STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Respondent	)	
	)	
v.	)	Case No. 05-CF-1381
	)	
STEVEN A. AVERY,	)	
	)	
Petitioner	)	

NOTICE OF MOTION
AND
MOTION FOR POST-CONVICTION RELIEF
PURSUANT TO WIS. STAT. 974.06 and 805.15

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STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Respondent,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Petitioner.

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

PLEASE TAKE NOTICE that the Petitioner, Steven A. Avery ("Mr. Avery"), by his undersigned attorneys, respectfully moves the 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 this motion, Mr. Avery alleges the following:

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

PROCEDURAL HISTORY

Trial:

1. The State proceeded to trial with the charges in the Second Amended Information, filed on February 2, 2007, which included charges of first degree intentional homicide, mutilating a corpse, possession of a firearm by a felon, and false imprisonment. 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) on March 18, 2007. The jury found Mr. Avery not guilty of mutilation of a

corpse. A fourth count of false imprisonment was dismissed by the trial court.[1]

Post-Conviction Motion Pursuant to Wis. Stat. § 974.02

2. On June 29, 2009, Mr. Avery filed a motion for post-conviction relief seeking a new trial on grounds that (1) the court improperly excused a deliberating juror and (2) the court improperly excluded evidence of third party liability. Mr. Avery's argument included a claim of ineffective assistance of counsel. An evidentiary hearing on Mr. Avery's post-conviction motion was held on September 28, 2009. On January 25, 2010, Mr. Avery's motion for post-conviction relief was denied by the Honorable Patrick L. Willis. Mr. Avery appealed that decision and the decision was affirmed by the appellate court on August 24, 2011.[2]

Pro Se Post-Conviction Motion Pursuant to Wis. Stat. § 974.06

3. Mr. Avery filed a pro se post-conviction motion pursuant to Wis. Stat. § 974.06 which was denied on November 19, 2015, by the Honorable Judge Angela Sutkiewicz. Mr. Avery filed a notice of appeal, but after obtaining current post-conviction counsel, that appeal was stayed and the case was remanded to the trial court in Sheboygan for Mr. Avery's motion for new scientific testing.

4. Mr. Avery's current post-conviction counsel have completed scientific testing and conducted an extensive re-investigation of his case, which demonstrates that planted evidence and false testimony were used to convict Mr. Avery of the first degree

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[1] In the original criminal complaint of November 15, 2005, Mr. Avery was charged with first degree intentional homicide and mutilating a corpse. Mr. Kratz amended the criminal complaint to reflect the additional charges of possession of a firearm by a felon, first degree sexual assault, kidnapping and false imprisonment. Mr. Kratz dropped the sexual assault and kidnapping charges within two weeks of the start of trial.

[2] Mr. Avery also raised an issue regarding a pre-trial ruling, claiming the trial court erred in denying his motion to suppress evidence resulting from the sixth search of his trailer home. The appellate court affirmed the trial court on that issue.

intentional homicide of Teresa Halbach ("Ms. Halbach"). Mr. Avery's trial defense counsel, Jerome Buting and Dean Strang ("trial defense counsel"), and prior post-conviction counsel, Suzanne Hagopian ("Ms. Hagopian") and Martha Askins ("Ms. Askins"), were ineffective in failing to hire the experts needed to establish that all of the evidence used by the State to convict Mr. Avery was planted or fabricated. Trial defense counsel and post-conviction counsel failed to conduct a proper investigation to refute the State's timeline and theory of when, where, and how this homicide occurred and to meet the standard necessary to name third party suspects.

INTRODUCTION

"My job as a prosecutor is to do justice. And justice is served when a guilty man is convicted and an innocent man is not." - Justice Sonia Sotomayor

As of the filing of this petition, Mr. Avery has been locked up for 10,909 days for crimes he did not commit. Mr. Avery has been alive for 20,058 days, so over 54% of his life has been spent behind bars. Ms. Halbach's entire life spanned just 9,355 days. Of the 4,238 days that have passed since Ms. Halbach's murder, only 9 short days were devoted by law enforcement to identifying the alleged murderer, much less time than the average vacation time allocated in 2005 to the law enforcement personnel involved in the 9-day effort leading to the arrest of Mr. Avery. Stated differently, of the 4,238 days that have passed since Ms. Halbach's death, only 0.212 percent of those days have been devoted to finding out who killed her. Because the State did not need to establish motive, it did not spend any time trying to figure out why Ms. Halbach was murdered. Both Mr. Avery and Ms. Halbach are victims of a justice system whose success depends upon the integrity, competence and devotion of judges, law enforcement, prosecutors, and defense attorneys. Both Ms. Halbach and Mr. Avery have yet to receive justice. Ms. Halbach has been all but forgotten in the rush to judgment to convict and maintain the conviction of Mr.

Avery. Mr. Avery has not been forgotten but buried alive because those individuals who were supposed to save him from a second wrongful conviction failed.

Mr. Kratz's theory of Ms. Halbach's murder is one of the most preposterous tales ever spun in an American courtroom. If Mr. Kratz's theory were true, Mr. Avery is a true "idiot-savant." Mr. Kratz's first tale was as follows: Mr. Avery, the idiot, selects, as his victim, the only female with whom he had an appointment on the day of her murder. Mr. Avery, the idiot, selects his own bedroom for the commission of an incredibly bloody crime. Mr. Avery, the idiot, handcuffs Ms. Halbach to his bed, sexually assaults her, slashes her throat, and stabs her stomach. He carries her lifeless bloody body to the garage, placing her in and taking her out of the back of her RAV-4, puts her on a creeper, and rolls her to his burn pit where he tosses her body into a bonfire. However, despite leaving a mountain of incriminating evidence, Mr. Avery, the savant, takes over and is able to level the mountain and remove all forensic traces of Ms. Halbach in his trailer and garage in a feat that is comparable to defying the laws of gravity and forensic science.

Mr. Kratz, recognizing the plot flaw in having no forensic evidence placing Ms. Halbach in Mr. Avery's bedroom or garage and not having the cooperation of Brendan Dassey ("Brendan"), decides to rewrite the script. Mr. Kratz's new script calls for Mr. Avery, the idiot, to reemerge and shoot Ms. Halbach twice in the head while she is lying on his garage floor. Mr. Avery, ever the idiot (except when he's the savant), leaves the magic damaged bullet with Ms. Halbach's full DNA profile on his garage floor. Mr. Avery confirms his idiocy by flinging Ms. Halbach into the back of her vehicle undoubtedly to create a blood stain pattern on the cargo door that would provide Mr. Kratz's blood spatter expert with a chance to display his own idiocy in misinterpreting the stain to fit Mr. Kratz' s script. Not to be outdone, Mr. Avery, the savant,

reappears and is able to remove his fingerprints, the blowback blood on the gun, and all of the blood spatter on the garage floor, giving credence to the saying "Even miracles take a little time."

Mr. Kratz's next plot twist is to have Mr. Avery, the idiot, burn Ms. Halbach's electronic devices in his burn barrel and selects the precise time to start the fire when his brother Earl Avery's ("Earl") friend, Robert Fabian ("Mr. Fabian"), drives up to Mr. Avery's burn barrel and smells the odor of burning plastic. Then Mr. Kratz, apparently in a creative frenzy, has Mr. Avery, the idiot, burn Ms. Halbach in his burn pit, 30 yards from his trailer, at 7:00 p.m., which will ensure that family members and visitors who drop by and witness this shocking scene will, of course, opt to watch Prison Break rather than call the police. Mr. Kratz creates another plot hole when he has Mr. Avery, the idiot, leaving the body burning in plain view and driving the RAV-4 with his accomplice Brendan, riding shotgun, to the southeast corner of the Avery property, past the car crusher where both the car and body could have been crushed, and past the smelter where the body could have been burned without detection. Mr. Kratz, in an imaginative burst, has Mr. Avery, the idiot, select a parking place for the RAV-4 on top of a ridge where it is sure to be easily spotted rather than hiding it in the midst of 4,000 other cars. Mr. Kratz, in a devilishly cunning fashion, has Mr. Avery, the idiot, place branches and a hood on the vehicle with the intent of concealing it, but because he parked the RAV-4 facing the opposite direction from all the other vehicles and leaves the logo on the cargo door tire cover plainly visible, he actually makes the vehicle more conspicuous.

Mr. Kratz, in a barrage of plot errors, creates an incongruent tale in which Mr. Avery, the savant, without wearing gloves, manages to not leave a single fingerprint in Ms. Halbach's RAV-4, while Mr. Avery, the idiot, deposits six drops of his blood on the front seats, by the

ignition, and on the rear door jamb. Mr. Avery, the savant, trying to save the day, manages not to leave a single drop of blood on the RAV-4 door handle, key and lanyard, hood prop, gear shift, steering wheel, or battery cables. To absolutely ensure that his DNA is linked to the vehicle, Mr. Avery, the idiot, locks the car and opens the hood latch so that his "sweat DNA" will be found on the latch, just in case the jury is smart enough to figure out that his blood in the RAV-4 was planted.

With the hubris of a novice writer, Mr. Kratz, in a desperate effort to connect Mr. Avery to Ms. Halbach's murder, has Mr. Avery, the idiot, hide Ms. Halbach's sub-key in his bookcase so he can start the engine as a necessary prerequisite to crushing the vehicle. However, Mr. Avery, the savant, knows that a key is totally unnecessary to crush a vehicle because it can be picked up with a front-loader and placed in the car crusher. In another illogical plot twist, Mr. Avery, the idiot, removes Ms. Halbach's DNA from the key but uses his own toothbrush to plant an abundance of his DNA on the key before hiding it in his bookcase.

Mr. Kratz interjects a little science-fiction into the storyline when he has Mr. Avery, the savant, cremate the entire body in his burn pit in a record 3-4 hours without a single family member detecting anything. After the body was burned, Mr. Avery, the idiot, left all of the bones on top of the ash pile within sight of anyone and within reach of his dog who would ingest bones which would be detected in his stool. Mr. Avery, the savant, burned the body in his burn pit in world-record time of 3-4 hours to a point where 60 percent of the bones completely disappeared and all but two teeth evaporated. Mr. Avery, the idiot, picked out some of the larger bones and moved them to his sister's burn barrel and the Manitowoc gravel pit.

As Albert Einstein once said, "the difference between stupidity and genius is that genius has its limits." One would never imagine being convicted on such an idiotic theory, but Mr.

Avery was. To understand how this happened, one must examine the other side of the coin: the performance of Mr. Avery's trial defense counsel. The State relied upon the following items of forensic evidence that allegedly linked Mr. Avery to the crime: 1) Mr. Avery's blood in the RAV-4; 2) Mr. Avery's DNA on the hood latch; 3) the electronic components (camera, palm pilot, and cell phone) in Mr. Avery's burn barrel; 4) the bones and remnants of Ms. Halbach's clothing in Mr. Avery's burn pit; 5) the Toyota key in Mr. Avery's bedroom with Mr. Avery's DNA; and 6) Ms. Halbach's DNA on the damaged bullet found in Mr. Avery's garage. The State convicted Mr. Avery on this ludicrous theory because trial defense counsel only had two experts to combat the State's 14 experts. One of the trial defense counsel's experts performed at a substandard level, and the other was not as qualified as the State's expert. Trial defense counsel claimed evidence was planted but failed miserably in proving that assertion by lacking experts in bloodstain pattern analysis, DNA, ballistics, forensic fire, trace, forensic pathology, and police procedure and investigation. Additionally, trial defense counsel failed to conduct a thorough investigation of the victim's background, deleted cell phone calls, potential third party suspects, or to construct an accurate timeline of Ms. Halbach and Mr. Avery's activities on October 31, 2005.

Trial defense counsel, by not carefully reviewing the discovery and not having the appropriate experts, failed to realize the following: 1) Mr. Avery's groin swab had been substituted for the hood latch swab by law enforcement; 2) the key discovered in Mr. Avery's bedroom was a sub-key and was planted by Lt. Lenk and Sgt. Colborn immediately before its discovery; 3) Ms. Halbach's voicemail messages had been deleted by the killer to keep her voice mailbox open and delay her family and friend's realization that she was missing; 4) Ms. Halbach's last appointment was at the Zipperer's not the Avery's, and the CD of her voicemail

left on the Zipperer's answering machine was concealed and/or destroyed by the State to mislead the jury into believing Ms. Halbach's last stop was Mr. Avery's; 5) the fuel level in Ms. Halbach's car was concealed by the State so that the mileage the vehicle had been driven on October 31 could not be determined, thereby preventing Mr. Avery from arguing that Ms. Halbach's vehicle had been driven many more miles after it left his property; 6) Ms. Halbach was at a higher risk for being a victim of violence because of her involvement in nude photography and her affair with a married man and with her ex-boyfriend's best friend; 7) Ms. Halbach's ex-boyfriend was verbally and physically abusive to her during their relationship; 8) Ms. Halbach's ex-boyfriend had sustained visible injuries to his hands, from fingernail scratches, around the time of her disappearance; and 10) Ms. Halbach's ex-boyfriend initially gave the police a false name, minimized his relationship with her, lied about crime scene evidence, controlled and led the searchers to Ms. Halbach's vehicle, had unrestricted access to the Avery property to plant evidence, assisted law enforcement in locating her car, and was living in her house after her murder in complete control of the evidence, disseminated to law enforcement, from her personal papers and effects.

Prior post-conviction counsel filed for post-conviction relief on June 29, 2009, which was denied on January 25, 2010, and the denial was affirmed on appeal in August of 2011. Prior post-conviction counsel attempted unsuccessfully to argue that *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) should be overturned. Prior post-conviction counsel never had an investigator develop evidence about third party suspects that would meet the *Denny* standard, and they never hired experts in blood spatter, DNA, ballistics, forensic fire, trace, forensic pathology, police procedure and investigation, brain fingerprinting, or prosecutorial misconduct, or a competent forensic anthropologist, or investigator.

Current post conviction counsel has retained 10 experts and 2 investigators who have developed strong evidence that undermines confidence in Mr. Avery's verdict. If Mr. Avery is granted an evidentiary hearing, the following experts and investigators will testify:

1. **Christopher Palenik, Ph.D.** ("Dr. Palenik"). Dr. Palenik is from Microtrace Laboratory, which is an internationally-recognized laboratory that is credited with contributing to resolving a variety of high profile cases, including the following: the Unabomber, Swiss Air Crash, Narita Airport Bombing (Tokyo), Air India Bombing, Oklahoma City Bombing, the Green River Murders, Jon Benet Ramsey Case, Atlanta Child Murders, "Ivan the Terrible" war crimes trial (Jerusalem), and the kidnapping and murder of DEA special agent "Kiki" Camerena in Mexico. Microtrace Laboratory scientists have conducted analyses and reviews of scientific findings in numerous cases involving trace evidence and have testified for both the prosecution and defense. Its scientists have, in addition, performed U.S. National Institute of Justice funded research and published articles and book chapters on various aspects of microscopic trace evidence. The Microtrace Laboratory conforms to the same international quality standard (ISO 17025) adhered to by forensic laboratories around the world. Dr. Palenik will testify that "there is no evidence to indicate that the bullet (Item FL) passed through bone. In fact, the particulate evidence that is present strongly suggests an alternate hypothesis, which is that the trajectory of the fired bullet took it into a wooden object, possibly a manufactured wood product. Furthermore, the presence of red droplets deposited on the bullet suggests that the bullet had picked up additional contamination from its environment at some point after coming to rest (*i.e.*, droplets of potential red paint or a red liquid)." The State's theory that Ms. Halbach's cause of death was the result of being shot twice in the head

with .22 caliber long rifle bullets is completely disproven by Dr. Palenik's testing. Because Dr. Palenik has determined that the damaged bullet (Item FL) never passed through bone (*i.e.*, Ms. Halbach's skull), the State's evidence that Ms. Halbach's DNA was found on the damaged bullet (Item FL) is completely discredited. Dr. Palenik examined the hood latch swab (Item ID) that allegedly was used to swab the hood latch of Ms. Halbach's vehicle and allegedly contained Mr. Avery's DNA. Dr. Palenik has concluded, by a series of experiments of the trace materials on the hood latch swab (Item ID) that it was never used to swab a hood latch. Dr. Palenik has also examined the victim's key (Item C) found in Mr. Avery's bedroom, with his DNA on it, and has conducted a trace examination and experiments and has concluded that the victim's key (Item C) was not a key used every day by Ms. Halbach.

2. **Lucien Haag** ("Mr. Haag"). Mr. Haag has authored and presented over 200 scientific papers, most of which have dealt with various exterior and terminal ballistic properties, effects and behavior of projectiles. His primary area of special interest is the reconstruction of shooting scenes and incidents. Mr. Haag has conducted a series of experiments firing a .22 caliber long rifle through bone to demonstrate that the soft lead of a .22 caliber long rifle bullet absorbs bone particles that are detectable by a scanning electron microscope. Dr. Palenik examined the control samples submitted by Mr. Haag and determined that they did have bone particles embedded in them, even after they were washed in a solution in a similar manner to Item FL at the Wisconsin State Crime Lab ("WSCL"). Mr. Haag will offer the opinion that damaged bullet (Item FL) would have had bone particles embedded in it if it had been shot through bone such as a human skull.
3. **John DeHaan, Ph.D.** ("Dr. DeHaan"). Dr. DeHaan is an internationally-recognized

forensic fire expert with a Ph.D. in Pure and Applied Chemistry — Forensic Science. Dr. DeHaan has testified in over 100 cases, authored multiple publications, and conducted numerous experiments in which he burned bodies, unlike Leslie Eisenberg, Ph.D. or Scott Fairgrieve, Ph.D. Most recently, Dr. DeHaan participated in the site inspection for the Attorney General of Mexico regarding the suspected disposal site of bodies of 43 students who were burned to death. Dr. DeHaan will testify that Ms. Halbach's bones were planted in Mr. Avery's burn pit after being burned in a burn barrel. Dr. DeHaan will testify that Ms. Halbach's body was not burned in Mr. Avery's burn pit.

4. **Steven Symes, Ph.D.** ("Dr. Symes"). Dr. Symes is an internationally-recognized forensic anthropologist who specializes in traumatic bone injuries that occur as a result of homicide or concealment of a body. Dr. Symes has authored over 100 peer-reviewed articles. Dr. Symes will testify that the suspected human pelvic bone found in the Manitowoc County quarry should have been examined microscopically and histological slides should have been taken to definitively establish that this bone was human in origin. Establishing that the bone was, in fact, human would have supported trial defense counsel's theory that the bones in Mr. Avery's burn pit were planted.

5. **Stuart James** ("Mr. James"). Mr James has been a blood spatter pattern analyst for 40 years. Mr. James has authored one of the leading textbooks in blood spatter pattern analysis and published dozens of scientific articles. He has testified numerous times for the prosecution in homicide cases across the United States. Mr. James has testified as an expert or been an expert consultant in 45 states and 10 countries. Mr. James will testify that the blood stains in the RAV-4 were selectively planted and 1 blood stain was placed by the ignition with an applicator. Mr. James will testify that Mr. Avery's blood did not

come from the 1996 blood vial, but was instead blood dripped by Mr. Avery into his bathroom sink in 2005, which was removed and dripped into the RAV-4. Mr. James will testify that the blood stain on the rear cargo door was not the result of Ms. Halbach being thrown into the rear cargo area of the RAV-4 after she had been shot as the State contended.

6. **Karl Reich, Ph.D.** ("Dr. Reich"). Dr. Reich has a Ph.D. in Molecular Biology from UCLA and Harvard Medical School. Dr. Reich has been qualified as an expert in 12 states. Dr. Reich will testify that the DNA on the hood latch did not come from Mr. Avery touching the hood latch, and most probably came from a relabeled groin swab. Dr. Reich will testify that the DNA on Ms. Halbach's sub-key located in Mr. Avery's bedroom did not come from Mr. Avery touching the key, but rather it came from another more prolific DNA source such as a toothbrush.

7. **Gregg McCrary** ("Mr. McCrary"). Mr. McCrary is a renowned police procedure and crime scene investigation expert with over 45 years experience, including 25 years as an FBI Agent. In that capacity, Mr. McCrary investigated violent crimes as a field agent for approximately 17 years and then was promoted and transferred to the FBI Academy in Quantico, Virginia as a Supervisory Special Agent where he worked in the National Center for the Analysis of Violent Crime (NCAVC). There, Mr. McCrary was assigned to the operational wing of the Behavioral Science Unit where his primary responsibility was to provide expertise in investigative techniques and crime scene analysis in violent crime investigations both to FBI field agents as well as to any law enforcement agency around the world that requested FBI assistance. His other responsibilities included conducting research into violent and sexually violent crimes and offenders and providing

training to law enforcement agencies nationally and internationally. Mr. McCrary has investigated thousands of violent crime cases nationally and internationally. Mr. McCrary has worked extensively with international and national law enforcement agencies including Scotland Yard, the New York City Police Department, the Texas Rangers, the Boston Police Department, the Florida Department of Law Enforcement, and the California Attorney General's Office. Mr. McCrary has been qualified as a police procedure and crime scene investigation expert in the Seventh Circuit. *Jimenez v. City of Chicago*, 732 F.3d 710, 719–23 (7th Cir. 2013). Mr. McCrary will testify that the law enforcement investigation into the Halbach murder was deeply flawed. The investigation prematurely focused on Mr. Avery as a suspect while failing to study the victim, Ms. Halbach, to determine if she was at an elevated risk of becoming a victim of violent crime. Because the investigation shifted prematurely to a "suspect-based investigation," it ignored significant evidence that pointed to another potential suspect as the murderer of Ms. Halbach.

8. **James Kirby** ("Mr. James Kirby") and **Steven Kirby** ("Mr. Steven Kirby"). Mr. James Kirby and Mr. Steven Kirby are both licensed Illinois and Wisconsin investigators. Mr. James Kirby has interviewed over 35 witnesses in regard to the Halbach murder case. He has uncovered evidence of the abusive relationship between Ms. Halbach and Mr. Hillegas. Mr. James Kirby has found evidence that Mr. Hillegas lied to law enforcement about the broken parking light in Ms. Halbach's car. He has interviewed witnesses whose statements were misrepresented by law enforcement officers investigating the Halbach murder. Mr. James Kirby has conducted experiments that refute the State's theory that Ms. Halbach's electronic components were burned in Mr. Avery's burn barrel. Mr. James

Kirby has investigated Mr. Avery's garage and participated in experiments producing information that was provided to Mr. Haag and Dr. Palenik, current post-conviction counsel's ballistic and trace evidence experts, respectively. Mr. Steven Kirby has interviewed Scott Bloedorn ("Mr. Bloedorn"), who inadvertently mentioned another suspect.

9. **Larry Blum, M.D.** ("Dr. Blum"). Dr. Blum is a triple-board-certified pathologist who has focused exclusively on forensic pathology in his 40-year career. Dr. Blum has performed over 10,000 autopsies in his career. He testified in the high-profile Drew Peterson case for the prosecution. He has been qualified as an expert over 500 times and has testified over 95 percent of the time for the prosecution. Dr. Blum will offer the opinion that the injury pattern on one potential suspect's hands is consistent with fingernail scratches that were inflicted during the timeframe of Ms. Halbach's murder.

10. **Bennett Gershman, J.D.** ("Mr. Gershman"). Mr. Gershman is one of the nation's leading experts in prosecutorial misconduct. He has authored numerous articles and a book on prosecutorial misconduct. He is a former Manhattan prosecutor and current professor of law at Pace University. He has identified the ongoing ethical and Constitutional violations committed by prosecutor Kenneth Kratz before, during, and after Mr. Avery's trial.

11. **Lawrence Farwell, Ph.D.** ("Dr. Farwell"). Dr. Farwell is a Harvard-educated forensic neuroscientist and founder of Brain Fingerprinting, LLC. He has published extensively on Brain Fingerprinting and other scientific topics in the scientific literature in forensic science, neuroscience, and psychophysiology. Dr. Farwell has testified in court as an expert witness on Brain Fingerprinting. He has conducted research on Brain

Fingerprinting at the FBI, the CIA, and the US Navy. TIME magazine named him one of the TIME 100: The Next Wave, the top innovators of this century who may be "the Picassos or Einsteins of the 21st Century." Brain Fingerprinting has been used in wrongful conviction cases and worldwide by different intelligence agencies. Dr. Farwell has conducted extensive brain fingerprint testing on Mr. Avery. He will offer his opinion, with a statistical confidence of 99.9 percent, "that Mr. Avery does not know certain specific details about the attack on Ms. Halbach. This salient crime-relevant information, which was experienced by the perpetrator when he committed the crime, is not stored in Mr. Avery's brain."

The opinions of all of these experts, combined with the new investigation conducted by current post-conviction counsel's investigators, so strongly undermines confidence in Mr. Avery's verdict that justice demands that his conviction be vacated.

THE STATE'S CASE AT TRIAL

5. The State, through its lead prosecutor Kenneth Kratz ("Mr. Kratz"), presented a case which included 396 exhibits and 53 witnesses, 14 of whom were qualified as experts.[3] Mr. Kratz, in his closing argument, repeatedly emphasized that this was one of the largest criminal investigations ever conducted in Wisconsin because the WSCL received more submissions in this case than in any preceding Wisconsin criminal investigation and more law enforcement officers were involved in this case than in any prior case.

[3] John Ertl, DNA analyst; Ronald Groffy, forensic imaging specialist; Sherry Culhane, DNA analyst; Dr. Donald Simley, forensic odontologist; Dr. Leslie Eisenberg, forensic anthropologist; Curtis Thomas, electronics engineer; William Newhouse, firearms and toolmarks examiner; Kenneth Olson, trace evidence examiner; Dr. Jeffrey Jentzen, forensic pathologist; Mr. Marc LeBeau, chemist; Michael Riddle, fingerprint identification analyst; Anthony Zimmerman, Cingular network engineer; and Bobbie Dohrwardt, Cellcom technical support analyst.

(TT:3/14:34).[4] Mr. Kratz stressed the sheer number of law enforcement officers involved in the investigation. (TT:3/14:34, TT:3/15:57). It is indisputable that the State of Wisconsin poured enormous resources and efforts into obtaining the conviction of Mr. Avery.

Manitowoc County Resources Needed for Investigation

6. In order to combat trial defense counsel's allegation that Manitowoc County had a conflict of interest because of Mr. Avery's pending civil rights lawsuit, Mr. Kratz argued in his closing argument that Manitowoc County's involvement in the investigation was critical because their proximity to and familiarity with the Avery salvage yard and the surrounding communities gave them exclusive access to available resources such as wreckers, ropes, tarps, searchers, and trained evidence technicians. (TT:3/14:47).

Mr. Avery was the Last Person to see Ms. Halbach Alive

7. According to Mr. Kratz, the only reason that law enforcement focused exclusively on Mr. Avery, almost immediately, was because Mr. Avery was the "last person to see [Ms. Halbach]." (TT:3/14:51). Mr. Kratz described a timeline of Mr. Avery's and Ms. Halbach's alleged activities on October 31, 2005, in an attempt to link Mr. Avery to the murder and mutilation of Ms. Halbach:

    a. **8:12 a.m.:** Mr. Avery called AutoTrader to set up a photo shoot appointment of his sister Barb Janda's ("Barb") Plymouth van. Mr. Kratz argued that Mr. Avery was using a pseudonym by giving AutoTrader the name "B. Janda." (TT: 3/14:82).
    b. **9:46 a.m.:** A voicemail from Dawn Pliszka ("Ms. Pliszka"), an AutoTrader receptionist, to Ms. Halbach, informed her of the B. Janda appointment and told her the phone number and address that was left. Manitowoc County Sheriff's Department ("MCSD)"
    c. **11:43 a.m.:** Ms. Halbach called the number left by Mr. Avery and left a message on Barb's answering machine. Detective Dave Remiker ("Det. Remiker") testified that he searched Barb's trailer and came across a voicemail from Ms.

[4] All future references to trial transcripts will be abbreviated as follows: TT:Month/Day:Page.

Halbach saying she did not know the address and that she would arrive around 2:00 p.m. or a little later. (TT:3/14:86).

d. **1:30 p.m.:** Steve Schmitz ("Mr. Schmitz") testified that Ms. Halbach was at his property to take a photograph while wearing a light colored or white shirt, waist length jacket, and jeans. (TT:3/14:88).
e. **2:24 and 2:35 p.m.:** Mr. Kratz contended that Mr. Avery placed two calls to Ms. Halbach using the *67 feature, which prevents the called party from seeing who was calling, before her arrival. (TT:2/12:123).
f. **2:27 p.m.:** A call between Ms. Pliszka and Ms. Halbach in which Ms. Halbach told Ms. Pliszka she was on her way to the Avery property. (TT:3/14:86, 89).
g. **2:30-2:45 p.m.:** Barb's son Bobby Dassey ("Bobby") testified that he saw Ms. Halbach finishing her photo shoot of the Janda van and walking toward Mr. Avery's trailer. After taking a shower and leaving the Janda trailer, Bobby saw Ms. Halbach's RAV-4 parked next to Barb's Plymouth van that she had photographed. Bobby testified that he did not see Ms. Halbach. Mr. Kratz argued that because a photo shoot only takes five to ten minutes, Ms. Halbach should have left before Bobby got out of the shower. (TT:3/14:91-92).
h. **2:41 p.m.:** A voicemail was received by Ms. Halbach's phone but was never retrieved. (TT:3/14:90).
i. **3:30-3:45 p.m.:** Another of Barb's sons, Blaine Dassey ("Blaine"), testified that he remembered seeing Mr. Avery place a white plastic bag in his burn barrel. (TT:3/14:67, 90).
j. **4:35 p.m.:** Mr. Avery placed an "alibi call" to Ms. Halbach's phone. (TT:3/14:93). Mr. Kratz claimed by this time, Mr. Avery had disposed of Ms. Halbach's phone in his burn barrel and had burned it. (TT:3/14:93). Mr. Avery had the foresight to call Ms. Halbach's phone so it would look like he was actually trying to reach her. (TT:3/14:93-94).
k. **Around Dusk (Approximately 5:20 p.m.):** Mr. Fabian testified that he saw smoke and smelled plastic being burned in Mr. Avery's burn barrel. (TT:2/27:114-16).
l. **7:00-7:30 p.m.:** Scott Tadych ("Mr. Tadych") testified that the fire behind Mr. Avery's garage was already burning and had flames reaching above the roof of the garage. Mr. Kratz claimed that Ms. Halbach had been killed by this time and Mr. Avery was then in the process of mutilating and burning her body. (TT:3/14:95).
m. **11:00 p.m.** Blaine testified that he saw a large fire behind Mr. Avery's trailer. (TT:2/27:70-71).

8. Mr. Kratz disputed the trial defense counsel's alternate timeline, in the closing, by pointing out that trial defense witness Lisa Buchner ("Ms. Buchner"), a school bus driver, testified that she did not know on what date she saw a woman taking photographs of the van on the Avery property, and that propane truck driver John Leurquin's ("Mr.

Leurquin") description of a "green mid-sized SUV" leaving the Avery property did not match the description of Ms. Halbach's vehicle. (TT:3/15:102-103).

Discovery of Victim's Vehicle on Avery Property

9. In order to deflect trial defense counsel's accusations that law enforcement had framed Mr. Avery by planting Ms. Halbach's RAV-4 in the Avery salvage yard, Mr. Kratz contended in his closing that two civilians, Pamela Sturm ("Pam") and Ryan Hillegas ("Mr. Hillegas"), decided to search for the victim's automobile at the Avery salvage yard. (TT:3/14:36-37). According to Mr. Kratz, the speed with which Pam located Ms. Halbach's RAV-4 on the Avery salvage yard was attributable to "the hand of God." (TT:3/14:39). Mr. Kratz told the jury, "Pam Sturm described it as divine intervention . . . that it was the hand of God . . . 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." (TT:3/14:39).

Victim's Vehicle was Locked

10. Mr. Kratz claimed, by referencing numerous witnesses (MCSD Deputy Pete O'Connor, MCSD Sergeant Josh Orth ("Sgt. Orth"), Det. Remiker, Calumet County Sheriff's Department ("CCSD") Lieutenant Todd Hermann, CCSD Sergeant Bill Tyson ("Sgt. Tyson")) in his closing, that no one tampered with Ms. Halbach's vehicle after the discovery of the vehicle at the Avery salvage yard on November 5, 2005. (TT:3/14:41-42, 44, 46). Mr. Kratz contended that evidence was not planted in the RAV-4 because witnesses from the WSCL who had processed the vehicle on November 7, 2005, claimed it was locked. (TT:3/14:53).

Victim's Vehicle was Obscured

11. Mr. Kratz admitted, in his closing, that Ms. Halbach's vehicle could not be seen in the flyover video taken on November 4, 2005, because it was covered with branches and a hood. (TT:3/14:53).

Vehicle Battery Cable Disconnected to Prevent Detection

12. Mr. Kratz's only explanation for the disconnected battery in Ms. Halbach's vehicle was that Mr. Avery might have feared that the search party would "press a button" on the victim's key and the car lights or alarm might have been activated. (TT:3/15:95-96). Ms. Halbach's vehicle had electronic locks. (1999 RAV-4 Windows and Doors Manual ("RAV-4 Manual"), attached and incorporated herein as **P-C Exhibit 1**; Photographs of Ms. Halbach's RAV-4 driver's door with rocker switch for electronic lock ("Driver's Door Photos"), attached and incorporated herein as **P-C Exhibit 2**).

Victim's Vehicle Could Not have been Driven from Fred Radandt Sons, Inc. Sand and Gravel Pit ("Radandt Pit") onto Avery Property

13. Mr. Kratz contended, in his closing, that the RAV-4 could not have been driven onto the Avery property from the Radandt Pit because of the 15-20 foot high berm immediately to the south of the vehicle which would have prevented entry from the Radandt Pit. (TT:3/14:53-54).

MCSD Sergeant Andy Colborn ("Sgt. Colborn") Did Not Discover Victim's Car on November 3, 2005

14. Mr. Kratz argued that when Sgt. Colborn placed a phone call to Manitowoc County dispatch from his cell phone, it was on November 3, 2005, following CCSD Investigator Mark Wiegert's ("Inv. Wiegert") call to Sgt. Colborn about Ms. Halbach's disappearance. Mr. Kratz contended that Sgt. Colborn was simply verifying Inv. Wiegert's information and had not actually found Ms. Halbach's vehicle. (TT:3/15:74-

75). Mr. Kratz also argued that Sgt. Colborn used the telephone rather than the radio because Mr. Avery had a police scanner. (TT:3/15:78).

Mr. Avery's Blood Was Not Planted

15. Mr. Kratz claimed that no one had access to Mr. Avery's blood prior to November 5, 2005, to plant it. (TT: 3/15:87). He also argued that trial defense counsel had failed to demonstrate exactly *how* the police could have planted Mr. Avery's blood in six different places in Ms. Halbach's vehicle. (TT:3/14:58-59). According to Mr. Kratz blood planting could be ruled out by "the sheer volume, the sheer number of places" that the blood was discovered in Ms. Halbach's vehicle. (TT:3/14:59, 118, 121).

Mr. Avery was Actively Bleeding from a Cut on his Finger

16. WSCL analyst Nick Stahlke ("Mr. Stahlke"), the State's blood spatter expert, testified that "this particular stain by the ignition is absolutely consistent with somebody with a cut to the outside of the right hand and turning an ignition" with a key. (TT:3/14:62). Mr. Kratz called this stain "a contact transfer stain." (TT:3/14:62).

17. Mr. Kratz emphasized that the DNA profile of Mr. Avery obtained from his blood in Ms. Halbach's vehicle came from the cut on the middle finger of his right hand. (TT:3/14:118). Mr. Kratz tried to dispute trial defense counsel's claim that the blood was planted in Ms. Halbach's car by arguing that the WSCL never had a blood sample from Mr. Avery because his DNA was obtained from a buccal swab. (TT:3/14:119).

Discovery of Victim's Electronics in Mr. Avery's Burn Barrel

18. Mr. Kratz pointed out that Mr. Avery's burn barrel was discovered by MCSD Deputy David Siders ("Dep. Siders") on a sweep of a property adjoining Mr. Avery's trailer on November 7, 2005. (TT:3/14:63). Dep. Siders found a tire rim in the barrel.

(TT:2/19:153). Inside Mr. Avery's burn barrel, three of Ms. Halbach's electronic devices were discovered, including her Motorola V3 RAZR ("RAZR") cell phone, the circuit board for her Palm Zire 31 palm pilot, and components of her Canon PowerShot A310 digital camera. (TT:3/14:65-66).

19. Mr. Kratz claimed that Mr. Fabian, a friend of Mr. Avery's brother Earl confirmed that there was an odor of plastic and heavy smoke coming from Mr. Avery's burn barrel on October 31, 2005, when he was present at about dusk. (TT:3/14:68).

Two Gunshots Caused the Death of the Victim

20. The State's forensic anthropology expert, Leslie Eisenberg ("Dr. Eisenberg"), claimed that the cause of Ms. Halbach's death was two gunshot wounds to her head that were "pre-burning." The State relied upon the testimony of Dr. Eisenberg, Kenneth Olson ("Mr. Olson"), and Dr. Jeffrey Jentzen ("Dr. Jentzen") to establish that the manner of death was a homicide. (TT:3/14:127-129).

Mr. Avery's Garage Had Room for a Body

21. Mr. Kratz also relied on Blaine's testimony that one of Mr. Avery's vehicles, a Suzuki Samurai, and his snowmobile were not inside Mr. Avery's garage on October 31, 2005. (TT:3/14:67). Therefore, according to Mr. Kratz, Mr. Avery could have placed "something else" presumably a body, in his garage on October 31, 2005. (TT:3/14:67).

Discovery of Damaged Bullets in Mr. Avery's Garage

22. Mr. Kratz pointed out that CCSD Deputy Daniel Kucharski ("Dep. Kucharski") found eleven spent shell casings in Mr. Avery's garage on November 6, 2005. (TT:3/14:79). In March 2006, additional search warrants were executed to search Mr. Avery's garage and two damaged bullets were discovered. (TT:3/14:79).

Ms. Halbach's DNA on Damaged Bullet (Item FL)

23. According to Mr. Kratz, the damaged bullet found under the air compressor in Mr. Avery's garage was subsequently found to have Ms. Halbach's DNA on it. (TT:3/14:79). Mr. Kratz stated, "Teresa Halbach is killed. She's laying down. She's shot twice, once in the left side of her head, once in the back of her head, or I guess I should more accurately say she's shot at least twice. Because two bullets were found, two entrance wounds were found to her head." (TT:3/14:98). Mr. Kratz explained that WSCL DNA analyst Sherry Culhane's ("Ms. Culhane") contamination of the control sample with her own DNA, during the testing process at the WSCL did not diminish the results of Ms. Culhane's DNA comparison and subsequent identification of Ms. Halbach's DNA. (TT:3/14:114). Mr. Kratz argued that Ms. Culhane could not have inadvertently transferred Ms. Halbach's DNA from a "sealed envelope" onto the damaged bullet. (TT:3/15:88). Mr. Kratz stated that the WSCL contamination log showed only 89 contaminated cases out of 50,000 cases. (TT:3/15:94).

More Thorough Garage Search Done in March 2006

24. Mr. Kratz claimed that investigators searched the garage more thoroughly in March than they did in November, and for the first time removed the "junk" from the garage. (TT:3/14:79-80). The State's ballistics expert William Newhouse ("Mr. Newhouse") opined that the bullet containing Ms. Halbach's DNA and a casing were fired from the .22 caliber rifle Mr. Avery kept mounted above his bed. (TT:3/14:80). Mr. Newhouse testified that the ammunition found in Mr. Avery's bedroom was manufactured by the same manufacturer as the shell casings from his garage. (TT:3/14:80).

Primary Burn Site was Mr. Avery's Burn Pit

25. Mr. Kratz relied on evidence from the trial defense counsel's forensic anthropology expert, Dr. Scott Fairgrieve ("Dr. Fairgrieve"), to support the State's claim that Ms. Halbach's whole body was burned in one session in Mr. Avery's burn pit. The State pointed out that Dr. Fairgrieve testified that it would take between 1.5 and 2.5 hours to cremate a body at 1,600 degrees Fahrenheit. Mr. Kratz argued that Mr. Avery was able to achieve such a temperature by burning tires in his burn pit with the body. (TT:3/14:96). Mr. Kratz relied upon the testimony of Blaine and Mr. Tadych that the fire was burning from 7:30 p.m. or so until past 11:00 p.m., giving Mr. Avery "plenty of time" to cremate Ms. Halbach's body. (TT:3/14:96).

26. Mr. Kratz argued that the burn pit bones were "intertwined or mixed" in with the steel belt from the tires, and that was Mr. Kratz's strongest evidence that the burn pit was the primary burn site. (TT:3/14:97). Mr. Kratz explained that Mr. Avery's "vicious" dog, Bear, delayed the discovery of the bones on November 8, 2005, by intimidating the scent tracking dogs and their handlers. (TT:3/14:97).

27. Mr. Kratz admitted that WSCL analyst John Ertl ("Mr. Ertl") began recovering bones from the burn pit on November 8 using a shovel. (TT:3/14:98). Mr. Kratz claimed that a shovel was used by Mr. Avery to dismantle Ms. Halbach's body as it burned. (TT:3/14:98-99).

28. Mr. Kratz relied upon Wisconsin Department of Justice Division of Criminal Investigation ("DCI") Agent Rodney Pevytoe ("Agent Pevytoe") to rule out other possible burn sites on the Avery property such as the smelter and the woodburner. (TT:3/14:99-100). Agent Pevytoe testified that on November 9 and 10, 2005, he consulted with Dr. Eisenberg about the excavation of the burn pit. (TT:3/7:56-57). Mr.

Kratz argued that the proximities of Mr. Avery's garage and home to the burn site were very incriminating and pointed to Mr. Avery being the killer. (TT:3/14:100).

29. Mr. Kratz relied upon the testimony of DCI Agent Kevin Heimerl ("Agent Heimerl") to establish that investigators found five, out of the standard six, jean rivets marked "Daisy Fuentes" in Mr. Avery's burn pit. Mr. Kratz referenced Katie Halbach's ("Katie") testimony that Ms. Halbach had Daisy Fuentes brand jeans that were missing after her disappearance. (TT:3/14:100-101). Mr. Kratz argued that a reasonable inference was that "those jeans [were] burned at exactly the same time" as the body. (TT:3/14:101).

30. To support the identification of Ms. Halbach as the cremains in Mr. Avery's burn pit, Mr. Kratz relied upon the testimony of forensic dentist Dr. Donald Simley ("Dr. Simley"), who could not positively identify the only tooth recovered as belonging to Ms. Halbach, but testified that the identification "was as close to a positive match" as one could get, given that there was only one tooth available to be identified. (TT:3/14:102). Mr. Kratz cited the testimony of Ms. Culhane, who claimed she was able to identify a partial DNA profile of Ms. Halbach from one piece of bone and tissue recovered from Mr. Avery's burn pit. (TT:3/14:102-103).

31. Mr. Kratz relied upon the testimony of forensic anthropologist Dr. Eisenberg to claim that there was a clear attempt to obscure the identity of Ms. Halbach so the mutilation count brought against Mr. Avery was proper. (TT:3/14:104).

32. Dr. Eisenberg testified that the primary burn site was the burn pit behind Mr. Avery's garage. Dr. Eisenberg, aided by animations created by Wisconsin State Patrol Trooper Timothy Austin ("Trooper Austin"), testified as to what bones were recovered from the burn area. Dr. Eisenberg testified that at least a part of every major bone group was

recovered from the burn area. (TT:3/14:105). Mr. Kratz showed the jury an animation image of a human skeleton and told them that at least fragments of each bone were recovered. (TT:3/14:105).

33. Mr. Kratz admitted in its rebuttal that "bones were moved in this case." (TT:3/15:75). Mr. Kratz argued that Mr. Avery "moved the big bones into his sister's burn barrel to direct attention away from himself." (TT:3/15:76).

34. In the closing, Mr. Kratz stated that he would take "20 seconds" to talk about the bones in the Manitowoc County pit. He said that these bones were "possibly human" so "it means that we don't know what it is" and neither did Dr. Eisenberg or Dr. Fairgrieve. (TT:3/15:78).

Mr. Avery's DNA on Hood Latch was from Sweat

35. Mr. Kratz also noted that Ms. Culhane testified that she matched Mr. Avery to the DNA profile allegedly found on the hood latch of Ms. Halbach's RAV-4, and that this DNA came from Mr. Avery's sweat. (TT:3/14:119-20).

Mr. Avery's DNA Found on Victim's Vehicle Key

36. Mr. Kratz relied upon Ms. Culhane's testimony that Mr. Avery's DNA was found on Ms. Halbach's vehicle key, located in his bedroom on November 8, 2005. (TT:3/14:120). Mr. Kratz pointed out that Ms. Culhane testified that the last person to handle the key was the most likely source of the DNA. (TT:3/14:120). Mr. Kratz disputed that the key was planted by arguing the impossibility of Sgt. Colborn and MCSD Lieutenant James Lenk ("Lt. Lenk") being able to plant the key and not be detected by Dep. Kucharski, who was searching Mr. Avery's bedroom with them. Mr. Kratz also pointed out that the photographs taken after the discovery of the key indicated that the cabinet was pushed to

the left because Mr. Avery's right slipper was moved and the left slipper was flipped over, and the picture binder was pushed several inches back into the bookcase which corroborated Sgt. Colborn's version of events leading up to the key's discovery. (TT:3/15:60-61; Trial Exhibit 210).

Does Not Matter if the Key is Planted

37. Mr. Kratz argued that even if the key was planted, as trial defense counsel claimed, the jury should "set the key aside" because there is "enough other evidence of Mr. Avery's guilt" and "that key, in the big picture, in the big scheme of things here, means very little." (TT:3/15:64).

The Killer was the Last Person to Hold the Key

38. Mr. Kratz argued, "the last person to hold that key other than Teresa Halbach is the person who killed her." (TT:3/15:68).

Latent Prints on Car Were Not Suitable for Identification

39. Mr. Kratz pointed out that the eight latent fingerprints lifted from Ms. Halbach's vehicle by WSCL analyst Michael Riddle ("Mr. Riddle") "were not suitable for identification." (TT:3/15:82).

Mr. Avery's Blood from his Bathroom Could Not have been Planted in Victim's Vehicle

40. Mr. Kratz argued that the blood from Mr. Avery's bathroom could not have been planted in Mr. Avery's vehicle because that blood was collected by Det. Remiker and Sgt. Tyson on November 5, 2005, around 10:00-11:00 p.m. and the SUV was already enclosed and locked in a trailer on its way to the WSCL in Madison. (TT:3/15:87).

State's Theory of Murder, Mutilation of Body, and Concealment of Vehicle

41. To combat the undisputed fact that none of Ms. Halbach's blood was found in Mr.

Avery's trailer, Mr. Kratz claimed that it was the AutoTrader Magazine and bill of sale that linked Ms. Halbach to Mr. Avery's trailer. Mr. Kratz asserted, "she was in the trailer but she was not killed in that trailer." (TT:3/15:93). Mr. Kratz repeatedly stated that Ms. Halbach was "killed in Steven Avery's garage." (TT:3/15:97).

42. Mr. Kratz claimed that Ms. Halbach's vehicle was backed into Mr. Avery's garage. (TT:3/15:98). Ms. Halbach was killed by two gunshot wounds, one to the left side of her head and 1 to the back of her head, while she was lying down on the garage floor. (TT:3/15:98). Dr. Eisenberg described two entrance wounds to Ms. Halbach's head but no exit wounds. There were two damaged bullets eventually found on Mr. Avery's garage floor. (TT:3/15:98). Mr. Kratz relied upon Dr. Eisenberg, who testified that the defect in the parietal bone, above the left ear, showed the characteristic sign of an entrance bullet wound and a second defect in the occipital region shows Ms. Halbach was also shot in the back of the head with a .22 caliber gun. (TT:3/14:128). Additionally, Mr. Kratz relied upon Mr. Olson, the State's trace metal expert, who testified that x-rays of the skull defects in the parietal region showed particles of lead. (TT:3/14:128).

43. Mr. Kratz contended that Mr. Avery threw Ms. Halbach in the back of the cargo area of her own RAV-4, and as he did so, blood from her hair spattered on the inside of the rear cargo door. (TT:3/15:99). Ms. Halbach landed diagonally in the back of the SUV and left a hair imprint on the side panel of the interior of the rear cargo area. (TT:3/15:99).

44. According to Mr. Kratz, Mr. Avery had to act quickly because "he [did not] know if the police [were] coming." (TT:3/15:100). According to Mr. Kratz, Mr. Avery burned Ms. Halbach's electronics on October 31, 2005, at 3:45 p.m., moved the RAV-4, then removed the license plates. (TT:3/15:77-78).

45. Mr. Kratz argued that it was "readily apparent" that Mr. Avery intended to crush Ms. Halbach's RAV-4 simply because the car was found in the vicinity of the car crusher. (TT:3/14:38).

46. Mr. Kratz contended that by 7:30 p.m. on October 31, 2005, there was already a "big fire in the back." Mr. Kratz claimed that Mr. Avery completely burned the body in his burn pit and moved some of the bones into his sister Barb's burn barrel. (TT:3/15:98-100; TT:3/15:76-77)

If Law Enforcement Planted Evidence, Then Also Involved in Murder and Mutilation

47. Mr. Kratz, in his rebuttal, told the jury that in order to believe trial defense counsel's claim that law enforcement planted evidence, they would have to believe that law enforcement "had to be involved in killing" Ms. Halbach. (TT:3/15:69). Specifically, Mr. Kratz stated to the jury in his closing argument: "Are you willing to say that these two otherwise honest cops came across a 25-year-old photographer, killed her, mutilated her, burned her bones, all to set up and frame Mr. Avery? You have got to be willing to say that. You have got to make that leap." (TT:3/15:70).

THE DEFENSE CASE AT TRIAL

48. Mr. Avery was represented by retained attorneys Dean Strang and Jerome Buting. Trial defense counsel presented seven witnesses, two of whom were qualified as experts and 1 of whom was the prosecution's witness, Inv. Wiegert.

Ms. Halbach's Killer Aided by Media Publicity

49. Trial defense counsel claimed that the person or persons who killed Ms. Halbach were aided by widespread media publicity as early as the morning of November 4, 2005. (TT:3/14:132-133). This publicity identified Mr. Avery as the last person known to have

seen Ms. Halbach. Because of the media attention he received after his 2003 release from prison and due to his lawsuit against Manitowoc County, Mr. Avery received more attention than another person might have. (TT:3/14:133). According to trial defense counsel, MCSD officers wanted to believe that Mr. Avery was guilty and therefore had an investigative bias that was exploited by the real killer. (TT:3/14:133). Trial defense counsel stated that when someone is framed, there is a lack of evidence and the jurors are entitled to draw reasonable inferences from this lack of evidence. (TT:3/14:135).

Partial Skeletal Remains Found in Mr. Avery's Burn Pit

50. According to trial defense counsel, "the most damning piece of evidence in the case" was that Ms. Halbach's remains were found in the burn pit outside of Mr. Avery's garage and trailer. Trial defense counsel noted Dr. Eisenberg's testimony that only 40 percent of Ms. Halbach's skeletal remains were recovered, so 60 percent of Ms. Halbach's bones were missing. No expert testified at trial that the other 60 percent of her remains were burned up or consumed by the fire. (TT:3/14:136-137). Trial defense counsel argued that while five of six rivets from a pair of Daisy Fuentes jeans were found in Mr. Avery's burn pit, the button that closed the waist of the jeans was never located even though magnets and sieves were used. (TT:3/14:137). Trial defense counsel pointed out that Ms. Halbach's house and work keys were never found. (TT:3/14:137).

Bones in Mr. Avery's Burn Pit were Moved

51. Trial defense counsel claimed that "all the experts agree these bones were moved," but Mr. Kratz had failed to explain "how that happened." (TT:3/14:137-38). While Mr. Kratz presented evidence of the cause and manner of death, there was no evidence about how or where Ms. Halbach was killed. (TT:3/14:138). Trial defense counsel claimed

that the bones were found in a burn barrel belonging to Barb's family, located 150 feet away from Mr. Avery's burn pit, and there was a third site where "suspected human bones" were found in the Manitowoc County pit adjacent to the Radandt Pit. (TT:3/14:139). Trial defense counsel criticized the State's investigators for not taking photographs of the bones found in the Manitowoc County pit upon their discovery. (TT:3/14:140).

52. Trial defense counsel stipulated to the FBI doing mitochondrial typing of the pelvic bone and agreed with the FBI findings that nothing could be determined from these bones. However, trial defense counsel pointed out that Dr. Eisenberg agreed that the bones from all 3 burn sites were burned to the same degree. According to trial defense counsel, it was clear that the bones were moved, but the State's theory did not account for their removal. (TT:3/14:138-39).

53. Trial defense counsel claimed that Dr. Eisenberg was not able to definitively answer the question of whether the burn pit was the original burn site. (TT:3/14:143). Dr. Eisenberg testified that the burn pit was probably the primary burn site because in it were numerous small, fragile bones that one would have expected to break if moved. However, trial defense counsel pointed out that Dr. Fairgrieve testified that in his experience, small bones usually wind up at the secondary site, and that the site where the majority of bones are recovered is usually the secondary site to which bones are transported. (TT:3/14:143). Due to the manner of excavation, Dr. Fairgrieve could not offer an opinion as to whether the burn pit behind Mr. Avery's garage was the primary site. (TT:3/14:144). Trial defense counsel relied upon Dr. Fairgrieve's opinion that the State should have had a forensic anthropologist come to Mr. Avery's burn pit to supervise the

original excavation of bones.

54. Trial defense counsel claimed that Dr. Fairgrieve said that at the original burn site, the bones would have some anatomical connection to each other, but if the bones were moved, they would "fall apart and they would be rearranged." (TT:3/14:144).

55. Trial defense counsel offered the jury the hypothesis that Ms. Halbach was burned in the Manitowoc County pit, and that a Janda burn barrel was used to transport her remains. Trial defense counsel claimed that because the burn barrels were heavy and were transported in the dark, bones were inadvertently left in the barrel. (TT:3/14:146-47).

56. Trial defense counsel pointed out that Bobby testified that Barb's residence only had 3 barrels, yet 4 barrels were found. Trial defense counsel contended that the fourth barrel was used to transport the bones from the original burn site. (TT:3/14:148). Trial defense counsel claimed, "if that body was burned elsewhere and then moved and dumped on Mr. Avery's burn pit, then Steven Avery is not guilty, plain and simple. Because no one would burn a body somewhere else and then move the remains and dump them in your own backyard. No one would do that." (TT:3/14:148-149).

Trial Defense Counsel's Theories About the Blood, Bullets, and Key

57. Trial defense counsel also made the following arguments to the jury in their closing about the blood, bullets, and key:

    a. According to the State's theory, Mr. Avery was actively bleeding in Ms. Halbach's RAV-4. However, Mr. Riddle did not identify any of Mr. Avery's fingerprints in the RAV-4. If Mr. Avery was not wearing gloves, it would have been reasonable to expect him to leave behind fingerprints. If Mr. Avery was wearing gloves, it would have been unreasonable to expect him to leave behind

blood. (TT:3/14:150-51).

b. Regarding fingerprints found on the RAV-4 by Mr. Riddle, there were 8 unidentified prints. Standards from Lt. Lenk and Sgt. Colborn were not compared to the 8 unidentified prints. (TT:3/14:151-52).

c. None of the investigators saw blood stains in the RAV-4 while it was at the scene. It was not until the RAV-4 was transported and processed at the WSCL that the blood stains were noticed. Trial defense counsel specifically discussed DCI Agent Thomas Fassbender's ("Agent Fassbender") and Mr. Ertl's testimony about shining a flashlight into the RAV-4 and how implausible it was that they would not look for a key in the ignition and not notice the nearby stain. (TT:3/14:153). Trial defense counsel referred to the blood stain by the ignition as a "rather peculiar looking bloodstain that looks sort of like you might get if you take a Q-tip and dab it." (TT:3/14:153).

d. The most obvious lack of evidence was the lack of any trace of Ms. Halbach in Mr. Avery's trailer. Further, there were no rope fibers on the headboard and no indications that anyone was restrained there. (TT:3/14:153-54). Trial defense counsel noted that Mr. Kratz was now alleging that the crime took place in the garage but in pre-trial publicity, Mr. Kratz said Ms. Halbach was killed in the bedroom. (TT:3/14:154-55).

e. If Ms. Halbach was shot in the garage, her blood should have been found in the garage. (TT:3/14:159). Further, Mr. Avery's blood was found in the garage, which was inconsistent with the theory that Mr. Avery cleaned up Ms. Halbach's blood in the garage. (TT:3/14:160). Trial defense counsel claimed that if Mr.

Avery had cleaned up blood in the garage, it would be expected that he would have also picked up the shell casings. (TT:3/14:161).

f. Trial defense counsel argued that had Mr. Avery killed Ms. Halbach, he would not have put her car key in his home unless he wanted to drive the RAV-4, which was inconsistent with the fact that Mr. Avery allegedly disconnected a battery cable. (TT:3/14:162-63).

g. Mr. Avery was approached by news media and law enforcement on November 3 and 4, 2005, so he knew that he was a person of interest and would not have kept Ms. Halbach's car key in his bedroom. (TT:3/14:163). Further, the key was not found until the seventh search of the trailer on November 8, 2005, and after hours spent searching Mr. Avery's bedroom. (TT:3/14:163). Dep. Kucharski testified that he was there to search the bedroom, not to watch Lt. Lenk and Sgt. Colborn. (TT:3/14:165-66).

h. Trial defense counsel argued that it was impossible for the key to have landed in the position it did if it had fallen out of the back of the bookcase. (TT:3/14:166-67). Trial defense counsel pointed out that there were no pictures of the bookcase because they "don't want you experimenting with that bookcase and this key, because they know you will see that it is incredibly improbable" that the key, the ring, the cloth fob, or the plastic clip would not get "hung up on anything." (TT:3/14:168). Trial defense counsel noted it was unusual that there was no mixture of DNA on the key and that there was no blood observed on the key despite the State's theory that Mr. Avery was bleeding from his right hand. Trial defense counsel also emphasized that Mr. Avery's fingerprints were not found on

the key. (TT:3/14:169-170).

i. Trial defense counsel suggested that the DNA on the key was planted from Mr. Avery's toothbrush. (TT:3/14:170). Trial defense counsel suggested that further evidence that Mr. Avery's DNA was planted on Ms. Halbach's key was that only Mr. Avery's DNA was found, as if someone had wiped clean her DNA and placed his on the key. (TT:3/14:172). Trial defense counsel claimed that if Mr. Kratz had nothing to hide regarding the key and the bookcase, he would have brought the bookcase to court; Mr. Kratz responded that the "defense has just as much right to bring that [bookcase] up here as Mr. Kratz did." (TT:3/15:84-85). Neither side brought the bookcase to court.

j. Trial defense counsel pointed out that Mr. Kratz had misrepresented to the jury, in his opening statement, that Mr. Avery's blood was on the rear of the vehicle on the tailgate; no proof was presented at trial that Mr. Avery's blood was found at that location. (TT:3/14:169). Trial defense counsel also claimed that there was not one microliter of blood in the RAV-4 by relying upon his own visual observation of the small amounts of blood in the vehicle. (TT:3/14:173). Trial defense counsel claimed you "can't even find any blood, can't see any blood" on the CD case. (TT:3/14:173).

1996 Blood Vial as Source of Planted Blood in the RAV-4

58. Trial defense counsel only offered one source for the allegedly planted blood of Mr. Avery—the 1996 blood vial, which was located in an unsecured area of the courthouse. (TT:3/14:174). Trial defense counsel asserted that Lt. Lenk and Sgt. Colborn could have gained "after hours access" to the 1996 blood vial because the Manitowoc Sheriff's

Department had a master key for the courthouse. (TT:3/14:175-76).

59. Trial defense counsel pointed out that on the box containing the 1996 blood vial, there was only a piece of Scotch tape and the styrofoam container had been slit as if by scissors or a razor. (TT:3/14:177). Trial defense counsel claimed that the hole in the 1996 blood vial in the middle was "where professionals would gain access to the blood, if they need it." (TT:3/14:177). However, trial defense counsel asserted that the blood between the rubber stopper and the glass demonstrated that the top had been taken off. Trial defense counsel cited the testimony of FBI chemist Dr. Marc LeBeau ("Dr. LeBeau") for this assertion. (TT:3/14:177-78).

60. Trial defense counsel also argued that Lt. Lenk was an evidence technician who, contrary to his testimony, did know that the 1985 court file stored in the courthouse had evidence exhibits contained in it. (TT:3/14:179). Trial defense counsel admitted that Lt. Lenk's and Sgt. Colborn's fingerprints were not on the 1996 blood vial but argued they would have worn gloves pursuant to their training. (TT:3/14:179).

61. According to trial defense counsel, the opportunity to plant blood in the RAV-4 occurred on November 5, prior to MCSD turning the investigation over to CCSD, and that MCSD kept their officers in control of the RAV-4 for four hours. Trial defense counsel stated that the car was not secured until 2:25 p.m., when Agent Fassbender arrived and started a log. (TT:3/14:180). Trial defense counsel also argued that the tarp placed over the RAV-4 was like a tent with an opening that would allow someone to plant evidence. (TT:3/14:181).

62. Trial defense counsel referenced Pam's testimony that she and her daughter Nikole Sturm ("Nikole") did not know with certainty that the rear cargo door of the RAV-4 was locked,

and trial defense counsel claimed that a police officer would know how to open a locked car. (TT:3/14:183). Trial defense counsel also stated that it is not entirely clear that Ms. Halbach's vehicle was locked when it arrived at the WSCL. (TT:3/14:183). Trial defense counsel asserted that it would only require someone to open two of the vehicle's doors to plant all of the evidence. (TT:3/14:183).

Lt. Lenk's False Testimony

63. Trial defense counsel accused Lt. Lenk of lying under oath about when he got to the Avery property on November 5, 2005. Trial defense counsel stated that Lt. Lenk at one point testified that he got to the site at 6:30 or 7:00 p.m., when it was getting dark, but at trial he claimed that he arrived at 2:00 p.m. Trial defense counsel suggested that Lt. Lenk changed the time so that he could explain why he never logged in on the log that was started by Agent Fassbender at 2:25 p.m. Trial defense counsel asserted that only one officer would be needed to plant the evidence, and that this would not need to be "a complicated wide ranging conspiracy." (TT:3/14:185).

64. Trial defense counsel argued that this one officer would be Lt. Lenk. Trial defense counsel presented the following evidence against Lt. Lenk:

    a. Lt. Lenk did not log in on November 5, 2005;

    b. Lt. Lenk found the "magic key;"

    c. Four months later, Lt. Lenk was back on the scene when the "magic bullet" was found;

    d. Lt. Lenk volunteered to participate in the Halbach case when it was just a "missing person" case in another county; and

    e. On November 6, 2005, Lt. Lenk was in the garage for 1 hour and 47 minutes with

2 other officers and located 10 or 11 shell casings but not any bullets.

(TT: 3/14: 185-86).

Damaged Bullet (Item FL) Not Linked to Shell Casings Found in the Garage

65. On March 1, 2006, a damaged bullet was located by the main garage door in plain sight. The second damaged bullet, found on March 2, 2006, was found under the air compressor. (STATE 5651; TT:2/12:102).

66. Trial defense counsel claimed that Rollie Johnson ("Mr. Johnson") fired .22 caliber firearms on the property around the garage and the bullet remnants were never picked up. (TT:3/8:161-162). Mr. Johnson owned the .22 caliber rifle that the State claimed was the murder weapon and was hanging above Mr. Avery's bed. Trial defense counsel argued that the State's expert, Mr. Newhouse, identified the shell casings as coming from Mr. Johnson's gun, but he could not say that the damaged bullet (Item FL) came from any of the recovered shell casings. None of Mr. Avery's fingerprints were on the shell casings. (TT: 3/14: 187-88).

67. According to trial defense counsel, Mr. Newhouse testified that he was unable to match the second damaged bullet (identified as Item FK) to Mr. Johnson's gun, and testified that the bullet could have come from a pistol with a different brand name. Therefore, Mr. Newhouse could not say that the second bullet (Item FK) had any connection to the case. (TT: 3/14: 188-89).

68. Trial defense counsel compared Mr. Newhouse's testimony to discredited hair comparison analysis. Trial defense counsel also criticized the State and Mr. Newhouse for not showing photos of the comparison of the bullets side-by-side. Trial defense counsel claimed that he could see a lot of differences between "those two fields of view."

Even if Item FL was fired from Mr. Johnson's gun, it did not mean that it was connected to the case according to trial defense counsel. Trial defense counsel also noted that Mr. Newhouse was not asked to determine if there was copper present in his examination of the damaged bullet because both bullets were copper-coated. (TT:3/14:189-91).

Ms. Culhane's Bias Against Mr. Avery

69. Trial defense counsel pointed out that, although Ms. Culhane helped to eventually exonerate Mr. Avery for the rape charge in 2003, she also helped to convict him of that rape in 1985. (TT:3/14:192).

70. Trial defense counsel referenced a phone message from Agent Fassbender to Ms. Culhane directing her "to try to put [Ms. Halbach] in [Mr. Avery's] house or garage." (Trial Exhibit 341). Trial defense counsel told the jury that "this is not blind testing." (TT:3/14:192). According to trial defense counsel, at the point that Ms. Culhane discovered Ms. Halbach's DNA on Item FL, she must have been feeling pressure because this was "the biggest case of her career" and 180 items had been submitted to her laboratory for analysis and she "still ha[d] not found" one item that linked Ms. Halbach to Mr. Avery's house or garage. (TT:3/14:193). Trial defense counsel suggested that because Ms. Culhane had contaminated the control sample for Item FL, she may also have transferred Ms. Halbach's DNA onto Item FL. (TT:3/14:194). Trial defense counsel stated that Ms. Culhane had Ms. Halbach's DNA from the RAV-4 cargo area "sitting right there on her bench" so "you can't tell how and whether Teresa Halbach's DNA ended up there in the same extraction mechanism." (TT:3/14:195). Trial defense counsel stressed that, of all of these other items, Item FL is "the only thing that's ever come up with Teresa Halbach's DNA." (TT:3/14:196).

Hood Latch DNA Came From Contamination by State's Blood Spatter Expert

71. Trial defense counsel told the jury that the most likely source of the hood latch DNA came from the State's blood spatter expert Mr. Stahlke. Specifically, trial defense counsel claimed that Mr. Stahlke inadvertently got blood on his gloves from inside the RAV-4 when he unsuccessfully attempted to get the odometer reading and realized the battery might have been dead. According to trial defense counsel, Mr. Stahlke failed to remove his gloves when he opened the hood latch to examine the battery. (TT:3/14:197).

Other AutoTrader Appointments Made by Someone Other Than Car Owner

72. Trial defense counsel disputed that Mr. Avery had attempted to lure Ms. Halbach to his property by using the name "B. Janda" because other customers that day did the same thing. Craig Sippel ("Mr. Sippel") scheduled an appointment with AutoTrader for Steven Schmitz ("Mr. Schmitz"). Mr. Sippel called and left Mr. Schmitz's name because he was the owner of the vehicle. (TT:3/14:198).

The State's Theory of Murder, Mutilation, and Concealment of Evidence is Illogical

73. Trial defense counsel also argued that the State's theory made no sense that Ms. Halbach would be killed in the garage, burned in the burn pit, then at some point put in the RAV-4 and driven 20 feet. Trial defense counsel pointed out that it would make no sense to put Ms. Halbach's electronic devices in Mr. Avery's burn barrel when they could have been put in the surrounding quarries. They also argued that it would be illogical, if the plan was to crush the car, not to have crushed it before November 5, 2005. (TT:3/14:200).

74. Trial defense counsel claimed that the body could have been much more effectively burned in the smelter on the Avery property than in Mr. Avery's burn pit. (TT:3/14:200-201).

Dr. LeBeau's Opinion is Flawed

75. Trial defense counsel referred in their closing to the testimony of Dr. LeBeau regarding the testing of the ethylenediaminetetraacetic acid (EDTA) tube and RAV-4 swabs as deserving "the award for the most absurd expert opinion" in this case. Trial defense counsel disputed Dr. LeBeau's opinion that just because 3 of the items tested did not have EDTA, the 3 untested items also did not have EDTA. (TT:3/14:201).

76. Trial defense counsel pointed out that Mr. Avery's expert, Janine Arvizu ("Ms. Arvizu"), correctly stated that Dr. LeBeau's experiment did not account for the absence of a limit of detection, his protocol was rushed, and no one had attempted such an EDTA experiment in ten years. (TT:3/14:203). Mr. Strang corrected his co-counsel's assertion that Ms. Arvizu was a doctor, as Ms. Arvizu had not actually completed her dissertation. (TT:3/15:40).

The Defense Timeline Placed Ms. Halbach at the Avery Property at 3:30-3:45 p.m.

77. Trial defense counsel disputed the testimony of Bobby that he saw Ms. Halbach at 2:45 p.m. because Bobby "[had] no good way of verifying the time." (TT:3/14:205).

78. Trial defense counsel argued that Bobby and Mr. Tadych were each other's alibis, no one saw Bobby go hunting in the woods, and the time when Bobby claims he left — 5:00 p.m. — makes no sense for deer hunting. (TT:3/14:206). They claimed that Mr. Tadych's testimony that he knew precisely what time it was was contrived and appeared to be the result of collaborating with Bobby to come up with their story. (TT:3/14:205-206).

79. Trial defense counsel relied on the testimony of Ms. Buchner, the bus driver, that she saw a woman taking pictures of a van on the Avery property when she dropped Brendan and

Blaine off at 3:30-3:40 p.m. Trial defense counsel admitted that Ms. Buchner was uncertain of the date, whether it was October 31 or November 1 or 2. (TT:3/14:207).

80. Trial defense counsel also cited the testimony of Mr. Leurquin, a propane driver, who believed he saw a green SUV around the same time Ms. Buchner described seeing the woman taking the photographs. (TT:3/14:208).

Other Witnesses Suspicious

81. Trial defense counsel suggested that no one checked out Mr. Tadych's story that he allegedly visited his mother at the hospital on October 31, 2005, or that he knew he saw a bonfire behind Mr. Avery's garage at 7:45 p.m. because he wanted to get home to watch Prison Break at 8:00 p.m. (TT:3/14:209).

82. Trial defense counsel pointed out that when Mr. Tadych was first interviewed by the police, he never mentioned a bonfire behind Mr. Avery's garage, much less a bonfire with "flames to the top of the roof" as he testified to at trial. (TT:3/15:44).

83. Bobby's testimony was contradicted by Blaine, who testified that Bobby was asleep when Blaine arrived at home between 3:30 p.m. and 3:45 p.m. on October 31, 2005 (TT:2/27:85-86); therefore, Bobby could not have seen Ms. Halbach at 3:45 p.m.

84. Trial defense counsel also pointed out that George Zipperer ("Mr. Zipperer") was belligerent while Mr. Avery was cooperative, Mr. Hillegas had no alibi, Mr. Bloedorn did not report Ms. Halbach missing for four days, Bradley Czech ("Mr. Czech") provided no alibi, and Thomas Pearce ("Mr. Pearce") also did not report her missing for four days. (TT:3/14:210-11).

85. Trial defense counsel also pointed out that Ms. Halbach attended a Halloween party in Green Bay on Saturday night but no one came forward saying they were with her on

Saturday night. (TT:3/14:212).

State's Expert Testimony that Voicemail Deletions Require Use of Password

86. Trial defense counsel argued that the State's expert Anthony Zimmerman ("Mr. Zimmerman") confirmed that the 18 messages discovered in Ms. Halbach's voicemail (Trial Exhibit 372) did not constitute a full mailbox. Trial defense counsel claimed that Mr. Zimmerman admitted that if Ms. Halbach's voicemail was indicating that the mailbox was full at a certain point, then this meant that messages had been erased by someone and that that person had to have known Ms. Halbach's password. (TT:3/14:213).

Mr. Avery Behaved like an Innocent Man

87. Trial defense counsel argued in the closing that Mr. Avery behaved like an innocent man by doing the following:

    a. Not destroying Ms. Halbach's phone number, license plates, key, or Mr. Johnson's gun;

    b. Not emptying the trash out of the burn barrels;

    c. Inviting some of Blaine's friends over for a bonfire at his place later in the week.

(TT:3/15:20-23, 29-30).

Sgt. Colborn Called In Ms. Halbach's Plates on November 3 or November 4, 2005

88. Trial defense counsel suggested that Sgt. Colborn's call to dispatch regarding the license plate check on Ms. Halbach's car was made either on November 3 or November 4, 2005, but more likely on November 4 because Sgt. Colborn called from his cell phone instead of his squad car radio. (TT:3/15:31-32). Trial defense counsel argued that the call was from November 4, 2005, because that was Sgt. Colborn's day off and he would not have

been in his squad car. (TT:3/15:32).

89. In their closing argument, trial defense counsel played both the Sgt. Colborn dispatch call tape and the MCSD Detective Dennis Jacobs ("Det. Jacobs") tape from November 5, 2005, at 11:30 a.m. after Ms. Halbach's vehicle was discovered. (TT:3/15:35-36). On the tape, Det. Jacobs asked if Mr. Avery was "in custody" yet. (TT:3/15:36).

90. Trial defense counsel contended that if Ms. Culhane had followed the WSCL protocol in testing the damaged bullet found on March 2, 2006, she would not have been able to offer the opinion that Ms. Halbach's DNA was found on the damaged bullet (Item FL) because it was contaminated. (TT:3/15:37-38). Ms. Culhane deviated from protocol for the first time in 23 years. (TT:3/15:37).

91. Trial defense counsel claimed that the FBI EDTA protocol presented by the State was flawed because it was put together in "a couple of weeks" and it could not detect the absence of EDTA. Trial defense counsel did not provide a scientific explanation as to why the EDTA could not be detected, but instead provided analogies to a telephone ringing and smelling apple pie. (TT:3/15:40-42).

92. Trial defense counsel, in arguing that the evidence was planted, offered the rationale that the investigators were not "doing it to frame an innocent man;" rather, they were trying "to ensure the conviction of someone they ha[d] decided [was] guilty." (TT:3/15:46).

EVIDENCE SUPPORTING PETITIONER'S CURRENT POST-CONVICTION PURSUANT TO § 974.06 and § 805.15 INEFFECTIVE ASSISTANCE OF TRIAL DEFENSE COUNSEL

Applicable Law Re: Ineffective Assistance of Counsel

93. A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" *State v. Johnson*,

133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986), quoting *Strickland v. Washington*, 466 U.S.668, 688 (1984). It is not necessary to demonstrate total incompetence of counsel, and the defendant makes no such claim here. Rather, a single serious error may justify reversal. *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986); see *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). The deficiency prong of the *Strickland* test is met when counsel's errors were the result of oversight rather than a reasoned defense strategy. *See Wiggins v. Smith,* 539 U.S. 510, 534 (2003); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001); *State v. Moffett*, 147 Wis.2d 343, 353, 433 N. W. 2d 572, 576 (1989).

94. Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *Moffett*, 147 Wis.2d at 354, quoting *Strickland*, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *Id.* at 357.

95. "Reasonable probability," under this standard, is defined as "probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland*, 466 U.S. at 694. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362 (2000). In addressing this issue, the Court normally must consider the totality of the circumstances (*Strickland*, 466 U.S. at 695) and thus must assess the cumulative effect of *all* errors, and may not merely review the effect of each in isolation. *See*, e.g., *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000); *State v. Thiel*, 2003 WI 111, ¶¶ 59-60, 264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient performance of counsel).

96. To prove prejudice, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 687, 104 S.Ct. 2082, 80 L.Ed.2d 674 (1984). The prejudice inquiry asks whether "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.

97. Trial defense counsel tried to combat the State's 14 experts merely by using cross-examination without their own experts in blood spatter, DNA, forensic pathology, ballistics, and forensic fire analysis.[5] Trial defense counsel's forensic anthropologist was incompetent for failing to do a microscopic analysis of CCSD Property Tag No. 8675, the suspected human pelvic bones found in the Manitowoc County gravel pit ("Manitowoc Pit") or a histological slide analysis of these bones to determine with certainty if they were human. If a determination had been made that these bones were human and linked to Ms. Halbach, trial defense counsel could have conclusively demonstrated that Ms. Halbach's other bones had been planted in Mr. Avery's burn pit.

98. Trial defense counsel failed to thoroughly investigate other suspects and instead chose a scattergun approach of simply naming individuals without meeting the requirements of *State v. Denny*, 357 N.W.2d 12, 120 Wis. 2d 614 (Wis. Ct. App. 1984). Trial defense counsel also failed to utilize available evidence which confirmed that the vehicle was moved onto the Avery property after Ms. Halbach was killed elsewhere.

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[5] Trial defense counsel were retained by Mr. Avery for $220,000 and therefore had funds with which they should have hired expert witnesses. (Retainer Agreement, attached and incorporated herein as **P-C Exhibit 3**).

Applicable Law Re: Duty to Investigate and To Present Expert Testimony

99. Counsel has a duty to conduct reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. *Id.* at 690-691; *see also Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (holding that counsel has an obligation to conduct prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case. Consistent with this obligation, *Strickland* typically demands that counsel go beyond the discovery provided by the State and conduct his or her own pre-trial investigation. *Campbell v. Reardon*, 780 F.3d 752 (7th Cir. 2015).

100. The decision not to investigate must be directly assessed for reasonableness under the circumstances. *Strickland*, 466 U.S. at 691.

101. An attorney's decision not to present a witness based on an unreasonably limited investigation is too ill-informed to be considered reasonable. *Stitts v. Wilson*, 713 F.3d 887, 891 (7th Cir. 2013).

102. In certain cases, the duty to investigate includes a duty to consult with and call expert witnesses to testify at trial. "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011) (emphasis added).

103. Thus, there are times where the only adequate means of challenging expert testimony elicited by the State is to introduce contrary expert testimony in favor of the defense. *Woolley v. Rednour*, 702 F.3d 411, 424 (7th Cir. 2012) (finding deficient performance for the failure to consult with and call a rebuttal expert where there were "significant holes" in the prosecution's expert's conclusions that could only be adequately addressed through

contrary expert testimony).

104. Moreover, the failure to investigate an expert where an expert witness's opinion is crucial to the defense theory constitutes ineffective assistance of counsel. *Stevens v. McBride*, 489 F.3d 883, 896 (7th Cir. 2007).

105. For example, in *Steidl v. Walls*, firemen responded to the report of a fire at the victims' residence. *Steidl v. Walls*, 287 F. Supp. 2d 919, 922 (C.D. Ill. June 17, 2003). The bodies of the two victims were subsequently found in their bedroom. *Id.* Both had suffered multiple stab wounds. *Id.* The State's primary witness testified that she was present when the murders occurred, that she observed a broken lamp in the room, and that she witnessed the defendant stabbing the victims. *Id.* The witness further testified that the defendant later gave her the knife used to stab the victims. *Id.*

106. Following the defendant's conviction and denial of his post-conviction motion, he filed a petition for writ of habeas corpus. *Id.* at 926-932. The defendant alleged that his attorney was ineffective for failing to call forensic experts to testify (1) that the victims' stab wounds did not correspond with the alleged murder weapon, and (2) that the lamp identified by the eyewitness was intact at the time of the fire. *Id.* at 933-934.

107. Noting defense counsel's duty to conduct an adequate investigation and present available evidence favorable to the defense, the U.S. District Court for the Central District of Illinois held that expert testimony from a forensic pathologist that the victims' stab wounds did not match the putative murder weapon would have significantly discredited the prosecution's claim that the forensic evidence supported its key witness's testimony. *Id.* at 937-938. The court further held that expert testimony concerning the lamp would have refuted a significant detail relied on by the prosecution to bolster its eyewitness's

credibility. *Id.* at 938-939. The court concluded that trial defense counsel's failure to discredit the most damaging evidence to the defendant resulted in prejudice, requiring reversal of the conviction. *Id.* at 939-940.

108. Likewise, in *Thomas v. Clements*, the defendant was convicted of intentionally strangling the victim to death. *Thomas v. Clements*, 789 F.3d 760, 762-763 (7th Cir. 2015). The defendant's defense was that he unintentionally caused the victim's death by putting too much pressure on her neck for too long during sex. *Id.* To rebut this defense, the prosecution relied on testimony from the medical examiner who performed the victim's autopsy. *Id.* at 764-765. The medical examiner testified that the hemorrhages in the victim's eyes and abrasions to her face indicated that the pressure applied to her neck occurred during an assault and was intentional. *Id.*

109. Following his conviction and the denial of his post-conviction petition, the defendant filed petition for writ of habeas corpus. Specifically, the defendant alleged that his trial attorney was ineffective for failing to consult with a medical expert to review the medical examiner's findings. *Id.* at 766. The defense expert would have testified that injuries indicative of strangulation were missing, such as external bruising to the neck and a broken bone in the back of the neck. *Id.* at 765. The expert would have further testified that the abrasions on the victim's face were not indicative of manual strangulation. *Id.*

110. The Seventh Circuit held that trial counsel's failure to even consider contacting a pathologist to review or challenge the medical examiner's findings constituted ineffective assistance. *Id.* at 769. Specifically, counsel knew that his client claimed that the death was unintentional, and that there were no signs of a struggle. *Id.* The court concluded that to not even contact an expert "was to accept [the medical examiner's] finding of

intentional death without challenge and basically doom [the] defense's theory of the case." *Id.*

111. In yet another case, the Court of Criminal Appeals held that the failure to challenge the State's testimony concerning blood spatter constituted ineffective assistance. *Ex parte Abrams*, Case No. AP-75366, 2006 WL 825775 (Tex. Crim. App. Mar. 29, 2006.) In *Abrams*, the defendant claimed that she stabbed the victim believing him to be an intruder. *Id.* at *1. Specifically, the defendant claimed that she was taking a bath when she heard noises in the other room. *Id.* at *2. The State elicited testimony – contrary to the defendant's version of events – to the effect that blood spatter in the defendant's bathtub indicated that the tub was not wet when the blood was deposited. *Id.* The court held that defense counsel's failure to challenge the State's witness's testimony by, for example, presenting contradictory expert testimony, qualified as ineffective assistance. *Id.*

112. Several cases in Wisconsin likewise hold that the failure to investigate and/or call expert witnesses to discredit the State's case, and/or to support the defendant's theory, constitute ineffective assistance. *E.g.*, *State v. Zimmerman*, 266 Wis. 2d 1003 (2003) (trial counsel rendered ineffective assistance by failing to call a pathologist to refute testimony that a cord in the defendant's van was consistent with victim's wounds).

113. Numerous other cases affirm the general proposition that defense counsel's failure to investigate and present available expert testimony to refute the prosecution's key evidence results in ineffective assistance. *E.g.*, *Caro v. Woodford*, 280 F.3d 1247, 1254-1256 (9th Cir. 2002) (holding that counsel was deficient for failing to consult an expert and present testimony about the physiological effect of a toxic chemical to which defendant's brain had been exposed); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) (finding

ineffective assistance where counsel failed to hire an expert to rebut testimony about physical evidence linking the defendant to the crime scene), *remand order modified by stipulation*, 268 F.3d 485 (7th Cir. 2001); *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986) (counsel's failure to consult with an expert to contradict key evidence of the most crucial aspect of the trial was deficient), *aff'd Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987).

Failure of Trial Defense Counsel to Investigate Mr. Avery's Claim that his Blood Was Removed from his Bathroom Sink and Planted in the RAV-4[6]

114. On the evening of November 3, 2005, Mr. Avery was having dinner at his mother's residence and when he walked outside her residence, a uniformed officer pulled up in a MCSD squad car and asked if he could speak with him. Later, Mr. Avery learned that this individual's name was Sgt. Colborn. Sgt. Colborn asked Mr. Avery if a female from AutoTrader Magazine had come to the property on Monday to take pictures of a vehicle they were selling. Mr. Avery told Sgt. Colborn that a female from AutoTrader had come to the property at approximately 2:30 p.m. and had photographed a van his sister was selling. Mr. Avery contended that she was on the property for less than five minutes. Mr. Avery told Sgt. Colborn that he noticed her photographing the van and he exited his trailer to pay her. Mr. Avery observed Ms. Halbach leave the property and turn left on Highway 147. Sgt. Colborn misrepresented, in a report written months later, that Mr. Avery said 3:00 p.m., not 2:30 p.m. Mr. Avery's affidavit is consistent with all of his prior statements

[6] Current post-conviction counsel filed a Motion for Scientific Testing on August 26, 2016 and requested, among other tests, to do radiocarbon and DNA methylation testing on Mr. Avery's blood swabs taken from the RAV-4. The purpose of these tests was to determine if Mr. Avery's blood had come from the 1996 blood vial. After receiving the samples, current post-conviction counsel's experts determined that there was an insufficient quantity of blood for these tests. Furthermore, current post-conviction counsel abandoned this effort after determining that the blood planted on the RAV-4 was taken from Mr. Avery's sink in 2005.

to police that Ms. Halbach was on the Avery property sometime between 2:00 p.m. and 2:30 p.m. (Affidavit of Steven A. Avery, Sr. ("Affidavit of Steven Avery"), attached and incorporated herein as **P-C Exhibit 4**).

115. Mr. Avery then drove his Pontiac Grand Am from his parents' residence to its usual parking spot in front of his garage. Mr. Avery then walked next door to his sister's trailer, where he attempted to unhitch the trailer. In so doing, Mr. Avery broke open the cut on the middle finger of his right hand. His finger was dripping blood as he walked back to his car to retrieve his cell phone charger. While in his car, Mr. Avery dripped blood from his finger onto the seats and the gear shift. From his car, Mr. Avery walked to his trailer, entering through the door at the south end. Mr. Avery dripped blood on the floor as he entered the bathroom to find a piece of tape to put on the cut. Mr. Avery dripped blood onto the rim and basin of the sink and the bathroom floor. He did not wash away or wipe up the floor or sink because his brother Charles Avery ("Chuck") was waiting for him to go to Menards in Manitowoc with him. He hastily wrapped his finger in masking tape and exited the trailer through the front door. Mr. Avery forgot to lock the south door on the front of the trailer. He did not clean the blood out of his sink prior to leaving the trailer at approximately 7:30 p.m. to go to Menards with his brother Chuck. (Affidavit of Steven Avery, **P-C Exhibit 4**). Menards in Manitowoc was an approximately 23 minute drive from the Avery property. (Affidavit of Steven Avery, **P-C Exhibit 4**). Mr. Avery and Chuck checked out at Menards at 8:06 p.m. (Menards Surveillance Video, attached and incorporated herein as **P-C Exhibit 5**).

116. Blood stains were noted on the molding (Item AA) and the inside living room door (Item CQ) of Mr. Avery's trailer. (3/31/2006 WSCL DNA Report, attached and incorporated

herein as **P-C Exhibit 6**, STATE 5245, 5249). Mr. Avery's Pontiac was unlocked and visible blood was on the gear shift. Anyone who examined the interior of his trailer or vehicle would have recognized that the locations of the various blood stains indicated Mr. Avery had a cut on his hand. (Affidavit of Steven Avery, **P-C Exhibit 4**).

117. Mr. Johnson, a family friend of the Avery's and owner of Mr. Avery's trailer, remembers observing the cut on Mr. Avery's finger at least one week prior to October 31, 2005. (Affidavit of Roland A. Johnson ("Affidavit of Rollie Johnson"), attached and incorporated herein as **P-C Exhibit 7**).

118. At approximately 7:30 p.m., Mr. Avery was exiting the Avery property onto Highway 147 when he observed taillights of a vehicle close to the front of his trailer. (Affidavit of Steven Avery, **P-C Exhibit 4**; Menards Surveillance Video, **P-C Exhibit 5**). Mr. Avery contends that the only way the vehicle could enter his property from the direction it was pointed was if it was driven by way of Kuss Road and then across the field to the front of his trailer. Mr. Avery believes the vehicle's taillights were similar to those of the RAV-4 and not a squad car. Mr. Avery instructed his brother Chuck to turn around and drive back to the trailer, but by the time they drove back to Mr. Avery's trailer, the vehicle had departed into the darkness. (Affidavit of Steven Avery, **P-C Exhibit 4**). Mr. Avery and Chuck went to Menards and the county jail to drop off money for Mr. Avery's girlfriend. (Affidavit of Steven Avery, **P-C Exhibit 4**). Mr. Avery arrived home at approximately 10:00-10:30 p.m. Mr. Avery did not enter the bathroom and went straight to bed. (Affidavit of Steven Avery, **P-C Exhibit 4**).

119. On November 4, 2005, Mr. Avery awoke at his normal time of 6:00 a.m. When he entered the bathroom of his trailer to take a shower, he observed that most of the blood in

and around his sink had been removed. (Affidavit of Steven Avery, **P-C Exhibit 4**).

120. Mr. Avery consistently expressed his belief to his attorneys and the media that the blood of his found in Ms. Halbach's vehicle was planted and that it came from his trailer. In one interview, he said he dripped blood from his finger into his bathroom sink. (Video Clips from 11/9/05 NBC-26 WFRV interview and 11/18/05 WBAY interview, attached and incorporated herein as **P-C Group Exhibit 8**).

121. At 10:30 a.m. on November 4, 2005, Lt. Lenk and Det. Remiker arrived at the Avery property to interview Mr. Avery. (Pages from MTSO Summary Report, **P-C Group Exhibit 11**, STATE 80). In the early evening, Mr. Avery smelled cigarette smoke when he entered his bedroom to retrieve a cable for his mother's television. Neither Mr. Avery nor his girlfriend smoked. Mr. Avery believes his trailer was entered unlawfully a second time. (Affidavit of Steven Avery, **P-C Exhibit 4**; 11/9/05 Interview of Steven Avery and Execution of Search Warrant ("11/9/05 Execution of Search Warrant"), attached and incorporated herein as **P-C Exhibit 9**, STATE 553-54).

122. On November 5, 2005, when Mr. Avery was preparing to leave for a trip to the family property in Crivitz, he noticed the south front door of his trailer had been pried open. Specifically, Mr. Avery observed pry marks on the south door of his trailer. (Affidavit of Steven Avery, **P-C Exhibit 4**; Affidavit of Rollie Johnson, **P-C Exhibit 7**). He remembered locking this door after Lt. Lenk and Det. Remiker left on the morning of November 4, 2005. (Affidavit of Steven Avery, **P-C Exhibit 4**).

123. As Mr. Avery's brother Chuck left for Crivitz, he observed headlights in the area where Ms. Halbach's vehicle was discovered by the pond. Chuck called Mr. Avery at 7:20 pm. to check on the headlights, but by the time Mr. Avery arrived by Chuck's trailer, the lights

were gone. (Affidavit of Steven Avery **P-C Exhibit 4**) (Page from Steven Avery's Phone Records, attached and incorporated herein as **P-C Exhibit 10**) (Pages from MCSD Summary Report verifying Chuck's phone number, attached and incorporated herein as **P-C Exhibit 11**, STATE 93).

Trial Defense Counsel's Failure to Present a DNA Expert's Opinions about Blood Being Planted in the RAV-4

124. On November 7, 2005, the WSCL discovered small drops of blood in the front of Ms. Halbach's vehicle on the driver and passenger seats, driver's floor, and the rear passenger door jamb. (Bench notes of WSCL blood spatter analyst Nick Stahlke, attached and incorporated herein as **P-C Exhibit 12**, STATE 1_1776-77). These blood drops produced a complete DNA profile of Mr. Avery. (November 14, 2005, WCSL DNA report ("11/14/05 WSCL DNA report"), attached and incorporated herein as **P-C Exhibit 13**, STATE 5095-98).

125. Suspiciously, there were no bloody fingerprints of Mr. Avery in or on the vehicle despite the fact that he could not have been wearing gloves when he allegedly deposited blood, from the cut on his finger, in the vehicle. (12/13/05 WSCL Fingerprint Report, attached and incorporated herein as **P-C Exhibit 14**).

Applicable Law Re: The Admissibility of Conducting Experiments and Recreations

126. The admissibility of experiments and recreations to support and illustrate an expert's opinions is well-established. "Pretrial experiments may be admitted into evidence if their probative value is not substantially outweighed by prejudice, confusion, and waste of time. . . . Experts are allowed to describe such experiments, state the results and give their conclusions based thereon." *Maskrey v. Volkswagenwerk Aktiengesellschaft*, 125 Wis.2d 145 (Ct. App. 1985).

127. Furthermore, an experiment or recreation need not exactly replicate the circumstances at issue in order to be admissible. "Rather, they need only be "sufficiently similar" such that the [trier of fact] can get a view of the issues involved." *Roy v. St. Lukes Medical Center*, 2007 WI App. 218, 305 Wis.2d 658, ¶ 25.

128. Thus, an expert's testimony that the experiments constitute his best approximation of the parties' respective theories provides a sufficient foundation for the admission of the experiments and visual depictions thereof. *Id.* at ¶¶ 27-28.

Failure of Trial Defense Counsel to Present a Blood Spatter Expert Who Had Conducted Experiments Which Demonstrated that Mr. Avery's Blood was Planted in the RAV-4

129. Mr. James, a renowned blood spatter expert, has examined all of the relevant blood spatter evidence produced in discovery to trial defense counsel. Mr. James oversaw a number of blood spatter experiments and formed opinions based upon a reasonable degree of scientific certainty as a bloodstain pattern analyst.

130. Mr. James, based upon the experiments that he oversaw, opines that the blood spatter found in the RAV-4 was selectively planted because the experiments demonstrated that if the State's theory that Mr. Avery was actively bleeding from the cut on his right middle finger was true, then blood would have been deposited in many more places in the RAV-4 than where it was deposited.

131. The blood spatter experiments conducted with actual blood on the subject's middle finger conclusively demonstrate that the blood would have been deposited on the RAV-4's outside door handle, key, key ring, steering wheel, the gear shift lever, brake lever, battery cables, and hood prop. The blood found in the RAV-4 was only deposited in six places[7],

[7] Small drops of blood were located on the driver's and passenger's seats, driver's floor, rear passenger door jamb, CD case, and by the ignition. (Bench Notes of Nick Stahlke, **P-C Exhibit 12**, STATE 1_1776-77).

not 15, and consisted of small drops of blood in the front of Ms. Halbach's RAV-4 on the driver and passenger seats, driver's floor, and the rear passenger door jamb.

132. Mr. James oversaw experiments that conclusively refute Mr. Kratz's argument that the "sheer volume, the sheer number of places rule out that the blood in the RAV-4 was planted." The experiments demonstrated that it was actually a small amount of blood that was planted in the RAV-4 and it was selectively dripped and one stain most probably was applied with an applicator. (Affidavit and CV of Stuart James ("Affidavit of Stuart James"), attached and incorporated herein as **P-C Group Exhibit 16**).

133. Mr. James opines that the blood flakes detected on the carpet of the RAV-4 were planted because experiments demonstrated that blood dripped on RAV-4 carpeting would be absorbed in the carpet and would not form flakes on top of the carpet. (Affidavit of Stuart James, **P-C Group Exhibit 16**).

134. Mr. James opines that the most likely source of Mr. Avery's planted blood was the blood deposited by Mr. Avery in his sink on November 3, 2005, and not blood from the 1996 blood vial. Mr. James, because of his familiarity with EDTA blood vials, opines that the hole in the top of the 1996 blood vial tube was made at the time Mr. Avery's blood was put in the tube, and the blood around the stopper is a common occurrence and does not indicate that the tube was tampered with. (Affidavit of Stuart James, **P-C Group Exhibit 16**).

Failure of Trial Defense Counsel to Present a Blood Spatter Expert Who Had Conducted Experiments Which Refuted The State's Blood Spatter Expert's Opinion About Cause of Blood Spatter on Rear Cargo Door of RAV-4

135. Mr. James opines that the blood spatter on the inside of the rear cargo door was the result of Ms. Halbach being struck with an object consistent with a hammer or mallet while she

was lying on her back on the ground behind the vehicle after the rear cargo door was opened.

136. Mr. James opines that the State expert, Mr. Stahlke, mistakenly described the blood on the rear cargo door as having been projected from Ms. Halbach's bloodied hair after she had been shot and as she was thrown into the cargo area of the vehicle. (TT:2/26:227-29; Affidavit of Stuart James, **P-C Group Exhibit 16**).

137. Mr. James, by overseeing a series of experiments, opines that the State's description of the cause of the blood spatter on the rear cargo door resulting from Ms. Halbach being thrown into the cargo area and blood being projected from her bloodied hair on the cargo door is demonstrably false. (TT:3/15:99; Affidavit of Stuart James, **P-C Group Exhibit 16**).

138. The erroneous blood spatter testimony of the State's expert Mr. Stahlke resulted in the State presenting a false narrative to the jury about the sequence of events surrounding the attack on Ms. Halbach. The State presented a scenario where Ms. Halbach was already fatally injured in Mr. Avery's garage prior to being thrown in the back of the RAV-4. The experiments overseen by Mr. James demonstrate that Ms. Halbach was struck on the head after she opened the rear cargo door. She fell to the ground next to the rear bumper on the driver's side where she was struck repeatedly by an object similar to a mallet or hammer. (Affidavit of Stuart James, **P-C Group Exhibit 16**, ¶ 17).

Failure of Trial Defense Counsel, Because of Not Having A Blood Spatter Expert, To Recognize 1996 Blood Vial Was Not the Source of Blood in the RAV-4

139. Mr. Avery's trial defense counsel were unaware of the EDTA preserved whole blood sample stored in the Manitowoc County Clerk of Court's office until the summer of 2006. Prior to that time, trial defense counsel failed to develop a credible explanation for the

presence of Mr. Avery's blood in the RAV-4. Trial defense counsel waited until December 2006 to present a motion to the trial court requesting that they be allowed to examine the blood vial. (Motion for Order Allowing Access to Prior Court File, attached and incorporated herein as **P-C Exhibit 17**).

140. Mr. Avery's trial defense counsel relied exclusively upon a frame-up theory of defense, correctly arguing that all evidence inculpating Mr. Avery was fabricated. However, they incorrectly argued that Mr. Avery's found in Ms. Halbach's vehicle was planted by law enforcement and that it came from a 1996 blood vial held in the Manitowoc County Clerk of Courts office. (TT:3/14:177-81). Trial defense counsel represented to the jury that the seal of the 1996 blood vial package had been broken and resealed with a strip of Scotch tape. (TT:3/14:177). Trial defense counsel would have been aware that this package was opened by members of the Wisconsin Innocence Project in 2002 to examine forensic evidence that could be tested. (12/11/16 Interview of former Manitowoc County District Attorney, Edward Fitzgerald ("12/11/06 Fitzgerald Interview"), attached and incorporated herein as **P-C Exhibit 18**, STATE 1_9950; 12/21/06 DCI report regarding review of Manitowoc County Clerk of Courts records ("12/21/06 Records Review"), attached and incorporated herein as **P-C Exhibit 19**, STATE 2_1068). At that time, Mr. Avery's Wisconsin Innocence Project attorneys broke the seal of the 1996 blood vial package, and resealed the enclosed box using only a strip of Scotch tape. (12/11/06 Fitzgerald Interview, **P-C Exhibit 18**, STATE 1_9951; 12/21/06 Records Review, **P-C Exhibit 19**, 2_1068-69). There was no credible proof presented to the jury establishing that Lt. Lenk and Sgt. Colborn accessed the Clerk of Court's file to obtain Mr. Avery's blood to plant it in the RAV-4.

141. Mr. Avery's trial defense counsel further inaccurately represented Lt. Lenk's knowledge of the 1996 blood vial to the jury. Trial defense counsel argued that Lt. Lenk had personal knowledge of the 1996 blood vial of Mr. Avery's blood in the Clerk of Court's office. (TT:2/21:31-35; TT:3/14:178-79). However, trial defense counsel failed to present evidence that proved, in any manner, that Lt. Lenk had knowledge of the 1996 blood vial. (TT:2/21:18). Trial defense counsel relied on a transmittal form that showed that other evidence from Mr. Avery's 1985 case was sent to the WSCL for testing. Simply stated, there is no evidence that Lt. Lenk ever had possession of or even knew about the 1996 blood vial of Mr. Avery's blood stored in the Clerk of Court's office. Despite knowing that there was no provable connection between Lt. Lenk and the 1996 blood vial, trial defense counsel represented to the jury that Lt. Lenk must have inadvertently found the 1996 blood vial in examining the file. (TT:2/21:26-29). This argument was totally lacking in credibility because there was no corroborative evidence to support it.

142. The Court was aware that no provable connection existed between Lt. Lenk and the 1996 blood vial, but allowed the planting defense to proceed to the jury. (Order on State's Motion to Exclude Blood Vial Evidence, attached and incorporated herein as **P-C Exhibit 20**, p. 4).

143. Trial defense counsel was aware that the nurse who drew Mr. Avery's blood in 1996 created the needle hole in the blood vial when she deposited Mr. Avery's whole blood into the EDTA prepared tube. (Trial Defense Counsel's Statement on Planted Blood, attached and incorporated herein as **P-C Exhibit 21**, ¶ 5). Trial defense counsel had no reason to believe that the hole in the top of the 1996 blood vial was created by anyone except this nurse.

144. Trial defense counsel's theory about the 1996 blood vial was carelessly constructed without corroboration. The blood vial theory was abandoned during the trial and it resulted in no viable theory being presented to the jury about trial defense counsel's claim that the blood in the RAV-4 was planted. Trial defense counsel lost credibility with the jury when it was unable to present any evidence that Mr. Avery's blood in the RAV-4 was planted.

145. Current post-conviction counsel's blood spatter expert has been able to demonstrate that all of Mr. Avery's blood in the RAV-4 was selectively planted and that the blood spatter on the rear cargo door was not the result of Ms. Halbach being thrown into the cargo area by her attacker as the State told the jury. (Affidavit of Stuart James, **P-C Group Exhibit 16).** The failure of trial defense counsel to have a viable theory supported by expert testimony explaining how Mr. Avery's blood was planted in Ms. Halbach's vehicle all but guaranteed his conviction and life sentence without parole.

Failure of Trial Defense Counsel to Demonstrate to the Jury that Ms. Halbach's Key Was Planted in Mr. Avery's Bedroom

146. Despite multiple prior entries into Mr. Avery's trailer, Ms. Halbach's Toyota RAV-4 key was not discovered until November 8, 2005. Prior to the discovery of the RAV-4 key with Mr. Avery's DNA on it, there was no forensic evidence in Mr. Avery's trailer connecting him to Ms. Halbach's death. Mr. Kratz contended that Mr. Avery kept the key so that he could move the RAV-4 to crush it. However, Mr. Avery would not have had to use a key to crush the R-4 because a frontloader would have picked up the vehicle and placed it in the crusher without starting the engine. Trial defense counsel failed to learn this simple but important fact by interviewing Mr. Avery or any of his family members on this issue. (Affidavit of Steven Avery, **P-C Exhibit 4**).

147. During the November 8 search of Mr. Avery's bedroom, Sgt. Colborn conducted an hour-long search of Mr. Avery's small bookcase, which was approximately 32 x 16 x 31 inches. (TT:2/20:123, 125). Sgt. Colborn testified that he tipped and twisted the bookcase, pulling it away from the wall. (TT:2/20:126). He proceeded to remove all of the bookcase contents, examine them, and put the items back in the bookcase but did not observe the key in the bookcase. (TT:2/20:126-27, 130). Sgt. Colborn testified that he forcefully pushed the photo album into the bookcase, and according to the State's theory, Sgt. Colborn's actions forced the key to fall from the back of the shelf and migrate to a place on the carpet on the northwest side of the bookcase by Mr. Avery's slippers. (TT:2/20:125-31).

148. The key was not present in the initial photographs of the bookcase and Mr. Avery's slippers. (Trial Exhibit 208; MHT:8/9:210; TT:2/20:130). During Sgt. Colborn's frenetic interaction with the bookcase, Lt. Lenk left the bedroom. (TT:2/20:129-30). When Lt. Lenk returned, he noticed a Toyota key had suddenly appeared. (TT:2/21:12-13). Rather than being located where one would expect the key to have fallen behind the bookcase, based on Sgt. Colborn's actions, the key was lying on the northwest side of the bookcase on the carpet. (Trial Exhibit 210). Lt. Lenk provided the only explicit account of the slippers being moved (as shown in the comparison of Trial Exhibits 208 and 210). (TT:2/21:10-11). Prior to the key's discovery, Lt. Lenk reportedly picked the slippers up and set them back down after checking within and under them, while searching Mr. Avery's bedroom on November 8, 2005. (TT:2/21:10-11).

149. Neither side subpoenaed Mr. Avery's bookcase to the trial. Trial defense counsel's failure to have the bookcase at trial to demonstrate the impossibility of the State's story about the

discovery of the key was a fatal error. A simple experiment with the bookcase and Toyota key would have conclusively demonstrated that the key was planted next to the bookcase by Sgt. Colborn and Lt. Lenk. Conclusive proof that this one piece of evidence was planted would have collapsed the State's house of fabricated evidence. Current post-conviction counsel had experiments performed with an identical bookcase ("experiment bookcase") an identical 1999 Toyota RAV-4 key on a blue fabric lanyard ("experiment key and lanyard") that demonstrates that Sgt. Colborn's and Lt. Lenk's testimony about the discovery of Ms. Halbach's key in Mr. Avery's bedroom is demonstrably false.

150. Current post-conviction counsel's law clerk conducted a bookcase experiment and produced the following results:

a. Mr. Avery's current post-conviction counsel, after reviewing the trial testimony of Sgt. Colborn and Lt. Lenk and the photos of Mr. Avery's bedroom taken by investigators on November 8, had an identical bookcase placed in Mr. Avery's bedroom. (Trial Testimony and Exhibits of St. Colborn and Lt. Lenk as cited in ¶¶ 147-148, *supra*). A charger was plugged into the wall outlet as it had been in Mr. Avery's bedroom on November 8, 2005. Items such as loose change, a television remote, a can of aerosol spray, and envelopes were placed in and on the experiment bookcase as they were positioned in and on Mr. Avery's bookcase prior to the search according to photos taken by investigators on November 8, 2005. (Trial Exhibits 208 and 209). (Affidavit of Kurt Kingler, attached and incorporated herein as **P-C Exhibit 22,** ¶¶ 5-6).
b. The experiment key and lanyard were placed in the back left corner of the bottom shelf of the experiment bookcase to most accurately simulate Sgt. Colborn's description of where the key and lanyard landed. (Affidavit of Kurt Kingler, **P-C Exhibit 22,** ¶7).
c. A photo album was used to forcibly strike the back panel of the experiment bookcase to separate the back panel from the bookcase itself, as described by Sgt. Colborn and shown in Trial Exhibit 169. These forceful strikes did not cause the experiment key and lanyard to fall through the gap between the back panel of the experiment bookcase and frame. The fabric of the lanyard appeared to cause it to adhere to the wood surface and hold the experiment key in place. (Affidavit of Kurt Kingler, **P-C Exhibit 22,** ¶8).
d. With the specific intent of pushing the experiment key and lanyard through the gap between the back panel and the experiment bookcase, the photo album was used to forcefully strike the back panel an additional 5 times. The experiment key and lanyard were eventually pushed through the gap between the back panel and

the bookcase frame and fell through the gap and directly to the floor, directly behind the experiment bookcase, following the direction of gravity. The experiment key and lanyard did not end up on the northwest side of the bookcase beneath the wall outlet, as described by Sgt. Colborn and shown in Trial Exhibit 210. (Affidavit of Kurt Kingler, **P-C Exhibit 22,** ¶9).

e. In the process of making the initial strikes against the back panel of the experiment bookcase with the photo album, much of the loose change fell off the experiment bookcase in addition to the television remote and an envelope, unlike the items in the photos of the actual bookcase. (Trial Exhibit 20). (Affidavit of Kurt Kingler, **P-C Exhibit 22,** ¶10).

f. Another attempt was made to push the experiment key and lanyard through the gap created between the back panel and experiment bookcase frame.The experiment key and lanyard were placed in the left anterior corner of the experiment bookcase and it was tipped and twisted and again, the photo album was forcefully pushed against the back panel of the experiment bookcase. The experiment key and lanyard did not move during this forceful pushing, and the lanyard again adhered to the wood surface of the experiment bookcase causing the experiment key and lanyard not to move. (Affidavit of Kurt Kingler, **P-C Exhibit 22,** ¶11).

g. A final attempt was made to dislodge the experiment key and lanyard from the bottom left corner of the experiment bookcase by tilting and rocking it. This final effort was unsuccessful in dislodging the experiment key and lanyard from its resting place on the left inside corner of the experiment bookcase. The experiment key and lanyard did not move during this activity but the remainder of the loose change and other bedroom debris fell from the top of the experiment bookcase to the bedroom floor. (Video of current post-conviction counsel's bookcase experiment, "Video of bookcase experiment," attached and incorporated herein as **P-C Exhibit 41**). (Affidavit of Kurt Kingler, **P-C Exhibit 22,** ¶12).

Failure of Trial Defense Counsel to Investigate and Demonstrate that Planted Toyota Key was a Sub-Key and Not a Master Key As Mr. Kratz Claimed

151. Mr. Kratz wanted the jury to believe that the key found in Mr. Avery's bedroom was the victim's everyday key because, if the key was a spare key, it is more likely that the key was planted by Sgt. Colborn and Lt. Lenk after it was obtained from the victim's residence by law enforcement. The 1999 Toyota RAV-4 manual clearly shows that the key recovered from Mr. Avery's bedroom was Ms. Halbach's spare or sub-key. Comparing evidence photos of the key found in Mr. Avery's bedroom (Trial Exhibits 219 and 316) with the 1999 Toyota RAV-4 manual, it is apparent that the key found in Mr. Avery's

bedroom was a spare or sub-key and not Ms. Halbach's master key. The shape of the key discovered in Mr. Avery's bedroom matches the shape of the sub-key illustrated in the RAV-4 manual, whereas the shape of the master key illustrated in the manual is more square. (RAV-4 Manual, **P-C Exhibit 1**).

152. A photograph of Ms. Halbach standing in front of her RAV-4 was admitted as Trial Exhibit 5. In this photograph, Ms. Halbach is holding a ring of keys on a white lanyard. (Trial Exhibit 5). Her master key is readily observable because of its square shape. Additionally, Ms. Halbach's RAV-4 had electronic locks. (RAV-4 Manual, **P-C Exhibit 1**; Driver's Door Photos, **P-C Group Exhibit 2**, STATE 9788, 1_0209). Based upon the photograph of Ms. Halbach, it is clear that Ms. Halbach kept her key fob attached to her master vehicle key. There was no fob attached to the key found in Mr. Avery's bedroom on November 8, 2005. The master key to Ms. Halbach's vehicle, which did have electronic locks and a fob, was never located, nor was the white lanyard that was attached to the master key as seen in Trial Exhibit 5.

153. On November 4, 2005, news media crews filmed the interior of the house Ms. Halbach shared with Mr. Bloedorn. While interviewing Mr. Bloedorn in the kitchen, news media filmed what appeared to be the RAV-4 sub-key and blue lanyard, which was next to the kitchen sink. (November 4, 2005, WFRV Interview of Scott Bloedorn stills, attached and incorporated herein as **P-C Group Exhibit 23**). It is indisputable that the key that was found Mr. Avery's bedroom on November 8, 2005 was Ms. Halbach's sub-key with a blue lanyard attached. Trial defense counsel failed to demonstrate this simple undisputed fact to the jury by using Trial Exhibit 5 and the RAV-4 manual which was critical to the success of proving the sub-key and blue lanyard were planted. (RAV-4 Manual, **P-C Exhibit 1**).

Failure of Trial Defense Counsel to Present a Trace Expert to Establish that the Key Planted in Mr. Avery's Residence was not a Key Ms. Halbach Used Every Day, Making it More Probable it was Planted

154. Dr. Palenik examined the Toyota sub-key recovered in Mr. Avery's bedroom (WCSL Item C). Dr. Palenik concluded that the sub-key recovered from Mr. Avery's bedroom is demonstrably not the master key that Ms. Halbach used on a daily basis because:

    a. The shape of the key recovered from Mr. Avery's bedroom (Item C) corresponds closely to the shape of the sub-key illustrated in the 1999 Toyota RAV-4 owner's manual;

    b. The key recovered from Mr. Avery's bedroom (Item C) is different from the key seen in the victim's hand in Trial Exhibit 5.

    (Affidavit and CV of Christopher Palenik, PhD, ("Affidavit of Dr. Palenik"), attached and incorporated herein as **P-C Group Exhibit 24,** ¶11) (RAV-4 Manual, **P-C Exhibit 1**).

155. The sub-key (Item C) and the debris adhering to it were microscopically examined. Wear patterns on surfaces of the sub-key that made contact with the locks and ignition show evidence that the sub-key had been utilized since the deposits of the fine debris in the sub-key grooves occurred. This is consistent with testimony that the sub-key had been placed into the vehicle ignition and driver's door after collection by state crime laboratory analyst Ms. Culhane. (TT:2/23:181).

156. Furthermore, the relative amount of debris in the sub-key grooves was compared to 5 exemplar vehicle keys that are utilized on a daily basis (including one from a 2012 Toyota RAV-4). While the amount of debris on a key can vary due to a number of circumstances, the general quantity of debris on the recovered sub-key (Item C) is greater than any of the

exemplar keys that were examined. This is consistent with the hypotheses that the key in question was not utilized on a regular basis and was not the primary vehicle key utilized by Ms. Halbach. This is also consistent with the previously established facts stated in ¶¶ 152-153, *supra*. (Affidavit of Dr. Palenik, **P-C Group Exhibit 24**, ¶ 13).

Failure of Trial Defense Counsel to Present a DNA Expert to Establish that Mr. Avery's DNA Was Planted on the Sub-Key by Law Enforcement

157. Allegedly, Ms. Halbach's sub-key had Mr. Avery's complete DNA profile but not Ms. Halbach's. (TT:2/23:181-83; TT:2/26:103-4). Although no presumptive blood testing was done by the State which would establish whether the DNA came from blood, their expert nonetheless testified that Mr. Avery's blood from his cut finger had masked Ms. Halbach's DNA profile. (TT:2/26:96; TT:2/19:133).

158. Current post-conviction counsel's DNA expert, Dr. Reich, conducted experiments that demonstrate that the DNA on the sub-key was planted because the amount of DNA detected by the WSCL on the sub-key found in Mr. Avery's bedroom is of much greater quantity than the amount of DNA Mr. Avery deposited on an exemplar sub-key by holding it in his hand for 12 minutes as a part of Dr. Reich's experiment. (Affidavit of Steven Avery, **P-C Exhibit 4**). Specifically, Dr. Reich found that Mr. Avery deposited 10 times less DNA on the exemplar sub-key than what the WSCL detected on the sub-key recovered from Mr. Avery's bedroom. As illustrated by Dr. Reich's experiments, Mr. Avery could not deposit the amount of DNA identified on the sub-key by the WSCL simply by holding it in his hand. (Affidavit of Dr. Reich, **P-C Group Exhibit 15,** ¶ 31). Because Dr. Reich's experiments have refuted the State's claim that the DNA on the sub-key came from Mr. Avery holding the key, the only remaining plausible explanation is that the DNA was planted on the key from another source of Mr. Avery's DNA.

159. New scientific source testing was performed on the exemplar sub-key to determine the source of the DNA, as discussed in ¶ 362, *infra*. An experiment eliminated skin cells, rubbed from slippers identical to the ones photographed in Mr. Avery's bedroom on November 8, 2005, as the source of the DNA on the Toyota Key (Item C). The quantity of skin cells detected by Dr. Reich on the exemplar sub-key after it had been rubbed in worn slippers identical to Mr. Avery's, was not comparable to the quantity detected by Ms. Culhane on the key. Mr Avery's toothbrush was taken by law enforcement and current post-conviction counsel's DNA experts' experiments have shown that rubbing a toothbrush on a exemplar sub-key would produce a comparable quantity of DNA. Mr. Avery's toothbrush was taken by law enforcement from his bathroom but suspiciously was never logged into evidence. Mr. Avery, after reviewing a law enforcement photograph taken of his bathroom during one of the multiple searches, immediately noticed that his toothbrush was missing. Mr. Avery had not removed the toothbrush prior to leaving for Crivitz on November 5, 2005. The only plausible explanation for the missing toothbrush was that law enforcement removed the toothbrush but never logged it into evidence so that it could be rubbed on the sub-key of Ms. Halbach. (Affidavit of Steven Avery, **P-C Exhibit 4**; Affidavit of Dr. Reich. **P-C Group Exhibit 15**, ¶ 37**;** Trial Exhibit 206).

Applicable Law Re: Exceeding Scope of Search Warrant for Mr. Avery's DNA Swabs Violated the Fourth Amendment

160. The Fourth Amendment to the United States Constitution requires that a search warrant "particularly describe the place to be searched, and the persons or things to be seized." *State v. Noll,* 116 Wis.2d 443 (1984). The original purpose of the particularity requirement was to do away with the evils of the general warrant known to the colonists as the writ of assistance. These writs, which were issued on "mere suspicion," gave customs

officials blanket authority to search wherever they pleased for any goods imported in violation of British tax laws. *United States v. Christine*, 687 F.2d 749, 755 (3rd Cir. 1982). In order to satisfy the particularity requirement, the warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized. *Steele v. United States*, 267 U.S. 498, 503 (1925). The use of a generic term or general description is constitutionally acceptable only when a more specific description of the items to be seized is not available. *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981).

161. The Wisconsin Supreme Court has stated that the particularity requirement of the Fourth Amendment satisfies 3 objectives by preventing general searches, the issuance of warrants on less than probable cause, and the seizure of objects different from those described in the warrant. *State v. Petrone,* 161 Wis.2d 530, 540 (1991) cert denied, 502 U.S. 925 (1991). Like the Fourth Amendment of the Federal Constitution and art. I, sec. 11 of the Wisconsin Constitution, a search warrant must particularly describe the place to be searched and the things to be seized. *Myers v. State,* 50 Wis.2d 248, 260 (1973). As in the past, the particularity requirement prevents the government from engaging in general exploratory rummaging through a person's papers and effects in search of anything that might prove to be incriminating. *State v. Starke*, 81 Wis.2d 399 (1977); *State v. Pires*, 55 Wis.2d 597 (1972). Whether an item seized is within the scope of a search warrant depends on the terms of the warrant and the nature of the items seized. *State v. Andrews,* 201 Wis.2d 383, 390-91 (1996).

162. Evidence uncovered during a search must not invariably be described in the warrant before it may be seized. *United States v. Damitz*, 495 F.2d 50, 56 (9th Cir. 1974). The threshold question must be whether the search was confined to the warrant's terms. The

search must be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed. It must not be a general exploratory search. *Gurleski v. United States,* 405 F.2d 253, 258 (5th Cir. 1968).

163. In *United States v. Rettig*, 589 F.2d 418 (9th Cir. 1979), the Court found that the investigators did not confine their search in good faith to the objects of the warrant. In that case, the police entered the defendant's home, caught him flushing marijuana down the toilet and obtained a search warrant for the marijuana. However, instead of seizing the marijuana, the police spent hours reviewing thousands of pages of written material seized during the search. The Court held that the investigators substantially exceeded any reasonable interpretation of its provisions. *Id.* at 423. All of the evidence seized during the search was suppressed. *Id.*

164. In *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988), the search warrant at issue identified firearms owned by the defendant as the items subject to the proposed search. In addition to the firearms seized during the search, hundreds of items not identified in the warrant were seized. The seizure of those items was "not listed by practical considerations" and appeared to be the result of a "fishing expedition." *Id.* at 1199. Both the firearms and additional items were suppressed. *Id.* at 1200.

165. Both *Rettig* and *Medlin* illustrate that a search conducted in "flagrant disregard" of the warrant's limits undermines the Fourth Amendment's particularity requirement and requires suppression of all items seized, including those within the scope of the warrant. *State v. Pender,* 308 Wis.2d 428 (2008).

Failure of Trial Defense Counsel to Detect and Raise Fourth Amendment Violation Regarding Groin Swab taken from Mr. Avery which exceeded the Scope of the Search Warrant for Mr.

Avery's DNA Samples

166. Two groin swabs were taken from Mr. Avery at Aurora Medical Center by a nurse on November 9, 2005. Mr. Avery was escorted by Inv. Wiegert to Aurora Medical Center at approximately 1:20 p.m. Agent Fassbender met Inv. Wiegert, who was escorting Mr. Avery for the examination. Mr. Avery was taken into an examination room. Present in the examination room were Faye Fritsch, RN and SANE Medical Director Laura Vogel-Schwartz, MD. (11/9/05 Execution of Search Warrant, **P-C Exhibit 9**, STATE 1635). Towards the end of the examination, Nurse Fritsch took two swabs of Mr. Avery's groin area in direct contravention of the search warrant, which specifically restricted that DNA samples were to be taken from Mr. Avery's saliva and blood. There was no reference to groin swabs in the search warrant. (11/9/05 Execution of Search Warrant, **P-C Exhibit 9**, STATE 1643). Significantly, Nurse Fritsch's documentation of taking swabs from Mr. Avery excludes any mention of taking groin swabs. A well-qualified nurse following acceptable standards of charting would never fail to document taking the groin swabs unless she were instructed not to document taking the groin swabs by Agent Fassbender or Inv. Wiegert. (Forensic Evidence Checklist, attached and incorporated herein as **P-C Exhibit 26**, STATE 2875, 2877). Agent Fassbender and Inv. Wiegert "conferred and determined that the search warrant did not call for that type of exam. Inv. Wiegert immediately stopped Fritsch and the exam was concluded." Again, Nurse Fritsch would never have taken the groin swabs without being specifically instructed to do so by Agent Fassbender and Inv. Wiegert. Agent Fassbender and Inv. Wiegert's explanation that they did not realize that the search warrant did not call for taking groin swabs is not credible.

167. Furthermore, according to Agent Fassbender's report, Nurse Fritsch disposed of the groin

swabs. (11/9/05 Execution of Search Warrant, **P-C Exhibit 9**, STATE 1635). Agent Fassbender's report is not credible because Nurse Fritsch never mentions, in her charting, disposing of the groin swabs. Agent Fassbender's report directly contradicts Mr. Avery's account of this examination as described in his affidavit. Contrary to Agent Fassbender's report, Inv. Wiegert told Nurse Fritsch that he would discard the swabs while Agent Fassbender escorted Mr. Avery into a separate room to get his fingerprints. As Mr. Avery followed Agent Fassbender and Nurse Fritsch out of the examination room, Mr. Avery heard Inv. Wiegert tell Nurse Fritsch to give him the groin swabs, and Mr. Avery observed Inv. Wiegert walk to the examination room receptacle as if to discard the groin swabs. Mr. Avery observed that Inv. Wiegert's did not drop the groin swabs into the receptacle. (11/9/05 Execution of Search Warrant, **P-C Exhibit 9**, STATE 1635; Affidavit of Steven Avery, **P-C Exhibit 4**).

168. Inv. Weigert, as an experienced investigator, would have known that taking groin swabs was not authorized by the search warrant, which permitted only the collection of saliva and blood samples. (11/9/05 Execution of Search Warrant, **P-C Exhibit 9**, STATE 1643). It is therefore reasonable to conclude, from this clear violation of Mr. Avery's Fourth Amendment rights, that Inv. Wiegert planned to use the illegally seized groin swabs from Mr. Avery to plant Mr. Avery's DNA on other crime scene evidence.

Hood Latch Story Fabricated by Inv. Wiegert and Agent Fassbender in Brendan's Confession

169. It was not until four months after Ms. Halbach's RAV-4 was analyzed by the WSCL in Madison that investigators became interested in the hood latch. The hood latch was first introduced by Agent Fassbender and Inv. Wiegert in their March 1, 2006, interrogation of Brendan. Agent Fassbender asked Brendan, "Did he, did he, did he go and look at the

engine, did he raise the hood at all or anything like that? To do something to that car?" (Pages from March 1, 2006, interrogation of Brendan Dassey ("3/1/06 Interrogation"), attached and incorporated herein as **P-C Exhibit 27**, STATE 4674). In a subsequent interview, Brendan denied seeing Mr. Avery open the hood. (Pages from May 13, 2006, interrogation of Brendan Dassey ("5/13/06 Interrogation"), attached and incorporated herein as **P-C Exhibit 28**, STATE 7300). In the May 13 interview, under pressure by Agent Fassbender and Inv. Wiegert, Brendan capitulated and changed his story to fit their narrative — that Mr. Avery opened the hood of Ms. Halbach's RAV-4. (5/13/06 Interrogation, **P-C Exhibit 28**, STATE 7355).

Failure of Trial Defense Counsel to Investigate and Detect Hood Latch Swab Chain of Custody Fabrication Which Allowed Swab Substitution; Failure to Interview Mr. Avery about Groin Swabs, and Failure to Present DNA and Trace Evidence Experts

170. In an effort to corroborate Brendan's confession taken on March 1, Agent Fassbender and Inv. Wiegert ordered that the hood latch be swabbed for DNA evidence. On April 3, 2006, Agent Fassbender and Inv. Wiegert specifically directed Deputy Jeremy Hawkins ("Dep. Hawkins") and Sgt. Tyson to go into the storage shed where the RAV-4 was located to swab the hood latch, battery cables, and interior and exterior door handles. (4/3/06 CCSD report by Dep. Hawkins, attached and incorporated herein as **P-C Exhibit 29**, STATE 1_2145). At 19:37 hours, Sgt. Tyson swabbed the hood latch. Dep. Hawkins took photographs, including a photograph of the swab. (4/3/06 CCSD report by Dep. Hawkins, attached and incorporated herein as **P-C Exhibit 30**, STATE 1_2095-96).

171. The instructions Agent Fassbender and Inv. Wiegert gave Dep. Hawkins and Sgt. Tyson are inconsistent with a good faith effort to recover forensic evidence. If they really thought Mr. Avery had opened the hood and wanted to collect any possible DNA of his

from the RAV-4, they should also have instructed Sgt. Tyson and Dep. Hawkins to swab the interior hood release lever and hood prop, which, by necessity, Mr. Avery would have handled when opening the hood to disconnect the battery cable.

172. After Sgt. Tyson swabbed the hood latch, he gave the swab to CCSD Dep. Hawkins for storage. (CCSD Evidence/Property Custody Document, **P-C Exhibit 31**, STATE 1_6975). The next day, 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. (4/4/06 CCSD Report by Hawkins, **P-C Exhibit 32**, STATE 1_2099-100). Inv. Wiegert transferred custody of the swab to WSCL personnel, purportedly delivering the swab collected from the hood latch for analysis. (CCSD Evidence/Property Custody Document, **P-C Exhibit 31**, STATE 1_6976). However, on WSCL custody transmittal documents, Dep. Hawkins' name is typed as the submitting officer. (WSCL Receipt of Physical Evidence, attached and incorporated herein as **P-C Exhibit 33**, STATE 4881). Additionally, Dep. Hawkins' name is printed by hand as the submitting officer on the Wisconsin Department of Justice Evidence Transmittal Form labeled M05-2467-27. (WSCL Transmittal of Criminal Evidence, attached and incorporated herein as **P-C Exhibit 34**, STATE 4917). There is no evidence that Dep. Hawkins submitted swabs to the WSCL, and all of the evidence establishes that it was Inv. Wiegert who delivered the hood latch swab and printed Dep. Hawkins' name on the transmittal form. It is therefore reasonable to conclude that Inv. Wiegert printed Dep. Hawkin's name by hand in direct violation of all established chain of custody standards and protocols.

173. According to Agent Fassbender's report, the groin swabs taken of Mr. Avery at Aurora Medical Center were discarded. (11/9/05 Execution of Search Warrant, **P-C Exhibit 9**,

STATE 1635). In light of Nurse Fritsch's failure to report that groin swabs were taken from Mr. Avery and Wiegert and Fassbender's intentional violation of the scope of the search warrant, it is a reasonable probability that they intended to plant DNA from the groin swabs and conceal, from the official medical report, that groin swabs were taken. Inv. Wiegert clearly fabricated the chain of custody form given to WSCL. In light of the new scientific testing done on the hood latch, Inv. Wiegert substituted the groin swabs for the hood latch swabs collected by Sgt. Tyson. (Affidavit of Steven Avery, **P-C Exhibit 4**; Affidavit of Dr. Reich, **P-C Group Exhibit 15,** ¶¶ 33-35) (See Paragraphs 169-172).

Failure of Trial Defense Counsel to Present a DNA Expert to Establish that Mr. Avery's DNA Was Never Deposited on the RAV-4 Hood Latch

174. According to current post-conviction counsel's expert, Dr. Reich, the most common way for forensic evidence to be planted is by re-labeling the forensic swabs. (Affidavit of Dr. Reich, **P-C Group Exhibit 15,** ¶ 38).

175. The State claimed that Mr. Avery's DNA profile on the hood latch was the result of Mr. Avery opening the hood and touching the latch with "sweaty" fingers. (TT:3/7:102-103; TT:3/14:119-20; TT:3/15:83). The WSCL identified 1.9 nanograms (30 microliters of a DNA solution at a concentration of 0.0616 nanograms/microliter) of DNA on the hood latch. (Affidavit of Dr. Reich, **P-C Group Exhibit 15,** ¶ 18; WCSL hood latch DNA quantities, attached and incorporated herein as **P-C Exhibit 35**).

176. Current post-conviction counsel's DNA expert, Dr. Reich, oversaw experiments in which individuals touched a hood latch identical to the one on Ms. Halbach's vehicle. The hood latch was then swabbed. The swabs were source tested for the presence of skin cells and analyzed for the presence of DNA. In 11 of the 15 experiments, no detectable DNA was present on the swab. The remaining four experiments yielded 0.0519 nanograms, 0.0936

nanograms, 0.0696 nanograms, and 0.0729 nanograms of DNA, respectively. The results of these experiments illustrate the complete improbability of an individual leaving a full DNA profile by simply touching the hood latch in order to open the hood. Instead, Dr. Reich has opined that the most logical explanation for such a high yield of DNA is that it was actually obtained from the swab of Mr. Avery's groin, which was substituted for the hood latch swab by Inv. Wiegert (*see* ¶¶ 166-173, *supra*). (Affidavit of Dr. Reich, **P-C Group Exhibit 15,** ¶¶ 25-30, 32-35); Affidavit of Dr. Palenik, **P-C Group Exhibit 24,** ¶ 10).

177. If trial defense counsel had discovered that the groin swab had been substituted for the hood latch swab, that would have been powerful evidence to present to the jury that would have undermined the State's entire theory and demonstrated that Mr. Avery was being framed.

Failure of Trial Defense Counsel to Present a Forensic Fire Expert to Establish that Ms. Halbach's Body Was Not Burned in the Avery Burn Pit and Her Bones Were Therefore Planted

178. Trial defense counsel certainly understood the necessity of having such experts, as is demonstrated by the fact that they had the curriculum vitae, in their trial file, of one of current post-conviction counsel's experts, Dr. DeHaan. (Affidavit of Lauren Hawthorne, attached and incorporated herein as **P-C Exhibit 36**).

179. Dr. DeHaan has been a forensic scientist/criminalist since 1970, having served with the Alameda County Sheriff's Department, California Department of Justice — Bureau of Forensic Services, and the U.S. Treasury Department — Bureau of Alcohol, Tobacco and Firearms. He has served as President of Fire-Ex Forensics, Inc., since its incorporation in January 1999. He has been involved with various aspects of fire and explosion investigation since 1971. In the past 12 years, he has testified as an expert witness in over

50 cases. In the past 30 years, he authored a major textbook, co-authored one textbook, chapters in three textbooks, and over 30 articles. (Affidavit of Dr. DeHaan, attached and incorporated herein as **P-C Group Exhibit 37,** ¶ 2).

180. Dr. DeHaan has expressed, to a reasonable degree of scientific certainty based upon his expertise in the area of fire and fire debris examination, the following opinions:

a. "The documentation, examination, and recovery of the remains at the Avery scene were all below acceptable professional standards of practice. A properly conducted recovery would have involved more comprehensive photography of the burned bones in the "burn pit" and better documentation as to from where and when all bones were recovered. It is my opinion that someone better qualified to recover potential human remains should have been summoned to perform this excavation. There were incomplete and confusing descriptions of where various possible "burn barrels" were located and incomplete numbering and chain of custody."[8] (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 16).

b. "The appearance of the remains as found is often critical to the reconstruction of a fatal event or the destruction of a body. In this case, the minimal photographs taken before the excavation revealed very little useful information as there were few close-up photos taken before or during the recovery/excavation process. In

[8] Bone fragments could not have actually been located in burn barrel no. two because this barrel had already been sifted by WSCL personnel on November 7, and no human bone fragments were discovered in this barrel or any of the barrels examined at that time. (STATE 1_1841-43). During their examination of barrel no. two on November 7, 2005, WSCL personnel used the same sifting apparatus that they later used to sift the burn pit behind Mr. Avery's garage. (TT:2/19:108). Suspiciously, the pieces of burned bone that were eventually found in barrel no. two were noticeably larger than the bone fragments from the burn pit. (TT:3/7:37-38). If bone fragments had been in burn barrel no. two when it was examined by Mr. Ertl and his team from the WSCL on November 7, 2005, the bone fragments would have been isolated by their sifting apparatus.

the pre-excavation overall photos, the area of interest was largely obscured by the shadows cast by the team of investigators standing nearby. In the few photographs of the "burn pit," there appeared to be numerous dried leaves that obscured nearly all identifiable detail of the material below (Item 26). From Sgt. Jost's and Wisconsin DOJ Special Agent Sturdivant's descriptions, it appeared that the remains showed no anatomical relationship to each other. Some remains were found outside the "burn pit" and no large bones (more resistant to fire) were visible at all. There was not sufficient pre-excavation documentation of the condition of the materials in the pit to establish the sequence or time of deposit of the remains ultimately recovered from the "burn pit." There was no assessment of fuels associated with the fire, other than describing the remains of the steel belts and beading of burned vehicle tires." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 17).

c. "The undersigned has had extensive experience with the combustion of human and animal remains under controlled conditions, both as part of enquiries related to active casework and as an instructor in the Forensic Fire Death Investigation Course (FFDIC) presented annually by the SLOFIST fire investigation group since 2008. I have had the opportunity to see some 50 or more unembalmed adult, human cadavers exposed to a variety of real-world fires. These range from "accidental" kitchen fires, to whole room, post-flashover structure fires, to trench- and "roadside" body disposals, to vehicle fires to dumpster and burn barrel disposals. Two of the primary instructors are forensic anthropologists Dr. Allison Galloway from the University of California –Santa Cruz and Dr Elayne Pope

from the Virginia State Medical Examiner's Office. We all assist in the preparation of the "demonstration" fires set as practical exercises for the students, observe the fires, and document the results (and the investigations/recoveries conducted by the student teams)." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 18).

d. As detailed in *Kirk's Fire Investigation* (*Kirk's Fire Investigation*, 7th ed., J.D. DeHaan and D.J. Icove, Pearson/Brady Publishing, 2012, pp 619-631), "destruction of a human body by fire is a progressive process. Upon first sustained exposure to fire, the skin shrinks, chars and splits, exposing the subcutaneous fat. The fat renders out to support a flaming fire adjacent to the body. The muscle tissues dehydrate, char, and burn (reluctantly). Bones are a composite of minerals and organics (fat, nerves, and collagen). The organic components dehydrate, char, and burn off if exposed to sufficient external heat. The mineral component (of both the dense cortical bone (hard outer layers) and the spongy (cancellous or trabecular) structures within them decompose by dehydration of the minerals, a process called calcination). Extreme exposure to fire results in loss of mechanical strength. Calcined bones are usually white, blue-white, or light grey in color and are friable (brittle), and are easily broken or shattered by contact or pressure. Under some conditions, the mineral residues can harden or vitrify into a ceramic-like mass retaining the shape of the original bone." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 19).

e. "Many of the bone fragments shown in Dr. Eisenberg's forensic anthropology photographs appear to be coated with a yellow or tan soil or dust. Dr. Eisenberg

reported that she rinsed some of the recovered bone fragments to allow detailed examination. The bone fragments shown in Dr. Eisenberg's forensic anthropology photos, largely consisted of fragments 1-4 cm in length (0.4 to 2"). Many were completely calcined with no charring of organic tissue visible. Others bore charred residues of organic material in the cancellous or spongy structure within. Such damage can be induced by exposure to an open-air fire of ordinary combustibles for six to eight hours or for shorter times (three to four hours) in a well-ventilated fire in a metal enclosure such as a burn barrel or automobile trunk."(Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 20).

f. "Based on the author's experience in exposing adult human cadavers to a variety of fire conditions, it was observed that a metal enclosure confines the flames to maximize their exposure to the body, reflects heat from the fire onto the target within, and generates radiant heat as the metal itself heats, adding to the total heat flux during the combustion of the body. It is this combined heat flux that occurs within a commercial crematorium, where the radiant heat from the firebrick lining and the sustained uniform flame contact from gas burners bring about full cremation of an adult human body in two and one half hours or less. In open-air "field" cremations, exposure to the flames is not uniform, there is minimal additional radiant heat, and charred masses of soft tissue will survive even a prolonged fire, particularly around the head or lower torso. Bodies that burn undisturbed will often demonstrate areas of less-burned tissue that has been somewhat protected by contact with the ground or confining vessel for the duration of the fire." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 21).

g. "The heat output of a fire largely fueled by an adult human body is limited (estimated to be on the order of that of an office wastebasket fire). The more massive tissues and bones require a larger, more sustained fire to be consumed (or calcined). This can be accomplished with the inclusion of a vehicle tire because it will burn energetically for extended periods of time. If a body is allowed to burn undisturbed to completion in either an enclosure or a well-fueled and ventilated fire, the larger bones will retain their relative anatomical position – head, neck, shoulders, upper arms (humerus), spine, hips (pelvis), upper legs (femurs). The process of stoking a fire with additional lumber or stirring with an implement during its active burning will cause the mechanical destruction of the bones as they are calcined by the flames and often, considerable displacement. The larger bone masses (hip joints, shoulder blades, base of skull at the spine) will remain mostly intact even after stoking an extended cremation of an adult body. The appearance, size, and type of bone fragments documented in Dr. Eisenberg's forensic anthropology reports and photographs exactly mirror the fragments recovered after burn-barrel cremations involving frequent stirring and stoking observed by this author. Such destruction was observed in wood-fueled, burn barrel cremations as short as three and one half hours. (Exhibit C, photographs, attached to Affidavit of Dr. DeHaan, **P-C Group Exhibit 37,** ¶ 22). In one recent case investigation, the accused described stoking a large, wood-fueled "pyre" with numerous adult human bodies for some 15 hours, then crushing most of the bones with rocks or wood clubs, and then removing the larger, more identifiable body parts that survived for disposal in the river. The hundreds of small fragments that

were recovered from the burn site were very similar in size, shape, and condition to the fragments in Dr. Eisenberg's forensic anthropology photos in this case. Note this involved no confinement except for the wood fuel and was accomplished over a span of 15 hours in an open-air burning pit." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 22).

h. "It is the opinion of the undersigned that the human remains recovered and examined by Dr. Eisenberg were physically entirely consistent with cremation of an adult human body in a "field" cremation involving a sustained and re-stoked fire for an extended period of time. In tests conducted as part of FFDIC exercises, open field (roadside dump) fires on flat ground, it was observed that the more massive portions of the adult anatomy (base of the skull, shoulders, pelvis) were charred but were not reduced to calcined bone fragments in fires lasting 4-7 hours, but they did retain their anatomical relationship unless mechanically stirred during the fire. The duration of the fire necessary would depend on whether the fire was in the open (like the shallow "burn pit" suggested by the investigators) or in a well-ventilated metal vessel such as a large drum. Such destruction has been seen to be accomplished in as little as three and one half hours in a well-ventilated, well-tended 55 gallon steel drum with wood fuel. Similar destruction in an open pit would require much more time, on the order of six hours or more." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 24).

i. It is the opinion of Dr. DeHaan that "Teresa Halbach's body was not burned in the burn pit behind Steven Avery's garage." Dr. DeHaan bases this opinion on "the reported lack of anatomical continuity of the remains, the findings of similarly

charred/calcined fragments in burn barrels and other locations on the property, and the absence of the more massive fragments that normally resist such exposure." Dr. DeHaan has observed "transfers of heavily burned remains under a variety of conditions that resulted in the largest amount of the fragmentary remains being transferred to another location (with the loss of anatomical relationships)." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 25).

j. It is the opinion of Dr. DeHaan "that someone transferred Teresa Halbach's bones to Steven Avery's burn pit. The discovery of larger fragments outside the margins of the burn pit and the finding of human bone fragments with similar degrees of fire damage in numerous other areas (including burn barrels on site) is also consistent with the "dumping" of burned remains into the pit, with some rolling away. I have observed the survival of numerous small bones after being dumped from a burn barrel or similar enclosure onto a tarp or examination table. It should be noted that there were numerous steel vessels on the salvage yard and surrounding properties that could have been used to burn a human body. These were not examined. The wood-fueled boiler and smelter were examined by [Agent] Pevytoe and no residues were detected there." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 25).

k. It is the opinion of Dr. DeHaan that the State's theory of the burning of Ms. Halbach's body in an open-air burn pit behind Steven Avery's garage from around 7:00 p.m. to 11:00 p.m. on October 31, 2005, a period of only 4 hours, is incorrect. Specifically, Dr. DeHaan states that "the State's theory is not supported by the physical evidence." Dr. DeHaan states that "burning a body in an open-air

burn pit takes six to eight hours to accomplish to the degree I observed in Dr. Eisenberg's reports and photos." It is Dr. DeHaan's opinion that "the burned bones found in Steven Avery's burn pit could not have been burned to the degree I observed after four hours of burning in an open-air pit like the one behind Steven Avery's garage." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 26).

l. It is the opinion of Dr. DeHaan that the State's theory was also incorrect "in its assertion that the burned vehicle bench seat was used to fuel the burning of Ms. Halbach's body. (TT:3/14:98). The burned remains of the bench seat were not found in the burn pit but near it. Its involvement as an external fuel to aid the combustion of a body in the burn pit is speculative and unsupported by any documents I have reviewed." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 27).

m. It is the opinion of Dr. DeHaan that the State's theory was also incorrect "in its assertion that burned bones were intertwined with metal belts resulting from the burning of tires. (TT:3/14:99). The State represented to the jury that the bones were fused with the metal belts in a manner that suggested that the tires from which the steel belts came were burned with the body in Mr. Avery's burn pit. Based upon my review of photographs taken on November 8, 2005 and November 10, 2005, on the occasion of the second excavation of Steven Avery's burn pit, the bone fragments appear to simply be mixed among the metal belts. I have had personal experience with burning steel-belted automobile tires in combination with human bodies. During fire exposure, the steel multi-strand

wires degrade, break, and fray to form bristles that readily trap any material coming into contact with them, during or after the fire. Small calcined bone fragments are especially easy to trap. This has been observed in test fires where the tires were under or alongside a burned body as well as on top. It should be noted that [Agent] Sturdivant noted that the guard dog's lead was sufficiently long to give him access to at least some of the burn pit. A quantity of the tire wires/belting was observed to be tangled in the dog's lead at one point. Dragging the tire remains across the burned fragments after the fire would result in the accumulation of fragments in the wire. The "burn pit" may have been used previously to dispose of tires, so there was no evidence that the entrapment of the debris occurred during the fire that consumed the remains. From my review of these photographs and reports generated by law enforcement agents at the scene and Dr. Eisenberg in later examinations, there is nothing to suggest that the tires were, in fact, burned with the human bones recovered in Steven Avery's burn pit in the manner described by the State." (Affidavit of Dr. DeHaan, **P-C Group Exhibit 37**, ¶ 28).

Failure of Trial Defense Counsel to Present a Competent Forensic Anthropologist to Establish that Bones in the Manitowoc County Pit were Human

181. Current post-conviction counsel has retained Dr. Symes, a renowned forensic anthropologist who has worked extensively in the areas of human skeletal biology and skeletal anatomy, forensic toolmark fracture pattern interpretation, including most aspects of trauma to bone, sharp force trauma, special expertise in knife and saw marks in bone, ballistic trauma, healing and acute trauma to bone, peri- vs. postmortem influences on bone, blunt force trauma, and burned bone trauma. Dr. Symes was the recipient of the 15th

T. Dale Stewart Award, which is a lifetime achievement award recognized by the American Academy of Forensic Sciences, Anthropology Section. The award recognizes enduring contributions to the field of forensic anthropology and a career marked by accurate, detailed scholarship and remarkable productivity. Dr. Symes' qualifications far exceed those of Dr. Eisenberg or Dr. Fairgrieve in the analysis of traumatic injury to skeletal remains. (Affidavit and CV of Steven Symes, PhD ("Affidavit of Dr. Symes"), attached and incorporated herein as **P-C Group Exhibit 38,** ¶ 2).

182. Dr. Symes has offered the opinion, to a reasonable degree of scientific certainty in the field of forensic anthropology, that:

    a. A microscopic examination, if performed in 2005, would have determined with a high percentage of accuracy whether the pelvic bones found in the Manitowoc County pit were human in origin; and

    b. Histological slides, if made in 2005 from the suspected human pelvic bones, would have determined with a high percentage of accuracy whether the pelvic bones found in the Manitowoc County pit were human.

183. Dr. Symes opines that it was below the standard of practice for a reasonably well qualified and competent forensic anthropologist, such as Scott Fairgrieve, PhD, the defense expert, to have relied exclusively upon photographs of the pelvic bones to complete their forensic examination. (Affidavit and CV of Steven Symes, PhD, **P-C Group Exhibit 38,** ¶ 5).

184. If trial defense counsel had obtained a competent forensic anthropologist who had performed a microscopic and histological examination of the suspected human bones found in the quarry, it would have conclusively established that Ms. Halbach's bones were

transported to Mr. Avery's burn pit from another site.

Failure of Trial Defense Counsel to Conduct a Simple Experiment to Establish that Mr. Fabian's Testimony Was False Regarding Smelling Burning Plastic Coming From Mr. Avery's Burn Barrel

185. The burned electronic components which belonged to Ms. Halbach were not found in the first searches of Mr. Avery's property. Mr. Kratz was involved in directing the search of the burn barrels. He knew that the electronic components of Ms. Halbach were not in Mr. Avery's burn barrel in the initial searches and then miraculously appeared on November 7, 2005. (TT:2/19:155-56). It was imperative for Mr. Kratz to connect Mr. Avery to the burning of Ms. Halbach's electronic components so he pressured Mr. Fabian into committing perjury.

186. The State's only witness used to establish that Mr. Avery burned Ms. Halbach's electronic devices in his burn barrel on October 31 at dusk was Mr. Fabian. A series of experiments conducted by current post-conviction counsel's investigator has established that Mr. Fabian committed perjury when he testified about smelling burnt plastic emanating from Mr. Avery's burn barrel. Trial defense counsel failed to rebut Mr. Fabian's very incriminating testimony about seeing thick smoke and smelling burning plastic, either by doing their own experiments to disprove his statements.

187. At trial, Mr. Fabian testified that on October 31, 2005, he and Earl were driving a golf cart in the vicinity of Mr. Avery's trailer at around 5:20 p.m. (TT:2/27:112). According to Mr. Fabian, Mr. Avery's burn barrel was burning at that time. (TT:2/27:112). Mr. Fabian described heavy smoke and a distinct odor of burning plastic emanating from Mr. Avery's burn barrel. (TT:2/27:114). On October 31, 2005, at 5:20 p.m., the wind was blowing at approximately five miles per hour from the northwest. (Midwest Regional

Climate Center Weather Report, attached and incorporated herein as **P-C Exhibit 39**, STATE 5717).

188. Current post-conviction counsel's investigator's experiments demonstrate Mr. Fabian's trial testimony is false. Using photographs of Mr. Avery's burn barrel taken by investigators in November 2005, Mr. James Kirby, current post-conviction counsel's investigator, with the assistance of two other witnesses placed Mr. Avery's burn barrel in the same location it was in when Mr. Fabian, according to his testimony, observed it on October 31, 2005. Whenever Mr. Avery burned garbage in his burn barrel, he started the fire using brush and a lighter, not an accelerant. (Affidavit of Steven Avery, **P-C Exhibit 4**). Mr. Kratz, in his closing, attributed the odor and smoke described by Mr. Fabian, to Mr. Avery's burning of Ms. Halbach's electronic devices. (TT:3/14:68). Mr. James Kirby, in his experiment, attempted to recreate the odor of burning plastic described by Mr. Fabian by burning electronic devices identical to those owned by Ms. Halbach in Mr. Avery's burn barrel. Mr. James Kirby allowed the experiment Palm Zire 31 PDA to burn for approximately 14 minutes and the experiment RAZR cell phone to burn for over an hour. Upon taking the RAZR out of the burn barrel, Mr. James Kirby observed that it was burned to a similar degree as the identical cell phone discovered in Mr. Avery's burn barrel. Two witnesses, when standing in the location described by Mr. Fabian at trial, as well as leaning over the burn barrel, detected no odor of burning plastic. (Affidavit and CV of James Kirby, attached and incorporated herein as **P-C Group Exhibit 40**).

189. On April 11, 2017, a second experiment was conducted where a Canon PowerShot A310, the same camera issued to Ms. Halbach by AutoTrader, was burned at a higher temperature than possible in Mr. Avery's burn barrel to determine whether it would emit a

detectable odor of burning plastic. Again, there was no detectable odor of burning plastic or heavy smoke emanating from the fire. (Affidavit of Lauren Hawthorne, **P-C Exhibit 36**; Second Affidavit of Kurt Kingler, attached and incorporated herein as **P-C Exhibit 78**). In light of the above-described experiments, Mr. Fabian could not have observed heavy smoke and detected the smell of burning plastic as a result of Mr. Avery burning Ms. Halbach's electronic devices in his burn barrel on October 31, 2005. Mr. Avery has consistently maintained that he did not burn garbage in his burn barrel on October 31, 2005. (Affidavit of Steven Avery, **P-C Exhibit 4**).

Applicable Case Law Re: State's Coercion of Witness to Provide False Trial Testimony

190. A prosecutor's knowing use of false or incredible evidence to obtain a conviction violates a defendant's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. *State v. Nerison,* 136 Wis.2d 37, 54 (1987). On occasion it may be discovered that the prosecution's case rests on perjured testimony that the prosecution knew or should have known was perjured. *Tucker v. State*, 84 Wis. 2d 630, 642 (1978). In such a case, a defendant's conviction must be set aside ". . . if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *United States v. Verser,* 916 F.2d 1268, 1271 (7th Cir.1990).

191. The State violates a defendant's due process rights to a fair trial by using and failing to correct false testimony. The crux of a denial of due process is deliberate deception. *United States ex rel. Burnett v. Illinois,* 619 F.2d 668, 674 (7th Cir.1980), *cert. denied,* 449 U.S. 880, (1980). Of course, the presentation of inconsistent testimony is not to be confused with presenting perjured testimony. *State v. Ladabouche,* 146 Vt. 279, 502 A.2d

852, 855 (1985).

192. For example, in *State v. Whiting*, 136 Wis. 2d 400, 418–19, (Ct. App. 1987), one State witness testified to a sequence of events that contradicted the testimony of other State witnesses. The defendant argued that the witness obviously lied and as a result, the State presented false testimony which violated the defendant's due process rights. The Court disagreed, finding the State's use of the witness's testimony proper, because it was the jury's role to determine the truth of the witness's testimony. *State v. Whiting*, 136 Wis. 2d 400, 418–19 (Ct. App. 1987).

193. Unlike the defendant in *Whiting*, Mr. Avery is not arguing that he was convicted because a State witness contradicted the testimony of other witnesses. Here, Mr. Avery's conviction must be set aside because it has been discovered through recent investigation that Mr. Fabian provided false testimony at Mr. Avery's trial.

194. Mr. Fabian's testimony that he observed heavy smoke and smelled burning plastic, presumably of Ms. Halbach's burning electronic components, has been completely refuted by a simple experiment. Therefore, Mr. Avery has established a due process violation occurred because he has established that (1) there was false testimony; (2) the State knew or should have known it was false; and (3) there is a likelihood that the false testimony affected the judgment of the jury. *See, State v. Cramer*, 2013 WI App 138, ¶ 22, 351 Wis. 2d 682 (2013). Additionally, Mr. Avery has established ineffective assistance of trial defense counsel for their failure to detect, by a simple experiment, that Mr. Fabian's trial testimony was false and could have been impeached by them if they had performed such a simple experiment.

195. Mr. Avery must be granted relief because implicit in any dignified concept of due

process, and well rooted in American jurisprudence, stands the principle that a conviction obtained through the use of false evidence or testimony, known by representatives of the prosecution, must be set aside in favor of a new trial. *See, Miller v. Pate*, 386 U.S. 1, 6-7 (1967). This fundamental tenet does not cease to apply merely because the false testimony goes only to the credibility of the witness. *Napue v. Illinois,* 360 U.S. 264, 269 (1959). The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. *Id.*

Applicable Case Law Re: Admissibility of Expert Testimony on Police Practices and Investigations

196. In *Jimenez v. City of Chicago*, 732 F.3d 710, 719–23 (7th Cir. 2013), the Seventh Circuit held that expert testimony on police practices and investigations is admissible. The plaintiff's expert in that case, Mr. McCrary[9], testified in detail as to reasonable practices for police investigations and how the investigation of the underlying murder in that case departed from those practices. Mr. McCrary's testimony tended to show that the errors in the investigator's handling of the investigation were severe and numerous.

197. The defendants in *Jimenez* argued that McCrary should not have been permitted to testify regarding reasonable police practices because "reasonableness" is a legal conclusion, and experts are not permitted to provide legal opinions. The defendants also argued that Mr. McCrary's testimony amounted to an impermissible attack on the credibility of the other witnesses. The Seventh Circuit disagreed, explaining that Mr. McCrary's testimony permitted the jury to infer that the investigators had engaged in deliberate wrongdoing.

[9] Mr. McCrary is the expert retained by current post-conviction counsel for Mr. Avery.

198. The Seventh Circuit further noted that Federal Rule of Evidence 702(a) permits an expert to testify regarding his opinion if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," but a witness may not offer legal opinions. *Id.* at 721. The defendants argued that Mr. McCrary's testimony regarding reasonable police practices was intertwined with probable cause, a legal standard, and thus Mr. McCrary should not have been permitted to testify on the subject. The Seventh Circuit disagreed, noting that Mr. McCrary had not offered any opinion at trial as to probable cause at any stage of the investigation. He testified only about reasonable investigative procedures and ways in which evidence from other witnesses did or did not indicate departures from those reasonable procedures.

199. Mr. McCrary testified about the steps a reasonable police investigator would have taken to solve the murder at issue, as well as the information that a reasonable police investigator would have taken into account as the investigation progressed. He did not try to resolve conflicts in the testimony. While Mr. McCrary offered a few observations on credibility, those observations were limited to proper discussions of the evidence that the investigators received during their investigation. *Id.* at 722.

200. For example, Mr. McCrary noted that one witness had given an investigator two inconsistent versions of the events at two different times in the investigation. In such an instance, Mr. McCrary explained, a reasonable officer would have realized that both of the stories could not be true and would have tried to resolve the conflicts. The Seventh Circuit held that such testimony was proper. *Id.* at 723.

201. Importantly, Mr. McCrary's opinions did have direct implications for applying legal standards such as probable cause and whether or not *Brady v. Maryland* was violated. But

those implications did not make his opinions inadmissible, they made Mr. McCrary's testimony relevant. An expert may offer any opinion relevant to applying a legal standard such as probable cause, but the expert's role is "limited to describing sound professional standards and identifying departures from them." *West v. Waymire,* 114 F.3d 646, 652 (7th Cir.1997); see also *Abdullahi v. City of Madison,* 423 F.3d 763, 772 (7th Cir. 2005) (commenting that expert's testimony could be relevant to jury in determining whether officers deviated from reasonable police practices). Thus, according to the Seventh Circuit opinion, the plaintiff was entitled to offer Mr. McCrary's testimony for those purposes.

Failure of Trial Defense Counsel to Present a Police Procedure and Investigations Expert to Demonstrate that the Police Investigation was Fatally Flawed in Numerous Ways

202. Current post-conviction counsel's police procedure and investigations expert, Mr. McCrary, has over 45 years of experience in law enforcement, including 25 years as an FBI agent. While in the FBI, Mr. McCrary spent 17 years as a field agent until he was promoted to the National Center for the Analysis of Violent Crime Behavioral Science Unit, where he used his expertise in investigative techniques and crime scene analysis in violent crime investigations to assist both FBI and other agency investigations. In this capacity, Mr. McCrary has researched the behavioral science underlying violent crimes and the people who perpetrate them and provided training to law enforcement agencies around the world. Mr. McCrary has been requested to participate in police investigations by law enforcement agencies nationally and internationally, including, among other reputable agencies, Scotland Yard. Mr. McCrary currently teaches graduate-level courses in the Forensic and Legal Psychology Program at Marymount University in Arlington, Virginia, and has published extensively in the field of criminal investigation. (Affidavit

and CV of Gregg McCrary ("Affidavit of Gregg McCrary"), attached and incorporated herein as **P-C Group Exhibit 42**, ¶¶ 2, 3).

203. Significantly, Mr. Avery's trial defense counsel failed to obtain an expert in police procedures and investigations, such as Mr. McCrary, who could have educated the jury about the fundamental failures of the investigation of the homicide of Ms. Halbach. Specifically, trial defense counsel could have presented testimony, through an expert in police procedures and investigations, that:

a. Law enforcement failed to study the lifestyle and relevant history shared by Ms. Halbach and those close to her;

b. Law enforcement failed to begin their investigation with a credible investigation of those closest to Ms. Halbach;

c. Law enforcement failed to identify which witnesses intentionally misled the investigation;

d. Law enforcement's investigation of the homicide of Ms. Halbach failed when they constructed a flawed narrative of the crime and built organizational momentum toward the resolution of that flawed narrative;

e. Law enforcement's investigation was characteristic of tunnel vision and premature closure when they closed the investigation to alternative theories; and

f. Law enforcement's investigation was characteristic of confirmation bias, anchor bias, and groupthink when they failed to consider suspects other than Mr. Avery. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 25).

204. Mr. McCrary holds all following opinions to a reasonable degree of professional certainty in the fields of police practices and investigative procedures. Every meaningful

investigation or analysis begins with a study of the victim. For example, investigators must seek to identify who the victim was and what was going on in his or her life at the time of the event when initiating a death investigation. Other salient details of the victim's life include whether the victim had expressed any concerns about his or her security, whether the victim had expressed any fears, whether the victim was in a relationship, and whether the victim had any significant issues in past dating relationships. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 4).

205. According to the FBI Uniform Crime Report, most victims of homicide are killed by someone known to them.[10] Further, the motive to kill typically is rooted in interpersonal conflict between the victim and the offender. Therefore, credible homicide investigations begin with those closest to the victim — e.g., family members, intimate partners, and close friends — and move out, as if in concentric circles, only when those closest to the victim have been thoroughly investigated and eliminated as suspects. If, through methodical investigation, those closest to the victim can be ruled out as suspects, the investigation moves out incrementally to people who knew the victim, like associates, colleagues, and acquaintances. Mr. McCrary has offered the opinion that someone who had no substantial prior relationship with the victim is unlikely to be the offender. (Affidavit of Gregg McCrary, **P-C Exhibit 42**, ¶ 5).

206. While shifting prematurely from an evidence-based investigation to a suspect-based investigation is problematic, investigators should be sensitive to signs and behaviors when developing or prioritizing suspects. For example, there is cause for concern when

[10] U.S. Department of Justice, Bureau of Justice Statistics, "Murder in Large Urban Counties, 1988," May 12, 1993. http://www.bjs.gov/content/pub/press/MILUC88.PR.
Federal Bureau of Investigation, Expanded Homicide Data Table 10: "Murder Circumstances by Relationship, 2011." https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-10.

individuals lie to or intentionally mislead investigators because such lies are designed to conceal that individual's motive and opportunity to have committed the crime. In some instances, the individual misrepresents the details relevant to the crime scene or his or her prior relationship with the victim. Misrepresenting the nature of his or her relationship with the victim is especially common among those offenders who have had an intimate relationship with the victim. (Affidavit of Gregg McCrary, **P-C Exhibit 42**, ¶ 6).

207. The more organized an offender is, the more likely he or she is to inject themselves into the investigation in an attempt to exert as much control as possible over the investigation. They often do so as a seemingly cooperative and helpful witness, which itself can divert suspicion away from them. However, their true purpose is to divert attention from himself or herself by misleading investigators into developing an alternate suspect. While this "staging" can range from minimal to elaborate, it often causes homicide investigations to fail because it affects the way investigators think, and when investigators think incorrectly — especially about motive — they will develop incorrect theories about suspects. The effect of such investigative failure could be an unsolved homicide or, far worse, a wrongful conviction. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 7).

208. From their first exposure to a crime scene, investigators construct a narrative of the crime that is derived from the chaos of the crime scene and the mindsets of individual investigators. Once investigators have constructed the narrative for a crime, their conception fundamentally alters how they perceive and incorporate evidence introduced through their investigation such that their objectivity is compromised. Investigators' narrative for a crime develops a psychological pressure to seek evidence that fits within their narrative and reject evidence that does not. This problem of framing most often

manifests when investigators prematurely develop the narrative of a crime based upon inaccurate assumptions and incomplete evidence. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 8).

209. The resulting investigation becomes an exercise in validating the dominant hypothesis rather than objective evaluation of the evidence. Once this dominant hypothesis becomes fixed, it creates such organizational momentum that contrary theories or evidence are smothered. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶¶ 8-9).

210. Cognitive biases such as confirmation bias, anchor traps, organizational momentum, and groupthink commonly cause investigators to make avoidable mistakes and jeopardize the successful resolution of their investigation. The failure of such criminal investigations are rarely examined. Therefore, the presence and effect of these biases often remain unexamined. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 10).

211. Tunnel vision emerges when investigators unduly limit the alternatives to their fixed hypothesis such that other suspects who should be investigated are eliminated from the investigation and evidence that cuts contrary to the dominant narrative is discounted or ignored. Similarly, premature closure results when investigators make early judgments about the resolution of their investigation and defend those judgments tenaciously, even in the face of conflicting evidence. Both tunnel vision and premature closure are evidence of a tendency to put more weight on evidence that supports the dominant hypothesis than evidence that weakens it. "Arresting the first likely suspect, then closing the investigation off to alternative theories, is a recipe for disaster; tunnel vision has been identified as a leading cause of wrongful convictions." (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶¶ 10-11).

212. Confirmation bias is a type of selective thinking in which an individual is more likely to notice or search for evidence that confirms his or her hypothesis while ignoring or refusing to search for contradicting evidence. Anchor traps occur when "a person does not consider multiple possibilities, but quickly and firmly latches onto a single one, sure that he has thrown his anchor down just where he needs to be." "Group think is the reluctance to think critically and challenge the dominant theory (no one wants to tell the emperor he has no clothes). It occurs in highly cohesive groups under pressure to make important decisions." These cognitive biases contribute to investigators' moving prematurely from an evidence-based investigation to a suspect-based investigation, where the attitude becomes, "We know who did it. Now let's get the evidence that proves it." (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶¶ 12, 14).

213. Regardless of what seemingly valid alibis are offered, potential suspects should be examined for injuries when investigators believe that a violent crime has occurred. Injuries are best considered to be transient evidence and if they are not documented early in an investigation, they will be lost. All alibis and statements should be thoroughly investigated and corroborated before eliminating anyone as a suspect. Any statements that contain non-public information about the crime or crime scene are of particular importance as it is the type of evidence that can turn a non-suspect into a suspect or elevate a given suspect into a prime suspect. The key issue in those situations is how the individual obtained that information. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 15).

Failure of Law Enforcement to Investigate Ms. Halbach's Background to Realize that She Was At An Elevated Risk of Becoming a Victim of Violence

214. "[Ms.] Halbach, the victim in this case, could be considered to be at an elevated risk for

becoming the victim of violence due to her prior abusive relationship with her ex-boyfriend, [Mr.] Hillegas, and her business, which involved nude photography." Third party advertisers began advertising Ms. Halbach's business as providing "adult entertainment services." Although there is no proof that Ms. Halbach herself chose to advertise her business as providing "adult entertainment services," her nude photography business led others to advertise her business as providing "adult entertainment services." (Affidavit of Thomas Pearce, attached and incorporated herein as **P-C Exhibit 44**; Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 17) ("Second Affidavit of James Kirby," attached and incorporated herein as **P-C Exhibit 79**).

Failure of Law Enforcement to Identify Prior Abuse in Ms. Halbach's Romantic Relationships to Correctly Assess the Motive for Her Murder

215. According to Mr. McCrary, based upon violent crime statistics, the killer most likely knew Ms. Halbach and may have been involved, at some point in time, in a romantic relationship with her. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 5). The relationship was characterized by verbal and physical abuse by the killer towards Ms. Halbach. (Affidavit of Thomas Pearce, attached and incorporated herein as **P-C Group Exhibit 44**). Even after Ms. Halbach ended their relationship, the killer continued to attempt to exert control over her by living nearby and coming to her home frequently. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 18).

216. Before Ms. Halbach's murder, the killer most likely became aware that she was sexually involved with a married man and a second male who was a very close friend of the killer's. (11/4/05 CCSD Interview of Bradley Czech ("Mr. Czech") ("Bradley Czech Interview"), attached and incorporated herein as **P-C Exhibit 43**) (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 17).

The Killer's Post-Mortem Activities to Conceal Evidence and Frame Mr. Avery

217. The killer wanted as much time as possible before the people close to Ms. Halbach realized she was gone. As she received more and more phone calls, her voice mailbox became full, something uncharacteristic of Ms. Halbach. The killer, who knew the password to her voice mailbox, deleted several of Ms. Halbach's voice messages to buy himself time before Teresa's family and friends realized that she was missing and began searching for her. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 22).

218. Before her death, Ms. Halbach was known to regularly check and respond to her voicemails. (11/9/05 DCI Interview of Thomas Pearce, attached and incorporated herein as **P-C Exhibit 52**, STATE 770). If family and friends were to call Ms. Halbach and receive a message that Ms. Halbach's voicemail was full, it can be assumed that they would have been alarmed. When Ms. Halbach's voicemail was discovered to be full on November 3, 2005, it triggered her friends and family to notify law enforcement that she was missing. The killer deleted voice messages from Ms. Halbach's voicemail in order to prolong the window of time before Ms. Halbach was reported missing, thereby increasing the amount of time the killer had to dispose of Ms. Halbach's body and personal effects. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 22).

219. The method of deletion, in order to leave no record in Ms. Halbach's cell phone records, could only be accomplished in one way: her voicemail had to be accessed from another phone by using Ms. Halbach's voicemail password. Ms. Halbach's phone records do not indicate that her voicemail was accessed using her own phone after 2:12 p.m. on October 31, 2005. This indisputable fact means the person who accessed Ms. Halbach's voicemail, prior to the authorities realizing she was missing on November 3, 2005, had to be the

killer who knew Ms. Halbach's password, which would be required to delete voicemails recorded to her phone. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 22). The killer knew Ms. Halbach very well in order to know her password. Clearly this person was not Mr. Avery.

220. Knowing that he was likely to be a prime suspect due to his prior romantic relationship with Ms. Halbach, the killer, who was highly organized, devised a plan to burn the body and plant evidence which would focus law enforcement on someone else. Because the killer found appointment details in the paperwork in the RAV-4, he knew Ms. Halbach had an appointment with Mr. Avery earlier that afternoon. The killer formulated a plan to move the body and the vehicle near the Avery property with the intent of planting the RAV-4 on the Avery property and Ms. Halbach's bones and electronic components as soon as the body and electronic components were burned in the adjacent gravel pit. (Trial Exhibits 17, 20; TT:2/13:79-80, 92). The killer would have been familiar with Mr. Avery and his fame as a wrongfully convicted exoneree who was suing Manitowoc County. (Trial Exhibit 17; TT:2/13:79-80) (Affidavit of Gregg McCrary, **P-C Exhibit 42**, ¶¶ 7, 17, 25).

221. The killer wanted to control the investigation and direct it towards the single goal of framing Mr. Avery for the murder. To accomplish that goal, he volunteered to take control of the citizen search as a means of both staying informed and controlling the focus of the investigation. In his initial contact with law enforcement, the killer immediately attempted to misdirect their investigation by not telling them about his relationship with Ms. Halbach or her relationship with other men. (TT:2/13:189). The killer participated in the discovery of major pieces of evidence, even going as far as leading searchers to the

vehicle that he planted. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 7).

The Killer, And Not Law Enforcement, Planted Mr. Avery's Blood in the RAV-4

222. Current post-conviction counsel's blood spatter expert has demonstrated that Mr. Avery's blood was planted in Ms. Halbach's RAV-4 (*see* ¶¶ 129-134). The only parties who may have had motive to plant evidence inculpating Mr. Avery were the killer and law enforcement, namely MCSD, in light of Mr. Avery's pending civil action against Manitowoc County.

223. However, current post-conviction counsel has determined that MCSD officers did not have time to plant Mr. Avery's blood in the RAV-4 on November 3, 2005. After Sgt. Colborn came to the Avery property on November 3 to speak with Mr. Avery around 7:00 p.m., he attended a meeting at the MCSD at 8:00 p.m. (T:2/20:73, 78). Sgt. Colborn's presence at the MCSD was corroborated by Inv. Dedering. For Sgt. Colborn to arrive at the MCSD, an approximately 23 minute drive from the Avery property (Google Maps Directions from Avery Property to MCSD, attached and incorporated herein as **P-C Exhibit 49**), by 8:00 p.m., he must have departed the Avery property by 7:37 p.m. Therefore, Sgt. Colborn would have had a short window of opportunity to obtain a spare key to Ms. Halbach's RAV-4, locate Ms. Halbach's RAV-4, drive Ms. Halbach's RAV-4 from Kuss Road to Mr. Avery's trailer through the field, drive back to a hiding place after being detected, return to the trailer a second time, collect Mr. Avery's blood from his bathroom sink, and plant Mr. Avery's blood in Ms. Halbach's RAV-4. If Mr. Avery left at 7:15 p.m., Sgt. Colborn would have had 22 minutes to accomplish all of those tasks. If Mr. Avery left at 7:20 p.m., Sgt. Colborn would have had 17 minutes to accomplish all of those tasks. If Mr. Avery left at 7:25 p.m., Sgt. Colborn would have had 12 minutes to

accomplish all of those tasks. If Mr. Avery left at 7:30 p.m., Sgt. Colborn would have had 7 minutes to accomplish all of those tasks. It is therefore extremely improbable that Sgt. Colborn planted Mr. Avery's blood in Ms. Halbach's vehicle on November 3, 2005. Further, Sgt. Colborn was driving a squad car when he met with Mr. Avery. Mr. Avery believes that the tail lights that he saw on his property were more similar to a RAV-4 than a squad car. (Affidavit of Steven Avery, **P-C Exhibit 4**).

224. The killer was familiar with the Radandt and Manitowoc County pits. He devised a plan to bring the RAV-4 from the murder scene to the Avery property. His chief objective was to plant the vehicle on the Avery property. The killer was organized and methodical, and likely had a background in science. He knew that he needed to put something with the DNA of Mr. Avery in the RAV-4. Evidence from the scent and cadaver dogs supports the conclusion that the killer drove the RAV-4 onto the Avery property from Kuss Road, across a field to the vicinity of Mr. Avery's trailer. (Scent and Cadaver Dogs Reports, **P-C Group Exhibit 46**, STATE 42-43; Affidavit of Steven Avery, **P-C Exhibit 4**).

225. Once Mr. Avery departed, the killer began to drive the RAV-4 onto the Avery property. When Mr. Avery spotted the RAV-4's tail lights and turned around and drove back to check it out (Affidavit of Steven Avery, **P-C Exhibit 4**), the killer retreated to Kuss Road. Once Mr. Avery left again, the killer drove back to the trailer. The south door on the east side of Mr. Avery's trailer was unlocked. (Affidavit of Steven Avery, **P-C Exhibit 4**), and the killer entered the trailer, intent on finding an item of Mr. Avery's with his DNA that he could use to plant DNA in the RAV-4 to connect Mr. Avery to Ms. Halbach's murder. In the small trailer, the killer noticed fresh blood in the bathroom sink. The killer recognized from his scientific background that if this blood was in Ms. Halbach's RAV-4,

Mr. Avery would immediately become the only suspect. The killer quickly collected the blood from the sink in Mr. Avery's bathroom and deposited the blood in several spots throughout the RAV-4. The killer recognized that the blood had to be planted quickly, within 15-28 minutes and before it coagulated. (Affidavit of Dr. Blum, **P-C Group Exhibit 47**, ¶ 12). He then hid the RAV-4 in the vicinity of the Kuss Road cul-de-sac.

226. On November 3, the killer learned vital information from law enforcement during his police interview. He quickly realized that law enforcement was focused on Mr. Avery and not on him. He was not asked to explain his past relationship with Ms. Halbach or to provide an alibi for the afternoon and evening of October 31. He was not asked about the scratches on his left hand or why he knew Ms. Halbach's voicemail password. The killer was not treated like a suspect. (TT:2/13:194-95).

227. On November 4, the killer decided to make another attempt to plant the vehicle on the opposite side of the Avery property, that is, in the southeast corner, close to the crusher. The killer, who drove the RAV-4 into the Radandt Pit in the late afternoon of November 4, was aided by an accomplice who drove another vehicle into the Radandt Pit to give the killer a ride out after the killer planted Ms. Halbach's vehicle on the Avery property.

228. The killer led law enforcement to Ms. Halbach's vehicle later in the evening on November 4. The killer represented to law enforcement that he would be willing to search the Avery property, something that the police could only do with a warrant based on probable cause which they did not have on November 4. The killer, accompanied by law enforcement, went to the Avery property and the killer proceeded to Ms. Halbach's vehicle in the southeast corner of the salvage yard. When the killer looked into Ms. Halbach's vehicle, he called out, "it's hers," because he recognized her personal items in

the vehicle in addition to her vehicle itself.

229. Once the vehicle was found on the Avery property, the investigation of any other potential suspects halted and, just as the killer planned, the whole case was focused on Mr. Avery. (Affidavit of Gregg McCrary, **P-C Group Exhibit 42**. ¶ 21). The killer duped law enforcement into focusing exclusively on Mr. Avery and helped them justify planting additional evidence to frame Mr. Avery.

The Killer Planted the Bones and the Electronic Devices

230. As the leader of the search team, the killer had unrestricted access to the Avery salvage yard and surrounding properties, closed off to public access. This was critical, because the killer still was in possession of the burned bones and the electronic devices of Ms. Halbach. Access to the Avery property allowed him to plant the bones and electronic devices of Ms. Halbach in Mr. Avery's burn pit and burn barrel.

The Killer Knocked Out the RAV-4 Parking Light While Trying to Plant RAV-4 on Mr. Avery's Property

231. Mr. Avery did not see any front end damage to Ms. Halbach's vehicle when she came to his property on October 31, 2005. (Affidavit of Steven Avery, **P-C Exhibit 4**). Mr. Schmitz, an earlier appointment of Ms. Halbach's, noted that Ms. Halbach's vehicle "looked very new," and did not note any damage. (11/3/05 CCSD Interview of Steven Schmitz, attached and incorporated herein as **P-C Exhibit 50**, STATE 1210). However, when Ms. Halbach's vehicle was discovered on the Avery salvage yard on November 5, the driver's side parking light was broken out and the killer had placed the broken light in the rear cargo area of her RAV-4. When the killer damaged the vehicle, he did not want the parking light found anywhere other than the Avery property because if any pieces of the parking light were found elsewhere, the State's entire theory that Mr. Avery was the

killer and the RAV-4 never left Mr. Avery's property would disintegrate. The killer would be highly motivated to pick up the parking light if he had a collision with a post that knocked the parking light to the ground near Mr. Avery's trailer. The killer put the parking light in the rear cargo area of the RAV-4 and planted the RAV-4 on the Avery property.

232. Only someone who committed the murder and/or was involved in the effort to plant the vehicle on the Avery property would know the significance of the broken parking light and that it had been placed in the RAV-4 to conceal the fact that the vehicle was moved onto Mr. Avery's property from elsewhere. Northwest of Mr. Avery's trailer, between the Avery property and the cul-de-sac at Kuss Road, there was a metal post protruding approximately 2 ½ feet from the ground. (Photo showing post, **P-C Exhibit 51**). When the killer attempted to plant Ms. Halbach's vehicle near Mr. Avery's trailer, he collided with this post, causing the damage to the front end of Ms. Halbach's RAV-4 and knocking out the driver's side parking light. He recognized the need to retrieve the parking light because leaving it, or any pieces of it, in the field would show the RAV-4 left the Avery property contrary to Mr. Kratz theory that the RAV-4 never left the Avery property. (TT:3/15:77-78).

Only One Person Meets the Requirements of Denny as a Third Party Suspect With Motive, Opportunity and a Connection to the Crime

Abusive History

233. Mr. Hillegas was Ms. Halbach's ex-boyfriend. Mr. Hillegas and Ms. Halbach knew each other since they were freshmen in high school, and dated on and off for five years. (TT:2/13:156, 173). Although Ms. Halbach and Mr. Hillegas were romantically involved during their high school and college years, they were no longer together in 2005, although

Ms. Halbach reported to friends that Mr. Hillegas continued to check her out despite being broken up for years. (Email from Ms. Halbach, attached and incorporated herein as **P-C Exhibit 53**, STATE 4030).

234. According to Mr. Pearce, a friend and colleague of Ms. Halbach, Ms. Halbach had been in a verbally and physically abusive relationship prior to or during her internship with Mr. Pearce. Ms. Halbach interned with Mr. Pearce in 2003 during her senior year of college when she was still involved with Mr. Hillegas. (Affidavit of Thomas Pearce, **P-C Exhibit 44**).

Jealousy Was The Motive

235. While Mr. Hillegas maintained an interest in Ms. Halbach, she was no longer romantically interested in him. (Email from Ms. Halbach, **P-C Exhibit 53**). Ms. Halbach became sexually involved with her housemate, Mr. Bloedorn, in the months preceding her disappearance. (Bradley Czech Interview, **P-C Exhibit 43**, STATE 2523-24). Reportedly, Mr. Bloedorn was also Mr. Hillegas' best friend. (TT:2/13:175). Mr. Hillegas committed perjury at trial when he described Ms. Halbach's relationship with Mr. Bloedorn as platonic and never romantic or sexual in nature. (TT:2/13:157). Current post-conviction counsel's investigator Mr. Steven Kirby attempted to interview Mr. Bloedorn about false statements he had made to the police in 2005. Mr. Bloedorn refused to sit for an interview with Mr. Steven Kirby, but when he was told that current post-conviction counsel planned to name a suspect in Ms. Halbach's murder, Mr. Bloedorn immediately blurted out, "You mean Ryan Hillegas." (Affidavit of Steven Kirby, attached and incorporated herein as **P-C Exhibit 83**). Another point of jealousy for Mr. Hillegas might have been the fact that Ms. Halbach, as part of her business, took nude photographs

of men and women and this activity led her to become sexually involved with one of her clients, Mr. Czech. Mr. Czech was married to someone else at the time. Ms. Halbach kept the nude photographs that she had taken of Mr. Czech and his then-wife in the bedroom of her residence, (11/4/05 CCSD Interview of Jolene Bain ("11/4/05 Jolene Bain Interview"), attached and incorporated herein as **P-C Exhibit 54**, STATE 2511) a home that Mr. Hillegas frequented and moved into after Ms. Halbach's death. (11/14/05 CCSD Report by Sgt. Tyson, attached and incorporated herein as **P-C Exhibit 55**, STATE 1466; Correspondence Regarding Nude Photography, attached and incorporated herein as **P-C Group Exhibit 56**, STATE 3898, 3849; Affidavit of Thomas Pearce, **P-C Exhibit 44**).

236. Mr. Czech left a text message for Ms. Halbach at 12:45 p.m. on October 31, 2005. Mr. Czech was completely forthcoming in his interview with law enforcement on November 4, 2005 that he had texted Ms. Halbach. He was not asked the content of the message nor to show the message to law enforcement during his interview. At no point did law enforcement attempt to obtain the text message from Mr. Czech. (11/4/05 CCSD Interview of Bradley Czech, **P-C Exhibit 43**). Although Mr. Czech did not have an alibi for October 31, and another witness had described that Ms. Halbach had broken off her relationship with Mr. Czech but he continued to call her, Mr. Czech did not meet the *Denny* requirements. (11/4/05 CCSD Interview of Jolene Bain, **P-C Exhibit 54**).

237. For some unknown reason, Mr. Hillegas called Mr. Czech on November 3, 2005. According to their phone records, this was the first time Mr. Hillegas talked to Mr. Czech on the phone. (Ryan Hillegas Phone Records, attached and incorporated herein as **P-C Exhibit 57**; Bradley Czech Interview to verify Bradley Czech's phone number, **P-C Exhibit 43**).

Mr. Hillegas Intentionally Misled Investigators

238. When Mr. Hillegas volunteered false information about *when* the parking light damage occurred, it raised red flags about his involvement in the murder and the effort to frame Mr. Avery. (12/14/05 DCI Report, attached and incorporated herein as **P-C Exhibit 58**, STATE 1144). Certainly, Mr. Hillegas had no motive to frame Mr. Avery unless he himself murdered Ms. Halbach. It is difficult to imagine a much more compelling motive to frame Mr. Avery than the one possessed by the murderer of Ms. Halbach. The alleged motive, presented by trial defense counsel, that MCSD investigators were trying to derail Mr. Avery's civil rights lawsuit against them pales in comparison to the killer's motive to frame Mr. Avery.

239. Mr. Hillegas intentionally diverted investigators by reporting that the damage to the driver's side bumper and parking light of Ms. Halbach's RAV-4 occurred months before her disappearance and that she had filed an insurance claim for the damage. (12/14/05 DCI Report, **P-C Exhibit 58**, STATE 1144). Current post-conviction counsel, through its investigator, has confirmed that Ms. Halbach never filed an insurance claim for this damage to her vehicle, and further contends that the damage to Ms. Halbach's vehicle occurred after she left the Avery property on October 31, 2005. (Response to Subpoena to Erie Insurance, attached and incorporated herein as **P-C Exhibit 59**). The most reasonable explanation for Mr. Hillegas' intentional misleading of law enforcement regarding the damage to Ms. Halbach's parking light is that Mr. Hillegas wanted to divert attention from the parking light that was tossed in the rear cargo area of the RAV-4 by the killer when he was trying to plant the car on Mr. Avery's property and inadvertently hit a post on Randandt's property. Mr. Hillegas would not want the searchers looking for other

pieces of the parking light on the Radandt property because, if those pieces were found, it would destroy the State's narrative that, after the murder, the RAV-4 never left the Avery property. If the narrative implicating Mr. Avery was refuted, the investigators might begin looking at more likely suspects such as Mr. Hillegas himself.

Opportunity

240. Mr. Hillegas was trained as a nurse but was unemployed in October and November 2005. He had no alibi for October 31, 2005, the date Ms. Halbach was murdered, or the subsequent days when her body was burned and bones planted. (TT:2/13:174).

241. Mr. Hillegas was never asked by law enforcement to provide an alibi for October 31, 2005. (TT:2/13:194). Trial defense counsel failed to conduct any substantive investigation of Mr. Hillegas, choosing to name him as a potential suspect at one point but failing to meet the requirements of *Denny*.

242. Mr. Hillegas' cell phone records show significant gaps during time periods in question. On October 31, 2005, there was a six hour gap — a time frame in which there were neither incoming nor outgoing calls — from 9:41 a.m. to 3:48 p.m. (Ryan Hillegas Phone Records, **P-C Exhibit 57**). It is most likely that during this time frame, Ms. Halbach departed the Avery property, departed the Zipperer property, and was killed after she arrived home at approximately 3:40-3:50 p.m. Ms. Halbach's day planner indicated that she wanted to "get Sarah's stuff from mom" at about 3 p.m. and "do biz paperwork" at approximately 4:30 p.m. ("Ms. Halbach's day planner," attached and incorporated herein as **P-C Exhibit 45**). Also on October 31, there was an over two hour gap in Mr. Hillegas' phone records from 3:50 p.m. to 6:01 p.m. (Ryan Hillegas Phone Records, **P-C Exhibit 57**).

243. Mr. Hillegas' phone records have an over 17 hour gap from 7:47 p.m. on October 31, 2005, to 1:31 p.m. on November 1, 2005, during the time where Ms. Halbach's body was transported and burned. Subsequently, Mr. Hillegas had more suspicious gaps in calls. There was a six hour gap in phone activity on November 2, 2005, from 10:06 a.m. to 4:12 p.m., and a gap on November 3, 2005, from 7:31 p.m. to 8:10 p.m, the time when Mr. Avery reported seeing headlights on his property. (Affidavit of Steven Avery, **P-C Exhibit 4**). His last call on November 3, 2005, was at 10:44 p.m.; Mr. Hillegas did not make another call until 7:52 a.m. the next morning. On November 4, from 4:15-7:25 p.m., Mr. Hillegas received 21 calls from an unidentified, hidden phone number. It is reasonable to conclude that the calling party intentionally hid its phone number and may have been law enforcement. It is during this time period that Sgt. Colborn called dispatch to confirm the license plate on Ms. Halbach's car. (*See* ¶ 256, *infra*) (Ryan Hillegas Phone Records, **P-C Exhibit 57**, pp. 8-10; Trial Exhibit 212, Track 3).

244. Mr. Hillegas had access to Ms. Halbach's Cingular Wireless account and knew her username and password, as evidenced by Mr. Hillegas' admission that he used her username and password to obtain her phone records after she went missing. (TT: 2/13:159).

Opportunity to Conceal and Plant

245. Mr. Hillegas called Ms. Halbach's phone at 6:42 p.m. on November 1, 2005. Mr. Hillegas has admitted that when he called on Thursday, November 1, 2005, an automatic message played saying that Ms. Halbach's voicemail box was full. (TT:2/13:183). However, Mr. Hillegas' testimony is undermined by the fact that his call only lasted 4 seconds; by comparison, Mr. Avery's call, which also generated an automated message

that the voicemail box was full, lasted 13 seconds, more than three times longer than Mr. Hillegas' call. (Ms. Halbach's cell phone records ("New Cell Records"), attached and incorporated herein as **P-C Exhibit 72).** Sometime after that call and before the call of Mr. Pearce when her voicemail box was full again, the killer deleted voice messages.

246. Scratches are visible on the back of Mr. Hillegas' left hand in footage taken prior to the discovery of the RAV-4 on November 5, 2005. Current post-conviction counsel's forensic pathologist, Dr. Blum, has opined that Mr. Hillegas' injuries are consistent with scratches from fingernails. Dr. Blum has confirmed that photographs of Ms. Halbach taken close to her death establish that her fingernails were of adequate length to inflict such scratches on Mr. Hillegas left hand. (Photographs of Mr. Hillegas' Hands, attached and incorporated herein as **P-C Group Exhibit 60**; Affidavit of Dr. Blum and and video reenactment of likely scenario creating injury pattern, **P-C Group Exhibit 47**; Affidavit of Gregg McCrary, **P-C Group Exhibit 42**, ¶ 25).

247. The most obvious motive for burning Ms. Halbach's body would be if the killer had a known and established relationship with Ms. Halbach and his DNA was on her body from a struggle or rape. Additionally, the burning of the body would allow him to move or plant the bones and divert the suspicion away from himself, because he was likely to be a prime suspect due to his prior abusive relationship with Ms. Halbach. Mr. Avery would not need to risk detection by others by burning Ms. Halbach's body in an open pit 20 feet from his trailer. Mr. Avery could have crushed the vehicle and disposed of the body on the hundreds of acres surrounding his property.

Mr. Hillegas Accessed Ms. Halbach's Voice Mailbox

248. After hearing Ms. Halbach's voicemail was full, Mr. Hillegas, who had no trouble

accessing Ms. Halbach's Cingular Wireless account, would be able to delete some of her voicemails in order to prevent family and friends from becoming concerned by a full voice mailbox. Clearly, the killer would not want Ms. Halbach's voice mailbox to be full because friends and family calling her would become concerned about her well-being and contact the authorities.

249. Ms. Halbach's voice mailbox had a twenty-minute capacity. (Cingular Basic Voicemail Features, attached and incorporated herein as **P-C Exhibit 61**). When Mr. Avery called Ms. Halbach's phone at 4:35 p.m. on October 31, his phone call went directly to the automated message which indicated that the voice mailbox was full, meaning her voice mailbox was occupied by twenty minutes of voicemails. When Ms. Halbach's colleague, Mr. Pearce, called her on November 2 around noon, her voice mailbox was full, meaning her voice mailbox was occupied by twenty minutes of voicemail again. (TT:2/12:199-200). According to Agent Fassbender's report documenting his receipt of voicemail records from Cingular, five minutes and eleven seconds worth of voice messages were left between when Mr. Avery found Ms. Halbach's voicemail to be full and when Mr. Pearce found Ms. Halbach's voicemail to be full. Therefore, to make room for the voice messages that were recorded between Mr. Avery's call and Mr. Pearce's call, at most five minutes and eleven seconds worth of voice messages were deleted by the killer between when Mr. Avery called and when Mr. Pearce called. (6/12/06 DCI Report ("Agent Fassbender VM Report"), attached and incorporated herein as **P-C Exhibit 62**).

250. After Mr. Pearce called around noon on November 2, 2005, three minutes and 45 seconds of voice messages were recorded to Ms. Halbach's voicemail before her voicemail was widely reported to be full on the evening of November 3, 2005. Therefore,

space in Ms. Halbach's voicemail had to be freed up for more voicemails to be recorded, so at most three minutes and forty-five seconds worth of voice messages were deleted after Mr. Pearce called. (Agent Fassbender VM Report, **P-C Exhibit 62**). The killer could have deleted Mr. Czech's text message without leaving proof that he entered the phone.

Scent Tracking Dogs Showed that Ms. Halbach's Vehicle Was Moved Onto the Avery Property

251. Scent tracking dogs gave trained alerts in the wooded area south of the Kuss Road cul-de-sac and between Mr. Avery's trailer and the Kuss Road cul-de-sac. (Sent and Cadaver Dogs Reports, **P-C Group Exhibit 46**, STATE 43, 45-46). Some of the scent tracking dogs deployed in the search for Ms. Halbach were trained to detect decomposing human remains. These dogs are trained to give alerts when they smell human blood or other decomposing tissue. (TT:2/16:17). The other scent tracking dogs deployed to the Avery property were trained to follow the scent of a living person when given an exemplar scent, e.g., the insole of a shoe belonging to Ms. Halbach, as was used in this case. The live scent tracking dogs' alerts establish that Ms. Halbach's vehicle, with her body still inside, was driven between Kuss Road and Mr. Avery's trailer and was in the wooded area south of the Kuss Road cul-de-sac. A human remains detection dog gave a trained alert in the wooded area south of the Kuss Road cul-de-sac, where a suspected burial site was discovered. Many dogs converged on this suspected burial site. A shallow ditch had been dug wherein plastic similar to a tarp was discovered. Sgt. Colborn persuaded everyone it was not a burial site, but no evidence supported that conclusion. Other scent tracking dogs led their handlers through the Radandt Pit, traveling from the place Ms. Halbach's RAV-4 was discovered to Jambo Creek Road, where a new witness observed a vehicle matching the description of Ms. Halbach's enter the Radandt and Manitowoc County Pits prior to its

discovery on November 5, 2005. (Scent and Cadaver Dogs Reports, **P-C Group Exhibit 46**) ("11/7/05 WSCL Report regarding Suspected Burial Site," attached and incorporated herein as **P-C Exhibit 82**).

252. Mr. Hillegas was aware of Sheriff Pagel's intention to conduct aerial surveillance of the Avery and surrounding properties on November 4, 2005, to search for Ms. Halbach's vehicle. Mr. Kratz admitted that the RAV-4 was not visible in footage taken during the November 4, 2005, aerial surveillance. (TT:3/14:53). After the flyover ended around 6:00 p.m. on November 4 (11/4/05 CCSD Report, attached and incorporated herein as **P-C Exhibit 63**, STATE 1244), the killer drove Ms. Halbach's vehicle to the southeast corner of the Avery property. A new witness describes seeing a vehicle similar to Ms. Halbach's RAV-4, followed by a white jeep, enter the Radandt Pit from Jambo Creek Road using an access road immediately south of his house. Only the white jeep returned. (See ¶¶ 290-291, *infra).*

253. The killer parked the RAV-4 in the southeast corner of the Avery property on a ridge overlooking a pond. The killer parked the RAV-4 facing west although the vehicles surrounding the RAV-4 all faced east and tried to conceal the RAV-4 using tree branches, cardboard boxes, and a rusty car hood as an explanation for why the car was not seen in the flyover video.

254. The killer returned to the Avery property with Sgt. Colborn in the evening on November 4, 2005, under the pretense of helping Sgt. Colborn search for Ms. Halbach's vehicle. Mr. Avery's brother Chuck told police that on November 4, he saw unidentified headlights in the salvage yard that evening. (**P-C Group Exhibit 10**, STATE 109). Sgt. Colborn, without probable cause for a search warrant for the Avery property, unwittingly relied

upon the killer, a civilian, to find Ms. Halbach's vehicle on the Avery property.

255. The individual who helped Sgt. Colborn to the RAV-4 on the Avery property was most likely the killer because he was able to enter the Avery property and quickly located the vehicle in the dark or with limited lighting. His words "It's hers," shouted out when he looked in the vehicle and clearly recognized her personal effects, established that he was a close friend of Ms. Halbach. Sgt. Colborn called MCSD dispatch to confirm Ms. Halbach's license plate number. (Trial Exhibit 212, Track 3). The dispatcher who answered Sgt Colborn's call usually worked from 2:00-10:00 p.m. (MCSD work dispatch records for 2007, attached and incorporated herein as **P-C Exhibit 65**). At 7:20 p.m. on November 3, 2005 Chuck called Mr. Avery about seeing headlights in the area where Ms. Halbach's vehicle was found. (Page from Steven Avery's Phone Records, **P-C Exhibit 10**, STATE 1586; Pages from MCSD Summary Report to verify Chuck's phone number, **P-C Exhibit 11**, STATE 93). By the time Mr. Avery went to check out this sighting the headlights were off. Mr. Avery called Chuck back at 7:25 pm to report that he could not see the headlights. The headlights were from Sgt. Colborn's personal vehicle and he had a friend of Ms. Halbach with him to search the Avery property without a search warrant because he did not have probable cause to be on the Avery property at that point in time. (Enhanced Audio Clip From Trial Exhibit 212, Track 3, attached and incorporated herein as **P-C Exhibit 66**).

Mr. Hillegas' Activities After Ms. Halbach's Death

256. In the days following Ms. Halbach's disappearance, Mr. Hillegas spearheaded the citizen search for Ms. Halbach. (TT:2/13:162). Mr. Hillegas misrepresented his identity when he became the leader of the search. (Ryan "Kilgus" Map, attached and incorporated herein as

P-C Exhibit 67, State_1_3783). Mr. Hillegas continued to misrepresent his true identity as evidenced by Wisconsin Department of Justice Report of November 16, 2005 in which he was still described as "Ryan Kilgus" and "a very close friend of Teresa's." At that time, Mr. Hillegas provided addresses for where Ms. Halbach donated blood and plasma and addresses of her doctors including a cardiologist, an OB/GYN, and a dermatologist. Mr. Hillegas also provided a phone number for Ms. Halbach's pharmacy. (Wisconsin Department of Justice Report of November 16, 2005 pages STATE 744-46, attached and incorporated herein as **P-C Group Exhibit 64**).

257. Mr. Hillegas made maps for searches and directed volunteers as to where they should be looking for Ms. Halbach. (TT:2/13:164-165). He also made a hand-drawn sketch of his investigation, noting that he found a condom wrapper on the corner of the lot by the first house on Jambo Creek Road. (Ryan "Kilgus" Map, **P-C Exhibit 67**). Mr. Hillegas directed Pam to search the Avery property and gave her the phone number of the direct line to Manitowoc Sheriff's Department in case she found anything. (TT:2/13:215) ("11/5/05 CCSD Interview of Pamela Sturm"), attached and incorporated herein as **P-C Exhibit 81**). Mr. Hillegas gave other search parties only maps, but he gave Pam a camera in anticipation that she would be the one to find the RAV-4. (TT:2/13:194; Affidavit of Gregg McCrary, **P-C Exhibit 42**, ¶ 19).

258. After Ms. Halbach's death and despite his prior abusive relationship with her, Mr. Hillegas moved into the house shared by Mr. Bloedorn and Ms. Halbach while the searches were ongoing in order to maintain tighter control over investigators' access to Ms. Halbach's belongings and home. Mr. Hillegas was present almost every time investigators entered Ms. Halbach's home, even months after Ms. Halbach was killed, and

frequently directed investigators to items of evidentiary value, such as her dirty clothing including lingerie, the boxes for her phone and camera, and medical records. (11/14/05 CCSD Report By Sgt. Tyson, **PC Exhibit 55**, STATE 1466; 12/1/05 CCSD Report by Inv. Wiegert, attached and incorporated herein as **P-C Group Exhibit 68**, STATE, 2759). It is reasonable to conclude that he would also have had access to Ms. Halbach's sub-key and given it to law enforcement to facilitate the sub-key being planted by Sgt. Colborn and Lt. Lenk.

259. In addition to maintaining control over Ms. Halbach's home and possessions, Mr. Hillegas personally searched property surrounding the Avery Salvage Yard and entered the salvage yard on multiple occasions. Even after November 5, 2005, the police allowed Mr. Hillegas through checkpoints to come and search the area. (TT:2/13:195). On November 7, 2005, Mr. Hillegas accessed the Avery property from 9:03 a.m. to 9:53 a.m. (Crime Scene Sign-in/sign-out Logs, attached and incorporated herein as **P-C Group Exhibit 69**, STATE 6124-25). Mr. Hillegas made a second entry to the Avery property on November 7, 2005, exiting the property at 4:28 p.m. (Crime Scene Sign-in/Sign-out Logs, **P-C Group Exhibit 69**, STATE 6130). Suspiciously, Mr. Hillegas never logged into the property when he entered the second time, meaning there is no way to know when he arrived or how long he had access to the property. (Affidavit of Gregg McCrary, **P-C Exhibit 42**, ¶ 20). This access to the salvage yard would give Mr. Hillegas opportunity to then plant the bones of Mr. Halbach, and her electronic devices, on November 6 and 7, now that the investigation was already focused on Mr. Avery. On at least one occasion, Mr. Hillegas also accessed the Avery and surrounding properties using a fake name. (Ryan "Kilgus" Map, **P-C Exhibit 67**, STATE 1_3783). This would also explain why,

despite previous searches of the Avery and Janda burn barrels, bones were not discovered until November 8, 2005.

260. Mr. Hillegas was not asked to provide an alibi. (TT:2/13:194). When asked by police about his last interactions with Ms. Halbach, Mr. Hillegas testified that on October 30, 2005, he dropped something off for Ms. Halbach at her house. Suspiciously, Mr. Hillegas does not recall what he delivered to Ms. Halbach nor can he remember anything about what time of day it was when he went to Ms. Halbach's residence even though this was supposedly the last time when he saw Ms. Halbach alive. (TT:2/13:180; Affidavit of Gregg McCrary, **P-C Exhibit 42**, ¶ 18).

261. At first, Mr. Hillegas told law enforcement that he was just a friend of Ms. Halbach's. (TT:2/13:189). Despite authorities eventually learning that Mr. Hillegas was Ms. Halbach's ex-boyfriend, he testified that he was never treated like a suspect in any way. (TT:2/13:195; Affidavit of Gregg McCrary, **P-C Exhibit 42**, ¶ 25).

262. On the afternoon and evening of November 4, 2005, Mr. Hillegas received twenty-two phone calls from a number or numbers with no identifiers. (Ryan Hillegas Phone Records, **P-C Exhibit 57**, p. 10). It is reasonable to conclude that law enforcement officers were calling Mr. Hillegas in connection with conducting an illegal search of the Avery Salvage Yard using Mr. Hillegas to access the property.

263. In his pre-trial hearing testimony, Mr. Hillegas stated that although he was not sure how many times he talked with Sheriff Pagel on November 4, 2005, they spoke at least once. (MHT:8/9/06:99). Mr. Hillegas did not recall whether he had contact with Inv. Wiegert on November 4, 2005. (MHT:8/9/06:100-101).

264. On November 5, 2005, with information obtained from law enforcement in twenty-two

unrecorded calls on November 4, 2005, Mr. Hillegas directed Pam to search Avery's Auto Salvage. While Mr. Hillegas provided only maps and missing person posters to other citizen searchers, Mr. Hillegas provided Pam and her daughter Nikole, the only searchers allowed access to the Avery Salvage Yard, with a digital camera and Calumet County Sheriff Pagel's direct line. Clearly, Mr. Hillegas knew that Pam would discover Ms. Halbach's vehicle. Pam located Ms. Halbach's vehicle on the Avery salvage yard — among 4000 other vehicles on the forty acres of uneven topography — within thirty minutes of her arrival, a true statistical improbability. It is clear that Pam was provided information pertaining to the location of Ms. Halbach's vehicle by Mr. Hillegas. (TT:2/13:168-69; Affidavit of Gregg McCrary, **P-C Exhibit 42**, ¶ 19).

Trial Defense Counsel Failed to Properly Investigate a Variety of Topics: Sgt. Colborn's Dispatch Call; Timelines; Voicemail Deletions; Items from Maribel Park; Suspected Burial Site; Veracity of Police Reports; Witness to the RAV-4 Planting on November 4

Applicable Case Law Re: Trial Defense Counsel's Duty to Investigate

265. In *State v. Thiel*, 264 Wis.2d 571 (2003), the Wisconsin Supreme Court granted post-conviction relief after the defense attorney at trial failed to conduct a significant investigation. There, the defendant set forth precisely what would have been revealed had the defense attorney conducted an investigation consistent with the defendant's constitutional right to counsel. As in *Thiel*, relief is warranted. *Thiel* also supports Mr. Avery's position that relief is warranted because his trial defense attorneys were ineffective in failing to properly review the discovery prior to Mr. Avery's trial. In *Thiel*, the defendant's allegation that his trial attorney had not reviewed all of the discovery constituted an additional basis for the Supreme Court to grant relief. The same result is compelled here.

Trial Defense Counsel's Failure to Investigate and Establish the Correct Timing of Sgt. Colborn's Dispatch Call and Discovery of the RAV-4

266. On November 4, 2005, Sgt. Colborn discovered Ms. Halbach's vehicle and called dispatch, on a personal line (TT:3/15:74-78), to confirm Ms. Halbach's license plate number. (TT:2/20:180-182). Audible in a recording of Sgt. Colborn's call to Manitowoc dispatch regarding the victim's plate number, a third party states, "it's hers." (Enhanced Audio Clip from Track 3 of Trial Exhibit 212, **P-C Exhibit 66**).

267. Sgt. Colborn's dispatch call was produced to trial defense counsel among other calls recorded by Manitowoc County Sheriff's Department on a CD. The recordings, which are labeled "Track 1" through "Track 30," give no outward indication of when they were left. However, based upon a review of the content of the recordings, it is apparent that the recordings are organized chronologically on the CD.

268. Sgt. Colborn's dispatch call was titled "Track 3." The preceding recording, "Track 2," is a call to Manitowoc Dispatch from an unnamed officer regarding George Zipperer. The officer requested a criminal records check of George Zipperer from the dispatcher. It is reasonable to conclude that this call was placed by one of the MCSD officers who were with CCSD Det. Dedering before they proceeded to the Zipperers on November 3, 2005. Therefore, it follows that Sgt. Colborn's call to dispatch occurred after he responded to the Avery property to make contact with Mr. Avery and after he drove back to the MCSD. (TT:2/20:75-78.) Further, based upon the order with which Inv. Dedering organized his report, Sgt. Colborn's call to dispatch occurred after he (Sgt. Colborn) informed the officers assembled at the MCSD about his contact with Mr. Avery.

269. Sgt. Colborn's explanation that he called MCSD dispatch to confirm information obtained from CCSD Inv. Wiegert (TT:2/20:184-85) is contradicted by the chronological

order of the MCSD dispatch calls as produced to trial defense counsel. Sgt. Colborn testified that he placed this call to dispatch after speaking with Inv. Wiegert about Ms. Halbach. (TT:2/20:184-85). Sgt. Colborn testified that he spoke with Inv. Wiegert while he was driving from the Avery property to MCSD after making contact with Mr. Avery. (TT:2/20:77-78). However, based upon the chronological organization of the MCSD dispatch calls as produced to trial defense counsel, Sgt. Colborn called dispatch after meeting the assembled officers at MCSD, long after leaving the Avery property and speaking with Inv. Wiegert.

270. After departing the MCSD for the Zipperers property, Sgt. Colborn had no viable reason to call MCSD dispatch regarding Ms. Halbach's vehicle. From the time Sgt. Colborn arrived at the MCSD to the time he checked out and returned home, Sgt. Colborn was with at least Det. Remiker and Inv. Dedering, both of whom could have confirmed information regarding Ms. Halbach's vehicle.

271. Further, Sgt. Colborn placed this call from his personal phone, not his squad car's radio. Sgt. Colborn testified that after completing contact with the Zipperers, he checked out at MCSD, which would have included leaving his squad car in the secure MCSD lot, and drove his personal vehicle home. (TT:2/20/80). If Sgt. Colborn was on-duty and in his squad car, it would be reasonable to expect transmissions to and from MCSD dispatch to come over the radio. Because Sgt. Colborn called dispatch from his personal phone, it is reasonable to conclude that he made the call on Friday November 4, 2005, his day off.

272. Sgt. Colborn confirmed the identity of Ms. Halbach's vehicle by calling MCSD dispatch on his cell phone around 7:30 p.m. on November 4. (MCSD Work Records, **P-C Exhibit 65**). Sgt. Colborn was with Mr. Hillegas who led him to Ms. Halbach's vehicle, which

had been previously planted by Mr. Hillegas on the afternoon of November 4, 2005, after a failed attempt to plant it closer to Mr. Avery's residence on November 3, 2005. Realizing such a call would be recorded, Sgt. Colborn removed the license plates from Ms. Halbach's vehicle to conceal that he had actually located the vehicle at the point in time when he made the call about the license plate. ("Timothy Austin Overlay of Location of License Plates," attached and incorporated herein as **P-C Exhibit 80**).

Trial Defense Counsel's Investigator's Failure to Construct the Correct Timeline of Ms. Halbach's Activities on October 31, 2005

273. Current post-conviction counsel, using new telephone records of Ms. Halbach, has reconstructed the correct timeline and route that Ms. Halbach took on October 31, 2005. (Ms. Halbach's New Cell Records, **P-C Exhibit 72**[11]):

a. **8:17 a.m.** AutoTrader calls Ms. Halbach. The duration of this call is one minute and seven seconds. (New Cell Records, **P-C Exhibit 72**). The State omitted this call from its timeline of Ms. Halbach's phone activity. (Trial Exhibit 362).
b. **9:46 a.m.** AutoTrader called Ms. Halbach. The duration of this call was thirty-three seconds.
c. **11:10 p.m.** AutoTrader called Ms. Halbach again at 11:10 a.m. for a duration of five seconds. (New Cell Records, **P-C Exhibit 72**, line 1342). The State omitted this call from its timeline of Ms. Halbach's phone activity. (Trial Exhibit 362).
d. **11:44 a.m.** Ms. Halbach placed a call to Barb Janda's landline. (New Cell Records, **P-C Exhibit 72**, line 1345).
e. **1:10 p.m.** Ms. Halbach arrived at Mr. Schmitz's residence. The State incorrectly presented a false timeline to the jury based upon the erroneous recollection of Mr. Schmitz that he received a call from Ms. Halbach at 1:10 p.m. (11/3/05 CCSD Interview of Steven Schmitz, **P-C Exhibit 50**, STATE 1210; TT:3/14:88). Ms. Halbach's phone records show that she called Mr. Schmitz at 12:51 p.m. (New Cell Records, **P-C Exhibit 72**, line 1348). Therefore, contrary to the State's timeline, Ms. Halbach arrived twenty minutes earlier at the Schmitz residence than the State represented to the jury. (TT:3/14:88).
f. **1:15 p.m.** Ms. Halbach departed Mr. Schmitz's residence after completing his photographs. Mr. Schmitz testified that Ms. Halbach completed his appointment

[11] For the convenience of the Court, current counsel has converted the times listed in Ms. Halbach's phone records. AT&T maintains its phone records using a 24-hour clock with Coordinated Universal Time ("UTC"), which, on October 31, 2005, was six hours ahead of Central Daylight Time, the local timezone for the State of Wisconsin. So, e.g., the 8:17 a.m CDT call is listed as 14:17:12 on Line 30 of this exhibit.

"around 1:30 [p.m.]" (TT:2/13:123). In light of Mr. Schmitz's mistaken timeline (*See* ¶ 274(E), *supra*), it is reasonable to conclude that Ms. Halbach departed Mr. Schmitz's property approximately twenty minutes earlier than what Mr. Schmitz testified at trial.

g. **Shortly after 2:00 p.m.,** Ms. Halbach arrived in the vicinity of the Zipperer residence. Despite searching for approximately ten minutes, Ms. Halbach was unable to locate their house and decided to proceed to her appointment at the Avery property. (Trial Exhibit 218). Ms. Halbach called the Zipperers' landline at 2:12 p.m. (Trial Exhibits 361 and 362) to tell them that she was having difficulty finding their house, so she was proceed to her next appointment but would return.

h. **2:24 p.m.** Ms. Halbach received a call from Mr. Avery who was wondering when she would arrive. Ms. Halbach did not answer the call. (Affidavit of Steven Avery, **P-C Exhibit 4**. Mr. Avery used the *67 feature on his cell phone so that Ms. Halbach would not feel that she needed to return his call if she did not answer because the *67 feature would not register Mr. Avery's cell phone number on Ms. Halbach's cellphone.

i. **2:27 p.m.** Ms. Pliszka called Ms. Halbach. Ms. Pliszka's account of her conversation with Ms. Halbach is not credible. At trial, Ms. Pliszka testified that it was Ms. Halbach who called her at 2:27 p.m. on October 31, 2005. (TT:2/13:80). Ms. Halbach's phone records, as reflected in Mr. Kratz's summary exhibit, show that it was AutoTrader who called Ms. Halbach, not vice versa. (Trial Exhibits 361 and 362; TT:2/27:186-87). Trial defense counsel failed to impeach Ms. Pliszka's testimony effectively that Ms. Halbach initiated the 2:27 p.m. call on October 31, 2005. Had trial defense counsel impeached Ms. Pliszka, they could have shown that her testimony was not credible about her alleged contact with Ms. Halbach, effectively undermining Ms. Pliszka's testimony that Ms. Halbach told her that she was on her way to the Avery property at the time of the call. (TT:2/13:80) (Interviews of Dawn Pliszka, attached and incorporated herein as **P-C Group Exhibit 102**, STATE 5572).

j. **Between 2:31 and 2:35 p.m.** Ms. Halbach arrived at the Avery property. Ms. Halbach snapped one photograph of Barb's van. Ms. Halbach began walking towards Mr. Avery's trailer, but when she saw Mr. Avery come out of his trailer, she waved and turned around to go to her car to get his magazine. When Mr. Avery approached the car, Ms. Halbach was in the driver's seat with the door open and the engine running. Ms. Halbach handed an AutoTrader magazine to Mr. Avery and he paid her. Ms. Halbach turned left on Hwy. 147 as she exited the Avery property.Affidavit of Steven Avery, **P-C Exhibit 4**).

k. **2:35 p.m.** Mr. Avery called Ms. Halbach (Trial Exhibit 360) because he realized, after quickly flipping through the AutoTrader magazine, that AutoTrader also advertised front-loaders and Mr. Avery wanted to sell one of his front-loaders. Mr. Avery called Ms. Halbach at 2:35 p.m. to request that she return to the Avery property to photograph his front-loader. He terminated the call before it connected because he wanted to go and see Bobby but discovered that Bobby was not home. (Affidavit of Steven Avery, **P-C Exhibit 4**).

l. **2:41 p.m.** The last voicemail received by Ms. Halbach registered to her phone. Ms. Halbach was on her way back to the Zipperer residence. (Trial Exhibit 361).

Based on the fact that the Zipperers had the AutoTrader magazine and receipt (11/3/05 CCSD Report, attached and incorporated as **P-C Exhibit 73**, STATE 2497-98; TT:2/13:132; Trial Exhibit 26), it is clear that Ms. Halbach located the Zipperer residence, photographed their vehicle and departed from the Zipperer residence. On November 5, 2005, Inv. Wiegert and Det. Remiker had a conversation about Ms. Halbach's appointment schedule on October 31, 2005. In that conversation, they discussed their understanding that the Zipperer residence was Ms. Halbach's final stop on October 31. (11/5/05 Wiegert/Remiker recording, attached and incorporated herein as **P-C Exhibit 71**)

Trial Defense Counsel's Failure to Construct an Accurate Timeline for Mr. Avery's Activities on October 31, 2005

274. Mr. Avery has given an affidavit that the following is the correct timeline for his activities on October 31, 2005:

a. **8:12 a.m.:** Mr. Avery called AutoTrader to schedule an appointment for his sister Barb Janda. According to Angela Schuster ("Ms. Schuster"), manager of the AutoTrader office, Mr. Avery was already linked to Barb's husband Tom Janda's AutoTrader account.
b. **11:04 a.m.:** Mr. Avery called AutoTrader from his landline (920-755-4860) (Toll Free Records, **P-C Exhibit 74**), which was linked in the AutoTrader records to Tom Janda's account. (11/6/05 DCI interview of Angela Schuster ("11/6/05 Schuster Interview"), attached and incorporated herein as **P-C Exhibit 75**). Mr. Avery confirmed that a photographer was coming to the Avery property to photograph the Janda van and that the photographer would be arriving at approximately 2:00 p.m. Mr. Avery confirmed the address of the Barbara Janda appointment as being 12932 Avery Road. (Affidavit of Steven Avery, **P-C Exhibit 4**). At this point in time, there can be no question that Ms. Pliszka knew that the appointment, scheduled at 8:12 a.m., was made by Mr. Avery and that it was to take place at the Avery property. The State omitted Mr. Avery's call to AutoTrader at 11:04 p.m. from its timeline to the jury. (Trial Exhibit 360).
c. **2:24 p.m.:** Mr. Avery called Ms. Halbach to see when she would be arriving. (Affidavit of Steven Avery, **P-C Exhibit 4**).
d. **2:31 p.m.:** Ms. Halbach arrived at the Avery property. Mr. Avery recalls that when he looked out of his trailer window, he saw Ms. Halbach snap one photograph of the Janda van. Mr. Avery put on his shoes and went outside. Ms. Halbach began walking towards Mr. Avery's trailer, but when she saw Mr. Avery, she waved and turned around to go to her car to get his magazine. When Mr. Avery approached the car, Ms. Halbach was in the driver's seat with the door open and the engine running. Mr. Avery approached the driver's door which Ms. Halbach left open and handed Ms. Halbach cash totalling $40.00. Ms. Halbach handed an AutoTrader magazine to Mr. Avery. Mr. Avery remembers there was no mud splattered on Ms. Halbach's car, or visible damage to the driver's side bumper or parking light of her vehicle, and the back seats were in the upright position. Ms.

Halbach turned left on Highway 147 after leaving the Avery property. (Affidavit of Steven Avery, **P-C Exhibit 4**).

e. **2:35 p.m.:** Mr. Avery read that AutoTrader advertised for sale front-loaders. He called Ms. Halbach to ask her to come back to his property in order to take a photograph of a loader that he wished to sell. Mr. Avery hung up before Ms. Halbach picked up the phone because he wanted to go see Bobby. (Affidavit of Steven Avery, **P-C Exhibit 4**).

f. **4:35 p.m.:** Mr. Avery called Ms. Halbach again at 4:35 p.m. that evening to set up an appointment for her to photograph the front-loader to advertise it in AutoTrader. (Affidavit of Steven Avery, **P-C Exhibit 4**). Mr. Avery's call went to the automated voicemail.

g. **5:36 p.m.:** Mr. Avery's girlfriend Jodi called Mr. Avery from jail. The couple spoke for fifteen minutes, the maximum time allowed from jail phones. These calls were recorded by the jail. (Jail Phone Log, attached and incorporated herein as **P-C Exhibit 76**, STATE 1_9308).

h. **Around 7:00 p.m.:** Mr. Avery had a bonfire. The fire burned for about two or two and a half hours. His nephew Brendan came over as well. They burned brush. (Affidavit of Steven Avery, **P-C Exhibit 4**).

i. **8:57 p.m.:** Jodi called Mr. Avery from the jail phone and the couple again spoke for the maximum time allowed from jail phones. This call was recorded by the jail. Brendan went home before Jodi called and by the time Brendan left, the fire had burned down to ash. (Jail Phone Log, **P-C Exhibit 76**, STATE 1_9308).

Trial Defense Counsel Failed to Detect the Voicemail Deletions From Ms. Halbach's Phone

275. Ms. Halbach owned a Motorola Razr V3 in October 2005 (TT:2/13:256; Trial Exhibit 380). Her Cingular wireless plan included Basic Voicemail (Trial Exhibit 380), which could retain a maximum of twenty minutes of voice messages. (Cingular Basic Voicemail Features, **P-C Exhibit 61**).

276. On October 31, 2005, six minutes and forty-one seconds worth of voice messages were recorded to Ms. Halbach's voicemail. (New Cell Records, **P-C Exhibit** 72, lines 1337, 1338, 1339, 1343, 1349/50, 1356/57, 1353/54). As explained above, these messages would not have filled the voicemail box to capacity on October 31, 2005, because the voicemail box could hold twenty minutes of recorded messages. Of the seven messages recorded on October 31, 2005, only two were not deleted. Before October 31, 2005, 15 minutes and 21 seconds of Ms. Halbach's voicemail was occupied by voice messages.

277. At 8:17 a.m. on October 31, AutoTrader called Ms. Halbach and recorded a one minute and six second voice message to her voicemail box. (New Cell Records, **P-C Exhibit 72**, line 1337). At 9:46 a.m., AutoTrader called Ms. Halbach again, this time recording a 33 second voice message. (New Cell Records, **P-C Exhibit 72**, line 1338). At 10:44 a.m., Denise Coakley called and recorded a 37 second voice message to Ms. Halbach's voicemail. (New Cell Records, **P-C Exhibit 72**, line 1339) Daniel Morrow, an AutoTrader client, recorded a 43 second voice message at 11:25 a.m. (New Cell Records, **P-C Exhibit 72**, line 1343). At 12:29 p.m., Don Breckheimer, a friend of Ms. Halbach, called and left a forty second long voicemail. (New Cell Records, **P-C Exhibit 72**, line 1346). In total, four minutes and 39 seconds worth of voice messages were recorded to Ms. Halbach's voicemail on October 31, 2005, before Ms. Halbach began her AutoTrader appointments.

Trial Defense Counsel's Failure To Investigate And Request DNA Testing Of Items Recovered from Maribel Caves Park

278. A civilian submitted items of potential evidentiary value that were allegedly found at Maribel Caves Park on November 6, 2005, to Sgt. Colborn. (CCSD Evidence/Property Custody Document, attached and incorporated herein as **P-C Exhibit 77**, STATE 1_6851). Investigators inventoried items of potential evidentiary value found at Maribel Caves Park on November 6, 2005, including torn women's blue jeans and a box containing personal lubricant. (CCSD Evidence/Property Custody Document, **P-C Exhibit 77**, STATE 1_6851). Neither of these items were subjected to forensic analysis by the State or trial defense counsel.

Trial Defense Counsel Failed to Investigate the Veracity of the Police Reports Regarding Joshua Radandt

279. When Mr. Radandt told investigators that he saw a fire on the Avery property on October 31, 2005, he described the fire as appearing to be contained to a fifty-five gallon drum. (11/5/05 Handwritten Statement of Joshua Radandt, attached and incorporated herein as **P-C Exhibit 84**, STATE 7019). When investigators re-interviewed Mr. Radandt on November 10, 2005, they pressured him to describe the fire as large, behind Mr. Avery's garage, and in an open burn pit. Mr. Radandt never told investigators that the fire was behind Mr. Avery's garage. Mr. Radandt sets forth in his affidavit that he remembers seeing the fire, contained to a burn barrel, and between several trailers on the Avery property. (Affidavit of Joshua Radandt, attached and incorporated herein as **P-C Exhibit 85**).

280. Trial defense counsel failed to investigate Mr. Radandt's observation of a fire on the Avery property. Had trial defense counsel investigated Mr. Radandt, they would have learned that investigators had pressured Mr. Radandt to exaggerate the size of the fire and he refused to do so. If trial defense counsel had called Mr. Radandt as a witness his testimony would have demonstrated to the jury that the investigators knew Ms. Halbach's vehicle had been driven through his gravel pit and planted on Mr. Avery's property. The jury would also have learned of the efforts of the investigators to pressure Mr. Radandt to exaggerate the size of the fire.

Trial Defense Counsel's Failure to Investigate the Veracity of the Police Reports Re: Paul Metz Interview

281. An example of the reckless investigation by law enforcement in the police report memorializing the interview of Paul Metz ("Mr. Metz"), a cattle farmer who lived approximately four and one half miles north of the Avery property, "heard a big 'whoosh'" that reminded him of starting a fire with gasoline on November 1, 2005.

Reportedly, Mr. Metz told investigators that he then smelled a vile odor that he could not identify. The reports state that the smell was coming from the direction of the Avery property. (11/18/05 CCSD Interview of Paul Metz, attached and incorporated herein as **P-C Exhibit 86**, STATE 2768).

282. Mr. Metz, in his affidavit, describes a different scenario. The date was October 31, 2005, not November 1, 2005. As dusk approached, Mr. Metz heard a loud buzzing sound that reminded him of electrical wires surging. Mr. Metz then smelled an odor that reminded him of insulation burning. At no time did Mr. Metz hear a sound that reminded him of gasoline igniting or smell and indescribable odor. Mr. Metz is familiar with the smell of a burned body because he was a volunteer firefighter. At no time on October 31, 2005, or November 1, 2005, did Mr. Metz detect an odor of a burning body. Mr. Metz never told investigators that he heard a "whoosh" and does not know how that statement came to be attributed to him. (Affidavit of Paul Metz, attached and incorporated herein as **P-C Exhibit 99**).

283. Trial defense counsel failed to conduct any investigation of Mr. Metz. Had trial defense counsel investigated the story investigators attributed to Mr. Metz, they would have learned that investigators misrepresented Mr. Metz's detection of a foul odor on October 31, 2005.

Trial Defense Counsel Failed to Investigate the Evidence of a Possible Burial Site

284. Scent-tracking dogs, as well as human remains detection dogs, identified a burial site south of the Kuss Road cul-de-sac, approximately 500 yards west of Mr. Avery's residence. Human remains detection dogs, trained to give alerts on decaying human tissue and fluids, indicated the presence of human remains at the burial site. (Scent and Cadaver

Dogs Reports, **P-C Group Exhibit 46**, STATE 65).

285. Between November 5 and November 8, 2005, there were numerous opportunities for cadaver and scent dogs to discover the bones in the fire pit of Mr. Avery if they were indeed present there from the time Mr. Avery left the property early in the morning on November 5 to go to the family cabin in Crivitz. (Affidavit of Steven Avery, **P-C Exhibit 4**, ¶ 30).

a. They searched around the general vicinity of Mr. Avery's residence but did not identify human remains or Ms. Halbach's scent. (Scent and Cadaver Dogs Reports, **P-C Group Exhibit 46**, STATE 63-67).
b. Jill Cramer ("Ms. Cramer") testified that Brutus was a "high drive" cadaver dog, meaning that he is capable of finding very small scent sources from large distances and will persist in working despite inclement weather. (TT:2/16:7). Given that Brutus was drawn to the RAV-4 from the area of the cars along the elevated ridgeway south of the car crusher, which was approximately 205 feet from the RAV-4, it is reasonable to conclude that Brutus was capable of detecting a scent source within a range of at least 200 feet. (Scent and Cadaver Dogs Reports, **P-C Group Exhibit 46**, STATE 63).
c. Ms. Cramer also testified that Brutus has an extremely low false negative rate and that he "very rarely has missed a source" during his years as a cadaver dog. (TT:2/16:37).
d. On November 6, sometime between 7:30 a.m. and 12:00 p.m., another cadaver dog, Trace, was assigned specifically to check the exterior of Mr. Avery's residence, including the driveway and red Plymouth van that Ms. Halbach had photographed. Trace identified no human remains on November 7. (Scent and Cadaver Dogs Reports, **P-C Group Exhibit 46**, STATE 64). Therefore, if Ms. Halbach's remains were concentrated in the burn pit on November 5 when Brutus was searching around Mr. Avery's trailer, it is highly unlikely that he would not alert at that particular site.

286. The cadaver dog alerts on the attached map are as follows: 1) on Ms. Halbach's RAV-4 where it was discovered; 2) on several spent shell casings along the conveyor road at the southwestern edge of the Avery property ("11/8/05 CCSD Report STATE1376-77"), attached and incorporated herein as **P-C Exhibit 87**); 3) north of Alert 2, along the conveyor road at the southwestern edge of the Avery property; 10) in the same area as Alerts 2 and 3; 12) the potential burial site south of the Kuss Road cul-de-sac; 15) several

burn piles in the area of large concrete slabs in the Manitowoc County gravel pit. Additionally, the live scent dogs alerted in the area of brush and trees between Kuss Road and Mr. Avery's trailer and in the area of the berm on the west border of the Avery property. The State conspicuously avoided mentioning any of these alerts because they were not on the Avery property. Trial defense counsel failed to mention these alerts. (Map of Cadaver and Scent Dog Alerts, attached and incorporated herein as **P-C Exhibit 90**).

287. The WSCL field response team was dispatched to the burial site to take photographs and conduct an examination. (11/23/05 WSCL Field Response, attached and incorporated herein as **P-C Exhibit 88**, STATE 1616). However, it was Lt. Lenk and Sgt. Colborn, along with Sgt, Tyson, who performed the excavation of the burial site and reported that it was of no evidentiary value. (11/7/05 CCSD Report, attached and incorporated herein as **P-C Exhibit 89**, STATE 1338).

288. Based upon the scent dogs' interest in the suspected burial site, it is very probable that Ms. Halbach's body was buried at this location for a period of time after her death and before her body was burned.

Trial Defense Counsel's Failure to Locate and Interview Witness Who Observed the RAV-4 Being Driven Onto Avery Property by way of the Radandt Pit Prior to November 5, 2005

289. Wilmer Siebert, ("Mr. Siebert") observed a vehicle similar in color, size, and style to Ms. Halbach's RAV-4 enter the Radandt Pit using an access road immediately south of his house. Mr. Siebert's house is immediately north of the east entrance to the Radandt Pit off of Jambo Creek Road. After observing the vehicle enter the Radandt Pit, Mr. Siebert saw pictures of Ms. Halbach's vehicle on the news. Mr. Siebert remembers the vehicle he saw driving into the Radant Pit had the same spare wheel and wheel cover on the rear cargo door as Ms. Halbach's RAV-4. Mr. Siebert observed a white Jeep accompanying

the other vehicle into the Radandt Pit. Mr. Siebert remembers the paint was chipping off of the hood of the white Jeep. Mr. Siebert remembers the two vehicles were traveling at a high rate of speed when they drove down Jambo Creek Road and turned east onto the gravel road that leads into the gravel pits. Shortly after the two vehicles entered the Radandt Pit, Mr. Siebert observed the Jeep, unaccompanied by the other vehicle, exit using the same gravel road immediately south of Mr. Siebert's house. (Affidavit of Wilmer Siebert, attached and incorporated herein as **P-C Exhibit 98**). Mr. Siebert's daughter, Vicki Siebert ("Ms. Siebert"), called Manitowoc County dispatch to report the activity observed by Mr. Siebert. (Trial exhibit 218, Track 27). Suspiciously, the recording of this call was not turned over to trial defense counsel.

290. In addition to Mr. Siebert's affidavit witnessing the RAV-4 being brought onto the Avery property through the Radandt Pit, the scent and cadaver dogs corroborate Mr. Siebert's observations that the RAV-4 was brought into the Radandt Pit from Jambo Creek Rd. and driven to various places in the Radandt Pit. (Scent and cadaver dog reports and maps, attached and incorporated herein as **P-C Group Exhibit 46**)

291. The State misrepresented to the jury that it was impossible to access the Avery property from the the south (TT:3/14:53-54), where the Radandt Pit borders the Avery yard. Although trial defense counsel claimed that the Avery property could be accessed through the Radandt property, they failed to rely on the dog tracks to corroborate their claim that this is exactly how the vehicle was moved onto the Avery property. (Affidavit of Joshua Radandt, **P-C Exhibit 85**). Ms. Halbach's vehicle was moved from the Radandt Pit to the Avery property using either the Jambo Creek entrance and road east of the conveyor road, or the conveyor road that led onto the Avery property from the Radandt property.

(TT:2/15:75; 11/7/05 CCSD Report, attached and incorporated herein as **P-C Exhibit 97**, STATE 1342).

BRADY VIOLATIONS

Applicable Case Law: Brady Violations

292. In *Brady v. Maryland,* 373 U.S. 83 (1963), the Court held that the State violates an accused's constitutional right to due process of law by failing to disclose evidence. A *Brady* claim requires a showing that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *State v. Harris*, 272 Wis.2d 80 (2004).

293. To comply with *Brady,* the prosecutor has a duty to learn of favorable evidence known to other government actors. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The Supreme Court has, therefore, noted "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene,* 527 U.S. 263, 281 (1999). The prosecutor's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Strickler,* 527 U.S. at 281, quoting *Berger v. United States,* 295 U.S. 78, 88 (1935).

294. The United States Supreme Court has made it clear that exculpatory evidence need not be evidence that would have produced an acquittal. *Kyles*, 514 U.S. at 434. It need only be evidence "favorable to the accused," *Brady*, 373 U.S. at 87, and of the nature that it creates 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, 681 (1985).

295. "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles*, 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 682). Stated simply, "[s]uch evidence is favorable to an accused . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676.

Investigators Withheld the Zipperer Voicemail CD which contained favorable and exculpatory evidence for Mr. Avery

296. When Ms. Halbach first arrived in the vicinity of the Zipperers' residence she made a phone call which was answered by the Zipperers' answering machine. Allegedly, Ms. Halbach left a voicemail that she could not locate the Zipperer residence. On November 3, when the Zipperers were interviewed at 9:30 p.m., they told the investigators that Ms. Halbach had left a voice message on their answering machine. The voicemail was listened to by Det. Remiker of the MCSD and it was copied by MCSD Detective Dennis Jacobs ("Det. Jacobs") onto a CD. (11/6/05 CCSD Report, attached and incorporated herein as **P-C Exhibit 101**, STATE 1311; 11/3/05 CCSD Report, **P-C Exhibit 73**, STATE 2497).

297. The CD of Ms. Halbach's voicemail recording on the Zipperer answering machine was never turned over to trial defense counsel and has allegedly disappeared. Current post-conviction counsel, through their investigators, sent a FOIA request for the CD and neither Manitowoc nor Calumet Counties claimed to have possession of the voicemail CD. (**P-C Group Exhibit 70**). Furthermore, although trial defense counsel's discovery requests would have encompassed the CD, it was never turned over by Mr. Kratz in discovery. Mr. Fallon confirmed in a letter to current post-conviction counsel on April 20, 2017, that neither Calumet nor the Manitowoc Sheriff's Departments have been able to locate the CD of Ms. Halbach's voicemail left on the Zipperer answering machine. (4/20/2017 Letter

from AAG Thomas Fallon, **P-C Exhibit 25**).

298. Suspiciously, Mr. Kratz never played the recording of the 2:12 p.m. voicemail for the jury. It is reasonable to conclude that Mr. Kratz concealed the 2:12 p.m. voicemail because it confirmed that the Zipperers' residence was Ms. Halbach's last stop. Corroboration of this assertion is found in a recorded conversation between Inv. Wiegert and Det. Remiker on November 5, 2005, about the sequence of Ms. Halbach's appointments on October 31, 2005. In that conversation, which occurred after interviews with Mr. Schmitz, Mr. Avery, and Mr. Zipperer, they concluded that Ms. Halbach's first appointment was with Mr. Schmitz, her second appointment was with the Averys, and her third appointment was with the Zipperers. (11/5/05 Wiegert/Remiker recording, **P-C Exhibit 71**). Obviously, Inv. Wiegert and Det. Remiker based their conclusion on the Zipperer voicemail left by Ms. Halbach, which was listened to by investigators on November 3, 2005, at the Zipperer residence and recorded to a CD on November 6, 2005 (11/3/05 CCSD Report, **P-C Exhibit 73**, STATE 2497), and having interviewed both Mr. Avery and Mr. Zipperer. Clearly, the destruction and/or concealment of Ms. Halbach's voicemail to the Zipperers' leads to the reasonable conclusion that her voicemail refuted Mr. Kratz's timeline and so it was concealed from trial defense counsel.

299. Investigators concealed the voicemail left by Ms. Halbach on the Zipperers' answering machine because it refuted their theory that Ms. Halbach's final appointment was Mr. Avery.

Investigators Concealed the Amount of Gas Remaining in the RAV-4's Fuel Tank from Trial Defense Counsel

300. Although the odometer reading from Ms. Halbach's vehicle was noted at the WSCL, no reference was made by law enforcement or the WSCL to the amount of gas remaining in

the RAV-4's fuel tank, which would have provided vital information about how far the car had traveled since its tank was filled to capacity on October 29, 2005. When Ms. Halbach used her credit card to purchase $38.06 worth of, presumably, fuel from an Exxon station in De Pere, WI. (11/4/05 CCSD Report, attached and incorporated herein as **P-C Exhibit 103**, STATE 2506). The average price of a gallon of fuel in the United States was $2.48 on October 31, 2005. (Environmental Impact Assessment Data, attached and incorporated herein as **P-C Exhibit 91**). According to manufacturer specifications, the fuel capacity of a 1999 Toyota RAV-4 is 15.3 gallons. (RAV-4 Manual, **P-C Exhibit 1**). Assuming Ms. Halbach paid $2.48 per gallon of fuel on October 29, 2005, she would have spent $37.94 to fill her tank to capacity. It is reasonable to conclude that Ms. Halbach completely filled her gas tank on October 29, 2005. Mr. Fallon has confirmed on April 20, 2017, that the State failed to determine and document the gas level remaining in Ms. Halbach's vehicle when it was discovered on the Avery's property. (4/20/17 Letter from AAG Thomas Fallon, **P-C Exhibit 25**). Clearly, the State did not want the mileage revealed because it would have completely refuted its theory that Ms. Halbach was killed on the Avery property and demonstrated that Ms. Halbach and her car were driven many more miles after she left the Avery property.

The Flyover Video was Edited to Conceal that the RAV-4 Was Not Present on the Avery Property Before 6 p.m. on November 4

301. Wendy Baldwin ("Ms. Baldwin") and Sheriff Pagel were in the air for around four hours (11/4/05 CCSD Report, **P-C Exhibit 63**, STATE 1244), yet the State produced only three minutes of footage. Mr. Kratz saw the unedited flyover video and knew that the RAV-4 was not there at that time, but knew that the State's case might fail if the RAV was not present before 6 p.m. on November 4. The video was intentionally edited to conceal the

fact that the RAV-4 was not present at the time of the flyover on November 4. (11/4/05 CCSD Report, **P-C Exhibit 63**, STATE_1244).

Investigators Concealed Their Knowledge that Ms. Halbach's RAV-4 was Driven Onto Mr. Radandt's Property

302. Mr. Radandt has provided an affidavit to current post-conviction counsel that State's the following:

> "At that time, I was told by the Department of Justice agents that they believed Teresa Halbach's vehicle was driven to the Kuss Road cul-de-sac by driving west through an empty field, then south down the gravel road past my hunting camp until reaching an intersection with a gravel road that ran northeast into the Avery property. They told that me that they believed Teresa Halbach's vehicle turned northeast onto that gravel road and entered the Avery property at its southwest corner. It is my understanding that this theory was based on the work of scent tracking dogs." (Affidavit of Joshua Radandt, **P-C Exhibit 85**).

DOJ Investigators never authored a report documenting their conversation with Mr. Radandt about the RAV-4 being drive from his property and planted on Mr. Avery's property. Mr. Kratz did not call Mr. Radandt as a witness at Mr. Avery's trial. The failure to produce this evidence to trial defense counsel was a clear *Brady* violation because this information could not only have been used to impeach the State's witnesses, it also would have provided exculpatory evidence for Mr. Avery that the RAV-4 was planted on his property.[12]

NEW EVIDENCE

New Scientific Evidence Demonstrates that the Damaged Bullet (FL) in Mr. Avery's Garage was Not Shot Through Ms. Halbach's Head Causing Her Death as the State Contended

303. Mr. Kratz claimed that Ms. Halbach was killed by two gunshot wounds, one to the left side of her head and one to the back of her head, while she was lying down on the garage

[12] Mr. Radandt has been unfairly targeted as a possible suspect, because he owned land adjacent to the Avery property. Current post-conviction counsel has interviewed Mr. Radandt on two occasions and has been accompanied by him twice to view all of his property. No evidence exists that implicates Mr. Radandt in the murder of Ms. Halbach, and he has a solid alibi for the afternoon of October 31, 2005.

floor. (TT:3/15:98). Dr. Eisenberg described two entrance wounds to Ms. Halbach's head but no exit wounds. Two damaged bullets were eventually found on Mr. Avery's garage floor. (TT:3/15:98). Mr. Kratz relies upon Dr. Eisenberg who testified that the defect in the parietal bone, above the left ear, shows the characteristic sign of an entrance bullet wound and a second defect in the occipital region shows Ms. Halbach was also shot in the back of the head with a .22 caliber gun. (TT:3/14:128). Additionally, Mr. Kratz relied upon Mr. Olson, the State's trace metal expert, who testified that x-rays of the skull defects in the parietal region showed particles of lead. (TT:3/14:128).

304. Current post-conviction counsel has obtained the opinions of Mr. Haag, a renowned ballistics expert, and Dr. Palenik, the trace expert referred to above. Dr. Palenik, utilizing a 2016 scanning electron microscope, has determined that Item FL, the damaged bullet that the State claimed was shot through Ms. Halbach's skull and caused her death, was not shot through bone.

305. Mr. Haag has testified as an expert witness on the subject of firearms related evidence and the reconstructive aspects of shooting incidents in numerous cases in the United States and other countries. Mr. Haag has published more than 200 scientific papers, most of which address the ballistic properties of projectiles. In particular, Mr. Haag published an article in the Association of Firearms and Toolmark Examiners (AFTE) Journal regarding the forensic value of bone particles recovered from bullets. (Affidavit and CV of Lucien "Luke" Haag ("Affidavit of Luke Haag"), attached and incorporated herein as **P-C Group Exhibit 92**).

306. Mr. Haag has concluded, to a reasonable degree of scientific certainty in the field of ballistics and illustrated by testing he has carried out, that the damaged bullet (Item FL)

recovered from Mr. Avery's garage was never shot through Ms. Halbach's skull. The damaged bullet (Item FL), which was identified as a .22 caliber long rifle bullet, was comprised of such soft metal that there would be detectable bone fragments embedded in the damaged bullet if it had been fired through Ms. Halbach's skull. Because no bone fragments were identified in the damaged bullet (Item FL) over the course of its examination — including DNA and firearms/tool marks analysis — at the WSCL, it is Mr. Haag's opinion, to a reasonable degree of scientific certainty if the field of ballistics, that the damaged bullet (Item FL) was never fired through Ms. Halbach's skull. (Affidavit of Luke Haag, **P-C Group Exhibit 92**, ¶ 7).

307. Mr. Haag conducted tests to illustrate that bone fragments would become embedded in .22 caliber long rifle bullets when fired through bone. Mr. Haag selected copper plated .22 caliber long rifle CCI Minimag® bullets for his experiment because fired copper plated CCI Minimag® casings were recovered from Mr. Avery's garage (TT:3/1:106-107) and unfired copper plated CCI Minimag® bullets were found in Mr. Avery's bedroom. (Trial Exhibit 246; TT:2/22:38-39) (Affidavit of Luke Haag, **P-C Group Exhibit 92**, ¶ 8).

308. Mr. Haag fired two copper plated CCI Minimag® .22 caliber long rifle bullets through approximately two millimeter thick flat bone and into a soft tissue simulant. Mr. Haag fired two other copper plated CCI Minimag® .22 caliber long rifle bullets through one sheet of approximately two millimeter thick flat bone, through five inches of soft tissue simulant, through a second section of approximately two millimeter thick flat bone, and into soft tissue simulant. Bone particles, embedded in the soft lead, were visible in a microscopic examination performed by Dr. Palenik for both the bullets fired through one thickness of bone and two thicknesses of bone (*See* ¶¶ 312-326). Dr. Palenik's

examination supports Mr. Haag's opinion that, to a reasonable degree of scientific certainty in the field of ballistics, the damaged bullet (Item FL) was not fired through Ms. Halbach's skull because there were no bone particles embedded in it when it was examined by WSCL analysts. (Affidavit of Luke Haag, **P-C Group Exhibit 92**).

309. Mr. Newhouse, a WSCL firearms examiner, analyzed the damaged bullet (Item FL), using a microscope. According to Mr. Newhouse's bullet worksheet (attached and incorporated herein as **P-C Exhibit 93**), Mr. Newhouse identified no trace evidence on the damaged bullet. If there were bone fragments embedded in the damaged bullet (Item FL), Mr. Haag would expect a reasonably competent firearms examiner to have identified them during their microscopical examination. Mr. Haag has concluded, upon review of Mr. Newhouse's trial testimony, that Mr. Newhouse is a reasonably competent firearms examiner who would have identified bone fragments embedded in the damaged bullet had they been present. Because Mr. Newhouse did not identify any embedded bone fragments during his microscopical examination of the damaged bullet (Item FL) it is the opinion of Mr. Haag, to a reasonable degree of scientific certainty in the field of ballistics, that the damaged bullet (Item FL) was never fired through Ms. Halbach's skull. (Affidavit of Luke Haag, **P-C Group Exhibit 92**).

310. Ms. Culhane testified that she washed the damaged bullet in a test tube filled with reagent. (TT:2/23:163-64). Before Mr. Newhouse analyzed the damaged bullet, Ms. Culhane washed the bullet to extract DNA from it. Ms. Culhane's wash would not have dislodged or otherwise removed the embedded particles from the damaged bullet. The particles, therefore, would have remained in place and would have been visible to Mr. Newhouse during his examination. (Affidavit of Dr. Palenik, **P-C Group Exhibit 48, ¶**

10(b)).

Microtrace Examination of Damaged Bullet (Item FL) with 2016 Stereomicroscopy Digital Video Microscropy and Scanning Electron Microscopy and Energy Dispersive X-Ray Spectroscopy (SEM/EDS) Demonstrates that the Damaged Bullet (Item FL) was Never Shot Through Ms. Halbach's Skull

311. The purpose of Dr. Palenik's trace examination with a 2016 Stereomicroscopy Digital Video Microscropy and Scanning Electron Microscopy and Energy Dispersive X-Ray Spectroscopy (SEM/EDS) was to determine if bone could be detected on the surface of the damaged bullet (Item FL).

312. Dr. Palenik utilized the following analytical approach in examining the damaged bullet (Item FL):

    a. Dr. Palenik performed the first in depth photo-documentation and microscopical examination of the damaged bullet (Item FL). This was conducted by a combination of a 2016 stereomicroscopy digital video microscopy, the latter of which was used to produce a map of the bullet surface and the debris adhering to it.

    b. Dr. Palenik obtained a characterization of the bullet by scanning electron microscopy and energy dispersive x-ray spectroscopy (SEM/EDS). Using the digital images of the bullet surface as a guide, specific areas were examined in detail and analyzed to determine their elemental composition. The inorganic portion of bone is composed almost entirely of calcium, phosphorous and oxygen, all of which are detectable by this approach.

313. Dr. Palenik, in preparation for this examination, examined four exemplar bullets that were fired through bone by Mr. Haag.

314. The exemplar bullets were initially examined by Dr. Palenik and photo-documented by a

combination of stereomicroscopy and digital video microscopy to assess the overall condition of the bullet. Dr. Palenik's initial examination showed the presence of white, translucent particles, consistent with the appearance of bone, on the surface of or embedded in each of the four exemplar bullets

315. After Dr. Palenik's initial examination and documentation, the bullets were individually packaged and submitted to Independent Forensics for DNA extraction, to simulate the process to which the damaged bullet (Item FL) had been subjected by Ms. Culhane. Independent Forensics Laboratory Supervisor Liz Kopitke ("Ms. Kopitke") placed each of the damaged bullets in separate test tubes and submerged them in buffer fluid. Ms. Kopitke then vigorously shook the test tubes in her hand.

316. The post-extraction exemplar bullets were again examined by Dr. Palenik and photo-documented by a combination of 2016 stereomicroscopy and digital video microscopy. Dr. Palenik's examination showed that white, translucent particles, morphologically consistent with bone, remained on and embedded in each of the four exemplar bullets. That is, the DNA extraction conducted by Independent Forensics, which was meant to simulate the extraction process the damaged bullet (Item FL) was subjected to, did not cause the white, translucent particles consistent with bone to fall or become dislodged from the exemplar bullet

317. Dr. Palenik's SEM/EDS analysis of debris on two of the exemplar bullets showed, as expected, the co-occurrence of calcium, phosphorous and oxygen in areas identified by digital video microscopy as containing white, translucent particles that appeared to be fragments of bone. This study of exemplar bullets demonstrates the following:

    a. Particles consistent with bone were detected on each of the four exemplar bullets

that were studied.

b. This approach using a combination of 2016 stereomicroscopy, digital video microscopy and scanning electron microscopy was shown to be suitable for the *in situ* documentation and identification of bone on a bullet. If indications of bone were detected by these methods, further analytical approaches could be applied to more specifically confirm its presence.

c. Particles consistent with bone were detected on the exemplar bullets after they were subjected to a DNA extraction process meant to simulate the DNA extraction performed on the damaged bullet (Item FL).

Dr. Palenik's Examination of the Damaged Bullet (Item FL)

318. On 23 May 2017, a damaged bullet (Item FL) was hand carried to Microtrace by Special Agent Jeff Wisch ("SA Wisch") of the Wisconsin Department of Justice. The bullet remained in the custody of SA Wisch during the analysis performed at Microtrace.

319. Dr. Palenik opened, photo-documented, and examined the damaged bullet (Item FL) using a combination of 2016 stereomicroscopy and digital video microscopy.

320. Dr. Palenik's examination revealed that the bullet surface was covered in debris exhibiting the following characteristics:

a. Wood fragments appear to be directly adhering to or embedded in the lead of the bullet. This later observation suggests that at least some of the wood was deposited when the energized bullet encountered a wooden object. Some of the fragments observed are individual particles of wood. One particle appears to be an agglomeration of woody fragments, possibly originating from a manufactured wood product such as chip or particle board. Isolation and analysis of these

particles would be required to identify the species or type of wood product.

b. A rounded red droplet (~.073 mm^2) adjacent to a smaller red droplet (~0.005 mm^2) is present on one side of the bullet. The identity of this dried liquid is presently unknown. Based upon its color and the fact that the bullet was previously extracted for DNA, it seems unlikely that this is blood. The color, texture, and shape of the deposit suggests that the material may be paint. Regardless of its identity, the texture of the bullet in the area where the droplets are observed strongly suggests that the droplet was deposited after the bullet was fired and came to rest. This material could be identified if subjected to further analysis.

c. No particles consistent with bone were detected by an examination using 2016 stereomicroscopy or digital video microscopy.

d. A waxy substance covers a significant portion (~40%) of the leading surface of the bullet. According to Mr. Haag, this wax is used by firearms analysts to orient and hold bullets during their analysis.

e. Numerous fibers are observed adhering to the waxy substance. Most of these are colorless; however, red and black fiber fragments were also noted. Other white fibers not associated with the waxy surface were observed in association with the bullet. These fibers could be more specifically identified after isolation and further analysis.

321. Dr. Palenik notes that the criteria for classification of each material described above is based upon *in situ* observations and are not necessarily inclusive of all particle types that may be present.

322. The sample was examined without any further preparation in a JEOL 7100FT field emission scanning electron microscope with a 50 mm^2 Oxford SDD EDS detector. The base of the bullet was fixed upon a piece of conductive, double sided, carbon tape. An image of the bullet was obtained at 20 kV. The sample was examined by a combination of backscatter and secondary electron imaging at magnifications ranging from ~50x to 2000x. Elemental maps were collected from various areas on the leading surface of the bullet that showed surfaces with exposed lead (*i.e.*, away from the waxy deposit). The elemental maps were examined for areas with elevated levels of calcium and phosphorous. Each area analyzed was rotated toward the EDS detector to increase the number of x-rays detected. No areas with elevated levels of calcium and phosphorous were detected, indicating the absence of detectable bone. A few silicon-rich areas were noted, which may suggest the presence of silicate compounds (*e.g.*, minerals).

Dr. Palenik's Opinions Re: The Damaged Bullet (Item FL)

323. Dr. Palenik opines that "there is no evidence to indicate that the bullet passed through bone. In fact, the particulate evidence that is present strongly suggests an alternate hypothesis, which is that the trajectory of the fired bullet took it into a wooden object, possibly a manufactured wood product. Furthermore, the presence of red droplets deposited on the bullet suggests that the bullet had picked up additional contamination from its environment at some point after coming to rest (*i.e.*, droplets of potential red paint or a red liquid)." (Affidavit of Dr. Palenik, **P-C Group Exhibit 48,** ¶ 19**).**

324. Based upon these findings, it is Dr. Palenik's understanding that an investigator was sent by Kathleen Zellner & Associates, P.C., to the Avery garage to review the area for possible sources of the particulate types described above. It is Dr. Palenik's understanding

that the following possible sources were identified:

A. Particle board in the garage with apparent bullet holes.

B. Red painted surfaces including a ladder in the garage and a red painted ceiling.

325. Each of the above listed materials observed on the bullet could be identified specifically. The potential sources for the particulate matter that were recently collected from the Avery garage could be directly compared to materials on the bullet. (Affidavit of Dr. Palenik, **P-C Group Exhibit 48,** ¶ 20**).**

326. On June 2, 2017, Mr. James Kirby and Kurt Kingler, current post-conviction counsel's investigator and law clerk, collected wood and paint samples from the Avery garage. Mr. Kingler test fired .22 long rifles through the exterior garage wall and wood samples into the interior of the garage. Those samples have been submitted to Dr. Palenik for further testing to determine if the samples obtained on June 2, 2017, are, in fact, the source of the red particles and wood product observed by Dr. Palenik on the damaged bullet (Item FL). Dr. Palenik will supplement his affidavit after he completes testing of these items.

327. Mr. Johnson, the owner and previous resident of Mr. Avery's trailer, often fired his .22 caliber rifle into gopher holes near the doors of Mr. Avery's garage. Mr. Johnson would expect spent casings to be ejected into the garage and not picked up. Further, Mr. Johnson would expect damaged bullets or bullet fragments to end up in the garage. (Affidavit of Rollie Johnson, **P-C Exhibit 7**; Affidavit of Steven Avery, **P-C Exhibit 4**).

Brain Fingerprinting Demonstrates Mr. Avery's Actual Innocence

328. Mr. Avery supports his claim of actual innocence with new evidence in the form of a brain fingerprinting analysis of Mr. Avery performed by Dr. Farwell.

329. As it relates to a criminal investigation, brain fingerprinting can determine whether or not

a suspect knows specific salient information about the crime that is known only to the perpetrator and investigators and not by an innocent suspect. (Affidavit of Dr. Lawrence Farwell, attached and incorporated herein as **P-C Exhibit 100, ¶ 5**).

330. Dr. Farwell is highly qualified to testify to the results of the brain fingerprinting analysis he conducted on Mr. Avery. Dr. Farwell received his B.A. from Harvard University and a Ph.D. in biological psychology from the University of Illinois. Dr. Farwell invented and developed brain fingerprinting through the course of research he conducted for the FBI, CIA, and United States Navy. His research has been published in leading peer-reviewed scientific journals in the field of forensic science, neuroscience, and psychophysiology. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100, ¶ 2**).

331. Moreover, Dr. Farwell's brain fingerprinting analysis meets the standards governing the admission of expert testimony set forth in Wisconsin Statute § 907.02(1):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

The current iteration of the statute was intended to mirror Federal Rule of Evidence 702, which codifies *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 549 (1993). *Seifert v. Balink*, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, ¶ 51.

332. Under *Daubert*, there are four non-exhaustive factors that render scientific evidence sufficiently reliable for admission: (1) whether the methodology can and has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) whether the technique has been generally accepted in the scientific community. *Id.* at ¶ 62 (citing *Daubert*, 509 U.S.

at 592-593). Brain fingerprinting meets each of these factors.

333. Briefly stated, brain fingerprinting detects information stored in the brain by measuring brainwave activity in response to certain stimuli, i.e., the P300, and/or the more recently developed P300-MERMER, effect. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100, ¶ 10**).

334. The methodology employed by Dr. Farwell in conducting his brain fingerprinting analysis of Mr. Avery is set forth in Appendix 1 to his report. This methodology can and has been subjected to rigorous testing. For example, in one study, tests were conducted on 76 subjects to detect the presence or absence of information concerning (1) real-life events including felony crimes; (2) real crimes with substantial consequences; (3) knowledge unique to FBI agents; and (4) knowledge unique to explosives experts. With both P300 and P300-MERMER, the error rate was 0%, determinations were 100% accurate, there were no false negatives, and there were no false positives. (Farwell, L. A., Richardson, D.C., and Richardson, G.M. (2013). Brain fingerprinting field studies comparing P300-MERMER and P300 brainwave responses in the detection of concealed information. DOI 10.1007/s11571-012-9230-0; *Cognitive Neurodynamics* 7(4), 263-299.). (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100, ¶ 29**).

335. Brain fingerprinting has been subjected to extensive peer review. One article written by Dr. Farwell, entitled, "Brain Fingerprinting: Detection of Concealed Information," cites 84 scientific papers on the subject. (Farwell, L. (2014). Brain Fingerprinting: Detection of Concealed Information, in *Wiley Encyclopedia of Forensic Science*, A. Jamieson and A.A. Moenssens, eds. Chichester: John Wiley. DOI 10.1002/9780470061589.fsa1013. Published 16 June 2014.).

336. Where the brain fingerprinting scientific standards have been met, the known potential error rate is less than 1%, while the median statistical confidence for individual determinations has been greater than 95%. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 28).

337. The science underlying brain fingerprinting is well accepted in the scientific community. The P300 effect has been documented in scientific literature as early as 1965. (Sutton, S.; Baren, M.; Zubin, J. & John, E.R. (1965). "Evoked-Potential Correlates of Stimulus Uncertainty". *Science*. 150 (3700): 1187-1188. DOI 10.1126/science.150.3700.1187.). Dr. Farwell's first publication on the application of the P300 effect in brain fingerprinting has been cited in approximately 2,427 subsequent publications. (U.S. National Library of Medicine, National Institutes of Health (https://www.ncbi.nlm.nih.gov/pubmed/2461285). All known scientists who have conducted and published research on the P300 effect accept it as valid and reliable.

338. Brain fingerprinting has been admitted into evidence in one of the only cases to address its reliability. *Harrington v. State*, Iowa District Court of Pottawatomie County Case No. PCCV 073247. In a decision issued on March 5, 2001, the district court acknowledged that the P300 effect has been recognized for decades, has been subjected to testing and peer review in the scientific community, and that the consensus in the field is that the P300 effect is valid. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 31, 40-41).

How Brain Fingerprinting Works

339. Brain Fingerprinting detects information stored in the brain. It does not claim to detect lies, truth-telling, guilt, innocence, or any past or present action or non-action. Brain Fingerprinting is applied in forensic settings to determine whether or not a suspect knows

specific salient information about a crime that is known only to the perpetrator and investigators, and would not be known to an innocent person. The purpose of Brain Fingerprinting is to determine scientifically whether the record stored in the suspect's brain matches the record of what actually took place when the crime was committed. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 5).

340. Brain Fingerprinting works by assessing — in real time — a subject's psychophysiological response to stimuli in the form of words or pictures presented on a computer monitor. As a forensic method, the test assess the subject's knowledge of a crime scene or of the instrumentalities or fruits of a crime, and it can also be used to assess knowledge of the particulars of an alibi scene or sequence of events. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 9).

341. Brain Fingerprinting uses electroencephalography (EEG) to measure a specific event-related potential known as the P300 — an electrical event in the brain beginning 300 milliseconds after exposure to a stimulus. The P300 is characteristic of the information processing that accompanies recognition of stimuli in comparison to a remembered context. Dr. Farwell has extended the analysis of this event-related potential farther in time to take account of additional information. This extension of the P300 is known as a "memory and encoding related multifaceted electroencephalographic response" (MERMER) or "P300-MERMER." (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 10).

342. If the subject is a witness to or perpetrator of the crime in question, his or her response to stimuli that embody accurate details of the crime will evoke a P300 response. The human brain emits a characteristic P300 (and MERMER) electrical response whenever the subject

responds to a stimulus by updating his or her memory context to take account of the stimulus. The P300 (and MERMER) response is not evoked when the stimulus is irrelevant to the subject's memory context.

343. These stimuli are crime- or situation-related words, phrases, or pictures are referred to as "probes." For the purposes of the Brain Fingerprinting test, probes are selected such that they contain information that is known only to the perpetrator and investigators, and has not been disclosed to the public. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 12-13).

344. In order for information detected in a suspect's brain to be useful to the trier of fact in determining whether or not the suspect was present when the crime was committed, a Brain Fingerprinting test must detect the presence or absence of information that is known only to the perpetrator and investigators. This must be information that is not known to the general public, has never been disclosed to the suspect after the crime, and thus would not be known to an innocent suspect. For example, information that the suspect knows from reading a newspaper, from interrogations, or from hearing testimony at trial is not applicable in a Brain Fingerprinting test. A finding that an individual knew such information would prove nothing about his participation in the crime. Knowledge of such information could be explained by his having read the newspaper, participated in the trial, etc. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 59).

345. Other items known to the person regardless of whether he or she was present at the crime ("targets") also evoke the P300 (and MERMER) response and permit Dr. Farwell to establish a baseline from which to compare the person's responses to the probes. Other stimuli that have no relevance either to the crime or to anything in the subject's memory

("irrelevants") establish a baseline for a flat response (no P300 or MERMER evoked), i.e., a response (or lack of response) to unknown and irrelevant information. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 12).

346. The signals obtained from the subject's response to multiple presentations of probes, targets, and irrelevant stimuli are averaged using analytical tools that are standard in the field of EEG psychophysiology. In this way, an overall result is obtained that demonstrates whether the probes have evoked a P300 recognition response or a flat non-recognition response (i.e., the lack of a recognition response). (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 12).

Probes Used By Dr. Farwell In Brain Fingerprint Test on Mr. Avery

347. The availability of fresh, salient, and detailed probes is essential to the efficacy of the Brain Fingerprinting test. That is, Brain Fingerprinting cannot be successfully applied in cases where the subject has been exposed, in circumstances unrelated to committing the crime, to all the known details of the crime. In such a case, no viable probes would be available, since probes by definition involve information that the suspect denies knowing by virtue of non-participation in the crime. Without such proves, a Brain Fingerprinting test would not be conducted. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 14).

348. Dr. Farwell, in his Brain Fingerprinting test of Mr. Avery, used probes developed from newly discovered forensic science evidence. Specifically, Dr. Farwell used the opinion of Mr. James that, to a reasonable degree of scientific certainty in the field of bloodstain pattern analysis, the bloodstain pattern observed on the interior cargo door of Ms. Halbach's RAV-4 is consistent with a cast-off pattern, which in turn indicates that Ms. Halbach was hit with an object when she was behind her car and while the cargo door was

open. (*See* ¶ 138, *supra*) (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 44).

349. As in every crime, the brain of the perpetrator was central to the phenomenon revealed by the newly discovered blood spatter evidence in this case. The killer's feet stood behind the car. The killer's hands wielded the object that struck Ms. Halbach. These actions cannot occur independently; the killer's brain controlled the actions of his hands and feet. The killer's brain controlled and processed the killer's actions, i.e., striking Ms. Halbach with an object when she was behind her car and while the cargo door was open. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 45).

350. There are three ways that the record of these two facts (that the killer attacked Ms. Halbach when she was behind her vehicle and that the cargo door was open at the time of the attack) could be stored in the subject's brain:

a. The suspect is the killer, and he obtained this information when he attacked Ms. Halbach;
b. The suspect was a witness to the crime, and he obtained this information by witnessing but not perpetrating the crime; and
c. The suspect did not perpetrate or witness the crime, but rather obtained this information after the crime, e.g., by seeing it in the news media or hearing it during the trial or an interrogation.

(Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 47).

351. Mr. Avery knows extensive information about the events surrounding the murder of Ms. Halbach because he learned information that was revealed during his trial and the associated interrogation and investigation in addition to his own experience with Ms. Halbach on the day of the crime. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 48).

352. However, previously unknown facts — that Ms. Halbach was behind her car and the cargo door was open when she was attacked — about the events surrounding the killer's

attack on Teresa were not revealed to Mr. Avery at trial or in the preceding investigation and had not been revealed to Mr. Avery prior to Dr. Farwell's Brain Fingerprinting test on Mr. Avery. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶¶ 50).

Dr. Farwell's Brain Fingerprinting Test Results for Mr. Avery

353. On May 2, 2016, Dr. Farwell performed a Brain Fingerprinting test on Mr. Avery. The specific purpose of this test was to determine definitively and scientifically whether or not two specific features of the attack on Ms. Halbach were stored in Mr. Avery's brain:

    a. Where the victim was in relation to her vehicle when the perpetrator attacked and wounded her behind her car.
    b. The configuration of the victim's vehicle when the perpetrator attacked the victim: cargo door open.

(Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶¶ 57).

354. In Dr. Farwell's Brain Fingerprinting test, the subject's brain responses to targets provide a template for that subject's response to known, relevant information. The responses to targets are expected to elicit a large P300 brain response because the subject's brain is expected to have the target information stored. Dr. Farwell used the following target information to provide a template of Mr. Avery's response to known, relevant information:

    a. What kind of car did Ms. Halbach drive: Toyota RAV-4. Mr. Avery selected widely known answer from three options, the two irrelevants being "Saab 9 5" and "Volvo S40."
    b. What killed Ms. Halbach: .22 bullet. Mr. Avery selected the widely known answer from three options, the two irrelevants being "deep stream" and "golf club."

(Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶¶ 59, 62).

355. Using the template provided by Mr. Avery's P300 response to the target information, as well as his P300 response to the irrelevants, Dr. Farwell's brain fingerprinting system computes a mathematical determination of "information present" or "information absent"

based on a mathematical analysis of the brainwave data captured by the EEG. If the brain response to the probes matches the brain response to the targets, this demonstrates that the probe information is stored in the subject's brain. That determination is "information present." If the brain response to the probes matches the brain response to the irrelevants, this demonstrates that the tested information is not stored in the subject's brain. The determination is "information absent." The Brain Fingerprinting system computes a statistical confidence for its determination. This computation takes into account the size of the effect measured in the brain waves along with the variability in responses in all of the brainwave data collected. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶¶ 65-66).

356. The probe stimuli for Dr. Farwell's Brain Fingerprinting test on Mr. Avery were "behind car" and "cargo door open." Dr. Farwell explained to Mr. Avery that he would first see on the computer screen a phrase that correctly specified "where the victim was in relation to her vehicle when the perpetrator attacked and wounded her" and then a phrase that accurately described "the configuration of the victim's vehicle when the perpetrator attacked the victim." The irrelevant stimuli corresponding to where the victim was in relation to her vehicle when the perpetrator attacked and wounded her were equally plausible, but incorrect, locations: "driver's seat" and "passenger side." The irrelevant stimuli corresponding to the configuration of the victim's vehicle when the perpetrator attacked the victim were equally plausible, but incorrect, configurations: "front locked up" and "rear window down." (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶¶ 60-61, 64).

Results of Dr. Farwell's Brain Fingerprinting Test On Mr. Avery

357. The determination mathematically computed by the Brain Fingerprinting system in the case of Mr. Avery was: Information absent with a statistical confidence of 99.9%. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 68).

358. These results mean that scientific testing has determined with a 99.9% statistical confidence that Mr. Avery does not know certain specific details about the attack on Ms. Halbach. This salient, crime-relevant information, which was experienced by the perpetrator when he committed the crime, is not stored in Mr. Avery's brain. Specifically, this information comprises the details that were revealed by the newly discovered blood-spatter evidence and embodied in the probe stimuli. This provides scientific evidence that Mr. Avery does not know specific critical, salient crime-relevant information regarding what actually took place at the time that the perpetrator attacked Ms. Halbach. (Affidavit of Dr. Lawrence Farwell, **P-C Exhibit 100,** ¶ 69).[13]

2016 Microscope Examination of Hood Latch Swab

359. Dr. Palenik has used a microscope developed in 2016 to analyze the hood latch swab. Dr. Palenik has offered the opinion that the swab was not used to swab the hood latch. (Affidavit of Dr. Palenik, **P-C Group Exhibit 24,** ¶ 10).

Source Testing of the Hood Latch Swab

360. Dr. Reich has applied newly developed DNA source testing methods to the hood latch swab, ruling out blood, saliva, semen, and urine as the source of Mr. Avery's DNA allegedly detected on the hood latch swab. Dr. Reich, through a series of experiments, has demonstrated that the DNA allegedly discovered on the hood latch was not the result of Mr. Avery touching the hood latch as he opened the hood. (Affidavit of Dr. Reich, **P-C**

[13] Current post-conviction counsel offers a free Brain Fingerprinting test, administered by Dr. Farwell, to the following individuals: Mr. Hillegas, Inv. Wiegert, Agent Fassbender, Sgt. Colborn, and Lt. Lenk, on the issues raised in this petition.

Group Exhibit 15, ¶¶ 25-30).

Source Testing of sub-key Demonstrated that the DNA of Mr. Avery on the sub-key was Planted

361. Dr. Reich has determined that the source of the DNA on the key, Item C, was not blood, as the State implied to the jury. (TT:2/19:132-33). Instead, Dr. Reich determined that the DNA extracted from the swab of the Toyota sub-key came from skin cells of Mr. Avery. However, Dr. Reich concluded that the DNA on Item C was planted because the amount of DNA detected by the WSCL was ten times greater than what Mr. Avery actually deposited on an exemplar sub-key by holding it. (Affidavit of Dr. Reich, **P-C Group Exhibit 15,** ¶ 31).

362. For the purposes of Dr. Reich's experiment, Mr. Avery held the exemplar sub-key in his hand for 12 minutes. The exemplar sub-key was then transported to Dr. Reich's lab, where it was swabbed. The exemplar sub-key, which Mr. Avery was touching for 12 minutes, yielded ten times less DNA than what the WSCL extracted from the Toyota sub-key, Item C. Therefore, Dr. Reich has concluded that Mr. Avery did not deposit his DNA on the sub-key recovered from his bedroom.

363. Mr. Avery recalls that the law enforcement photos taken of bathroom show that his toothbrush had been taken from the bathroom.

364. Dr. Reich has offered the opinion that, to a reasonable degree of scientific certainty, Mr. Avery's DNA on the Toyota sub-key, Item C, was planted from a DNA-rich source, such as Mr. Avery's toothbrush. (Affidavit of Dr. Reich, **P-C Group Exhibit 15,** ¶ 37)

Applicable Case Law Re: Planting and Fabrication of Evidence Violated Mr. Avery's Due Process Rights

365. Mr. Avery has demonstrated that forensic evidence was planted to incriminate him. Specifically, Mr. Avery has demonstrated that the following evidence was planted: the

victim's DNA on the damaged bullet (Item FL); his blood in the RAV-4; his DNA on the victim's key; the victim's electronic components in the burn pit; the victim's bones in the burn pit and burn barrels; and his DNA on the hood latch swab. This planting of evidence is equivalent to the fabrication of evidence. No matter what the label, the result is the same. Mr. Avery was convicted on false evidence. The State presented evidence that Mr. Avery was forensically tied to the murder. The jury likely believed that evidence as illustrated by its guilty verdict, but current post-conviction counsel has demonstrated that evidence was false. Therefore, Mr. Avery's due process rights were violated by the State's presentation of the false evidence and his conviction must be vacated.

366. A conviction obtained through the use of false evidence violates due process as guaranteed by the 14th Amendment. *State v. Yancey*, 32 Wis. 2d 104, 113, (1966); *State v. Nerison,* 136 Wis.2d 37, 54 (1987). Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. *State v. Plude*, 301 Wis. 2d 746 (2007). A defendant must demonstrate that the false evidence in question was "used" or "relied on" by the prosecutor to deliberately deceive the jury. *State v. Holtet*, 204 Wis. 2d 108 (Ct. App. 1996). The prosecutor may not rely on evidence which is incredible as a matter of law, or which conflicts with nature or with fully established or conceded facts. *Nerison,* 136 Wis.2d at 54; *State v. Oliva*, 178 Wis. 2d 876 (Ct. App. 1993).

367. Falsified evidence will never help a jury perform its truth seeking function. That is why convictions premised on deliberately falsified evidence will always violate the defendant's right to due process. *Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017). In the event that the jurors hear false evidence of a critical nature, the real controversy has not

been tried and relief is warranted. *State v. Miller*, 152 Wis. 2d 89 (Ct. App. 1989).

368. Mr. Avery has conclusively demonstrated that evidence was planted and fabricated against him. The fact that that evidence was false evidence has been established through new information discovered pursuant to the recent investigation. The application of new technology that did not exist at the time of his conviction has revealed that the evidence presented at the trial to cause his conviction was false. For that reason, Mr. Avery should be granted relief because the new evidence demands the conclusion that Mr. Avery's conviction is the result of a manifest injustice committed against him.

369. Due process may require granting a new trial under § 974.06 on the basis of evidence discovered after the time for bringing post-verdict motions has passed. Due process warrants a new trial when newly discovered evidence meets the following criteria: (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial. *State v. Boyce,* 75 Wis.2d 452, 457 (1977). If the above criteria are met, the court will conclude that a manifest injustice has occurred, warranting relief. *State v. Plude*, 310 Wis.2d 28 (2008).

Applicable Case Law Re: New Evidence

370. As described in great detail herein, Mr. Avery has presented new evidence that entitles him to relief. In *State v. Plude*, 310 Wis.2d 42 (2008), the Court explained that new evidence warrants relief if the new evidence establishes that the defendant's conviction constitutes a "manifest injustice." The issue was whether the defendant drowned his wife

by forcing her head in the toilet, which involved conflicting testimony from several experts. *Plude*, 310 Wis. 2d 28, ¶45. After the trial, the defendant argued that one of the State's experts, who testified that the victim could not have inhaled toilet water on her own, had falsified his credentials. The *Plude* court determined that had the jury known about the expert's lie as to his credentials, there was a very real probability a different result would have been obtained at the trial. *Id.*

371. Here, through the use of new technology previously unavailable, Mr. Avery has discovered new evidence that shows his conviction was the result of a manifest injustice. Much of the evidence was discovered diligently after the new technology became available. Further, the evidence is crucial to the issue of Mr. Avery's guilt or innocence and is not cumulative. As in *Plude*, relief is warranted.

372. Mr. Avery acknowledges that after satisfying the four prong test, the Court must assess the impact of the new evidence on the evidence presented at trial and find that the reasonable probability exists that the new evidence would have resulted in a different outcome. For example, in *State v. Avery*[14], 2013 WI 13, 345 Wis. 2d 407, the Court applied the test set forth in *Plude* to the defendant's argument that he was entitled to a new trial in the interest of justice as the result of new evidence. The defendant submitted that his new "photogrammetry" evidence could not have been presented at his trial because the technology was not available. For that reason, he had not been negligent in seeking the evidence. The defendant further argued that the new evidence showed he had not participated in the crime for which he had been convicted, therefore it was material. Finally, the defendant submitted that the evidence was not cumulative because the new

[14] Although they share the same surname, the defendant in the case at bar is not related to Mr. Avery or Brendan.

evidence showed the perpetrator's height while no such evidence had done so at his trial. The *Avery* court agreed and found that the defendant met all four prongs of the test. The defendant in *Avery* was not granted relief because, although he could satisfy the four prong test, he was unable to show that the jury would have reached a different result had his new evidence been presented to the jury. In *Avery*, strong eyewitness identifications were presented at the trial and the defendant gave a detailed confession. Although the defendant recanted his confession at trial, the jury did not believe him.

373. Just like the defendant in *Avery*, Mr. Avery has satisfied the first four prongs of the test. The 2016 SEM/EDS examination of the damaged bullet fragment (Item FL) by Dr. Palenik only became available through technological advancements after Mr. Avery's 2007 trial. Similarly, the source testing developed by Dr. Reich at Independent Forensics was not available in 2007, and Dr. Farwell's newest version of Brain Fingerprinting was also not available at the time of the trial. Therefore, Mr. Avery was not negligent in failing to have any of these tests conducted. Clearly, the results of these tests are material and non-cumulative to establishing his innocence in the murder of Ms. Halbach.

374. The abundant scientific evidence presented by Mr. Avery in this petition would have had a strong impact on the jury such that one must surely conclude there is a reasonable probability that had the jury heard it, Mr. Avery would have been acquitted.

375. This case is similar to the recent case of *State v. Scheidell*, 2015AP1598-CR, 2017 WL 1180366, at *3 (Wis. Ct. App. Mar. 29, 2017). The new evidence and expert testimony presented by the defendant resulted in the court granting him a new trial. The *Scheidell* court found it important that the defendant had supported his claims with expert testimony, just as Mr. Avery has done here.

376. Citing both *Avery* and *Plude*, the *Scheidell* Court reiterated that a judgment of conviction is properly set aside and a new trial granted based on newly discovered evidence where the evidence is "sufficient to establish that the defendant's conviction resulted in a 'manifest injustice.' " *Avery*, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (citing *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42). If a defendant is able to prove all four criteria, then the court must also determine "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." *Id.* If these four criteria are met, the defendant has established the existence of a manifest injustice. *Plude*, 310 Wis. 2d 28, ¶33.

377. In *Scheidell*, the defendant filed a § 974.06 motion and argued that he had discovered new evidence, supported by expert testimony, that the perpetrator of a sexual assault against a victim in a separate crime was the perpetrator of the sexual assault underlying his conviction. The court of appeals affirmed the circuit court's decision to grant a new trial to the defendant.

378. In deciding that relief was warranted, the *Scheidell* court reviewed the strength of the State's case at trial in conjunction with the proposed new evidence. The court recognized that the victim held an unwavering belief in the defendant's identity as her attacker. But the court noted that other factors detracted from her identification. Further the court found the additional expert testimony persuasive. Ultimately, the court held that the newly discovered evidence afforded a reasonable probability that if the jury had heard it, it would have a reasonable doubt as to the defendant's guilt. The *Scheidell* court held that unlike *Avery*, the new evidence went to the heart of the controversy. For that reason, the case

was distinguishable from *Avery* and similar to *State v. McCallum*, 208 Wis. 2d 463, 480, 561 N.W.2d 707, 713 (1997), *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374 (shift in mainstream medical opinion regarding shaken baby syndrome established reasonable probability that a different result would be reached in a new trial) and *Plude*.

379. Mr. Avery has demonstrated the discovery of new evidence by experts. Mr. Avery has shown the following: A) the damaged bullet (Item FL) did not penetrate the skull of Ms. Halbach, absorb her DNA, or cause her death; B) the crime-relevant information is not stored in Mr. Avery's brain; C) the hood latch swab (Item ID) did not swab a hood latch; D) Mr. Avery did not deposit his DNA on the victim's key by holding it in his hand; rather, it was deposited by applying Mr. Avery's DNA to his key with a DNA rich source such as his toothbrush. Unlike *Avery* and consistent with *Scheidell*, *Plude*, *McCallum* and *Edmunds,* Mr. Avery's new evidence addresses the heart of the controversy before this Court as to whether the forensic evidence used against Mr. Avery was valid or credible. Mr. Avery has demonstrated that it is not.

ETHICAL VIOLATIONS OF PROSECUTOR KRATZ HAVE IMPAIRED MR. AVERY'S DUE PROCESS RIGHTS TO A FAIR TRIAL

380. Mr. Gershman is a Professor of Law at Pace Law School in White Plains, New York, and an attorney licensed to practice in the State of New York. Mr. Gershman is widely recognized as the leading authority in the United States on the subjects of prosecutorial misconduct. Mr. Gershman has served as an Assistant District Attorney in the office of the New York County District Attorney and as Assistant Attorney General in the office of the New York State Special Prosecutor's Office, where he investigated and prosecuted official and political corruption within the New York City criminal justice system. Later, Mr. Gershman served as the Chief of the Appeals Bureau and the Bronx Anti-Corruption

Bureau where he investigated and prosecuted public officials, including judges, prosecutors, attorneys, and police officers. Mr. Gershman has frequently testified as an expert witness in judicial proceedings and before legislative bodies, such as the United States Congress, as an expert on criminal procedure, prosecutorial misconduct, and professional ethics. Mr. Gershman has written extensively on the subject of prosecutorial ethics. (Affidavit and CV of Bennett Gershman ("Affidavit of Bennett Gershman"), attached and incorporated herein as **P-C Exhibit 96**, ¶¶ 2, 4-6).

381. Mr. Gershman holds the following opinions to a reasonable degree of certainty as an expert on the subjects of criminal procedure, prosecutorial misconduct, and professional ethics:

a. Mr. Kratz's statements at his press conferences constituted professional misconduct;

b. Mr. Kratz's charging Mr. Avery based upon Brendan's confession constituted professional misconduct;

c. Mr. Kratz's attempt to introduce allegations of Mr. Avery's prior wrongful acts into his 2007 criminal trial constituted professional misconduct;

d. Mr. Kratz's pursuit of inconsistent and irreconcilable theories at the separate trials of Mr. Avery and Brendan constituted professional misconduct;

e. Mr. Kratz's request for an aiding and abetting instruction in Mr. Avery's trial constituted professional misconduct;

f. Mr. Kratz's public dissemination of inflammatory information about Mr. Avery constituted professional misconduct; and

g. Mr. Kratz's jailhouse contacts with Mr. Avery constituted professional

misconduct.

(Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 7) ("Mr. Kratz and Sheriff Pagel 3/2/05 press conference video," attached and incorporated herein as **P-C Exhibit 95**).

Fabrication of Evidence Pre-Trial: Mr. Kratz Press Conference

382. On March 2, 2006, Mr. Kratz held a press conference following Brendan's confession on March 1, 2006. After warning children not to watch, Mr. Kratz related to the assembled media and live television audience the horrific details in Brendan's confession, outlining Brendan's statements about how he saw Ms. Halbach naked and shackled to Mr. Avery's bed, how he and Mr. Avery repeatedly raped, tortured, and gruesomely butchered Ms. Halbach to death, all based entirely on Brendan's confession. Mr. Kratz knew there was no evidence to corroborate Brendan's confession and implicate Mr. Avery, despite the four month long police investigation and exhaustive search of Mr. Avery's trailer, garage, and property. Mr. Kratz also knew that this new account of the rape-torture-murder of Ms. Halbach contradicted virtually every fact Mr. Kratz had alleged in his original criminal complaint against Mr. Avery — the place where Ms. Halbach was killed (garage), the weapon used (gun), and the cause of death (shot in the head). Mr. Kratz asserted that "[w]e have no determined what occurred sometime between 3:45 p.m. and 10 or 11:00 p.m. on the 31st of October." He then proceeded to recount for the media, the viewing audience, and ultimately a nationwide audience the following allegations:

a. Mr. Avery, "partially dressed and full of sweat," invited Brendan, his sixteen-year-old nephew, into his trailer;

b. Ms. Halbach, "completely naked and shackled to the bed, scream[ed] louder and

louder for help;"

c. Mr. Avery "invite[d] [Brendan] to sexually assault [Ms.] Halbach, telling him that he ha[d] repeatedly sexually assaulted her;"

d. Brendan "proceed[ed] to sexually assault [Ms.] Halbach, who begged the sixteen-year-old for help;"

e. Mr. Avery "watche[d] as his sixteen-year-old nephew rape[d] this woman;"

f. Mr. Avery complimented Brendan on "what a good job he did;"

g. Mr. Avery told Brendan "of his intent to murder [Ms.] Halbach;"

h. "Brendan watche[d] as [Mr.] Avery [took] a butcher knife from the kitchen and stab[bed] [Ms.] Halbach in the stomach;"

i. Mr. Avery, "while [Ms.] Halbach [was] still begging for her life, hand[ed] the knife to the sixteen-year-old boy and instruct[ed] him to cut her throat;"

j. Brendan "cut[] [Ms.] Halbach's throat but she still [didn't] die;" and

k. Mr. Avery and Brendan together sadistically inflict on Ms. Halbach "additional torture, additional mutilation, additional mechanisms of death which include manual strangulation and gunshot wounds."

383. Mr. Kratz's statements at his press conferences constituted professional misconduct. Mr. Kratz, an experienced prosecutor, knew that a prosecutor is not allowed to disparage the character and reputation of the accused, disclose the existence of a confession or other physical evidence, discuss any information that is likely to be inadmissible in evidence and if disclosed would create a substantial risk of prejudicing an impartial trial, and express an opinion on a defendant's guilt. Mr. Kratz knew that his statements would make it virtually impossible for anyone watching his press conference to keep an open mind

about the case and the guilt of the defendants. Mr. Kratz knew what he had accomplished. In a subsequent interview he stated, "I was hoping the media would not choose to release all of the disturbing details." Mr. Kratz knew that his statements would have a "substantial likelihood of materially prejudicing an adjudicative proceeding" and a "substantial likelihood of heightening public condemnation of the accused." (ABA Model Rules 3.6, 3.8; Affidavit of Bennett Gershman, **P-C Exhibit 96**, ¶ 14).

384. Moreover, although a prosecutor is barred from expressing an opinion on the merits of a case and the guilt of an accused, Mr. Kratz bolstered his grisly description of the crime by representing that everything he said was a truthful and accurate account. He asserted in his March 1, 2006, press conference that law enforcement "now has a definitive set of answers as to what happened to [Ms.] Halbach" and that law enforcement is presently executing a search warrant on the Avery property where "we know exactly what to look for and where to look for it." Then, at his press conference the next day, Kratz assured his listeners that "we have now determined what occurred sometime between 3:45 p.m. and 10 or 11 p.m. on the 31st of October." (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 15; 3/1/06 and 3/2/06 Press Conference, **P-C Group Exhibit 95**).

385. Given Mr. Kratz's prestige and prominence as the special prosecutor appointed by the governor to lead the investigation, Mr. Kratz's assertions that law enforcement had "solved" the case would almost certainly be greeted by public with both relief that the supposed perpetrators had been apprehended and an outcry to punish them. (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 16).

Mr. Kratz Charged Mr. Avery Despite Knowing that Brendan's Confession was Fabricated

386. Mr. Kratz knew at the time of his March 2, 2006, press conference that every statement

he made accusing Mr. Avery of the horrific acts against Ms. Halbach — shackling, raping, torturing, and butchering her to death — was based exclusively on the uncorroborated confession of 16-year-old Brendan, which has recently been found by a federal court to have been coerced by the police.[15] Mr. Kratz knew that Brendan was of borderline intelligence, attended special education classes, and was known as a mild-mannered, introverted young man who was never before in trouble with the law. As head of the investigation, Mr. Kratz knew several other critical facts: the police interrogated Brendan several times without his lawyer or parent being present; there were no independent facts or circumstances to corroborate Brendan's confession; Brendan's confession presented a narrative that was totally different than the version Mr. Kratz used in filing the original murder charges against Mr. Avery; and Brendan's confession was legally inadmissible against Mr. Avery for constitutional and statutory reasons. In short, Mr. Kratz had no evidence and therefore no legal basis to support the new charges of sexual assault and torture against Mr. Avery contained in the amended complaint and announced at the press conference. (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 17).

387. In addition to saturating the media and the public with an extraordinarily horrific description of Mr. Avery repeatedly raping, torturing, and sadistically butchering to death a young woman, Mr. Kratz knew when he brought the new charges against Mr. Avery that he had no legal basis to do so. Mr. Kratz knew that a four-month police investigation that had conducted at least eight separate searches of Avery's trailer, garage, and every part of the property had yielded no forensic or physical evidence to corroborate Brendan's confession. A prosecutor engages in professional misconduct when he makes unwarranted claims and brings unwarranted criminal charges. See Wisconsin Rules of

[15] *Dassey v. Dittman*, 201 F.Supp.3d 963 (E.D.Wis. Aug. 12, 2016)

Professional Conduct. SCR 20:3.1(1)("knowingly advancing a claim that is unwarranted under existing law"); SCR 20:31(2)("knowingly advancing a factual position unless there is a basis for doing so that is not frivolous"). (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 18).

Mr. Kratz's Knowledge of the Falsity of the Charges Against Mr. Avery Based Upon Brendan's Confession

388. Moreover, in bringing charges that are not legally and factually sustainable, Mr. Kratz engaged in professional misconduct for another reason. Prosecutors are commanded "not to prosecute a charge that the prosecutor knows is not supported by probable cause." Wisconsin Rules of Professional Conduct. SCR 20:3.8 (a). See *Draper v. United States*, 358 U.S. 307 (1959) ("probable cause exists where the facts and circumstances within [the prosecutor's] knowledge and of which [he has] reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."). Mr. Kratz knew that he lacked sufficient evidence to charge Mr. Avery with the acts described in Brendan's confession. Brendan's confession, as Mr. Kratz surely knew, was inadmissible against Mr. Avery under the Sixth Amendment to the U.S. Constitution. See *Bruton v. United States*, 391 U.S. 123 (1968). Brendan's confession was also inadmissible against Mr. Avery because it violated a fundamental rule of evidence barring use of statements that are hearsay. See Wisconsin Evidence Rule. SCR 908.02 (hearsay evidence not admissible). See also ABA Model Rules, Rule 3.8(a)(Comment [1])(prosecutor has "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence"); ABA Prosecution Standards 3-4.3 (prosecutor allowed to file criminal charges "only if the prosecutor reasonably believes that the charges are supported

by probable cause, that admissible evidence will be sufficient to support the conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice"). (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 19).

389. Mr. Kratz's conduct constituted professional misconduct. Mr. Kratz was an experienced prosecutor. He knew that Brendan's confession was inadmissible against Mr. Avery and that that there was no evidence to corroborate Brendan's account of Ms. Halbach's murder. He lacked probable cause — indeed, any factual basis whatsoever — to file his amended complaint charging Avery with the additional crimes of sexual assault and torture and then publicly announced those new charges to the world. In Mr. Gershman's opinion, Mr. Kratz brought these new charges against Mr. Avery in bad faith. He knew he would not be able to present these facts against Mr. Avery to a jury, as demonstrated by his decision to drop the sexual assault and kidnapping charges on February 2, 2007. He disclosed these facts publicly knowing that they would be heard by prospective jurors and used to prejudice Mr. Avery. (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 20).

Mr. Kratz Engaged in Fraudulent Conduct

390. Moreover, Mr. Kratz's charging Mr. Avery without a proper evidentiary basis constituted professional misconduct under a separate ethics rule. As noted, prosecutors cannot file criminal charges without a sufficient legal basis to support those charges. See Wisconsin Rules of Professional Conduct SCR 20:8.4(c) ("professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). By charging without a proper factual basis, and then representing inofficial court documents and in his public statements that those charges were validly brought, Mr. Kratz engaged in

fraudulent, dishonest, deceitful, and a misleading conduct. (Affidavit of Bennett Gershman, **P-C Group Exhibit 96,** ¶ 21).

Mr. Kratz's Statements Destroyed Mr. Avery's Due Process Rights to Receive a Fair Trial

391. Mr. Kratz also engaged in professional misconduct for yet another reason. Mr. Kratz's official and public statements went so far beyond what any responsible prosecutor would believe were appropriate judicial and public statements that he thereby violated the "attorney's oath" by advancing facts prejudicial to the reputation of a party without any legitimate reason in law or justice to do so. See Wisconsin Rules of Professional Conduct SCR 20:8.4(g)("professional misconduct to violate the attorney's oath"); SCR 40:15 (lawyers commanded to "advance no fact prejudicial to the reputation of a party or witness"). It is one thing for a co-defendant like Brendan to make allegations that implicate himself and others. It is a far different thing for a prosecutor not only to repeat those statements publicly but also to endorse them as the truth, particularly when there was no factual basis to confirm their validity. All of Mr. Kratz's references to Mr. Avery's alleged heinous acts were gratuitous, without any legitimate basis in fact or law, without any legitimate law enforcement reason, and destroyed Avery's character, his ability to receive a fair trial, and his constitutional right to the presumption of innocence. Collectively, Mr. Kratz's statements were offensive to the fair and proper administration of justice and the integrity of our system of justice, and demonstrated Mr. Kratz's unfitness as a prosecutor. See ABA Model Rule 8.4 (d) ("professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice"). (Affidavit of Bennett Gershman, **P-C Group Exhibit 96,** ¶ 22).

Mr. Kratz's Attempt to Introduce Uncharged, Unproven, or Irrelevant Prior Conduct of Mr. Avery

392. Mirroring his actions in his March 2, 2006, press conference that smeared Mr. Avery's character, on June 15, 2006, Mr. Kratz moved to introduce at Mr. Avery's trial allegations of Mr. Avery's prior uncharged, unproven, or irrelevant conduct that Mr. Kratz claimed would be relevant in proving Mr. Avery's guilt. Given the already massive media coverage of the case, Judge Willis sealed the motion.

393. At the time Mr. Kratz filed his motion, in addition to the murder and mutilation charges, Mr. Avery had also been charged with sexual assault and torture based entirely on Brendan's confession, which Mr. Kratz knew was not admissible against Mr. Avery. Although at this point the police investigation into Mr. Avery's involvement had lasted over eight months, Mr. Kratz lacked any proof against Mr. Avery of sexual assault and torture charges. Mr. Kratz therefore sought to bolster his case against Mr. Avery by introducing allegations ostensibly to show that Mr. Avery had a violent and sexually assaultive disposition: threats by Mr. Avery against his ex-wife many years earlier; physical violence by Mr. Avery against his girlfriend; Mr. Avery's conviction for torturing and killing a cat twenty-five years earlier; recklessly endangering the safety of an acquaintance over twenty years earlier; his prior conviction for possessing a firearm; alleged sexual misconduct and abuse with several persons; and a phone conversation with a woman containing sexual innuendo. (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 24).

394. Mr. Kratz knew when he made his motion to introduce evidence of Mr. Avery's violent and sexually assaultive character that he lacked any evidence to charge Mr. Avery with sexual assault or torture against Ms. Halbach so that the alleged conduct lacked any probative value with respect to any issue in the case. In addition, these allegations were

hugely inflammatory and prejudicial. (Affidavit of Bennett Gershman, **P-C Group Exhibit 96,** ¶ 25).

395. Judge Willis found that the proof Mr. Kratz offered "bore little relationship between the offered evidence and any proper purpose;" "had minimal probative value;" "was clearly inadmissible;" that "[Mr. Kratz] failed to clearly articulate a rationale for admission of the offered evidence, a shortcoming which runs through the state's argument on much of its offered other acts evidence;" that the motion "contained no serious argument for admissibility;" that the "court is at a loss to understand how the requested evidence would be offered for a proper purpose;" that it was "difficult for the court to analyze and evaluate the State's argument because the court simply does not understand it;" and that "the evidence has *zero probative value* and would be highly prejudicial." (Affidavit of Bennett Gershman, **P-C Group Exhibit 96,** ¶ 26) (emphasis added).

Mr. Kratz's Ongoing Effort to Destroy Mr. Avery's Reputation to Prevent Him From Receiving a Fair Trial

396. Clearly, the only apparent reason Mr. Kratz sought to admit these clearly inadmissible and blatantly inflammatory charges was to destroy Mr. Avery's character — as he had done at the press conference — and thereby help persuade the jury to convict him. As Judge Willis found, the only reason Mr. Kratz offered this incendiary proof was to show that Mr. Avery had a "propensity to commit sexual assaults." In fact, Mr. Kratz even disclosed his true purpose when he argued that the proof was admissible to prove that Mr. Avery has a "sadistic personality." But as Judge Willis noted, and which every trial lawyer recognizes, "that is specifically the type of character evidence which is prohibited." Thus, by seeking to introduce these incendiary bad acts allegedly committed by Mr. Avery knowing that there was no valid basis to admit them, Mr. Kratz knew he was making a

claim and advancing a position that was unwarranted under existing law. His conduct constituted professional misconduct. See Wisconsin Rules of Professional Conduct. SCR 20:3.1(1)(2). (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 27).

Due Process Violations: Mr. Kratz's Presentation of Inconsistent and Irreconcilable Theories

397. A prosecutor's fundamental interest in criminal prosecutions is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Although the prosecutor is allowed to prosecute with earnestness and vigor, and "may strike hard blows, he is not at liberty to strike foul ones." *Id.* Constitutional and ethical rules impose a special obligation on prosecutors to serve and vindicate the truth and administer justice. Thus, a prosecutor violates due process and his ethical duty to serve the truth when he presents inconsistent and irreconcilable theories at two different trials against two different defendants. Such conduct is inherently unfair, disserves the truth, renders any resulting conviction unreliable, and undermines confidence in the verdict. (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶ 28).

398. At Mr. Avery's trial, Mr. Kratz argued in his summation that the "uncontested and uncontroverted facts" proved several issues. First, he argued that uncontested and uncontroverted facts pointed to Mr. Avery as the "one person" who was exclusively responsible for the death of Ms. Halbach. Mr. Kratz argued in his closing:

a. There is no question about who is responsible for the death and the mutilation of Ms. Halbach;

b. All of the evidence points to one person. That's the one person being responsible;

c. I'm going to argue at the conclusion of this case who that one person is. I bet you can guess who I'm going to suggest was responsible;

d. The facts are uncontested, uncontroverted;

e. Mr. Avery was the last person to see Ms. Halbach alive;

f. All the early clues pointed to one man. One person. The last person to see her alive;

g. Who's involved in the mutilation process? The evidence keeps pointing to one individual;

h. All of the evidence points to only one person; and

i. Other suspects were checked out. There was no evidence pointing to suspects other than Mr. Avery.

399. Mr. Kratz also argued that Ms. Halbach's death was caused by two gunshots to her head. He argued:

a. We're going to hear about gunshots to the head;

b. The instrumentality of the murder was a .22 caliber rifle;

c. We will actually be arguing to you that Mr. Avery handled, held that weapon in his hands when Ms. Halbach was killed;

d. Ms. Halbach's death caused by two gunshot wounds to the head;

e. Ms. Halbach's potential and future aspirations were snuffed out by one act, and by one act from one person; and

f. Ms. Halbach was killed by gunshot wounds.

400. Mr. Kratz also claimed that the place where Teresa Halbach was killed was in Avery's garage. He argued:

a. No blood was found in the trailer. But since Teresa wasn't killed in the trailer, there shouldn't be;

b. She was not killed in the trailer;

c. Where was Teresa killed? This is an easy answer, or at least it is an answer that is directed by all the physical evidence in this case. Teresa Halbach was killed in the garage; and

d. She was killed in Steven Avery's garage.

(Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶¶ 29-31).

401. But when trying Brendan, Mr. Kratz claimed that Brendan killed Ms. Halbach, or at least participated in her killing with Mr. Avery. Mr. Kratz claimed that she was killed by Mr. Avery stabbing her in the stomach, Brendan slitting her throat, Mr. Avery manually strangling her, and then incidentally adding a gunshot. Mr. Kratz argued that she was killed in Mr. Avery's trailer, not in his garage.

402. Mr. Kratz's inconsistent contentions at the trials of Mr. Avery and Brendan violate due process as well as a prosecutor's duty to promote the truth and serve justice. See *Stumpf v. Houk*, 653 F.3d 426 (6th Cir. 2011); *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *State v. Gates*, 826 So.d 1064 (Fla. App. 2002). A prosecutor may not advance at separate trials theories of guilt which cannot be reconciled factually. Mr. Kratz could not in good faith argue at Mr. Avery's trial that Mr. Avery was the only killer, and then argue at Brendan's trial that Mr. Avery along with Brendan killed Ms. Halbach. Mr. Kratz could not in good faith argue at Mr. Avery's trial that Ms. Halbach's death was caused by gunshot wounds and then argue at Brendan's trial that her death was caused by stab wounds to her stomach and throat and manual strangulation as well as gunshots. Mr. Kratz could not in good faith argue in Mr. Avery's trial that Ms. Halbach was killed in the garage and then argue in Brendan's trial that she was killed in Mr. Avery's trailer.

403. Mr. Kratz's theories in the two different trials of who killed Ms. Halbach, how she was killed, and where she was killed, negate one another. His claims are inconsistent and irreconcilable. Such flip-flopping conduct by a prosecutor is inherently unfair, legally and ethically, and undermines the very concept of justice and the duty of a prosecutor to serve truth. A prosecutor cannot engage is such blatant gamesmanship; such conduct destroys confidence in the integrity of the system of justice and the constitutional and ethical precept that the prosecutor's goal is to serve justice rather than winning convictions. See Wisconsin Rules of Professional Conduct SCR 20:8.4 (c) ("professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); SCR 20:3.1 (1) (lawyer shall not advance claim that is "unwarranted under existing law"); SCR 20:3.1 (2) (lawyer shall not "knowingly advance factual position unless there is a basis for doing so that is not frivolous"); ABA Model Rules 8.4 (d) (professional misconduct to "engage in conduct that is prejudicial to the administration of justice"). (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶¶ 32-34).

Mr. Kratz's Request for an Aiding and Abetting Instruction in Mr. Avery's Trial

404. Mr. Kratz requested Judge Willis to give the jury a preliminary instruction that the jury could find Mr. Avery guilty as having "caused the death of Teresa Halbach or aided and abetted Brendan Dassey in causing the death of Teresa Halbach." (TT:2/12:9). However, Mr. Kratz later stated that he did not want to highlight Brendan's identity because it might hurt his case; as Mr. Kratz noted, "some of the jurors quite candidly indicated in jury selection . . . that the state should . . . call Brendan Dassey as a witness." (TT:2/12:9-10). Mr. Kratz was worried that the jurors would think the state had the burden to call Brendan and therefore asked the judge to omit his name and substitute the word "another." The

judge agreed that "it's not a good idea . . . to focus attention on Mr. Dassey" (TT:2/12:16) and then gave the jury a preliminary instruction that Mr. Avery was charged with either directly killing Ms. Halbach or by aiding and abetting another person who directly killed her. Judge Willis repeated to the jury the aiding and abetting theory for Mr. Avery's guilt at least eleven times.

405. Mr. Kratz's request to instruct the jury on Mr. Avery's guilt as an "aider and abettor of another" was unwarranted, dishonest, and prejudicial to the administration of justice. Mr. Kratz knew that for the previous eleven months, massively prejudicial publicity had linked Mr. Avery and Brendan in the Halbach murder. For eleven months, the media had been saturated with Brendan's confession that described the gruesome details of Halbach's death. Mr. Kratz knew that the jury certainly was aware of Brendan's role in the killing. Mr. Kratz also knew that legally he was barred from using any evidence against Brendan to prove Mr. Avery's guilt. So, if Mr. Avery's culpability rested exclusively on Mr. Avery's own conduct and not on the conduct of anyone else, what was the legal basis for Mr. Kratz to seek a gratuitous reference to a legal concept that had nothing to do with the case and what Mr. Kratz intended to prove?

406. Mr. Kratz's seeking the aiding and abetting instruction, in the professional opinion of Mr. Gershman, was done to invite the jury to focus on all of the disturbing details in Brendan's confession. Mr. Kratz knew that there would be no proof relating to Brendan or his confession. Mr. Kratz thereby encouraged the jury to speculate on Brendan's participation when Mr. Kratz knew full well that there would be no proof offered that would suggest that Mr. Avery aided Brendan or anybody else in the crime. Indeed, as noted above, Mr. Kratz in his closing argument repeatedly told the jury that there was only

one person who was involved in Ms. Halbach's death and that person was Mr. Avery.

407. It was therefore dishonest, unwarranted, and a misrepresentation for Mr. Kratz to suggest to the jury that Mr. Avery was being tried as a principal and also as an aider and abettor. His conduct violated the Wisconsin Rules of Professional Conduct. SCR 20:8.4 (c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); SCR 20:3.1 ("knowingly advancing a claim that is unwarranted under existing law"). Mr. Kratz's bad faith conduct also was prejudicial to the administration of justice. See ABA Model Rules 8.4 (d) (professional misconduct to "engage in conduct that is prejudicial to the administration of justice"). (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶¶35-38.

Mr. Kratz's Ongoing Character Assassination Destroys Mr. Avery's Ability to Ever Receive a Fair Trial

408. Mr. Kratz has recently published a book about the Avery case entitled The Case Against Steven Avery and What "Making a Murderer" Gets Wrong. He has also appeared on various television shows to promote his book. Mr. Kratz's book and media appearances describe in vivid detail how he claims Mr. Avery sexually assaulted his ex-wife, his former girlfriend, his niece, and his babysitter; his horrific torture of a cat; and a variety of other violent criminal acts. Indeed, these allegations parallel the inflammatory allegations Mr. Kratz made against Mr. Avery in his sealed motion to Judge Willis (*see* ¶¶ 388-91, *supra*). To be sure, the First Amendment protects Mr. Kratz's freedom to publish and talk about his book. But as an attorney, and former lead prosecutor in the Avery and Dassey cases, Mr. Kratz's free speech rights are constrained by ethical rules. Two separate rules of professional ethics limit Kratz's freedom to speak about his prosecution: first, as noted above, the prohibition applicable to all lawyers in making extrajudicial statements that

could impair a criminal defendant's right to a fair trial, and second, a prohibition against a former prosecutor disclosing in a book or media appearance confidential information in connection with the cases he prosecuted.

409. Mr. Kratz's book and media appearances exposed considerable information that apparently had not been publicly available that alleged that Mr. Avery was a violent, sadistic, and sexually assaultive person. Some of the information disclosed by Mr. Kratz had already been contained in Mr. Kratz's pretrial motion to Judge Willis, which as noted, Judge Willis declared inadmissible. But as noted, Judge Willis had sealed the motion to protect potential jurors from being contaminated by such inflammatory and prejudicial information. Although Judge Willis unsealed the motion after Mr. Avery was convicted, the publishing of this information was unnecessary and would certainly be prejudicial to future jurors if Mr. Avery was successful in seeking a new trial. Mr. Kratz's book is an inaccurate and inflammatory attack on the popular Netflix series "Making a Murderer."

410. Given the relatively recent trials in both the Avery and Dassey cases and the current litigation by Mr. Avery and Brendan in seeking new trials, there appears to be no legitimate reason for Mr. Kratz to disseminate this inflammatory information. Post-conviction remedies are available for both Mr. Avery and Brendan. Brendan's conviction has been vacated and an appeal is pending. Mr. Avery too has a new attorney who is seeking a new trial on a variety of grounds. If a new trial is granted for either defendant, there is no question that Mr. Kratz's public disclosures of so much unnecessarily prejudicial information have the potential to seriously impair a fair trial. See ABA Model Rules, Rule 3.6.

411. Although the Avery and Dassey cases have attracted widespread interest, and were the

subject of the ten-part Netflix series "Making a Murderer," Mr. Kratz was in a unique position that was different from all other journalists and commentators. Mr. Kratz was the lead prosecutor against Mr. Avery and Mr. Dassey. Mr. Kratz was privy to considerable confidential information that had not been officially revealed. Ethical standards specifically address the question of the extent to which a former prosecutor is allowed to reveal secret information obtained in confidence while investigating and prosecuting a criminal matter. The fact that Judge Willis unsealed Mr. Kratz's pretrial motion depicting a wide range of alleged and criminal acts by Mr. Avery does not authorize Mr. Kratz to arbitrarily decide to disseminate this information without at least obtaining the consent of the Calumet County District Attorney's office, as well as to ensure that his disclosures are an accurate account of the facts and in the public interest. See ABA Prosecution Standards 3-1.11 ("In creating or participating in any literary or other media account of a matter in which the prosecutor was involved, the prosecutor's duty of confidentiality must be respected even after government service is concluded"). (Affidavit of Bennett Gershman, **P-C Group Exhibit 96, ¶¶** 39-42).

Unprecedented, Unethical, Dishonest, and Fraudulent Activities of Mr. Kratz

412. On January 14, 2013, Mr. Kratz wrote to Mr. Avery on his "Kratz Law Firm" letterhead soliciting Mr. Avery's consent to meet with Mr. Kratz to discuss his case. At the time, Mr. Avery was in the State prison at Boscobel, Wisconsin. Mr. Kratz advised Mr. Avery that he was presently in private practice, that he believed Mr. Avery's criminal appeals had concluded and that Mr. Avery was not currently represented by counsel, that he wanted to meet with Mr. Avery "for [his] own personal use," and that Mr. Avery would receive nothing of value if he agreed to talk to Mr. Kratz.

413. Mr. Avery replied on June 18, 2013, suggesting that since Mr. Kratz was no longer working for the State, he could take Avery's appeal, that "you now (sic) the case and you got Candy Avery," and that "we can all get money together."

414. Two years later, Mr. Kratz wrote Mr. Avery two more letters. Mr. Kratz wrote him on August 10, 2015, informing him that since Mr. Avery had not added Mr. Kratz to his visitor list, the prison authorities had canceled Mr. Kratz's visit because "it would be contrary to [Mr. Avery's] programming there and they didn't want me talking to you." Mr. Kratz once again solicited Mr. Avery's consent for a visit, emphasizing in bold letters to "ADD ME" to your visitor list, that the prison authorities "probably do not want you to tell your story to me," that "they can't tell you who you can tell your story to," and again emphasizing in bold letters "that it is YOUR DECISION if you want to talk to me or not." Mr. Kratz stated that Mr. Avery "no longer ha[s] any pending litigation, including appeals, and therefore there is NO conflict which exists to you speaking with me."

415. In his last letter to Mr. Avery, dated September 6, 2015, Mr. Kratz referred to Mr. Avery's letter dated August 28, 2015, in which Mr. Avery asked Mr. Kratz whether "he checked out other fingerprints found on Teresa Halbach's car." Mr. Kratz "apologizes for misunderstanding" Mr. Avery's June, 2013, letter. Mr. Kratz stated that "I thought you were interested in being honest about what happened and finally telling the whole story to someone." Mr. Kratz added that "since I'm the person who probably knows more about your case than anyone else, I hoped that you would choose me to tell your story to." Mr. Kratz continued:

> Unfortunately, you only want to continue your nonsense about being set up. That's too bad, because you had ONE opportunity to finally tell all the details, but now that will never happen.

> By the way, the difference between you and famous convicted murderers from the past is they told their whole truthful story to someone, who then wrote a book about what actually happened and people got to understand both sides. I was willing to do that for you. But if you are going to continue to lie about what happened between you and Ms. Halbach, I am not interested.
>
> If you change your mind, and want to tell your honest story someday, please contact me.

416. Mr. Kratz's conduct in approaching the man he vilified, brought unsubstantiated charges against, convicted of murder and sent to prison for life without parole, in order to "tell his story" is unlike any conduct of any ex-prosecutor Mr. Gershman has ever encountered. Mr. Kratz's conduct is offensive to the proper administration of justice. His intimidation and manipulation for his own selfish motive of the person he prosecuted impairs the dignity of the legal profession and the ethical responsibility of lawyers to abstain from overreaching, harassing and manipulative conduct

417. In Mr. Gershman's professional experience and expertise, it is unprecedented for a prosecutor who led one of the state's most sensational murder investigations and prosecutions to solicit from the person he prosecuted his cooperation in writing a book about his case. Mr. Kratz's solicitation of Mr. Avery is akin to a personal injury lawyer's solicitation of cases from recent accident victims. Dubbed "ambulance chasing," such conduct has seriously impaired the reputation of the Bar. It is the opinion of Mr. Gershman that Mr. Kratz's conduct is even more nefarious; Mr. Kratz had a personal involvement with Mr. Avery, and sought to manipulate that connection under the guise of appearing to act on Mr. Avery's behalf to help him tell his "honest" story so that the public would "understand both sides." But of course, Mr. Kratz's appeal for Mr. Avery's cooperation ostensibly for disinterested motives was a sham. Mr. Kratz wanted to write a book and get the person he prosecuted to help him. His solicitation was disingenuous and

prejudicial to the administration of justice. See ABA Model Rules 8.4(c) ("conduct involving dishonesty, fraud, deceit, and misrepresentation"); (d) ("conduct that is prejudicial to the administration of justice"). (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶¶43-48).

Uncanny Parallel Between Mr. Kratz's Prior Unethical Behavior and Current Unethical Behavior

418. Moreover, there is an uncanny parallel between Mr. Kratz's solicitation of Mr. Avery as a private lawyer and Mr. Kratz's solicitation of vulnerable women when he was a prosecutor. In 2010, Mr. Kratz was investigated by the Wisconsin Division of Criminal Investigation for sending inappropriate text and email messages to women, including victims in active domestic abuse cases Mr. Kratz was then prosecuting. There were at least ten women who complained about Mr. Kratz's improper sexual overtures to them. The investigation led the Wisconsin District Attorneys Association to call for Mr. Kratz's resignation, for Governor James Doyle to initiate removal proceedings against Mr. Kratz, and after Mr. Kratz involuntarily resigned, for the Office of Lawyer Regulation in 2011 to bring a disciplinary complaint against Mr. Kratz alleging several counts of professional misconduct. Mr. Kratz was found to have committed professional misconduct by violating the attorney's oath, which includes abstaining from "offensive personality." Wisconsin Rules of Professional Conduct SCR 20:8.4(g), 40:15. He was suspended for four months from the practice of law. The Wisconsin Supreme Court upheld the suspension. See In the Matter of Disciplinary Proceedings against Kenneth R. Kratz, 353 Wis.2d 696 (2014). Among the allegations supporting that sanction were the following:

a. Mr. Kratz contacted a young woman who had accused her boyfriend of domestic violence, asking her whether "she is the kind of girl that likes secret contact with an older elected DA…the riskier the better;"

b. Mr. Kratz sent the same woman eight more inappropriate messages, including "You may be the tall, young hot nymph, but I am the prize! I would want you to be so hot and treat me so well that you'd be THE woman. R U that good?
c. Mr. Kratz, in prosecuting a parental rights termination case, told a woman who was a witness that he "won't cum in your mouth," and later that he was leaving on a trip to Las Vegas where he could have "big boobed women serve me drinks;" and
d. Mr. Kratz commented in court to a social worker that the court reporter had "big beautiful breasts."

419. Mr. Kratz tried to defend his appalling behavior towards the women by raising "incredible," "inconsistent," "hyper-technical," and "puzzling" arguments. His claim that he wanted to amicably resolve the disciplinary proceedings, according to the Wisconsin Supreme Court, "borders on the intellectually insulting." Mr. Kratz's insistence that his conduct resulted from addiction to drugs does not change the "ugly picture presented by the record."

420. Interestingly, quite similar allegations in the disciplinary proceeding against Mr. Kratz are present in Mr. Kratz's solicitation of Mr. Avery. Thus, in the disciplinary proceeding Mr. Kratz was found to have acted with a "selfish motive," manipulated a "vulnerable victim," engaged in "exploitative behavior," engaged in "harassing behavior," showed a "crass placement of his personal interests above those of his client," and "crossed the line separating the unprofessional conduct from the acutely offensive and harassing." The referee also noted as an aggravating factor Mr. Kratz's considerable legal experience and leadership on victims' rights.

421. To be sure, Mr. Avery was neither a client of Mr. Kratz nor a crime victim, and so his conduct toward Mr. Avery may not have been as "boorish," and "appalling," the way the Wisconsin Supreme characterized Mr. Kratz's conduct towards the vulnerable victims of his sexual pursuits. But as a matter of professional ethics, Mr. Kratz's conduct towards

Mr. Avery was as intimidating, self-interested, and manipulative as it was to the women Mr. Kratz abused. Mr. Avery was in a hopeless position and an easy target for Mr. Kratz's solicitations. Mr. Kratz knew the prison authorities had objected to Mr. Avery speaking to Mr. Kratz and that Mr. Kratz's overtures might hurt Mr. Avery. Particularly disingenuous was Mr. Kratz's ploy to suggest falsely that Mr. Kratz was simply a disinterested person trying to assist Mr. Avery to tell his "honest" story to the world, but knowing full well that he wanted Mr. Avery's story only if Mr. Avery told his story in a way that served Mr. Kratz's selfish interests in writing a book and promoting himself. Mr. Kratz exploited his former status as Mr. Avery's prosecutor "who knows more about your case than anyone." Mr. Kratz disparaged Mr. Avery's "continued nonsense about being set up." He intimidated Mr. Avery as he did with the women he abused, trying to convince Mr. Avery to talk to him by the veiled threat that it was "too bad" that Mr. Avery refused to talk to him "because you had ONE opportunity to finally tell all the details, but now that will never happen."

422. That same "ugly picture" depicted in Mr. Kratz's offensive sexual misconduct with women appears in Mr. Kratz's solicitation of Mr. Avery. Mr. Kratz acted out of his own self-interest, in an utterly unethical way, abused his professional office, and engaged in conduct prejudicial to the administration of justice. (Affidavit of Bennett Gershman, **P-C Group Exhibit 96**, ¶¶ 49-53).

MR. AVERY'S PREVIOUS POST-CONVICTION MOTIONS DO NOT PROCEDURALLY BAR HIM FROM BRINGING THIS CLAIM

Applicable Case Law Re; Prior Post-Conviction Motions

423. Mr. Avery acknowledges that Wis. Stat. § 974.06 (4) provides:

> 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).

424. Mr. Avery's prior post-conviction counsel, Ms. Hagopian and Ms. Askins, of the Wisconsin State Appellate Defender, filed Mr. Avery's § 974.02 motion immediately after trial and were ineffective under *Strickland* because they failed to argue that Mr. Avery's trial defense counsel was ineffective as described herein in paragraphs 93-292. Ineffective assistance of prior post-conviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal. *State ex. rel. Rothering v. McCaughtry,* 205 Wis. 2d 675 (1996) (If the defendant alleges that he did not raise an issue because of ineffective post-conviction counsel, "[t]he trial court can perform the necessary factfinding function and directly rule on the sufficiency of the reason."). *Id.*

425. A defendant who alleges in a § 974.06 motion that his prior post-conviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims prior post-conviction counsel actually brought. *State v. Romero-Georgana,* 2014 WI 83, ¶ 4, 360 Wis. 2d 522, 530, 849 N.W.2d 668, 672; *See also, State v. Starks,* 2013 WI 69, ¶ 6, 349 Wis.2d 274, 833 N.W.2d 146.

426. The issue of Mr. Avery's trial defense counsel's ineffectiveness was clearly stronger than the issues the prior post-conviction attorneys raised in their § 974.02 motion. In that motion, Mr. Avery argued that 1) the trial court had improperly barred him from admitting evidence that a third party committed the crime and 2) the trial court had

improperly excused a deliberating juror. In choosing to present only these two issues, the post-conviction attorneys acted ineffectively.

427. As described herein in great detail, Mr. Avery's trial defense counsel was ineffective in numerous ways (Paragraphs 93-292, *supra*). This ineffectiveness should have been brought to the attention of the trial court when the prior post-conviction attorneys filed their § 974.02 motion.

428. Instead, the prior post-conviction attorneys argued that the defense should not have been barred from arguing that a third party was responsible for the crimes charged. The trial defense counsel had not identified a specific perpetrator. Instead, they argued that Mr. Avery's family members were potential suspects, as were customers of the Avery Salvage Yard. Those unnamed suspects, according to the trial attorneys, had the same opportunity as Mr. Avery had to commit the crime. The prosecution argued that *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct.App.1984) set forth the test to be applied. The trial court agreed, and barred the evidence.

429. *Denny* mandates that a defendant seeking to introduce third party liability evidence must demonstrate a legitimate tendency that a third person could have committed the crime. To show a "legitimate tendency," a defendant may not introduce third party liability evidence that simply affords a possible ground of suspicion against another person. Pursuant to *Denny*, a defendant must show motive, opportunity and additional evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances. *Id.* at 120 Wis. 2d at 623–24, 357 N.W.2d 12.

430. There was no realistic possibility that the post-conviction attorneys would be successful in reversing the trial court's decision barring the third party evidence at trial.

431. The trial court's decision denying the § 974.02 motion further demonstrates that the issue lacked merit. The trial court noted that even if *Denny* had not applied, the evidence of the alleged third party liability was not sufficiently relevant, nor sufficiently probative. At best, the third party liability evidence was marginally relevant, of extremely limited probative value, and likely to confuse the jury and waste the jury's time.

432. Thus, there was no likelihood whatsoever that the trial court would reverse its decision and grant relief in response to the § 974.02 motion filed by prior post-conviction attorneys.

Prior Post-Conviction Attorneys Were Ineffective in Their Presentation to the Trial Court of Evidence Allegedly Meeting the Denny Standard

433. Judge Willis outlined all of the deficiencies in prior post-conviction counsel's *Denny* argument in his opinion dated January 25, 2010 as follows:

434. Prior post-conviction attorneys incorrectly asserted that trial attorneys were precluded from arguing that the evidence admitted at trial demonstrated that third parties may have murdered Ms. Halbach. ("Decision and Order On Defendant's Motion For Post-Conviction Relief" dated January 25, 2010 ("Order"), **P-C Exhibit 94**, p. 62).

435. Prior post-conviction attorneys did not recognize that the jury heard the defense argument suggesting that third parties may have murdered Ms. Halbach on the precise terms the trial attorneys indicated they sought to present the argument. (Order, **P-C Exhibit 94**, p. 64).

436. Not only did the prior post-conviction attorneys fail to recognize that the court's ruling at trial did not prohibit Mr. Avery from arguing that third parties committed the murder, the trial attorneys argued exactly that. (Order, **P-C Exhibit 94**, p. 65).

437. The prior post-conviction attorneys made reference to evidence ("bloody bandages" and "bloody rags") that was not referenced in the offer of proof presented by Mr. Avery's trial

attorneys, thus the court could not consider that evidence in ruling on the post-conviction motion. (Order, **P-C Exhibit 94**, p. 65).

438. The prior post-conviction attorneys failed to recognize that the court could not give consideration to information presented to the court for the first time at the post-conviction stage. (Order, **P-C Exhibit 94**, p. 65-66).

439. The prior post-conviction attorneys misunderstood the scope of the court's order at trial. That order did not bar all of the evidence that the prior post-conviction attorneys interpreted the order to bar. (Order, **P-C Exhibit 94**, p. 66).

440. For example, the prior post-conviction attorneys assumed the trial court's order barred the trial attorneys from introducing evidence that some unknown person other than himself may have been the murderer, but the order did not bar such evidence. (Order, **P-C Exhibit 94**, p. 66).

441. The post-conviction attorneys failed to recognize that the trial court's order only barred "Denny-type evidence" that a known individual committed the murder. (Order, **P-C Exhibit 94**, p. 66).

442. The prior post-conviction attorneys failed to recognize that the trial attorneys interpreted the trial court's order correctly and realized they could present evidence that an unknown third party committed the murder, which they did, for example, through Dr. Fairgrieve. (Order, **P-C Exhibit 94**, p. 67).

443. The prior post-conviction attorneys framed the issue incorrectly in their brief. They focused their argument on the effect the court's decision on the *Denny* issue had on the defense, rather than whether the court correctly ruled on the *Denny* issue. (Order. **P-C Exhibit 94**, p. 68).

444. The prior post-conviction attorneys incorrectly claimed that the trial attorneys were precluded from arguing things that they in fact did argue. For example, the trial attorneys actually presented the "hustle shot" argument that the prior post-conviction attorneys claimed they were barred from presenting. (Order **P-C Exhibit 94**, p. 69-70).

445. Further, the prior post-conviction attorneys claimed that the trial attorneys were barred from introducing evidence of other sources of Mr. Avery's blood that could have been used to frame him, but the trial attorneys were permitted to do so, and they did introduce such evidence. (Order, **P-C Exhibit 94**, p. 70).

446. Simply put, the trial attorneys were not barred from introducing evidence and presenting arguments that the prior post-conviction attorneys contended they were barred from introducing and presenting. (Order, **P-C Exhibit 94**, p. 70-71).

447. The prior post-conviction attorneys improperly cited an unreported decision that bore no factual relationship to the case at bar. (Order, **P-C Exhibit 94**, p. 73).

448. The prior post-conviction attorneys argued that the trial attorneys were barred from offering their "frame up evidence" but the trial attorneys were not barred from doing so, and they did. (Order, **P-C Exhibit 94**, p. 74).

449. The trial attorneys presented an offer of proof that related to the opportunity of third parties to commit the crime, but not to any effort on the part of those third parties to frame Mr. Avery for the crime. (Order, **P-C Exhibit 94**, p. 74).

450. The trial attorneys claimed they were not offering any evidence that a third party had a motive to commit the murder, but they actually did seek to offer motive evidence; for example, the trial attorneys attributed a motive to Scott Tadych, Andres Martinez, Charles Avery and Earl Avery. (Order, **P-C Exhibit 94**, p. 76).

451. The prior post-conviction attorneys argued that the inability of a defendant to show motive excused them from complying with the legitimate tendency test, but offered no relevant precedent for this argument. (Order, **P-C Exhibit 94**, p. 76).

452. The prior post-conviction attorneys cited cases in support of that argument that did not even mention *Denny* and/or that did not address the issue the prior post-conviction attorneys claimed they did. (Order, **P-C Exhibit 94**, p. 77).

453. The prior post-conviction attorneys argued that Ms. Culhane's testimony excluding the Avery family members as the source of the blood in the vehicle was inadmissible and opened the door to third party evidence. But not only was Ms. Culhane's testimony admissible, the trial attorneys had failed to object to it. Thus, the prior post-conviction attorneys could not raise the argument properly, as it was waived. (Order, **P-C Exhibit 94**, pp. 81-82).

454. The prior post-conviction attorneys argued that *Denny* was wrongly decided, but that argument had no chance of success as the appellate court could not consider it. (Order, **P-C Exhibit 94**, p. 84).

455. The prior post-conviction attorneys offered only speculative motives of others to frame Mr. Avery, and they did not even attempt to explain how such motives could induce the suspects to commit the murder solely for the purpose of framing Mr. Avery. (Order, **P-C Exhibit 94**, p. 87).

456. Thus, the prior post-conviction attorneys' argument that any third party had a motive to frame Mr. Avery was waived long ago and had no reasonable likelihood of success. (Order, **P-C Exhibit 94**, p. 88).

457. The prior post-conviction attorneys insufficient offer of proof completely lacked

probative value such that it could not be given any serious consideration. (Order, **P-C Exhibit 94**, p. 88).

458. The prior post-conviction attorneys improperly presented an offer of proof as to the motives of Tadych, Dassey, Charles, and Earl that was more detailed than the offer by the trial attorneys, such that the court was not required to consider it. (Order, **P-C Exhibit 94**, p. 89).

459. Even if the trial court considered the more detailed offer of proof, it could not have considered the alleged motive of Tadych, because the proffered facts related to "other acts" and not directly to a motive to murder Ms. Halbach. The prior post-conviction attorneys did not articulate how the "other acts" were admissible. (Order, **P-C Exhibit 94**, p. 90).

460. The prior post-conviction attorneys could attribute no motive to Tadych and no direct evidence to suggest Tadych was even present on the salvage yard at the time of the murder, thus the prior post-conviction attorneys argument as to Tadych as the killer had no reasonable probability of success. (Order, **P-C Exhibit 94**, pp. 92-93).

461. The prior post-conviction attorneys argument as to Charles Avery had no reasonable probability of success for the same reasons as the argument relating to Tadych. The other acts attributed to Charles were inadmissible and did not establish a motive. (Order, **P-C Exhibit 94**, pp. 93-94).

462. Similarly, the prior post-conviction attorneys could not attribute a motive to Earl, thus the prior post-conviction attorneys could not make a reasonable argument that the trial attorneys had satisfied the *Denny* test. (Order, **P-C Exhibit 94**, pp. 94-95).

463. The prior post-conviction attorneys also completely failed to attribute a motive to

Brendan, thus there was no reasonable likelihood they could have satisfied the *Denny* test. (Order, **P-C Exhibit 94**, pp. 94-95).

464. Even if *Denny* was held not to apply, neither the trial attorneys nor the prior post-conviction attorneys could have successfully argued that the proffered third party evidence should have been admitted because the evidence was clearly irrelevant under Wis. Stats. § 904. (Order, **P-C Exhibit 94**, p. 102).

465. The prior post-conviction attorneys and trial attorneys offered nothing with regard to the third party evidence because it was clearly prohibited by Wis. Stat. § 904.4 as general character evidence. (Order, **P-C Exhibit 94**, p. 98).

466. The prior post-conviction attorneys failed to even suggest in their motion how the third party evidence was relevant under section 904.02 and sufficiently probative under section 904.03. (Order, **P-C Exhibit 94**, pp. 99-100).

467. Neither the trial attorneys nor the prior post-conviction attorneys presented any physical or other evidence connecting any individuals to the crime, other than their presence in the general vicinity. Thus there was no reasonable probability the evidence could have been admitted. (Order, **P-C Exhibit 94**, p. 100).

468. The trial attorneys and prior post-conviction attorneys offered no evidence that would have been admissible even if the trial attorneys and prior post-conviction attorneys convinced the court that they were not required to meet the *Denny* legitimate tendency test. (Order, **P-C Exhibit 94**, p. 102).

Mr. Avery's Prior Post-Conviction Counsel Was Ineffective For Bringing Clearly Weaker Claims than Current Post-Conviction Counsel

Ineffective Assistance of Mr. Avery's Prior Post-Conviction Counsel

469. Current post-conviction counsel has possession of four banker boxes from Mr. Avery's §

974.02 prior post-conviction counsel. In carefully examining these boxes it is not possible to distinguish separate duties or assignments between the two attorneys Ms. Hagopian and Ms. Askins; however, to the extent possible, specific references will be included where relevant for this court to evaluate their performance.

470. Mr. Avery's prior post-conviction counsel failed to retain experts in blood spatter, DNA, ballistics, trace, fire forensics, forensic pathology, police procedure and investigation, prosecutorial misconduct, and brain fingerprinting, as well as a competent investigator and forensic anthropologist, who would have been able to demonstrate that all of the forensic evidence used to convict Mr. Avery for Ms. Halbach's murder was planted.

471. Ms. Hagopian and Ms. Askins raised claims that were clearly less strong than the current claims of ineffectiveness raised by Mr. Avery's current post-conviction counsel. They confined the ineffectiveness claim against Mr. Buting and Mr. Strang to the narrow issue of juror removal. They overlooked the clearly stronger ineffectiveness claim of trial defense counsel's failure to hire a blood spatter expert who would have demonstrated as Mr. James has done that the blood deposited in the RAV-4 was selectively planted and did not originate from an actively bleeding finger as Mr. Kratz told the jury. A blood spatter expert would also have refuted the testimony of the State's expert, Mr. Stahlke, that the blood spatter on the rear cargo door was created when Ms. Halbach was thrown into the rear cargo area of the RAV-4. The correct explanation of the blood spatter on the rear cargo door would have provided a completely different scenario of the attack upon Ms. Halbach than the one presented by Mr. Kratz.

472. If Ms. Hagopian and Ms. Akins had hired a DNA expert such as current post-conviction counsel's expert Dr. Reich, the DNA expert would have conducted a number of

experiments to demonstrate that it is highly improbable that Mr. Avery would have been able to leave a full DNA profile on the hood latch by simply opening the hood as Mr. Kratz alleged to the jury in his closing argument. Additionally, if Ms. Hagopian and Ms. Askins had retained a trace expert such as Dr. Palenik they would have discovered that the alleged hood latch swab did not come from swabbing the hood latch; rather, it most likely came from Inv. Weigert substituting the hood latch swab for the groin swabs taken from Mr. Avery at the Aurora Medical Center. If Ms. Hagopian and Ms. Akins had done a thorough review of the discovery and interviewed Mr. Avery about the groin swabs taken from him, they would have recognized the suspicious circumstances surrounding the acquisition and disposal of the groin swabs by Inv. Wiegert from Mr. Avery. If Ms. Hagopian and Ms. Askins had investigated the chain of custody forms for the hood latch swab, they would have discovered that it was Inv. Wiegert not Dep. Hawkins who delivered the alleged "hood latch" swabs to the WCL. Ms. Hagopian and Ms. Askins would have been able to present this compelling information about the alleged hood latch swab to the trial court and been able to undermine confidence in the verdict against Mr. Avery.

473. If Ms. Hagopian and Ms. Askins had hired a police procedure and investigation expert such as Mr. McCrary, current post-conviction counsel's expert, they would have been able to present admissible evidence that law enforcement's investigation of Mr. Avery was fatally flawed because of its premature focus on Mr. Avery rather than developing evidence as to Ms. Halbach's background and her enhanced risk for becoming a victim of a violent crime. Additionally, an expert such as Mr. McCrary and a competent investigator would have developed invaluable information about one potential suspect that

had: a prior history of verbal and physical abuse of Ms. Halbach; an injury pattern consistent with a struggle at the relevant time; and had deleted voicemail messages from Ms. Halbach's phone. An expert such as Mr. McCrary and a competent investigator would also have learned that the suspected lied to investigators about crime scene evidence, his relationship with Ms. Halbach, and his identity during the search; and controlled the search and the dissemination of information to law enforcement after he moved into Ms. Halbach's house. A competent investigator would have discovered Mr. Siebert, who witnessed the RAV-4 being brought onto the property prior to November 5, 2005.

474. Current post-conviction counsel found a letter dated May 4, 2008 and received by the State Public Defender Madison Office on June 20, 2008 from an inmate Bobby Don Salas ("Mr. Salas"), inmate number 420573. Remarkably, Mr. Salas suggested that Mr. Avery get a blood spatter expert, DNA expert on the key to determine the source of the DNA, and "brain fingerprint" testing. This letter was forwarded to Ms. Hagopian and was ignored by her. (Letter from Mr. Salas, attached and incorporated herein as **P-C Exhibit 105**).

475. Ms. Hagopian and Ms. Askins should have discovered and raised the *Brady* violations discussed in paragraphs 293-303.

476. Ms. Hagopian and Ms. Askins should have interviewed Mr. Avery to learn that the source of his blood that was planted in the RAV-4 came from his trailer sink, his observation of the RAV-4 being driven up to his property on November 3, 2005. and his description of the groin swabs taken from him and concealed by Inv. Weigert.

Mr. Avery's Prior Post-Conviction Counsel were Ineffective for Failing to Argue that Mr. Avery's Due Process Rights were Violated when Mr. Kratz Presented a Theory at Mr. Avery's

Trial that was Inconsistent and Irreconcilable with the Theory He Presented at Brendan's Trial

477. The prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *See id.* Those lawyers who act on behalf of the government in criminal cases "serve truth and justice first." *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997), rev'd, 523 U.S. 538 (1998).

478. Professor Bennett Gershman has set forth herein several ethical violations committed by Mr. Kratz at Mr. Avery's trial. One of those violations was that Mr. Kratz presented a theory against Mr. Avery at his trial that was inconsistent and irreconcilable with the theory that Mr. Kratz presented against Brendan at his trial. As a result of that violation, Mr. Avery's due process rights were violated. This issue could not have been raised by Mr. Avery's trial attorneys, as Brendan's trial followed Mr. Avery's trial. However, Mr. Avery's post-conviction attorneys should have raised this issue as it was clearly stronger than the issues those post-conviction attorneys chose to raise.

479. Due process forbids the State from employing inconsistent and irreconcilable theories to secure convictions against individuals for the same offenses arising from the same event. *Smith v. Groose*, 205 F.3d 1045, 1048–49 (8th Cir. 2000). While prosecutors are not required to present precisely the same evidence and theories in trials for different defendants, the use of inherently factually contradictory theories violates the principles of due process. *Id.* at 1052. When no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and

facts regarding the same crime. *Thompson,* at 120 F.3d 1045, 1058–59.

480. In *Thompson*, the State argued in the defendant's trial that he alone committed a murder, while arguing at a separate defendant's subsequent trial that that defendant committed the same murder. 120 F.3d 1045, 1058-1059 (9th Cir. 1997). The prosecutor in the second trial discredited the evidence he had presented in the first trial. *Id.* The prosecutor argued different motives, different theories and different facts at both trials. *Id.* at 1059. Such conduct amounted to a due process violation.

481. A similar due process violation was found in *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000). As in *Thompson*, the prosecutor in *Smith* presented two distinct theories of guilt at the trials of two separate defendants for the same murders. For that reason, the *Smith* court granted habeas relief to the petitioner. In doing so, the *Smith* court cited *Drake v. Kemp,* 762 F.2d 1449 (11th Cir.1985) (en banc). In *Drake*, one concurring judge addressed the due process issue. After determining that the State presented two different prosecution arguments for two separate defendants convicted of the same murder, the concurring judge concluded that "the State cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth." *Id.* at 1479.

482. For the same reason due process violations were found and relief was warranted in *Smith*, *Thompson* and *Drake*, relief is warranted here. Mr. Avery's due process rights were obviously violated. At Mr. Avery's trial, Mr. Kratz repeatedly argued that Mr. Avery was the "one person" responsible for the death of Ms. Halbach. He claimed that Ms. Halbach's death was caused by two gunshots to her head. Mr. Kratz added that Ms. Halbach was killed in Mr. Avery's garage.

483. But Mr. Kratz offered a completely different theory at Brendan's trial. Mr. Kratz claimed that Brendan murdered Ms. Halbach, or participated in her murder with Mr. Avery. Mr. Kratz advised the jury deciding Brendan's fate that Mr. Avery stabbed Ms. Halbach in the stomach and Brendan slit her throat. Next, Mr. Kratz explained that Mr. Avery manually strangled Ms. Halbach. Even the location of the murder was changed. By the time of Brendan's trial, Mr. Kratz said that Ms. Halbach was killed in Mr. Avery's trailer, not the garage, and that Ms. Halbach had died as the result of a gunshot to the head not from her throat being slashed and her stomach stabbed.

484. The theories Mr. Kratz presented at Mr. Avery's trial and Brendan's trial were completely inconsistent, notwithstanding that the trials involved the same murder of the same victim. Mr. Kratz's argument that Mr. Avery alone murdered Ms. Halbach was irreconcilable with his argument at Brendan's trial that Mr. Avery and Brendan both killed her. In the initial version of the offense Mr. Kratz presented at Mr. Avery's trial, Ms. Halbach was murdered by two gunshots to her head. In the subsequent version he presented at Brendan's trial, Ms. Halbach was stabbed, her throat was slit and she was strangled. From the first to second trial, the responsible parties changed. Although Mr. Kratz implicated Mr. Avery in both versions, the conduct he attributed to Mr. Avery completely changed. Further, not only did the cause of death change from one trial to the next, but the location of the murder was changed in the second theory presented at Brendan's trial. These are the type of inconsistencies that violate due process. *Clay v. Bowersox,* 367 F.3d 993, 1004 (8th Cir.2004) (To violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime.).

485. Under these circumstances, Mr. Avery's due process rights were violated. Rather than

seeking justice, the prosecutor took part in the type of gamesmanship the law prohibits. There is no way to reconcile the theories that were offered at the trials.

486. Therefore, Mr. Avery's post-conviction attorneys should have raised this due process issue. Had they done so, there is a reasonable probability that the post-conviction motion would have been granted. In failing to raise this due process issue, which was clearly stronger than those the post-conviction attorneys chose to raise, the post-conviction attorneys were ineffective.

Applicable Case Law Re: Pro Se Post-Conviction Motion of Mr. Avery

487. Mr. Avery's previous *pro se* § 974.06 motion should also not act to preclude this court from addressing his current claims. There are sufficient reasons Mr. Avery did not raise the current claims in his *pro se* motion.

488. A defendant's unawareness of the factual and/or legal basis for his claims may constitute a sufficient reason for his failure to raise those claims. *See, State v. Allen*, 2010 WI 89, ¶¶ 42-52; *State v. Howard*, 211 Wis.2d 269, 287-88 (1997).

489. In *State v. Anderson*, 2013 WI App 30, ¶ 16, 346 Wis. 2d 278, the defendant argued that his cognitive deficiencies provided a sufficient reason why he had not raised certain claims prior to the filing of his § 974.06 motion. The Court was skeptical of the defendant's claims as to his disability, especially in light of the simple factual nature of his claims. Still, the Court assumed the defendant's disabilities excused his failure to raise the claims earlier, and addressed the claims' merits in his § 974.06 motion. *Anderson*, 2013 WI App 30, ¶ 16, 346 Wis. 2d 278.

490. In *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 57, 354 Wis. 2d 626, 649, the defendant filed a petition for writ of habeas corpus, seeking to reinstate the deadline to file a notice

of intent to pursue post-conviction relief, alleging that he had been denied effective assistance of counsel when his attorney failed to file the notice. The Court of Appeals denied the petition, and defendant appealed. The Supreme Court reversed. The Supreme Court refused to apply procedural bars to the defendant's claims in part because the defendant's "various attempts at appealing his case *pro se* ... were thwarted due to his lack of legal knowledge." *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 57, 354 Wis. 2d 626, 649 (emphasis added). The same principle should be applied here. Mr. Avery should not be barred from obtaining a review of the merits of his claims due to his lack of legal knowledge.

491. Thus, numerous 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 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.

492. 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.[16] 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

[16] Current post-conviction counsel, Kathleen T. Zellner and Associates, P.C., has expended $232,541.98 on experts. Of that amount, the law firm has received $22,000 from the Midwest Innocence Project, $14,000 from the Avery family, and $21,190.99 from public donations, which totals $57,190.99. The law firm has therefore expended $175,350.99 of its own funds. Additionally, the law firm has incurred $428,000 in legal fees in the representation of Mr. Avery. Ms. Zellner and her law clerks have visited Mr. Avery over 27 times at the Waupun Correctional Center.

be addressed on the merits.

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

493. 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.

494. 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 interests 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).

495. 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.

496. 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. *State v. Armstrong*, 2005 WI 119, ¶ 156. 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 161 (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, 655-56 (1976).

497. As argued above, this new evidence directly contradicts the State's theory presented at trial and during direct appeal, but a jury never heard this testimony.

CONCLUSION

Mr. Avery respectfully asks that this Court consider this motion and the attached documents, order a hearing, and grant the requested relief.

Dated June 6th, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 7th, 2017, a true and correct copy of the foregoing was furnished by first-class U.S. Mail, postage prepaid to:

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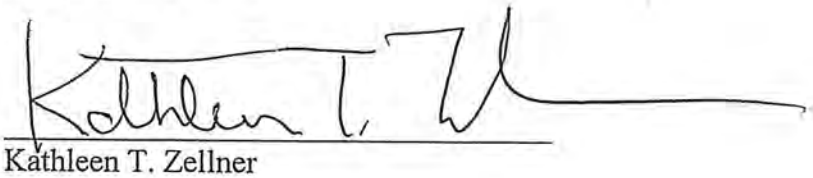

Kathleen T. Zellner