STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN AVERY,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL

Introduction

Defendant-Appellant-Petitioner's (hereinafter Defendant) *Motion to Compel Production of Recent Examination of the Dassey Computer* concerns evidence that did not, and could not, have existed when his case went to trial in 2007. Yet, Defendant contends such evidence is material and would have changed the outcome of his trial. This notwithstanding the fact he had the original evidence (the forensic image of the Dassey computer) to do his own analysis since December 2006. Defendant chose not to undertake that analysis until the summer of 2017.

Issue

Is the Defendant entitled to postconviction discovery of evidence that did not exist when his case went to trial in 2007?

Argument

Historically, the right to discovery in criminal cases has been limited to that

which is provided by statute. *State v Miller*, 35 Wis. 2d 454, 474, 151 N.W.2d 157 (1967), *State v. O'Brien*, 223 Wis. 2d 303, 319 (¶ 22c), 588 N.W.2d 8 (1999). Although § 971.23(1)(e) allows for pretrial discovery of expert reports, it is uncontested that it does not provide for post-conviction discovery of expert reports. *Id.*

In *State v. O'Brien*, the supreme court addressed the issue of postconviction discovery. While acknowledging that in certain circumstances a defendant may be entitled to postconviction discovery, the court declined to adopt guidelines. *O'Brien*, at 321 (¶ 25). The court held "that a party who seeks post-conviction discovery must first show that the evidence is consequential to an issue in the case and had the evidence been discovered, the result of the proceeding would have been different." *Id.* at 323 (¶ 28).

> "[E]vidence is [consequential] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." [Internal citations omitted.] Evidence that is of consequence then is evidence that probably would have changed the outcome of the trial. *See United States v Bagley,* 473 U.S. 667, 682-84 (adopting *Strickland* standard of consequential evidence); *Unites State v. Agurs,* 427 U.S. 97, 104 (1976) (explaining meaning of consequential evidence). "The mere possibility that an item of undisclosed information might have helped the defense ... does not establish '[a consequential fact]' in the constitutional sense." *Agurs*, 427 U.S. at 109-110.

Id. at 321 (¶ 24).

In his argument, Defendant disingenuously claims the supreme court

adopted guidelines for obtaining postconviction 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 postconviction discovery motions."

Def.'s Mot. To Compel 4-5[1] ¶ 11. This is a blatantly false statement of the law.

The above quoted language is from the court of appeals decision, *State v O'Brien*, 214 Wis. 2d 328, 343-44, 572 N.W.2d 870 (Ct. App. 1997). Yet, Defendant attributes this language to the supreme court. Except for its summary of the court of appeals decision, the guidelines are not part of the supreme court opinion. The supreme court specifically declined to adopt these guidelines stating *"[n]evertheless, we decline, at this time, to adopt the guidelines as created by the court of appeals. Rather, we believe that a determination whether evidence is of consequence to the case will limit the remedy of post-conviction discovery to only those situations where it is warranted." Obrien*, 223 Wis. 2d at 321 (¶ 25), emphasis

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[1] What is even more confounding is the fact that Defendant relies on *State v. O'Brien* (although he cites the court of appeals decision), for the proposition that he is entitled to postconviction discovery and then disavows the application of *State v. O'Brien* in ¶ 26 of his *Motion to Compel,* where he once again misinterprets the decision.

added. We return now to the correct legal standard and apply it to these facts.

First, Defendant must show that the sought after evidence is consequential to an issue in the case. *Id.* at 323 (¶ 28). Defendant has not demonstrated how a claimed new forensic examination of the Dassey computer or a reexamination of the work done by Captain Michael Velie in April and May of 2006 is consequential. As noted above, evidence is consequential only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* Since any new analysis or reexamination constitutes evidence that did not exist at the time of Defendant's trial, it could not be consequential; *i.e.,* it could not have changed the outcome. The State is under no obligation to provide counsel with postconviction discovery absent the presence of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963), *State v. O'Brien*, 214 Wis. 2d at 320-21 (¶¶ 22e – 25) and SCR 20:3.8 (g)(h).

Next, Defendant boldly states "*Disclosure of All the Forensic Examinations of the Dassey Computer Would Create a Reasonable Probability of a Different Outcome.*" (Mot. Compel Prod. Recent Exam. of Dassey Comp. 7.) Yet, Defendant fails to actually identify what this new evidence is and how it would factor into a specific analysis that would undermine the outcome of his trial. And more importantly, since such evidence didn't exist until 2018, how such evidence could undermine confidence in the outcome of his trial which occurred in 2007. Lastly, if this is more of the same evidence that was originally provided in the seven

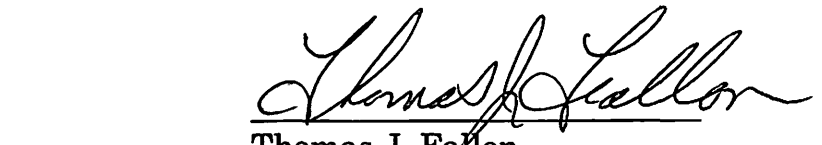
DVDs, as he seems to allude in ¶¶ 12-13 and 18-21 (Def.'s Mot. to Compel 5-6 & 7-8), any *new* and or similar evidence regarding Bobby Dassey, developed in 2018, is cumulative to what has already been provided. In effect, Defendant seeks disclosure of evidence by way of a hearing to determine whether he has a claim at all and whether it could lead to exculpatory evidence or a reasonable probability of a different outcome. Such a purpose does not entitle Defendant to postconviction discovery. *State v Kletzien*, 2008 WI App 182, 314 Wis. 2d 750, 762 N.W.2d 788. As in *Kletzien*, this *Motion to Compel* is nothing more than a fishing expedition to discover just what the State knows about this computer evidence. Defendant has not met his burden under *O'Brien*, 223 Wis. 2d at 323 (¶ 28).

Finally, Defendant argues that he's entitled to the State's evidence under a theory that it is *Newly Discovered Evidence.* A novel argument for which he provides no support. As we have argued previously in our *Response to Defendant's Motion to Supplement Previously Filed Motion for Post-Conviction Relief,* 18-20, the analysis of the Dassey computer evidence is not newly discovered evidence — regardless of whether it was done in 2006 or 2018. We decline to beat this dead horse. Suffice it to say, nothing has been *discovered* as it relates to the 2018 reexamination of evidence that is *new*.

Therefore, this Court should deny *Defendant's Motion to Compel Production of Recent Examination of the Dassey Computer* without further argument or hearing.

Dated this 3d day of August, 2018.

Respectfully submitted,



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