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2005CF000381

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

RESPONSE OPPOSING A MOTION FOR AN EVIDENTIARY HEARING AND POSTCONVICTION RELIEF UNDER WIS. STAT. § 974.06

The State of Wisconsin, by undersigned counsel, opposes Defendant Steven A. Avery's motion for postconviction relief and request for an evidentiary hearing pursuant to Wis. Stat. § 974.06. He claims that his newly discovered purported witness's, Thomas Sowinski's, testimony would have allowed him to meet the three-part *Denny*[1] test to introduce third-party perpetrator evidence at trial and allege that Bobby Dassey, Avery's nephew, committed the murder and then planted all of the evidence to frame Avery. He also claims that the State committed a violation of *Brady v. Maryland*[2] by failing to turn over to defense counsel a snippet of audio recorded by the

[1] *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).
[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Manitowoc County Sheriff's office when Sowinski called them on November 6, 2005, which Avery claims would have led defense counsel to Sowinski and allowed them to present this theory of defense instead of the one they chose. He also attempts to relitigate his *Brady* claim regarding Kevin Rahmlow's assertion that he told Sergeant Andrew Colborn on November 4 that he saw a car that looked like the victim's parked on the side of the road. Finally, he asks this Court to order a new trial in the interests of justice.

The motion is insufficiently pled, unsupported by sufficient facts, and the record conclusively demonstrates that Avery is due no relief on either his newly discovered evidence or his *Brady* claims. And circuit courts have no authority to order a new trial in the interests of justice unless the request is raised on direct appeal. Accordingly, no evidentiary hearing is necessary, and this Court should summarily deny the motion.

BACKGROUND

Teresa Halbach, a 25-year-old professional photographer, disappeared on October 31, 2005. (Doc. 1056:2.)[3] She was last seen walking toward Steven Avery's trailer after photographing a van on the Avery Salvage yard, per Avery's request. (Doc. 1056:2.) She was reported missing on November 3 and her RAV-4 was found on the Avery property November 5. Police searched the

[3] A copy of the Wisconsin Court of Appeals decision is included as Ex. 4, 001-049.

Avery property and found burned bone fragments from nearly every bone in the human skeleton in Avery's burn pit with DNA matching Ms. Halbach's and two skull fragments with bullet holes in them, along with rivets from a type of jeans she owned; Avery's and the victim's blood in the RAV-4; the burned remnants of Ms. Halbach's camera and other items; Ms. Halbach's RAV-4 key in Avery's bedroom with Avery's DNA on it; Avery's DNA on the hood latch of the RAV-4; and shell casings and bullet fragments in Avery's garage that were fired from the gun in Avery's bedroom and one of which had Ms. Halbach's DNA on it. (Doc. 1056:3; 596:160–64; 597:38–43; 600:166; 601:88–89, 100–03, 107–18.)

A five-week trial commenced where "[t]he State's theory was that Avery shot Ms. Halbach in the head, in his garage, and threw her into the cargo area of the RAV-4." (Doc. 1056:3.) He then burned the electronics and the camera and cremated Ms. Halbach's remains, transferred some of them to a burn barrel, and hid the RAV-4 until he could crush it in the Avery car crusher. (Doc. 1056:3.) Avery's theory of defense was that the police were biased against him because of a wrongful conviction lawsuit he had pending against Manitowoc County and the Sheriff's Department and planted the evidence against him. (Doc. 1056:3.)

"The jury found Avery guilty of first-degree intentional homicide and felon in possession of a firearm." (Doc. 1056:3.) He was sentenced to life

without the possibility of extended supervision. (Doc. 1056:3–4.) Avery appealed and the conviction was affirmed. (Doc. 1056:4.) Avery filed a Wis. Stat. § 974.06 motion pro se in 2013. (Doc. 1056:4.) The motion was denied, and the subsequent appeal was stayed and later dismissed on Avery's motion. (Doc. 1056:4.) Avery then, between 2017 and 2019, filed an additional six postconviction motions alleging myriad claims of error, all of which were denied. (Doc. 1056:4.) Avery appealed and the court of appeals affirmed. (Doc. 1056:4.) The Wisconsin Supreme Court denied his petition for review on November 17, 2021.

Avery then filed the motion at issue here seeking an evidentiary hearing. He claims that the State committed a *Brady* violation by failing to provide his defense counsel with a snippet of audio recorded by the Manitowoc County Sheriff's Office on November 6, 2005, when Thomas Sowinski, who used to deliver newspapers to the Avery property, called to report that he needed to speak to someone about the investigation into Halbach's disappearance. (Doc. 1065:8, 31–74.) He also alleges that Sowinski claims he saw Bobby Dassey and an "unidentified older male" pushing a dark blue RAV-4 down the road sometime after Ms. Halbach's disappearance, which Avery alleges is newly discovered evidence warranting a new trial because it would allow him to set forth a third-party perpetrator defense.

(Doc. 1065:24–46, 79–80.) Finally, he additionally seeks a new trial in the interest of justice. (Doc. 1065:46–50.)

ARGUMENT

A circuit court may deny a postconviction motion without a hearing if the facts alleged do not entitle the movant to relief, or "if one or more key factual allegations in the motion are conclusory." *State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 682 N.W.2d 433. To sufficiently plead a postconviction motion, the defendant must present, within the four corners of the document, the "who, what, where, when, why, and how" that would entitle him to the relief he seeks. *Id.* ¶ 23. Mere speculation presented as fact is a conclusory allegation insufficient to meet this standard. *See, e.g.*, *State v. Burton*, 2013 WI 61, ¶ 69, 349 Wis. 2d 1, 832 N.W.2d 611; *State v. Lock*, 2013 WI App 80, ¶¶ 42–47, 348 Wis. 2d 334, 833 N.W.2d 189; *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

A sufficiently pleaded motion, however, is not enough to require a hearing. The Wisconsin Supreme Court has recently underscored that "an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that [the] defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." *State v. Ruffin*, 2022 WI 34, ¶ 37, 401 Wis. 2d 619, 974 N.W.2d 432 (citation omitted).

I. Avery failed to plead sufficient facts to meet any of the prongs of the *Denny* test.

"When a defendant seeks to present evidence that a third party committed the crime for which the defendant is being tried, the defendant must show 'a legitimate tendency' that the third party committed the crime; in other words, that the third party had motive, opportunity, and a direct connection to the crime." *State v. Wilson*, 2015 WI 48, ¶ 3, 362 Wis. 2d 193, 864 N.W.2d 52 (citation omitted). A defendant's offer of proof on these three prongs is insufficient if it merely establishes a bare possibility that the third party could have been the perpetrator. *Id.* ¶ 83. Rather, "[i]t is the defendant's responsibility to show a *legitimate* tendency that the alleged third-party perpetrator committed the crime." *Id.* ¶ 59 (emphasis in original).

Whether Sowinski's testimony and the other allegations Avery presented actually allow him to meet the prongs of *Denny* is a threshold question; if it does not, Avery cannot meet his burden on either his newly discovered evidence claim or his *Brady* claim. And, as explained below, Avery has not pled sufficient facts to meet the *Denny* test and thus no hearing is necessary on these new claims.

A. Motive

"'Motive' refers to a person's reason for doing something." *Wilson*, 362 Wis. 2d 193, ¶ 62 (citation omitted). Avery claims that he has established

that Bobby Dassey had a motive to kill the victim because pornography and some gory images were found on the communal computer in the Dassey home. (Doc. 1065:17–24.) But what Avery presents is, on the whole, a misrepresentation of the facts, and those assertions that are minimally consistent with the record consist of tenuous conjecture only. He falls far short of presenting facts that would establish that Bobby Dassey is the person who accessed the pornography and other images, let alone that anything found on the Dassey computer plausibly establishes that Bobby (or anyone else) had a motive for Ms. Halbach's murder.[4] The facts of record show that these computer searches are neither relevant to nor probative to establish that anyone, but particularly not that Bobby, had a motive for murder in October 2005.

First, Avery has once again failed to supply sufficient facts to prove that Bobby conducted any of these searches. As the court of appeals noted previously in this case, the mere fact that Bobby could have been at home when some of these searches were conducted fails to establish anything about

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[4] Avery's contention that "[l]aw enforcement considered pornography as evidence of motive in Ms. Halbach's murder" merely because they collected it and wrote a report about it is false. (Doc. 1065:18.) Law enforcement conducting an examination during a murder investigation gather anything that could conceivably be relevant to the case; vast portions of what the police collect is later determined to be of no importance. Avery's contention that they seized and reported about this pornography because they believed it was evidence of motive is pure speculation which he has not supported with any record evidence at all.

who actually conducted them, and Avery cannot rely on his computer expert's or anyone else's speculation on what Bobby's schedule might have been on those days. *See, e.g.*, *State v. Avery*, No. 2017AP2288-CR, 2021 WL 3178940, ¶¶ 67 n.25, 68 (Wis. Ct. App. July 28, 2021) (unpublished). But speculation based on the timestamps from a fraction of the searches is once again all Avery has provided, with no citations to any actual facts of record about Bobby's whereabouts at those times nor anyone else's who may have had access to the home. (Doc. 1065:20–21.)[5] As the court of appeals previously observed, the existence of the searches is not a fact that would establish Bobby was even in the house at those times, let alone that he was the person using the computer or accessing these images. *Avery*, 2021 WL 3178940, ¶ 67 n.25.

[5] Avery's record citations do not make sense. He cites to "689:35; 705:56–57; 630:28–29; 633:47; 737:164; 739:154; [and] 743:12." (Doc. 1065:21.) Document 689 is a single-page receipt of the circuit court file and document 705 is similarly a single-page document regarding Avery's visits by his defense counsel. Documents 630 and 633 are extension motions. Document 737 is a two-page email between law enforcement about license plate photos, 739 is a single-page exhibit about a 1994 jail phone call, and 743 is a single-page exhibit detailing evidence collected from Avery's garage floor. Avery appears to be working off of the record index numbers in the court of appeals and referring to his own previous arguments in those filings. Those document numbers do not correspond to the record index in this Court; therefore, it is impossible to ascertain what Avery is attempting to pinpoint. (E.g., Avery's App. Vol I–III (Doc. 1073; 1074; 1075.).) The State thus makes educated guesses at which exhibits Avery means to cite.

Furthermore, Avery has failed to support his allegations with sufficient factual particularity to establish anything related to Bobby Dassey or even to a crime. There are no timestamps given for the searches Avery points to in Velie's report and no explanation of how any of them are relevant to an individual's motive for this murder. (Doc. 1065:17–24; 1074:50.) Most of them are generic and mundane—the mere fact that someone searched for "[n]ews," "[b]ody," "[j]ournal" and "[c]ement" doesn't show anything similar or related to this crime. (Doc. 1074:50.)

Additionally, Avery's own submitted exhibit shows that the bulk of the searches for pornography or gory material that he relies upon for this allegation of motive had no similarity to this crime and either occurred on a weekend when anyone there could have accessed the computer, or occurred after 3:45 p.m. on a weekday when Blaine indisputably also had access to it. (Doc. 1065:20–21; 1074:62–66.) Nor did Avery account for the fact that Mishicot School District had spring break from March 24, 2005, to March 30, 2005, meaning Blaine and Brendan and anyone they invited over also could have been in the home on weekdays during that time, and from April 7, 2006,

to April 18, 2006, meaning Blaine at least also had access during those weekdays.[6]

Indeed, of the 128 searches listed only 28 of them occurred between 7:00 a.m. and 3:45 p.m. on a weekday. (Doc. 1065:20–21; 1074:62–66.) And of those 28 searches, only 3 of them occurred before Ms. Halbach's murder—two at 8:14 a.m. on Tuesday, September 13, 2005, and one at 7:54 a.m. on Thursday, September 15, 2005. (Doc. 1074:62–66.) Avery fails to explain how Bobby Dassey's only possibly having searched for pornography a mere three times before Ms. Halbach's murder is sufficient to show he was a voracious violent pornography consumer on October 31, 2005, who was thus motivated to abduct and kill a stranger that day because of it. (Doc. 1065:17–24.)

Avery once again attempts to rest this theory on *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001), as if it held that any and all pornography consumption establishes a motive for murder regardless of circumstances. (Doc. 1065:22–24.) *Dressler* held no such thing and is not remotely on point (not to mention that as a federal habeas corpus case it is not binding law in Wisconsin). The facts of the underlying Wisconsin case in *Dressler* are a vast departure from the facts of this case. There, the male

[6] Records of the academic calendars for all Wisconsin school districts for the dates in question can be found at https://dpi.wi.gov/cst/data-collections/school-directory/calendar (*last accessed* November 1, 2022).

victim was last seen approaching Dressler's house for political campaign activity; he was assaulted and murdered in an extremely specific and particularly brutal way that included binding, mutilation, and dismemberment; and police found myriad weapons and restraints, along with pictures, magazines, and videos depicting similarly murdered and mutilated victims and homosexual pornography in Dressler's home. *Dressler*, 238 F.3d at 910–11. These items were admitted as other acts evidence of Dressler's intent, motive, and plan to assault and kill the victim in that particular manner. *Id.* at 914.

But in that case: (1) there was no dispute that the materials were Dressler's, unlike in this case where anyone could have been responsible for these searches and Avery has not provided any facts showing otherwise; (2) the materials found in Dressler's home depicted things that very closely mirrored the brutal crime, whereas here the searches Avery is attempting to rely on vary widely from the obscene to the mundane with no relation to how Ms. Halbach's murder occurred—indeed, Avery fails to point to a single image or search for someone who was shot and the body burned nor anything that would suggest that these widely varying types of pornography had any similarity whatsoever to Ms. Halbach's murder, and has included such irrelevant and off-point searches as "MySpace," "tires," "race car accidents," "ford focus accident," "diseased girls" and "big woman naked" (Doc. 1074:50,

62–66); and (3) in *Dressler* there was no dispute that Dressler owned all of the pornographic and violent material *before* the murder occurred, and they were deemed relevant to show that he was both homosexual and had a fascination with mutilation and dismemberment and thus a motive, intent, and plan to act out his violent sexual fantasies in this particular manner by the time the male victim arrived at Dressler's home. *Dressler*, 238 F.3d at 914. Here, the vast majority of the material on which Avery relies and actually provides some timestamp for has no similarity or even relation to how Ms. Halbach's murder occurred, and it was not searched for until months *after* the murder. (Doc. 1074:62–66.) Avery fails to explain how motive to fulfill a violent porn-fueled sexual fantasy can be formed or proven by someone not viewing any of this material until months after the murder already occurred.

To the extent that *Dressler* is relevant at all, it actually shows that Avery has not met his pleading burden because a comparison to it shows why these computer contents would not be admissible as other acts evidence to prove motive if Bobby were the defendant. *See Wilson*, 362 Wis. 2d 193, ¶ 63. Other acts evidence is admissible if it meets the familiar three-part test from *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998), requiring it to be offered for permissible purpose, relevance, and that the probative value of

the evidence is not outweighed by unfair prejudice. The latter two prongs are not met.

Motive is a permissible purpose for introducing other acts evidence. *Id.* But as explained, none of what Avery has presented is relevant to show motive to commit this specific crime. The court of appeals already determined that Avery's contention that these images are similar to the violent murder of Ms. Halbach was false. *Avery*, 2021 WL 3178940, ¶ 67 n.25, 68. The pornography and videos of murder and mutilation deemed relevant in *Dressler* were indisputably Dressler's, they closely mirrored what happened to the victim in that case, and were collected by the defendant long before the murder occurred. *See Dressler*, 238 F.3d at 910–14. Nothing about an unidentified person searching a communal computer for various types of pornography and pictures of race car accidents or drowning victims months after Ms. Halbach's murder occurred shows an interest in anything similar to this crime, nor makes it any more or less likely that Bobby Dassey had a motive to shoot and kill Ms. Halbach in October 2005. The computer contents are simply not relevant. These searches and images also would be excluded because, without some closer tie to the events of October 31, 2005, their prejudicial value would greatly outweigh whatever minimal relevance they might have and influence the jury to convict because they believed whomever

conducted the distasteful searches must be a bad person. *Sullivan*, 216 Wis. 2d at 783.

Finally, apart from the lack of evidentiary support, Avery's theory that this pornography, accessed months later in 2006, shows that Bobby Dassey had a motive to murder a stranger within minutes of meeting her in October 2005 ignores basic human experience. Despite Avery's inadmissible "police procedure" expert's opinion,[7] it is no surprise to find pornography and gore accessed on a communal computer available to at least four teenage boys—not to mention anyone else permitted in the Dassey home. But viewing pornography or searching for "race car accidents" does not create a motivated murderer. Even if Avery could show that Bobby was the one who performed these searches or accessed these images (which, again, he has provided no facts to support), he provides nothing establishing that viewing these images would give someone a motive for this murder, and certainly nothing establishing that Bobby Dassey specifically had such a motive in October 2005. Avery did not plead sufficient facts to establish Bobby's motive.

[7] Avery failed to show that Gregg McCrary has even one relevant credential to give the type of opinion referred to in Avery's motion (Doc. 1065:23), and no Wisconsin case has ever permitted a "police procedure" expert due to the high likelihood of turning the proceedings into a minitrial on the propriety of law enforcement's protocols. Wis. Stat. §§ 904.03, 907.02.

B. Opportunity

"The second prong of the 'legitimate tendency' test asks whether the alleged third-party perpetrator *could have* committed the crime in question." *Wilson*, 362 Wis. 2d 193, ¶ 65 (emphasis in original). Evaluation of this prong is guided by the defense's theory of the third party's involvement in the crime. *Id.* ¶ 68. Sometimes, opportunity can be established by simply showing the third party was at the crime scene. *Id.* ¶ 65. When, as here, the theory of how the third party committed the crime requires that person to have carried out a series of complicated and difficult tasks, it is not enough to show the third party's mere presence at the scene and an unaccounted-for period of time. *Id.* ¶¶ 65, 68, 85. In this situation, to meet the opportunity prong, the defendant has to offer evidence that the alleged third-party perpetrator had the skills, contacts, tools, time, and/or other means necessary to have committed the crime and staged the scene in the manner the defendant alleges—in other words, "evidence that the third party had the realistic ability to engineer such a scenario." *Id.* ¶¶ 10, 85; *see also State v. Krider*, 202 P.3d 722, 729 (Kan. Ct. App. 2009) (holding that a third-party's possible access to hair and blood samples from the victim was mere conjecture insufficient to establish opportunity to frame the defendant). Avery's submissions do not meet this threshold.

Avery fails to acknowledge that his "defense theory" has changed drastically from the time of trial. (Doc. 1065:25.) Then, his contention was that he was framed by law enforcement, who had plenty of time, knowledge, and access to the evidence to plausibly doctor the crime scene. Now, he claims his nephew Bobby Dassey framed him, and did so in a very short time period. That means that to sufficiently plead his motion, he had to provide more than just a showing that Bobby physically "had access to" the evidence because he was on the property. (Doc. 1065:25–26); *Krider*, 202 P.3d at 729. He had to show that Bobby had the actual ability to both commit the murder and then complete each step of this framing process, and to do so before November 5. And Avery has not provided facts that would establish at least four key components necessary to sufficiently plead that Bobby had the opportunity to kill the victim and plant all the evidence against his uncle: the "why," the "when," the "where," and the "how."

Assuming for the sake of argument that Avery had pled facts that would establish Bobby's motive to kill in the first place (and as explained above, he has not), Avery has not offered anything that would suggest *why* Bobby would want to frame Avery, especially given the grave risks and extreme difficulty of doing so. (Doc. 1065:24–27); *see Krider*, 202 P.3d at 729. Anyone who murders someone typically wants to escape detection. But that does not explain *why Bobby would frame Avery for it*, especially when doing

so would ensure that law enforcement would be taking a close and intense look at the entire Avery property and everyone who lived on it. He offers no reason why Bobby would want to send him to prison. If Bobby Dassey truly wanted to hide the evidence of a crime he committed, there were limitless ways to do so that would not have led law enforcement directly to the Dassey's door—Lake Michigan, for example, was a mere few miles from the Avery property, and the property was surrounded by vast tracts of undeveloped land. Nor has Avery explained why someone who wanted to frame him would go to such lengths to *hide* the evidence. Surely if Bobby or anyone else wanted to frame Avery, they wouldn't have gone out of their way to make all of the evidence difficult for law enforcement to detect, gather, and connect to Avery—it makes no sense to burn the victim's remains and personal property in an attempt to conceal them, or to drip Avery's blood around the RAV-4 but then remove the license plate from and attempt to hide the vehicle by covering it with debris at a point far away from Avery's trailer. Avery has provided no facts explaining why Bobby Dassey's framing him is plausible when he has given no reason whatsoever that would explain why Bobby would do this.

Avery's argument fails on the "when" and the "how," as well, as he's provided nothing that could plausibly establish that Bobby had the knowledge, skills, tools, or time to engineer this elaborate ruse. The mere fact

that Bobby was on the Avery property at some time when Avery's hand was bleeding falls far short of facts necessary to establish that Bobby had the opportunity to successfully orchestrate this extremely complicated supposed frame-up. (Doc. 1065:26); *see Wilson*, 362 Wis. 2d 193, ¶ 85 (third party's mere presence at the scene of a shooting was insufficient to show that the defendant had the contacts and resources necessary to have had the opportunity to orchestrate a "hit" on the victim). The complete absence of the necessary facts to support several crucial elements of how Bobby could have accomplished staging this scene demonstrate that Avery has failed to plead sufficient facts to show that Bobby had any opportunity to kill the victim and frame Avery in this manner. *See id.* ¶ 69.

Avery has offered no facts at all that would establish *how* Bobby Dassey—an 18-year-old high-school graduate with no criminal record whatsoever and who was working third shift at a furniture factory (Doc. 581:34–35):

(1) managed to steal, at some unidentified time prior to October 31, the rifle hanging above Avery's bed with which the victim was shot, and at some other unidentified time before November 5 managed to replace it, with Avery's never noticing (Doc. 594:92–93, 100–02, 108–12; 596:134–39; 597:163–65; 601:88–89, 100–03, 107–18);

(2) could have abducted and killed the victim and hidden both her body and her car in some unknown area in the minutes between her arrival on the property and Scott Tadych passing Bobby Dassey on the highway around 3:00 p.m. on October 31, 2005 (nor has Avery provided any facts to establish where the killing could have happened apart from a nondescript "in the [RAV-4]," or where Bobby could have hidden the RAV-4 and the victim's remains in this short period of time) (Doc. 581:36–45; 599:123; 1065:24–27.)

(3) had the scientific sophistication and knowledge necessary for it to occur to Bobby to collect, transport, and plant Avery's blood from his sink and—as Avery has completely overlooked—his non-blood touch DNA on the hood latch of victim's RAV-4 and her keys, or how Bobby acquired the skills to do this successfully (Doc. 597:122, 125–26, 168–83, 185–96; 1065:24–27);

(4) had a convenient stash of unidentified instruments capable of collecting and transporting liquid blood on hand or what those might have been;

(5) planted the keys to the RAV-4 in Avery's trailer unnoticed and at some unspecified time between November 3 and November 5, yet also either managed to move the RAV-4 off of the 40-acre property without the keys or drive it away and return on foot from wherever he supposedly took it and then sneak into Avery's trailer again to hide the keys, at some other unidentified time, once again unnoticed (Doc. 596:35–36; 1065:24–27);

(6) found, and then planted, a tiny, mangled bullet fragment that Bobby inexplicably knew had the victim's DNA on it underneath items in Avery's garage, or alternatively how he shot the victim in Avery's garage on October 31 and then at another unidentified time scrubbed the scene with Avery remaining unaware—this despite Avery indisputably having been working on his Suzuki and other vehicles in and around the garage around this time (Doc. 581:48; 594:99–100; 596:134–39, 185–86; 597:163–68);

(7) burned the victim's body in some undisclosed location and then moved the remains to Avery's burn pit, again completely undetected, and did it so thoroughly as to include "at least a fragment or more of almost every bone below the neck" in the entire human skeleton, along with the rivets from her jeans (nor has Avery provided any facts showing where and when this occurred) (Doc. 596:160–64; 597:38–40; 600:166.);

(8) convinced his younger brother Brendan to go along with this plan and fabricate a confession implicating himself and Avery, or why Brendan would do so (Doc. 179:172–86).

Even if one accepts at face value Avery's theory that Bobby was scientifically sophisticated and equipped enough for it to occur to him to do all of the blood-evidence-gathering-and-planting, Avery provides nothing that would explain how Bobby could have done so in the roughly half an hour window before the blood would have coagulated or dried when Avery was at

Menards on November 3. (Doc. 1065:24–29.) And Avery has not pled even a single fact to establish how or when Bobby could have planted any of the rest of the mountain of forensic evidence against Avery, particularly the victim's remains, the non-blood DNA evidence, and the bullet, and also successfully eliminate any trace of his own involvement or physical presence. (Doc. 597:127–32, 175–76, 182–96; 1065:24–29).

In sum, Avery has provided no facts in his motion that would establish why Bobby would want to frame him or when, where, or how Bobby could have even possibly accomplished any of the necessary tasks to make this theory plausible. (Doc. 1065:24–27.) He has supplied nothing other than a series of constantly-shifting affidavits about his and others' activities during the relevant time frame and then backfilled it with speculation—with zero factual support—about how a small fraction of the evidence against him (the blood and the car only) could have ended up where it was if someone else was the perpetrator and pretends the rest of the evidence does not exist. (*Compare* Docs. 1065:24–27; 179:22–30; 965:1–7; 1071; Exhibit 3 (Sowinski's April 10, 2021 Affidavit).) That is flatly insufficient to provide facts that could show that Bobby had the opportunity to engineer this complicated scheme.

C. Direct Connection

Direct connection is assessed by considering "the proffered evidence in conjunction with all other evidence to determine whether, under the totality

of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime" and take the defendant's theory "beyond mere speculation." *Wilson*, 362 Wis. 2d 193, ¶¶ 59, 71 (emphasis in original). "No bright lines can be drawn as to what constitutes a third party's direct connection to a crime," but it must be more than "a connection between the third party and the crime"; it requires "some direct connection between the third party and the *perpetration of* the crime." *Id.* (emphasis in original).

Sowinski's averments that he purportedly saw Bobby pushing a RAV-4 on November 5—several days after Ms. Halbach's murder—do not provide a link between Bobby Dassey and *perpetration of the murder*. At the most generous, the exhibits Avery has submitted could establish that Bobby was involved in moving the RAV-4 to the location where it was eventually found.[8] That is nothing more than a possible "connection between the third party and

[8] This would require a reading of Avery's submissions that ignores their glaring inconsistencies. The information Sowinski initially provided in his emails to counsel does not at all match up with what his affidavits now say about what or who he observed, when he observed them, and who he spoke to at the Manitowoc County Sheriff's office. (*Compare* Exhibit 1 (Sowinski's Dec. 26, 2020 email), Exhibit 2 (Sowinski's Jan. 7, 2016 email) and Exhibit 3 (Sowinski's April 10, 2021 Affidavit) *with* Doc. 1071.) And, in fact, Sowinski's original information to current defense counsel would have *eliminated* Bobby Dassey as a suspect, because Bobby was at work during the time frame Sowinski gave, and Mike Osmunson was nowhere near age 60 in 2005. (Doc. 581:25–26; Exhibit 1.) Sowinski's account changed drastically after having his memory "refreshed" by counsel and her investigators. (Doc. 1071:3). *See, e.g.*, *State v. Avery*, 2017AP2288-CR, 2021 WL 3178940, ¶¶ 26, 31–33, 67 n.25, 79 (Wis. Ct. App. July 28, 2021) (unpublished).

the crime." *Wilson*, 362 Wis. 2d 193, ¶ 71. It provides no link at all between Bobby and the perpetration of the actual killing. It also does nothing to establish that Avery was *not* the killer—even if believed, all Sowinski's evidence would show is that perhaps Bobby was involved in trying to cover up Avery's crime. *See State v. Bembenek*, 140 Wis. 2d 248, 257, 409 N.W.2d 432 (Ct. App. 1987). After all, Avery recruited Brendan to help him try to cover his tracks; the same could be true about Bobby. Nothing Sowinski avers connects Bobby to the actual killing in any way.[9] Direct connection requires a showing that "under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime." *Wilson*, 362 Wis. 2d 193, ¶ 71. Avery's multiple layers of conjecture, piled on top of an allegation that Sowinski maybe saw Bobby pushing a car similar to the victim's at some point, do nothing to establish any fact showing that Bobby actually murdered the victim.

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In short, Avery's claim that "the *Denny* requirements are now satisfied" is wrong. (Doc. 1065:18.) The "tendency" that Bobby committed this crime

[9] All of Avery's salacious claims that Mike Osmunson must somehow be involved because he and Bobby spoke frequently and the two of them did not remember many years later precisely what date they had a conversation with Avery or when or what they did when they spent time together do nothing to support this theory and have no relevance whatsoever to Avery's ability to meet any of the three prongs of *Denny*. (Doc. 1065:27–29, 61–62.)

based on what Avery has presented here has not even entered the ballpark of "legitimate." *Wilson*, 362 Wis. 2d 193, ¶ 59. Avery's allegations are conjecture and speculation plugged in to unaccounted-for periods of Bobby's time. That is insufficient to meet *Denny*. *Id.* ¶ 68, 84. The dearth of facts in Avery's motion necessary to establish Bobby's motive or opportunity to commit this crime and then carry out an elaborate planting scheme, along with nothing tying Bobby to perpetration of the actual killing, means Avery has failed to establish a *legitimate* tendency that Bobby was the killer. Avery thus failed to meet his pleading burden on both his newly discovered evidence and his *Brady* claim. No hearing is necessary.

II. Avery is not entitled to an evidentiary hearing on his newly discovered evidence claim.

Avery's newly discovered evidence claim is multilayered. To be entitled to a hearing, Avery had to plead sufficient facts to establish not only that Sowinski's alleged testimony would have allowed him to meet the *Denny* test (which, as explained above, he did not do), but also sufficient facts to establish that if he had presented this third-party perpetrator defense at trial, a jury would have had a reasonable doubt about his guilt. He has not done so.

A. Defendants must meet a five-part test to obtain a new trial based on newly discovered evidence.

"To set aside a judgment of conviction based on newly discovered evidence, the evidence must be sufficient to establish that the defendant's conviction resulted in a 'manifest injustice.'" *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). When moving for a new trial based on the allegation of newly discovered evidence, "the defendant must prove, by clear and convincing evidence, that: '(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.'" *Id.* (quoting *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)).

"If the defendant is able to make this showing, then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" *Id.* "A court reviewing the newly discovered evidence should consider whether a jury would find that the evidence 'had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt.'" *Id.* (citation omitted). "While the court must consider the new evidence as well as the evidence presented at trial, the court is not to base its decision solely on the credibility of the newly discovered evidence." *Id.* Instead, the court must ask

whether a jury presented with this evidence, regardless of its lack of credibility, would have had a reasonable doubt about the defendant's guilt when considered along with the evidence presented against the defendant at trial.

The State disputes that the evidence Avery submitted is material for the reasons explained above. Even if Avery could meet the first four prongs of the newly discovered evidence test, though, he cannot show that this evidence would cause a jury to have a reasonable doubt about his guilt.

B. Because Avery failed to plead facts that would sufficiently establish the three prongs of *Denny*, his allegations that Bobby was the perpetrator would be inadmissible at a new trial.

If the newly discovered evidence presented by a defendant would be inadmissible at a new trial, there is no way it could have an impact on the jury's evaluation of the other evidence and the defendant fails to meet his burden. *Bembenek*, 140 Wis. 2d at 256–57.

As *Wilson* makes clear, "the *Denny* test is a three-prong test; it never becomes a one-or two-prong test." *Wilson*, 362 Wis. 2d 193, ¶ 64. If a defendant fails to make an adequate showing on any of the three prongs, the third-party perpetrator evidence is inadmissible. And as the State explained, Avery failed to meet his burden on all three prongs of the test. But even demurring on motive, his opportunity evidence is flatly insufficient to

establish that Bobby could have committed the crime or staged the crime scene, and his direct connection evidence doesn't establish a connection between Bobby and the actual killing. Accordingly, no jury would ever be presented with what Avery has submitted here, and therefore there is no possibility that it could affect the outcome of a new trial. *Bembenek*, 140 Wis. 2d at 256–57.

C. Even if this evidence were admitted and this theory of defense were presented, there is no reasonable probability of a different result at a new trial.

Even assuming that this was sufficient to meet *Denny* and Avery had a new trial presenting this defense instead of the police bias defense, there is no possibility that any jury hearing it would have a reasonable doubt about Avery's guilt. As explained above, there are far too many irreconcilable inconsistencies between Avery's allegations about Bobby Dassey and the actual evidence produced at trial. Particularly damning would be Avery's complete failure to account for his DNA on the hood latch of the RAV-4 and Ms. Halbach's remains—again, including a fragment from "virtually every" bone in the human body—being found in his burn pit, and nothing to explain how Bobby could possibly be responsible for the bullet with Ms. Halbach's DNA on it being found in his garage and matched to the gun above his bed.

Avery's new defense would essentially be asking the jury to ignore the forensic evidence introduced against him. When presented with the common-

sense explanation that the evidence was located where it was because Avery shot and killed the victim and then attempted to hide the evidence of his crime versus Avery's attempt to paint Bobby as a porn-obsessed, scientifically savvy, and extraordinarily stealthy criminal mastermind who inexplicably wanted to frame his uncle, no one would have a reasonable doubt about Avery's guilt.

"Courts may permissibly find—as a matter of law—that no reasonable jury could determine that the third party perpetrated the crime in light of overwhelming evidence that he or she did not." *Wilson*, 362 Wis. 2d 193, ¶ 70. Here, overwhelming evidence that Bobby did not commit this crime exists in the utter absence of any facts tying him to the actual killing or to even a single piece of the forensic evidence. Avery's theory requires so many speculative leaps ignoring the actual facts of the case that reasonable movie-goers would be hard-pressed to sit through it. Any reasonable juror being asked to search for the truth in a murder trial would reject it without fail.

III. Avery has failed to plead sufficient facts to establish a violation of *Brady v. Maryland* and the record conclusively proves that he could not do so, so no hearing is necessary.

A. Avery failed to provide sufficient facts to establish this audio clip's materiality.

Under the Fourteenth Amendment, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The evidence must be "favorable to the accused, either because it is exculpatory or impeaching," it "must have been suppressed by the State, either willfully or inadvertently," and it "must be material" to the defendant's guilt or punishment. *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468. Evidence is "material" and therefore must be disclosed "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." *State v. Garrity*, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

However, "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more," *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), and "[a] defendant's request for *Brady* Material . . . does not require a prosecutor to wade through all government files in search of potentially exculpatory evidence." *State v. Harris*, 2004 WI 64, ¶ 15, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted). Importantly for the issue raised here, *Brady* does not require the prosecution to disclose evidence that is merely "potentially exculpatory." *Id.* ¶ 16. Stated differently, the State is not constitutionally

required to turn over "the type of information that could form the basis for further investigation by the defense." *Id.*; *see also State v. Greenwold*, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (recognizing the Supreme Court's differentiation between "potentially useful evidence" and exculpatory evidence required to be disclosed under *Brady*).

Avery has again failed to meet his pleading burden because he has not submitted anything that would establish an actual *Brady* claim even if true. There are several glaring failures with what Avery has presented.

First, Avery's dogged insistence that Bobby Dassey "was the State's primary witness against Mr. Avery at his trial" remains false no matter how many times he repeats it. (Doc. 1065:38.) Bobby established only that Ms. Halbach arrived at the Avery Salvage Yard on the day in question and that he saw Ms. Halbach walking toward Avery's trailer shortly before she disappeared. (Doc. 581:35–66, 89–99; 591:7–51.) The State's 16 law enforcement witnesses and 12 forensic scientists who explained the enormous amount of forensic evidence pointing directly to Avery as the killer were all far more material than Bobby, and Avery fails to explain how attempting to impeach Bobby with this purported evidence would have turned the tide at trial.

Second, Avery's submissions are insufficient to establish any facts related to this claim. Avery has presented nothing more than an

unauthenticated piece of paper on which some unidentified person apparently typed their interpretation of what was said in an audio clip at some unidentified time. (Doc. 1071:12.) Absent from what Avery submitted to this Court is any copy of this audio clip, let alone any documentation about when it was received by the Sheriff's office, who answered, who transcribed this clip, when they did so, what they were using as a reference, any timestamps, or anything else that would provide some verification that what Avery submitted is actually true and accurate. It is a bare piece of paper with some words typed upon it. That is not evidence.[10]

Assuming that everything Avery submitted is accurate, though, he still hasn't established that this was material evidence that was required to be disclosed to the defense. There are literally no details contained in the audio clip that would indicate that Sowinski had materially exculpatory information; Sowinski said nothing other than that he had something that he

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[10] Avery notably also did not provide any affidavit from Sergeant Senglaub or any investigator who spoke to him that would show that Sowinski was actually connected to him when this call was allegedly made, and does not establish that anything Sowinski says now was actually what he told Senglaub at the time. (*See* Doc. 1072:8; 1065–75.) The audio clip establishes nothing substantive, and the record shows that Sowinski was not telling this new story until defense counsel somehow "refreshed" his memory 17 years later about what he believed he saw and when—with no documentation that would show how this memory refreshment could have been achieved. (*Compare* Exhibit 1 *with* Doc. 1065:76–81, 1071.) Accordingly, Avery's failure to submit anything from Senglaub means he has additionally failed to submit sufficient facts that would show that law enforcement was actually in possession of Sowinski's purported information in 2005.

didn't know if it was "good information" or "bad information" about "the girl who is missing from Hilbert." (Doc. 1071:12.) That is everything contained in the audio clip. Nothing in those few sentences could even conceivably be considered materially exculpatory evidence that the prosecution should have been on notice to turn over, and indeed, Avery actually does not attempt to argue that the contents of the phone call are materially exculpatory or impeaching. (Doc. 1065:32–37.) What he argues is that if the defense had been provided with this snippet of audio, they could have tracked down and interviewed Sowinski. (Doc. 1065:32–39; 1072.)

But that does not make this phone call clip *Brady* material; it makes it an avenue of investigation that could have led anywhere, which is insufficient to establish that it was materially exculpatory. *See Greenwold*, 181 Wis. 2d at 885. And significantly, absent from Attorney Buting's or Attorney Strang's affidavits is any allegation that they would have pursued Avery's new *Denny* theory if they had Sowinski's new information. (Doc. 1065:88–96.) They say only that they would have "pursued that information [that Sowinski called the Sheriff's department] diligently" and would have "made a specific request for further information about the substance of that call from Sgt. Senglaub." (Doc. 1065:95.) There is no allegation that they would have attempted to present this fanciful theory that Bobby Dassey was somehow responsible for the murder, either at the pretrial *Denny* hearing or at trial, if they had

spoken to Sowinski. (Doc. 1065:88–96.) And it is easy to see why: no reasonable jury would have believed it. The police-frame-up theory was a far more believable defense. Again, evidence is only material if there's a reasonable probability that it would have made a difference in the outcome of the trial. *Garrity*, 161 Wis. 2d at 850. A defense that would not have been presented would not have made a difference in the outcome of the trial, therefore Avery's affidavits are insufficient to establish facts to support a *Brady* claim.

So, all Avery has established and argued is that if he'd been provided this phone call clip, he would have had "information that could form the basis for further investigation by the defense." *Harris*, 272 Wis. 2d 80, ¶ 16; (Doc. 1065:33; 1072). That is demonstrably insufficient to state a *Brady* claim. *Harris*, 272 wis. 2d 80, ¶ 16.

B. Avery's *Brady* claim regarding Kevin Rahmlow was previously litigated but also fails on the merits.

Avery attempts to relitigate his *Brady* claim that Kevin Rahmlow allegedly told law enforcement that saw Ms. Halbach's RAV-4 off of the Avery property on November 3, 2005. (Doc. 1065:44–46.) By his own admission, he already made this argument to this Court in his motion for reconsideration in October of 2017, on the grounds that Rahmlow's information was newly discovered evidence of a *Brady* violation, and he again relied on it as part of

his July 2018 supplemental motion alleging that the contents of the Dassey computer would have allowed him to establish Bobby as a *Denny* suspect. (Doc. 1065:44; 227:31–32; 963.) This Court denied the myriad new claims Avery raised in his motion for reconsideration on the grounds that new claims were not an appropriate reason to reconsider an earlier decision. (Doc. 820:3–5.)

"A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Avery already litigated this claim. In 2017, he claimed Rahmlow's information was newly discovered evidence warranting reconsideration of this Court's October 2017 decision pursuant to *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, 275 Wis. 2d 397, 685 N.W.2d 853. (Doc. 227:3–4, 31–32.) The fact that this Court did not individually address it when denying his motion for reconsideration is immaterial; it was presented to this Court previously under one particular legal theory and this Court properly denied it, meaning Avery cannot relitigate it now. *Witkowski*, 163 Wis. 2d at 990. Just as "an appellate court is not a performing bear, required to dance to each and every tune played on an appeal," neither is a circuit court required to individually address in detail claims that are improperly before it if it explains why they

are improperly raised, which this Court did in its prior decision. *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 261 N.W.2d 147 (1978). This Court's failure to address it on the merits previously does not permit Avery to continuously reraise it until this Court does so.

C. The record conclusively demonstrates that Avery could not establish a *Brady* violation at a hearing.

Even if this claim were not previously litigated, it would fail, because the record conclusively demonstrates that what Rahmlow says in his affidavit about telling Sergeant Andrew Colborn on November 4 that he saw the victim's RAV-4 on a highway cannot possibly be true. (Doc. 1075:58–60.) Sergeant Colborn ended his shift on November 3, 2005, around 11:00 p.m. (Doc. 594:66, 80.) The affidavit Rahmlow submitted unequivocally states that midday on November 4 "[w]hile [he] was in the Cenex station, a Manitowoc County Sheriff's Department officer came into the station," whom he claims he told about seeing the victim's car, and that it wasn't until December 2016 that he "recognized the officer who [he] talked to at the Cenex station" and that it was Colborn. (Doc. 1075:59.)

But Colborn was off work on November 4, 2005, meaning he would not have been in uniform or driving a squad car that day. (Doc. 594:80.) Even assuming (and it is a big assumption) that Colborn actually went into a Cenex station on November 4, Rahmlow by his own admission does not know

Colborn personally—Rahmlow had no idea who Colborn was until he saw him on TV in 2016—and consequently nothing Rahmlow states in his affidavit or that is claimed in Avery's motion can possibly have happened. (Doc. 1065:44–49.) Colborn would not have been identifiable as a Manitowoc County Sheriff's Officer while he was off duty and thus out of uniform in a gas station, so there is no way that Rahmlow saw him come into the gas station, identified him as a Sheriff's officer, and told him this. The record thus conclusively demonstrates that the State did not suppress any information about Rahmlow's tale because there was nothing to suppress—the evidence did not exist.

Finally, Avery has once again failed to plead sufficient facts that this information from Rahmlow could have been material. As explained above, Avery did not plead sufficient facts to satisfy the three prongs of *Denny* and allege that Bobby was a plausible perpetrator, so the jury would not have heard that theory, which is the only way there would have been any exculpatory context to this information. Assuming that Rahmlow's information standing alone would have been admissible, there's no reasonable probability of a different result at the trial. Rahmlow's seeing a car similar to the victim's on the side of the road between November 3 and November 5 does nothing whatsoever to exonerate Avery—Avery himself could easily have driven it there. After all, the State had no way of knowing

what Avery did with the evidence between October 31 and November 5. At best, Rahlmow's evidence would have allowed the State to fill in its own gaps in how Avery kept the victim's car hidden between her disappearance and the car's discovery on November 5. There is not a reasonable probability the jury would have reached a different outcome if presented with Rahmlow's testimony.

IV. Circuit courts have no authority to grant a new trial in the interests of justice when the request is made in a Wis. Stat. § 974.06 motion.

Avery's final request is that this Court grant him a new trial in the interest of justice pursuant to Wis. Stat. § 805.15(1). (Doc. 1065:46–49.) There is no need to belabor why Avery fails to meet the requirements for such relief, because the Wisconsin Supreme Court has unequivocally held that circuit courts have no authority to grant new trials in the interest of justice in criminal cases pursuant to Wis. Stat. § 805.15(1). *State v. Henley*, 2010 WI 97, ¶ 5, 328 Wis. 2d 544, 787 N.W.2d 350. Nor can such claims be raised in a Wis. Stat. § 974.06 motion because they are neither jurisdictional nor constitutional. *See id.* ¶¶ 54–55. "Interest of justice" claims can only be considered by the circuit court if they are presented in a defendant's Wis. Stat. § 974.02 motion on direct appeal. *Id.* ¶ 63. As this is not such a motion, this Court lacks the authority to grant Avery any relief on this claim.

CONCLUSION

Avery has not pled sufficient facts to meet the three prongs of *Denny*, and the record conclusively disproves much of what he states, which means his *Brady* and newly discovered evidence claims could not prevail even if he established the facts he alleges at a hearing. Even if he had met his pleading burden, though, what he submitted did not establish he could meet the newly discovered evidence or *Brady* tests because he cannot show that there is a reasonable probability of a different result at trial if the jury were presented with Sowinski's or Rahmlow's evidence. This Court should deny Avery's motion without an evidentiary hearing.

Dated this 23rd day of November 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1221
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us