the bonfire were much higher, so at trial I testified that the flames of the bonfire were 4-5 feet high but that testimony was not true. The police put the height of the flames "in my head and I agreed to it."

8. On October 31, 2005, I was with Brendan up until I left to go trick-or-treating. I distinctly remember Brendan wanted to use the computer at slightly before 5 p.m. because I wanted to make a phone call and his use of the dial-up internet computer would have prevented me from doing that. I know that Brendan was not at Uncle Steven's trailer up until I left to go trick-or-treating.

9. There was only one computer at the residence and it was always in Bobby's room sitting near a desk.

10. The computer had a password.

11. The computer had an AOL dial-up internet connection.

12. Bobby was the primary user of the computer.

13. At no time did I ever do searches for pornographic images or words related to pornography, words related to violence, words related to death, words related to mutilations, words related to torture, words related to guns or knives, words related to Teresa Halbach, words related to Steven Avery, words related to DNA, or words related to dead, mutilated or dismembered female bodies.

14. At no time did I ever create a folder for Teresa Halbach, my Uncle Steven, DNA, or news stories on the murder.

15. The only time I used the computer was to do my homework and occasionally send instant messages.

16. I remember my mother Barb hiring someone to "reformat the computer" but I'm not sure who that person was.

17. I do not have any personal knowledge of who made the appointment with AutoTrader to have my mother's van photographed but I did help clean the van so that it could be sold.

18. At the time, my family had two burn barrels located behind our house.

19. I was familiar with the gravel pits to the south of the Avery salvage yard but I did not go to the gravel pits to hunt. I stopped hunting when I was 22.

20. On October 31, 2005 when the school bus driver brought Brendan and me home as we travelled west on STH 147 I saw Bobby on STH 147 in a bluish or

greenish vehicle heading towards Mishicot. Bobby was not driving his black Blazer. Bobby was not home the rest of the evening while I was home. (Attached and incorporated herein as Exhibit A is a map that of the location of Bobby's vehicle that I described in this paragraph.)

FURTHER AFFIANT SAYETH NAUGHT

Blaine Dassey

State of Wisconsin
County of Manitowoc

Subscribed and sworn before me
This 15th day of June 2016.

Notary Public
My Commission expires:
2-24-2020

Q Was there anybody outside, or making contact with her, outside by the vehicle?
A No.
Q After seeing this woman walking toward your Uncle Steven's trailer, did you ever see this woman again?
A No.
Q How long was it that you were in the shower? Do you remember?
A Maybe three minutes, or four minutes.
Q Okay. What did you do then?
A Got dressed, and left, to go hunting.
Q Now, when you left to go hunting, did you have a vehicle on the premises?
A Yes.
Q Can you tell the jury what kind of vehicle it was?
A A black Chevy Blazer.
Q Where was that parked?
A It was parked right between the house and the garage.
Q About what time do you think you left to go hunting?
A Probably twenty to three, quarter to three.
Q Quarter to three? Bobby, how do you know that was the time? Why is that time important as it

Q Did you get anything that day?
A No. I seen two deer. I didn't get anything, no.
Q All right. After deer hunting, what did you do?
A Came home, and I laid down, and I went to sleep again.
Q What time did you get home? Do you recall?
A It was "five-ish".
Q Now, when you drove back home at about five o'clock in the afternoon, was Ms. Halbach's vehicle still visible?
A No.
Q What did you do when you got home?
A I watched TV for a little bit, then I went to bed.
Q Did you go to sleep?
A Yes.
Q How long did you sleep?
A Probably three hours.
Q Let me back up just a few minutes, Bobby. At any time during the morning or early afternoon hours, did you receive any phone calls at your residence?
A No. Not that I am aware of.
Q Why don't you tell us what that means, "not that you are aware of"?
A I am a real deep sleeper. When I sleep, I don't hear nothing.

Q. Was this the first you learned that Teresa Halbach was missing?
A. Yes.
Q. But one or both of them, from a conversation, had seen it on TV?
A. Yes.
Q. What the TV had said -- well, I guess you hadn't seen the TV, but you eventually did see TV reports?
A. Yes.
Q. Of Ms Halbach missing? And it described her as missing?
A. Yes.
Q. At least for the first several days?
A. Yes.
Q. Now, you, I think beginning on November 5, which is the day you tried to come home and found Jambo Creek Road blocked off?
A. Yes.
Q. Saturday?
A. Yes.
Q. Okay. Beginning that day, you were coming home to try to get your labrador puppy back after goose hunting?
A. Yes.

Q. In the morning?
A. Yes.
Q. With Mike, again, actually, right?
A. Yes.
Q. Okay. So you come back and you can't get to your house because the police have the road blocked off?
A. Yes.
Q. Beginning that, right then and there, for probably over three hours that Saturday, November 5, you've talked to the police a number of times?
A. Yes.
Q. About the investigation into Teresa Halbach's disappearance and death?
A. Yes.
Q. It was a little over three hours, as you recall, that first day, Saturday, before you could get your dog back?
A. Yes, it was about three and a half hours.
Q. Okay. And then, at least two other times, you were interviewed in the weeks, or days, weeks, months following Teresa Halbach's disappearance?
A. Yes.
Q. In any one of those conversations with the

A. Yes.
Q. About the investigation into Teresa Halbach's disappearance and death?
A. Yes.
Q. It was a little over three hours, as you recall, that first day, Saturday, before you could get your dog back?
A. Yes, it was about three and a half hours.
Q. Okay. And then, at least two other times, you were interviewed in the weeks, or days, weeks, months following Teresa Halbach's disappearance?
A. Yes.
Q. In any one of those conversations with the police, did any police officer ever ask you about this joke that you overheard between Mike and Steve in the garage?
A. No.
Q. If we go back to Friday, November 4, again, later in the night, do you remember either yourself or your Uncle Steven getting a call, probably on a cell phone, from your Uncle Chuck?
A. No.
Q. Something about having seen headlights back by his house?
A. Not that I remember.

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
05-0157-955

Page 90
File Number

TYPE OF ACTIVITY: Interview of Bobby A. Dassey

DATE OF ACTIVITY: 11/05/05

REPORTING OFFICER: Inv. John Dedering

DOCUMENTS GENERATED: One Page Written Statement

On Saturday, 11/05/05 at 1753 hrs., I (DEDERING) in the company of Manitowoc Co. Det. DENNIS JACOBS did interview the following individual at a roadblock situated at the intersection of STH 147 and Jambo Creek Rd. in the Town of Gibson, Manitowoc County:

BOBBY A. DASSEY
DOB 10/18/86
N12930 Avery Rd.
Two Rivers, WI
Phone 920-755-8715

Prior to asking BOBBY A. DASSEY any questions, he was advised that he was free to leave, was not under arrest and did not have to answer any questions at anytime. I did have BOBBY DASSEY open his door to prove to him that the door was not locked and that he was, in fact, free to go.

BOBBY advised me that his father is PETER DASSEY and that his mother is BARB JANDA. He stated he does live with his mother at the Avery Rd. address. He stated that he lived on Avery Rd. since 2001 and prior to that he lived on Preston Rd. in Whitelaw for approximately eight years.

BOBBY states he works third shift at HAMILTON MANUFACTURING in Two Rivers and is normally home by 6:30 a.m. in the morning.

BOBBY indicated that on Monday, 10/31/05, he woke up between 1400 and 1430 hrs. He stated that he looked out his family's mobile home window and observed a "little SUV" which he described as being either teal or blue in color. He stated he observed the vehicle stop and a female exit the unit and photograph a maroon van, which his mother is attempting to sell. He stated that after the photographer had finished photographing the van, he observed her walking towards the residence of STEVEN AVERY. This residence is located immediately west of DASSEY's home. He stated that she was seen walking "towards the porch." He stated the photographer spent approximately five minutes photographing the vehicle.

BOBBY stated that he left for deer bow hunting at approximately 1445 to 1500 hrs. He stated that the teal vehicle was still there when he left. He stated that he arrived home at dark or shortly

EXHIBIT
Group Ex. M

630-75

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
05-0157-955

thereafter. He did estimate the time at 1645 hrs. He stated that when he arrived home, the blue or teal colored SUV was gone.

BOBBY was asked to describe the female who he saw walking towards STEVE's porch. He described her as being skinny with "brownish hair," and wearing a dark colored, waist length coat. He indicated he did not know if she was wearing glasses and did not know what kind of trousers she was wearing.

BOBBY indicated when he came out of his residence to go to his truck, he did not see the lady.

BOBBY stated it was his understanding that the lady had been to the AVERY property four to five different times in the past twelve months to photograph units that STEVE wished to sell in the AUTO TRADER magazine.

BOBBY indicated he was never in the teal or blue colored SUV and had never touched the vehicle. BOBBY stated that his vantage point of the vehicle and the young lady was from his mother's mobile home, which he estimated to be approximately six yards away from where the van is parked. BOBBY indicates that Monday, 10/31/05, was the first time he had seen the female photographer.

BOBBY indicated that as he was traveling on STH 147 towards the property he hunts deer on, he did observe an individual known to him as SCOTT TADYCH. BOBBY indicated that SCOTT would be able to verify precisely what time he had seen BOBBY.

BOBBY stated that no one was in his vehicle with him.

BOBBY was asked once again, whether his prints would be in or on the RAV4 and he indicated, "No, no way at all."

BOBBY DASSEY indicated that he believed STEVE AVERY was at home alone during the time the photographer was in the vicinity. BOBBY indicated he was unsure who might have been at the AVERY'S AUTO SALVAGE shop.

BOBBY denied having any sort of contact with the lady.

I advised him that we had learned that STEVEN indicated BOBBY had seen this young lady after STEVEN had. He indicated that there was "No way, I was hunting."

I asked BOBBY if he would be interested in pursuing some sort of truth verification to show me that he was, in fact, being truthful and his response was "Yes."

I asked him what he thought the results of this examination would show, and he indicated, "I'm telling the truth."

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
05-0157-955

I asked Mr. DASSEY why STEVEN AVERY would say that BOBBY was the last one to see the photographer. BOBBY responded, "Did he say that?" I then asked BOBBY if it was true and his response was, "No." I asked BOBBY why STEVEN would say something like this and BOBBY's response was "He'd stab ya in the back." BOBBY indicated that STEVEN has done this to him before over "little stuff."

BOBBY DASSEY did indicate that he was concerned for an eight-week-old Labrador puppy, which he stated, was in his mother's residence. He, very respectfully, asked Det. JACOBS and me if there was anyway possible he could retrieve the Labrador. I advised Mr. DASSEY that I would think about this and we ultimately made the decision to go into the BARB JANDA residence with BOBBY's permission to retrieve the dog. He indicated that we would find the doors to the residence unlocked.

At 1831 hrs., Det. JACOBS and I did retrieve a black Laborador puppy from the far west bedroom and we left the residence at 1834 hrs. At 1844 hrs., the Labrador puppy was turned over to BOBBY DASSEY and BOBBY DASSEY did provide us with a written statement at that time.

BOBBY DASSEY did dictate the following one page written statement to me:

- *"On Monday, 10/31/05 at about 2:15 - 2:30 pm, I got up to go deer hunting. I took a shower. I got dressed for bow hunting & noticed someone coming down the driveway. She stopped in front of my mom's maroon van that Steve is trying to sell for my mom. I watched her take pictures of the van. She got done with that & started to walk toward Steven's house. I grabbed my bow, got into my Blazer, and left. I didn't see the lady who took the pictures when I left. The S.U.V, a teal colored, possibly a Honda, was there when I left to go hunting. She had shoulder length brown hair, it looked darker to me. She was wearing a dark waist length jacket. She was skinny. About 3 or 4 minutes went by between the time I got my jacket and the time I got into my truck. I dictated this statement to Investigator Dedering. I have read this statement and initiated all corrections. This statement is true and accurate. No promises or threats have been made to get this statement."*

This statement was signed by BOBBY DASSEY in my presence as well as in the presence of Det. JACOBS at 7:01 p.m.

My contact with BOBBY DASSEY ended at 1902 hrs.

Investigation continues.

CALUMET COUNTY SHERIFF'S DEPARTMENT

Page
195

Complaint No.
05-0157-955

File Number

TYPE OF ACTIVITY: Interview of Bobby Dassey

DATE OF ACTIVITY: 11/09/05

REPORTING OFFICER: Inv. John Dedering

DOCUMENTS GENERATED: Miranda Warning and Two Cassette Tapes

On Wednesday, 11/09/05, DCI Special Agent KEVIN HEIMERL and I (DEDERING) were given the assignment of serving a Warrant on BOBBY J. DASSEY for his finger and palm prints and a DNA swab. We received the assignment in the morning and spent the majority of the morning and a good part of the afternoon attempting to contact Mr. DASSEY.

We ultimately made contact with BOBBY DASSEY and he agreed to meet us at AURORA MEDICAL CENTER located between Manitowoc and Two Rivers on STH 42.

At 1444 hours on 11/09/05, I (DEDERING) did serve the Warrant on BOBBY DASSEY. At this point, I explained to him that he was not in custody, but was not technically free to leave either until we had executed the Warrant.

At 1447 hours, I (DEDERING) did review BOBBY DASSEY's Miranda Warning from a form. The form was initialed in the proper areas by DASSEY, was signed by BOBBY DASSEY and witnessed by Special Agent HEIMERL and me.

We advised BOBBY DASSEY we were going to be recording the interview and he indicated he had no problem with this. A synopsis of the taped interview is that once again DASSEY stated he left home at approximately 1500 hours on 10/31/05 and he had observed a teal SUV, that he had never touched or gotten close to. He stated when he left the property there was no one in his immediate sight. He stated he did not talk with STEVEN AVERY between 11:00 a.m. and noon on 10/31/05 indicating he was asleep and is a very sound sleeper. He stated he does not even hear the telephone when it rings. DASSEY indicated he stayed home until 2330 hours on 10/31/05 and then left for work at HAMILTON MANUFACTURING.

DASSEY states only STEVEN AVERY has keys to STEVEN's house.

DASSEY states he knew nothing about a family dinner at Grandma AVERY's on 10/31/05.

DASSEY indicated he has seen the Suzuki that we discussed with him parked at STEVEN's garage for about two weeks. He indicates the clutch is out and you have to push it to move it. He stated the Suzuki was parked in the garage the week before the girl went missing.

CALUMET COUNTY SHERIFF'S DEPARTMENT

Page
196

Complaint No.
05-0157-955

File Number

DASSEY indicated that sometimes family members will burn the heads of deer but this is usually in the burn barrel.

DASSEY stated the only deer at the residence was the deer that is hanging in the garage currently.

BOBBY DASSEY states this is his first year bow hunting and he hunts approximately two and one-half miles away from his house.

DASSEY stated STEVEN was mad at BARBARA about something and he was not sure what but they patched it up last Wednesday.

DASSEY indicated he does not talk to CHARLES or EARL and has not spoken with CHRIS (ph) AVERY in the past nine months.

DASSEY indicated that on Tuesday or Wednesday, he observed a burning in the area in a pit behind STEVEN's garage. He believed there was brush burning. DASSEY stated he was home that night.

BOBBY DASSEY states STEVEN sometimes burns tires in the pit and STEVEN usually burns tires at night so you cannot see the smoke.

DASSEY indicated STEVEN does not burn his tires anywhere else and he indicated he believed STEVEN was burning with DASSEY's little brother, BRENDAN.

At 1618 hours, (by my watch) BOBBY DASSEY's palm prints and fingerprints were taken by Correctional Officers SCHROEDER and FLEMING.

At 1631 hours, (by my watch) there was a physical examination of BOBBY DASSEY by FAY L. FRITSCH an exam nurse at AURORA MEDICAL CENTER.

At 1636 hours, I did question BOBBY DASSEY regarding scratches on his back. He stated these were due to his week old Labrador puppy jumping on his back. He stated he was bent down to put on his shoes when the dog jumped up and scratched him. I did examine DASSEY's shirt and could find no obvious holes or tears. The exam ended at 1643 hours (by my watch).

I did speak with Dr. VOGEL-SCHWARTZ who indicates the scratches appear to be fairly recent but possibly could be a little older. She stated it was not likely they were over a week old. She stated it is her opinion that the scratches were fairly recent.

The scratches to BOBBY DASSEY's back were photographed.

CALUMET COUNTY SHERIFF'S DEPARTMENT

Page
197

Complaint No.
05-0157-955

File Number

At 1648 hours, we did escort DASSEY from the hospital, he was released and I observed him speaking with his mother in the parking lot.

Investigation continues.

Inv. John Dedering
Calumet Co. Sheriff's Dept.
JD/bdg

CALUMET COUNTY SHERIFF'S DEPARTMENT

Page
518
File Number

Complaint No.
05-0157-955

TYPE OF ACTIVITY: Interview of Bobby Dassey

DATE OF ACTIVITY: 02/27/06

REPORTING OFFICER: Inv. John Dedering

DOCUMENTS GENERATED: None

On Monday, 02/27/06 at 1726 hrs., various members of the WISCONSIN DEPT. OF CRIMINAL INVESTIGATION and the CALUMET CO. SHERIFF's DEPT. did meet at MISHICOT FIRE DEPT. The purpose of our meeting was to view a videotaped interview done by Special Agent TOM FASSBENDER and Inv. MARK WIEGERT on a subject named BRENDAN R. DASSEY on 02/27/06. According to information I had obtained from WIEGERT, DASSEY had made some statements with regard to STEVEN AVERY's disposal of TERESA HALBACH, as well as who was responsible for her death.

While waiting for other members of the interview team to arrive, I did assist Inv. BALDWIN with an interview of BARBARA JANDA. For details of this, please see the report of Inv. BALDWIN.

Special Agent MICHAEL SASSE and I did locate BOBBY DASSEY at the residence of DUANE OSMUNSON, 5017 Nuclear Rd. in the Mishicot area at 1955 hrs. SASSE and I asked BOBBY DASSEY if he had some time to speak with us and he indicated that he did. We then went out to the county vehicle, which I was operating, and BOBBY DASSEY did have a seat in the front passenger side and Special Agent SASSE climbed into the rear passenger side. Prior to asking DASSEY any questions, he was advised that he was not under arrest, did not have to answer questions if he chose not to and was free to leave at anytime he so wished. I asked him to open the passenger front door of the vehicle in order to demonstrate to him that he was perfectly free to leave. He understood this and agreed to answer questions.

We went over his activities to the best of his recollection on Monday, 10/31/05. He stated that he arrived home from work at approximately 0630 hrs (It should be noted that DASSEY was employed at FISHER HAMILTON in Two Rivers at this time) and went to bed. He stated that he got up between 1400 and 1430 hrs., got into the shower and went bow hunting. He stated he arrived home somewhere approximately 1730 hrs. and that it was dark out already. He stated he did not recall who was home when he arrived, but thought perhaps BRENDAN was. He stated that when he arrived home, he went straight to bed and did not eat. He stated he got up at approximately 2100 hrs., got ready for work and once again did not eat. He stated that to the best of his recollection, BLAINE was home and possibly BRENDAN as well. He stated that his other brother BRYAN was not at home and was possibly at his girlfriend's residence.

CALUMET COUNTY SHERIFF'S DEPARTMENT

Page
519
File Number

Complaint No.
05-0157-955

BOBBY indicated that when he was leaving for work at approximately 2130 hrs., he noticed that STEVEN was having a bonfire. He estimated that the flames were five to six feet in height. He stated that it was a good-sized fire and that STEVEN has had fires there in the past. He stated that he could not say for sure that STEVEN was tending to the fire and he was further unsure whether BRENDAN was there or not. He stated that the view from his residence to the fire pit is somewhat blocked by the garage of STEVEN AVERY.

He stated that he worked from 2200 hrs. until 0600 hrs. the following day and when he arrived home, he noticed nothing unusual and that the fire was out.

I asked BOBBY if his brother, BRENDAN, was one to lie about things and he stated that BRENDAN would possibly lie about little things. I asked him if BRENDAN would lie about anything concerning the HALBACH murder investigation, and he stated that he would not lie about this.

I asked BOBBY if he has noticed any changes in BRENDAN and his response was "not really." When I asked him if BRENDAN has been depressed recently, he stated that he was a little depressed.

BOBBY indicated that BRENDAN has not discussed anything regarding what he may have seen in the fire pit on 10/31/05 or what STEVEN may have told BRENDAN.

BOBBY indicated that his brother, BRENDAN, likes to play basketball games and racing games on their Playstation 2. He states that he does not play with others, but prefers to compete by himself on the machine.

I asked BOBBY if he could recall once again what he saw regarding TERESA HALBACH and her vehicle. He stated that while he was preparing to go bow hunting on 10/31/05, he observed TERESA's vehicle pull in and he observed TERESA get out and take one or two photos of the maroon van, which his mother had for sale. BOBBY said that this was prior to him getting into the shower. He stated that when he got out of the shower (approximately ten minutes later) he brought his bow out to the vehicle and TERESA's vehicle was still there but he did not see her. He stated that she was wearing a black coat, black trousers and he cannot recall what color her top was.

DASSEY drew me a diagram indicating that the HALBACH vehicle was pointed in a westerly direction almost directly across from the westernmost portion of the BARBARA JANDA circular driveway.

BOBBY stated that the vehicle was gone when he got back from hunting.

CALUMET COUNTY SHERIFF'S DEPARTMENT

Page
520
File Number

Complaint No.
05-0157-955

I asked BOBBY about the position of the Suzuki Samurai. BOBBY thought that to his best recollection, the Suzuki was in the garage for a while, and he was unsure when STEVEN moved it out of the garage. He stated that he was never in the garage when the Suzuki was parked in the garage and he stated that he could no longer independently recall where the Suzuki was positioned when he left for hunting.

I asked BOBBY DASSEY who his brother, BRENDAN, might confide in and he indicated the only person he could think of was BRENDAN's friend, TRAVIS FABIAN, whose father, ROBERT FABIAN, is a friend of EARL AVERY.

I asked BOBBY if he could recall the burn barrel in front of STEVEN's residence burning when he left for hunting, and he stated he could not independently recall this.

Agent SASSE asked BOBBY DASSEY if he could ever recall STEVEN AVERY shooting a .22 at the burn barrel or anything else in the immediate vicinity of STEVEN AVERY's residence. BOBBY indicated he could not recall anything like this except for one occasion.

SASSE asked DASSEY if he could recall STEVEN AVERY in possession of a buck knife or a leatherman and BOBBY DASSEY could not recall that.

BOBBY DASSEY indicated that he doesn't recall BRENDAN or STEVEN acting any differently after the October 31st. incident. He further indicated he could not recall any sort of injury to STEVEN's arms or hands on October 31st.

John Dedering, Inv.
Calumet Co. Sheriff's Dept.
JD/ds

Q Tell us why not?
A They had the road all blocked off. They wouldn't let anybody in there.
Q Who is "they"?
A The police officers.
Q How about your dog? What happened to your black lab?
A I had to wait, like, three hours, in order to get her.
Q In order to get her?
A Yeah.
Q How did you get her?
A I had to give my statement and everything. Then the investigator went in and got her.
Q They got your dog for you?
A Basically, yeah.
Q Now, Bobby, on the third of November, that would be a Thursday, I believe, do you recall having a conversation with your Uncle Steven regarding a body?
A Yes.
Q Could you tell us what your Uncle Steven told you that day?
A Well, my buddy, Mike, was over too, and he asked us, it sounded like he was joking, honestly, he asked us

A. 11-04-05.

ATTORNEY STRANG: Your Honor, maybe I will just, if I may, just pass this around the jury in the old-fashioned way.

THE COURT: Any objection?

ATTORNEY KRATZ: No.

THE COURT: Go ahead.

Q. (By Attorney Strang)~ As you and Mike were putting these climbing sticking pads on the deer stand, your Uncle Steven walked over to the garage?

A. Yes.

Q. Came in. He and Mike had some conversation?

A. Yes.

Q. You didn't catch the first part of the conversation, I gather?

A. Yes.

Q. That is, I mean you did not catch?

A. No, I didn't.

Q. So you don't personally know whether Mike started the conversation or Steve did?

A. No, I don't.

Q. What you caught was Steve making a joke about, want to help me get rid of a body, or dispose of a body, something like that?

A. Yes.
Q. That was clear to you it was a joke?
A. Yes.
Q. Mike laughed?
A. Yes.
Q. You laughed?
A. Yes.
Q. And Steve followed that up by saying something like, people go missing all the time, and this girl may have left for Mexico?
A. Yes.
Q. Did you guys laugh about that too?
A. Yes.
Q. Was this the first you learned that Teresa Halbach was missing?
A. Yes.
Q. But one or both of them, from a conversation, had seen it on TV?
A. Yes.
Q. What the TV had said -- well, I guess you hadn't seen the TV, but you eventually did see TV reports?
A. Yes.
Q. Of Ms Halbach missing? And it described her as missing?

CALUMET COUNTY SHERIFF'S DEPARTMENT

Page
259
File Number

Complaint No.
05-0157-955

TYPE OF ACTIVITY: Contact with Michael Osmunson

DATE OF ACTIVITY: 11/14/05

REPORTING OFFICER: Inv. John Dedering

DOCUMENTS GENERATED: None

On Monday, 11/14/05, at 1529 hours, Special Agent KEVIN HEIMERL and I (DEDERING) did meet with the following individual at his residence regarding this matter:

MICHAEL M. OSMUNSON
DOB 09/08/86
5017 Nuclear Rd.
Mishicot, WI 54228
Telephone number: 920-755-2150
Cell phone number: 920-973-0514
Employed at JINDRA PLUMBING & HEATING, INC. in Shoto

MICHAEL indicated the only time he had been at the AVERY property between 10/31/05 and 11/14/05 was on Thursday, 11/10/05. He stated he and BOBBY were inside the DASSEY garage when STEVEN came over. MICHAEL indicated he was aware STEVEN was one of the last people to see the missing girl and jokingly asked STEVEN if STEVEN had her (the missing girl) in a closet. At this point, STEVEN asked MICHAEL if MICHAEL wanted to "help bury the body" and they laughed about this together. MICHAEL stated he had just learned about the missing girl on the Tuesday prior to that. He once again indicated he thought STEVEN might have been the last one to see the missing girl.

According to MICHAEL, STEVEN stated people go missing all the time and this girl may "have left for Mexico."

MICHAEL stated that after conversation about the body, BARBARA JANDA came out of her residence and she needed to go somewhere. STEVEN had BARBARA parked in and STEVEN left after moving his vehicle and there was no further contact between MICHAEL and STEVEN.

I asked MICHAEL about his whereabouts on 10/31/05 and he stated he had taken his little brother trick or treating in Two Rivers.

MICHAEL indicated he has never seen any fires at the AVERY residences, but stated BOBBY mentioned the fact he had seen a big fire on Tuesday or Wednesday, 11/01/05 or 11/02/05. According to MICHAEL, BOBBY had told MICHAEL that STEVEN had thrown tires onto the fire.

EXHIBIT
N

STATE1463

630-84

ORIGINAL

STATE OF WISCONSIN, CIRCUIT COURT, MANITOWOC COUNTY

For Official Use

Arrest-Bench Warrant/ Capias

Steven A. Avery
Name of Person

Case No. 05 CF 375

Person's Address				Phone Number
12932 Avery Road, Two Rivers, WI 54241				
Person's Date of Birth	Sex	Race	Driver's License Number	
07/09/1962	M	W	A160-7816-2249-00	
Height	Weight	Eye Color	Hair Color	Other Identifying Characteristics
5'6"	218 lbs.	Blue	Blonde	
Charges				
Possession of a Firearm by a Felon				

TO ANY LAW ENFORCEMENT OFFICER:

Arrest and bring the above-named person before me, or if I am not available, before some other judge or court commissioner of this county, because:

(Check box A, B, or C below.)

☒ A. A complaint/citation has been filed charging the defendant with the commission of an offense(s). The defendant has not previously appeared in or submitted to the jurisdiction of the court. [A copy of the complaint or citation must always be attached. For a citation, an affidavit of the court officer is recommended.] The name of the crime and statutory references in the complaint/citation are incorporated into this warrant. I have reviewed the complaint/citation and find probable cause to believe the defendant committed the offense(s).

(Check if either is appropriate):

☐ Although the maximum imprisonment is 6 months or less, I believe that the defendant will not appear in response to a summons.

☐ If the offense is one covered by the Uniform Bail/Deposit Schedule, the defendant may be released upon payment of the amount below. A new court date shall be provided to the defendant.

☐ B. The person failed to appear in court as required on (date) _____ for (type of court appearance) _____

☐ The person shall be held for appearance in court.

☐ The person may be released upon payment of the amount below. A new court date shall be provided to the defendant.

☐ C. The person has failed to comply with a court order concerning the payment of fines, forfeitures, assessments, surcharges or costs to the court. The defendant may be released with no further court appearances upon payment of the total due, set forth below.

Amount due $ BODY ONLY, plus statutory sheriff's fees.

If the person posts the total amount due and is released, the law enforcement agency shall inform the court and district attorney of any new court date.

BY THE COURT:

Circuit Court Judge/Circuit Court Commissioner

Jerome L. Fox
Name Printed or Typed

11/9/05
Date

Geographic restriction:
☐ Statewide ☐ Within county of ORI
☐ Within adjacent counties of ORI
☒ Other: NATIONWIDE

CF-142, 06/02 Arrest-Bench Warrant/Capias Chapter 345, §§ 345.11(2), 968.04(3)(a), 968.07, Wisconsin Statutes
This form shall not be modified. It may be supplemented with additional material.

STATE0593

630-89

CALUMET COUNTY SHERIFF'S DEPARTMENT

Page 259
File Number

Complaint No.
05-0157-955

TYPE OF ACTIVITY: **Contact with Michael Osmunson**

DATE OF ACTIVITY: 11/14/05

REPORTING OFFICER: Inv. John Dedering

DOCUMENTS GENERATED: None

On Monday, 11/14/05, at 1529 hours, Special Agent KEVIN HEIMERL and I (DEDERING) did meet with the following individual at his residence regarding this matter:

MICHAEL M. OSMUNSON
DOB 09/08/86
5017 Nuclear Rd.
Mishicot, WI 54228
Telephone number: 920-755-2150
Cell phone number: 920-973-0514
Employed at JINDRA PLUMBING & HEATING, INC. in Shoto

MICHAEL indicated the only time he had been at the AVERY property between 10/31/05 and 11/14/05 was on Thursday, 11/10/05. He stated he and BOBBY were inside the DASSEY garage when STEVEN came over. MICHAEL indicated he was aware STEVEN was one of the last people to see the missing girl and jokingly asked STEVEN if STEVEN had her (the missing girl) in a closet. At this point, STEVEN asked MICHAEL if MICHAEL wanted to "help bury the body" and they laughed about this together. MICHAEL stated he had just learned about the missing girl on the Tuesday prior to that. He once again indicated he thought STEVEN might have been the last one to see the missing girl.

According to MICHAEL, STEVEN stated people go missing all the time and this girl may "have left for Mexico."

MICHAEL stated that after conversation about the body, BARBARA JANDA came out of her residence and she needed to go somewhere. STEVEN had BARBARA parked in and STEVEN left after moving his vehicle and there was no further contact between MICHAEL and STEVEN.

I asked MICHAEL about his whereabouts on 10/31/05 and he stated he had taken his little brother trick or treating in Two Rivers.

MICHAEL indicated he has never seen any fires at the AVERY residences, but stated BOBBY mentioned the fact he had seen a big fire on Tuesday or Wednesday, 11/01/05 or 11/02/05. According to MICHAEL, BOBBY had told MICHAEL that STEVEN had thrown tires onto the fire.

EXHIBIT
N
Dedering

STATE1483

630-84

WISCONSIN DEPARTMENT OF JUSTICE

REPORT NAME : Frequency PAGE #1
DESCRIPTION : No Subscriber

Brighan Daisey

INCLUSION VALUES :

Case Number : 05-1776
Target : (920) 973-1742
Date : 10/24/05 - 11/9/05

Dialed (Chan)	Frequency	Date	Dialed Name	Dialed Name2	Dialed Address	Dialed City	State
66	1	10/24/2005 to 11/09/2005	VOICE MAIL				
(920) 242-3925	1	11/05/2005 to 11/05/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 323-3206	6	10/27/2005 to 11/01/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 418 0593	1	11/09/2005 to 11/09/2005	NO SUBSCRIBER			CHILTON	WI
(920) 418-4055	5	11/09/2005 to 11/09/2005	NO SUBSCRIBER			CHILTON	WI
(920) 553-3856	1	10/25/2005 to 10/25/2005	NO SUBSCRIBER			TWO RIVERS	WI
(920) 629-1303	26	10/24/2005 to 11/08/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 629-5788	1	11/01/2005 to 11/01/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 683-4251	1	11/04/2005 to 11/04/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 755-2150	1	11/03/2005 to 11/05/2005	NO SUBSCRIBER			WISHCOT	WI
(920) 755-4230	1	11/05/2005 to 11/05/2005	NO SUBSCRIBER			WISHCOT	WI
(920) 755 8715	7	10/26/2005 to 11/04/2005	JANDA, THOMAS		12930 AVERY RD	TWO RIVERS	WI
(920) 794-2265	4	10/27/2005 to 10/27/2005	NO SUBSCRIBER			TWO RIVERS	WI
(920) 863-3049	2	10/24/2005 to 10/24/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 894-1690	3	10/27/2005 to 10/28/2005	NO SUBSCRIBER			KIEL	WI
(920) 901-1136	5	10/24/2005 to 11/02/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 973-0330	1	10/24/2005 to 10/24/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 973-3513	65	10/24/2005 to 11/09/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 973-3725	1	10/27/2005 to 10/27/2005	AVERY'S AUTO SALVAGE	EARL AVERY	12930 AVERY RD	TWO RIVERS	WI
(920) 973-1130	6	10/27/2005 to 11/09/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 973-1742	36	10/25/2005 to 11/09/2005	NO SUBSCRIBER			MANITOWOC	WI
(920) 973-1742	1	11/05/2005 to 11/05/2005	NO SUBSCRIBER			MANITOWOC	WI

EXHIBIT 15

737-73

(920) 979-1742 Cellular
Bobby Dassey

	Seize Date Time	Answer Date Time	Release Date Time	Answer Indicator	Calling Mdn Full Number	Dialed Mdn Full Number	Terminating Mdn Full Number	Physical Cell Type	Phone Sid	CDMA Bs Sid	First Originating Cell	First Originating Cell Name	First Originating Member	Previous Originating Cell
56	10/31/2005 5:12	10/31/2005 5:12	10/31/2005 5:24	Answered	1 920 9730514	1 920 9731742	1 920 9731742	C-MTM	1822	1822	3851	GBayCELL360X	9999	3443
57	10/31/2005 5:36	10/31/2005 5:36	10/31/2005 6:37	Answered	1 920 9731742	1 920 9730514	1 920 8067778	I-WTL	1822	1822	3701	GBayCELL370X	9999	0
58	10/31/2005 15:02	10/31/2005 15:03	10/31/2005 15:03	Answered	1 920 9731742	1 920 9311138	1 920 9311138	I-WTL	1822	1822	3851	GBayCELL385X	9999	3851
59	10/31/2005 15:55	10/31/2005 15:55	10/31/2005 15:57	Answered	1 920 9731742	1 920 9730514	1 920 9730514	C-MTM	1822	1822	3701	GBayCELL370X	9999	0
60	10/31/2005 15:57	10/31/2005 15:57	10/31/2005 15:58	Answered	1 920 9730514	1 920 9731742	1 920 9731742	C-MTM	1822	1822	3851	GBayCELL385X	9999	0
61	10/31/2005 16:53	10/31/2005 16:53	10/31/2005 16:55	Answered	1 920 9731742	1 920 9730514	1 920 9730514	C-MTM	1822	1822	3701	GBayCELL370X	9999	0
62	10/31/2005 17:10	10/31/2005 17:10	10/31/2005 17:10	Answered	1 920 9730514	1 920 9731742	1 920 8067778	I-WTL	1822	1822	3441	GBayCELL344X	9999	0
63	10/31/2005 18:01	10/31/2005 18:02	10/31/2005 18:03	Answered	1 920 9730514	1 920 9731742	1 920 9731742	C-MTM	1822	1822	3443	GBayCELL3442	9999	0

(920) 973-1742 Cellular
Bobby Dassey

Previous Originating Member	Last Originating Cell	Last Originating Member	First Terminating Cell	First Terminating Cell Name	First Terminating Member	Previous Terminating Cell	Previous Terminating Member	Last Terminating Cell	Last Terminating Cell Member	Release Cause	Seize Duration	Call Duration	Hand offs
9999	3681	9999	3681	GBayCELL365X	9999	3681	9999	3701	9999	Called party disconnect (Answer)	11.65	11.65	11
0	3701	9999	162	GBayWMS7	105	0	0	162	105	Calling party disconnect (Answer)	1.23	0.67	0
9999	3701	9999	576	GBayMLWVJ1456:1:7	33	0	0	576	33	Calling party disconnect (Answer)	0.77	0.3	1
0	3701	9999	3651	GBayCELL365X	9999	0	0	3651	9999	RF signal lost	0.67	0.42	0
0	3651	9999	3701	GBayCELL370X	9999	0	0	3701	9999	Called party disconnect (Answer)	1.27	1.13	0
0	3701	9999	3721	GBayCELL372X	9999	0	0	3721	9999	Calling party disconnect (Answer)	2.17	1.57	0
0	3681	9999	162	GBayWMS7	241	0	0	162	241	Calling party disconnect (Answer)	0.83	0.03	0
0	3643	9999	3701	GBayCELL370X	9999	0	0	3701	9999	Called party disconnect (Answer)	1.57	1.27	0

important moment.

We could start with the moment or with the visual or with the image of that man, Steven Avery, standing outside of a big bonfire, with flames over the roof, or at least over the garage roof, and the silhouette of Steven Avery, with the bonfire in the background and the observations made by some witnesses.

Can you all picture that? Can you picture that as a moment, as a moment in time? And that moment, by the way, although dramatic and although important, should tell the whole story. That moment of Steven Avery, after the murder was committed, of Steven Avery tending the fire, of Steven Avery disposing of and mutilating the body of 25 year old Teresa Halbach. That would be a good place to start.

But I'm not going to start there. I'm going to start somewhere else. I'm going to start with the Toyota RAV4. The Toyota RAV4, which was owned by Teresa Halbach, which was discovered on the 5th of November, at the Avery Salvage Property, is less dramatic, it's a less dramatic place to start, than those other moments in time that I talked about. But it's equally

important.

Because the discovery of that RAV4, the discovery of Teresa Halbach's vehicle, changed the course of not only this case, but the clues and the secrets found in that vehicle changed the lives of everybody in this room. Look around, everybody.

The clues found in that vehicle, on the 5th of November, changed everybody's lives, yours included. Your lives will never be the same, ours won't, families won't. That moment is particularly important. And that is where we're going to begin.

This woman, Pam Sturm, of the 60 witnesses -- by the way, I'm going to be helping you remember some of these faces as we go along. I don't expect you to remember 60 people and what they look like. And when I talk about witnesses, I'm going to try to help the jury with some photos to jog your memories.

But on the 5th of November, Pam Sturm and Ryan Hillegas had a conversation. They had a conversation about where should Pam search for Teresa's vehicle. And, importantly, in that conversation, they decided to search the Avery

salvage property, the last place where Teresa Halbach was seen alive.

Now, as I mentioned, this case dramatically changes at that moment. This changes from a missing persons investigation to where something horribly bad has happened to Teresa Halbach.

It's also the first opportunity that we hear where we talk about law enforcement bias. And we have heard that a lot from the defense, throughout this case. But the perception or the finding of the vehicle on the Avery property, in fact, the very decision to look for this vehicle on the Avery property, should tell you something. What should it tell you?

Well, if Pam Sturm and Ryan Hillegas can figure it out. If Pam Sturm and Ryan Hillegas, when they talk to each other, say to themselves, you know what, common sense would tell us that the first place that we should look for Teresa was the last place that she was seen alive, that should put a lot of the defense suggestion of law enforcement bias by Mr. Fassbender and Mr. Wiegert, into perspective.

Because you don't have to be Sherlock

Holmes to figure out that that's where the investigation should start. Pam and Ryan figured that out, when Pam Sturm decided, let's go look at the Avery property for this particular vehicle.

Now, we also remember that Pam's daughter, Nikole, went with her. Nikole, importantly, did some things at the scene. She took the photograph. She realized that the doors were locked. She realized that it was too dark to see inside, or to see any blood inside. She realized that there were no plates on the vehicle. But, importantly, both ladies never took their eyes off of that vehicle until the law enforcements arrived.

Now, photographs that were taken from Pam are important; they are important in this case. It was a camera lent to them by Scott Bloedorn, as we understand. But what we do find is that there were obvious attempts to obscure the view of this car. There's no question that this car was found by the car crusher.

Doesn't take a great leap of interpretation to suggest that Steven Avery intended to crush this car. But you don't have

to make that finding in this case. I'm just saying that parenthetically for you. In other words, that where it was located was not an accident. There was no accident where Teresa Halbach's vehicle was located.

Think also, if you will, about how important this particular event was, finding this car. Pam Sturm described it as divine intervention, or words to that effect, that it was the hand of God, I think was the term that she said, as to where we should look at the 4,000 cars that were on this property. Pam Sturm looked in that one place. She never would have gotten through all those cars.

But on that Saturday morning, or going into that Saturday afternoon, think of what would have happened if this car wouldn't have been found. Think about what would have happened if this car was crushed, like the other 54 crushed cars that were there. Think of what would happen if the law enforcement officials wouldn't have known that this car was there and this car would have secretly been taken off the property and the blood wouldn't have been found, both Teresa's blood and Steven's blood.

Think how close he got to getting away with that. Pam Sturm doesn't find this car, this case doesn't change at that moment, we may not be standing here today. All right. And that's why that's the important place to start in this case. That's why the investigation changes so dramatically upon the recovery -- excuse me -- and observation of this particular car. All right. That's the first fact.

Usually, when I would talk to a jury, I wouldn't be concerned with things like security issues, but part of the prosecution's job, not only is to present my case, but to dispel any defense suggestions that they have made in this case. I'm not going to identify what the defense has told you is evidence in the case, because evidence has a meaning. Evidence suggests that there were witnesses that said things about it or that there were witnesses that agreed with the questions that the defense gave.

Remember evidence in the case -- excuse me -- evidence is the answers that witnesses give. Evidence aren't the questions that Mr. Buting or Mr. Strang asked. I know this is a little bit of a diversion, but I'm the

shower and left to go deer hunting, bow hunting, about 15 minutes later. You are going to hear from Bobby that when he left 15 minutes later, Teresa's SUV was there, but Teresa was nowhere to be found.

You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive. You are going to hear from other citizens like that, other people that will help place this case into context for us.

Juries are triers of fact. You don't decide what the law is, the judge does that. But you decide what the facts of the case are. And the facts in this case aren't just going to point to who did it; it's not just a who done it case. It's a what happened and where it happened and when it happened.

But we're also going to provide you evidence, not just that Steven Avery did it, but to the exclusion of other people as well. In other words, positive evidence about who done know it, but also negative evidence of why that necessarily excludes others. And so you get to find those facts and at the end of this case, you

still sleeping? Or did you wake up?
A I was up by 2:30, yeah.
Q At 2:30, did you see something?
A Yes.
Q What did you see?
A I seen a vehicle pull up in our driveway.
Q Do you recall which window you were looking from?
A Through the front window, in front of the kitchen table.
Q Bobby, could you describe that vehicle for the jury please?
A It was a light green SUV, like a "teal" color.
Q How do you know that it was about 2:30 in the afternoon?
A Because I was going hunting that night, so that was the time I wanted to get up. I got up at "two".
Q All right. From which way did this blue or teal SUV drive in, as you were looking out the window?
A Toward the west it would be.
Q Can you tell the jury please from which direction your uncle's trailer is from your house?
A The west.
Q Did you know what kind of SUV it was?
A Not at the time.
Q All right. After seeing that vehicle driving up

the roadway, tell the jury what you saw then?

A I seen Teresa Halbach get out of the vehicle, and started taking pictures.

Q What was she taking pictures of?

A A maroon van.

Q A what?

A A maroon van.

Q Can you tell us about this vehicle? Where was it parked?

A It was parked right in front of our house.

Q Now you told this jury it was Teresa Halbach that had taken the pictures. How do you know that?

A Now, I know that. At the time, I didn't.

Q What did this woman look like?

A She was about maybe five-eight. She had brown, shorter-like hair. She had a black coat on, that went past the hips.

Q Was she wearing pants, or a skirt?

A She was wearing pants.

Q Now, about this van, what can you tell the jury about that van?

A It was a 1989 Plymouth Voyager. It had lots of miles on it. It was my mom's van. She had it for a couple of years. I don't know really much more about it.

Q All right. As you were looking out the window, you said that you saw a woman taking pictures. Can you describe that please?
A Well, I seen her take one picture of the front of the van. Then I went in and took a shower.
Q Okay. After seeing her taking some pictures, did you see her do anything else?
A She started -- Before I got in the shower, she actually started walking over to Steven's trailer.
Q You could see that from your location?
A Yeah. Through the window, yeah.
Q You said, "walking toward Steven's trailer". What does that mean?
A She walked toward it, to the door.
Q How close to the door did she get, before you stopped watching?
A Maybe 25 yards.
Q Did you see her enter your uncle's trailer?
A No.
Q Why not?
A Because I wanted to take a shower. I didn't pay no attention to it.
Q All right. Was there anybody with her at that time?
A No.

Case 2005CF000381 Document 1112 Filed 01-24-2023 Page 44 of 74

Q Was there anybody outside, or making contact with her, outside by the vehicle?
A No.
Q After seeing this woman walking toward your Uncle Steven's trailer, did you ever see this woman again?
A No.
Q How long was it that you were in the shower? Do you remember?
A Maybe three minutes, or four minutes.
Q Okay. What did you do then?
A Got dressed, and left, to go hunting.
Q Now, when you left to go hunting, did you have a vehicle on the premises?
A Yes.
Q Can you tell the jury what kind of vehicle it was?
A A black Chevy Blazer.
Q Where was that parked?
A It was parked right between the house and the garage.
Q About what time do you think you left to go hunting?
A Probably twenty to three, quarter to three.
Q Quarter to three? Bobby, how do you know that was the time? Why is that time important as it

relates to hunting?
A Well, that is when the deer start moving. They go on their feeding patterns then.
Q Pardon?
A They go on their feeding patterns then.
Q Where did you go hunting that day?
A It was actually maybe two miles up the road from my house.
Q What kind of hunting was it?
A Deer hunting. Bow hunting.
Q Mr. Dassey, when you walked out to your vehicle to go bow hunting, did you notice if that teal or blue SUV was still in the driveway?
A Yes, it was.
Q It was?
A Yes.
Q Did you see Ms. Halbach?
A No.
Q Did you see any signs of her at all?
A Nope.
Q What did you do then?
A I proceeded to leave. I got in my vehicle and I left.
Q Did you hunt that day?
A Yes.

On Sunday, November 6, 2005, at approximately 12:20 p.m., S/A Kim J. Skorlinski and S/A Debra K. Strauss interviewed Bryan J. Dassey, DOB 07/15/1985, the nephew of Steven Avery, regarding this investigation. Bryan lives with his mother, Barbara Janda, and three brothers on the Avery Auto Salvage property. His house is adjacent to Steven's house. Prior to the interview, Bryan was driving Steven's blue 1993 Pontiac Grand Am and was stopped by the Marinette County Sheriff's Department pursuant to a search warrant for that vehicle.

At first Bryan said he did not know anything about what was going on, but then agreed to talk to the special agents. During the interview, S/A Skorlinski and Bryan sat in the front seat of S/A Skorlinski's state vehicle and S/A Strauss sat in the backseat. S/A Skorlinski explained to Bryan the search warrant for the Pontiac Grand Am, and he stated he understood why the car had to be seized. He said he and his brother Brendan were on their way to a local store, Tall Oaks, to buy soda when they were stopped.

Bryan said he rode up to the Avery residence at N9493 Highline Road, Town of Stephenson (Crivitz), on Saturday morning, November 5, 2005, with Steven and his grandmother, Delores Avery. He said when they got to the residence, his grandfather, Allan Avery; and his uncle, Charles "Chuck" Avery; and his brother, Brendan were already there. Bryan said his grandfather came to the residence on Thursday night, November 3, 2005, and Chuck and Brendan came on Friday night, November 4, 2005. Bryan said the plan was for all family members to stay at the residence until today and then travel back to their residences at Avery's Auto Salvage in Two Rivers, Manitowoc County.

S/A Skorlinski asked how he could contact Bryan's mother, Barb, and he said S/A Skorlinski said he could call her on her cell phone, 920-973-1740, or else her boyfriend, Scott's cell phone (b/f/b Scott Tadych), 920-973-2222. Bryan said his mom and step-dad are getting a divorced. He said his biological dad is not around much.

Bryan lives at Avery's Auto Salvage property with his mom, and brothers Brendan (15½ years old), Blaine (16 years old) and Bobby (19 years old). Bryan said he is not around the residence or the auto salvage yard much because he works at Woodland Face Veneer, Two Rivers. He said he leaves for work at 6:00 a.m. and then after work he is usually at his girlfriend's house until late in the evening.

Bryan was asked about the other vehicles at the Avery residence on Highline Lane, and he said Chuck's flatbed tow truck and Allan's Chevrolet pick up truck are still there. Byran was asked about a black Ford pick up truck at Steven's residence at the auto salvage yard. He said that pick up truck is owned by Steven and should be at the residence because Steven drove his Pontiac Grand Am.

Bryan was asked about the events of Monday, October 31, 2005, which was Halloween. He said

he was not home at all during that day, except for waking up and going to work. Bryan said he got home sometime after supper, but could not recall when that was. He was asked why the Avery family members chose to come to their residence on Highline Lane this weekend, and he said they were going to butcher chickens and cut firewood. Bryan was asked about a deer they had hanging at their residence at the auto salvage yard. He said Bobby picked up that deer from a car/deer accident and it is hanging in the garage at his mom's house. Bryan believed this accident occurred on Friday night, November 4, 2005. Brayn said he is not certain, because he stayed with his girlfriend Friday night and did not get home until about 5:30 a.m. on Saturday, November 5, 2005.

Bryan said he heard from his mom and Steven that Halbach was only at their residence about 5 minutes. He heard she just took the photo of the van and left. Bryan said the investigators should also talk to his brother Bobby, because he saw her leave their property.

Bryan was asked about access into the back of the salvage yard, and he said anyone can drive a car back there. He said a car can be driven through Radant Sand and Gravel pit to the back of the salvage yard. He recalled a time when 4 kids were caught driving back there.

Bryan said he also heard that his uncle, Earl Avery and his brother-in-law, Bob, were hunting rabbits in the salvage yard on Wednesday, November 2, 2005, and they did not see Halbach's vehicle in the back of the salvage yard.

The interview was terminated at approximately 1:00 p.m., however, Bryan remained in S/A Skorlinski's vehicle until Investigators Tony O'Neill and Todd Baldwin, of the Marinette County Sheriff's Department, had completed their interview of Brendan. When that was completed, both Bryan and Brendan were transported back to the Avery residence at Highline Lane, which was approximately 1:45 p.m.

(5) *New Evidence That Mr. Avery Was Denied Effective Assistance Of Trial Defense Counsel And Post-Conviction Counsel Where His Trial And Post-Conviction Attorneys Failed To Investigate And Present To The Jury Significant Impeachment Evidence Related To Bobby Dassey.*

Bobby Dassey's testimony was critical to the State's case against Mr. Avery. During his opening statement, prosecutor Ken Kratz explicitly informed the jury of the significance of Bobby Dassey's putative observations on the date of Teresa Halbach's disappearance:

> You will hear from various kinds of citizens like Bobby Dassey, who is one of the sons of Barb Janda, who you will hear testimony about, that at about 2:45 on the 31st of October, Bobby saw a young girl drive up to the Avery property.
>
> Bobby Dassey saw this young girl, later identified as Teresa Halback, get out of her teal, or blue, or green colored SUV and actually take pictures of the van that her [*sic*] mom had for sale. Bobby Dassey is going to tell you, that after looking out the window and after seeing Teresa Halbach take these photographs of this vehicle and finish [*sic*] her job, that Teresa walked towards Steven Avery's trailer.
>
> You will hear evidence that she was walking towards the main entrance of Steven Avery's trailer and that Bobby thereafter took a shower and left to go deer hunting, bow hunting, about 15 minutes later. You are going to hear from Bobby that when he left 15 minutes later, Teresa's SUV was there, but Teresa was nowhere to be found.
>
> You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive.

(TT:2/12:103).

At trial, Bobby Dassey testified that he observed Ms. Halbach's light-green or teal-colored SUV pull up in his driveway at 2:30 p.m. on October 31, 2005. (TT:2/14:36). Bobby then observed Ms. Halbach exit her vehicle and start

taking pictures of his mom's maroon van right in front of his trailer. (TT:2/14:37). Bobby testified that he then observed Ms. Halbach walking towards the door of Mr. Avery's trailer. (TT:2/14:38). The prosecutor, Mr. Kratz, elicited the following:

> Q: After seeing this woman walking toward your Uncle Steven's trailer, did you ever see this woman again?
>
> A: No.

(TT:2/14:39).

Bobby Dassey then testified that he took a three or four-minute shower, and then left his trailer to go hunting. (TT:2/14:39). Bobby walked to his Chevy Blazer, which was parked between the trailer and garage. (TT:2/14:39). Bobby testified that as he walked to his vehicle, he observed Ms. Halbach's vehicle still parked in the driveway. (TT:2/14:40). Bobby further testified that he did not see Ms. Halbach or any signs of her. (TT:2/14:40). Bobby testified that when he returned to his trailer around "five-ish," Ms. Halbach's vehicle was gone. (TT:2/14:41).

During closing argument, Mr. Kratz once again emphasized the importance of Bobby Dassey's testimony:

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

> Now, we heard about taking a shower. And we heard about him leaving for hunting. That all becomes important and becomes more important when, after leaving for hunting, he sees Teresa's SUV still parked next to the van, next to his mom's van that's for sale, but Teresa is nowhere to be found. . . .
>
> Mr. Dassey is looking out this window, a clear view, sees the pictures being taken of the SUV, a clear pathway, and that as she walks towards Mr. Avery's, that's the last Ms. Halbach is seen. That's the last she's seen alive. All right. So that's the timeline. That's the pathway, if you will, towards what happens to Ms. Halbach.

(TT:3/27:91-92).

Given the importance of Bobby Dassey's testimony, it was imperative that Mr. Avery's trial attorneys conduct an adequate investigation of him to uncover any available impeachment evidence. Unfortunately, Mr. Avery's trial attorneys failed to do so.

On November 6, 2005, special agents with the Wisconsin DOJ Division of Criminal Investigation interviewed Bryan Dassey, Bobby Dassey's older brother. The investigators asked Bryan about the events of October 31, 2005. Bryan told the investigators that he was not at home during the day other than waking up and going to work. Bryan told the investigators the following:

> Bryan said he heard from his mom and Steven that Halbach was only at their residence about 5 minutes. He heard she just took the photo of the van and left. Bryan said the investigators should also talk to his brother Bobby, because he saw her leave their property.

See 11/6/05 DCI report, attached as Exhibit F (emphasis added). Obviously, this statement directly contradicts what Bobby Dassey testified to at Mr. Avery's trial.

Recently Bryan Dassey has been interviewed to determine the accuracy of the foregoing report and the statement he attributed to Bobby Dassey. Bryan Dassey indicated that in November of 2005 he lived with his girlfriend but kept his clothing at his mother's trailer on the Avery's Auto Salvage Property. *See* Affidavit of Bryan Dassey, Exhibit G, ¶ 3. Bryan Dassey states as follows:

> On or about November 4, 2005, I returned to my mother's trailer to retrieve some clothes, and I had a conversation with my brother, Bobby, about Teresa Halbach. I distinctly remember Bobby telling me, "Steven could not have killed her because I saw her leave the property on October 31, 2005."

See Exhibit G, ¶ 4. Bryan Dassey confirmed that when he was interviewed on November 6, 2005, he told the investigators that they should talk to his brother Bobby Dassey because Bobby saw Ms. Halbach leave the Avery property on October 31, 2005. *See* Exhibit G, ¶ 6.

At trial, Mr. Avery's defense attorneys stated on the record that they had not interviewed Bobby Dassey. (TT:2/14:79). Moreover, Mr. Avery's trial defense counsel's hired investigator was unaware that Bryan Dassey made any statement about Bobby Dassey seeing Ms. Halbach leaving the property on October 31, 2005. (Affidavit of Conrad E. Baetz, attached and incorporated herein as Exhibit H). Prior post-conviction counsel also utilized an investigator. In the course of their investigation, prior post-conviction counsel identified Bryan Dassey's statement in a memo summarizing law enforcement interviews, however, they too failed to recognize the import of Bobby Dassey's statement to Bryan. (Prior post-conviction counsel's summary memo and attached police

report, attached and incorporated herein as Group Exhibit I). The significance of Bryan Dassey's statement was lost on trial counsel and post-conviction counsel, who did not interview Bryan Dassey. If trial defense counsel or prior post-conviction counsel had recognized the value of Bryan Dassey's impeachment testimony as to Bobby Dassey's statement that Ms. Halbach's vehicle was still on the property when he left to go hunting, they could have effectively undermined a core aspect of the State's case: that Ms. Halbach never left the Avery property.

The failure to investigate this crucial impeachment evidence constitutes deficient performance. Bobby Dassey's putative observations on the date of Ms. Halbach's disappearance formed the crux of the prosecution's case. Undermining his credibility was therefore imperative. Furthermore, trial defense and post-conviction counsel attempted to suggest that Bobby Dassey and Scott Tadych could possibly be the killers. During closing, trial Defense counsel argued:

> Bobby Dassey says that he sees Teresa Halbach at 2:45, he leaves at three, and the vehicle is still there, something like that. He has no good way of verifying the time, but he tells the officer, talk to Scott Tadych — Tadych, he can tell you precisely, is the word he used, precisely what time it was.
>
> Well, how does he know that Tadych can tell precisely what time it was that he supposedly is being seen, unless the two of them maybe got together, talked about a story they had come up with.
>
> Remember, those two people, unlike anybody else that was asked about an alibi and maybe weren't, but those two people alibied themselves. Without each other, there is no alibi for either one of them.

(TT:3/27:205-206). Given that trial defense counsel's theory was that Bobby Dassey was the killer, no reasonable trial strategy would contemplate the failure to investigate evidence that Bobby saw Ms. Halbach leaving the Avery property. *State v. Thiel*, 2003 WI 111, ¶ 44, 264 Wis. 2d 571, 655 N.W.2d 305 (citing *Brown v. Sternes*, 304 F.3d 677, 692 (7th Cir. 2002) ("[i]f we decide that the decision not to investigate is unreasonable, we must find that trial counsel's performance is deficient")).

Trial and post-conviction counsels' deficient performance was clearly prejudicial. Evidence that Bobby Dassey witnessed Ms. Halbach leave the Avery property — and, perhaps even more importantly, later lied about seeing her walk towards Mr. Avery's trailer — would have cast the State's case in a completely different light. This is particularly true given the other evidence Mr. Avery has uncovered since his trial implicating Bobby Dassey as a possible perpetrator. Had this evidence been presented, there is a reasonable probability that the result of Mr. Avery's trial would have been different. Mr. Avery was therefore denied effective assistance of counsel. *Thiel*, 2003 WI 111, ¶ 81 (finding ineffective assistance where counsel failed to read all discovery materials and therefore did not investigate evidence that would have discredited crucial prosecution witness); *State v. Honig*, 2016 WI App 10, ¶¶ 40-47, 366 Wis. 2d 681, 874 N.W.2d 589 (finding ineffective assistance where, *inter alia*, counsel failed to impeach alleged victim with prior inconsistent statement); *State v. Jenkins*, 2014 WI 59, ¶ 53, 355 Wis. 2d 180, 848 N.W.2d 786 (finding ineffective

assistance where failure to call contradictory eyewitness would expose vulnerabilities at center of State's case).

(6) *In the alternative, the State violated Mr. Avery's fundamental right to due process where it knowingly used false testimony to secure his conviction.*

In the alternative, the State used Bobby Dassey's testimony knowing it to be false. The State was in possession of the report referenced, *supra*, wherein Bryan Dassey told investigators that they should speak with Bobby because Bobby saw Ms. Halbach leave the Avery property. Bryan would have no reason to lie about what Bobby told him. Nevertheless, the State elicited wholly contradictory testimony from Bobby Dassey at trial that when he last saw Ms. Halbach she was walking towards the door of Mr. Avery's trailer. The State utilized this testimony as the centerpiece of its argument that Mr. Avery was the last person to see Ms. Halbach alive, all the while knowing it to be false.

When the government obtains a conviction through the knowing use of false testimony, it violates a defendant's right to due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *United States v. Bagley*, 473 U.S. 667, 679, n. 8 (1985). When false evidence appears, the prosecutor is responsible for correcting it. *Giglio v. United States*, 405 U.S. 150, 153 (1972). And, commensurate with a prosecutor's special duty to assure that a defendant receives a fair trial, a prosecutor may not simply turn a blind eye to evidence he or she reasonably knows to be false:

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

(*See*, Exhibit 1 at pp. 5-6) (emphasis added).

Barb, in response to Mr. Avery saying that Bobby had said "she left," agreed, "Yeah. She left." (*See*, Exhibit 1 at p. 6). Mr. Tadych, in response to Mr. Avery saying that Bobby had said "she left," agreed, "That's right." (*See*, Exhibit 1 at p. 6). Mr. Tadych's response indicates either that Bobby had told him that he (Bobby) observed Ms. Halbach leave the property, or Mr. Tadych's response indicates that he (Mr. Tadych) observed and/or had contact with Ms. Halbach *after* she left the property. (*See*, Exhibit 1 at p. 12).

Barb and Mr. Tadych's admissions are crucial to Mr. Avery's defense because the most important eyewitness for the State was Bobby, who testified that Ms. Halbach was still on the Avery property and that he saw Ms. Halbach approaching Mr. Avery's trailer before he left. (Motion for Reconsideration at pp. 33-35). Bobby made statements to his brother, Bryan Dassey ("Bryan"), that impeach Bobby's trial testimony and establish that, in fact, he had observed Ms. Halbach leave the Avery property before he left. (Motion for Reconsideration at pp. 35-36). Now, in addition

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN, Plaintiff, v. STEVEN A. AVERY, Defendant.	)	Case No. 05-CF-381 Honorable Judge Angela Sutkiewicz, Judge Presiding

AFFIDAVIT OF BRYAN J. DASSEY

Now comes your affiant, Bryan J. Dassey, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I have not taken any medication or ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. Steven Avery is my uncle, Barb Tadych (formerly Barb Janda) is my mother, and Bobby, Blaine, and Brendan Dassey are my brothers.
3. In October and November 2005, I lived with my girlfriend but I kept my clothing at my mother's trailer, which was on the Avery's Auto Salvage property
4. On or about November 4, 2005, I returned to my mother's trailer to retrieve some clothes, and I had a conversation with my brother, Bobby, about Theresa Halbach. I distinctly remember Bobby telling me, "Steven could not have killed her because I saw her leave the property on October 31, 2005."

EXHIBIT G

630-30

5. I also have a distinct memory of being present prior to October 31, 2005 when my mother made a call to Auto Trader and set up an appointment to have photographs of her van taken. I know that my mother made the appointment because she told me that Steven Avery, my uncle, had insisted that she make the appointment because it was her van.
6. I was interviewed by law enforcement on November 6, 2005, after being pulled over while driving my uncle Steven's Pontiac. My brother Brendan was in the car with me and he was interviewed by other officers at the same time as me. I told the investigators that they should talk to my brother Bobby because he saw Teresa Halbach leave the Avery property on October 31, 2005.
7. I was not called as a witness to testify at my Uncle Steven's criminal trial.
8. Nothing has been promised or given to me in exchange for this affidavit.

FURTHER AFFIANT SAYETH NAUGHT

Bryan J. Dassey

State of Wisconsin
County of Manitowoc

Subscribed and sworn before me
this 16th day of October, 2017.

Notary Public

My commission expires: 2/14/2020

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

AFFIDAVIT OF KEVIN RAHMLOW

Now comes your affiant, Kevin Rahmlow, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.

2. In 2005, I lived near Mishicot, Wisconsin. I am familiar with the Tadych family because I am acquaintances with Shaun Tadych. Shaun's brother Scott is now married to Steven Avery's sister, Barb.

3. On November 3 and 4, 2005, I was in Mishicot. I saw Teresa Halbach's vehicle by the East Twin River dam in Mishicot at the turnabout the bridge, as I drove west on Highway 147.

4. Around midday on November 4, 2005, I stopped at the Cenex gas station at the intersection of Highway 147 and State Street in Mishicot. While there, I saw and read a missing person poster for Teresa Halbach. I remember that the poster had a picture of

Teresa Halbach and written descriptions of Teresa Halbach and the car she was driving. I recognize the poster attached as Exhibit A to this affidavit as a copy of the one I saw at the Cenex station on November 4, 2005.

5. I recognized that the written description of the vehicle on the poster matched the car I saw at the turnaround by the dam.

6. While I was in the Cenex station, a Manitowoc County Sheriff's Department officer came into the station. I immediately told the officer that I had seen a car that matched the description of the car on Teresa Halbach's missing person poster at the turnaround by the dam.

7. In December 2016, I watched Making a Murderer. In the series, I recognized the officer who I talked to at the Cenex station on November 4, 2005. A photograph of this officer is attached as Exhibit B to this affidavit. Having watched Making a Murderer, I now know that his name is Andrew Colborn.

8. After I watched Making a Murderer, I sent a text message to Scott Tadych. Having reviewed a saved copy of that message, I know that I sent it on December 12, 2016, at 6:13 p.m. In the message, I told Scott Tadych that I had seen Teresa Halbach's car in Mishicot on November 4, 2005, and had told the officer in the Cenex station. On December 19, 2016, I sent Scott Tadych another message. I never heard back from Scott Tadych. Copies of the text message conversation I had with Scott Tadych are attached as Exhibit C to this affidavit.

9. Nothing has been promised or given to me in exchange for this affidavit.

10. FURTHER YOUR AFFIANT SAYETH NAUGHT

Kevin Rahmlow

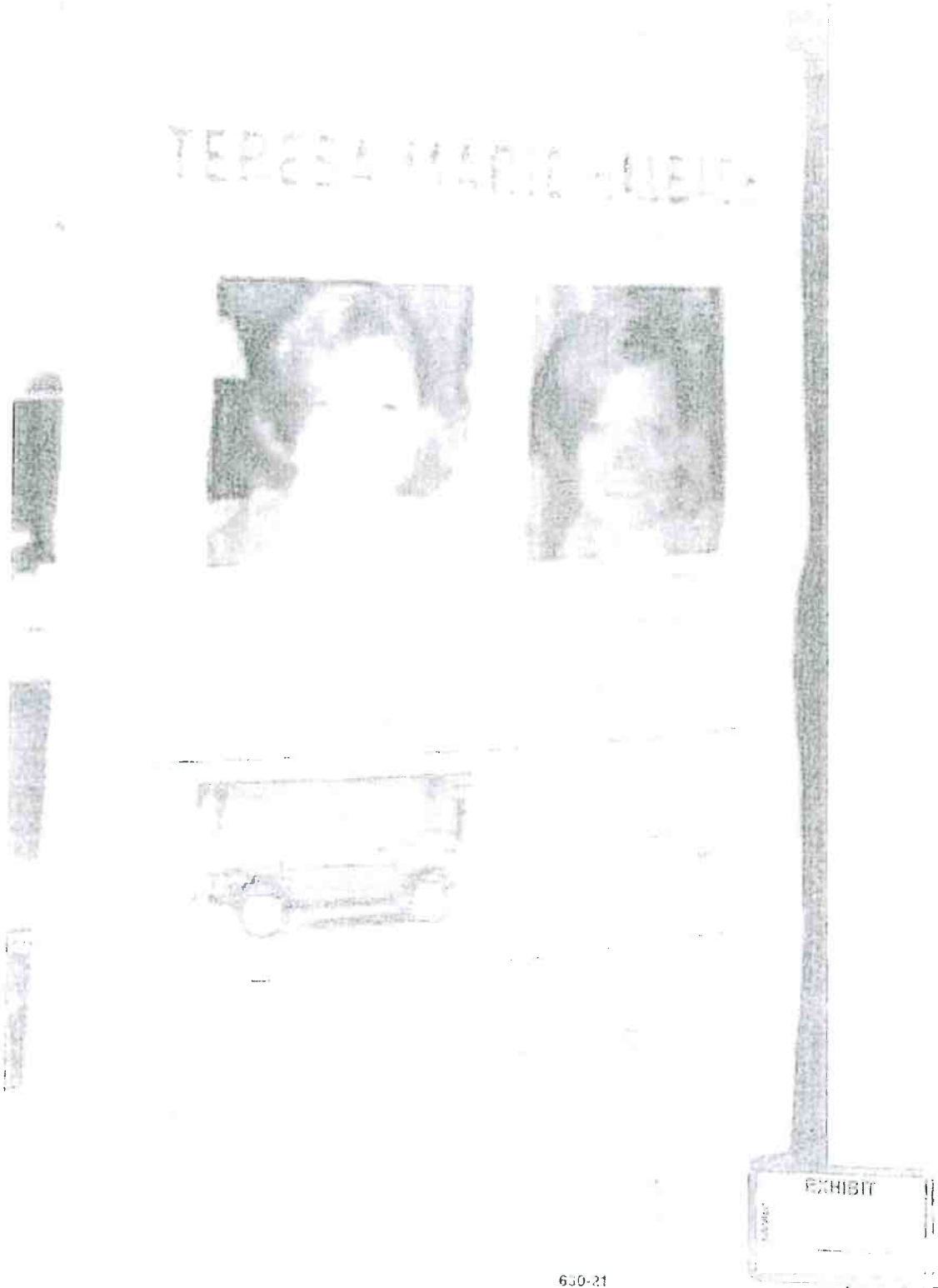
[illegible] S. [illegible]
Notary Public
State of Wisconsin

Commission Expires
11/15/2019

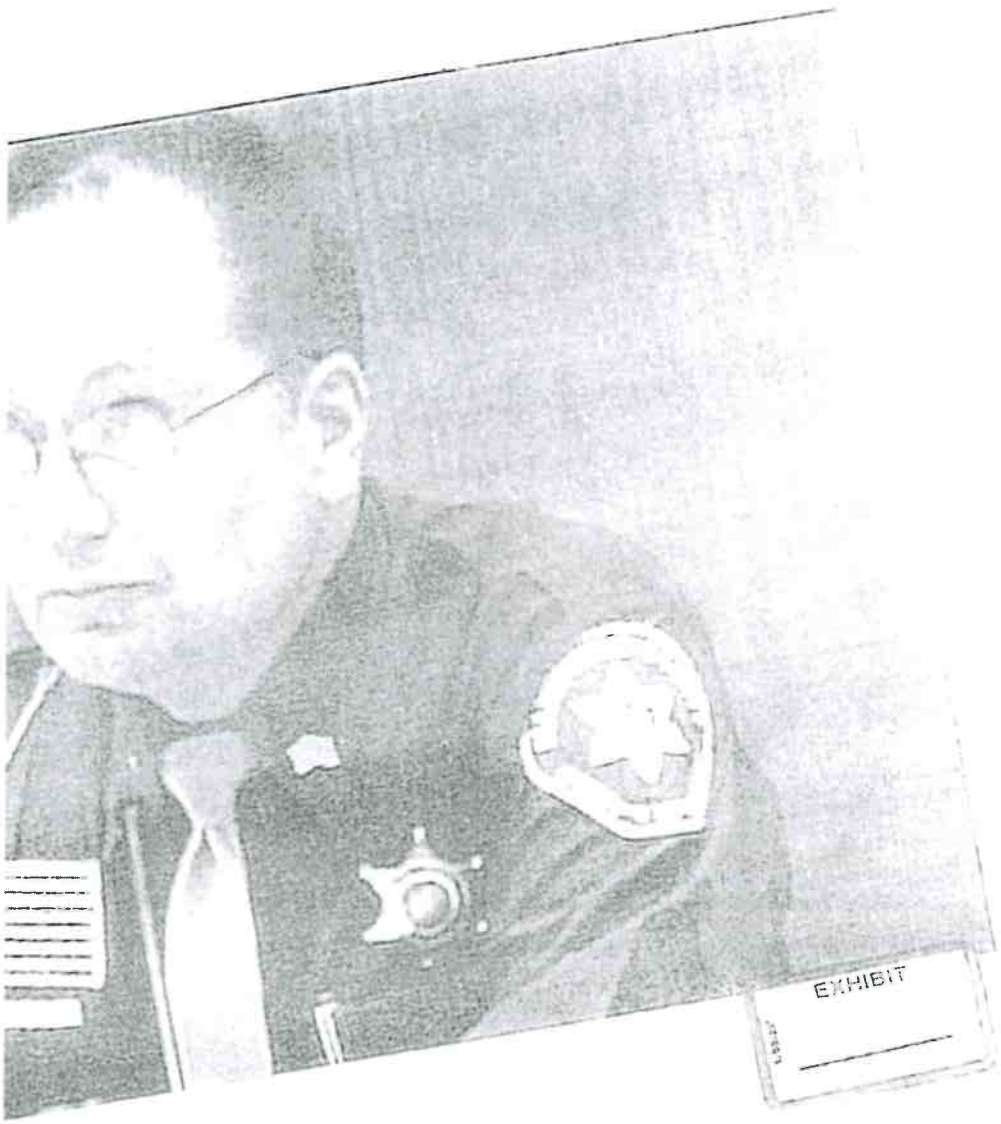
State of Wisconsin
County of Manitowoc

Subscribed and sworn before me
this 15th day of July, 2017.

Notary Public



EXHIBIT



I just watched the series makin of a murderer and I gotta tell ya I need to get in touch with one of their lawyers as coubern I saw art cenex and told him that vehicle was at the old damn on a thurs or Fri

And im guessing now 3rd was the

EXHIBIT

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 06-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

SUPPLEMENTAL AFFIDAVIT OF KEVIN RAHMLOW

Now comes your affiant, Kevin Rahmlow, and under oath hereby states as follows:

1. I wish to amend ¶ 8 of my original affidavit to read as follows:

   After I watched Making a Murderer, I sent a message to Scott Tadych on December 12, 2016, at 18:13. The message stated:

   > I just watched the series makin [*sic*] of a murderer and I gotta tell ya I need to get in touch with one of of their lawyers as coubern [*sic*] I saw art [*sic*] cenex and told him that vehicle was at the old damn [*sic*] on a thurs or Fri. And im [*sic*] guessing Nov 3rd was the day he called the plates in

   I sent another message at 19:41, in which I stated, "Hey give me a call 9063612866." I received one message back from Mr. Tadych that day, in which he said he was sick and that he would call the next day. I did not hear from Mr. Tadych the next day — or any other day — responsive to my request for attorney contact information for Steven Avery or Brendan Dassey. I received another message from Mr. Tadych on December 19 at 6:10 p.m., which was not responsive to my request. All of the messages exchanged between Mr. Tadych and I are attached.

2. Finally, I received a response to my initial inquiry from Barbara Tadych. Mrs. Tadych sent me a message on or about September 3, 2017, in which she stated:

EXHIBIT
Amended Group 7

634-2

Case 2005CF000381 Document 1071 Filed 10-19-2022 Page 65 of 74

Hello Kevin, I see you messaged scott awhile back and said things to him about the case. Brendan's attorneys would like to talk to you. Laura Nytridor [sic] 8125032204. Please give her a call.

FURTHER AFFIANT SAYETH NAUGHT

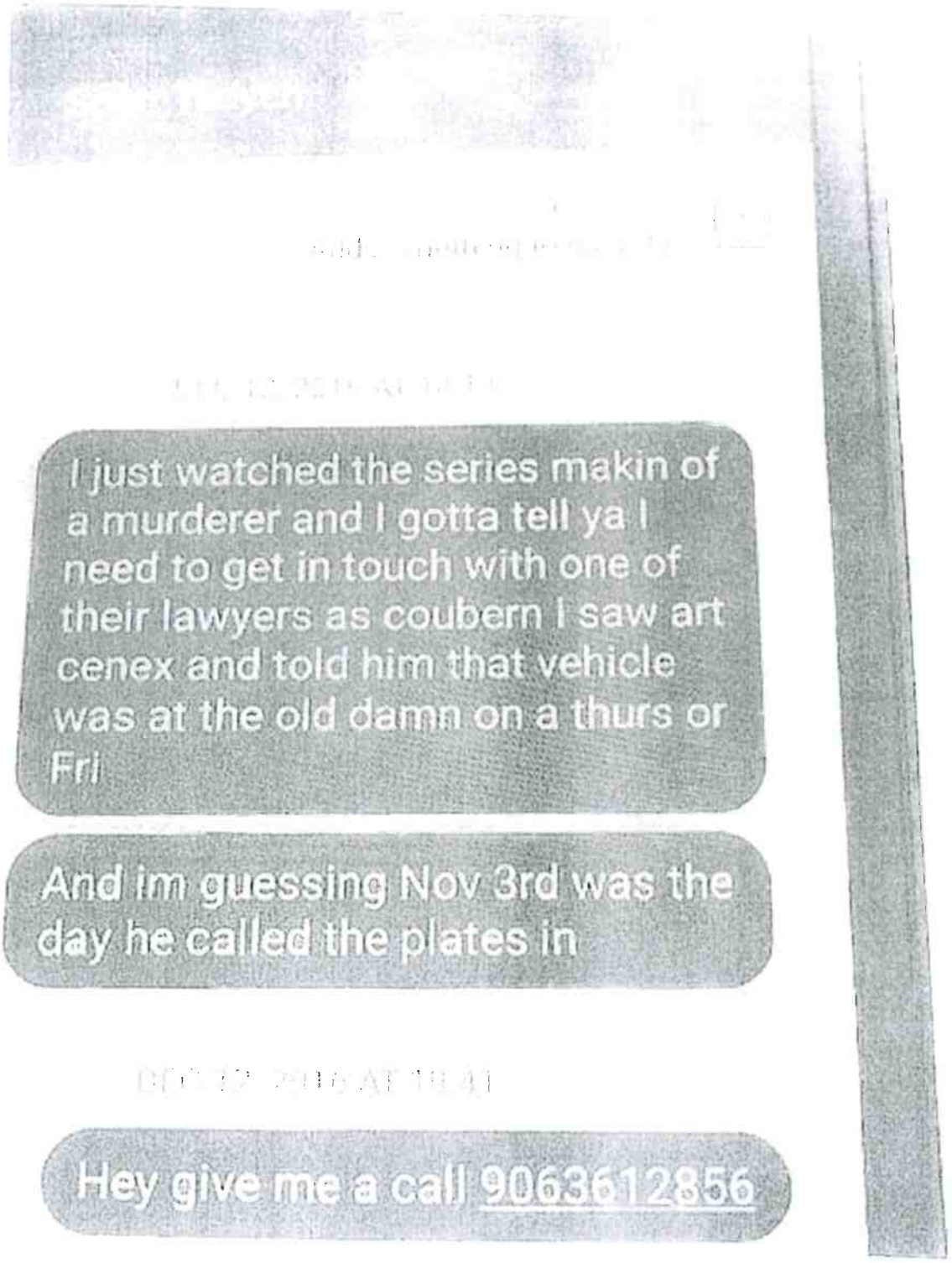
Kevin Rahmlow

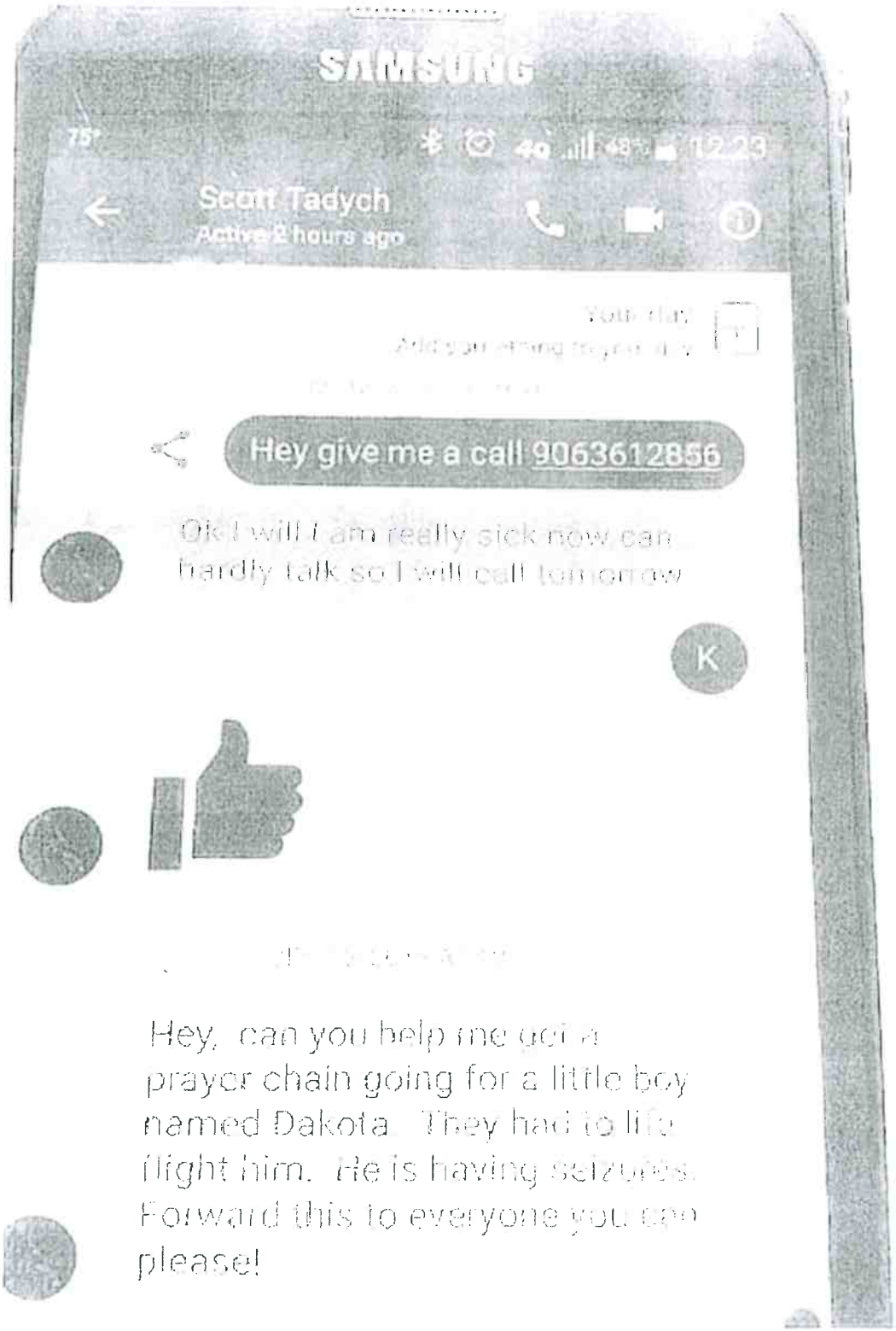
State of ~~Wisconsin~~ Minnesota
County of St. Louis

Subscribed and sworn before me ~~on~~ ~~October~~ November
this 2nd day of ~~October~~ November, 2017.

Carla Rae Kampsula
Notary Public

CARLA RAE KAMPSULA
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES 01/31/2021


I just watched the series makin of a murderer and I gotta tell ya I need to get in touch with one of their lawyers as coubern I saw art cenex and told him that vehicle was at the old damn on a thurs or Fri
And im guessing Nov 3rd was the day he called the plates in
Hey give me a call 9063612856


SAMSUNG
75°
12:23
Scott Tadych
Active 2 hours ago
Hey give me a call 9063612856
Ok I will I am really sick now can hardly talk so I will call tomorrow
K
Hey, can you help me get a prayer chain going for a little boy named Dakota. They had to life flight him. He is having seizures. Forward this to everyone you can please!

Hello Kevin, I see you messaged scott awhile back and said things to him about the case. Brendan's attorneys would like to talk to you. Laura Nytrider 3125032204. Please give her a call.

CERTIFICATE OF SERVICE

I certify that on November 2nd, 2017, a true and correct copy of Defendant Steven Avery's Amendment of Group Exhibit 7 of his Previously Filed Amended Supplement to Motion for Reconsideration, Pursuant to Wisconsin Statute 805.07 (1)(a) was furnished via electronic mail and by first-class U.S. Mail, postage prepaid to:

Manitowoc County District Attorney's Office
1010 South 8th Street
3rd Floor, Room 325
Manitowoc, WI 54220

Mr. Thomas J. Fallon
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Kathleen T. Zellner

Mr. Ertl told you that, right on the other side, see this, right on the other side of the SUV, running all the way along this ridge, was this berm. Mr. Ertl talked about this being 15 to 20 feet high.

Remember he talked about walking over that particular berm where he -- after he got to the top of it, kind of slid down, or gravity kind of assisted this going down the other side of that berm. That is important, or it may be for you, important, when deciding whether or not somebody knew to put this car here.

It certainly couldn't be driven in from the south. That's the point. All right. The point is that it couldn't be driven into that property unless somebody knew that property, unless who ever put that car there, knew how to get the car into this location. Again, it's near the car crusher. It's near a place where other cars are to be crushed. It's near cars that have been crushed. The 54 cars that we talked about.

But Mr. Ertl's job, primary job, at this location, is to process the outside of the vehicle. But then to get a wrecker, to get a tow assembly set up, and to put this on an enclosed

ATTORNEY KRATZ: All right.

Q. (By Attorney Kratz)- You said that you saw Scott Tadych on the way to deer hunting. About what time was it that you saw him; do you recall?

A. Quarter to three.

Q. About 2:45 p.m.?

A. Yes.

Q. So you had already seen Teresa Halbach by 2:45 and, in fact, had already left your residence; is that right?

A. No, she was still there.

Q. What I'm saying is, you had already seen her?

A. Oh, yes.

Q. And had left your residence --

A. Yes.

Q. -- by 2:45?

A. Yes.

Q. Mr. Strang, asked if you heard any screaming or if you heard any other noises when you got into your truck; were you listening for anything like that?

A. No.

Q. How long does it take from exiting your trailer until you get into your truck; how far of a distance was that?

egress to that property.

Sergeant Orth testified that while the officers were somewhere in this area, remember this picture was taken after the vehicle had been removed, but that there's -- there's ways in and out from the west. I will show you in a moment, if I can find the overhead.

A little farther up, one can see the -- how the roads down here, we have lots of ways to get in and put that -- First of all, for someone to plant the vehicle. And, secondly, for anyone to approach it while it's there. And an even more distant shot that shows all the ways in to this plot of land.

So while maybe directly to the south of that berm it is not immediately accessible, there's all these other ways in from here, or from here. When somebody who knows the area, perhaps someone who's been a patrol sergeant for many years, knows the county like the back of his hand, is going to know how to get to that RAV4.

Then we have this whole question of whether the vehicle is locked or not. Well, the Sturms said they thought it was locked, but then when they were questioned more carefully it turns

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CF-381
v.	)	
	)	Honorable Judge Angela Sutkiewicz,
STEVEN A. AVERY,	)	Judge Presiding
	)	
Defendant.	)	

AFFIDAVIT OF BRAD A. DASSEY

Now comes your affiant, Brad A.Dassey, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I have not taken any medication or ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. Bryan, Bobby, Blaine, and Brendan Dassey are my half-brothers. Peter Dassey is our common father.
3. I had a conversation with Barb Dassey,(Janda) (now Barb Tadych) during a car trip to visit Brendan Dassey at Sheboygan County Jail. My father Peter Dassey was with us. Barb stated that she had hired someone to "reformat" her home computer. She wanted to know if "reformating" would remove what was on the computer.
4. Barb admitted her computer had some pornography stored on it and she claimed the computer had "viruses" on it. She had the reformatting done shortly before the

EXHIBIT

632-35

authorities seized her computer. Barb commented that she did not think the person she hired knew what he was doing.

5. She said she did not want anyone to get what was on her computer
6. Shortly after my conversation with Barb I contacted the authorities because I thought Barb was trying to remove evidence relevant to the Teresa Halbach murder from her computer.
7. I do not know who reformatted Barb's computer.
8. I was interviewed by the authorities after I reported this information to them.
9. I was not called as a witness to testify at Steven Avery or Brendan Dassey's criminal trials.
10. Nothing has been promised or given to me in exchange for this affidavit.

FURTHER AFFIANT SAYETH NAUGHT

Brad A. Dassey

State of Wisconsin
County of Outagamie

Subscribed and sworn before me
this 30th day of October, 2017.

Notary Public

a. any reports or statements of experts or if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony

b. the results of any physical examination, scientific test, experiment or comparison that the plaintiff intends to offer in evidence at trial.

14. Furnish the defendant with a detailed inventory of all items which the State has in its possession, knowledge or control in regards to this case which were obtained from or belong to the defendant, together with the date, time, place and manner in which those items were obtained.

15. Furnish the defendant with all information concerning any electronic surveillance of any conversation to which the defendant was a party and of any electronic surveillance of his premises;

16. Furnish the defendant with all information concerning the interception of mail which is or was sent to him or which he sends to others including but not limited to the use of a mail cover;

17. Furnish the defendant with a written report detailing the defendant's conduct, including all observations of him as well as the results of all tests and/or experiments which were performed on or by the defendant which the State intends to introduce into evidence;

18. Furnish the defendant with a copy of all subpoenas for documents issued pursuant to sec. 968.135, Stats., copies of all requisite showings of probable cause, and copies of all documents so received;

19. Disclose to the defendant all promises, rewards and inducements made by the plaintiff or any of its agents to any witnesses that will testify at the trial in the above-captioned matter;

20. Pursuant to sec. 971.23(1)(h) Wis. Stats., furnish the defendant with all exculpatory evidence, including but not limited to:

a. Any and all exculpatory evidence and/or information within the possession, knowledge or control of the State which would tend to negate the guilt of the defendant.

b. Any and all exculpatory evidence and/or information within the possession, knowledge or control of the State which would tend to affect the weight or credibility of the evidence used against the defendant including but not limited to:

i. Any and all statements of all individuals which may be inconsistent in whole or in part with any other statement made by the same individual.

ii. Any statements made by any individuals which are inconsistent in whole or in part with any and all statements made by other individuals who have given statements relevant to the charges against the defendant.

iii. Any and all reports, results, and conclusions of all tests recreations, reconstructions, calculations or experiments made to be used by the plaintiff which were inconsistent with the plaintiff's theory of the defendant's guilt, and/or any other theory inculpating the defendant of any crime charged or uncharged, or which were inconclusive or abortive of the same.

iv. Any and all information, reports, or evidence of any form of bias, prejudice, or untruthfulness of any witness the State intends to call at trial. O.A.G. 12-86, April 28, 1986.

c. Any and all evidence and/or other information in the possession or knowledge of the State which would tend to show, indicate or give rise to inferences that the defendant:

i. was acting in self defense at the time, either of the alleged offense(s) were committed,

ii. was acting in the defense of others at the time of the alleged offense,

iii. was acting under the influence of adequate provocation at the time of the alleged offense,

iv. was acting because the defendant believed he or another was in imminent danger or great bodily harm and that the force was necessary to defend the endangered person, whether or not that belief was unreasonable at the time of the alleged offense,

v. was acting because the defendant believed that force was necessary in the exercise of a privilege to prevent or terminate the commission of a felony, whether or not that belief was unreasonable at the time of the alleged offense,

vi. was acting in the exercise of a privilege under 939.45, Wisconsin Statutes at the time of the alleged offense.

vii. was acting because the defendant believed, as a result of a threat or threats by a person it was the only means of preventing imminent death or great bodily harm to himself or another person, whether or not that belief was unreasonable at the time of the alleged offense.

viii. was acting because the defendant believed as a result of the pressure of natural physical forces, it was the only means of preventing imminent public disaster, or imminent death or great bodily harm to himself or another, whether or not that belief was unreasonable at the time of the alleged offense.

d. Any and all evidence and/or other information in the possession, knowledge or control of the State which would indicate or gives rise to inferences that the defendant:

i. caused the death of Teresa Halbach intentionally under mitigating circumstances, including but not limited to those enumerated in section 940.01(2) Wisconsin Statutes, at the time of the alleged offense,

ii recklessly caused the death of Teresa Halbach under circumstances showing utter disregard for human life at the time of the alleged offense,

iii. recklessly caused the death of Teresa Halbach under circumstances that do not show utter disregard for human life at the time of the alleged offense,

iv. negligently caused the death of Teresa Halbach at the time of the alleged offense,

v. caused the death of Teresa Halbach by the negligent handling or operation of a dangerous weapon, explosives or fire at the time of the alleged offense,

vi. caused the death of Teresa Halbach by the intoxicated use of a vehicle or firearm,

vii. caused the death of Teresa Halbach by the negligent operation of a vehicle,

viii. caused the death of Teresa Halbach by the negligent control of a vicious animal,

ix. caused the death of Teresa Halbach while committing or attempting to commit a crime specified in sec. 940.225(1) or (2)(a), 943.02, 943.10(2), 943.23(1g), or 943.32(2) Wis. Stats.

x. caused the death of Teresa Halbach under circumstances, or with a mental purpose or lack thereof, which constitute any other lesser included offense to the alleged offense.

e. Any and all evidence and/or information in the possession, knowledge or control of the State which would indicate, show, or gives rise to inferences that the defendant:

i. was suffering from a mental disease or defect at the time any of the alleged offense, and/or,

ii. lacked substantial capacity to appreciate the wrongfulness of his conduct at that time, and/or,

iii. lacked substantial capacity to conform his conduct to requirements of law at that time.

f. Any and all evidence and/or other information in the possession, knowledge or control of the State which would tend to show or gives rise to inferences that:

i. the defendant was in a voluntary intoxicated or drugged condition at the time of the alleged offense,

ii. this condition may have negated the existence of a state of mind essential to the offense charged.

g. Any and all evidence and/or other information in the possession, knowledge or control of the State which would tend to show or gives rise to inferences that:

i. the defendant was in an involuntary intoxicated or drugged condition at the time of the alleged offense,

ii. this condition may have rendered the defendant incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act was committed.

h. Any and all evidence and/or other information in the possession, knowledge of control of the State which would tend to show or give rise to inferences that the defendant was stimulated by intoxication at the time of offense to a degree that he should be convicted of a lesser degree of homicide. Please see State v. Heisler, 116 Wis.2d 657, 344 NW.2d 190 (Ct. App. 1983) and Lee v. State, 65 Wis.2d, 648, 223 N.W.2d 455 (1974).

i. All exculpatory evidence and/or information within the possession, knowledge or control of the State which indicates or gives rise to inferences which indicate that the events alleged as crimes committed by the defendant were the result of accident or were perpetrated by accidental means.

j. All exculpatory evidence and/or information within the possession, knowledge or control of the State which indicates or gives rise to inferences which indicate that the crime or crimes charged as well as the events alleged to have been committed by the defendant, were committed in whole or in part by a person or persons other than the defendant. Please see Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

k. All exculpatory evidence and/or information within the possession, knowledge or control of the State which indicates or gives rise to inferences which indicate that any or all of the evidence being used against the defendant was "planted" by others in an attempt to falsely inculpate the defendant. Id.

l. All exculpatory evidence and/or information within the possession, knowledge or control of the State which indicates or gives rise to inferences that the events alleged or crimes committed by the defendant were the result of an honest error of either fact or law that negatived the existence of a state of mind essential to the crime.

m. All exculpatory evidence and/or information within the possession, knowledge or control of the State which indicates or gives rise to inferences that the events alleged or crimes committed by the defendant were the result of misadventure.

n. All exculpatory evidence and/or information within the possession, knowledge or control of the State which indicates or gives rise to inferences that the defendant acted with a depraved mind at the time of any of the crimes charged.

o. All exculpatory evidence and/or information within the possession, knowledge or control of the State which indicates or gives rise to inferences that the defendant was acting with a high degree of negligence at the time of any alleged offense.

p. All exculpatory evidence and/or information within the possession, knowledge or control of the State which indicates or gives rise to inferences which tend to indicate that the defendant "did not mean to" commit any of the crimes alleged in the information, as that defense is described in State v. Bougneit, 97 Wis.2d 687, 695, 294 N.W.2d 675, (Ct. App. 1980), and Morrissette v. United States, 342 U.S. 246, 250-251, 72 S.Ct. 243 (1952).

q. All exculpatory evidence and/or information within the possession, knowledge or control of the State that the defendant acted without the requisite intent, or with lack of intent, at the time of any crime alleged in the information.

r. Any and all evidence and/or other information in the possession, knowledge or control of the State which would tend to indicate or gives rise to inferences that the defendant acted while suffering from mental, psychological, physiological, biological, medical or emotional disorders; as well as any information indicating that the defendant has suffered from physical, sexual, mental or emotional abuse.

s. Any and all evidence and/or other information in the possession, knowledge or control of the State concerning the activities of Teresa Halbach and all allegations against her made by the defendant, other citizens, or law enforcement officers, and copies of all law enforcement reports, memos, books, and all other reports and documents of any and all investigations done by the Manitowoc County Sheriff's Department, the City of Manitowoc Police Department, the City of Two Rivers Police Department, the Wisconsin Department of Justice, and/or any other law enforcement agency; or agency or individual acting under color of state law concerning the activities of Teresa Halbach and the allegations made against her.

t. Any and all evidence and or other information in the possession, knowledge or control of the State, which would extenuate, mitigate, or reduce the degree of the offenses charged or the defendant's punishment therefore, including, but not limited to evidence or information which shows or gives rise to inferences that the defendant acted at the time of the alleged offense:

i. with a diminished capacity
ii. in a drugged condition
iii. in an intoxicated state
iv. with a depraved mind
v. with reckless conduct (gross negligence)
vi. with a high degree of negligence
vii. in self defense
viii. with excessive use of self defense
ix. under duress
x. under coercion
xi. under necessity
xii. while mistaken as to fact or law
xiii. while suffering from abused child syndrome
xiv. by misadventure
xv. under provocation
xvi while he "did not mean to," State v. Bougneit, supra
xvii. with the lack of intent
xviii. with the lack of reckless conduct showing utter disregard for human life.

u. Any and all exculpatory information and/or evidence within the possession, knowledge or control of the State which would extenuate, mitigate or reduce the degree of either of the offenses charged and/or of the defendant's punishment.

v. Any and all information in the possession, knowledge or control of the State which shocks the conscience and is favorable to the defendant.

w. Any and all exculpatory evidence and/or information within the possession, knowledge or control of the State which would form the basis for further investigation by the defense.

21. Furnish the names and addresses of all persons known by the state to have witnessed any matter related to this case, whether or not the state intends to call them as witnesses at any hearing or trial in this case. Please see Brady v. Maryland, 373 U.S. 83 (1963) and Nelson v. State, 59 Wis.2d 474, 208 N. W.2d 410 (1973).

22. Furnish copies of all written, recorded, or videotaped statements and a summary of any oral statements made by witnesses, including but not limited to copies of police reports, showups, notebooks, memo books, and all other documents, prepared by the witnesses, whether or not the state intends to call them to testify at any hearing or trial in this case. Please see State v. Groh, 69 Wis.2d 481, 230 N.W.2d 745 (1975); State v. Van Ark, 62 Wis.2d 155, 215 N.W.2d 41 (1974); and Simos v. State, 53 Wis.2d 493, 192 N.W.2d 877 (1972).

SEALED

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MOTION FOR DISCLOSURE OF EXCULPATORY INFORMATION

Steven A. Avery, by counsel, now moves the Court for an order requiring the state immediately to disclose all of the following specific exculpatory information and documents in its possession, known to it, or that would be known to it in the exercise of reasonable diligence. Mr. Avery makes this motion pursuant to the due process guaranties of the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution. He further relies upon *Brady v. Maryland*, 373 U.S. 83 (1963), and progeny (through at least *Strickler v. Greene*, 527 U.S. 263 (1999)), and upon *State ex rel. Lynch v. County Court, Branch III*, 82 Wis. 2d 454, 262 N.W.2d 773 (1978), WIS. SCR 20:3.8(d) and other Wisconsin authority explaining the state's duty to disclose exculpatory information to the defense in a criminal case.

Some of the information that Mr. Avery seeks here he already requested of the prosecution in writing, by letter dated December 15, 2006. The prosecution to date has not responded to that letter. Other information Mr. Avery now requests specifically for the first time. Mr. Avery prays that the Court order the state immediately to disclose:

1. All documents and information about the work schedules and whereabouts of James Lenk, Andrew Colborn, Kenneth Peterson, and Thomas Kocourek on October 31, 2005 and on November 1-4, 2005. This includes any information about their locations and activities during nighttime hours. This information was requested in the December 15 letter from defense counsel. Information already in the possession of the defense, through previous discovery, of course need not be disclosed again.

2. All documents and information about the work schedule and whereabouts of James Lenk on Saturday, November 5, 2005, before 10:41 p.m. Specifically, the state should disclose where Lt. Lenk was when he made a 2:57 p.m. telephone call that day to Inv. Dedering, when he first arrived at the Manitowoc County Sheriff's Department that day or counted himself on duty, and when he first arrived anywhere on the Avery Auto Salvage property that day.

3. The number, location, actual possessors, and nominal custodians, at any time, of all master keys or other keys that opened the Manitowoc County Clerk of Court's office between October 30, 2005 and November 6, 2005. This request includes any information concerning the use or misuse of any such key, or the unexplained disappearance of any such key, during the same time period.

4. All documents and information about the work schedules and whereabouts on November 3, November 4 and November 5, 2005, of every employee of the Manitowoc County Sheriff's Department with actual access, whether proper or otherwise, to any key that opened the Manitowoc County Clerk of Court's office during the same time period.

5. All documents and information explaining, purporting to explain, or relating in any way to the apparent hole in the cap of the vial of liquid blood labeled as Steven Avery's, and contained in the court file of the 1985 case that resulted in Mr. Avery's wrongful conviction.

6. All documents and information bearing on the bias of any current or former member of the Manitowoc County Sheriff's Department or the Calumet County Sheriff's Department against Steven Avery, if that bias reasonably may have existed at any time between October 30, 2005 and the present.

7. All documents and information relating to any internal investigation or discipline by the Manitowoc County Sheriff's Department, the Manitowoc County Board of Supervisors or any of its committees, the Manitowoc Fire and Police Commission, or any other oversight body, of James Lenk, Andrew Colborn, or any other Manitowoc County Sheriff's Department employee involved in the investigation leading to the present charges against Mr. Avery, for any job-related act of dishonesty or alleged dishonesty, dereliction of duty, bias, tampering with (or improper handling of) evidence, or other failure to follow departmental rules at any time. This request includes, but is not limited to, information in personnel or human resources files, or in internal affairs division (or the equivalent internal professional performance investigative arm) files. It also includes the circumstances of Lt. Lenk's departure from the Detroit Police Department in or before 1980, if that was in the wake of allegations about his professional performance, honesty, integrity, or suitability for law enforcement work.

8. All documents and information reflecting any inconsistent statements made by James Lenk, Andrew Colborn, or any other Manitowoc County Sheriff's Department employee involved in the investigation leading to the present charges, to the extent that those inconsistent statements relate to the investigation into Teresa Halbach's disappearance or to the present prosecution of Mr. Avery.

9. All documents and information reflecting any plea offers by Brendan Dassey or any of his lawyers, any hopes of leniency that Brendan Dassey or his lawyers have expressed, any expectations of leniency or favor that Brendan Dassey or his lawyers have expressed, any promises offered or made to Brendan Dassey by prosecutors or law enforcement officials involved in the prosecution of either Steven Avery or Brendan Dassey, and any further statements Brendan Dassey has made to anyone (including on tapes made by the Sheboygan County facility where he is lodged) about the offenses alleged here in the Amended Information. Such statements necessarily will be inconsistent with other statements by Mr. Dassey. This request encompasses all information within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), and both federal and Wisconsin cases applying that decision.

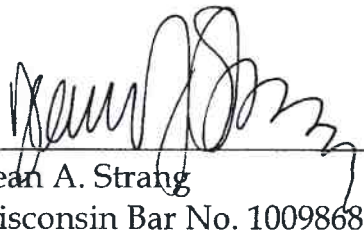
10. All documents and information concerning the non-human nature, or uncertain nature, of a bone fragment with a kerf cut, examined by Dr. Leslie Eisenberg and later submitted to the FBI Laboratory. At this point, the state has not disclosed any results of FBI testing.

Dated at Madison, Wisconsin, January 17, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

HURLEY, BURISH & STANTON, S.C.



10 East Doty Street, Suite 320
Madison, Wisconsin 53703
[608] 257-0945

Dean A. Strang
Wisconsin Bar No. 1009868
Counsel for Steven A. Avery

BUTING & WILLIAMS, S.C.

Jerome F. Buting

400 Executive Drive, Suite 205
Brookfield, Wisconsin 53005
[262] 821-0999

Jerome F. Buting
Wisconsin Bar No. 1002856
Counsel for Steven A. Avery

Teresa Halbach and written descriptions of Teresa Halbach and the car she was driving. I recognize the poster attached as **Exhibit A** to this affidavit as a copy of the one I saw at the Cenex station on November 4, 2005.

5. I recognized that the written description of the vehicle on the poster matched the car I saw at the turnaround by the dam.

6. While I was in the Cenex station, a Manitowoc County Sheriff's Department officer came into the station. I immediately told the officer that I had seen a car that matched the description of the car on Teresa Halbach's missing person poster at the turnaround by the dam.

7. In December 2016, I watched Making a Murderer. In the series, I recognized the officer who I talked to at the Cenex station on November 4, 2005. A photograph of this officer is attached as **Exhibit B** to this affidavit. Having watched Making a Murderer, I now know that his name is Andrew Colborn.

8. After I watched Making a Murderer, I sent a text message to Scott Tadych. Having reviewed a saved copy of that message, I know that I sent it on December 12, 2016, at 6:13 p.m. In the message, I told Scott Tadych that I had seen Teresa Halbach's car in Mishicot on November 4, 2005, and had told the officer in the Cenex station. On December 19, 2016, I sent Scott Tadych another message. I never heard back from Scott Tadych. Copies of the text message conversation I had with Scott Tadych are attached as **Exhibit C** to this affidavit.

9. Nothing has been promised or given to me in exchange for this affidavit.

10. FURTHER YOUR AFFIANT SAYETH NAUGHT

Kevin Rahmlow

State of Wisconsin
County of Manitowoc

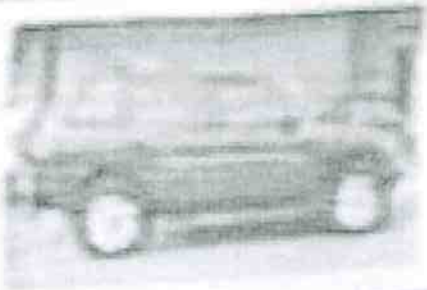
Subscribed and sworn before me
this 15th day of July, 2017.

MARK S. ERDMANN
Notary Public
State of Wisconsin

Commission Expires
11/15/2019

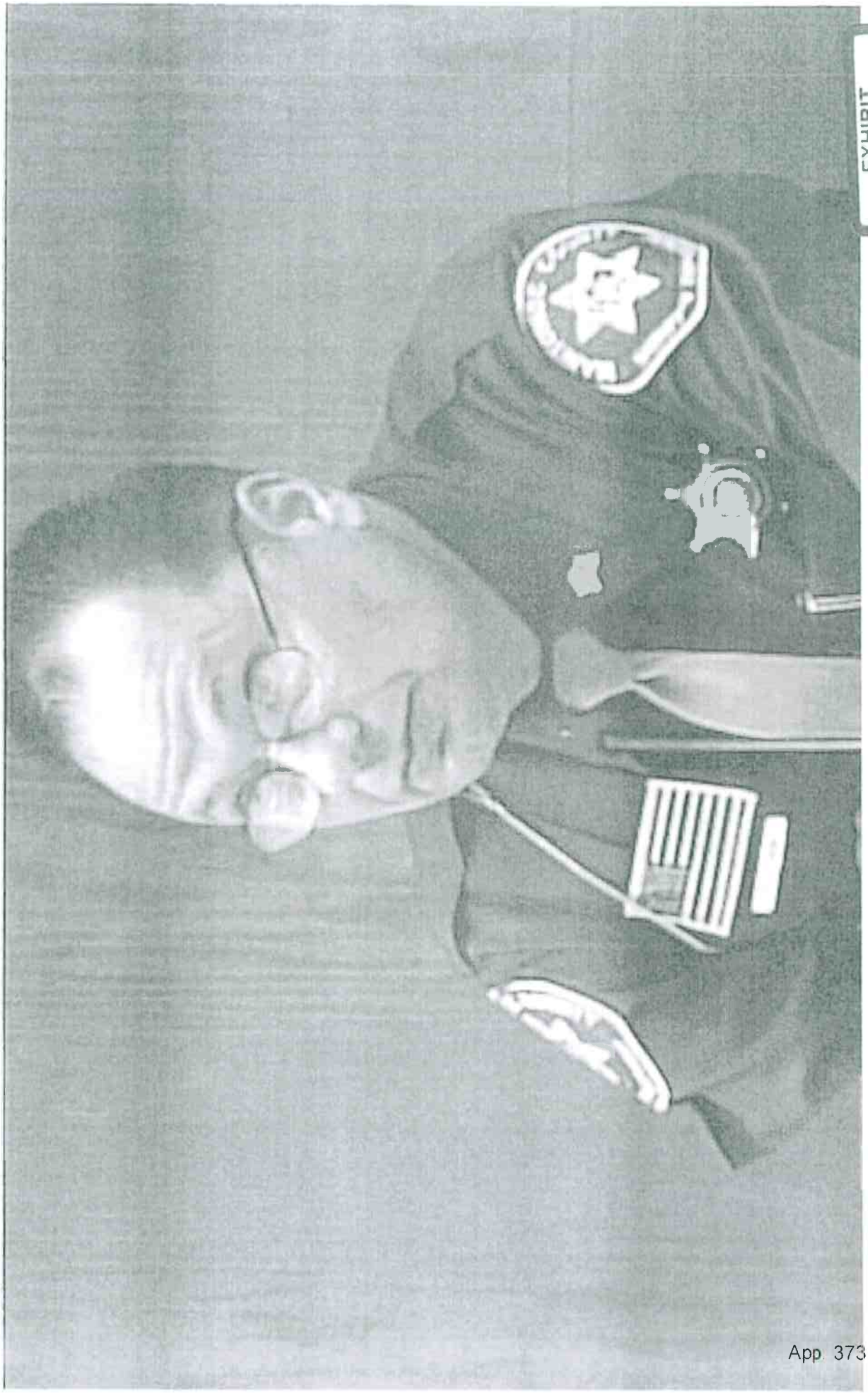
Notary Public

TERESA MARIE HALBACH



EXHIBIT

App. 372



EXHIBIT

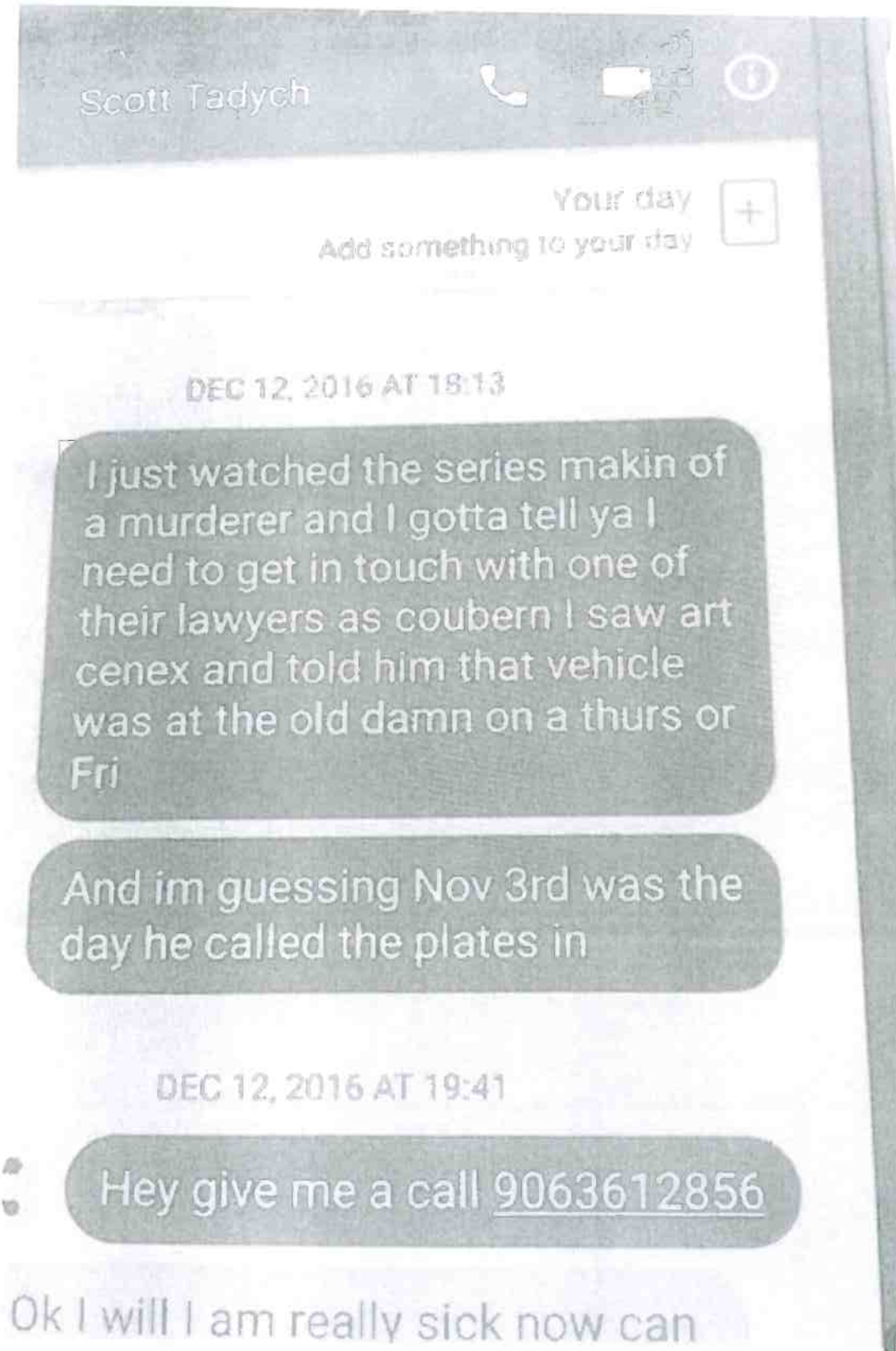


EXHIBIT
C
App. 374