**STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY**

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

# MR. AVERY'S REPLY TO THE STATE'S RESPONSE OPPOSING A MOTION FOR AN EVIDENTIARY HEARING AND POSTCONVICTION RELIEF UNDER WIS. STAT. § 974.06

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**STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY**

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| State of Wisconsin | ) | |
| Plaintiff, | ) | |
| v. | ) | Case No. 05 CF 381 |
| STEVEN A. AVERY, | ) | |
| Defendant | ) | |

**MR. AVERY'S REPLY TO THE STATE'S RESPONSE OPPOSING A MOTION FOR AN EVIDENTIARY HEARING AND POSTCONVICTION RELIEF UNDER WIS. STAT. § 974.06**

Defendant, Steven Avery ("Mr. Avery"), by his undersigned attorneys, Kathleen T. Zellner and Associates, P.C. and Steven G. Richards, for his reply to the State's response in opposition to his motion for an evidentiary hearing and postconviction relief, states as follows:

## INTRODUCTION

The State has presented an argument designed to obfuscate the significance of Mr. Avery's powerful new evidence that Bobby Dassey ("Bobby") had the *opportunity* and is *directly connected* to actually murdering Teresa Halbach ("Ms. Halbach") and to planting the forensic evidence to frame Mr. Avery because he was observed pushing her vehicle, which contained her blood spattered in the rear cargo area and door, onto the Avery Salvage Yard in the middle of the night, planting it where it would easily be discovered the next day. The RAV-4 contained evidence of the violence inflicted on Ms. Halbach, her clothing and personnel effects, blood, and the forensic evidence that was used to convict Bobby's uncle, Mr. Avery, of Ms. Halbach's murder.

Bobby's possession of the RAV-4, with Ms. Halbach's blood spattered inside of it, demonstrates he not only had a direct connection and opportunity to murder Ms. Halbach but also to plant the following evidence contained in the vehicle: Ms. Halbach's three electronic devices that were burned and placed in Mr. Avery's burn barrel **(Doc. 610:65-66; 593:155-156)**[1] (715:65-66; 700:155-56) (App. 1-3; 4-6); the RAV-4 license plate that was removed and hidden in a salvage car **(Doc. 592:1-3, 227)** (695:1-3, 227) (App. 7-10); Mr. Avery's blood that was found carefully dripped in the front seat of the RAV-4 and applied to the dash with an applicator **(Doc. 179:135-36; 965:31)** (604:135-36; 737:31) (App. 11-14); the RAV-4 key that was found in Mr. Avery's bedroom with his but not Ms. Halbach's DNA **(Doc. 600:19; 593:55-56; 594:129-30)** (706:19; 700:55-56; 701:129-30) (App. 15-22); and Ms. Halbach's DNA that was found on a bullet in Mr. Avery's garage **(Doc. 597:168, 176)** (699:168, 176) (App. 23-25). Additionally, if Bobby is the perpetrator of Ms. Halbach's murder, he had the opportunity to burn her body in the Dassey burn barrel, where some of her larger bones were found with cut marks, smelling of a flammable liquid **(Doc. 601:37)** (707:37) (App. 26-27), and plant the remaining bones and burned jean rivets in Mr. Avery's burn pit **(Doc. 610:104-05)** (715:104-05) (App. 28-30). In regard to the hood latch DNA swab, Mr. Avery has previously argued that his DNA was removed by Nurse Faye L. Fritsch ("Fritsch") at the Aurora Medical Center, on November 9, 2005, upon the request of Investigators Fassbender and Weigert, when he was arrested for unlawful possession of a firearm and his body was illegally swabbed. **(Doc. 179:64)** (604:64) (App. 31-32).[2] The investigators admitted in their report that they "utilized a Woods light to

[1] The Circuit Court Record shall be referred to as "**(Doc. _)**". The Appellate Court Record shall be referred to as "(_)". Cites to the Appendix of this brief shall be referred to as "(App. _)".

[2] On April 4, 2006, Dep. Hawkins signed the hood latch swab (CCSD Property Tag #9188) over to Inv. Wiegert for transport to the WSCL in Madison. When Inv. Wiegert arrived at WSCL, he

illuminate any secretions on Steven's body. Fritsch subsequently took two swabs in Steven's groin area. After that, she continued and was going to take some more swabs when S/A Fassbender and Wiegert conferred and determined that the search warrant did not call for that type of exam." Mr. Avery has previously argued and presented evidence that one of the two swabs was kept and deceptively submitted to the Wisconsin State Crime Lab ("WSCL") by Inv. Weigert, as the RAV-4 hood latch swab which contained Mr. Avery's DNA **(Doc. 179:28; 178:87-88; 180:46, 58, 61-62, 64, 66; 179:64)** (604:28 ¶31; 603:87-88; 615:46, 58, 61-62, 64, 66; 604:64) (App. 33-46). Mr. Avery's trace expert, Dr. Christopher Palenik, opined, after conducting a series of experiments that the alleged hood latch swab never swabbed a hood latch. **(Doc. 181:35, Affidavit of Christopher Palenik, PhD)** (621:35) (App. 299-305). The State argued, at trial, that Mr. Avery's DNA was deposited on the hood latch when he opened the hood, with sweaty hands, to disconnect the battery to prevent the vehicle alarm from being activated. **(Doc. 615:95-96)** (716: 95-96) (App. 47-49). The State's theory is implausible at best. Mr. Avery's fingerprints were not found anywhere on the RAV-4 even though the State fingerprint expert found 8 latent prints on the vehicle and testified that someone with "sweaty hands" was more likely to leave prints than someone with dry hands. **(Doc. 605:103)** (711:103) (App. 306-07). The killer had Ms. Halbach's key, so the chances of triggering the alarm were remote at best, and even if that had occurred, the alarm could have been quickly disabled by using the key. Mr. Avery's new witness, Thomas Sowinski ("Sowinski"), provides the plausible answer as to

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presented Wisconsin Department of Justice Evidence Transmittal Form labeled M05-2467-27. Dep. Hawkins' name was typed on the form as the submitting officer, which he was not. Then, Inv. Wiegert hand-printed Dep. Hawkins' name on the form, again deliberately misidentifying Dep. Hawkins as the submitting officer, which was a complete misrepresentation. Clearly, Inv. Wiegert switched the groin and hood latch swab and fabricated the chain of custody documentation so that it would appear that Dep. Hawkins submitted the actual hood latch swab to WSCL. **(Doc. 180:58-66)** (615:58-66) (App. 61-69).

why the battery was disconnected when he describes the RAV-4 lights being off when he observed Bobby and another individual pushing the vehicle onto the Avery Salvage Yard. **(*See* Doc. 1071, Affidavit of Thomas Sowinski)** (App. 50-60). Clearly, the obvious and simple explanation for the battery being disconnected was to disable the vehicle's interior and exterior lights so that Bobby and his unidentified companion could push the vehicle onto the Avery Salvage Yard and avoid detection. Mr. Avery never deposited his DNA on the RAV-4 hood latch. The State never explains why Mr. Avery's DNA is not found in the vehicle but is found on the hood latch or why his blood is not found on the hood latch but is found in the vehicle. Of course, his fingerprints are found nowhere on the exterior or interior of the vehicle.

Bobby, by his possession of the RAV-4, is directly connected to both Ms. Halbach's murder and to framing Mr. Avery. Bobby's possession of Ms. Halbach's vehicle gave him the opportunity to murder her and plant the forensic evidence used to frame Mr. Avery. *See State v. Wilson*, 2015 WI 48, ¶1, 362 Wis. 2d 193, 199, 864 N.W.2d 52, 54.

## APPLICABLE CASE LAW

The court, in *State v. Griffin*, 2019 WI App 49, ¶8, 388 Wis. 2d 581, 589, 933 N.W.2d 681, states the *Denny* standard as follows:

> Our supreme court affirmed that the *Denny* "legitimate tendency" test "is the correct and constitutionally proper test for circuit courts to apply when determining the admissibility of [known] third-party perpetrator evidence." *Wilson*, 362 Wis. 2d 193, ¶52, 864 N.W.2d 52. *Denny* "created a bright line standard requiring that three factors be present" for admissibility of evidence that an alleged third-party perpetrator committed the crime. *Wilson*, 362 Wis. 2d 193, ¶51, 864 N.W.2d 52 (citing *Denny*, 120 Wis. 2d at 623-25, 357 N.W.2d 12). "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." *Wilson*, 362 Wis. 2d 193, ¶3, 864 N.W.2d 52 (citation omitted).

> Under the motive prong, the court must question whether "the alleged third-party perpetrator [had] a plausible reason to commit the crime?" *Id.*, ¶57. 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, 864 N.W.2d 52. The third, and final, prong asks whether there is "evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly?" *Id.*, ¶59. "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, 357 N.W.2d 12 (citation omitted). "[C]ircuit courts must assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime." *Wilson*, 362 Wis. 2d 193, ¶71, 864 N.W.2d 52. Courts must "look for some direct connection between the third party and the *perpetration* of the crime." *Id.*

## ARGUMENT

### I. MR. AVERY HAS PLED SUFFICIENT FACTS TO MEET THE PRONGS OF THE *DENNY* TEST.

The Appellate Court found that Mr. Avery's new evidence could establish a "direct connection" between Bobby and the murder of Ms. Halbach, making him a viable *Denny* suspect. Specifically, the Appellate Court stated:

> 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. 1074:41, note 26)** (App. 70-71).

### A. The State's Motive Argument

The State devotes 36 percent (14 of 38 pages) of its entire argument to motive which is the least important of the three prongs of *Denny* in this case because of Mr. Avery's new evidence of the direct connection of Bobby to the actual commission of the murder and planting of evidence to frame Mr. Avery. Another 15 percent of the State's argument (6 of 38 pages) is devoted to the opportunity prong. A mere 6.5 percent (2.5 pages of 38 pages) is devoted to Mr. Avery's powerful new evidence of Bobby's direct connection to Ms. Halbach's murder and planting forensic evidence to frame Mr. Avery. As stated in the Introduction, the State's allocation of its argument on the three *Denny* prongs to minimize the direct connection and opportunity evidence is a deliberate strategy to distract, mislead and obfuscate the fact that an evidentiary hearing must be held because Mr. Avery has overcome the procedural bars and met the specificity requirements to proceed to a hearing on his new evidence and *Brady* violations.

As part of its obfuscation strategy, the State attempts to impose an impossible burden on Mr. Avery, not required by Wisconsin case law, to prove with substantial certainty that Bobby had the motive to murder Ms. Halbach. Because motive is never an element of any crime, the State never needs to prove motive; relevant evidence of motive is generally admissible *regardless of weight. Wilson*, 2015 WI 48, ¶63, 362 Wis. 2d at 221, 864 N.W.2d at 65; *see also State v. Berby,* 81 Wis.2d 677, 686, 260 N.W.2d 798 (1977). The same applies to evidence of a third party's motive—the defendant is not required to prove motive. Evidence of motive that would be admissible against a third party, were that third party the defendant, is therefore admissible when offered by a defendant in conjunction with evidence of that third party's opportunity and direct connection. *Wilson*, ¶63, 221, 65. Here, Mr. Avery has offered his motive evidence in conjunction with evidence of Bobby's opportunity and direct connection to Ms.

Halbach's murder and the framing of Mr. Avery. Mr. Avery's motive evidence is relevant regardless of the weight assigned to it by this Court.

The State does not dispute that viewing violent pornography could establish motive for a murder; rather, the State claims that the Dassey pornography of young females being tortured, mutilated, and otherwise abused is simply too "mundane," too vanilla, too boring to predispose someone to commit a murder. The State opines as an expert, without having a real expert, on violent pornography that these searches for images of abused and deceased young females, are simply too dull and generic for concern.[3]

The State, in an effort to divert attention from the powerful new evidence of opportunity and a direct connection of Bobby to the murder of Ms. Halbach and planting of evidence, claims that Mr. Avery has failed to prove motive, by failing to identify with substantial certainty, the individual who performed these thousands of pornographic searches on the Dassey computer as if the burden of proof requires Mr. Avery to produce a videotape of Bobby performing these searches. The State is imposing a burden of proof for motive that does not exist in Wisconsin law. The issue is whether the pornographic searches on the Dassey computer are *relevant* to motive *regardless of the weight* of the motive evidence.

The State's strategy fails to consider that a new witness has established opportunity and a direct connection between Bobby and the murder of Ms. Halbach and the framing of Mr. Avery. As the Appellate Court found, if the new direct connection evidence survives scrutiny; the motive evidence found in the Velie CD "might become *relevant* to showing Dassey's motive, and might bear on whether Dassey is, or should have been, a viable *Denny* suspect." **(Doc. 1074:41,**

[3] According to Wis. Stat. § 948.12, each image of child pornography can be punished as a separate count of possession of child pornography and can be punished by up to 25 years per charge.

**note 26)** (emphasis added) (App. 70-71). The State wants this Court to believe that because some of the computer searches could be done by someone else Mr. Avery's *Denny* argument fails. What the State conveniently overlooks is that no one else from the Dassey household has been identified as having possession of Ms. Halbach's vehicle after her disappearance. Mr. Avery's motive evidence must be evaluated in light of his powerful new evidence of direct connection and opportunity for Bobby to be the perpetrator of this crime and the one who framed Mr. Avery. "No bright lines can be drawn as to what constitutes a third party's direct connection to a crime. Rather, circuit courts must assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator actually committed the crime." *Wilson*, ¶71, 224, 67.

Additionally, in its Response, the State ignores well-established Wisconsin case law that the Court *must* assume the facts in the pleading to be true when determining the legal sufficiency of the pleading. At this juncture, the Court *must* assume that Bobby was the primary user of the computer, as his brother Blaine has attested in his affidavit **(Doc. 965:164-66)** (737:164–66) (App. 72-76), and therefore, it is highly likely that Bobby was conducting the searches for pornography. Also, Bobby has been caught in a blatant lie about the location of the computer. He told the police the computer was located in the living room **(Doc. 965:64-65)** (737:64–65) (App. 77-78) when the crime scene footage showed the computer was located in his bedroom. **(Doc. 965:170; 991:1-2)** (737:170; 763:1–2) (App. 79-81). Regardless of the dates and times of the searches, Bobby cannot be ruled out, by the State, as the individual who was conducting any of the searches for pornography and his motive must be evaluated in light of his possession of Ms. Halbach's vehicle which establishes his direct connection and opportunity to commit the actual murder of Ms. Halbach and to plant the forensic evidence used to frame Mr. Avery.

The Appellate Court correctly noted that Mr. Avery cannot definitively prove Bobby's schedule by relying on the affidavits of his computer expert, Gary Hunt. Mr. Avery has added additional evidence, including the affidavit of Blaine Dassey and police interviews regarding the family member's schedules. **(Doc. 581:35, 599:56-57, 228:28-29, 158, 160; 284:47; 965:164-67, Affidavit of Blaine Dassey)** (636:27–37, 39; 689:35; 705:56-57; 630:28-29, 158, 160; 633:47; 737:164-67) (App. 141-55) (*See infra*, at Pgs. 15-16). Importantly, the motive evidence has to be re-evaluated in light of the new evidence of the direct connection and opportunity of Bobby to have actually committed the murder and planted evidence against Mr. Avery. The Appellate Court did not consider this new evidence, ruling as follows: "This is, instead a distinct issue that [sic] that the circuit court should resolve on a standalone basis through a new WIS. STAT. § 974.06 motion." **(Doc. 1056:46)** (Opinion, pg. 46) (App. 294-95).

***Pornography searches were relevant in the investigation of Ms. Halbach's murder***

The State claims in its Response that "Avery's contention that '[l]aw enforcement considered pornography as evidence of motive' is false." (St. Br. 7, note 4). The hypocrisy of the State's argument is vividly illustrated by the fact that on March 10, 2006, the State filed an amended information against Mr. Avery, adding the charge of sexual assault among others. **(Doc. 266:1-2)** (App. 296-97).[4] This amended charge was the result of Brendan Dassey's ("Brendan") confession on March 1, 2006. The only plausible reason that law enforcement spent substantial time after the April 21 of 2006 seizure of the Dassey computer, collecting and analyzing the pornography on the computer, was to corroborate Bendan's confession by establishing a sexual assault motive for Ms. Halbach's murder. The State's electronic data investigator, Detective

[4] Almost a year later, on February 2, 2007, the State filed a second amended information dropping the charge of sexual assault. **(Doc. 495)** (App. 298).

Velie, created word searches relevant to the murder and attempted to connect these specific words to the contents of the Dassey computer.

Significantly, Mr. Avery's trailer and his computer were also searched extensively for pornography, and none was found. Detective Velie was asked to generate a report of Mr. Avery's computer. Based on Detective's Velie's report, no apparent searches of pornographic and/or sexual images were made and no websites with apparent sexual and/or pornographic images were accessed. **(*See* Doc. 614:27-28, Second Supplemental Affidavit of Gary Hunt)** (636:27-28) (App. 82-85).

The clear working theory of the investigators was that the murder of Ms. Halbach was motivated by a sexual assault as described in Brendan's confession. Other motives were ruled out such as robbery or animus against Ms. Halbach who had no known enemies. In Judge Willis' January 25, 2010 Order denying Mr. Avery postconviction relief, Judge Willis explained that, "While neither the State nor the defense was able to offer any direct evidence of motive for Steven Avery or anyone else to have wanted to murder Teresa Halbach, it is not fair to say that either party regarded her murder as a motiveless crime." **(Doc. 660:76)** (370:76) (App. 86-87). Clearly, there was a motive for Ms. Halbach's murder.

Sexual assault is a frequent motive in the murder of young women. There is a clearly established correlation between compulsively and obsessively viewing pornography and sexual assault. Mr. Avery's expert on sexual homicide, Ann Burgess, PhD ("Dr. Burgess"), opines in her affidavit, relying upon thirty years of empirical research, that there is a well-established causal connection between pornography consumption and violent behaviors.[5] **(Doc. 966:2-8, Affidavit**

[5] Dr. Burgess notes in Paragraph 15 of her Affidavit, that, not only did the examination of the Dassey computer reveal significant searches for teenage/child pornography, but also contains conversations between Bobby and 14-and 15-year-old girls, which have explicit sexual content.

**of Ann Burgess, PhD)** (738:2-8) (App. 88-94). In Paragraph 51 of Mr. Avery's Third Motion for Postconviction Relief, Mr. Avery supports his argument with Dr. Burgess' opinion. The State, in its Response, completely ignores and/or overlooks the expert opinion of Dr. Burgess who provided expert deposition testimony in a Wisconsin premise liability sexual assault case, *Grabot v. Prime Outlets* in Kenosha Wisconsin. The State ignores Dr. Burgess' qualifications and publications: Dr. Burgess has been qualified as an expert in the areas of child pornography, crime classification, offender typology, rape victims, rape trauma, and serial offenders. She has published extensively, including co-authoring 24 books, 30 book chapters, and over 164 peer-reviewed articles. She has co-authored the book *Sexual Homicide: Patterns and Motivations, The Crime Classification Manual, Understanding Violence Against Women, Violence Through a Forensic Lens, and Forensic Science Lab Manual* (co-authored with two FBI Agents, John Douglas and Robert Ressler).

Because the State charged Mr. Avery with sexual assault on March 10, 2006, the Dassey computer was seized by law enforcement on April 21, 2006. **(Doc. 281:31-32; Search Warrant)** (632:31-32) (App. 103-04). Law enforcement made great efforts to extract all the pornography from the Dassey computer and even went so far as to have Detective Velie conduct specific word searches *related to the murder* in an effort to connect the pornography to the murder. The "Velie CD"[6] contains the State's "recovered" pornography images relevant and material to the Halbach murder. On the CD, Detective Velie refined 14,099 images on the 7 DVDs and recovered 1,625

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In a conversation, Bobby asks that the girls "flash" him using a webcam. **(Doc. 966:5, Affidavit of Ann Burgess, PhD); (*See also* Doc. 964:18-25, ¶19; Third Supplemental Affidavit of Gary Hunt)** (741:18-25) (App. 95-102).

[6] The CD containing Detective Velie's report and unique word searches was withheld from Mr. Avery's defense counsel.

violent pornography images *that had been deleted.* **(Doc. 964:23, 25, Third Supplemental Affidavit of Gary Hunt)** (741:23, 25) (App. 95-102). The CD contains thousands of images of violent pornography, criteria, word searches, registry, internet history, windows history, and all MSN messages, all of which revealed a propensity for sexual violence.

There were 2,632 word searches performed by Detective Velie of words that he believed were *directly related* to the crime including: blood (1 result); body (2083 results); bondage (3 results); bullet (10 results); cement (23 results); DNA (3 results); fire (51 results); gas (50 results); gun (75 results); handcuff (2 results); journal (106 results); rav (74 results); stab (32 results); throat (2 results); and tires (2 results).

In its Response, the State only refers to Detective Velie's word searches for "news," "body," "journal," and "cement" leaving out the other searches and disingenuously claiming that "the mere fact that someone searched for '[n]ews,' '[b]ody,' '[j]ournal' and '[c]ement' doesn't show anything similar or related to this crime." (St. Br. 9). The State claims that Mr. Avery gives "no explanation of how any of [the search terms] are relevant to an individual's motive for this murder." However, the State chooses these few cherry-picked words and ignores the rest to minimize the importance of the word searches. Taking these terms in the context of Ms. Halbach's murder and its potential motive, all these terms are relevant. Two bullets from a gun pierced her skull **(Doc. 597:168, 176)** (699:168,176) (App. 105-07). There was a fire ignited by gas and tires which burned her body **(Doc. 610:104-05)** (715:104-05) (App. 108-10). She may have been handcuffed. She bled in her vehicle, so she may have been stabbed. **(Doc. 179:91-97)** (604:91-97) (App. 111-13). Her DNA was found on a bullet, and she did keep a journal. **(Doc. 597:168, 176)** (699:168, 176) (App. 114-18).

***Timing of Searches***

In its Response, the State concedes that Bobby is at least connected to three of the most violent searches prior to Ms. Halbach's murder, but the State has inadvertently conceded that Bobby is connected to twenty-five of the searches after Ms. Halbach's murder. More importantly, Bobby cannot be eliminated by the State from *any* of the pornographic searches, especially the ones conducted prior to and very close in time to Ms. Halbach's murder. The individual performing the searches was becoming obsessively deviant in the weeks before Ms. Halbach's murder. **(Doc. 228:117-19, Supplemental Affidavit of Gregg McCrary[7] at ¶¶ 3, 4)**

[7] The State, in its Response, incorrectly argues that McCrary does not have the credentials to opine as a police procedure expert. (*See* St. Br. 14, note 7). However, in *Jiminez v. City of Chicago*, 732 F.3d 710 (7th Cir. 2013), the 7th Circuit recognized McCrary as an expert in police procedure as well as in the cases of *Williams v. Brown*, 208 F. Supp. 3d 713 (E.D. Va. 2016); *Tennessee v. Stevens*, 78 S.W.3d 817 (Tenn. 2002). The State incorrectly asserts that Wisconsin does not allow experts on police procedure. *See State v. Newton*, 2002 WI App. 134, 255 Wis. 2d 832, 646 N.W.2d 854.

As the court noted in *Harris v. City of Chicago*, No. 14 C 4391, 2017 WL 3193585 (N.D. Ill. July 27, 2017), McCrary has the following credentials: McCrary has been professionally involved in violent crime investigations and crime scene analysis for more than 40 years-including 25 years as an FBI Agent. While at the FBI, Agent McCrary investigated violent crimes as a field agent for approximately 17 years, after which he was promoted to Supervisory Special Agent and transferred to the FBI Academy in Quantico, Virginia. As a Supervisory Special Agent, McCrary worked for the National Center for the Analysis of Violent Crime ("NCAVC") in the operational wing of the Behavioral Science Unit. Agent McCrary's primary responsibility as a Supervisory Special Agent was to provide expertise in investigative techniques and crime scene analysis in violent crime investigations both to FBI field agents and any law enforcement agency that requested FBI assistance. His other responsibilities included conducting research into violent and sexually violent crimes and providing training to law enforcement agencies nationally and internationally.

McCrary has investigated over 1,000 homicide cases nationally and internationally, including numerous equivocal death cases. Among the agencies with which McCrary has trained and/or worked on violent crime investigations are the New York City Police Department, the New York State Police, the Texas Rangers, the Boston Police Department, the Florida Department of Law Enforcement, the Georgia Bureau of Investigation, the Massachusetts State Police, and the California Attorney General's Office. McCrary has also worked or provided training for international agencies, including Scotland Yard, the Cuerpo Nacional De Policia in Spain, the

(630:117-19) (App. 119-21). The State fails to consider that the motive for this crime started as a sexual assault that turned into a murder, so all the pornographic images are relevant.

All the evidence appears to point to Bobby conducting the searches in question on weekdays, but it is necessary to have an evidentiary hearing to definitely determine if it was him. Based upon the findings of Mr. Gary Hunt ("Mr. Hunt," Mr. Avery's forensic computer expert), 667 sexual content searches were performed in total. Of those searches, 562 were performed on 10 weekdays between 6:00 a.m. to 3:30 p.m.: 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). **(Doc. 614:38-44; Second Supplemental Affidavit of Gregg McCrary)** (636:38-44) (App. 122-28). Therefore, 64 sexual content searches were performed prior to Ms. Halbach's murder between 6:00 a.m. to 3:45 p.m., when Bobby was supposedly at home alone. Another 500 searches were performed in this same time frame after the murder when Bobby was supposedly home alone.

The State has focused on a subset of 128 searches that Mr. Hunt identified, which comprised very specific image searches focused on pain, torture, humiliation, and death inflicted upon women. Bobby cannot be definitively excluded from the following 128 most violent 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;

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Policia Judiciaire in Portugal, the Hungarian National Police, Budapest Homicide, the French National Police, the Dutch National Police, the Metropolitan Toronto Police, the Royal Canadian Mounted Police, and the Oslo Police Homicide, among others.

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.

**(Doc. 614:39-40, Second Supplemental Affidavit of Gregg McCrary)** (636:39-40) (App. 122-28). The State links Bobby to 28 of these searches during the day and argues that only 3 of those 28 are relevant because they occurred before Ms. Halbach's murder; however, the State totally misses the point that all 677 sexual searches are relevant to a sexual assault motive, which would exist before the crime and be corroborated after the crime by a continuing obsessive pornography consumption.

Mr. Avery has provided sufficient evidence concerning the schedules of the occupants of the Dassey residence to justify an evidentiary hearing on the issue of who was conducting the searches. Mr. Avery has provided additional evidence (from that provided in his appeal) about the schedule of the occupants of the Dassey residents, showing that the pornographic searches primarily occurred on weekdays when Bobby was thought to be in the residence. **(Doc. 614:27-37, 39, Second Supplemental Affidavit of Gary Hunt; 581:35, 599:56-57, 228:28-29; 284:47; 965:164-67, Affidavit of Blaine Dassey)** (636:27–37, 39; 689:35; 705:56-57; 630:28-29; 633:47; 737:164-67) (App. 129-53). To make this determination, an evidentiary hearing must be held. Stated differently, in the absence of an evidentiary hearing, it's impossible to make this determination.

The schedules of the other Dassey household members seem to eliminate them from the searches cited above. 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. 154). 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. 155). Therefore, it appears that Barb, Blaine, and Brendan—the three other individuals living at the Dassey residence are excluded from being present, much less having access to the Dassey computer, at the times many of the pornographic searches occurred. Additionally, Brendan would be eliminated from all but 26 of 128 of the most violent searches related to Ms. Halbach's murder (20.3%) by having been arrested on March 1, 2006. **(*See* Doc. 614:33-37)** (636:33-37) (App. 156-60).

It is undisputed that Mr. Avery never accessed the Dassey computer. He did not have the password for the computer, nor did he possess a key to the Dassey residence, which was locked when no one was home. **(Doc. 614:89-90, Supplemental Affidavit of Steven A. Avery, Sr.)** (636:89–90) (App. 161-66). Mr. Avery only entered the residence with the permission of Dassey family members. Mr. Avery worked during the weekdays from 8:00 a.m. to 5:00 p.m. **(Doc. 614:91)** (636:91) (App. 161-66). Mr. Avery would be eliminated from all but 15 of 128 of the most violent searches related to Ms. Halbach's murder (11.7%) simply by having been arrested on November 9, 2005. **(Doc. 228:85)** (630:85) (App. 167).

***Searches that took place after Ms. Halbach's murder***

The State argues, "Avery fails to explain how motive to fulfill a violent porn-fueled sexual fantasy can be formed or proven by someone not viewing any of this material until months after the murder already occurred." (St. Br. 9). However, conduct of a suspected person, after the crime, is a legitimate subject for consideration as bearing upon the probability of his guilt. Motive can manifest itself after the crime when the perpetrator is reliving and fantasizing about the crime. The continued searches for pornography demonstrate that the motive for this

murder was a sexual assault. It is highly significant that the searches for deceased, mutilated young women began *after* not before the murder and mutilation of Ms. Halbach. The searches after the murder coincide with the fact that a young woman was murdered and mutilated. The searches before the murder coincide with thousands of images of young women engaging in sexual activity, many unwillingly, and corroborate a sexual assault motive. *See State v. Silva*, 2003 WI App 191, 266 Wis. 2d 906, 670 N.W.2d 385.

***The Dassey Computer Deletions: A Consciousness of Guilt Inference***

The State completely ignores the evidence presented by Mr. Avery of the Dassey computer deletions, which infers consciousness of guilt.

Significantly, many of the Dassey computer searches had been deleted, and only some of those were recovered, which leads to the question of who in the Dassey household deleted the searches, and why were these searches deleted before Mr. Avery's trial? To make a complete and thorough record of who made the searches, why those searches were made, and who deleted specific searches, there must be an evidentiary hearing that consists of the testimony from the occupants of the Dassey household who can answer these questions for the Court. It is not possible for this Court to determine, without an evidentiary hearing, who conducted the searches of the pornography and who attempted to delete the pornography after the murder of Ms. Halbach and before the trial of Mr. Avery.

It is highly significant in any investigation if there is an attempt to delete or destroy records. *See i.e., State v. Renier*, 2019 WI App 54, 388 Wis. 2d 621, 935 N.W.2d 551 (In this sexual assault case, the appellate court found, "[the defendant's] consciousness of guilt was also evidenced, as he told the victim to delete the text messages the two had exchanged."); *see also State v. Mercer*, 2010 WI App 47, ¶33, 324 Wis. 2d 506, 529, 782 N.W.2d 125, 137 (where the

appellate court found the fact that "the jury heard evidence from which it could infer that Mercer deleted the files where the forensic examiners would have found the child pornography stored in his hard drive" was significant evidence of the defendant's guilt.)

Mr. Hunt has identified 8 times when there were deletions on the Dassey computer. Those deletions are very important because they correlate with Ms. Halbach's visits to the property. Ms. Halbach visited the property on **August 22, 2005**, and there are deletions on the Dassey computer from **August 23 through August 26, 2005.** Ms. Halbach visited the property on **August 29, 2005**, and there are deletions from **August 28, 2005 through September 11, 2005**. Ms. Halbach visited the property on **September 19, 2005**, and there are deletions from **September 14, 2005 through September 15, 2005.** There are also deletions from **September 24, 2005 through October 24, 2005.**

Most significantly, around the time of her murder on October 31, 2005, there were deletions from **October 26, 2005 to November 2, 2005**. During the investigation of Ms. Halbach's murder, beginning **November 3, 2005**, there were further deletions made on the Dassey computer. **(Doc. 614:40, Affidavit of Gregg McCrary at ¶7)** (636:40) (App. 168-74). These deletions at the above-described relevant times cannot simply be dismissed as mere coincidences, and an evidentiary hearing needs to be held to determine who made these deletions and why.

Dr. Burgess wrote in her affidavit, "It is not unusual for an organized offender [to] try to cover up his fantasies by deleting files from a computer." She agreed with Mr. McCrary that it is "highly significant in any investigation if there is an attempt to delete or destroy records." **(Doc. 966:2-8, Affidavit of Ann Burgess, PhD)** (738:2-8) (App. 175-81). Dr. Burgess concluded the following:

> 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.

(*Id.*, ¶19) (emphasis added).

***Dressler* Case**

The State attempts to distinguish *Dressler v. McCaughtry,* 238 F.3d 908 (7th Cir. 2001), a case that Mr. Avery cited for support, arguing first that, in *Dressler,* there was no dispute that the materials belonged to Dressler. (St. Br. 10-11). However, the State ignores that the new evidence presented by Mr. Avery establishes that Bobby has a direct connection to the murder of Ms. Halbach by virtue of having possession of her vehicle which also allowed him to plant evidence to frame Mr. Avery. In *Dressler*, the only possible direct connection between the defendant and the crime were some generic yellow trash bags, found by the police, in the defendant's residence, that were similar to the yellow bags used to dispose of the victim's dismembered body miles from the defendant's residence.

In *Dressler*, the State relied heavily on establishing motive because the evidence of direct connection and opportunity were weaker than motive. Mr. Avery is relying heavily on direct connection and opportunity and to a lesser extent on motive which is the lesser of the three standards when the other two are so strong. In *Dressler*, motive evidence was established by the defendant's pornography collection. Opportunity was established by the simple fact the victim visited the defendant's neighborhood. Here, Bobby's possession of the victim's vehicle is much more powerful evidence of a direct connection to the murder and to the opportunity to plant all the forensic evidence to frame Mr. Avery. The burden of establishing motive based on the Dassey

computer evidence is greatly lessened by establishing Bobby's direct connection to the crime and opportunity to have committed the murder and planted the evidence to frame Mr. Avery.

The State argues that Bobby's searches did not reveal things closely mirroring the crime, contending "Avery fails to point to a single image or search for someone who was shot and the body burned nor anything that would suggest that these widely varying types of pornography had any similarity whatsoever to Ms. Halbach's murder, and has included such irrelevant and off-point searches as "MySpace," "tires," "race car accidents," "ford focus accident," "diseased girls" and "big woman naked." (St. Br. 11-12). The State is wrong; Mr. Avery did, in fact, provide this Court with specific searches about "someone who was shot" and searches for a "gun to head." There were 8 searches prior to Ms. Halbach's murder, on 9/17/05, for "skeleton" and "alive skeleton." (App. 136). These searches exactly mirror Ms. Halbach's fate. (**Doc. 964:33-35, Affidavit of Gary Hunt)** (630:94-96) (App. 182-87).

In any regard, the State misconstrues the holding in *Dressler* by arguing that the pornographic images must be a mirror image of the crime, or they have no relevance. The court in *Dressler* held that "the pictures depicting violence were offered to prove Dressler's fascination with death and mutilation, and this *trait* [of Dressler] is undeniably probative of a motive, intent, or plan to commit a vicious murder." *Id.* at 914. Likewise, here, most of the Dassey computer pornography consists of images depicting violence (even race car accidents) that show a fascination with death and mutilation and this *trait* of the Dassey pornographic consumer is "undeniably probative of a motive, intent, or plan to commit a vicious murder." (*See* Violent Pornographic Images from Dassey Computer, on disc attached hereto as **"Exhibit A"**).

Moreover, each piece of a defendant's proffered evidence need not individually satisfy all three prongs of the *Denny* test. Some evidence provides the foundation for other evidence. Facts

give meaning to other facts, and certain pieces of evidence become significant only in the aggregate, upon the proffer of other evidence. *Wilson*, ¶1, 54. Additionally, strong evidence implicating the third party on one prong may lessen the need for evidence on the other two prongs. *State v. Hopgood*, 2016 WI App 57, 370 Wis. 2d 786, 882 N.W.2d 870. The strong new evidence of Bobby's direct connection and opportunity to murder Ms. Halbach, by virtue of having possession of her vehicle after her disappearance, lessens the importance of the motive evidence. Nevertheless, the Velie CD of pornographic images and searches on the Dassey computer, when viewed in light of Bobby's possession of Ms. Halbach's vehicle, takes on a whole new meaning and has much more relevancy in terms of establishing the motive prong of the *Denny* criteria than it would standing alone.

**B. The State's Opportunity Argument**

According to the trial court, Mr. Avery's trial defense counsel already established that Bobby had the opportunity to commit the murder of Ms. Halbach by his mere presence at the Avery Salvage Yard on October 31, 2005. **(Doc. 660:1, 95-96)** (453:1, 95-96) (App. 188-90). Now the State wants to place an additional burden on Mr. Avery, relying on Kansas and not Wisconsin case law. (*State v. Krider,* 202 P.3d 722,729 (Kan. Ct. App. 2009)). The State admits that under Wisconsin law, "opportunity can be established by simply showing the third party was at the crime scene." *Wilson,* 362 Wis.2d 193, ¶65. However, the State contends that in order to meet the opportunity prong, Mr. Avery has to offer evidence that the alleged third party perpetrator had "the skills, contacts, tools, time and/or other means necessary to have committed the crime and staged the scene in the manner the defendant alleges . . . ." quoting the *Krider* opinion. (St. Br. 15). There is no such requirement in Wisconsin law which states in much more general terms that it is sufficient to demonstrate "evidence that the third party had the realistic

ability to engineer such a scenario." *Wilson,* ¶¶10, 85. The State concludes that Mr. Avery's submissions do not meet the Kansas standard. Since Mr. Avery's case is pending in Wisconsin, he is focused on his submissions meeting the Wisconsin standard, which he has clearly accomplished.

The State is baffled as to "*why* Bobby would want to frame Avery . . . ." (St. Br. 16-17). The answer is simple: if Mr. Avery was not prosecuted for Ms. Halbach's murder then Bobby was the next most likely candidate to be prosecuted for her murder. he was present and observing Ms. Halbach during her visit to the Avery property on October 31, 2005.

Bobby lied about being asleep from 6:30 a.m. to 2:30 p.m. **(Doc. 284:38-39; 581:35; 591:41)** (633:38–39; 689:35; 697:41) (App. 191-96). 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, Affidavit of Gary Hunt)** (632:37-38) (App. 197-98). Bobby was the only one home during these searches according to his trial testimony. **(Doc. 591:41)** (697:41) (App. 196). Bobby was present and awake when Ms. Halbach called and left a voicemail requesting the exact address for the appointment. He was present when Ms. Halbach arrived. He lied about Ms. Halbach walking towards Mr. Avery's trailer **(Doc. 581:38)** (689:38) (App. 199-200) because he saw her leave the property at the same time he left the property. He lied about going hunting and passing Scott Tadych at 3 p.m. going east in his Blazer when he was seen at 3:30 pm driving an unknown vehicle west, by his brother Blaine and a propane driver on the Avery property, which resembled Ms. Halbach's vehicle. **(Doc. 606:128-29, 137; Doc. 965:164-67, Affidavit of Blaine Dassey)** (712:128-29, 137; 737:164-67) (App. 201-09). Ms. Halbach's RAV-4 was seen by witnesses parked at the turnaround about a 1.8 miles west from the Avery Salvage Yard in the direction Blaine saw Bobby driving. Bobby had

*human* fingernail scratches on his back that he claimed were from his puppy. (**Doc. 965:152-62, Affidavit of Dr. Larry Blum)** (737:152–62) (App. 210-20). Bobby gave false testimony about Mr. Avery's alleged remark about disposing of a body. This remark was completely discredited and contradicted by Michael Osmansun. **(Doc. 591:30; 228:75-83)** (697:30; *see also* 630:75-83, Combined reports re-interviews of Bobby where Bobby never told this to law enforcement) (App. 221-31). Ms. Halbach's fuel stained, cut large bones were found in the Dassey burn barrel, including a scapula, portions of a spinal column, metacarpals and fragments of long bones. **(Doc. 600:231-33)** (706: 231-33) (App. 321-323).

The State argues that "Avery's defense theory has changed dramatically since the trial." (St. Br. 16). However, the State fails to acknowledge that because the trial court barred introduction of third party *Denny* suspect evidence in Mr. Avery's trial (obviously prior to the discovery of the violent searches and the Sowinski evidence), Mr. Avery's trial defense counsel did not have the ability to suggest that persons other than law enforcement officers had access to bloody bandages, bloody towels, and blood drips that came from Mr. Avery's pre-existing finger injury.

In its Response, the State claims that "Avery offers no reason why Bobby would want to send Avery to prison" and gives its own wild hypothesis about the impossibility of Bobby actions to hide the crime (St. Br. 17). The State claims, "Nor has Avery explained why someone who wanted to frame him would go to such lengths to hide the evidence. Surely if Bobby or anyone else wanted to frame Avery, they wouldn't have gone out of their way to make all the evidence difficult for law enforcement to detect, gather, and connect to Avery." (St. Br. 17). The State claims that by hiding the RAV-4 on the Avery property it led the authorities right to Dassey's door. The State's assertion is demonstrably false. Putting the RAV-4 on the Avery

property with Mr. Avery's blood in it led the police directly to Mr. Avery's door. The RAV-4 was not carefully hidden because the civilian searcher found it in less than 35 minutes among hundreds of salvage cars. **(Doc. 590:230)** (694:230) **(App 308-11)**. It makes perfect sense, contrary to the State's argument, to burn the victim's remains and personal property and plant them in Mr. Avery's burn pit to frame him. Mr. Avery was the only one who had a huge civil rights case pending against the Manitowoc County police, so he became law enforcement's target of choice. The police needed Bobby to testify against Mr. Avery to say Ms. Halbach went to Mr. Avery's trailer, and Bobby needed to testify to exculpate himself and inculpate Mr. Avery. Bobby seized every opportunity to frame Mr. Avery, including becoming the State's star witness.

The State is incorrect that the evidence was difficult for law enforcement to detect, gather, and connect to Mr. Avery. The evidence was blatantly easy for law enforcement to detect immediately *after* it was planted, such as when Ms. Halbach's RAV-4 was suddenly found, coincidentally at the Avery Salvage Yard after witnesses observed the vehicle in a different location earlier in the week, or Mr. Avery's blood was found selectively dripped in the RAV-4 and placed on the dash with an applicator. None of Mr. Avery's fingerprints were found on the RAV-4. Even though Mr. Avery could have crushed the vehicle in minutes, he allegedly left it in plain sight for several days with the incriminating evidence intact. Only Bobby stayed behind when others living on the property went to the family residence in Crivitz the weekend after Ms. Halbach's disappearance; thus, Bobby had an easy opportunity to plant evidence against Mr. Avery. Ms. Halbach's key magically appeared in Mr. Avery's trailer after multiple searches had been made of his trailer without the key being detected.

The State's Response is completely devoid of any mention of its theory during Mr. Avery's trial. The State's theory of what happened the day of Ms. Halbach's murder left many

questions unanswered. The State claimed that Mr. Avery, inexplicably, placed Ms. Halbach's body in the rear cargo area of her RAV-4 in his garage then removed her from the RAV-4, laid her on the garage floor, and shot her in the left side and back of her head. **(Doc. 615:98-99)** (716:98-99) (App. 232-34). The State's nonsensical theory was contrived to explain the presence of Ms. Halbach's blood on the rear cargo door and in the rear cargo area of her vehicle.

The State did not have an explanation for how Ms. Halbach's bones were found in multiple locations which undoubtedly explained why Mr. Avery was acquitted of the mutilation charge. The more likely chain of events was that Ms. Halbach had finished photographing Barb Janda's van, and as she was leaving the Avery Salvage Yard, Bobby followed her, flagged her down, and then attacked her. He placed her body in the back of the RAV-4, drove back to the Avery Salvage Yard, drove into his garage, shot her in the head, dismembered her body, placed her body in one of the Dassey burn barrels and transported it to the quarry where he burned it, inadvertently spilling bones on the ground; and then he brought the bones back to the Avery Salvage Yard and tipped them into Mr. Avery's burn pit. The theory that Bobby returned to the Avery Salvage Yard with Ms. Halbach in the cargo area of her vehicle is corroborated by the fact that the propane driver saw a vehicle similar to Ms. Halbach's drive past him exiting the Avery Salvage Yard and Blaine saw Bobby driving a greenish/bluish-colored vehicle on STH 147 (in the opposite direction Bobby testified he was driving), both witnesses making these observations at around 3:30 p.m on October 31, 2005. The RAV-4 was dumped about 1.8 miles west of the Avery property where Kevin Rahmlow ("Rahmlow") spotted it on November 3rd.

The State argues that, "Avery has offered no facts at all that would establish how Bobby Dassey-an 18-year-old high-school graduate with no criminal record whatsoever and who was working third shift at a furniture factory" could have executed the State's list of events that it

argues had occurred in the murder of Ms. Halbach (St. Br. 18-19).[8] The State has offered no facts to establish how Mr. Avery a high school dropout, whose experience consisted of serving 18 years in prison for a crime he did not commit, suddenly decided to murder Ms. Halbach and forego the millions of dollars he stood to obtain from the State and his civil rights lawsuit.

Even if a court is disinclined to believe evidence offered by a movant, the court must hold a hearing before making credibility determinations. *State v. Allen*, 2004 WI 106, ¶12 (citing *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis.2d 195, 633 N.W.2d 207) (stating that if the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing). Only after an evidentiary hearing is the court charged with determining the issues and making findings of fact and conclusions of law. Wis. Stat. § 974.06(3)(d).

The State claims that Mr. Avery has the burden of demonstrating the following points (St. Br. 18-20), which is contrary to Wisconsin case law, but regardless, Mr. Avery responds to each of the State's allegations concerning its claim that "Avery had offered no facts at all that would establish *how* Bobby Dassey—an 18-year-old high-school graduate with no criminal record whatsoever and who was working third shift at a furniture factors" as follows:

**State's Response:** "(1) managed to steal, at some unidentified time prior to October 31, the rifle hanging above Avery's bed with which the victim was shot, and at some other unidentified time before November 5 managed to replace it, with Avery's never noticing;"

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[8] Contrary to the State's implication that Bobby being 18 years old makes him less likely to have committed the crime against Ms. Halbach, the Department of Justice has data stating that from 1980 to 2008, "Approximately a third (34%) of murder victims and almost half of the offenders were under age 25. For both victims and offenders, the rate per 100,000 peaked in the 18 to 24 year-old age group at 17.1 victims per 100,000 and 29.3 offenders per 100,000."
*See Homicide Trends in the United States* 1980-2008, DOJ, https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf (last visited January 12, 2023).

**Mr. Avery's Reply:** The bullets from Mr. Avery's garage and the surrounding property were the result of target shooting around Mr. Avery's garage over a long period of time. All these bullets would have matched Mr. Avery's rifle. The bullet with Ms. Halbach's DNA on it was planted by the killer. The bullet had a substance similar to red paint (like the red paint on Avery's garage) and never went through the skull or any other part of Ms. Halbach's skeleton. **(Doc. 600:180)** (706:180) (App. 317-320). The killer had access to Ms. Halbach's DNA and could have easily planted it on a bullet in Avery's garage. **(Doc. 228:5-7 Supplemental Affidavit of Christopher Palenik, PhD)** (630:5-7) (App. 235-37).

**State's Response:** "(2) could have abducted and killed the victim and hidden both her body and her car in some unknown area in the minutes between her arrival on the property and Scott Tadych passing Bobby Dassey on the highway around 3:00 p.m. on October 31, 2005 (nor has Avery provided any facts to establish where the killing could have happened apart from a nondescript "in the [RAV-4]," or where Bobby could have hidden the RAV4 and the victim's remains in this short period of time);"

**Mr. Avery's Reply:** Mr. Avery would challenge the credibility of Mr. Tadych and his timeline at an evidentiary hearing. Mr. Tadych's testimony directly contradicts the testimony of Blaine who saw Bobby traveling the opposite direction (west on STH 147) at 3:40 p.m. **(Doc. 965:164-67, Affidavit of Blaine Dassey)** (737:164-67) (App. 238-42). Mr. Tadych would be impeached on a number of other issues at an evidentiary hearing, including but not limited to his entire timeline for his whereabouts on October 31, 2005 and his efforts to sell Bobby's .22 cal. rifle after the murder.

**State's Response:** "(3) had the scientific sophistication and knowledge necessary for it to occur to Bobby to collect, transport, and plant Avery's blood from his sink and-as Avery has

completely overlooked-his non-blood touch DNA on the hood latch of victim's RAV-4 and her keys, or how Bobby acquired the skills to do this successfully;"

**Mr. Avery's Reply:** Bobby could easily have removed blood from Mr. Avery's sink by using a wet sponge or rag and dripping it into the RAV-4 which was in his possession. He could have applied the blood smear on the dash with any type of Q-tip-like object from the Avery Salvage Yard. **(Doc. 179:126-37, Affidavit of Stuart H. James)** (604:126-37) (App. 243-53).

The touch DNA on the hood latch was planted by the police by substituting the groin swab illegally taken from Mr. Avery for the hood latch swab taken by Inv. Hawkins. **(Doc. 179:28; 178:87-88; 180:46, 58, 61-62, 64, 66; 179:64)** (604:28 ¶31; 603:87-88; 615:46, 58, 61-62, 64, 66; 604:64) (App. 254-65). Even if that theory were discounted, Bobby had access to Mr. Avery's DNA by having access to his trailer, so he could have used Mr. Avery's toothbrush to plant his DNA on the hood latch. Bobby had to touch the hood latch to disconnect the battery and he undoubtedly wore gloves, so perhaps the idea of planting Mr. Avery's DNA came to him as a result of that activity. Perhaps his 3 searches for DNA on the Dassey computer gave him the idea. (*See supra*, at Pg. 12).

**State's Response:** "(4) had a convenient stash of unidentified instruments capable of collecting and transporting liquid blood on hand or what those might have been;"

**Mr. Avery's Reply:** The only "instrument" necessary to transport the blood would be a sponge or rag.

**State's Response:** "(5) planted the keys to the RAV-4 in Avery's trailer unnoticed and at some unspecified time between November 3 and November 5, yet also either managed to move the RAV-4 off of the 40-acre property without the keys or drive it away and return on foot from

wherever he supposedly took it and then sneak into Avery's trailer again to hide the keys, at some other unidentified time, once again unnoticed;"

**Mr. Avery's Reply:** Bobby had the vehicle key when he drove the RAV-4 to its location at the State Highway 147 turnaround on Monday, October 31 and on Friday, November 4, when he moved it back onto the Avery Salvage Yard. He planted the key in Mr. Avery's bedroom after removing Ms. Halbach's DNA from it and putting Mr. Avery's DNA on it. Many items in Mr. Avery's trailer could have been the source of his DNA including Mr. Avery's toothbrush. The key was not discovered until November 8. Bobby was alone on the property after the family left on November 4 and early on November 5 until the police blocked off access to the property when Ms. Halbach's vehicle was discovered around noon. All the family members residing on the Avery property had left and traveled to Crivitz to the family residence.

**State's Response:** "(6) found, and then planted, a tiny, mangled bullet fragment that Bobby inexplicably knew had the victim's DNA on it underneath items in Avery's garage, or alternatively how he shot the victim in Avery's garage on October 31 and then at another unidentified time scrubbed the scene with Avery remaining unaware-this despite Avery indisputably having been working on his Suzuki and other vehicles in and around the garage around this time;"

**Mr. Avery's Reply:** Bobby had access to Ms. Halbach's blood if he killed her and could simply put the blood on one of the dozens of bullets in and around Mr. Avery's garage. There is no proof that Ms. Halbach was shot in Mr. Avery's garage. There is no other DNA of Ms. Halbach in Mr. Avery's garage. There is no blood spatter in Mr. Avery's garage or on Mr. Avery's rifle. There is no evidence that the crime occurred in Mr. Avery's garage.

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

**Mr. Avery's Reply:** Mr. Avery was acquitted of burning Ms. Halbach's body. Ms. Halbach's body was not burned in Mr. Avery's burn pit but was burned in the Dassey burn barrel which contained Ms. Halbach's bone fragments, which had cut marks and smelled of a flammable liquid. **(Doc. 984:29; 601:6-7)** (756:29; 707:6-7) (App. 312-316). Only 40% of Ms. Halbach's bones were ever discovered, and her bone fragments were found in the quarry, suggesting that she was burned in the Dassey burn barrel in the quarry and transported back to the Avery Salvage Yard where the bones were dumped in Mr. Avery's burn pit. (**Doc. 180:83-97, Affidavit of John D. DeHann)** (615:83-97) (App. 266-80).

**State's Response:** "(8) convinced his younger brother Brendan to go along with this plan and fabricate a confession implicating himself and Avery, or why Brendan would do so."

**Mr. Avery's Reply:** It was not Bobby who coached Brendan. It was the police. As Brendan's interrogation video indicates, the police fed him the entire story to frame Mr. Avery.

After the State improperly alleges that Mr. Avery must address all its speculative theories, it also claims that Bobby would have needed to taken action in roughly half an hour because Mr. Avery's blood would have coagulated. (St. Br. 20). The State, without any expert to support this assertion, claims that Mr. Avery's blood would have coagulated in half an hour. Even so, it is Mr. Avery's theory that the RAV-4 was parked 1.8 miles from the Avery Salvage Yard at the Turnaround by the bridge at STH 147. Driving at 30 miles an hour, it would have taken Bobby 3

minutes and 36 seconds to reach the RAV-4, which would leave 26 minutes and 24 seconds to plant Mr. Avery's blood. Additionally, Bobby could have used a water-infused sponge to collect the blood from Mr. Avery's sink which would have slowed the coagulation process without affecting the DNA profile of Mr. Avery. The internet search for blood on the Dassey computer could have revealed that the addition of water to blood slows or stops the coagulation process. (*See Supra*, at Pg. 12).

If the defense theory is that a third party framed the defendant, then the defense might show opportunity by demonstrating the third party's access to the items supposedly used in the frame-up. *State v. Wilson*, 2015 WI 48, ¶1, 362 Wis. 2d 193, 199, 864 N.W.2d 52, 54. As stated previously, Bobby had access to all the forensic evidence (*see* Introduction) and therefore had the opportunity to frame Mr. Avery.

Moreover, the defendant need not establish the guilt of the third party to the level that would be necessary to sustain a conviction to introduce third party perpetrator evidence. To support the introduction of such evidence, there must be a legitimate tendency that the third person *could* have committed the crime. *Wilson*, at ¶1.

This Court cannot determine the new evidence regarding Bobby being in possession of Ms. Halbach's car and moving it onto the Avery Salvage Yard in the middle of the night without holding an evidentiary hearing to determine the credibility of the new eyewitness, Sowinski. No matter what diversions the State attempts to concoct or specious arguments it raises, this issue cannot be resolved without an evidentiary hearing which necessitates credibility findings by this Court.

### C. The State's Direct Connection Argument

This Court "must determine first whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *State v. Ruffin*, 2022 WI 34, ¶35, 401 Wis. 2d 619, 635, 974 N.W.2d 432, 439, citing *State v. Allen*, 274 Wis. 2d 568, ¶9. The State, rather than accepting Mr. Avery's material facts as true, is attempting to dispute those facts with speculative theories unsupported by the record. By disputing rather than accepting Mr. Avery's facts as true the State is conceding that Mr. Avery is entitled to an evidentiary hearing to resolve those disputes. As an example, the State concedes the necessity of an evidentiary hearing in its Footnote 8, by attempting to claim that Sowinski's admissions have "changed drastically." (St. Br. 22). The State is attempting to perform its own credibility analysis of Sowinski, which is totally improper at the pleading stage, where the allegations must be taken as true.

In briefly addressing the issue of Bobby's direct connection, the State argues, "Sowinski's averments that he purportedly saw Bobby pushing a RAV-4 on November 5-several days after Ms. Halbach's murder-do not provide a direct connection between Bobby Dassey and *perpetration of the murder.*" (St. Br. 22). However, the corroborated evidence that Sowinski provided does precisely establish the direct connection between Bobby and Ms. Halbach's murder required by *Denny*.

The State contends that, "at the most generous, the exhibits Avery has submitted could establish that Bobby was involved in the moving of the RAV-4 to the location where it was eventually found." (St. Br. 22). The State speculates that the reason for Bobby moving the RAV-4 was to cover up the crime committed by Mr. Avery. (St. Br. 23). The State's theory is totally nonsensical because Bobby was the primary witness who testified against Mr. Avery. He was not trying to help Mr. Avery; he was trying to frame him. The discovery of the RAV-4 on the Avery

Salvage Yard led to all the forensic evidence used to convict Mr. Avery. If Bobby was an accomplice, he was the worst accomplice ever in a murder case. He made a much better star witness for the prosecution, helping to convict Mr. Avery while saving himself.

In *State v. Williams*, 2009 WI App 95, 320 Wis. 2d 484, 769 N.W.2d 878, the appellate court found a direct connection between the perpetrator of the murder and the fact that he had possession of the victim's vehicle several days after her murder, specifically, the court explained:

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

*State v. Williams*, 2009 WI App 95, 320 Wis. 2d 484, 769 N.W.2d 878. Applying this rationale, the Sowinski evidence provides the direct connection (that is, Bobby being witnessed in possession of Ms. Halbach's vehicle) to Bobby probably having committed the murder of Ms. Halbach and planting the evidence to frame Mr. Avery.

The State claims, "It provides no link at all between Bobby and the perpetration of the actual killing. It also does nothing to establish that Avery was not the killer-even if believed, all Sowinski's evidence would show is that perhaps Bobby was involved in trying to cover up Avery's crime," citing *State v. Bembenek,* 140 Wis. 2d 248, 257, 409 N.W.2d 432 (Ct. App. 1987). (St. Br. 23). In *Bembenek*, the defendant argued that affidavits attempting to implicate her ex-husband as the killer were newly discovered evidence. However, the appellate court found that the affidavits were not newly discovered evidence but were merely cumulative of evidence introduced in trial (*i.e.*, there was already evidence introduced at trial that the victim was afraid of the third party). None of the affidavits established that a third party was directly connected to

the crime. *Bembenek* is completely inapposite to the Sowinski evidence in Mr. Avery's case. The new evidence presented by Mr. Avery is not cumulative of evidence presented at Mr. Avery's trial. None of the evidence provided by Sowinski directly connecting Bobby to the actual murder of Ms. Halbach and the opportunity to plant the forensic evidence to frame Mr. Avery was known during any prior proceedings in the case. Sowinski's evidence is "newly discovered" (*i.e.*, unavailable, and not discoverable through reasonable diligence at the time of Mr. Avery's June 2017 motion). Sowinski's existence and information was not known or discoverable by current counsel until Sowinski contacted counsel on April 11, 2021. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129 ¶¶ 44, 44-48, 275 Wis. 2d 397, 685 N.W.2d 853.

Additionally, the State overlooks the fact that the possession of evidence used to frame the defendant also qualifies as making someone a third party *Denny* suspect. *State v. Wilson*, 2015 WI 48, ¶1, 362 Wis. 2d 193, 199, 864 N.W.2d 52, 54.

The State is attempting to impose a burden previously rejected by the Wisconsin Supreme Court in the *Denny* decision. The State is requiring that evidence connecting a third party to the crime be "substantial." Wisconsin rejected that standard in *State v. Wilson*, 2015 WI 48, 362 Wis. 2d 193, 217, 864 N.W.2d 52, 63, holding that standard to be unfair to defendants. *Id.* at 623.

***State Waived the Escalona-Naranjo Procedural Bar***

The Appellate Court specifically directed Mr. Avery to file this motion pertaining to the new evidence from Sowinski and specifically stated that that evidence needed to survive any *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) challenge, but perplexingly the State has waived the *Escalona* challenge by not raising it. Therefore, the State has conceded that *Escalona* is not a bar to Mr. Avery's new motion. Mr. Avery has provided a "sufficient

reason" for overcoming the *Escalona* bar in his third motion for postconviction relief. **(*See* Doc. 1102:42-44)** (App. 281-84).

## II. MR. AVERY IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS NEWLY DISCOVERED EVIDENCE CLAIM.

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

When moving for a new trial based on an allegation of newly discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant is able to prove all 4 of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *State v. Love*, 2005 WI 116, ¶ 44, 284 Wis.2d 111, 700 N.W.2d 62.

### B. Avery has plead facts that would sufficiently establish the three prongs of *Denny*, and Mr. Avery's allegations that Bobby was the perpetrator would be admissible in trial.

As stated above, Mr. Avery has sufficiently established opportunity, motive, and a direct connection of Bobby to the crime.

### C. There is a reasonable probability of a different result at a new trial.

The State argues that even if Mr. Avery has presented newly discovered evidence, at least satisfying the first four prongs of the newly discovered evidence test, he cannot show that this evidence would cause a jury to have reasonable doubt of his guilt (St. Br. 26).

First, the State contends that because Mr. Avery did not plead sufficient facts to establish *Denny*, his allegations would be inadmissible at trial, and thus, he is not entitled to an evidentiary

hearing on his newly discovered evidence. (St. Br. 26). However, as already argued above, Mr. Avery has pled sufficient facts to establish *Denny*. Therefore, the State's argument fails.

Second, it argues that even if the Sowinski evidence were admitted and Mr. Avery's theory of defense were presented, there is no reasonable probability of a different result at a new trial. (St. Br. 27). The State claims,

> As explained above, there are far too many irreconcilable inconsistencies between Avery's allegations about Bobby Dassey and the actual evidence produced at trial. Particularly damning would be Avery's complete failure to account for his DNA on the hood latch of the RAV-4 and Ms. Halbach's remains-again, including a fragment from "virtually every" bone in the human body-being found in his burn pit, and nothing to explain how Bobby could possibly be responsible for the bullet with Ms. Halbach's DNA on it being found in his garage and matched to the gun above his bed.

(St. Br. 27). Mr. Avery has addressed his DNA on the hood latch (*supra*, at Pgs. 2-4). In regard to Ms. Halbach's bone fragments in his burn pit, the State needs to be reminded that Mr. Avery was *acquitted* of burning Ms. Halbach's bones in his burn pit. Additionally, as noted above, Mr. Avery's current forensic fire expert, John DeHaan has completely refuted the State's theory that a human body was ever burned in Mr. Avery's burn pit. (*See* Affidavit of John D. DeHaan's *supra*, at Pg. 30). Mr. Avery has explained how Bobby could easily be responsible for the bullet with Ms. Halbach's DNA being planted in Mr. Avery's garage that matched his gun (*supra*, at Pg. 27). Ms. Halbach's DNA in the RAV-4 and the spent bullets from Mr. Avery's rifle in his garage and property were easily accessible to Bobby.

The State claims that the "enormous amount of forensic evidence pointing directly to Avery as the killer were all far more material than Bobby . . . ." (St. Br. 30). The State misses the mark entirely. If Bobby transforms into a viable third party *Denny* suspect, because the Sowinski evidence is found to be credible after an evidentiary hearing, all of the forensic evidence used to convict Mr. Avery is now placed in Bobby's hands. He is no longer facing a jury as a

disinterested unimpeached witness. The State has not presented a shred of evidence that Bobby did not commit this crime (such as an alibi) particularly in light of his possession of Ms. Halbach's blood-spattered vehicle directly connecting him to her actual murder; his opportunity to plant all of the forensic evidence; and the motive established by the pornographic searches on the Dassey computer located in his bedroom.

In *State v. Wilson*, 2015 WI 48, ¶61, 362 Wis. 2d 193, 220, 864 N.W.2d 52, 65, the court held that "it is unconstitutional to refuse to allow a defendant to present a defense simply because the evidence against him is overwhelming." Mr. Avery would be able to present his theory that all of the evidence against him was planted and that Bobby is a viable third party suspect. There is a reasonable probability of a different result at a new trial.

## III. MR. AVERY HAS PLEAD SUFFICIENT FACTS TO ESTABLISH A VIOLATION OF *BRADY V. MARYLAND*

### A. Mr. Avery provided sufficient facts to establish the audio clip's materiality.

In addressing a *Brady* claim, the court is not to view each piece of suppressed evidence in isolation. Instead, the court is required to assess the cumulative impact of all the suppressed evidence to determine its materiality. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Suppressed evidence is material if its cumulative effect creates a reasonable probability of a different result at trial. *E.g.*, *Goudy v. Basinger*, 604 F.3d 394, 400 (7th Cir. 2010) (citing *Kyles*, 514 U.S. at 434). A reasonable probability of a different result exists if the suppressed information undermines confidence in the verdict. *Id.* (citing *Kyles*, 514 U.S. at 434).

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).

The State claims,

> Avery's dogged insistence that Bobby Dassey 'was the State's primary witness against Mr. Avery at his trial" remains false no matter how many times he repeats it. (Doc. 1065:38.) Bobby established only that Ms. Halbach arrived at the Avery Salvage Yard on the day in question and that he saw Ms. Halbach walking toward Avery's trailer shortly before she disappeared.

(St. Br. 30). Bobby was the State's primary witness against Mr. Avery. During his closing argument, Prosecutor Kratz once again emphasized the importance of Bobby's testimony and vouched for his credibility:

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

**(Doc. 610:91)** (715:91) (App. 285-86). Bobby's testimony was the most determinative of Mr. Avery's guilt[9] because the State used it to establish that Ms. Halbach never left the Avery property alive. **(Doc. 589:103-04)** (696:103–04) (App. 287-89). If the jury knew that Bobby was lying about seeing Ms. Halbach leave the Avery property, because he was in possession of her blood-spattered vehicle and moved it back onto the Avery property, then the Defense could have argued that Bobby was directly connected to the actual murder of Ms. Halbach and planted the forensic evidence to frame Mr. Avery. With a viable third party *Denny* suspect who was directly connected to Ms. Halbach's murder and to planting the forensic evidence to convict Mr. Avery confidence in the verdict would be undermined. There is more than sufficient evidence to conclude that Bobby actually committed this crime. There is no reason for him to have told the multiple lies that he has told in this case if he has no culpability. There is no reason for him to

[9] Bobby was 1 of only 2 witnesses whose testimony the jury requested to review during deliberations. **(Doc. 539:1-2)** (384:1–2) (App. 292-93).

have possession of the victim's blood-spattered vehicle or to have planted it on the Avery property. There is no reason for him to have unexplained scratches on his back or the victim's cut, fueled-stained bones in the Dassey burn barrel. Bobby was the only family member to stay on the property after the others had left.

**B. Mr. Avery's Brady claim regarding Kevin Rahmlow has not been litigated.**

The State incorrectly claims that the *Brady* issue regarding Rahmlow seeing the RAV-4 was already litigated. In the Appellate Court's July 2021 Opinion, the Appellate Court noted that in Mr. Avery's motion for reconsideration, he raised an issue pertaining to a witness affidavit attesting in 2005 a witness [ Rahmlow] observed a vehicle matching a missing person poster of Halbach's car and informed law enforcement of that fact and "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. 290-91). The Appellate Court declined ruling on the issue, and therefore, it was never litigated. Specifically, the Court stated 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.*). Mr. Avery could not have discovered the existence of Rahmlow through reasonable diligence because there was no mention of him in any police report or prior defense counsel's file. It would have been impossible for Mr. Avery to discover this evidence. It was only after Mr. Avery filed his 2017 motion that this witness came forward.

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

The State claims, "Even if [Mr. Avery's *Brady* claim regarding Rahmlow] were not previously litigated, it would fail, because the record conclusively demonstrates that what Rahmlow says in his affidavit about telling Sergeant Andrew Colborn on November 4 that he saw the victim's RAV-4 on a highway cannot possibly be true." (St. Br. 35). The State proceeds to dispute Colborn's schedule (St. Br. 36), which is an improper attempt to litigate a witnesses' credibility in the pleadings. Rahmlow's credibility must be the subject of an evidentiary hearing.

Regarding the Sowinski evidence, the State deliberately conflates the snippet of audio that Mr. Avery discovered with the information that Mr. Sowniski provided to police that is the basis of his *Brady* claim. Mr. Avery does not have to present any audio including a snippet of audio to allege his *Brady* violation. In fact, the significance of the audio is that it corroborates the fact that Sowinski provided exculpatory information to the Manitowoc Sheriff's Department that was suppressed by the State. Sowinski could simply testify he reported this occurrence to law enforcement and if this Court finds him credible it is sufficient to establish a *Brady* violation.

The State's claim that the audio clip transcript undermines the veracity of Mr. Avery's claim is nonsensical because the Court can listen to the audio clip without looking at the translation provided by Mr. Avery. The audio clip from the Manitowoc Sheriff's Office speaks for itself.

Further, in regard to Footnote 10 of the State's Response (St. Br. 31), Mr. Avery is not obligated to have an affidavit from Sergeant Senglaub or any investigator at the Manitowoc Sheriff's Office who spoke to Sowinski on the phone. It is sufficient that Sowinski would testify

that he made the call to the Manitowoc Sheriff's Office, and it is up to this Court to determine his credibility. The audio clip simply provides some corroboration of Sowinski's witness affidavit.

## IV. MR. AVERY HAS SATISFIED THE *ALLEN* REQUIREMENTS FOR AN EVIDENTIARY HEARING.

The court in *Allen*, 2004 WI 106, ¶ 24, 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)—that clearly satisfy the *Bentley* standard, and would entitle a defendant to a hearing." As the chart illustrates, Mr. Avery has met all the *Allen* requirements:

| Who | What | Where | When | Why/How |
|---|---|---|---|---|
| **Newly Discovered Evidence (Sowinski Evidence)/Brady Violation** | | | | |
| Thomas Sowinski<br><br>*Witness who observed Bobby Dassey pushing Ms. Halbach's vehicle* | Sowinski was delivering papers on the Avery Salvage Yard in the early morning hours of Saturday, November 5,2005. He observed Bobby Dassey with an unidentified male with pushing Ms. Halbach's vehicle down Avery Road on the right side towards the salvage yard. | The Avery Salvage Yard | The early morning hours of November 5, 2005, the same day Ms. Halbach's vehicle was discovered by law enforcement after civilian searchers discovered the vehicle on the Avery Salvage Yard. | This new evidence disclosed to Mr. Avery directly connects Bobby Dassey to the actual murder of Ms. Halbach as well as having the opportunity to murder Ms. Halbach and plant the forensic evidence used to convict Mr. Avery. This |

| | | | | |
|---|---|---|---|---|
| | Sowinski reported this to the Manitowoc Sheriff's Office. The Manitowoc Sheriff's Office and Prosecutors failed to disclose this information to Mr. Avery's trial attorneys. | | | new evidence combined with the previous motive evidence establishes Bobby as a third party *Denny* suspect. |

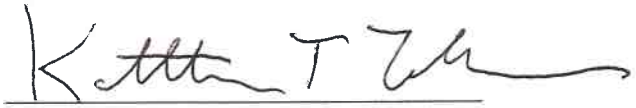
As with any other civil pleading, in assessing the legal sufficiency of the motion, the court must assume the facts alleged therein to be true. *Gritzner v. Michael R.*, 2000 WI 68, ¶ 17, 235 Wis.2d 781, 611 N.W.2d 906. Even if a court is disinclined to believe evidence offered by a movant, the court must hold a hearing before making credibility determinations. *State v. Allen*, 2004 WI 106, ¶12 (citing *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis.2d 195, 633 N.W.2d 207). Only after an evidentiary hearing is the court charged with determining the issues and making findings of fact and conclusions of law. Wis. Stat. § 974.06(3)(d).

## CONCLUSION

Mr. Avery respectfully requests that this Court grant him one of the following alternate remedies: (1) Grant an evidentiary hearing; (2) grant his 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 26th day of January, 2023.

Respectfully Submitted,



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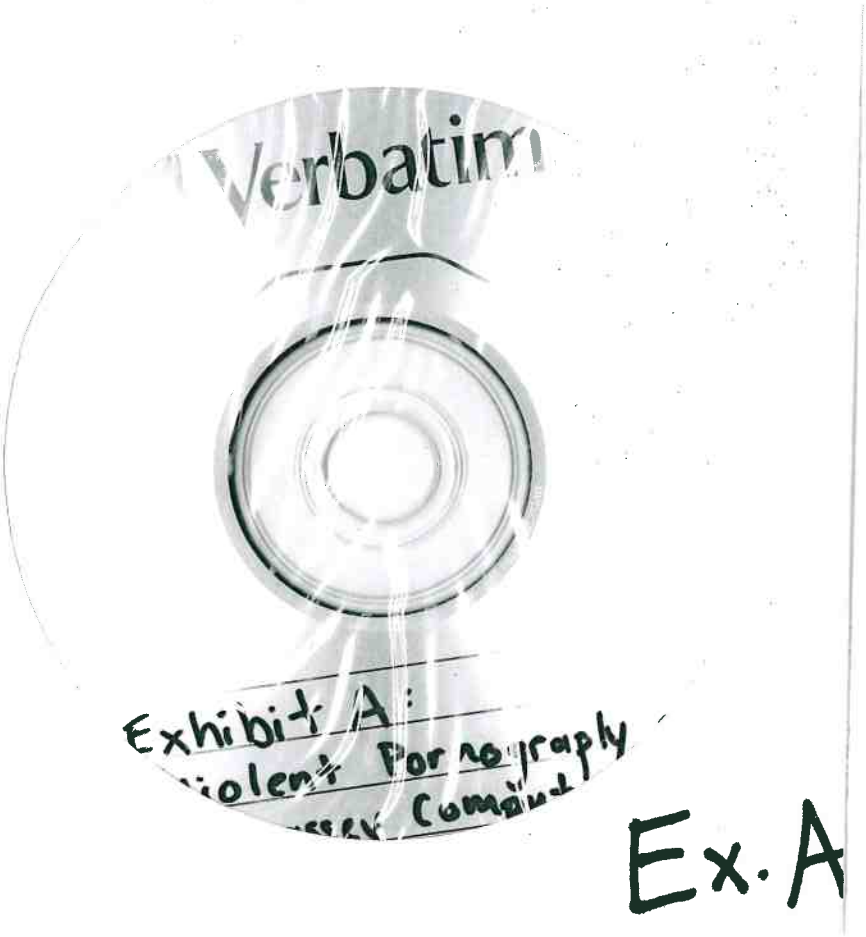
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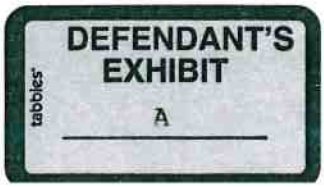
Exhibit A:
Violent Pornography
Ex. A


DEFENDANT'S
EXHIBIT
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## CERTIFICATE OF SERVICE

I certify that on January 26th, 2023, a true and correct copy of **MR. AVERY'S REPLY TO THE STATE'S RESPONSE OPPOSING A MOTION FOR AN EVIDENTIARY HEARING AND POSTCONVICTION RELIEF UNDER WIS. STAT. § 974.06** Pursuant to Wisconsin Statute 806.07 (1)(a) was furnished via electronic mail and by Federal Express, postage prepaid to:

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