STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

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

DEFENDANT STEVEN AVERY'S SECOND SUPPLEMENT TO PREVIOUSLY FILED MOTION FOR RECONSIDERATION

Now Comes Defendant, Steven A. Avery, by and through his attorneys, Kathleen T. Zellner and Steven Richards, and hereby files the Second Supplement to his previously filed Motion for Reconsideration of this Court's order filed October 3, 2017. In support of this Second Supplement, Mr. Avery states as follows:

Introduction

Mr. Avery has been incarcerated for 4390 days for a murder he did not commit. On October 3rd, 2017, the Court summarily dismissed Mr. Avery's Motion for Post-Conviction Relief. The Court failed to rule on numerous issues raised by Mr. Avery in his petition. On October 6, 2017, Mr. Avery filed a Motion to Vacate the October 3rd, 2017 order informing the Court that an agreement had been reached between Mr. Avery's current post-conviction counsel and the Attorney General prosecutors to conduct additional scientific testing and to amend the petition. This Court never responded to that motion despite the fact that no objection was filed on behalf of the Attorney General.

The effect of the Court's failure to vacate its October 3, 2017, ruling is that it has unilaterally blocked all future scientific testing in the Avery case, in direct contravention of the April 4, 2007, order entered by Judge Willis. On October 23, 2017, Mr. Avery's current post-conviction counsel filed a Motion for Reconsideration of the Court's October 3, 2017, ruling. Mr. Avery raised new evidence in addition to pointing out that this Court made manifestly erroneous determinations of law and fact. Again, this Court did not respond. On October 31, 2017, Mr. Avery filed a Supplement to the previously filed Motion for Reconsideration. Mr. Avery filed an Amended Supplement to the previously filed Motion for Reconsideration on November 1, 2017. On November 2, 2017, Mr. Avery filed an Amendment to Group Exhibit 7 of his previously-filed Amended Supplement to the Motion to Reconsider. The Court did not respond to any of these filings. Today is Mr. Avery's last attempt to elicit a response from this Court. Tomorrow Mr. Avery will file his notice of appeal from the Court's October 3, 2017, order.

Brady Violation

"'[T]he 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.'" *State v. Harris*, 2004 WI 64, ¶ 12, 272 Wis. 2d 80, 680 N.W.2d 737 (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)). Evidence is "favorable" to an accused, when, "'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" *Id.* (quoting *United States v. Bagley,* 473 U.S.

667, 676, 105 S.Ct. 3375 (1985)). Evidence is "material" 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." *Id*. at ¶ 14 (quoting *Bagley*, 473 U.S. at 682).

On November 11, 2017, undersigned counsel, Kathleen Zellner, had a meeting with Mr. Avery's trial attorneys, Jerome Buting ("Mr. Buting") and Dean Strang ("Mr. Strang"). One of the purposes of the meeting was to determine whether certain evidence was disclosed to Mr. Avery's trial attorneys before his trial. During the meeting, it was discovered that, in fact, the State failed to disclose material exculpatory evidence related to Bobby Dassey's status as a potential suspect. Specifically, the State failed to disclose the report of a forensic analysis performed on a computer to which Bobby Dassey had access prior to and after Teresa Halbach ("Ms. Halbach") was murdered. Such evidence would have strengthened Mr. Avery's *Denny* motion, which was pending at the time that the computer forensics report should have been disclosed. Disclosure of the computer forensics report would have enabled Mr. Buting to meet the *Denny* standard by establishing a motive of sexual assault for the murder of Ms. Halbach and to introduce Bobby Dassey as an alternative suspect to the jury.

Mr. Buting's affidavit is attached to this Second Supplement as **Exhibit A**. Mr. Buting states that when Ken Kratz tendered discovery to Mr. Avery's defense, Mr. Kratz itemized the discovery in cover letters which accompanied the disclosure

of the documents. *See* **Exhibit A**, ¶ 3. By way of correspondence dated December 14, 2006, Mr. Kratz disclosed a large batch of discovery. Included in the discovery was a report from Special Agent Thomas Fassbender entitled, "Examination of Brendan Dassey Computer." The report number was DCI Report No. 05-1776/304, and the report was dated December 7, 2006. *See* **Exhibit A**, ¶ 4, and exhibit 1 to **Exhibit A**.

As described in Special Agent Fassbender's report, the State seized a computer from the Dassey residence on April 21, 2006. The report indicates that the computer was then transferred to Detective Mike Velie of the Grand Chute Police Department for forensic examination. Per Special Agent Fassbender's report, Detective Velie returned the computer to Special Agent Fassbender on May 11, 2006. The report further states that on a subsequent date, Special Agent Fassbender received from Detective Velie a CD titled, "Dassey's Computer, Final Report, Investigative Copy." The report also states that the CD "contained information on websites and images from the hard drive." *See* **Exhibit A**, ¶ 5, and exhibit 2 to **Exhibit A**.

Mr. Buting avers in his affidavit that neither the above-referenced CD nor Detective Velie's investigative report were turned over in discovery. The December 14, 2006, letter from Mr. Kratz likewise confirms by omission that neither document was disclosed to the defense in that batch of discovery. *See* **Exhibit A**, ¶ 6, and exhibit 1 to **Exhibit A**.

Mr. Buting likewise notes that Special Agent Fassbender's report indicates he did not book the CD or Detective Velie's report into evidence. Rather, the report states "the disc received from Detective Velie, as well as the hard copy pages of instant message conversations were maintained in Special Agent Fassbender's possession." *See* **Exhibit A**, ¶ 7, and exhibit 2 to **Exhibit A**. Thus, Mr. Buting did not observe the CD entitled "Dassey's Computer, Final Report, Investigative Copy" when he reviewed the evidence maintained by the Calumet County Sheriff's Office prior to Mr. Avery's trial. *See* **Exhibit A**, ¶ 8. To the best of Mr. Buting's recollection, he never saw the CD entitled "Dassey's Computer, Final Report, Investigative Copy." *See* **Exhibit A**, ¶ 9.

Although the State has never disclosed Detective Velie's "Final Report," the report must contain evidence favorable to Mr. Avery. As noted in Mr. Avery's Motion for Reconsideration (*see* pp. 46-48), Gary Hunt, a forensic computer expert, has performed an analysis of the Dassey hard drive. Mr. Hunt has further refined his analysis of the Dassey computer to isolate violent images of sexual acts that involve the infliction of physical pain and torture and an equally disturbing fascination with viewing dead female bodies.

Importantly, many of these searches were performed at times when only Bobby Dassey was home and able to use the computer. Bobby Dassey was the only family member at home during the week from 6:30 a.m. to 3:45 p.m. All other Dassey family members who lived at the residence were either at work or school during those hours. However, Scott Tadych ("Mr. Tadych") was observed driving

towards the Dassey residence in his green truck on several occasions during the time period. Mr. Avery never accessed the Dassey computer and did not have the password for the computer. Mr. Avery did not have a key to the Dassey residence and the residence was locked when no one was home. Mr. Avery only entered the residence with permission of a Dassey family member. Mr. Avery worked during the weekdays from 8:00 a.m.to 5:00 p.m. The Supplemental Affidavit of Steven A. Avery is attached and incorporated herein as **Exhibit D,** at ¶¶ 3, 5, 10.[1]

Mr. Buting describes the significance of the State's concealment of Detective Velie's "Final Report" in his affidavit. At the time the voluminous discovery was tendered on December 14, 2006, defense counsel was preparing to litigate a *Denny* motion to introduce evidence of third-party suspects at Mr. Avery's trial. Judge Willis ruled against the defense on this *Denny* motion because the defense failed to present any evidence of the motive for the murder. Had the defense been able to use Detective Velie's report to link Bobby Dassey to the violent, sexual, and deceased body images on the Dassey computer, the defense would have been able to establish sexual assault as the motive for Ms. Halbach's murder.

Violent, Sexual, and Deceased Body Images on the Dassey Computer Were Admissible Evidence in Mr. Avery's Trial to establish the Denny requirement of Motive

[1] Mr. Avery has given an affidavit wherein he states that he never made statements to Orville Jacobs about pornography on Barb's computer. Mr. Jacobs was planted in Mr. Avery's cell by law enforcement and Mr. Avery did not communicate with him about his case. Mr. Avery's attorneys wanted to inspect the Dassey computer and told him so in a telephone conversation. The Dassey computer was seized shortly after this telephone conversation. *See* Supplemental Affidavit of Steven Avery, **Exhibit D** at ¶ 9.

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

The defendant in *Dressler* argued that the videotapes and pictures were irrelevant and constituted inadmissible propensity evidence. The court disagreed. The fact that the defendant maintained a collection of videos and pictures depicting intentional violence was probative of the State's claim that he had an obsession with that subject. A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs were deemed relevant. *See* Wis. Stat. § 904.01 ("'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.")

The *Dressler* Court also rejected the defendant's argument that the videos and pictures were inadmissible propensity evidence. Although evidence of the general character of a defendant is inadmissible to prove he acted in conformity therewith, the above exception from § 904.04(2) was deemed to apply. The pictures depicting violence were offered to prove the defendant's fascination with death and

mutilation, and this trait is undeniably probative of a motive, intent, or plan to commit a vicious murder. The *Dressler* Court ultimately determined that although the videotapes and pictures may also have proved the defendant's bad character or propensity, the materials were offered for permissible purposes.

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

Sexual Assault as the Motive for Ms. Halbach's Murder

Mr. Hunt detected 667 searches for sexual images on the Dassey computer on weekdays when Bobby Dassey was the only member of his family at home. Of the 667 searches for sexual images, 562 were performed on just 10 weekdays, demonstrating the obsessively compulsive nature of Bobby Dassey's internet searches and his fascination with sexual acts that involve the infliction of pain, torture and humiliation on females and an equally disturbing fascination with viewing dead female bodies. *See*, Second Supplemental Affidavit of Gary Hunt, attached and incorporated herein as **Exhibit B** at ¶ 3; Second Supplemental Affidavit of Gregg McCrary, attached and incorporated herein as **Exhibit C** at ¶¶ 3-5.

The Dassey computer contained 128 images of sexual acts that involve the infliction of physical pain and torture as well as humiliation on females, and

mutilated, dead female bodies. *See*, Second Supplemental Affidavit of Gary Hunt, **Exhibit B** at ¶ 5.

Bobby Dassey was the only family member at home when these searches were typed on the Dassey computer, which was photographed in his bedroom when the Janda residence was searched on November 9, 2005 until deletions were made by a person hired by his mother Barb Tadych. SAO 1385-1390. The relevant searches are as follows:

a. 13 searches for terms describing forced penetration of sex toys and objects into vaginas, specifically: "big things in pussy," "huge dildo in pussys [*sic*]," "stretching pussy," "stretching pussy toys," and "woman's dildo;"

b. 13 searches for terms describing violent accidents, including violent car crashes with images of dead bodies, specifically: "accident," "car accident," "fast accident," "fast car accident," "ford tempo car accident," "race car accidents," and "seeing bones hot girls;"

c. 8 searches for terms describing drowned, dead, or diseased female bodies, specifically: "drowned girl," "drowned girl nude," and "drowned pussy;" and

d. 15 searches for terms describing the infliction of violence on females, including fisting and images of females in pain, specifically: "fist fucking sluts," "fist sex," "fisting," "Girl action hurts," and "Girl hurting."

Bobby Dassey cannot be excluded from the additional remarkably similar searches of the same categories that were typed into the Dassey computer when other family members may have been home:

a. 9 additional searches for terms describing forced penetration of sex toys and objects into vaginas, specifically:"slut useing [*sic*] sex objects," "Extreme anal toys," and "object pussy;"

b. 15 additional searches for terms describing violent accidents, including violent car crashes with images of dead bodies, specifically: "car accidents," "alive skeleton," and "skeleton;"

c. 5 additional searches for terms describing drowned, dead, or diseased female bodies, specifically: "diseased girls," and "rotton [*sic*];" and

d. 50 additional searches for terms describing the infliction of violence on females, including fisting and images of females in pain, specifically: "girls groming [*sic*] face," "fist fuck," "Girl moning [*sic*] face," and "girl guts."

See, Second Supplemental Affidavit of Gregg McCrary, attached and incorporated herein as **Exhibit C**, at ¶ 6; exhibit 1 to **Exhibit C**.

Mr. Avery would be eliminated from all but 15 of the 128 searches (11.7%) at issue simply by having been arrested on November 9, 2005. Mr. Avery states in his unrebutted affidavit that he never accessed or used the Dassey computer at any time, much less to search violent sexual images and dead bodies. *See,* **Exhibit D,** at ¶¶ 5-6. A forensic analysis done of Mr. Avery's computer revealed no searches of

sexual images, much less violent images and dead bodies. Brendan Dassey would be eliminated from all but 26 of the 128 searches (20.3%) at issue by having been arrested on March 1, 2006.

The State's concealment of the Velie report prejudiced the defense. The report would have provided the defense with the ability to meet the *Denny* standard, and therefore would have raised reasonable doubt resulting in Mr. Avery's acquittal. The existence of this new *Brady* violation undermines confidence in the verdict against Mr. Avery. At a bare minimum, Mr. Avery should be allowed to present this evidence of a significant *Brady* violation at an evidentiary hearing.[2]

Scott Tadych as a Potential Suspect

Gregg McCrary, current post-conviction counsel's police investigation and procedure expert, opines that Mr. Tadych was not thoroughly investigated as a potential suspect by law enforcement during Ms. Halbach's murder investigation, but he should have been for the following reasons:

a. Several incidents of violence against women were reported about Mr. Tadych, one of which resulted in a battery conviction on July 29, 1997. *See,* exhibit 4 to **Exhibit C**, at ¶ 13.

b. Mr. Tadych's multiple inconsistent statements severely undermined his credibility at trial. *See*, Motion for Reconsideration, at pp. 44-46.

[2] Further, in support of Mr. Avery's argument for new evidence of a *Brady* violation which concealed Ryan Hillegas's connection to the crime scene (*see,* 10/23/2017 Motion for Reconsideration, at pp. 48-49), Mr. Avery presents the affidavit of Steven Speckman (attached and incorporated herein as **Exhibit E**) as evidence that Ms. Halbach had her day planner in her vehicle when Mr. Speckman called her and — through reasonable inference — at the time of her death.

c. Mr. Tadych should have been investigated regarding his activities on November 3, 2005, in light of the anonymous handwritten note discovered by the Green Bay post office and reported to the Green Bay police department. Mr. Tadych worked at the Wisconsin Aluminum Foundry at 838 South 16th Street, Manitowoc, Wisconsin. The note specifically referenced a body being burned at 3:00 a.m. at an "alunamon [*sic*] smelter." SAO 6040. Mr. Tadych worked the third shift at the Wisconsin Aluminum Foundry. The note, which was never thoroughly investigated by law enforcement, is potentially of great evidentiary value because the note was sent on November 9, 2005, and it was not disclosed to the public until November 11, 2005, that Ms. Halbach had allegedly been burned in the Avery burn pit. *See* group exhibit 5 to **Exhibit C**, at ¶ 13. Current post-conviction counsel's investigator, James Kirby, has confirmed that Mr. Tadych's nickname at work was "Skinny," and, according to a current employee, many of the shift workers are not totally literate. It is a reasonable inference that a semi-literate employees might have misspelled the word "Skinny" in the note. *See,* Affidavit of James Kirby attached and incorporated herein as **Exhibit F**.

d. Mr. Tadych should have been investigated more thoroughly by law enforcement during the Halbach murder investigation. At a

minimum Mr. Tadych should have been asked to provide his DNA and fingerprints so that they could be compared to crime scene evidence.

e. Mr. Tadych's failure to respond to Kevin Rahmlow's text about seeing the Rav4 at the turnaround by the old dam in November, 2005, before the discovery of the Halbach vehicle on the Avery property, is also suspicious. *See,* Affidavit of Kevin Rahmlow, Exhibit D in the Motion for Reconsideration.

f. His recent telephone call with Mr. Avery demonstrates his knowledge that Ms. Halbach had left the Avery property on October 31, 2005. The telephone call also demonstrates that Mr. Tadych has a violent and uncontrollable temper. Mr. Tadych threatened to physically assault Mr. Avery and, even more disturbingly, put Mr. Avery "in the ground." *See,* Supplement to the Motion for Reconsideration, Exhibit 1 at p. 14.

Ineffective Assistance of Counsel

The United States Constitution and the Constitution of the State of Wisconsin guarantee the right to counsel. The right to counsel is more than the right to nominal representation. Representation must be effective. *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *State v. Koller,* 87 Wis.2d 253, 274 N.W.2d 651 (1979); *State v. Harper,* 57 Wis.2d 543, 205 N.W.2d 1 (1973).

Whether or not an attorney is experienced is not the criterion for determining whether counsel was effective in a particular case, and the fact that an attorney is ineffective in a particular case is not a judgment on the general competency of that lawyer. It is merely a determination that a particular defendant was not appropriately protected in a particular case. As Judge Bazelon has written:

> "Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly: the question is not whether the defendant received the assistance of effective counsel but whether he received the effective assistance of counsel. *In applying this standard, judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise.*"

Bazelon, *The Realities of Gideon and Argersinger,* 64 Georgetown Law J. 811, 822–23 (1976) (emphasis added).

Current post-conviction counsel has previously alleged that trial defense counsel was ineffective for their failure to consult with a blood spatter expert who would have opined that Steven Avery's blood was selectively planted in Ms. Halbach's vehicle; and that the rear cargo door blood spatter was the result of Ms. Halbach being hit on the head with a mallet or hammer as she lay on the ground next to the driver's-side rear wheel of her vehicle and not, as the State contended, from being tossed into the back of her vehicle. A blood spatter expert would also have prevented the defense from erroneously claiming the 1996 blood vial was the source of Steven Avery's blood discovered in Ms. Halbach's vehicle (P-C Mot. at ¶¶ 129-45).

Current post-conviction counsel has previously alleged that the trial defense

counsel was ineffective for their failure to present a ballistics expert who would have opined that if Ms. Halbach were shot through the skull by Item #FL, there would have been bone fragments embedded in #FL (P-C Mot. at ¶ 308).

On November 13, 2017, current post-conviction counsel met with trial defense counsel, Mr. Strang and Mr. Buting. Mr. Strang has provided an affidavit that concurs that he was ineffective in his representation of Mr. Avery by failing to retain blood spatter and ballistics experts. Affidavit of Dean Strang is attached and incorporated herein as **Exhibit G**. The failure of trial defense counsel to have presented blood and ballistics experts meets the criteria of *Strickland v. Washington* 466 U.S. 668 (1984) by making errors so serious that trial defense counsel was not functioning as the "counsel" guaranteed to Mr. Avery by the Sixth Amendment, and trial defense counsel's deficient performance prejudiced the defense so seriously as to deprive Mr. Avery of a fair trial with reliable results. Mr. Avery is entitled to an evidentiary hearing on the issue of ineffective assistance of trial defense counsel.

Conclusion

Wherefore, for the reasons stated herein and in his Motion for Reconsideration, his Supplement to the Motion for Reconsideration, his Amended Supplement to the Motion for Reconsideration, his Amendment of Group Exhibit 7 of the Amendment to the Motion for Reconsideration, and his § 974.06 motion, Mr. Avery respectfully asks that this Court vacate its order of October 3, 2017, order an evidentiary hearing, and grant any and all other relief deemed appropriate.

Dated: November 16, 2017

Respectfully submitted,

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