

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,)
)
 Plaintiff,)
)
 v.) Case No. 05-CF-381
)
 STEVEN A. AVERY,)
)
 Defendant.)

**MOTION TO COMPEL PRODUCTION OF RECENT
EXAMINATION OF THE DASSEY COMPUTER**

Now comes Defendant, Steven A. Avery (“Mr. Avery”), by and through his attorneys, Kathleen Zellner and Steven Richards and hereby respectfully moves this Court to compel the State to produce their most recent forensic examination of the Dassey computer. In support of said motion, Mr. Avery states as follows:

1. On August 30, 2017, the State began conducting a new investigation of certain issues related to Teresa Halbach’s murder raised in current post-conviction counsel’s Motion for Post-Conviction Relief filed on June 7, 2017.
2. On May 30, 2018, current post-conviction counsel’s investigator, James Kirby (“Mr. Kirby”), pursuant to the Freedom of Information Act (“FOIA”), received 64 pages of new reports pertaining to a “follow-up investigation, regarding several allegations or questions raised in several filings of STEVEN AVERY’s current defense attorney, KATHLEEN ZELLNER” from the Calumet County Sheriff’s Department. It was at that time that current post-conviction counsel first realized that the Dassey computer had been “turned over to Special Agent Wisch” for “reasons of possible additional forensic examination.”

(Attached and incorporated herein as **Exhibit A** are redacted copies of the police reports referring to Special Agent Wisch taking and returning the Dassey computer). In conjunction with the new investigation, at least 18 witnesses have been interviewed, including: Scott and Barbara Tadych, and Bobby Dassey. Some witnesses, like Scott Tadych, have been interviewed twice.

3. On November 10, 2017, as a part of the new investigation, when the State investigators were interviewing Scott Tadych (“Scott”) and his wife Barbara Tadych (“Barb”), Barb was questioned about her knowledge of pornography on the Dassey computer. Barb specifically stated that she never saw her ex-husband Tom Janda “view pornography on the computer” and that he had moved out of the residence on October 15, 2005. When the interview concluded at 1545 hours, Barb turned over to Special Agent Wisch “the tower for the computer,” which had been previously seized, forensically examined and returned to the Dassey residence on May 11, 2006. The report of the Barb and Scott interview states that “**the computer was taken for reasons of possible additional forensic examination.**” (*emphasis added*). The Dassey computer was kept by the State for **146 days** until April 5, 2018. (**Exhibit A**).
4. On June 12, 2018, current post-conviction counsel emailed a letter to Assistant Attorney General Thomas J. Fallon (“Attorney Fallon”) requesting the following evidence from the examination of the Dassey computer:

Any and all documentation, including any drafts of notes, typed or handwritten memorandums, interoffice communications, files, logbooks, any video or motion picture taken of the examination performed, writings (electronic or otherwise) of any type or nature that make reference to the computer examination performed during the above time period, including but not limited to, computer images, recovered images, internet searches and history, including any and all word searches, computer discs, computer tapes, computer cards,

computer printouts, photo records, reports, recovered pornography, all data from the Windows registry, any and all folders with Steven Avery and Teresa Halbach's photographs, any other information about Teresa Halbach's murder, DNA folders, messages (instant, email, or text), and all chain of custody documents related to the seizure of the Dassey computer on November 10, 2017.

(Attached and incorporated herein as **Exhibit B** is a copy of Attorney Zellner's letter to Attorney Fallon dated June 12, 2018).

5. On June 25, 2018, Attorney Fallon responded by denying Attorney Zellner's request and stating the following: "We discussed your request in light of the specific and narrow remand of this case issued by the Court of Appeals, our continuing obligation to provide exculpatory evidence, and that you have provided absolutely no legal or factual basis for your request as required by *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). We are declining your request at this time." (Attached and incorporated herein as **Exhibit C** is a copy of Attorney Fallon's email to Attorney Zellner dated June 25, 2018).
6. On June 25, 2018, Attorney Zellner responded to Attorney Fallon's email stating that she strongly disagreed with his interpretation of the June 7, 2018 Appellate Court's remand order when he characterized it as being "narrow" and with his conclusion that she had provided no legal or factual basis for the request pursuant to *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). (Attached and incorporated herein as **Exhibit D** is a copy of Attorney Zellner's letter to Mr. Fallon dated June 25, 2018).
7. On July 2, 2018 Attorney Zellner once again contacted Attorney Fallon since she had not received any response to her June 25, 2018 letter. Again, Attorney Zellner requested all of the data related to the most recent forensic exam of the Dassey computer. (Attached and incorporated herein as **Exhibit G** is a copy of Attorney Zellner's letter to Mr. Fallon dated July 2, 2018).

8. On July 2, 2018 at 7:04 p.m. Attorney Fallon sent an email to Attorney Zellner stating that he was “on vacation until Thursday” and that “We will reconsider your request in the context of this case.” (Attached and incorporated herein as **Exhibit H** is a copy of Attorney Fallon’s July 2, 2018 email to Attorney Zellner).
9. The June 7, 2018 Appellate Court order requires Mr. Avery to file his Motion to Supplement with the circuit court on July 6, 2018. Current post-conviction counsel has no reason to believe that Mr. Fallon will be tendering any of the requested data from the most recent forensic examination of the Dassey computer before July 7; therefore, current post-conviction counsel is proceeding with this motion to compel.
10. The Appellate Court remand order of June 7, 2018 is not narrow since it orders “further proceedings” regarding the alleged *Brady* violation as a result of the State allegedly withholding the Dassey computer CD of Det. Velie’s report in 2006. Specifically, the Appellate Court contemplates one outcome in which the entire case is resolved in Mr. Avery’s favor and the current appeal is dismissed. (Attached and incorporated herein as **Exhibit E** is the Appellate Court remand order of June 7, 2018.)

The Requirements for Obtaining Post-Conviction Discovery

11. The Wisconsin Supreme Court, in *O’Brien*, addressed post-conviction discovery demands. The *O’Brien* court specifically stated, “[W]e conclude that a defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence.” *Id.* at 321. Specifically, the *O’Brien* court set forth a criteria that must be met in order to obtain post-conviction discovery:

“(1) provide supporting affidavits with the motion which describe the material sought to be discovered and explain why the material was not supplied or discovered at or before trial; (2) establish that alternative means or evidence is not already available such that the postconviction

discovery is necessary to refute an element in the case; (3) describe what results the party hopes to obtain from discovery and explain how those results are relevant and material to one of the issues in the case; and (4) after meeting the first three criteria, the party must then convince the trial court that the anticipated results would not only be relevant, but that the results would also create a reasonable probability of a different outcome. General allegations that material evidence may be discovered are inadequate for post-conviction discovery motions.”

Id. at 343-44.

Support Affidavit:

12. Trial defense counsel Jerome Buting (“Attorney Buting”) provided an affidavit which has been reviewed by the Appellate Court in ordering the case to be remanded. Attorney Buting explains that the Dassey computer CD of Det. Velie’s report was not supplied by the State prior to trial because it was in the sole possession of Investigator Thomas Fassbender (“Inv. Fassbender”). Specifically, in paragraph 6 of his affidavit, Attorney Buting states:

Neither the above referenced CD nor the investigative report of Det. Velie was ever turned over in discovery. The December 14, 2006 letter from Special Prosecutor Kratz (Exhibit 1) which itemizes the discovery related to this report, confirms by omission that no CD entitled “Dassey’s computer, final report, investigative copy” was included in this batch of discovery. (R.636:19) (Attached and incorporated herein as **Exhibit F** is a copy of Attorney Buting’s affidavit including Exhibit 1 of that affidavit).

13. Attorney Buting, in his affidavit, describes how the evidence on the Dassey computer CD of Det. Velie’s report would have been relevant and material to the *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984) pre-trial issue. Specifically, in paragraph 10 of his affidavit, Attorney Buting states that trial defense counsel was preparing a *Denny* motion to “introduce evidence of third-party suspects at Mr. Avery’s trial.” Mr. Buting offers the following opinion about the Dassey computer CD of Det. Velie’s report being

consequential in meeting the motive requirement of *Denny* and allowing trial defense counsel to name a third party suspect:

“In that *Denny* motion, subsequently filed by the defense on January 8, 2007, we named Bobby Dassey as a possible suspect for the homicide of Teresa Halbach. We established that he had access and opportunity to have committed the crime, but the court ruled no motive was established and therefore denied the *Denny* motion as to Bobby Dassey and others. If there was anything that was on the CD investigator report from Det. Velie that would have linked Bobby Dassey to the violent porn images found on the Dassey computer, we would have included such information in our *Denny* motion. Such information could have strengthened Bobby Dassey as a possible suspect who may have sexually assaulted and killed Ms. Halbach, and specifically would have provided evidence of a motive.”

(R. 636:19) (**Exhibit F**).

The New Forensic Examination of the Dassey computer CD of Det. Velie’s report Meets the Requirements of Newly Discovered Evidence:

14. Current post-conviction counsel believes that the new investigation has uncovered additional, consequential evidence on the *Denny* issue. Current post-conviction counsel is entitled to the new forensic examination done of the Dassey computer CD of Det. Velie’s report because that evidence will likely meet the requirements of newly discovered evidence in that: 1) The evidence was discovered after the conviction; 2) The defendant was not negligent in seeking to discover it; 3) The evidence is material to an issue in the case; and 4) The evidence is not merely cumulative. *State v. Vollbrecht*, 2012 WI App 90, 344 Wis.2d 69, 820 N.W.2d 443. The court in *Vollbrecht* held:

“[T]he parties parse out all of the issues on appeal -- addressing the newly discovered evidence, third-party perpetrator (*Denny*) evidence and the alleged *Brady* violation as if disconnected. However, the overarching issue is that of newly discovered evidence, under which all other issues on appeal are subsumed. We therefore examine it as such.”

Id. at 85.

15. As Mr. Buting has explained in his affidavit, trial defense counsel was preparing a motion pursuant to *Denny* to introduce evidence of third-party suspects in Mr. Avery's trial. (R. 636:18-20). Trial defense counsel named Bobby as a potential suspect in Ms. Halbach's homicide but was unsuccessful in meeting the *Denny* requirement of establishing motive for the murder. If trial defense counsel had the Dassey computer CD of Det. Velie's report, revealing all of the violent pornography, trial defense counsel would have been able to establish motive and successfully establish Bobby as a *Denny* third-party suspect.

Disclosure of All the Forensic Examinations of the Dassey Computer Would Create a Reasonable Probability of a Different Outcome:

16. The Appellate Court order of June 7, 2018 clearly contemplates that the material on this CD is "consequential" to the case because it discusses the possibility of the entire case being resolved on this *Brady* issue. (**Exhibit E**).

17. It is hard to contemplate how a subsequent forensic examination of the Dassey computer would not be consequential to the *Denny* issue when the first forensic examination of the Dassey computer is consequential enough to the Appellate Court to cause it to remand the case to the circuit court for further proceedings on this alleged *Brady* violation.

18. Wis. Stat. § 904.04(2), provides that "[e]vidence of other crimes [and/or] wrongs [and/or] acts...when offered...as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" is admissible. The court in *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001), held that the "acts" admitted pursuant to this section were the defendant's possession of the pornographic videotapes and pictures. Those images depicting intentional violence were admitted as evidence of the defendant's motive, intent, and plan to murder the victim. (R. 636:7).

19. The defendant in *Dressler* argued that the videotapes and pictures were irrelevant and constituted inadmissible propensity evidence. The 7th Circuit disagreed stating:

The fact that the defendant maintained a collection of videos and pictures depicting intentional violence was probative of the State's claim that he had an obsession with that subject. A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs were deemed relevant. *Id.* at 914.

20. The *Dressler* court also rejected the defendant's argument that the videos and pictures were inadmissible propensity evidence and held that, although evidence of the general character of a defendant is inadmissible to prove he acted in conformity therewith, the above exception from § 904.04(2) was deemed to apply.

21. The same result, as in *Dressler*, is required here. Ms. Halbach was killed in a violent and vicious manner. An obsession with images depicting sexual violence against women made it more likely that person would commit a sexual homicide. The violent sexual images were relevant to motive and would have resulted in trial defense counsel being able to establish motive to meet the *Denny* standard.

22. The United States Constitution and the Wisconsin Constitution guarantee criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Whether the right is rooted in the due process clause, or the compulsory process or confrontation clauses of the Sixth Amendment, the defendant has the fundamental right to defend himself. *Holmes* at 324.

23. "The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial." *State v. Pulizzano*, 155 Wis.2d 633, 645, 456 N.W.2d 325 (1990), citing *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973).

24. Mr. Avery has a constitutionally-guaranteed right to present a complete defense to the charges against him. Mr. Avery was deprived of his constitutional right to present a complete defense because of the *Brady* violation committed by the State in failing to tender the first forensic examination of the Dassey computer CD of Det. Velie's report. Mr. Avery also has a constitutionally-guaranteed right to receive the second forensic examination of the Dassey CD of Det. Velie's report.
25. Clearly if the State kept the Dassey computer for an additional 146 days, some type of forensic examination was performed even if no new evidence was produced. Mr. Avery is entitled to be so informed and to have his expert review the results of the second forensic examination of the Dassey computer CD of Det. Velie's report so that he can attempt to meet the *Denny* motive requirement and therefore be accorded a meaningful opportunity to present a complete defense in a new trial.
26. The State relies upon the case of *O'Brien* to argue that the Dassey computer CD of Det. Velie's report is inconsequential. *O'Brien* provides absolutely no support for the State's position. *O'Brien* concerned a post-conviction motion "to remove exhibits for purposes of physical testing in anticipation of a motion for postconviction relief." The defendant sought to remove and test the blood samples, semen samples, and anal swabs and smears taken from the victim to support a claim that the victim consented to one of the charges. The specific issue concerned the defendant's right to "remove the evidence to dispute the charge of fellatio." The *O'Brien* case relies upon Wisconsin statute section 971.23(5), which does not allow for the release of evidence for scientific testing and has absolutely nothing to do with the remand of the present case to the circuit court for further proceedings pursuant to an alleged *Brady* violation. The *O'Brien* court acknowledged that

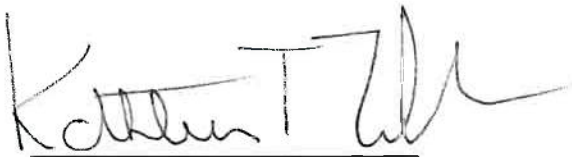
“a criminal defendant should have a right to post-conviction discovery when the sought-after evidence would be consequential to the case.” *State v. Hicks*, 202 Wis.2d 150, 172, 549 N.W.2d 435 (1996). The *O'Brien* case found the request for testing to be inconsequential for the following reason:

Even if post-conviction testing revealed no blood and no semen, it is simply of no consequence to the outcome of this case. The critical evidence--the victim's testimony that he did not consent to the acts performed by the defendant, coupled with the detective's testimony that the victim, who was half-naked, who appears very upset and distraught and who was trembling, waved down a town marshal to report the assault--would not be rebutted or weakened by further testing of the samples. *Id.*, at 13.

WHEREFORE, undersigned counsel respectfully requests that this Court enter an order compelling the immediate production of the most recent forensic examination reports and data of the Dassey computer and allow Mr. Avery to supplement his motion to supplement which will be filed on July 6th, 2018.

Dated this 3rd Day of July, 2018

Respectfully submitted,



Kathleen T. Zellner
Admitted pro hac vice
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1901 Butterfield Road, Suite 650
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(630) 955-1212
attorneys@zellnerlawoffices.com



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

CERTIFICATE OF SERVICE

I certify that on July 3rd, 2018, a true and correct copy of Defendant Steven Avery's Motion to Compel Production of Recent Examination of the Dassey Computer, Pursuant to Wisconsin Statute 806.07 (1)(a) was furnished via electronic mail and by first-class U.S. Mail, postage prepaid to:

Ms. Jacalyn C. LaBre
Manitowoc County District Attorney's Office
1010 South 8th Street
3rd Floor, Room 325
Manitowoc, WI 54220

Mr. Thomas J. Fallon
Ms. Lisa E.F. Kumfer
Ms. Tiffany Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Mark S. Williams
11708 Settlers Road
Cedarburg, WI 53012

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

Lynn Zigmunt
Clerk of the Circuit Court
Manitowoc County Courthouse
1010 South 8th Street
Manitowoc, WI 54220


Kathleen T. Zellner

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
LCA17-009022

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TYPE OF ACTIVITY: Contact with Scott Tadych and Barbara Tadych
DATE OF ACTIVITY: 11/10/17
REPORTING OFFICER: Special Inv. John Dederling

At 1545 hours on 11/10/05, BARBARA turned over to Special Agent WISCH the tower for the computer that we had been previously discussing and Special Agent WISCH provided a receipt to BARBARA. The computer tower was collected at the TADYCH's residence located at 12520 Princel Road in Mishicot. The computer was taken for reasons of possible additional forensic examination.

Investigation continues.

Special Inv. John Dederling
Calumet Co. Sheriff's Dept.
JD/ab



CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
LCA17-009022

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TYPE OF ACTIVITY: Return of Computer Tower Drive

DATE OF ACTIVITY: 04/05/18

REPORTING OFFICER: Special Inv. John Dederling

On Thursday, 04/05/18, I (Special Inv. JOHN DEDERING of the CALUMET COUNTY SHERIFF'S DEPARTMENT), along with Special Agent JEFF WISCH of WISCONSIN DEPARTMENT OF CRIMINAL INVESTIGATIONS returned the computer tower drive to SCOTT TADYCH at his residence.

Special Agent WISCH provided TADYCH with a copy of the Property Receipt form and the original Property Receipt was then retained by Special Agent WISCH.

Investigation continues.

Special Inv. John Dederling
Calumet Co. Sheriff's Dept.
JD/ab



KATHLEEN T. ZELLNER & ASSOCIATES, P.C.

ATTORNEYS AT LAW

Esplanade IV

1901 Butterfield Road

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SCOTT T. PANEK
OFFICE MANAGER

Telephone: (630) 955-1212
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kathleentzellner.com
AV-Preminent Rating

June 12th, 2018

Mr. Thomas J. Fallon
State of Wisconsin, Office of the Attorney General
114 East State Capitol
Madison, Wisconsin 53702-7857
(608) 266-7340

RE: People -v- Steven Avery


Dear Tom,

As you know, the appellate court remanded our case to the circuit court to allow us to supplement our Motion for Post-Conviction Relief with evidence related to the Dassey CD, which you disclosed on April 17, 2018. I am in possession of new police reports from the Calumet County Sheriff's Department that reference the seizure of the Dassey computer on November 10, 2017 at 1545 hours by Special Agent Wisch. The computer was located at the Tadych residence 12520 Princel Rd. in Mishicot. The computer was kept for 146 days and returned to the Tadych residence on April 5, 2018. I am requesting that you immediately provide us with any and all documentation, including any drafts of notes, typed or handwritten memorandums, interoffice communications, files, logbooks, any video or motion picture taken of the examination performed, writings (electronic or otherwise) of any type or nature that make reference to the computer examination performed during the above time period, including but not limited to, computer images, recovered images, internet searches and history, including any and all word searches, computer discs, computer tapes, computer cards, computer printouts, photo records, reports, recovered pornography, all data from the Windows registry, any and all folders with Steven Avery and Teresa Halbach's photographs, any other information about Teresa Halbach's murder, DNA folders, messages (instant, email, or text), all chain of custody document related to the seizure of the Dassey computer on November 10, 2017. I am also requesting any and all documents confirming that the computer belonged exclusively to Brendan Dassey.

I am also requesting any and all reports of the current investigation of any and all witness interviews from June 2017 to the present.



Sincerely,


Kathleen T. Zellner



Kathleen Zellner <attorneys@zellnerlawoffices.com>

Steve Avery - Please review & respond to the attached letter.

Fallon, Thomas J. <fallontj@doj.state.wi.us>
To: Kathleen Zellner <kathleen.zellner@gmail.com>
Cc: Kathleen Zellner <attorneys@zellnerlawoffices.com>

Mon, Jun 25, 2018 at 11:56 AM

Dear Kathleen:

Today Mr. Williams, Mr. Gahn and I met to consider your request for additional postconviction discovery as set forth in your June 12, 2018 correspondence.

We discussed your request in light of the specific and narrow remand of this case issued by the Court of Appeals, our continuing obligation to provide exculpatory evidence, and that you have provided absolutely no legal or factual basis for your request as required by *State v O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). We are declining your request at this time. Regards,

From: Kathleen Zellner [mailto:kathleen.zellner@gmail.com]
Sent: Tuesday, June 12, 2018 11:48 AM
To: Fallon, Thomas J. <fallontj@doj.state.wi.us>
Cc: Kathleen Zellner <attorneys@zellnerlawoffices.com>
Subject: Steve Avery - Please review & respond to the attached letter.

[Quoted text hidden]





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ATTORNEYS AT LAW

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AV-Preminent Rating

June 25, 2018

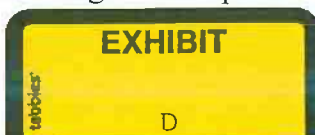
Mr. Thomas J. Fallon
State of Wisconsin, Office of Attorney General
114 East State Capitol
Madison, Wisconsin 53702-7857
(608) 266-7340

Dear Mr. Fallon,

My interpretation of your email is that you are refusing to produce any of the current documentation from the forensic examination that was performed on the Dassey computer while it was in possession of the State, from November 10, 2017 to April 5, 2018. I strongly disagree with your interpretation of the Appellate Court order, which specifically states:

The circuit court shall hold proceedings on the supplemental postconviction motion and enter its written findings and conclusions deciding the supplemental postconviction motion within sixty days after the motion is filed. In the event Avery remains aggrieved, the circuit court clerk shall re-transmit the record, including any post-remand papers, according to the procedures described below, and the appeal will continue. In addition to any pre-existing issues, the parties' appellate briefs shall address any new issues arising from the circuit court's post-remand order deciding Avery's supplemental postconviction motion. If Avery is afforded relief pursuant to his supplemental postconviction motion, he may seek dismissal of the pending appeal. If the appeal is dismissed but the State is aggrieved, it may file a notice of appeal from the circuit court's order deciding any supplemental postconviction motion entered pursuant to this remand.

Since the Appellate Court is considering the possibility of the case being resolved by the proceedings on the CD, I do not know how you could interpret their order as a "specific and narrow remand of this case." The case of *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999) provides absolutely no support for your position. That case concerned a post-conviction motion "to remove exhibits for purposes of physical testing in anticipation of a motion for post-conviction relief." The defendant sought to remove and test the blood samples, semen samples, and anal swabs and smears taken from the victim to support a claim that the victim consented to one of the charges. The specific issue concerned the defendant's right to "remove the evidence to



dispute the charge of fellatio.” Not exactly on-point with our case. Other than the fact that the case is written in English, I fail to see any similarities between it and the remand order in our case.

Your attempt to apply this case to our current situation strains credulity. The *O'Brien* case relies upon Wisconsin statute section 971.23(5), which does not allow for the release of evidence for scientific testing and has absolutely nothing to do with the remand of our case to the circuit court for further proceedings of an alleged *Brady* violation. The *O'Brien* court acknowledged that “a criminal defendant **should** have a right to post-conviction discovery when the sought-after evidence would be consequential to the case.” *State v. Hicks*, 202 Wis.2d 150, 172, 549 N.W.2d 435 (1996). The *O'Brien* case found the request for testing to be inconsequential for the following reason:

Even if post-conviction testing revealed no blood and no semen, it is simply of no consequence to the outcome of this case. The critical evidence--the victim's testimony that he did not consent to the acts performed by the defendant, coupled with the detective's testimony that the victim, who was half-naked, who appears very upset and distraught and who was trembling, waved down a town marshal to report the assault--would not be rebutted or weakened by further testing of the samples.

Id., at 13.

I believe that our Appellate Court order clearly contemplates that the material on this CD is “consequential” to our case. Your refusal to produce the information requested in my recent correspondence simply creates another issue for us to present to the circuit court and ultimately to the Appellate Court.

Sincerely,

A handwritten signature in black ink that reads "Kathleen T. Zellner". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Kathleen T. Zellner

mail - Steve Avery - Please review & respond to the attached letter.

<https://mail.google.com/mail/u/0/?ui=2&ik=60e7567b76&jsver=vr0...>



Kathleen Zellner <kathleen.zellner@gmail.com>

Steve Avery - Please review & respond to the attached letter.

Kathleen Zellner <kathleen.zellner@gmail.com>
To: "Fallon, Thomas J." <fallontj@doj.state.wi.us>

Mon, Jun 25, 2018 at 12:52 PM

Steve Avery - Please review & respond to the attached letter.
[Quoted text hidden]

 **AVERY - AG Fallon ltr 6.25.1807567620180625131543.pdf**
834K



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WISCONSIN COURT OF APPEALS

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DISTRICT II



June 7, 2018

To:

Hon. Angela W. Sutkiewicz
Circuit Court Judge
Sheboygan County Courthouse
615 N. 6th St.
Sheboygan, WI 53081

Lynn Zigmunt
Clerk of Circuit Court
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Downers Grove, IL 60515

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

2017AP2288

State of Wisconsin v. Steven A. Avery (L.C. # 2005CF381)

Before Reilly, P.J.

The appellant, Steven A. Avery, by counsel, moves to supplement the record with a compact disc "disclosed to defendant for the first time on April 17, 2018." Avery alleges that the CD contains exculpatory, material evidence and that State's failure to disclose the CD earlier violates his due process right to a fair trial under *Brady v. Maryland*, 373 U.S. 83 (1963). The State objects because the CD was not part of the record before the circuit court when it denied Avery's WIS. STAT. § 974.06 postconviction motion and his motions for reconsideration. Avery

has filed a reply asserting that supplementation is appropriate because although the CD itself was not presented to the circuit court, the facts surrounding the “suppression of the contents of the undisclosed CD to trial defense counsel” are contained in the record through Avery’s prior postconviction motions and the attachments thereto. Avery contends that we should add the CD to the record “because the circuit court had all of the *Brady* issues before it” and “[t]he State should not be rewarded for having suppressed the CD until after the appellate record was completed.”

Avery’s reply misses the point, which is that we are not a fact-finding court and cannot consider items not presented to the circuit court. Based on the assertion that Avery recently received previously withheld discovery or other new information, we retain jurisdiction but remand this case to enable Avery to file an appropriate supplemental postconviction motion in the circuit court. Avery shall file any supplemental postconviction motion within thirty days of the date of this order. The circuit court shall hold proceedings on the supplemental postconviction motion and enter its written findings and conclusions deciding the supplemental postconviction motion within sixty days after the motion is filed. In the event Avery remains aggrieved, the circuit court clerk shall re-transmit the record, including any post-remand papers, according to the procedures described below, and the appeal will continue. In addition to any pre-existing issues, the parties’ appellate briefs shall address any new issues arising from the circuit court’s post-remand order deciding Avery’s supplemental postconviction motion. If Avery is afforded relief pursuant to his supplemental postconviction motion, he may seek dismissal of the pending appeal. If the appeal is dismissed but the State is aggrieved, it may file a notice of appeal from the circuit court’s order deciding any supplemental postconviction motion entered pursuant to this remand. Therefore,

IT IS ORDERED that the motion to supplement the record is denied.

IT IS FURTHER ORDERED that this appeal is remanded forthwith to the circuit court to permit Steven A. Avery to pursue a supplemental postconviction motion in connection with Avery's receipt of previously withheld discovery or other new information.

IT IS FURTHER ORDERED that any supplemental postconviction motion shall be filed in the circuit court within thirty days.

IT IS FURTHER ORDERED that the circuit court shall conduct any necessary proceedings and enter an order containing its findings and conclusions within sixty days after the supplemental postconviction motion is filed.

IT IS FURTHER ORDERED that if Avery intends to order a transcript of any post-remand hearing, he shall do so within ten days after the circuit court enters its order deciding the supplemental postconviction motion. Any such transcript shall be filed and served within twenty days after its request. Avery shall provide the court reporter with a copy of this order.

IT IS FURTHER ORDERED that Avery shall file a statement on transcript within fifteen days after the circuit court enters its post-remand order deciding the supplemental postconviction motion. The statement on transcript shall reflect either that a post-remand transcript has been ordered or that such a transcript is not necessary for this appeal.

IT IS FURTHER ORDERED that the circuit court clerk shall re-transmit the record to this court within twenty days after the later of the entry of the circuit court order resolving the supplemental postconviction motion or the filing of any post-remand hearing transcript, if ordered. The record shall include any papers filed pursuant to this remand.

IT IS FURTHER ORDERED that the appellant shall file an appellant's opening brief presenting all grounds for relief within forty days after the filing of the record.

Sheila T. Reiff
Clerk of Court of Appeals

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 2005 CF 381

STEVEN A. AVERY,

Defendant.

Affidavit of Jerome F. Buting

STATE OF WISCONSIN)
)SS
COUNTY OF WAUKESHA)

I, Jerome F. Buting, swear and depose as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin.
2. I was one of the attorneys retained to represent Steven Avery at his trial in this case. I represented him from about March 2006 through June 1, 2007.
3. During our pretrial representation of Mr. Avery we periodically received discovery from Special Prosecutor, Kenneth Kratz. Items of discovery that we received from Mr. Kratz were itemized by a cover letter which went along with the disclosure of such items to Mr. Avery's defense counsel.
4. By correspondence dated December 14, 2006, attached as Exhibit 1 to this affidavit, we received a large batch of discovery from Special Prosecutor Kratz. Contained in that batch of discovery was a report from Special Agent Thomas Fassbender, entitled, "Examination of Brendan Dassey Computer." The report number for that report was DCI Report No. 05-1776/304. The report by Special Agent Fassbender had a report date of December 7, 2006. It is attached as Exhibit 2 to this affidavit.
5. DCI Report No. 05-1776/304 describes the state's seizure of a computer from a Dassey residence on Friday, April 21, 2006. The report states that on April 22, 2006 the Dassey computer was transferred to Detective Mike Velie of the Grand Chute Police Department for forensic examination. According to the report, Det. Velie returned the computer to Special Agent Fassbender on May 11, 2006. The report states that on some unspecified subsequent date Fassbender received from Det. Velie a CD titled "Dassey's computer,



final report, investigative copy.” The report further states that this CD “contained information on websites and images from the hard drive.” Special Agent Fassbender further states in the report that images found on the Dassey computer included violent pornography, including “injuries to humans, to include a decapitated head, badly injured and bloody body, a bloody head injury, and a mutilated body.”

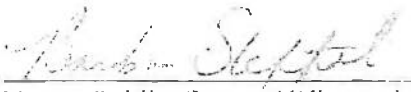
6. Neither the above referenced CD nor the investigative report of Det. Velie was ever turned over in discovery. The December 14, 2006 letter from Special Prosecutor Kratz (Exhibit 1) which itemizes the discovery related to this report, confirms by omission that no CD entitled “Dassey’s computer, final report, investigative copy” was included in this batch of discovery.
7. At the end of DCI Report No. 05-1776/304 Special Agent Fassbender indicates that he never booked the CD into evidence that was maintained by the Calumet County Sheriff’s Dept. on the Avery case. Instead, the report states, “the disc received from Det. Velie, as well as the hard copy pages of instant message conversations were maintained in Special Agent Fassbender’s possession.”
8. Co-counsel Dean Strang and I met with Calumet County Sheriff’s Deputy Jeremy Hawkin, before trial, and viewed all of the evidence maintained by that department in their property inventory on this case. To the best of my recollection, the CD entitled, “Dassey’s computer, final report, investigative copy” was not contained in any evidence that we reviewed at the Calumet County Sheriff’s Office.
9. To the best of my recollection I never saw the CD entitled, “Dassey’s computer, final report, investigative copy” or any of the violent pornography images discussed by Special Agent Fassbender.
10. At approximately the same time that the December 14, 2006 mass of discovery was received by us, defense counsel was preparing a motion under *State v. Denny* to introduce evidence of third-party suspects at Mr. Avery’s trial. In that *Denny* motion, subsequently filed by the defense on January 8, 2007, we named Bobby Dassey as a possible suspect for the homicide of Teresa Halbach. We established that he had access and opportunity to have committed the crime, but the court ruled no motive was established and therefore denied the *Denny* motion as to Bobby Dassey and others. If there was anything that was on the CD investigator report from Det. Velie that would have linked Bobby Dassey to the violent porn images found on the Dassey computer, we would have included such information in our *Denny* motion. Such information could have strengthened Bobby Dassey as a possible suspect who may have sexually assaulted and killed Ms. Halbach, and specifically would have provided evidence of a motive.

Dated at Brookfield, WI this 13th day of November, 2017.

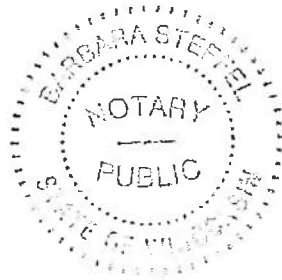


Jerome F. Buting

Subscribed and sworn to before me
this 13th day of November, 2017.



Notary Public, State of Wisconsin
My Commission Expires: 4-17-21



Buting

CALUMET COUNTY
DISTRICT ATTORNEY'S OFFICE

Kenneth R. Kratz, District Attorney

Jeffrey S. Froehlich,
Assistant District Attorney
Julie L. Leverenz/Dorinda K. Thomas
Victim/Witness Assistance Coordinators

206 Court Street
Chilton, WI 53014
(920) 840-1135
FAX: 840-1464

December 14, 2006

Attorney Dean Strang
10 E. Doty Street #520
P.O. Box 1528
Madison, WI 53701-1528

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

Dear Attorney Strang,

Recognizing this office's continuing duty of providing discovery, enclosed please find additional information regarding the above-captioned case.

1. CD - Toyota Rav 4 Original Laser Scans - 11/15/06
2. CD - Avery Calls: 11/1/06 - 11/13/06
3. CD - Avery Calls: 11/14/06 - 11/27/06
4. CD - Avery Calls: 11/28/06 - 12/4/06
5. CD - Avery Calls: 12/5/06 - 12/12/06
6. CD - Jodi Phone Calls: 12/15/05 - 1/8/06
7. CD - Jodi Stachowski: 2/15/06
8. Photos: S3 (1-192)
9. Photos: E2 (1-133)
10. Photos: A18 (1-23)
11. Photos: A19 (1-68)
12. Photos: A20 (1-17)
13. Search Warrant & Return for Dassey Residence - 4/21/06 (12 pgs)
14. Search Warrant & Return for Avery's Kodak Easyshare camera - 10/6/06 (9 pgs)
15. MCSO Narrative Report - Officer Shallue - 11/30/06 (2 pgs)
16. Supplemental Report - Officer JoAnn Mignon (BPD) - 11/7/05 (2 pgs)
17. MCI Voice Services - Toll Free Call Detail of Auto Trader - 10/13/05 - 11/14/05 (30 pgs)
18. FBI Laboratory Report dated 1/17/06 re: charred remains & buccal swabs of Karen Halbach (3 pgs)
19. FBI Report dated 1/4/06 by Gerald Mullen re: examination of Canon Sure Shot digital camera and cellular telephone - received 1/6/06 (4 pgs)



STATE_1_9970

20. FBI Report from Gerald Mullen re: examination of digital camera and cellular telephone – received 4/19/06 (3 pgs)
21. Written statement of Bobby Dassey – 11/5/05 (1 pg)
22. Written statement of Josh Radandt – 11/5/05 (1 pg)
23. Written statement of Jodi Stachowski – 11/6/05 (1 pg)
24. Written statement of George Zipperer – 11/6/05 (1 pg)
25. Written statement of Paul Metz – 11/20/05 (1 pg)
26. Written statement of William Elroy Brandes, Jr. – 12/7/05 (1 pg)
27. Written statement of Nikole Sturm – 11/5/05 (1 pg)
28. Written statement of JoEllen Zipperer – 11/6/05 (1 pg)
29. Diagram drawn by Bobbie Dassey on 2/27/06 (1 pg)
30. Signed Miranda Warnings: Earl Avery (11/9/05); Bobby Dassey (11/9/05); Jodi Stachowski (11/8/05); Jodi Stachowski (11/11/05); Brendan Dassey (5/13/06) (5 pgs)
31. Leads Information: 11/8/05 – 11/12/05 (6 pgs)
32. Info provided from Kohl's regarding Teresa Halbach's credit card account (25 pgs)
33. Photo Log & Photos – Wisconsin State Patrol (30 pgs)
34. CCSD Evidence/Property Custody Document Re: Fiber, Vacuum Roller & Carpet Cleaner (1 pg)
35. Receipt of Physical Evidence received from State Crime Lab (57 pgs)
36. Crime Lab Report – Sherry Culhane – 11/14/05 (4 pgs)
37. Crime Lab Report – Sherry Culhane – 12/5/05 (3 pgs)
38. Crime Lab Report – Sherry Culhane – 3/31/06 (7 pgs)
39. Crime Lab Report – Sherry Culhane – 5/8/06 (5 pgs)
40. Crime Lab Report – Sherry Culhane – 12/4/06 (6 pgs)
41. Crime Lab Report – John Ertl – 11/23/05 (5 pgs)
42. Crime Lab Report – Michael Haas – 11/9/05 (1 pg)
43. Crime Lab Report – William Newhouse – 2/21/06 (1 pg)
44. Crime Lab Report – William Newhouse – 5/10/06 (1 pg)
45. Crime Lab Report – Kenneth Olson – 12/13/05 (1 pg)
46. Crime Lab Report – Kenneth Olson – 2/27/06 (1 pg)
47. Crime Lab Report – Kenneth Olson – 5/26/06 (1 pg)
48. Crime Lab Report – Kenneth Olson – 12/4/06 (1 pg)
49. Crime Lab Report – Michael Riddle – 3/8/06 (1 pg)
50. Crime Lab Report – Michael Riddle – 3/17/06 (1 pg)
51. Crime Lab Report – Michael Riddle – 4/26/06 (1 pg)
52. Crime Lab Report – Michael Riddle – 12/5/06 (1 pg)
53. Crime Lab Report – Michael Riddle – 4/26/06 (1 pg)
54. Crime Lab Report – R. Nick Stahlke – 1/31/06 (2 pgs)
55. Crime Lab Report – Joseph Wermerling – 12/6/05 (1 pg)
56. CCSD Supplemental Contact Reports – (19 pgs)
57. CCSD Narrative Reports pgs. 967-969 w/ attached letter written by Tiffany to Sandra Barth (4 pgs)
58. CCSD Narrative Reports pgs. 970-1006
59. CCSD Narrative Report pg. 1007 w/ attached letters from Andres Martinez (6 pgs)
60. CCSD Narrative Report pgs. 1008-1009 w/ attached letter from Terry Vollbrecht (4 pgs)

61. CCSD Narrative Report pgs. 1010 w/ attached Crime Lab Report of Sherry Culhane dated 12/4/06 (6 pgs) & Crime Lab Report of Michael Riddle dated 12/5/06
62. CCSD Narrative Report pgs 1011-1017
63. CCSD Narrative Report pg. 1018 w/ attached Crime Lab Report of Kenneth Olson dated 12/4/06
64. CCSD Narrative Reports pgs. 1019-1021 w/ attached Crime Lab Receipt of Physical Evidence dated 9/19/02 & Order signed by Judge Hazelwood on 5/2/02 (6 pgs)
65. CCSD Narrative Reports pgs. 1022-1023
66. Responses to Subpoenas For Records - Misc Telephone Numbers (134 pgs)
67. DCI Narrative Reports: 05-1776/303; 05-1776/304; 05-1776/305; 05-1776/306; 05-1776/307; 05-1776/308; 05-1776/309; 05-1776/310; 05-1776/311; 05-1785/4; 05-1785/5 (115 pgs)
68. Report of Dr. Kenneth Bennett dated 11/10/05 (2 pgs)

Sincerely,



Kenneth R. Kratz
Manitowoc County Special Prosecutor

KRK:mlm

Enclosures

cc: Attorney Jerome Buting
Attorney Norman Gahn
Attorney Thomas Fallon

STATE_1_9972

Wisconsin Case Management ACISS Investigative Report

Report Number: 05-1776/304

Report Date: 12/07/2006

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

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

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

Fassbender, Thomas J (Appleton Special Assignments / Wisconsin Department of Justice DCI)	Kelly, Carolyn S (Madison Arson / Wisconsin Department of Justice DCI)	12/12/2006
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Narrative begins on the following page.

This report is property of Wisconsin Case Management. Neither it or its contents may be disseminated to unauthorized personnel

fassbenderj 12/12/2006 14:48

Page 1 of 3



STATE_1_9915

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

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

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

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

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

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

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

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

Narrative Page 1

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STATE_1_9916

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

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

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

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

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

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

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

Narrative Page 2

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STATE_1_9917



KATHLEEN T. ZELLNER
DOUGLAS H. JOHNSON
NICHOLAS M. CURRAN
SCOTT T. PANER
OFFICE MANAGER

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kathleentzellaer.com
AV-Precminent Rating

July 2, 2018

Mr. Thomas J. Fallon
State of Wisconsin, Office of Attorney General
114 East State Capitol
Madison, WI 53702-7857
(608)266-7340

Dear Mr. Fallon,

You have not responded to my June 25, 2018 letter requesting that you produce any data or other documentation from the most recent forensic examination that we performed on the Dassey computer while it was in possession of the State from November 10, 2017 to April 5, 2018. You previously stated that we had not provided any legal or factual basis for our request. Therefore, I am once again requesting the most recent forensic examination documentation, and in support thereof state the following legal and factual basis for our request:

1. The Wisconsin Supreme Court, in *O'Brien*, addressed post-conviction discovery demands. The *O'Brien* court specifically stated, “[W]e conclude that a defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence.” *Id.* at 321. Specifically, the *O'Brien* court set forth a criteria that must be met in order to obtain post-conviction discovery:

“(1) provide supporting affidavits with the motion which describe the material sought to be discovered and explain why the material was not supplied or discovered at or before trial; (2) establish that alternative means or evidence is not already available such that the postconviction discovery is necessary to refute an element in the case; (3) describe what results the party hopes to obtain from discovery and explain how those results are relevant and material to one of the issues in the case; and (4) after meeting the first three criteria, the party must then convince the trial court that the anticipated results would not only be relevant, but that the results would also create a reasonable probability of a different outcome. General allegations that material evidence may be discovered are inadequate for post-conviction discovery motions.”

Id. at 343-44.

2. Trial defense counsel Jerome Buting (“Attorney Buting”) provided an affidavit which has been reviewed by the Appellate Court in ordering the case to be remanded. Attorney



Buting explains that the Dassey computer CD of Det. Velie's report was not supplied by the State prior to trial because it was in the sole possession of Investigator Thomas Fassbender ("Inv. Fassbender"). Specifically, in paragraph 6 of his affidavit, Attorney Buting states:

Neither the above referenced CD nor the investigative report of Det. Velie was ever turned over in discovery. The December 14, 2006 letter from Special Prosecutor Kratz (Exhibit 1) which itemizes the discovery related to this report, confirms by omission that no CD entitled "Dassey's computer, final report, investigative copy" was included in this batch of discovery. (R.636:19) (Attached and incorporated herein as **Exhibit F** is a copy of Attorney Buting's affidavit including Exhibit 1 of that affidavit).

3. Attorney Buting, in his affidavit, describes how the evidence on the Dassey computer CD of Det. Velie's report would have been relevant and material to the *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984) pre-trial issue. Specifically, in paragraph 10 of his affidavit, Attorney Buting states that trial defense counsel was preparing a *Denny* motion to "introduce evidence of third-party suspects at Mr. Avery's trial." Mr. Buting offers the following opinion about the Dassey computer CD of Det. Velie's report being consequential in meeting the motive requirement of *Denny* and allowing trial defense counsel to name a third party suspect:

"In that *Denny* motion, subsequently filed by the defense on January 8, 2007, we named Bobby Dassey as a possible suspect for the homicide of Teresa Halbach. We established that he had access and opportunity to have committed the crime, but the court ruled no motive was established and therefore denied the *Denny* motion as to Bobby Dassey and others. If there was anything that was on the CD investigator report from Det. Velie that would have linked Bobby Dassey to the violent porn images found on the Dassey computer, we would have included such information in our *Denny* motion. Such information could have strengthened Bobby Dassey as a possible suspect who may have sexually assaulted and killed Ms. Halbach, and specifically would have provided evidence of a motive."

(R. 636:19) (**Exhibit F**).

4. Current post-conviction counsel believes that the new investigation has uncovered additional, consequential evidence on the *Denny* issue. Current post-conviction counsel is entitled to the new forensic examination done of the Dassey computer CD of Det. Velie's report because that evidence will likely meet the requirements of newly discovered evidence in that: 1) The evidence was discovered after the conviction; 2) The defendant was not negligent in seeking to discover it; 3) The evidence is material to an issue in the case; and 4) The evidence is not merely cumulative. *State v. Vollbrecht*, 2012 WI App 90, 344 Wis.2d 69, 820 N.W.2d 443.

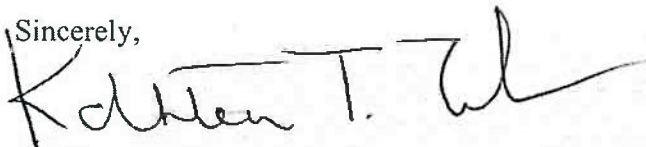
5. As Mr. Buting has explained in his affidavit, trial defense counsel was preparing a motion pursuant to *Denny* to introduce evidence of third-party suspects in Mr. Avery's trial. (R. 636:18-20). Trial defense counsel named Bobby as a potential suspect in Ms. Halbach's homicide but was unsuccessful in meeting the *Denny* requirement of establishing motive for the murder. If trial defense counsel had the Dassey computer CD of Det. Velie's report, revealing all of the violent pornography, trial defense counsel would have been able to establish motive and successfully establish Bobby as a *Denny* third-party suspect.
6. The Appellate Court order of June 7, 2018 clearly contemplates that the material on this CD is "consequential" to the case because it discusses the possibility of the entire case being resolved on this *Brady* issue. (**Exhibit E**).
7. It is hard to contemplate how a subsequent forensic examination of the Dassey computer would not be consequential to the *Denny* issue when the first forensic examination of the Dassey computer is consequential enough to the Appellate Court to cause it to remand the case to the circuit court for further proceedings on this alleged *Brady* violation.
8. Wis. Stat. § 904.04(2), provides that "[e]vidence of other crimes [and/or] wrongs [and/or] acts...when offered...as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" is admissible. The court in *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001), held that the "acts" admitted pursuant to this section were the defendant's possession of the pornographic videotapes and pictures. Those images depicting intentional violence were admitted as evidence of the defendant's motive, intent, and plan to murder the victim. (R. 636:7).
9. The defendant in *Dressler* argued that the videotapes and pictures were irrelevant and constituted inadmissible propensity evidence. The 7th Circuit disagreed stating:

The fact that the defendant maintained a collection of videos and pictures depicting intentional violence was probative of the State's claim that he had an obsession with that subject. A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs were deemed relevant. *Id.* at 914.
10. The *Dressler* court also rejected the defendant's argument that the videos and pictures were inadmissible propensity evidence and held that, although evidence of the general character of a defendant is inadmissible to prove he acted in conformity therewith, the above exception from § 904.04(2) was deemed to apply.
11. The same result, as in *Dressler*, is required here. Ms. Halbach was killed in a violent and vicious manner. An obsession with images depicting sexual violence against women made it more likely that person would commit a sexual homicide. The violent sexual images were relevant to motive and would have resulted in trial defense counsel being able to establish motive to meet the *Denny* standard.

12. The United States Constitution and the Wisconsin Constitution guarantee criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Whether the right is rooted in the due process clause, or the compulsory process or confrontation clauses of the Sixth Amendment, the defendant has the fundamental right to defend himself. *Holmes* at 324.
13. “The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial.” *State v. Pulizzano*, 155 Wis.2d 633, 645, 456 N.W.2d 325 (1990), citing *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973).
14. Mr. Avery has a constitutionally-guaranteed right to present a complete defense to the charges against him. Mr. Avery was deprived of his constitutional right to present a complete defense because of the *Brady* violation committed by the State in failing to tender the first forensic examination of the Dassey computer CD of Det. Velie’s report. Mr. Avery also has a constitutionally-guaranteed right to receive the second forensic examination of the Dassey CD of Det. Velie’s report.
15. Clearly if the State kept the Dassey computer for an additional 146 days, some type of forensic examination was performed even if no new evidence was produced. Mr. Avery is entitled to be so informed and to have his expert review the results of the second forensic examination of the Dassey computer CD of Det. Velie’s report so that he can attempt to meet the *Denny* motive requirement and therefore be accorded a meaningful opportunity to present a complete defense in a new trial.

If we do not receive the data or documentation from the most-recent forensic examination of the Dassey computer by 4 p.m. tomorrow (July 4, 2018), we shall proceed in filing a motion to compel production of these documents with the circuit court.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen T. Zellner". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Kathleen T. Zellner



Kathleen Zellner <attorneys@zellnerlawoffices.com>

Please respond

Fallon, Thomas J. <fallontj@doj.state.wi.us>
To: Kathleen Zellner <attorneys@zellnerlawoffices.com>

Mon, Jul 2, 2018 at 7:04 PM

I am out of the office and on vacation until Thursday. We will reconsider your request in the context of this case.
Regards,

From: Kathleen Zellner [mailto:attorneys@zellnerlawoffices.com]
Sent: Monday, July 02, 2018 4:00 PM
To: Fallon, Thomas J. <fallontj@doj.state.wi.us>
Subject: Please respond

[Quoted text hidden]

