STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

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

DEFENDANT STEVEN AVERY'S 'S MOTION FOR RECONSIDERATION

Now Comes Defendant, Steven A. Avery, by and through his attorneys, Kathleen Zellner and Steven Richards and hereby respectfully moves this Court to reconsider its order filed October 3, 2017, based on manifest errors of law and fact and the development of new evidence. In support of this motion, Mr. Avery states as follows:

Introduction

Mr. Avery's conviction for first degree intentional homicide was based exclusively on the following evidence:

1. Ms. Halbach's vehicle being found on the Avery's Auto Salvage property (TT:3/14:36-39);
2. Mr. Avery's blood being recovered from six locations in Ms. Halbach's vehicle (TT:3/14:58-59);
3. Mr. Avery's DNA being extracted from a swab taken from the hood latch of Ms. Halbach's vehicle (TT:2/23:172-75);
4. Mr. Avery's DNA being extracted from Ms. Halbach's vehicle key that was recovered from Mr. Avery's bedroom (TT:2/23:181-82);
5. Ms. Halbach's DNA being extracted from a damaged bullet recovered from Mr. Avery's garage (TT:2/23:163-65);
6. Bobby Dassey's testimony that Ms. Halbach never left the Avery property before her murder (TT:2/14:40);

7. Bobby Dassey and Scott Tadych's testimony which established each other's alibi on October 31, 2005 (TT:2/15:39; TT:2/27:123-24; TT:3/14:206);
8. Mr. Avery's alleged call to AutoTrader on October 31, 2005, using his sister's name to mislead and lure Ms. Halbach to the Avery property (TT:3/14:82);
9. Ms. Halbach's bones being found in Mr. Avery's burn pit (TT:3/14:96). Mr. Avery was acquitted on the mutilation of a body charge (TT:3/18:3); and
10. Prosecutor Kratz's pretrial press conference where he provided all the details in the alleged confession of Brendan Dassey (TT:3/8:32-33).

Current post-conviction counsel, in its June 7, 2017 motion for post-conviction relief refuted all of the forensic evidence used to convict Mr. Avery of first degree intentional homicide in the unrebutted affidavits of seven experts. Three of the more blatant examples of the falsity of the State's forensic evidence are:

1. that the hood latch would have had to be opened 90 times by Mr. Avery to account for the quantity of his DNA extracted from the hood latch swab by the Wisconsin Crime Lab (Supplemental Affidavit of Dr. Karl Reich, attached and incorporated herein as **Exhibit A** at ¶ 5);
2. Mr. Avery deposited 10 times less DNA on the exemplar key than what the Wisconsin State Crime Lab purportedly detected on the key police claim to have recovered from Mr. Avery's trailer (Motion at ¶¶ 158-59); and
3. The bullet, which allegedly went through Ms. Halbach's skull, is devoid of any bone particles which would be present if the bullet had entered and exited her skull as the State claimed at Mr. Avery's trial.

Dr. Palenik did detect an abundance of wood on the bullet which makes Mr. Avery's allegation that Ms. Halbach's DNA was planted on the bullet beyond question and unrefuted. (Supplemental Affidavit of Dr. Christopher Palenik, attached and incorporated herein as **Exhibit B** at ¶5).

Current post-conviction counsel is providing this Court with new evidence which establishes that Ms. Halbach and her vehicle left the Avery property; that Bobby Dassey gave false testimony about Ms. Halbach and her vehicle not leaving the Avery property; that Bobby Dassey and Scott Tadych gave false testimony establishing the other's alibi; that the Dassey computer contains images of Ms. Halbach, violent pornography and dead bodies of young females viewed by Bobby Dassey at relevant time periods before and after the murder of Ms. Halbach; that Mr. Avery did not set up the original appointment with AutoTrader to photograph Barb Janda's van; and that Ryan Hillegas had possession of a document that was in Ms. Halbach's vehicle at the time of her murder.

On June 7, 2017, Mr. Avery filed a motion for post-conviction relief pursuant to Wis. Stats. § 974.06. The statute requires this Court to order the State to respond and to conduct a "prompt hearing" on the motion unless the motion, files, and records of the action "conclusively show that the person is entitled to no relief." Wis. Stats. 974.06(3)(c) (emphasis added). On October 3, 2017, this Court summarily dismissed the petition without ordering the State to respond to the motion and without holding an evidentiary hearing.[1]

Mr. Avery respectfully moves this Court to reconsider its order summarily dismissing his petition. To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of

[1] The Court's opinion was a mere 1,606 words compared to the 64,118 of Mr. Avery's motion. That is, the Court's opinion was only 2.5% as long as Mr. Avery's motion, perhaps explaining why 97.5% of Mr. Avery's allegations were not addressed by the Court.

law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275 Wis. 2d 397, 416 (2004) (citation omitted). A "manifest error" is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* (citation omitted).

(1) *This Court Committed Manifest Error Where It Failed To Accept As True The Allegations In Mr. Avery's Post-Conviction Motion.*

Mr. Avery's motion for relief was filed pursuant to Wis. Stats. § 974.06 which provides that unless the motion and the files and records of the action conclusively show that the person is entitled to no relief, the court shall grant a prompt hearing. Wis. Stats. § 974.06(3)(c) (emphasis added). The statute requires that the circuit court hold an evidentiary hearing when the movant states sufficient material facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶ 14, 274 Wis. 2d 568, 682 N.W.2d 433. In making this determination, the court must assume the facts alleged in the motion to be true. *Id.* at ¶ 12 (citing *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W. 2d 50 (2004)); *State v. Ziehli*, 2017 WI App 56, ¶ 22, 2017 WL 3209410 ("Because the circuit court did not hold an evidentiary hearing on Ziehli's motion, we will assume that the factual allegations in her motion are true.") Conversely, factual disputes may only be resolved at an evidentiary hearing. *State v. Hampton*, 2004 WI 107, ¶ 70, 274 Wis. 2d 379, 683 N.W.2d 14 ("[t]he State is free to present its evidence to meet its burden of persuasion at the evidentiary hearing. . . . there is a genuine issue of material fact which must be resolved at an evidentiary hearing.")

In summarily dismissing Mr. Avery's motion without an evidentiary hearing, this Court failed to properly accept the factual allegations in Mr. Avery's motion as true. Mr. Avery's motion is replete with material factual allegations that, if true, would entitle him to relief. In fact, as noted in Mr. Avery's motion to vacate this Court's order filed October 3, 2017, even the State anticipated that additional forensic testing and an evidentiary hearing would be required and did not move to dismiss Mr. Avery's motion and stated it would not do so during a meeting with current post-conviction counsel, Ms. Zellner and Mr. Douglas Johnson on September 18, 2017. Instead, as noted above, this Court committed a manifest error by not accepting all of the factual allegations in Mr. Avery's motion as being true before denying an evidentiary hearing.

In the very recent case of *State v. Willis*, 2017 WI App 56 (July 18, 2017), the defendant sought an evidentiary hearing on his post-conviction claims of ineffective assistance of counsel. The *Willis* Court applied the *Allen* test and made clear that for the purpose of determining whether an evidentiary hearing was required, the court would accept as true the facts alleged in the post-conviction motion. *Id.* at ¶ 24. In *Willis*, the defendant was convicted of murder in part due to "boot print" evidence presented by the State. In his post-conviction motion, the defendant presented the opinion of an expert ("Mr. Streeter") rebutting the "boot print" evidence and claiming his attorney was ineffective for not presenting such expert testimony at the trial. *Id.* at ¶¶ 28-29.

The circuit court denied the post-conviction motion without an evidentiary hearing.

The appellate court reversed and held that the defendant's post-conviction motion met "the five w's and one h" test. *Id.* at ¶ 39 (*citing Allen*, 274 Wis. 2d 568, ¶ 23). The *Willis* Court explained that a motion provides "sufficient material facts," if the motion provides the name of the witness (the who), the reason the witness is important (the why and the how), and facts that can be proven (the what, where and when). *Id.* at ¶ 24. The *Willis* Court held that the *Allen* test was satisfied because: (1) the "who" was identified as the expert — Mr. Streeter; (2) the "what, where, and when" were that the defendant's boot print and the impression obtained at the time and place of the incident did not match; and (3) the "why and the how" was that Mr. Streeter's opinion could have been used to establish that the defendant's boots did not match the boot impression. *Id.* at ¶ 39.

The defendant in *Willis* also argued in his post-conviction motion that his trial counsel was ineffective for failing to introduce evidence of the victim's time of death. The motion identified evidence described in two police reports that could be used to establish that time of death, including cell phone records showing outgoing calls from the victim's phone at 7:51 p.m. and 7:55 p.m. and the 911 call at 7:58 p.m. *Id.* at ¶ 41.

As to the time of death argument, the *Willis* Court again found that the post-conviction motion met "the five 'w's and one 'h'" test. *Id.* at ¶23. The

motion explained that: (1) the "who," as indicated in the police reports, was Officer Michael Sarenac, the cell phone data analyst, and Detective Thomas J. Caspar, Jr., author of the 911 call report; (2) the "what, when, and where" were the times of the victim's cell phone calls, the time of the 911 call, and the defendant's whereabouts when the victim died; and (3) the "why and the how" were that the information potentially could be used to establish that the defendant was not present when the victim died. *Id.* at ¶ 24.

Therefore, the *Willis* Court reversed the circuit court and remanded the case for an evidentiary hearing. The same result is required here. Mr. Avery has identified each witness who would testify, and the subject matter of the witness's testimony covering the who, what, where, when, how, and why of all of the evidence used to convict Mr. Avery. A chart that describes all of the evidence presented by Mr. Avery which more than meets the *Allen* criteria is attached and incorporated herein as **Exhibit C**. Each allegation cited in the chart establishes the prejudice necessary to undermine confidence in Mr. Avery's verdict.

Mr. Avery is entitled to a new trial on the basis of newly discovered evidence

In denying Mr. Avery's motion, this Court held:

> The defendant attached numerous reports to his latest motion, arguing that the forensic tests conducted in the reports were not available at the time of the defendant's trial in 2005. However, the defendant's arguments ignore an important question – were the tests available at the time of the defendant's previous motion pursuant to Wis. Stats. § 974.06 or any of the other appeals or motions filed after trial?

(Opinion at 2).

As a preliminary matter, in asking this question this Court ignores Mr. Avery's assertions that the forensic evidence on which he relies is the product of technology developed since his trial. For example, with regard to the testing performed by Dr. Palenik, Dr. Palenik relied on a state-of-the art electron microscope manufactured in 2016 to examine the bullet the State alleged passed through Ms. Halbach's skull (Item FL). Similarly, Dr. Reich applied newly-developed DNA source testing methods (specifically, RSID tests) to rule out the source of the DNA present on the hood latch of Ms. Halbach's vehicle. These methods were not available at the time of Mr. Avery's trial.

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

This Court's ruling that in order for evidence to be "new" the testing methods used to obtain it must not have been available at the time of Mr. Avery's prior appeals and/or post-conviction motions is therefore manifestly erroneous. That is not the standard. Rather, once it is shown that the evidence was discovered after the defendant's conviction, the question becomes whether the defendant was not negligent in seeking the evidence prior thereto. If the defendant was not negligent in failing to ferret out the evidence on which he relies, then a prior motion brought pursuant to Wis. Stats. § 974.06(4) does not procedurally bar the claim. *State v. Edmunds*, 2008 WI App 33, ¶¶ 10-15, 308 Wis. 2d 374, 746 N.W.2d 590 (defendant's prior post-conviction motion did not bar successive post-conviction motion based on newly discovered medical evidence calling into question State's evidence related to "shaken baby syndrome").

In *State v. Avery*, 2013 WI 13, 826 N.W.2d 60, the defendant filed a motion under Wis. Stats. § 974.06 over twelve years after his conviction and argued that during that time, new technology had allowed him to develop new evidence of his innocence. The circuit court denied the motion, but the court of appeals reversed the post-conviction order and remanded the matter for an evidentiary hearing, concluding that the defendant had made a *prima facie* claim of newly discovered evidence. *Id.* at ¶ 13, 345 Wis. 2d 407, 418–19, 826 N.W.2d 60, 66. The appellate court applied the test discussed above from *Edmunds* and determined that the defendant met all four prongs of the test. As to the first prong, the

defendant was not required to establish when the new technology became available. The defendant satisfied his burden by simply showing that the technology was not available at the time of his trial.[2] Similarly, Defendant in the case at bar has satisfied his burden by setting forth in his motion that the new technology was not available at the time of trial. At this stage of the proceedings, Defendant need not detail precisely when the new technology became available.

This Court Committed Manifest Error When it Dismissed Dr. Palenik's Expert Opinion re the Bullet Fragment #FL

Mr. Avery's motion presented new evidence obtained by a world-renowned trace evidence laboratory, which used 2016 technology (meaning it was not available before 2016) to determine that the bullet fragment #FL which allegedly caused Ms. Halbach's death by entering and exiting her skull did not in fact do so. Rather than granting an evidentiary hearing on this astounding fact, which stands unrefuted, this Court put on its "science cap" and attempted to dispute this new scientific evidence. This Court committed manifest error of fact when it disputed Dr. Palenik's findings, stating, "the tests used on the bullet are not inclusive to the point of discovering all particles present on the bullet surface." (Opinion at 5). However, as Dr. Palenik explains in ¶¶ 3-4 of his Supplemental Affidavit (**Exhibit B**), this is an incorrect interpretation of his conclusions. As Dr. Palenik explained in ¶ 15(f) of his original affidavit, "no particles consistent

[2] Ultimately, the defendant, Brian Avery, was not awarded a new trial. However, that decision was based on the strength of the evidence against him at trial, not because the court discarded the newly discovered evidence.

with bone were detected using stereomicroscopy and digital video microscopy." *See*, Supplemental Affidavit of Dr. Palenik, **Exhibit B** at ¶ 3. That is, when Dr. Palenik examined the entire bullet, he discovered no bone particles. Furthermore, when Dr. Palenik examined the bullet fragment using a scanning electron microscope and energy dispersive x-ray spectroscopy, "no particles consistent with bone were detected . . . ." *See*, Supplemental Affidavit of Dr. Palenik, **Exhibit B** at ¶ 4. Clearly, when Dr. Palenik examined the entire bullet, he identified all observable particles on it. As described by Dr. Palenik in his original and supplemental affidavits, "no particles consistent with bone were detected." *See* Affidavit of Dr. Palenik, P-C Exhibit 48 at ¶¶ 15 (f) and 17(f); Supplemental Affidavit of Dr. Palenik, **Exhibit B** at ¶¶ 3-4. That this Court would contend that Dr. Palenik's examinations failed to include all particles on the bullet is manifestly erroneous; Dr. Palenik, in his examination of the entire bullet, discovered no particles with the morphological and elemental characteristics of bone. Put plainly, Dr. Palenik concluded that this bullet did not pass through Ms. Halbach's skull. *See*, Supplemental Affidavit of Dr. Palenik, **Exhibit B** at ¶ 5.

Dr. Palenik's opinions can be summarized as follows: (1) the bullet purportedly shot through Ms. Halbach's skull, killing her, was never shot through Ms. Halbach's skull and (2) there are wood particles present on the bullet that was purportedly shot through Ms. Halbach's skull, which supports an

alternate theory that the bullet struck a wooden object and not a human skull. Affidavit of Dr. Palenik, P-C Exhibit 48 at ¶¶ 17(f) and 19.

This Court has misstated Mr. Avery's argument by claiming that "the Defendant argues that the report proves that the red stain on the bullet was not blood but paint." (Opinion at 5). This Court attributed this allegation to Mr. Avery. Mr. Avery has never made such a claim.[3]

At trial, there was no testimony that there was blood on the bullet. Sherry Culhane, the State's DNA expert, testified that she did not perform a presumptive test for blood on the bullet. (TT:2/26:106). Ms. Culhane testified that the she did not visually observe any blood or staining on the bullet. (TT:2/23:163; TT:2/26:106). According to Ms. Culhane, she could not offer an opinion as to the source of the DNA she extracted from the bullet. (TT:2/26:106). Further, Ms. Culhane testified that the only opinion she could render about the origin of the DNA recovered from the bullet was that it had to have come from nucleated cells. (TT:2/26:106). It is undisputed that red blood cells are not nucleated and do not contain DNA. If this Court really believes the red flecks are blood, it is a simple matter for this Court to order such testing bearing in mind, of course, that neither side has ever recognized such testing as being

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[3] The only references to the red stain on the bullet in the June 7, 2017, motion were at ¶ 320(b): "[t]he identity of this dried liquid is presently unknown. Based upon its color and the fact that the bullet was previously extracted for DNA, it seems unlikely that this is blood. The color, texture and shape of the deposit suggests that the material may be paint," and at page 9 and ¶ 323, which include the same language: "[f]urthermore, the presence of red droplets deposited on the bullet suggests that the bullet had picked up additional contamination from its environment at some point after coming to rest (*i.e.*, droplets of potential red paint or a red liquid)."

necessary because the potential existence of blood on the bullet was destroyed by the State years ago when Ms. Culhane washed the bullet in a buffer solution.

Thus, whether there was blood on the bullet was not an issue at trial and is not an issue now. The goal of Dr. Palenik's analysis was to determine whether the damaged bullet found in Mr. Avery's garage had been shot through Ms. Halbach's skull. He has concluded, to a reasonable degree of scientific certainty, that the bullet was not shot through Ms. Halbach's skull. *See,* Supplemental Affidavit of Dr. Palenik, **Exhibit B** at ¶ 5. Therefore, Mr. Avery submits that the source of Ms. Halbach's DNA on the bullet is moot; the issue before this Court is whether the damaged bullet was, as contended by the State (TT:3/15:98), shot through Ms. Halbach's skull. Based upon Dr. Palenik's analyses, Mr. Avery's allegation that the bullet was never shot through bone must be accepted as true. This opinion — which stands unrebutted by the State — so thoroughly undermines the prosecution's case against Mr. Avery that his conviction should be vacated.

This Court Committed Manifest Error when it Dismissed the Opinion of Dr. Karl Reich regarding the Hood Latch DNA.

This Court erroneously concluded that the DNA on the hood latch could have been left by sweat from the defendant's hands. Specifically, this Court stated:

> The author (Dr. Reich) of the report concedes that there is no forensic test available that can conclusively determine whether DNA was left by sweat. As such, the report cannot conclusively state that the DNA on the hood latch could not have been left by the sweat of the defendant's hand.

(Opinion at 3).

In his supplemental affidavit, Dr. Reich rebuts this point by stating that this Court's conclusion is demonstrably false for the following reasons:

> **i)** there is no test, assay, measurement or analytical method that can identify sweat as a body fluid, the prosecution's assertion is pure storytelling with no scientific foundation;
>
> **ii)** sweat, which technically has no DNA whatsoever [sweat is an exocrine secretion of water and salt], can only have DNA that is derived from the few sloughed skin cells carried along in the aqueous volume; i.e., the amount of DNA deposited from 'sweat' would be roughly equivalent to that left by simple touching of an object...

(*See*, Supplemental Affidavit of Dr. Reich, **Exhibit A** at ¶ 3).

This Court rejected Dr. Reich's hood latch experiments by stating the following:

> The report indicates that 15 people, unidentified by any statistical data, touched the hood latch of a car substantially similar to the one owned by the victim and found on the defendant's lot. Of those individuals, 11 left no trace. As a result, the report concludes that it is highly unlikely that the defendant's touch left the DNA on the hood latch.

(Opinion at 3).

In his supplemental affidavit, Dr. Reich rebuts this point by stating:

> 1.) The Court's comment, *"unidentified by any statistical data"* (italics added) is somewhat opaque, but may be related to an older, and discredited, concept of 'secretor *vs.* non-secretor' or to the sample size (15 individual measurements) used in the experiment."
>
> 2.) The Court's comment about *"unidentified by any statistical data,"* the court may be referring to a possible statistical bias

> when small sample sizes are analyzed in an experiment. Here the analysis from fifteen (15) separate contacts from fifteen individuals is a reasonable number of independent tests sufficient to provide substantive information to the trier of fact in regard to the amount of DNA that could be expected to be left on a hood latch after a contact that replicates an action described at trial.
>
> 3.) No identification or differentiation of the individuals who participated in the hood latch experiments is relevant as there is no theoretical, experiential or analytical method that would favor one person over another as leaving more, or less, DNA on an item of evidence, here a hood latch. Thus the choice of individuals cannot, and does not, bias the experimental results.

(*See*, Supplemental Affidavit of Dr. Reich, **Exhibit A** at ¶ 4).

This Court concluded that the source of the DNA as being from the Defendant's hands has not been ruled out by Dr. Reich:

> Furthermore, while 11 of the test subjects did not leave detectable DNA on the hood latch, the fact remains that 4 of the test subjects did leave detectable DNA by touch. The report does not give any quantifiable statistics as to the amount of DNA left in his tests or comparable data to the test performed on the hood latch in question and entered into evidence at trial. Contrary to the defendant's assertions, the test of the DNA on the hood latch does not rule out the defendant's hand as the source of the DNA. In fact, the report declines to make such a conclusion, noting that the matter could become a subject of further, non-DNA, investigation.

(Opinion at 3-4).

In his supplemental affidavit, Dr. Reich rebuts this point by stating:

> Unfortunately the court is in error as precise values were provided for (a) the amount of DNA allegedly recovered by the Wisconsin State laboratory from the hood latch of the vehicle and (b) the four (4) replicates of the experimental hood openings that did leave some detectable DNA.

i) The Wisconsin State laboratory recovered approximately 1.9 nanograms of DNA from the item of evidence named as the hood latch: to be precise, 30 microliters of a 0.0616 ng/μL solution of purified DNA which equals ~1.9 nanograms. These data were provided previously.

ii) the four attempts at opening the hood latch that did leave detectable DNA quantified at 0.0519 nanograms, 0.0936 nanograms, 0.0696 nanograms, and 0.0729 nanograms. These data were provided previously.

iii) the total amount of DNA that was recovered from the fifteen (15) hood opening trials was 0.288 nanograms [0.0519 + 0.0936 + 0.0696 +, 0.0729]. These data were provided previously.
iv) the difference in the amount of DNA recovered from the hood opening trials versus the amount of DNA recovered by the Wisconsin State laboratory is six (6) fold (to be precise, 6.6 times); *i.e.*, from a total of 15 attempts six times less DNA was recovered than quantified by the State laboratory. These data were provided previously.

It was left to the court to calculate that it would take approximately 90 attempts at opening the hood to deposit the amount of DNA recovered by the Wisconsin State laboratory. *i.e.*, from 15 attempts 0.288 nanograms was recovered: therefore to deposit 1.9 nanograms it would take approximately 6 times as many trials, 15 x 6 or 90 attempts at opening the hood.

(*See*, Supplemental Affidavit of Dr. Reich, **Exhibit A** at ¶ 5).

Additionally, this Court Committed Manifest Error when it Dismissed the Opinion of Dr. Karl Reich Regarding the DNA on Ms. Halbach's sub-key.

Additionally, Mr. Avery has alleged that his trial and post-conviction attorneys were ineffective for failing to consult with, retain, and present expert testimony that Mr. Avery's DNA was planted on the sub-key to the victim's vehicle. Mr. Avery has alleged numerous facts in support of that allegation,

including the highly suspicious circumstances surrounding the key's recovery. *See* Motion at ¶¶ 147-148. Mr. Avery has alleged that his DNA expert, Dr. Reich, conducted an experiment which involved Mr. Avery holding an exemplar sub-key for 12 minutes. *See* Motion at ¶ 158. Dr. Reich subjected the exemplar key to DNA analysis and determined that Mr. Avery deposited 10 times less DNA on the exemplar key than what the Wisconsin State Crime Lab purportedly detected on the key police claim to have recovered from Mr. Avery's trailer. *Id.* Dr. Reich has concluded that the only plausible explanation for this discrepancy between the quantities of DNA is that Mr. Avery's DNA was planted on the key from a DNA-rich source, rather than from him handling it. This Court misses the point entirely that even after holding an exemplar key for 12 minutes, Mr. Avery did not leave a full DNA profile on it. *See* Motion at ¶¶ 158-159. Mr. Avery has asserted through his affidavit that photographs taken of his trailer show that his toothbrush was inexplicably missing from his bathroom after police searched it. *See* Motion at ¶ 159. Dr. Reich, based on his education, training, and experience, has averred that Mr. Avery's toothbrush could have deposited the quantity of his DNA detected on the victim's key. *Id.* (Attached and incorporated herein is the supplemental affidavit of Dr. Reich, ¶ 6(i-iii)).

In rendering its decision, this Court improperly disputed Dr. Reich's opinions:

> There is no question that the DNA found on the key was the defendant's. . . . While the defendant asserts that someone took his toothbrush and planted the DNA on the subkey, there is no evidence submitted that establishes a break in or

> the theft of a toothbrush other than the defendant's conclusory allegations.

See Opinion at pp. 4-5. In rejecting Mr. Avery's claim, this Court has wholly ignored Dr. Reich's testing of an exemplar key and his expert opinion that the quantity of DNA on the key (1) could not have been deposited by Mr. Avery simply by handling it, and (2) is strongly suggestive that someone planted it. Moreover, this Court disputes Mr. Avery's assertion that his toothbrush was taken by couching it as a "conclusory allegation," which clearly it is not. Rather, Mr. Avery has asserted that he kept his toothbrush by the sink in the bathroom of his trailer, and that crime scene photographs taken of his bathroom after police searched his trailer show that the toothbrush is missing. Again, these are factual assertions that this Court is not permitted to dispute at this stage of the proceedings and must accept as true.

(2) *This Court Committed Manifest Error When it Held that Defendant's Ineffective Assistance of Post-Conviction Counsel Claims Must be Pursued by Filing a* Knight *Motion with the Court of Appeals.*

In its ruling of October 3, 2017, this Court held as follows:

> In his motion, the defendant asserts that his post-conviction counsel was ineffective for failing to raise these issues in prior motions submitted to this court. A circuit court is not authorized by statute to resolve claims of ineffective assistance of appellate counsel. *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). In this matter, if the defendant wishes to pursue the claims regarding his appellate counsel, the defense may file a *Knight* motion with the Court of Appeals.

See Opinion at pp. 2-3.

This ruling demonstrates that this Court has misinterpreted the allegations of Defendant's motion. Defendant has not asserted claims that his appellate attorneys[4] were ineffective. Rather, Defendant avers that his attorneys were ineffective in their post-conviction capacity. The difference has great procedural significance. Defendant agrees that in *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), the court determined that the proper procedure by which a defendant may assert a claim of ineffective assistance of appellate counsel is through a petition to the appellate court. *Id.* at 520. However, the same is not true for claims of ineffective assistance of post-conviction counsel.

The first opportunity after trial to raise the issue of counsel's ineffectiveness at trial is in a post-conviction motion under § 974.02. Post-conviction counsel may move for a new trial on grounds that trial counsel was constitutionally ineffective. *State ex rel. Rothering v. McCaughtry,* 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996).

To bring a post-conviction motion alleging ineffective assistance of appellate counsel, a defendant is required to file a petition for habeas corpus with the appellate court that heard the appeal. *State v. Knight,* 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). "When, however, the conduct alleged to be ineffective is post-conviction counsel's failure to highlight some deficiency of trial counsel in a § 974.02 motion before the trial court, the defendant's remedy lies

[4] Defendant was represented on appeal by the same attorneys that represented him at the post-conviction stage. In construing the allegations of the petition, the Court must identify whether counsels were acting in their appellate capacity or post-conviction capacity.

with the circuit court under either Wis. Stat. § 974.06 or a petition for habeas corpus." *Rothering,* 205 Wis. 2d at 679, 681 (emphasis added); *State v. Balliette,* 2011 WI 79, ¶¶ 29-33, 336 Wis. 2d 358, 805 N.W.2d 334.

Rothering illustrates the reason for this distinction. There, the defendant claimed that his appellate counsel should have argued that his trial counsel was ineffective. *Rothering*, 205 Wis. 2d at 677. However, the defendant's attorney never filed a post-conviction motion with the trial court arguing the claim of ineffectiveness. *Id.* at 679. This was significant because the rules require that a defendant "shall file a motion for post-conviction or post-disposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." Wis. Stats. § 809.30(2)(h). In other words, because the defendant's attorney did not preserve those issues with a motion for post-conviction relief, he could not raise them on appeal. The court of appeals explained:

> What [the defendant] really complains of is the failure of post-conviction counsel to bring a post-conviction motion before the trial court . . . raising the issue of ineffective trial counsel. The allegedly deficient conduct is not what occurred before this [appellate] court but rather what should have occurred before the trial court by a motion filed by post-conviction counsel.

Id. As noted above, the court ultimately concluded that where the alleged deficiency occurred at trial, as opposed to on appeal, the proper forum to raise that claim is in a motion filed pursuant to § 974.06. *Id.* at 89; *State v. Gilliam*, 2017 WL 3611036.

Balliette is also instructive. There, the defendant's post-conviction counsel raised two claims of ineffective assistance of trial counsel. *Id.* at ¶ 10. After the trial court denied those claims, the defendant unsuccessfully appealed that denial. The defendant then filed a § 974.06 motion for a new trial. Ultimately, the Wisconsin Supreme Court reviewed the manner in which the defendant had raised his claims of ineffectiveness of post-conviction counsel. After explaining that the conduct the defendant alleged to be ineffective was post-conviction counsel's failure to highlight the deficiency of trial counsel in a § 974.02 motion before the trial court, the Wisconsin Supreme Court concluded that there could be no dispute that the defendant properly filed his motion in the circuit court. *Id,* at ¶ 33.

All of the ineffective assistance of counsel claims raised in the instant motion relate to post-conviction counsel's failure to raise meritorious issues of ineffective assistance of trial counsel. For example, Mr. Avery alleges that his trial attorney was ineffective for failing to investigate Mr. Avery's claim that his blood was removed from his bathroom sink and planted in the victim's vehicle; failing to investigate and present evidence concerning the illegal taking of groin swabs from Mr. Avery which were used to plant evidence connecting him to the crime; failing to investigate and introduce evidence that the victim's body was not burned in the Avery burn pit and had instead been moved there; failing to call the appropriate DNA, blood spatter, trace, ballistics, and anthropological experts to support the foregoing; failing to investigate and introduce evidence of

third-party guilt pursuant to *Denny*; and failing to investigate and call witnesses who would have undermined the State's theory. *See* Motion at ¶¶ 93-291. In turn, Mr. Avery alleges that his post-conviction attorneys were ineffective for failing to raise these issues of ineffective assistance of trial counsel in his motion brought pursuant to Wis. Stats § 974.02. *See* Motion at ¶¶ 423-492.

Because Mr. Avery's ineffective assistance of counsel claims relate to his post-conviction counsel's failure to raise meritorious claims of ineffective assistance of trial — rather than appellate — counsel, he properly raised those issues in a § 974.06 motion filed with this Court. *Balliette*, 2011 WI 79 at ¶ 32. This Court's conclusion that those issues should be raised via a *Knight* motion filed with the appellate court constitutes a manifest error of law. For this reason, this Court should grant the instant motion for reconsideration.

(3) *This Court Committed Manifest Error Where It Held That Defendant Failed To Argue Or Show A Sufficient Reason As To Why His Claims Could Not Have Been Raised In Prior Motions.*

In its order, this Court further found that Mr. Avery has failed to overcome the procedural bar to having his motion heard. In so ruling, this Court held, "There is no argument or showing of a sufficient reason as to why these issues could not have been raised in prior motions. Without such sufficient reason, these arguments are precluded from any subsequent motion." *See* Opinion at p. 3.

Once again, this Court's conclusion relies on a manifest error of law. This Court is correct that if a defendant has filed a motion under § 974.02, a direct

appeal, or a previous motion under § 974.06, the defendant is barred from making a claim that could have been raised previously unless he shows a sufficient reason for not making the claim earlier. *State v. Romero-Georgana*, 2014 WI 83, ¶ 35, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted). However, Mr. Avery has in fact meticulously argued sufficient reasons overcoming the procedural bar.

First and foremost, in making its ruling this Court seems to have focused solely on Mr. Avery's ineffective assistance of counsel claims. However, Mr. Avery has also alleged numerous *Brady* violations based on evidence obtained by current post-conviction counsel, through the course of her investigation. *See* Motion at ¶¶ 292-302. Of course, a *Brady* violation is based on the non-disclosure of material exculpatory and/or impeachment evidence. *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, 154, 92 S.Ct. 763 (1972)). It is axiomatic that the discovery of a *Brady* violation subsequent to filing a motion pursuant to § 974.02 (or § 974.06) constitutes a sufficient reason for failing to raise the issue in a prior motion. *E.g.*, *State v. Grant*, 222 Wis. 2d 217, 1998 WL 665384, *2 (1998) ("Grant had sufficient reason in that he did not realize the alleged discovery violation until after his direct appeal.")

With regard to Mr. Avery's ineffective assistance of counsel claims, ineffective assistance of post-conviction counsel for failing to raise a claim in a prior motion constitutes a sufficient reason to overcome the procedural bar.

Romero-Georgana, 2014 WI 83 at ¶ 36 (citing *State v. Allen*, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124 (2010)). To be entitled to an evidentiary hearing, a defendant must allege sufficient material facts, *e.g.*, who, what, where, when, why, and how, demonstrating that his post-conviction counsel was ineffective for not raising the issues on which the defendant relies. *Balliette*, 2011 WI 79, ¶¶ 58-60. Moreover, the defendant must also show that the claims he wishes to bring are clearly stronger than those actually raised by post-conviction counsel. *Romero-Georgana*, 2014 WI 83, ¶ 4.

This precise law has been set forth in Mr. Avery's petition. *See* Motion, ¶¶ 423-425. Furthermore, Mr. Avery alleged all of the essential elements of his ineffective assistance claims in great detail. *See* Motion, ¶¶ 93-292, 427. Mr. Avery has described in painstaking fashion how the ineffective assistance claims he wishes to raise now are clearly stronger than those raised by his initial post-conviction attorneys. This includes a detailed explanation of how Mr. Avery's post-conviction attorneys — who also acted as his appellate attorneys — misapprehended the scope of the trial court's ruling on proposed *Denny* evidence and the extent to which trial counsel was able to present evidence of an unknown third-party perpetrator as seen in the brief they filed on appeal. *See* Motion, ¶¶ 428-468. Moreover, the current motion alleges that the ineffective assistance claims therein — such as the due process violation resulting from the State's use of conflicting and contradictory theories at Mr. Avery's and Brendan Dassey's trials — are far more meritorious than the single issue raised by post-

conviction counsel related to the removal of a juror. *See* Motion, ¶¶ 477-486. This is sufficient, at a minimum, to require an evidentiary hearing on Mr. Avery's ineffective assistance claims.

Finally, Mr. Avery has set forth sufficient reasons for not raising the instant ineffective assistance of counsel claims in his previous *pro se* motions. This case, perhaps more than any other, is driven by forensic evidence. The State's case at trial consisted almost exclusively of forensic evidence. The defense at trial was aimed largely at refuting that forensic evidence with expert testimony. The State presented fourteen experts and Mr. Avery presented two. To that end, the law firm of Kathleen T. Zellner & Assoc. P.C. has expended a vast amount of resources, in excess of two hundred thousand dollars,[5] to re-investigate the case, hire experts, and conduct additional testing. It is beyond question that Mr. Avery, who is indigent, would be unable to fund this investigation and hire experts to perform testing from the confines of his prison cell. To hold otherwise would suggest a departure from reality. *See* Motion, ¶¶ 491-492.

Other unique circumstances establish sufficient reason for Mr. Avery failing to raise the claims herein in his prior *pro se* motion. Inmates in the custody of the Department of Corrections are limited to maintaining legal materials in a single box which is no larger than 20" x 20" x 20". Wis. Admin. Code. § 309.20(3)(f) (DOC).

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[5] Current post-conviction counsel has expended $232,541.98 on experts.

At the point in time when Mr. Avery filed his *pro se* petition, his case file was far too voluminous to fit in a twenty-inch box. His trial transcripts alone were in excess of 5,500 pages. A standard banker's box has a volume of 1,784.25 cubic inches and can store around 3,873 sheets of paper. At the time of Mr Avery's first *pro se* filing, approximately 36,548 pages had been filed in his case. Mr. Avery would have needed the equivalent of ten standard banker's boxes, with a combined volume of 17,842.5 cubic inches — more than double the volume of material permitted by the Department of Corrections — to hold the documents filed in his case. Since Mr. Avery could not even access his full legal file, he could not possibly develop and raise claims with colorable factual bases in his *pro se* motions.

Even if granted unfettered access to the necessary documents, Mr. Avery simply lacks the legal acumen or financial resources necessary to advance an even arguably meritorious claim in a post-conviction motion, let alone the claims raised herein based on countless hours of investigation and consultation with experts. As noted in his motion, Mr. Avery is learning disabled and uneducated. *See* Motion, ¶¶ 491-492. Mr. Avery wrote to several attorneys following the denial of his direct appeal, but it was not until undersigned counsel agreed to represent him that he was able to secure counsel.

In the meantime, Mr. Avery did what he could to advocate on his own behalf given his limited means and resources, all without knowing that by doing so he could be erecting procedural roadblocks to any future claims for relief. In

summarily dismissing the instant petition, this Court relied in part on Defendant's previously-filed *pro se* § 974.06 motion. Using Defendant's prior *pro se* motion against him is fundamentally unfair, given that Defendant clearly lacks the intelligence, education, and resources to draft even a cogent motion, let alone one that comes close to having any legal merit. An examination of this Court's November 19, 2015 order dismissing Defendant's *pro se* § 974.06 motion conclusively shows this assertion to be true.

In his *pro se* motion, Defendant claimed that he was denied effective assistance of counsel. This Court noted that in advancing his claim, Defendant made "extensive use of federal case law, citing and quoting from a number of federal courts of appeals and U.S. Supreme Court cases, most of which have little or nothing to do with the position he seeks to advance." (Nov. 19, 2015 Opinion, p. 3). This Court held that, "Other than expressing his opinion that he was somehow denied his right to counsel . . . [Defendant] provides no factual information of any evidentiary value that this was the case." (*Id.*).

Defendant's lack of legal knowledge and training are also evident in his *pro se* motion. Specifically, Defendant argued that the State somehow violated his right to counsel. This Court noted that absent a "sufficient reason" for not raising the issue on direct appeal, the claim was procedurally barred. Defendant did not even make an attempt to explain why the issue was not raised on direct appeal. This Court therefore held that the issue was waived. (*Id.* at p. 4).

In his *pro se* motion, Defendant made a meritless argument that the district attorney implicitly commented on Defendant's silence during closing argument. Once again, this Court noted that Defendant's claim was completely without support: "[N]othing in those portions of the DA's argument quoted in the defendant's brief that supports his claim that his choice not to testify was highlighted by or mentioned by the DA in his closing statements." (*Id.*). And, this Court further held that Defendant failed to address the fact that his claim of prosecutorial misconduct was not preserved by an objection coupled with a motion for mistrial. (*Id.*).

Defendant further argued that the trial judge, Judge Willis, was biased against him because he found probable cause to hold Defendant over for trial. Defendant maintained that his trial attorneys' failure to move that Judge Willis recuse himself constituted ineffective assistance. This Court properly rejected the claim as wholly lacking merit, pointing out that a judge's finding of probable cause after a preliminary examination does not constitute a disqualifying bias. (*Id.* at pp. 4-5).

Defendant made a nonsensical argument that Wis. Stats. § 971.05 prohibits the judge who presides over the preliminary hearing from also presiding over the defendant's trial. This Court pointed out that the statute clearly provides otherwise and that Defendant's "argument to the contrary is empty and without substance." (*Id.* at pp. 5-6).

Defendant argued that the search warrants issued in his case were void for lack of a court seal. Defendant did not offer any support for his claim, other than by citing to statutes that have no bearing on search warrants. (*Id.* at p. 6). Defendant further claimed that the search warrants were void because a magistrate failed to sign the affidavits submitted along with the requests for the warrants. Again, this Court properly concluded that the argument "is completely without merit and borders on frivolous. . . . The defendant cannot offer any case law or statutory provision in direct and clear support of his argument because it is completely without merit and contrary to Wisconsin's long standing law and procedures for issuing search warrants." (*Id.* at pp. 6-7).

Likewise, Defendant argued that his attorneys were ineffective for failing to assert a break in the State's chain of custody with respect to the victim's vehicle and the manner in which it was taken into evidence. Yet again, this Court noted that Defendant failed to point to any facts supporting his claim: "[Defendant only offers four lines of argument regarding how those cases apply to his situation and absolutely no supporting evidence of record to establish how his counsel was deficient in this matter."[6] (*Id.* at p. 7).

Defendant made a number of other frivolous arguments. For example, Defendant claimed that his attorney was ineffective for stipulating to the fact that he is a convicted felon. This Court noted, however, that Defendant is indeed a convicted felon, and that had his trial attorney refused to so stipulate it

[6] This Court erroneously held that no evidence from the victim's car was used against Defendant during his trial. This ruling is manifestly erroneous; the putative existence of Defendant's blood in the victim's vehicle was a focal point of the State's case against him. (*E.g.*, TT:3/27:59).

would have been a simple matter for the prosecution to establish that fact of record. (*Id.* at p. 8). Defendant raised a number of claims concerning improper joinder; however, he did so without legal or factual support. In fact, this Court noted that Defendant's argument in that vein was not even directed to the issue of severance, but rather the sufficiency of the evidence. (*Id.* at p. 9).

Defendant attempted to argue that his trial attorneys failed to properly develop an argument that the evidence in his case was planted. Once again, Defendant was unable to adequately substantiate his *pro se* claim. This Court summarily dismissed Defendant's claim because he failed to support it with any evidence of record or affidavits from a qualified scientific expert.[7] (*Id.* at pp. 9-10).

Defendant claimed that he was denied due process because the trial court was "incompetent to hear an appointed special prosecutor" based on an unsigned oath. This Court held not only was the claim forfeited, but that Defendant utterly failed to supply case law or legislation to establish why a single unsigned oath would cause the trial court to lose jurisdiction. (*Id.* at p. 10).

Finally, Defendant, in conclusory fashion, made several arguments that he was denied his Constitutional right to an unbiased jury. This Court denied these arguments in a similar fashion to those raised throughout his *pro se* motion: "As he has done so many times prior in his brief, the defendant offers no evidence to establish that the jurors selected in this case had a direct financial

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[7] This Court did not address how, precisely, Defendant should have retained such experts given his incarceration and lack of financial resources.

interest in its outcome. . . . This argument is completely meritless. . . . These assertions are wildly speculative. . . . As the court has stated several times already, the defendant does not support his claims with any evidence of record." (*Id.* at pp. 11-15).

Based on the foregoing, it is clear that Defendant lacked the ability to draft a *pro se* motion advancing even arguably meritorious issues. This Court's reliance on his *pro se* motion to avoid addressing the substance of the claims raised in the instant petition therefore capitalizes on Defendant's lack of education and indigence.

Mr. Avery could not have conceived of the experiments performed by current post-conviction counsel and current post-conviction counsel's experts to undermine the validity of his conviction, much less be expected to perform them from the confines of his prison cell. To impose a procedural bar against his claims under such circumstances is manifestly unjust. For these reasons this Court should grant the instant motion for reconsideration.

(4) *New Evidence of a* Brady *Violation Destroys the State's Theory That Ms. Halbach Never Left the Avery Salvage Yard on October 31, 2005.*

A new witness describes observing the victim's RAV-4 parked at the turnaround at State Highway 147 and the East Twin River Bridge[8] on

[8] It is noteworthy that the location where the new witness observed Ms. Halbach's vehicle is approximately 590 yards from where Mr. Tadych was living at the time of Ms. Halbach's death. Additionally, a prepaid mobile phone was found along Highway 147 in the immediate vicinity of where the new witness observed Ms. Halbach's vehicle. (Calumet County Sheriff's Dept. Tag No. 8451). Ms. Halbach's colleague, Tom Pearce, in his prior affidavit, stated that Ms. Halbach was receiving harassing phone calls during the summer before and weeks leading up to her death.

November 3 and 4, 2005. On November 4, the witness disclosed his observation about seeing the vehicle during a conversation with Manitowoc County Sheriff's Department ("MCSD") Sergeant Andy Colborn ("Sgt. Colborn") at the Cenex Station in Mishicot. Immediately prior to the conversation with Sgt. Colborn the witness had observed the missing person poster of Ms. Halbach posted on one of the doors to the Cenex Station and recognized the vehicle on the poster as the vehicle he had seen two days in a row at Highway 147 and the East Twin River Bridge. Sgt. Colborn failed to disclose this material conversation or prepare a report documenting this conversation with the witness, which was both exculpatory and favorable to defendant, and therefore *Brady* was violated. The witness's observation of the RAV-4 would have destroyed the State's theory that the victim's vehicle never left the Avery property after her arrival on October 31, 2005. The witness sent text messages to Scott Tadych ("Mr. Tadych") on January 15 and 16, 2016, telling him that he recognized Sgt. Colborn from the Netflix documentary, *Making a Murderer*, and that he was the officer with whom he spoke on November 4, 2005, at the Cenex Station in Mishicot. Mr. Tadych never responded to the witness nor did he report this information to Brendan Dassey's attorneys. (Affidavit of Kevin Rahmlow, attached and incorporated herein as **Exhibit D**).[9]

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[9] Investigator James Kirby requested records of abandoned vehicles for the dates of October 31, 2005, to November 5, 2005, from the Manitowoc County Sheriff's Department, Two Rivers Police Department, and Mishicot Police Department. Based upon the responses pursuant to Mr. Kirby's request, these agencies did not log any abandoned vehicles where Mr. Rahmlow saw Ms. Halbach's vehicle. *See*, supplemental affidavit of James Kirby, **Exhibit E**.

(5) ***New Evidence That Mr. Avery Was Denied Effective Assistance Of Trial Defense Counsel And Post-Conviction Counsel Where His Trial And Post-Conviction Attorneys Failed To Investigate And Present To The Jury Significant Impeachment Evidence Related To Bobby Dassey.***

Bobby Dassey's testimony was critical to the State's case against Mr. Avery. During his opening statement, prosecutor Ken Kratz explicitly informed the jury of the significance of Bobby Dassey's putative observations on the date of Teresa Halbach's disappearance:

> You will hear from various kinds of citizens like Bobby Dassey, who is one of the sons of Barb Janda, who you will hear testimony about, that at about 2:45 on the 31st of October, Bobby saw a young girl drive up to the Avery property.
>
> Bobby Dassey saw this young girl, later identified as Teresa Halback, get out of her teal, or blue, or green colored SUV and actually take pictures of the van that her [*sic*] mom had for sale. Bobby Dassey is going to tell you, that after looking out the window and after seeing Teresa Halbach take these photographs of this vehicle and finish [*sic*] her job, that Teresa walked towards Steven Avery's trailer.
>
> You will hear evidence that she was walking towards the main entrance of Steven Avery's trailer and that Bobby thereafter took a shower and left to go deer hunting, bow hunting, about 15 minutes later. You are going to hear from Bobby that when he left 15 minutes later, Teresa's SUV was there, but Teresa was nowhere to be found.
>
> You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive.

(TT:2/12:103).

At trial, Bobby Dassey testified that he observed Ms. Halbach's light-green or teal-colored SUV pull up in his driveway at 2:30 p.m. on October 31, 2005. (TT:2/14:36). Bobby then observed Ms. Halbach exit her vehicle and start

taking pictures of his mom's maroon van right in front of his trailer. (TT:2/14:37). Bobby testified that he then observed Ms. Halbach walking towards the door of Mr. Avery's trailer. (TT:2/14:38). The prosecutor, Mr. Kratz, elicited the following:

> Q: After seeing this woman walking toward your Uncle Steven's trailer, did you ever see this woman again?
>
> A: No.

(TT:2/14:39).

Bobby Dassey then testified that he took a three or four-minute shower, and then left his trailer to go hunting. (TT:2/14:39). Bobby walked to his Chevy Blazer, which was parked between the trailer and garage. (TT:2/14:39). Bobby testified that as he walked to his vehicle, he observed Ms. Halbach's vehicle still parked in the driveway. (TT:2/14:40). Bobby further testified that he did not see Ms. Halbach or any signs of her. (TT:2/14:40). Bobby testified that when he returned to his trailer around "five-ish," Ms. Halbach's vehicle was gone. (TT:2/14:41).

During closing argument, Mr. Kratz once again emphasized the importance of Bobby Dassey's testimony:

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

> Now, we heard about taking a shower. And we heard about him leaving for hunting. That all becomes important and becomes more important when, after leaving for hunting, he sees Teresa's SUV still parked next to the van, next to his mom's van that's for sale, but Teresa is nowhere to be found. . . .
>
> Mr. Dassey is looking out this window, a clear view, sees the pictures being taken of the SUV, a clear pathway, and that as she walks towards Mr. Avery's, that's the last Ms. Halbach is seen. That's the last she's seen alive. All right. So that's the timeline. That's the pathway, if you will, towards what happens to Ms. Halbach.

(TT:3/27:91-92).

Given the importance of Bobby Dassey's testimony, it was imperative that Mr. Avery's trial attorneys conduct an adequate investigation of him to uncover any available impeachment evidence. Unfortunately, Mr. Avery's trial attorneys failed to do so.

On November 6, 2005, special agents with the Wisconsin DOJ Division of Criminal Investigation interviewed Bryan Dassey, Bobby Dassey's older brother. The investigators asked Bryan about the events of October 31, 2005. Bryan told the investigators that he was not at home during the day other than waking up and going to work. Bryan told the investigators the following:

> Bryan said he heard from his mom and Steven that Halbach was only at their residence about 5 minutes. He heard she just took the photo of the van and left. Bryan said the investigators should also talk to his brother Bobby, because he saw her leave their property.

See 11/6/05 DCI report, attached as **Exhibit F** (emphasis added). Obviously, this statement directly contradicts what Bobby Dassey testified to at Mr. Avery's trial.

Recently Bryan Dassey has been interviewed to determine the accuracy of the foregoing report and the statement he attributed to Bobby Dassey. Bryan Dassey indicated that in November of 2005 he lived with his girlfriend but kept his clothing at his mother's trailer on the Avery's Auto Salvage Property. *See* Affidavit of Bryan Dassey, **Exhibit G**, ¶ 3. Bryan Dassey states as follows:

> On or about November 4, 2005, I returned to my mother's trailer to retrieve some clothes, and I had a conversation with my brother, Bobby, about Teresa Halbach. I distinctly remember Bobby telling me, "Steven could not have killed her because I saw her leave the property on October 31, 2005."

See **Exhibit G**, ¶ 4. Bryan Dassey confirmed that when he was interviewed on November 6, 2005, he told the investigators that they should talk to his brother Bobby Dassey because Bobby saw Ms. Halbach leave the Avery property on October 31, 2005. *See* **Exhibit G**, ¶ 6.

At trial, Mr. Avery's defense attorneys stated on the record that they had not interviewed Bobby Dassey. (TT:2/14:79). Moreover, Mr. Avery's trial defense counsel's hired investigator was unaware that Bryan Dassey made any statement about Bobby Dassey seeing Ms. Halbach leaving the property on October 31, 2005. (Affidavit of Conrad E. Baetz, attached and incorporated herein as **Exhibit H**). Prior post-conviction counsel also utilized an investigator. In the course of their investigation, prior post-conviction counsel identified Bryan Dassey's statement in a memo summarizing law enforcement interviews; however, they too failed to recognize the import of Bobby Dassey's statement to Bryan. (Prior post-conviction counsel's summary memo and attached police

report, attached and incorporated herein as **Group Exhibit I**). The significance of Bryan Dassey's statement was lost on trial counsel and post-conviction counsel, who did not interview Bryan Dassey. If trial defense counsel or prior post-conviction counsel had recognized the value of Bryan Dassey's impeachment testimony as to Bobby Dassey's statement that Ms. Halbach's vehicle was still on the property when he left to go hunting, they could have effectively undermined a core aspect of the State's case: that Ms. Halbach never left the Avery property.

The failure to investigate this crucial impeachment evidence constitutes deficient performance. Bobby Dassey's putative observations on the date of Ms. Halbach's disappearance formed the crux of the prosecution's case. Undermining his credibility was therefore imperative. Furthermore, trial defense and post-conviction counsel attempted to suggest that Bobby Dassey and Scott Tadych could possibly be the killers. During closing, trial Defense counsel argued:

> Bobby Dassey says that he sees Teresa Halbach at 2:45, he leaves at three, and the vehicle is still there, something like that. He has no good way of verifying the time, but he tells the officer, talk to Scott Tadych — Tadych, he can tell you precisely, is the word he used, precisely what time it was.
>
> Well, how does he know that Tadych can tell precisely what time it was that he supposedly is being seen, unless the two of them maybe got together, talked about a story they had come up with.
>
> Remember, those two people, unlike anybody else that was asked about an alibi and maybe weren't, but those two people alibied themselves. Without each other, there is no alibi for either one of them.

(TT:3/27:205-206). Given that trial defense counsel's theory was that Bobby Dassey was the killer, no reasonable trial strategy would contemplate the failure to investigate evidence that Bobby saw Ms. Halbach leaving the Avery property. *State v. Thiel*, 2003 WI 111, ¶ 44, 264 Wis. 2d 571, 655 N.W.2d 305 (citing *Brown v. Sternes*, 304 F.3d 677, 692 (7th Cir. 2002) ("[i]f we decide that the decision not to investigate is unreasonable, we must find that trial counsel's performance is deficient")).

Trial and post-conviction counsels' deficient performance was clearly prejudicial. Evidence that Bobby Dassey witnessed Ms. Halbach leave the Avery property — and, perhaps even more importantly, later lied about seeing her walk towards Mr. Avery's trailer — would have cast the State's case in a completely different light. This is particularly true given the other evidence Mr. Avery has uncovered since his trial implicating Bobby Dassey as a possible perpetrator. Had this evidence been presented, there is a reasonable probability that the result of Mr. Avery's trial would have been different. Mr. Avery was therefore denied effective assistance of counsel. *Thiel*, 2003 WI 111, ¶ 81 (finding ineffective assistance where counsel failed to read all discovery materials and therefore did not investigate evidence that would have discredited crucial prosecution witness); *State v. Honig*, 2016 WI App 10, ¶¶ 40-47, 366 Wis. 2d 681, 874 N.W.2d 589 (finding ineffective assistance where, *inter alia*, counsel failed to impeach alleged victim with prior inconsistent statement); *State v. Jenkins*, 2014 WI 59, ¶ 53, 355 Wis. 2d 180, 848 N.W.2d 786 (finding ineffective

assistance where failure to call contradictory eyewitness would expose vulnerabilities at center of State's case).

(6) *In the alternative, the State violated Mr. Avery's fundamental right to due process where it knowingly used false testimony to secure his conviction.*

In the alternative, the State used Bobby Dassey's testimony knowing it to be false. The State was in possession of the report referenced, *supra*, wherein Bryan Dassey told investigators that they should speak with Bobby because Bobby saw Ms. Halbach leave the Avery property. Bryan would have no reason to lie about what Bobby told him. Nevertheless, the State elicited wholly contradictory testimony from Bobby Dassey at trial that when he last saw Ms. Halbach she was walking towards the door of Mr. Avery's trailer. The State utilized this testimony as the centerpiece of its argument that Mr. Avery was the last person to see Ms. Halbach alive, all the while knowing it to be false.

When the government obtains a conviction through the knowing use of false testimony, it violates a defendant's right to due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *United States v. Bagley*, 473 U.S. 667, 679, n. 8 (1985). When false evidence appears, the prosecutor is responsible for correcting it. *Giglio v. United States*, 405 U.S. 150, 153 (1972). And, commensurate with a prosecutor's special duty to assure that a defendant receives a fair trial, a prosecutor may not simply turn a blind eye to evidence he or she reasonably knows to be false:

> The government's duty to assure the accuracy of its representations has been well stated, many times before. This means that when the government learns that part of its case may be inaccurate, it must investigate. It cannot simply ignore evidence that its witness is lying.

United States v. Freeman, 650 F.3d 673, 680 (7th Cir. 2011) (emphasis added) (citations omitted).

To establish a constitutional violation based on the knowing use of perjured testimony, a defendant must show (1) that there was false testimony; (2) that the government knew or should have known it was false; and (3) that there is a likelihood that the false testimony affected the judgment of the jury. *State v. Cramer*, 2013 WI App. 138, ¶ 22, 351 Wis. 2d 682, 840 N.W.2d 138; *United States v. Saadeh*, 61 F.3d 510, 523 (7th Cir. 1995).

Mr. Avery has established all three of the foregoing elements. As to the first two elements, the prosecution should have known that Bobby Dassey's trial testimony was false based on the report it possessed summarizing Bryan Dassey's interview. As to the third element, Bobby Dassey's false testimony affected the judgment of the jury because, absent Bobby Dassey's false testimony, no witness rebutted the defense's position that Ms. Halbach left the Avery property after completing her appointment with Mr. Avery. If Ms. Halbach left the Avery property, the prosecution's theory of the crime unravels.

Not only should the State have known that Bobby Dassey's testimony was false, but it very likely had actual knowledge that Bobby was providing perjured testimony based on other false testimony he gave at trial. Bobby testified that

after Ms. Halbach's disappearance, Mr. Avery asked Bobby and his friend, Michael Osmunson, whether they wanted to help him get rid of a body. (TT:2/14:47-48). Bobby Dassey never reported this statement allegedly made by Mr. Avery to police. (*See* Combined reports re interviews of Bobby Dassey, **Group Exhibit M**). Rather, Michael Osmunson told police that Mr. Avery made a similar statement to them on November 10, 2005. (*See* Interview of Michael Osmunson, attached and incorporated herein as **Exhibit N**). This claim is unequivocally false, since Mr. Avery was arrested on November 9, 2005. (*See* Arrest warrant, attached and incorporated within **Group Exhibit O)**. Thus, the State knew that Bobby was lying when he repeated this alleged statement at trial. That the State suborned perjury in one instance is powerful evidence that it did so in another in an effort to convict Mr. Avery.

In addition to suborning the perjury of Bobby Dassey, the State knowingly used the false testimony of Ryan Hillegas. Ryan Hillegas was not — in direct contradiction to his trial testimony — at Ms. Halbach's house for the duration of the night of November 3, 2005. Mr. Hillegas testified that he went over to Ms. Halbach's house in the late afternoon on November 3, 2005. (TT:2/13:158). According to Mr. Hillegas's testimony, Kelly Pitzen was also present at Ms. Halbach's residence that evening, and they stayed at Ms. Halbach's house until midnight or 1:00 a.m. (TT:2/13:160, 186). On November 3, 2005, Mr. Hillegas's phone records show that he made a call to Ms. Pitzen at 7:18 p.m. (*See*, Mr. Hillegas's phone records, attached and incorporated herein as **Group Exhibit**

P, line 327; Ms. Pitzen's phone number confirmed at **Group Exhibit P**, p. 2). If Mr. Hillegas was present at Ms. Halbach's residence with Ms. Pitzen, there is no discernable reason for him to have called her. Instead, the fact that Mr. Hillegas called Ms. Pitzen at 7:18 p.m. suggests that he was away from Ms. Halbach's residence. Mr. Hillegas committed perjury when he claimed to have remained at Ms. Halbach's residence on the evening of November 3, 2005 (TT:2/13:160, 186), and, therefore, Mr. Hillegas's whereabouts on the evening of November 3, 2005, remain unaccounted for.

As previously stated, to establish a constitutional violation based on the knowing use of perjured testimony, a defendant must show (1) that there was false testimony; (2) that the government knew or should have known it was false; and (3) that there is a likelihood that the false testimony affected the judgment of the jury. *Cramer*, 2013 WI App. 138, ¶ 22; *Saadeh*, 61 F.3d at 523. Mr. Avery has established all three prongs with relation to Mr. Hillegas. First, as described above, Mr. Hillegas was not present at Ms. Halbach's residence on November 3, 2005, when he testified he was. Second, the prosecution knew or should have known that Mr. Hillegas was not present at Ms. Halbach's residence because it was in possession of Mr. Hillegas's phone records, which demonstrate that he was not at Ms. Halbach's residence, and police reports reflecting interviews of Mr. Hillegas, wherein he claimed to have remained at Ms. Halbach's residence for the duration of the evening of November 3, 2005. Third, there is a significant likelihood that Mr. Hillegas's false testimony affected the

judgment of the jury because had the jury heard testimony that Mr. Hillegas was not present at Ms. Halbach's residence for the duration of the evening of November 3, 2005, it could have reasonably concluded that Mr. Hillegas was aiding law enforcement when he said he was at Ms. Halbach's residence.

(7) *New Evidence Establishes That Bobby Dassey and Scott Tadych were at the Same Location as Ms. Halbach When She Received Her Last Telephone Call.*

Mr. Avery has conducted an experiment using an expert videographer, to establish the timeline of Ms. Halbach's arrival and departure from the Avery Salvage Yard on October 31, 2005.

Two vehicles were used of the same year, make, and model as Ms. Halbach's and Bobby's vehicles. (The footage of this experiment is attached and incorporated herein as **Exhibit J**).

As demonstrated by the experiment, it took Ms. Halbach no more than two minutes and thirty seconds from the time she entered the Avery property to complete the photo shoot, get back in her vehicle, and begin to drive away from the van's location.

Ms. Halbach arrived at the Avery property at 2:34 p.m. After completing her photographs of the van and receiving payment from Mr. Avery, she began driving to the exit at 2:36:30. Mr. Avery returned to his trailer. Ms. Halbach reached the exit at Highway 147 at 2:37:32.

Bobby left his residence 30 seconds behind Ms. Halbach at 2:37. Mr. Avery exited his trailer after 50 seconds, at 2:37:20, and proceeded to walk towards his

driveway, reaching the middle at 2:37:32. At that point in time, 2:37:32, he saw Teresa turn left onto Highway 147 and then he looked to his right and observed that Bobby's vehicle was gone. Bobby's vehicle was not visible on the south end of Avery Road from the middle of Mr. Avery's driveway. (Page from 11/9/05 Interview of Steven Avery, attached and incorporated herein as part of **Group Exhibit O**, STATE 550).

In the experiment, Ms. Halbach was approaching the intersection of Highway 147 and County Road Q when Bobby caught up with her. (Experiment footage, **Exhibit J**).

At 2:41 pm. Ms. Halbach forwarded a call from her cell phone, indicating she was preoccupied or distracted by another matter. Her cell phone was deactivated after this point in time, leading to the reasonable inference that she was assaulted and murdered at approximately 2:45 p.m.

Further evidentiary support for Ms. Halbach being assaulted and murdered at the cul-de-sac on Kuss Road is that the scent and cadaver dogs detected a suspected burial site immediately south of the Kuss Road cul-de-sac. (Reports regarding potential burial site, attached and incorporated herein as **Group Exhibit K**).

Mr. Tadych placed himself at the intersection of Highway 147 and County Road Q at 2:41 p.m. when Bobby and Ms. Halbach were at or approaching Kuss Road. (TT:2/27:134). The credibility of Mr. Tadych's testimony is undermined by the numerous and significant discrepancies between his statements to law

enforcement in interviews and his testimony at trial. For instance, in his first interview, Mr. Tadych told investigators that when he arrived at Barb Janda's residence to pick her up on October 31, 2005, she was standing with Mr. Avery by the fire. (Law Enforcement Reports regarding Mr. Tadych, attached and incorporated herein as **Group Exhibit L**, STATE 575). Later, Mr. Tadych told investigators that he arrived at Barb Janda's residence between 5:15 p.m. and 5:30 p.m., and that it was one of Barb Janda's sons who was standing with Mr. Avery by a fire with flames at least three feet high. (**Group Exhibit L**, STATE 1112). At trial, Mr. Tadych testified that it was later, not until 7:30 or 7:45 p.m., that he saw a fire behind Mr. Avery's garage, this time with flames eight or ten feet high. (TT:2/27:130-31). Mr. Tadych's testimony is also unreliable because he changed his story regarding whether Barb Janda spent the night on October 31, 2005. First, Mr. Tadych told investigators that Barb went home before midnight (**Group Exhibit L**, STATE 575, 1113), then that she spent the entire night (**Group Exhibit L**, STATE 5668), before testifying that Barb went home at 10:30 or 11:00 p.m. (TT:2/27:133). On October 31, 2005, Mr. Tadych did not go to work. (TT:2/27:133-34). Additionally, although it was reported that Mr. Tadych attempted to sell a .22 caliber rifle to a coworker (**Group Exhibit L**, STATE 5670-71), Mr. Tadych flatly denied doing so at trial. (TT:2/27:148). Therefore, the testimony of Mr. Tadych, who was described as a chronic liar by his supervisor , is not credible. (**Group Exhibit L**, STATE 5665).

Based upon the timeline constructed by the above-described experiment, prior admissions, and the affidavit of Bryan Dassey, it is reasonable to conclude that Bobby Dassey, Scott Tadych, and Teresa Halbach were all in the same location at the time of her last known activity, *i.e.* forwarding a cell phone call prior to her death. This evidence would have allowed Mr. Avery to reach the evidentiary threshold of establishing opportunity to commit the murder. *State v. Denny*, 120 Wis. 2d 614, 623-24 (Ct. App. 1984).

(8) *Dassey Computer Forensic Examination Using New Technology Reveals Images of Ms. Halbach and Graphic Images of Violent Pornography Involving Young Females Being Raped and Tortured, and Dead Female Bodies.*

New computer forensic technology reveals improved images of Ms. Halbach, many images of violent pornography involving young females being raped and tortured, and images of injuries to females, including a decapitated head, bloodied torso, a bloody head injury and a mutilated body, on the Dassey computer. (**Exhibit R**, STATE 1_9917). Computer forensic examiner Gary Hunt ("Mr. Hunt"), as described in his affidavit (attached and incorporated herein as **Exhibit Q**) has utilized 2017 technology to examine a forensic image of the computer taken from the Dassey residence. (*See*, affidavit of Gary Hunt, **Exhibit Q** at ¶ 11(b)). Many of the female images, both alive and deceased, bear an uncanny resemblance to Ms. Halbach.

These searches have been isolated to times when only Bobby Dassey was home. Although there was only one user account on the Dassey computer (Affidavit of Gary Hunt, **Exhibit Q** at ¶ 11(a)), the relevant searches occurred

during times when Bobby Dassey was alone in the house. *See* Exhibit 3 to affidavit of Gregg McCrary (**Exhibit S**). While Bobby worked nights and was home during the day on weekdays (TT:2/14:35), all of his family members either attended high school or worked the day shift. (**Group Exhibit V,** STATE 360; 236; 805).

The quantity and nature of the pornographic content recovered by Mr. Hunt from the Dassey computer should have alerted investigators to the individual viewing such images as someone at elevated risk of committing a sexually motivated violent crime. Police procedure expert Gregg McCrary ("Mr. McCrary") has submitted a supplemental affidavit (attached and incorporated herein as **Exhibit S**) wherein he describes his opinion that the violent, underage, and child pornography, combined with the images of and searches for dead bodies, "reflects a co-morbidity of sexual paraphilias." (*See*, affidavit of Gregg McCrary, **Exhibit S** at ¶ 3). It is the opinion of Mr. McCrary that "Bobby Dassey was becoming obsessively deviant in his viewing of violent pornography" in the weeks before Ms. Halbach's October 31, 2005, appointment at the Avery salvage property. (*See*, affidavit of Gregg McCrary, **Exhibit S** at ¶ 4).

In light of Bobby Dassey's status as a key witness for the prosecution, it is the opinion of Mr. McCrary that the deviant nature of Bobby Dassey's internet activity should have alerted law enforcement to Bobby Dassey as someone having an elevated risk to perpetrate a sexually motivated violent crime such as

the violent crime perpetrated on Ms. Halbach. (*See*, affidavit of Gregg McCrary, **Exhibit S** at ¶ 4).

(9) *New Evidence of a Brady Violation Which Concealed Ryan Hillegas's Connection to the Crime Scene*

It is undisputed that Ms. Halbach's day planner was in Ms. Halbach's vehicle at the time of her murder. It is also undisputed that Mr. Hillegas, who was in possession of the day planner, gave the one page document to a friend of Ms. Halbach who turned it over to the police on November 3, 2005. (Ms. Halbach's day planner is attached and incorporated herein as **Exhibit T**).

Denise Heitl, f.k.a. Denise Coakley ("Ms. Coakley"), has provided Mr. Avery's counsel with an affidavit attesting to the fact that she had a telephone conversation with Ms. Halbach on October 31, 2005 at 11:35 a.m. while Ms. Halbach was driving. Ms. Halbach pulled her vehicle over to make notations on her day planner as she was engaged in conversation with Ms. Coakley.

According to Ms. Coakley's affidavit, she reported this conversation to the authorities, including the fact that Ms. Halbach was driving and pulled over to check her schedule before making the appointment with Ms. Coakley. After pulling over and checking her schedule Ms. Halbach made notations of an appointment with Ms. Coakley for November 1 at her Green Bay studio. (*See*, affidavit of Denise Heitl, attached and incorporated herein as **Exhibit U**). Despite Ms. Coakley being interviewed by the authorities about this telephone conversation, no report of Ms. Coakley's October 31, 2005, conversation with Ms. Halbach was ever turned over to Mr. Avery's trial defense counsel.

If trial defense counsel had been provided with the report of the Coakley conversation, they would have realized that Ms. Halbach left her residence before 11:35 a.m. on October 31, 2005, and that her day planner was in her vehicle at the time of the Coakley conversation and at the time of her murder. Armed with this vital information, trial defense counsel would have been able to link Mr. Hillegas to the crime scene because he had possession of the day planner which was in Ms. Halbach's vehicle at the time of her murder. This highly incriminating evidence would have resulted in trial defense counsel meeting the legitimate tendency test established in *State v. Denny,* 120 Wis. 2d 614 (Ct. App. 1984).

Current post-conviction counsel is not attempting to solve the murder of Ms. Halbach but simply is showing that evidence existed and has been recently developed that would have met the *Denny* standard. If Mr. Avery's jury had been allowed to hear this evidence, there is a reasonably probability that he would have been found not guilty.

(10) *Mr. Avery is Entitled to an Evidentiary Hearing*

After *Allen*, the Wisconsin Supreme Court decided *State v. Love*, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62. In that case, the defendant filed a *pro se* motion for post-conviction relief. The circuit court denied the motion and the court of appeals affirmed. The Supreme Court applied the test set forth in *Allen* and reversed. *Id.*

In holding that the defendant's motion required an evidentiary hearing, the *Love* Court reviewed each of the defendant's claims. The Court first held that the defendant's motion contained material facts allowing it to meaningfully assess the merits of his ineffective assistance of counsel claim. *Love* at ¶ 33. The Court reached this conclusion because the defendant satisfied all the prongs of the *Allen* test. He identified the witness he claimed his counsel should have investigated. As to the "why" and "how" prongs, the defendant's motion indicated the reason the witness's exculpatory statements were critical to his defense. As to the "what," "where," and "when" prongs, the motion specifically indicated the facts that could be proven.

The State argued that the *Love* defendant did not establish how the witness claimed to know what he knew, thus the motion was deficient. The *Love* Court disagreed, explaining that a movant need only provide sufficient "objective factual assertions." *See Bentley,* 201 Wis. 2d at 313, 548 N.W.2d 50; *cf. Allen,* 274 Wis. 2d 568, ¶ 30, 682 N.W.2d 433. The Court declared that a movant need not demonstrate theories of admissibility for every factual assertion he or she seeks to introduce. Instead, in determining whether an evidentiary hearing is warranted, the circuit court is to accept the factual assertions in the motion as true and decide whether there are sufficient objective material factual assertions that would entitle the defendant to relief. *Love,* at ¶¶ 32-38. The *Love* Court concluded that the defendant's factual allegations and legal assertions, if true,

were adequate to allow the reviewing court to meaningfully assess his claim of ineffective assistance of counsel.

The *Love* Court further concluded that the defendant's post-conviction motion set forth sufficient material factual assertions that entitled him to an evidentiary hearing on his ineffective assistance of counsel claim. As to the defendant's trial counsel's deficient performance, the State did not dispute that pursuant to the ABA Standards for Criminal Justice, trial counsel is obligated to investigate information in police reports. *See* ABA Standards for Criminal Justice, The Defense Function, § 4-4.1 (3d ed.1993); *see Thiel,* 264 Wis. 2d at ¶ 37. As to prejudice, the State argued the evidence of defendant's guilt was overwhelming. But the Court was required to accept the factual assertions of the motion as true, and in doing so, held that its confidence in the outcome was undermined.

In the end, an evidentiary hearing was required on the defendant's ineffective assistance of counsel claim because the new witness could have admissible information as to the real perpetrator but the Court could not determine how his exculpatory testimony would measure against the credibility of the testimony inculpating the defendant at the trial. The general rule is that credibility determinations are resolved by live testimony. *See Honeycrest Farms, Inc. v. A.O. Smith Corp.,* 169 Wis. 2d 596, 604, 486 N.W.2d 539 (Ct.App.1992). Assuming the exculpatory testimony as true, the Court held that its confidence in the outcome was undermined. Thus, because the motion on its face alleged

sufficient material facts that, if true, would entitle the defendant to relief, the defendant was entitled to an evidentiary hearing. *Love*, at ¶¶ 39-42.

The *Love* Court also reviewed the defendant's newly discovered evidence claim under the test set forth in *Allen*. First, as to the "who" prong, the defendant indicated the name of the newly discovered witness. Second, as to the "why" and "how" prongs, the defendant satisfied those by indicating that the witness was important because another person told the witness that a third party (other than the defendant) had committed the murder. The defendant described why the proposed testimony was important and supported his position that a different result may have occurred at a trial had the newly discovered evidence been admitted at trial. Third, as to the "what," "where," and "when" prongs, the motion indicated the specific facts that could be proven and provided details. *Id.* at ¶¶ 45, 47-49.

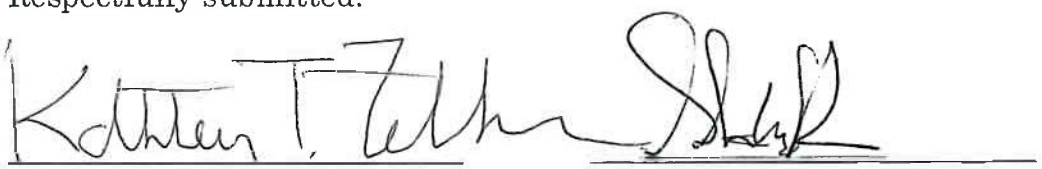
The State argued once again that the defendant had not proven that the new evidence was admissible. But the *Love* Court reiterated that a defendant need not demonstrate the admissibility of the facts asserted in the post-conviction motion. Rather, the defendant's burden is to show sufficient objective material factual assertions that, if true, warrant the movant to relief. Mr. Avery has presented an abundance of sufficient objective material factual assertions that warrant relief. Additionally, Mr. Avery has provided sufficient reasons why these arguments were not raised in any previous motions. Mr. Avery's unrebutted expert affidavits and new evidence establish a reasonable probability that a different result would be reached at a new trial based upon the totality of this evidence.

CONCLUSION

Wherefore, Mr. Avery respectfully asks this Court to reconsider and vacate its order of October 3, 2017, and grant Mr. Avery's motion by ordering an evidentiary hearing and grant the relief requested.

Dated October 23, 2017.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I certify that on October 23rd, 2017, a true and correct copy of Our Motion for Reconsideration of Order filed October 3rd, 2017, Pursuant to Wisconsin Statute 806.07 (1)(a) was furnished via electronic mail and by first-class U.S. Mail, postage prepaid to:

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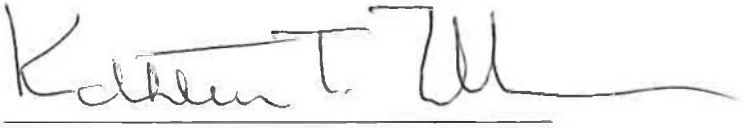

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