STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

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

DEFENDANT'S REPLY TO THE STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPLEMENT PREVIOUSLY-FILED MOTION FOR POST-CONVICTION RELIEF

Introduction

It is undisputed that the State misled trial defense counsel about the evidentiary value of the Dassey computer contents and the identity of the computer's primary user, the State's star witness, Bobby Dassey ("Bobby"). The State's untimely disclosure of hundreds of images and searches for sexually assaulted, mutilated, and deceased young women deprived trial defense counsel of the opportunity to effectively use these images and searches to identify Bobby as a third-party suspect in Teresa Halbach's ("Ms. Halbach") murder. (Attached and incorporated herein as **Exhibit A** is the Dassey computer browsing data). The State withheld entirely from trial defense counsel the results of its own forensic analysis. These results were finally disclosed to current post-conviction counsel in 2018. Importantly, the State's forensic results include 2,632 word searches on the Dassey computer that were relevant to Ms. Halbach's murder. (Attached and incorporated herein as **Exhibit B** are the word searches on the Dassey computer at pp. 1-130). The State accepts no blame for these transgressions and invites this court to find trial

defense counsel at fault for failing to realize that they had been duped by the State into not hiring experts to perform the same forensic analysis that had been withheld from them by the State. To impose such a crushing burden on trial defense counsel would be unprecedented, unworkable, and unfair at every level. No court has ever interpreted "reasonable diligence" for trial defense counsel so unreasonably.

Equally astounding is the State's claim that the Dassey computer's violent images of young women being tortured, bound, raped, murdered, and mutilated are of no consequence and immaterial, even though Ms. Halbach was a young woman who, according to the State, was tortured, bound, raped, murdered, and mutilated. Ms. Halbach's last destination was the Dassey address, Bobby watched her from the window, and some of her burned and mutilated bones were found in the Dassey burn barrel.

Bobby viewed and saved 42 pornographic images that bore a striking resemblance to Ms. Halbach. (AverySupp-00011-26, 28-29, 31). Ms. Halbach's pictures found in the unallocated space on the Dassey computer had been deleted at some point in time. (R. 636:29). Investigator Thomas Fassbender ("Inv. Fassbender") incorrectly documented that the photograph of Ms. Halbach had an "apparent date of April 18, 2006." (R. 636:26).

Mr. Avery's Motion to Compel seeks the results of the State's second forensic examination of the Dassey computer, conducted from November 10, 2017 to April 5, 2018. This court has not ruled on Mr. Avery's Motion to Compel, which was filed 29 days ago. Today, August 3, 2018, the State filed its response. It would be difficult for the court to fairly and fully comply with the Appellate Court order (Ct. of App. Remand Order 1, Jun. 7, 2018)[1] and accurately evaluate the content on the Dassey computer without reviewing the information from the second forensic examination.

[1] The Ct. of App. Remand Order is cited as "Remand Order at p.___.

On August 2, 2018, current post-conviction counsel obtained an affidavit from Barbara Tadych ("Barb") (attached and incorporated herein as **Exhibit C** is the affidavit of Barbara Tadych), the mother of the Bryan, Bobby, Blaine, and Brendan Dassey. In that affidavit, Barb states:

> I distinctly remember, at the time I turned over the computer tower to the investigators, saying "I am thinking of getting rid of this computer." After I made that comment, Investigator John Dedering replied, "That would be a good idea, and you should not give that computer to Kathleen Zellner."

The fact that Investigator John Dedering ("Inv. Dedering") told Barb that it would be a "good idea" to get rid of the computer and not to give the computer to Kathleen Zellner conclusively demonstrates that the computer contains additional relevant and significant information about Ms. Halbach's murder. In light of the potential risk that the computer might be destroyed, current post-conviction counsel is requesting that this court issue a subpoena to Barb for the computer.

The State misrepresents the scope of the Remand 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." (Remand Order at p. 2) (emphasis added).

The Remand Order specifically notes that "we are not a fact-finding court and cannot consider items not presented to the circuit court." (Remand Order at p. 2). In an effort to head off an evidentiary hearing, the State narrowly construes the Remand Order, claiming it is "quite specific as to the subject matter" and contends that, because of its narrow scope, "no evidentiary hearing is warranted." The State's interpretation contradicts the clear and precise language of the Remand Order. This court cannot make the necessary factual and credibility findings required by

the Remand Order in the absence of an evidentiary hearing. If this court refuses to hold an evidentiary hearing, all of Mr. Avery's undisputed affidavits must be accepted as true. The State has produced one affidavit by Detective Micheal *(sic)* Velie, which Mr. Avery disputes.

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

The Wisconsin Supreme Court, in *Harris*, stated, "We agree with Harris that here, the undisclosed information is favorable to the accused because it casts doubt on the credibility of the State's primary witnesses [. . .]" *Id.* at 108-109. As *Harris* illustrates, favorable evidence includes impeachment evidence, and the failure to disclose impeachment evidence has been uniformly recognized as a *Brady* violation by the United State's Supreme Court. *Wearry v. Cain* 136 S. Ct. 1002, 194 L.Ed. 2d 78 (2016).

The Remand Order also states that Mr. Avery may present any newly discovered evidence "[b]ased 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." (Remand Order at p. 2) (emphasis added). The State simply ignores the plain language of the Remand Order in an effort to deprive Mr. Avery of the opportunity to fully litigate his constitutional claims.

Summary of Relevant Facts

1. The Prosecution Did Suppress Evidence by the Untimely Disclosure of the 7 DVDs and the Complete Nondisclosure of the CD to Trial Defense Counsel

The State claims that there is no *Brady* violation because "the entire contents of the Dassey computer were within the Defendant's possession seven weeks before trial." (St. Resp. at p. 14).[2]

The State admits that the CD was suppressed from May 10, 2006 until the State disclosed it to current post-conviction counsel on April 17, 2018, exactly *4,360 days* after it was created by State's forensic examiner.

The State ignores Mr. Avery's argument that his trial defense counsel was deliberately misled by Prosecutor Kenneth Kratz ("Prosecutor Kratz"). In Prosecutor Kratz's December 14, 2006 letter, he did not disclose the CD but did disclose the December 7, 2006, Thomas Fassbender report ("Fassbender report"). The Fassbender report was prepared 218 days after Det. Velie's final investigative report was completed for the State on May 10, 2006. The State ignores that the Fassbender report was misleading in the following ways:

a. The Fassbender report refers to the "examination of **Brendan Dassey's** computer." (emphasis added). There is no proof that the Dassey computer belonged exclusively to Brendan Dassey, but there is proof that it was primarily used by his brother Bobby. (Motion to Supplement, **Exhibit 19**).
b. The Fassbender report minimizes the number of violent images as well as their severity. The Fassbender report vaguely refers to images "depicting bondage, as well as possible torture and pain," but omits the indisputable fact that there are hundreds of violent images of young women who bear an uncanny resemblance to Ms. Halbach.
c. The Fassbender report confusingly describes "images depicting potential young females, to include an infant defecating." The report refers to "images of injuries to humans, to include a decapitated head, a badly injured and bloody body, a bloody head injury, and a mutilated body," but the report fails to acknowledge that these images are exclusively of young females. The report also fails to acknowledge that Det. Velie performed 2,632 word searches linking the images to details of the murder. (R.636:26).
d. The Fassbender report omits evidence of Bobby's computer use on October 31, 2005, which impeaches his trial testimony that he was asleep from 6:30 a.m. to

[2] The State's Response to the Motion to Supplement is cited as St. Resp. at p. __.

2:00 p.m. (R.689:35-36). The computer was used to access the internet on October 31, 2005 at 6:05 a.m., 6:28 a.m., 6:31 a.m., 7:00 a.m., 9:33 a.m., 10:09 a.m., 1:08 p.m., and 1:51 p.m. (Motion to Supplement, **Group Exhibit 8**).

e. The Fassbender report omits the pornographic searches dated October 31, 2005, which include searches for "stupud sluts *[sic]*," "girls nuked *[sic]* in shower," "girls playing ith *[sic]* dildo," "15 year old girl naked," "china teen naked," prono *[sic]* tapes," "porno samples i can watch," "SLUTS," "the best fucking pussy in the world," "hot pussy and wet orgaisms *[sic]* juicy," "teen models," "wet hot pussy juice messy," and "big black pussy nude." (AverySupp-00828-31).
f. The Fassbender report refers to "photographs of both Teresa Halbach and Steven Avery with an apparent date of April 18, 2006." The report misleadingly cites the April 18, 2006 date when there is "no evidence that the images of Teresa Halbach...were saved to the Dassey computer on April 18, 2006." (R.636:29).
g. The Fassbender report omits the timeline of when the images were viewed, which excludes other family members and incriminates Bobby in the violent pornographic searches. (Motion to Supplement, **Exhibit 2**) (R. 636:24-26).
h. The Fassbender report refers to Brendan's messages about whether he thought Mr. Avery was guilty of the Halbach murder, but ignores Bobby's prolific, graphic, and sexually aggressive messages to underaged girls. (Motion to Supplement, **Exhibit 2**) (R. 636:24-26).
i. The Fassbender report conspicuously omits any reference to the May 10, 2006 completion date of the Velie Final Investigative Report. (Motion to Supplement, **Exhibit 2**) (R. 636:24-26). The only possible explanation for failing to document the completion date of the Velie report would have been to sandbag trial defense counsel's discovery requests for their *Denny* motion, filed on January 10, 2007.

Most significantly, the State completely ignores Mr. Avery's argument that the Fassbender report deliberately misled trial defense counsel into thinking that the computer belonged exclusively to Brendan. No justification is provided in the State's response for this blatant mischaracterization because there is none. Not a shred of forensic evidence ever confirmed that the computer belonged exclusively to Brendan. (R. 636:24-26). Mr. Avery has demonstrated, through his forensic computer expert's analysis of the computer data, that Brendan was eliminated from all but a fraction of the searches performed before his arrest on March 1, 2006. Mr. Avery was eliminated from an even larger percentage of searches than Brendan. (R.636:10-11). Of course, the State completely ignores the undisputed fact that its own crime

scene video, filmed on November 12, 2005, shows the computer located in Bobby's bedroom, not Brendan's. (R. 648:1-2).

The State simply concocts a specious argument against Mr. Buting and Mr. Strang, claiming, "[N]either Mr. Strang nor Mr. Buting requested additional information about the Velie CD." The United States Supreme Court has specifically rejected the "hide and seek" standard of reasonable diligence for defense counsel in detecting the intentional suppression by the State of *Brady* evidence. In *Banks v. Dretke,* 540 U.S. 668, 681 (2004), the Supreme Court held:

> A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.

Significantly, the State ignores that "[p]re-trial, trial defense counsel made two specific requests pursuant to Section 971.23(1)(h) Wis. Stats. for all exculpatory evidence and/or information within the possession, knowledge, or control of the State which would tend to negate the guilt of the defendant, or which would tend to affect the weight or credibility of the evidence used against the defendant including any inconsistent statements." (R. 26:4-5). A second request was made by trial defense counsel for *Brady* material immediately before trial on January 18, 2007. (R. 225:1-6). The State makes the unprecedented argument that trial defense counsel should have made a third discovery request for the CD, despite being misled by the Fassbender report as to the content and identity of the primary user of the Dassey computer. (St. Resp. at p.10).

2. The Late Disclosure of the 7 DVDs is a Brady Violation

The State ignores Mr. Avery's argument that *Brady* requires the *timely* disclosure of evidence "within a reasonable time before trial to allow for its effective use." *State v. Harris*, 2004 WI 64 ¶ 37, 272 Wis. 2d 80, 680 N.W.2d 737; *Socha v. Richardson*, 874 F.3d 983 (7th Cir.

2017). The State contends that, because Mr. Avery had the 7 DVDs 7 weeks prior to trial, there was no *Brady* violation. The State ignores the fact that there was not time for trial defense counsel to effectively use the contents of the 7 DVDs in its pre-trial *Denny* motion. *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). The State in *Harris* argued that the undisclosed evidence was not material because it did not meet the "*Pulizzano* test." *Harris*, 2004 WI 64 at ¶ 8. The *Harris* court stated that "we find this argument to be not persuasive because the State never afforded Harris the opportunity to bring a *Pulizzano* motion in the first place." *Harris*, 2004 WI 64 at ¶ 31. The *Harris* court explained further that, by failing to disclose the suppressed evidence, "the State denied Harris the opportunity to further investigate B.M.M.'s allegations and bring a *Pulizzano* motion." *Id.* In the instant case, Mr. Avery was deprived of the opportunity to further investigate and develop evidence against Bobby as a third-party *Denny* suspect.

Mr. Buting explained that, as of December 14, 2006, a "massive discovery" was received by trial defense counsel, who was preparing a *Denny* motion to introduce evidence of third-party suspects at Mr. Avery's trial. (R.636:18-20). In that *Denny* motion, subsequently filed by trial defense counsel on January 10, 2007, Bobby was named as a potential suspect in Ms. Halbach's homicide. (R.636:18-20). According to the trial court, trial defense counsel had established that Bobby had "access and opportunity to have committed the crime," but, because no motive evidence was presented, the *Denny* motion was denied pertaining to Bobby as well as others. (R.636:18-20).

According to the State, trial defense counsel had the 7 DVDs in their possession before trial and "all they had to do was look at it. It took Velie only 17 days to do a complete forensic analysis of the Dassey computer." (St. Resp. at p. 11). The State's fallacious argument collapses

because it fails to address the undisputed fact that it deliberately misled trial defense counsel into thinking that the computer belonged solely to Brendan and the computer content was generated exclusively by Brendan.

The State's argument is further weakened by the highly improbable odds of an innocent explanation for both the misidentification of the computer as Brendan's (R. 636:24) and the misidentification of 6 DVD+Rs, instead of 7 DVDs plus a CD. (R. 636:25).

Mr. Avery's computer forensic expert Gary Hunt ("Mr. Hunt") disagrees with paragraph 6 of Det. Micheal (*sic*) Velie's affidavit (St. Resp. Exh. 1), in which Det. Velie claims that "the same or similar forensic tools or techniques are used to examine the 7 DVDs" as the CD. Mr. Hunt points out that the 7 DVDs could only be opened with an Encase program, whereas the CD reports could be opened with standard PDF-capable software "generally included with any computer or web browsing software." (Motion to Supplement, **Group Exhibit 8**).

Astoundingly, rather than admitting that a *Brady* violation occurred because of the untimely and deceptive disclosure of the 7 DVDs, the State cavalierly responds that "it is not responsible for explaining to the defense possible ways to make use of the evidence provided during the discovery process." However, it is the responsibility of the State not to make untimely and deceptive discovery disclosures while suppressing favorable evidence for the defendant.

3. The Non-Disclosure of the CD is a Brady Violation

It is Inv. Fassbender who provides the information in the Fassbender Report about the images on the CD, not Det. Velie, who did the actual forensic analysis. It is disingenuous for the State to contend that, because trial defense counsel had the Fassbender Report, which indisputably only contained Inv. Fassbender's analysis and not Det. Velie's, that the State had met its *Brady* obligations. The State has failed to provide the forensic computer expert

credentials of Inv. Fassbender to demonstrate that his analysis was anything other than a transparent effort to circumvent *Brady* by suppressing the CD and misleading trial defense counsel in his report about the total number of disks containing the Dassey computer contents.

In regard to the CD, there is no question that it was not disclosed by the State until April 17, 2018. It is undisputed that trial defense counsel was deprived entirely of the ability to hire experts, such as current post-conviction counsel has, to analyze and evaluate the CD for purposes of impeaching Bobby and to establish him as a third-party *Denny* suspect.

The State ignores Mr. Avery's contention that Prosecutor Kratz deliberately misled trial defense counsel in his December 15, 2006 itemized inventory of discovery disclosure, in which he labeled "7 CD's: contents of Brendan Dassey's computer." The State tacitly admits Prosecutor Kratz's deception by placing the Latin term "*(sic)*" after the 7 CD's as follows: "*7 CD's (sic): Contents of Brendan Dassey's Computer.*" The term "sic" was not part of Prosecutor Kratz's disclosure to trial defense counsel.

The State ignores the exact language of Prosecutor Kratz's stipulation proposal paragraph R, which stated, "Computer Analysis of Steve, Teresa's and *Brendan's Computer*---Mike Veile [*sic*], of the Grand Chute PD, analyzed the hard drives of these 3, and *found nothing of evidentiary value.* We may wish to introduce the fact that they looked. This stip eliminates Officer Veile [*sic*] as a witness." (*emphasis added*). (Motion to Supplement, **Exhibit 5**, R. 266:2). The State simply refers to Paragraph R as "the forensic computer analyses by Michael Velie conducted on the Avery, Halbach, and Dassey computers," deliberately avoiding the actual misleading language of Prosecutor Kratz's proposal when he identified the computer as belonging to Brendan Dassey.

In essence, the State's argument is that partial disclosure immunizes it from any *Brady* violation claim even if the disclosure is incomplete and misleading. This argument is a non-starter. In *United States v. Bagley*, 473 U.S. 667 (1985), the United States Supreme Court held that an incomplete disclosure of information can constitute a *Brady* violation, particularly where the disclosure misleads the defense. *Bagley*, 473 U.S. at 670.

Because of Det. Velie's misrepresentations, Mr. Hunt has provided a Fourth Supplemental Affidavit on August 3, 2018 (Attached and incorporated herein as **Exhibit D** is Mr. Hunt's Fourth Supplemental Affidavit), responding to Det. Velie's claim that the additional information is "typical administrative and procedural files, folders, and techniques routinely used by a digital forensic examiner during a forensic examination of digital evidence." Mr. Hunt describes all of the new information contained in the CD, not contained in the 7 DVDs. The new information consists of a supplemental report by Det. Velie describing his forensic analysis (AverySupp-02443-47), the 2,632 investigator's search terms (**Exhibit B** of Mr. Avery's Reply), the selective data parsed by Detective Velie from the Dassy computer's Windows Registry (AverySupp-00745-973), and specific "Internet History Results" related to the pornographic searches and relevant Chat Log reports (**Exhibit A)**(AverySupp-00974-2441). Mr. Hunt also detected 145 additional pornographic images that Det. Velie overlooked and should have saved to the "Recovered Pornography" report on the CD. (**Exhibit D** at ¶ 7).

The State contends that it never "suppressed the Velie CD or its contents" because the CD was identified in the Fassbender report. The flaw in the State's argument is that the Fassbender report does not identify the new information cited in Hunt's Fourth Supplemental Affidavit. (**Exhibit D**). The State contends that it has not violated *Brady* because it "disclosed the *existence* of the Velie CD." (emphasis added).

The State is taking the position that trial defense counsel, without being provided the CD and being misled about its contents, should have been able to deduce, through "mind-reading" of Det. Velie, all of the new information described in ¶¶ 5 and 7 of **Exhibit D**. The court in *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001) stated:

> In cases like the present one, the question is whether defense counsel had access to *Brady* material contained in the witness's head. (*citations omitted*). Because mind-reading is beyond the abilities of even the most diligent attorney, such material simply cannot be considered available in the same way as a document [. . .] This stretches the concept of reasonable diligence too far.

The State fails to explain why the CD was not logged into evidence or labeled with a Calumet County inventory number, and why the CD was in the possession of Inv. Fassbender for 12 years. There is no credible explanation for this egregious behavior.

4. The Evidence was Favorable to the Defense

The State argues that the Velie CD was not favorable to the defense. Once again, the State is construing the *Brady* violation too narrowly. The 7 DVDs, which were provided to trial defense counsel, contained 6,545 pages of data that had not been organized into a forensic analytical framework that specifically extracted evidence relevant to the murder. For example, the CD, and not the DVDs, contained 2,632 search results, devised by the investigators of Ms. Halbach's murder, for the terms relevant to the crime, including: blood (1 result), body (2083 results), bondage (3 results), bullet (10 results), cement (23 results), DNA (3 results), fire (51 results), gas (50 results), gun (75 results), handcuff (2 results), journal (106 results), MySpace (61 results), news (54 results), rav (74 results), stab (32 results), throat (2 results), and tires (2 results). (**Exhibit B**). Each of the word search items on the CD were specifically linked to the State's theory regarding the forensic evidence in Teresa Halbach's murder. Clearly, the non-disclosure of the word search terms on the CD was a *Brady* violation. Significantly, the State

never addresses the fact that the word search terms and results *were not on the 7 DVDs* because they were formulated by the investigators for the forensic evaluation by Det. Velie, which is only contained on the CD.

The State makes the bald assertion, without producing a single affidavit or any other evidence that the computer was accessible to numerous people, including Brendan Dassey, Blaine Dassey, Scott Tadych, Bryan Dassey, Barb Tadych, Tom Janda, and Steven Avery from October 31, 2005 to March 1, 2006 when Brendan was arrested.

It is undisputed that Mr. Avery never accessed the Dassey computer. He did not have the password for the computer, nor did he possess a key to the Dassey residence, which was locked when no one was home. (Motion to Supplement, **Exhibit 19**) (Motion to Supplement, **Group Exhibit 11**). Mr. Avery only entered the residence with the permission of a Dassey family member. Mr. Avery worked during the weekdays from 8:00 a.m. to 5:00 p.m. (R. 636:6, 89-96, at ¶¶ 3, 5, 10) (Motion to Supplement, **Group Exhibit 11**). Mr. Avery would be eliminated from all but 15 of the 128 searches (11.7%) at issue simply by having been arrested on November 9, 2005. (R. 630:85). Brendan would be eliminated from all but 26 of the 128 searches (20.3%) at issue by having been arrested on March 1, 2006. (R. 636:11, 33-37).

Unlike the State, Mr. Avery has provided the court with the affidavits of Mr. Avery, Blaine Dassey, and Bryan Dassey, a police report of Brendan Dassey, and a meticulous reconstruction of the timing of the relevant 562 searches that connect the searches to a time when only Bobby was home. (Motion to Supplement, **Group Exhibit 8**). The issue of who had access to the Dassey computer can only be resolved by an evidentiary hearing in which the court hears testimony from the residents of the Dassey residence in 2005-2006 and makes credibility findings as to who was using the computer at the time of the violent pornography searches.

The State graciously provides an excuse for trial defense counsel not requesting the Velie CD, claiming that it was a strategy decision. According to the State, trial defense counsel's focus on the "blood planting defense" made the Dassey computer irrelevant. (St. Resp. at p. 12). The State's logic is completely undermined by the fact that trial defense counsel's affidavits describe their diligent efforts to identify a *Denny* third-party suspect.

The State takes issue with Mr. Avery's reliance on *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001). Federal court opinions are frequently cited for their persuasive value. The findings in *Dressler* are consistent with numerous other cases, which have allowed the admission of pornographic images to establish motive and intent. These cases have also rejected the claim that the images are inadmissible propensity evidence. In *United States v. Torrez,* 869 F.3d. 291 (4th Cir. 2017), the court held that the lower court had not committed error in allowing the admission of the defendant's "pornographic videos showing violence against women who were sleeping, unconscious, or restrained." This evidence was admitted to show intent and motive for the murder of a young female victim. *United States v. Blauvelt,* 638 F.3d 281, 292 (4th Cir. 2011) (upholding admission under Rule 404(b) of adult pornographic videotapes in order to prove identity, motive, and intent in child pornography case).

5. The Evidence was Material to the Issue at Trial

It strains credulity for the State to contend that the violent pornographic images depicting bondage, torture, pain, decapitation, and mutilation of young females, on the 7 DVDs and CD, are immaterial to the murder of Ms. Halbach. The State's current position is belied by the State's unrelenting effort at Mr. Avery's trial to convince the jury that Ms. Halbach was lured to Mr. Avery's property so that he could sexually assault her. (R. 694:76-78; 258:1; 715:93; 705:154). During the multiple searches of the Avery property, the State displayed a single-minded focus on

gathering pornography from Mr. Avery's residence in order to incriminate him. The State did not abandon its sexual assault theme, even when Det. Velie's forensic analysis performed on Mr. Avery's computer revealed no searches for sexual images, much less violent images and dead bodies. (R. 636:58-59). Now, the State contends that Mr. Avery's argument regarding the significance of the hundreds of violent pornographic images on the Dassey computer is immaterial and would not have been admitted under Wis. Stat. § 904.05(2).

The State briefly argues that Mr. Avery has not demonstrated how the pornography evidence present on Bobby's computer would have been admissible as "specific instances of conduct" under Wis. Stat. § 904.05(2) to impeach Bobby. (St. Resp. at p. 15). The State's argument is misleading on multiple fronts. First, the pornography evidence – including images Bobby viewed depicting violence against women – would have been admissible as proof of Bobby's motive, intent, and/or plan to sexually assault and murder Ms. Halbach. The evidence would be admissible under a straightforward analysis of relevance. *State v. Berby*, 81 Wis.2d 677, 688, 260 N.W.2d 798 (1978) ("[E]vidence of motive is relevant if it meets the same standards of relevance as other evidence.") Certainly, if the State had found such evidence on a computer owned by Mr. Avery, it would have endeavored to present such evidence to the jury. Such evidence would therefore also have been admissible as to Bobby. E.g., *Wilson*, 2015 WI 48, ¶ 63 ("The admissibility of evidence of a third party's motive to commit the crime charged against the defendant is similar to what it would be if that third party were on trial himself.")

The State appears to conflate the general rules regarding character evidence with evidence that is relevant and offered to establish motive. Wis. Stat. § 904.04(2)(a) generally holds that other wrongs or acts are not admissible to establish propensity. However, the section also provides that it does not exclude evidence of other wrongs or acts when offered for some

other purpose, e.g., motive. Wis. Stat. § 904.05(2), which is cited by the State, sets forth methods of proving character where character or a trait of character is an essential element of a charge. That statute has no applicability here, where the pornography evidence is not being offered by Mr. Avery to establish Bobby's character.

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. *State v. Normington*, 2008 WI App 8, ¶ 21, 306 Wis. 2d 727, 744 N.W.2d 867 (2007). In *Normington*, the court determined that the probative value of the pornographic images substantially outweighed the danger of unfair prejudice, and the images established the defendant's motive in committing the crime. *State v. Jensen,* 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 42 (pornographic photographs admitted to establish motive). *State v. Luchinski,* 2009 WI App 110, 320 Wis. 2d 702, 771 N.W.2d 928. *State v. Wayerski*, 2017 WI App 80.

If trial defense counsel had possession of the Dassey computer internet browsing data from the CD, they would have been able to impeach Bobby's testimony that he was asleep from 6:30 a.m. until 2:30 p.m. because of the pornographic internet searches conducted during that time period. (**Exhibit A**) (R. 689:35-36).

The State ignores Mr. Avery's contention that the deceptive, untimely disclosure of the 7 DVDs also constitutes a *Brady* violation. Again, in an effort to defeat Mr. Avery's *Brady* claim, the State is attempting to limit Mr. Avery's *Brady* argument to the CD, when, in fact, the untimely and deceptive disclosure of the 7 DVDs also constitutes a *Brady* violation, which prevented Mr. Avery from successfully meeting the *Denny* requirements of establishing a third-party suspect.

The State ignores the January 25, 2010 opinion of Judge Willis in which the he found that "[t]he evidence offered against Bobby Dassey probably did meet the opportunity and direct connection to the crime requirements of the legitimate tendency test because of his presence on the property at the time Teresa Halbach was there. However, without any showing of motive, third party evidence against Bobby Dassey is precluded under *Denny.*" (R.453:95-96). The violent pornographic images and searches, connected directly to Bobby, would have established motive pursuant to *Denny.* Despite Judge Willis's opinion that trial defense counsel had established a "direct connection" between Bobby and Ms. Halbach's murder, the State continues to argue there was no direct connection. It is hard to imagine a more direct connection between Bobby and Ms. Halbach's murder than the presence of her bones in the Dassey burn barrel.

Even the State acknowledges its previous concession that "opportunity to commit the crime may be arguable because Bobby Dassey was on the grounds of the salvage yard on the day in question." (St. Resp. at pp. 16-17). The State claims that Mr. Avery "has failed to establish how Bobby Dassey was motivated by his alleged use of pornography to murder Teresa Halbach." In order to reach this ill-founded conclusion, the State had to turn a blind eye to the indisputable correlation between violent pornography leading to sexual aggression and, in extreme cases, homicide. The correlation has been established in peer-reviewed literature, as presented in the affidavit of Dr. Ann Burgess ("Dr. Burgess"). (Motion to Supplement, **Group Exhibit 9**). Dr. Burgess has presented the court with 30 years of empirical research that clearly establishes the relationship between pornography consumption and violence towards women.

Additionally, Dr. Burgess has presented multiple other studies, including a recent meta-analysis analyzing 22 studies from 7 different countries, establishing that pornography consumption is associated with sexual aggression. Both experimental and non-experimental

studies have confirmed the relationship between pornography and violence. Experimental studies have shown that male participants who are exposed to pornography endorse increased rape fantasies, willingness to rape, aggression against females, and acceptance of rape myths. (Allen, De'Alessio, & Brezgel, 1995; Malamuth et al. 2000). Further, a meta-analysis by Hald, Malamuth, and Yuen (2010) showed a significant positive association between pornography use and attitudes supporting violence against women in non-experimental studies. Use of sexually violent pornography as well as acceptance of interpersonal violence against women has been shown to be related to self-reported likelihood of raping or using sexual force. According to a survey conducted at a rape crisis center, almost a third of women who had been raped indicated that their abuser used pornography.

In the book *Sexual Homicide: Patterns and Motives*, which Dr. Burgess co-authored with FBI Agents Robert K. Ressler and John E. Douglas, one chapter focused on "Preoccupation with Murder: Pattern Responses." As a part of this chapter, Dr. Burgess interviewed 36 sexual murderers and concluded that, as a group, they had several traits in common: 1) they had a long standing pre-occupation and preference for a very active fantasy life; and 2) they were preoccupied with violent, sexualized thoughts and fantasies. In Dr. Burgess's opinion, in reviewing Mr. Hunt's affidavits, the obvious preoccupation with violent pornography on the Dassey computer, which includes torturing young females and dismembering and/or mutilating female bodies, over time would result in a "justification for killing." If trial defense counsel had presented the expert testimony of Dr. Burgess to establish motive for purposes of *Denny* based upon her review of the 7 DVDs and the CD, it is indisputable that Mr. Avery would have met the requirements of motive for *Denny* purposes.

Despite admitting that the State had conceded that Bobby had an opportunity to commit the crime, the State claims that opportunity was never proven. (St. Resp. at p. 17). Mr. Avery has clearly established opportunity for Bobby to commit the crime by the evidence he presented in his Motion to Supplement. Specifically, Mr. Avery has presented the following evidence that Bobby had the opportunity to commit the murder, hide Ms. Halbach's vehicle, and dispose of her body:

1. November 6, 2005: Bryan Dassey was interviewed by the Wisconsin Department of Justice (WDOJ) and stated that Bobby told Bryan that Bobby saw Ms. Halbach leave the Avery property. (WDOJ November 6, 2005 Report of Interview with Bryan: R. 630:34-37) (Affidavit of Bryan Dassey: R. 630:30-31) (Motion to Supplement, **Exhibit 14** is Calumet County Sheriff's Department Report of the Bryan interview on 11/3/2017). Contrary to Bryan's WDOJ report, Bobby testified at trial that when he left to go hunting, he saw Ms. Halbach's car still in the driveway, but he did not see Ms. Halbach. (R. 689:39-40). On October 30, 2017, Barb, Bobby's mother, posted on Facebook that Bobby told her that he did not see Ms. Halbach walking towards Mr. Avery's trailer, contrary to his trial testimony. (Barb's 10/30/17 Facebook post: R. 633:40). On October 24, 2017, Barb and Scott admitted that they did know that Ms. Halbach had left the Avery property on October 31, 2005. (Barb and Scott's phone call with Steven Avery on 10/24/17: R. 633:20).
2. November 6, 2005: Mr. Avery stated to the Marinette County police that, after going into his trailer to leave the Autotrader magazine, he came back outside and saw Ms. Halbach making a left turn off Avery Road onto CTH 147 going West. Mr. Avery then looked at the Dassey residence and noticed that Bobby's vehicle was gone. (Motion to Supplement, **Group Exhibit 17** is the transcription and police report regarding the 11/6/05 Marinette interview with Mr. Avery).
3. Bobby testified at trial that, on October 31, 2005, he went hunting between 2:45 p.m. and 5:00 p.m. (R. 689:39-40). However, Bobby contradicted that time frame in a November 5, 2005 interview in which he claimed he got home at 4:45 p.m. (R. 630:75-77). In a recent interview on November 17, 2017, Bobby provided another contradicting time when he stated that he got home at 5:30 p.m. (Motion to Supplement, **Exhibit 13** at p. 38).
4. Most importantly, Bobby's brother Blaine has provided an affidavit in which he describes seeing Bobby at 3:45 p.m. driving a greenish-blue vehicle, the same color as Ms. Halbach's. John Leurquin, a propane driver, corroborates Blaine's statement when he testified at trial that he saw a bluish-green SUV, similar to Ms. Halbach's, leaving the Avery property around 3:45 p.m. (R.712:125-28). Two witnesses have described seeing Ms. Halbach's vehicle parked by the Old Dam in Mishicot after her disappearance. (Motion to Supplement, **Exhibit 23** is the affidavit of Paul Burdick) (R.630:18-23).

5. Bobby stated that he would hunt on the property behind Tadych's house at 12764 SH 147, which was **East** of the Salvage Yard. (Motion to Supplement, **Exhibit 13** at p. 37). At 3:02 p.m. on October 31, 2005, Bobby hit off Tower 363X, 5.47 miles **West** of the Dassey residence. Bobby's hunting spot was only 1.5 miles from tower 370X. (Motion to Supplement, **Exhibit 15** is Bobby Dassey's 10/31/05 phone records) (Motion to Supplement, **Exhibit 16** is the cell tower maps). If Bobby was hunting where he claimed to be hunting **East** of the Avery property, there would be no reason that his call at 3:02 p.m. would have bounced off of tower 363X, **West** of the Avery property, instead of 370X.

The State complains that Mr. Avery has not described "how Bobby killed Ms. Halbach, where he killed her, when he killed her, or whether he really was assisted by Scott Tadych." (St. Resp. at pp.17-18). Unlike *State v. Wilson*, 2015 WI 48 ¶ 3, 362 Wis. 2d 193, 864 N.W. 2d 52, in which no reasonable juror could have determined that the alleged third party perpetrated the crime in light of overwhelming evidence that he did not, Mr. Avery's third-party theory about Bobby suffers no such affliction. The following evidence fits within the contours of the known facts of the case and cannot be readily disproven. *Wilson* at ¶ 88. Mr. Avery does not have to prove that Bobby committed the crime as long as his theory is based on evidence beyond "a possible ground of suspicion." *Denny* at 623. The evidence supporting that Bobby was a viable third-party suspect, and had a realistic ability to engineer the crime, is as follows:

1. Bobby had developed an obsession with Ms. Halbach and, on a number of occasions, watched her from the window. The following day after her visits, Bobby commented about her, indicating that he was watching her. Because of Bobby's obsessive and compulsive preoccupation with viewing violent pornography of women who resembled Ms. Halbach, he developed violent sexual fantasies about her. (R.636:89).
2. On October 31, 2005, Bobby told police that he viewed Ms. Halbach by her vehicle for approximately 10 seconds. However, he was able to describe her clothing, physique, and hair style, indicating that he had further contact with Ms. Halbach. (R.630:76-77).
3. Upon Ms. Halbach's arrival on October 31, 2005, Bobby watched her from his window, as he had in the past, but denied to the police that he was aware that she was coming to the property. (Motion to Supplement, **Exhibit 10** is the Wisconsin Public Defender interview of Bobby).

4. As Ms. Halbach left the property, Bobby followed. Ms. Halbach was persuaded to pull over in the Kuss Road cul-de-sac area and open her rear cargo door to obtain her camera for a photograph.
5. Advances were made, a struggle ensued, and Ms. Halbach was knocked to the ground and hit by a rock, causing blood spatter to land on the inside of the rear cargo door of her RAV-4. (Motion to Supplement, **Exhibit D** to **Group Exhibit 11** is the Supplemental Affidavit of Stuart James).
6. Ms. Halbach was lifted into the rear of the RAV-4 and driven to the area of the suspected burial site, assaulted, and then driven back to the Avery property. The hair bloodstain patterns on the inside panel of the rear cargo area of the RAV-4 were created by Ms. Halbach's injured head as the car was driven back to the Avery salvage yard. (Motion to Supplement, **Exhibit D** to **Group Exhibit 11**).
7. The RAV-4 was pulled into the Dassey garage and Ms. Halbach was shot twice in the head. (R.706:165-66). The Dassey garage was never luminoled or checked for forensic evidence of any type; blood found between the Dassey garage and residence was never tested. Her body was left in the garage and her vehicle was driven off of the Avery property, turning East on STH 147 at approximately 3:45-3:50 p.m. At that time, the vehicle was observed by John Leurquin, a propane truck driver who was on the Avery property. (R.712:127-28).
8. Bobby was observed driving a green vehicle East on SHT 147 at approximately 3:45-3:50 p.m. by his brother Blaine. (Motion to Supplement, **Group Exhibit 19** is the Affidavit of Blaine Dassey).
9. Ms. Halbach's vehicle was observed, parked by a tree at the Old Dam, by witness Paul Burdick on October 31, 2005. (Motion to Supplement, **Exhibit 23** is the Affidavit of Paul Burdick).
10. On November 2 and 3, 2005, Ms. Halbach's vehicle was observed parked in the same location at the Old Dam by witness Kevin Rahmlow. (R.630:18-23).
11. It was possible to walk back to the Avery salvage yard from the location by the Old Dam. The electronic components of Ms. Halbach were burned in the Dassey burn barrel behind the residence at approximately 4:30-5:00 p.m. That fire was observed in the Dassey burn barrel by Josh Radandt. (R.621:224-28).
12. Ms. Halbach's body was put in the Dassey burn barrel and transported to the Manitowoc County Gravel Pit after sunset. The body was burned in the burn barrel and the odor was detected by Travis Groelle on CTH Q.
13. The burn barrel was returned to the Dassey residence, leaving some of the bones in the burn barrel. The remainder of the bones and teeth from the quarry were burned at an aluminum foundry. (Motion to Supplement, **Exhibit 28** is the Affidavit of Lisa Novachek) (R.636:87-88).
14. On November 3, 2005, Bobby is informed by Mr. Avery about Sgt. Andy Colborn's visit to the Avery salvage yard regarding Ms. Halbach being missing. Bobby observes that Mr. Avery's finger is cut and bleeding. When Mr. Avery leaves the property to go to Menard's, Bobby enters Mr. Avery's trailer and wipes up blood from Mr. Avery's sink. He transports the blood to the RAV-4 and selectively drips the blood into Ms. Halbach's vehicle in order to frame Mr. Avery for the murder. (Motion to Supplement, **Group Exhibit 11** and **Exhibit D** to Group Exh. 11). Bobby was the only person who could have planted Mr.

Avery's blood in the RAV-4 because he was the only person home when Mr. Avery's finger started bleeding again who had access to Mr. Avery's blood in the sink. The court in *Wilson* held that, "If the defense theory is that a third party framed the defendant, then the defense might show opportunity by demonstrating the third party's access to the items supposedly used in the frame-up." *Id.* at 66. Bobby is the only family member on the Avery property who was present and had access to the blood dripped in Mr. Avery's sink on November 3, 2005. Bobby also is the only family member present on the Avery property that could have planted Ms. Halbach's bones in the Avery burn pit. Bobby was the only avid deer hunter on the Avery property who had access to knives and the knowledge of how to burn and dismember a body.

15. On November 4, 2005, Bobby attempts to plant the bones in his burn barrel in Mr. Avery's burn pit and inadvertently leaves some of the bones in the bottom of the burn barrel. (R.706:229-30).
16. Bobby had scratches on his back, in close proximity to the the time of the murder, that were consistent with human fingernails. (R. 630:78-80). According to current post-conviction counsel's forensic pathologist, Larry Blum, M.D. ("Dr. Blum"), the scratches on Bobby's back were not caused by a labrador puppy and are consistent with human fingernails scratching Bobby's back. (Motion to Supplement, **Exhibit 18** is Dr. Blum's affidavit.).

In *Wilson*, 2015 WI 48 ¶ 3, the defendant was unable to meet the *Denny* standard of demonstrating opportunity because he failed to show that it was possible for the third-party suspect to have been the direct shooter or to have hired someone to shoot the victim. The *Wilson* court stated that "the defendant must provide some evidence that the third party had the realistic ability to engineer" the crime. In the instant case, the State has not submitted any evidence that would rule Bobby out as a third-party suspect because could not have engineered the crime.

The State erroneously claims that the evidence is only material if a different verdict would have resulted had the suppressed evidence been available to the defense. In *Kyles,* the United States Supreme Court stated that 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 but whether, in its absence, he received a "fair trial" understood as a trial resulting in a verdict worthy of confidence. *Kyles* at 1566.

In *Tolliver v. McCaughtery*, 539 F.3d 766 (2008), the 7th Circuit reversed and remanded case back to the Wisconsin Appellate Court for its unreasonable application of clearly established Supreme Court precedent when the Wisconsin court required that the *Brady* evidence result in a different outcome. The *Tolliver* Court stated:

> The state court had determined that 'Mr. Smith's testimony possibly would have affected the jury's views of the persons Mr. Smith named, their motives for testifying, and Oliver's reasons for shooting Ms. Rogers," but the court nevertheless concluded that *the result of the proceeding would not have been different*. . . .There is little doubt that, had the disputed evidence been admitted, it would have been reasonable for the jury to conclude as the Court of Appeals of Wisconsin believed that it would. With great respect, however, we believe that it is not reasonable to conclude that such a result was the *only* result or even the probable result that the jury would have reached. Again, we believe that our colleagues on the Court of Appeals of Wisconsin failed to apprehend the nature of Mr. Tolliver's defense and failed to assess how the evidence in question might have enhanced the possibility of that defense succeeding.

Id. at 778. (emphasis added).

Despite all of the alleged forensic evidence against Mr. Avery, the jury took 3 days to reach a verdict and clearly had questions about Bobby's credibility as the State's star witness. Bobby was the only witness whose transcripts the jury requested to review during deliberations. (R. 384).

Alternatively, Mr. Buting and Mr. Strang Provided Ineffective Assistance of Counsel

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*, All 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).

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.

"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).

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.

The State claims that Mr. Avery's "new ineffective assistance of counsel claim" is insufficiently pled. However, the State has pled the ineffective assistance of trial defense counsel in its effort to avert this court from finding a *Brady* violation. The State claims that trial defense counsel had the 7 DVDs 7 weeks before trial and that they were alerted to the existence of the Velie CD and the CD contained the pornographic images contained on the 7 DVDs. The State contends that "Avery had the information and the ability to ask for more detail [. . .] before the start of trial on February 5, 2007. Avery's trial counsel never asked for the CD." The State claims that trial defense counsel was not "reasonably diligent" and that, because trial defense counsel had the evidence, the State "was not responsible for explaining to the defense possible ways to make use of the evidence provided during the discovery process."

The ineffectiveness of trial defense counsel and prior post-conviction counsel is a sufficient reason to overcome the procedural bar relied upon by the State in its response.

Prior post-conviction counsel ignored the ineffectiveness of trial defense counsel failing to retain a computer forensic expert when trial defense counsel received the 7 DVDs. Clearly, prior post-conviction counsel recognized the need for experts on Mr. Avery's behalf because they asked the court for an extension to retain experts and stated as follows:

> "Counsel would be remiss if they did not consult with scientific experts on matters beyond their own knowledge and expertise, just as counsel would fail to satisfy their ethical obligations if they did not pursue potential leads for postconviction relief."

(R. 421:1-5, at p. 3).

Both trial defense counsel and prior post-conviction counsel were ineffective, pursuant to *Strickland*, in failing to hire a computer forensic expert. Their deficient performance falls below

an objective standard of reasonableness. Mr. Avery was prejudiced by their deficient performance. *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305. *State v. Scott*, 2011 WI App 19, 331 Wis.2d 487, 795 N.W.2d 63 (cited for persuasive value). Additionally, trial counsel and prior post-conviction counsel were ineffective, pursuant to *Strickland*, in their deficient performance which fell below an objective standard of reasonableness. The cumulative effect of trial defense and prior post-conviction counsel prejudiced Mr. Avery because they failed to review "certain portions of discovery" provided by the State; failed to "master the discovery documents." The *Thiel* court instructed that, in making a *Strickland* evaluation of prejudice, the "totality of the representation" standard is not the proper inquiry, but rather "the effect of counsel's act or omissions on the reliability of the trial's outcome." *Thiel* at ¶ 80. The cumulative effect of trial defense counsel and post-conviction counsel's deficiencies undermines confidence in the outcome of the trial and establishes *Strickland* prejudice. *Thiel* at ¶ 81. Even though prior counsel performed well on some aspects of the trial and post-conviction, it does not offset the cumulative effect of their deficiencies in failing to master the discovery and realize that the 7 DVDs demonstrated that the Dassey computer did not belong to Brendan and that it contained critically importance evidence that would have established a motive for purposes of meeting the *Denny* standard and provided evidence to impeach Bobby, the State's star witness.

The Velie CD is Newly-Discovered Evidence

The State erroneously attempts to argue that there is a distinction between newly discovered evidence and newly available evidence. None of the cases cited by the State pertain to an alleged *Brady* violation. The court in *State v. Volbrecht,* 2012 WI App. 90, 344 Wis. 2d 69 stated:

> At the outset we observe that the parties parse out 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.

The State contends that the contents of the Velie CD are not newly discovered evidence. (St. Resp. at pp. 19-21). In support thereof, the State recites Wisconsin's four-part test for newly discovered evidence reiterated in *State v. [Brian] Avery*: " '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.' [*State v. Plude*, 2008 WI 58, ¶ 32] (quoting *State v. McCallum*, 208 Wis. 2d 463, 473)."

In this case, the contents of the Velie CD qualify as new evidence because: (1) the CD was first disclosed to Defendant in 2018 after being withheld for 12 years; (2) whatever duty Defendant was under to investigate the Velie CD was superseded by the prosecution's ongoing duty to disclose and not suppress evidence; (3) the evidence — *i.e.*, recovered pornographic images, 2,632 searches for keywords related to the murder of Ms. Halbach, provided by investigators, in addition to a description of Detective Velie's examination methodology — was material to the trial court's consideration of *Denny* evidence related to Bobby Dassey; (4) and the evidence, specifically the aggregated pornographic images and investigators' keyword searches, was not cumulative of the hard drive copy tendered to Defendant. Rather, this evidence constitutes a unique work-product that is not merely a re-evaluation of existing evidence or a new appreciation of known evidence.

To this point, the State misrepresents what Defendant submits is newly discovered evidence; Defendant does not interpret his recently proffered expert witness testimony to be newly discovered evidence. (*See* St. Resp. at p. 20). Instead, as described above, the evidence at

issue is the contents of Velie's CD, specifically the aggregated pornographic images and investigators' keyword searches.

This distinction is critical. In support of its proposition that the Velie CD is not newly-discovered evidence, the State cites *State v. Williams*, 2001 WI App 155, ¶ 16. The State's reliance on *Williams* is misplaced. In *Williams*, the supposed newly discovered evidence was a psychological re-examination report authored by a State psychologist, based solely upon a previously filed psychological evaluation. *Id.* at ¶¶ 7, 8. The *Williams* court concluded that the re-examination report merely constituted an "assessment of pre-existing information," reasoning that "[m]erely recycling and reformulating existing information into a new format does not generate new evidence." *Id.* at ¶ 16.

Here, Mr. Avery is not recycling or reformatting existing information and claiming it is newly-discovered evidence. Rather, the newly discovered evidence consists entirely of Det. Velie's unique investigative work product, including the 2,632 word search responses that were directly linked to the details of Ms. Halbach's murder. Unlike the re-examination report in *Williams*, Velie's CD is not a reorganization of existing information; instead, it constitutes Velie's investigative analyses of the computer's hard drive, including his sifting through the thousands of images identified in the web browser history and file registry to isolate those of potential evidentiary value. The 7 DVDs do not include the new information described above.

THEREFORE, this court should grant Mr. Avery's Motion to Supplement and conduct an evidentiary hearing on the matters contained therein.

WHEREFORE, undersigned counsel respectfully requests that this court conduct an evidentiary hearing to determine the merits of the factual allegations set forth in this motion and to grant Mr. Avery a new trial based upon the court's findings in said evidentiary hearing.

Dated this 3rd day of August, 2018.

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CERTIFICATE OF SERVICE

I certify that on August 3rd, 2018, a true and correct copy of Defendant's Reply to the State's Response to Defendant's Motion to Supplement Previously-Filed Motion for Post-Conviction Relief, was furnished via electronic mail and by Federal Express, postage prepaid to:

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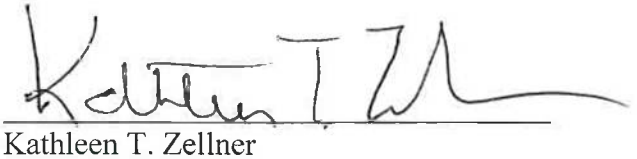

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