

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2017AP002288

STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	Case No. 05-CF-381
v.)	
)	Honorable Judge Angela Sutkiewicz
STEVEN A. AVERY,)	Judge Presiding
)	
Defendant.)	

**DEFENDANT-APPELLANT’S MOTION TO STAY APPEAL AND
REMAND FOR PETITIONER TO FILE A SUPPLEMENTAL POST-
CONVICTION MOTION DISCLOSING NEW EVIDENCE OF A BRADY
VIOLATION AND A THIRD-PARTY DENNY SUSPECT**

The Defendant-Appellant, Steven Avery (“Mr. Avery”), by his undersigned attorneys, Kathleen T. Zellner and Steven G. Richards, hereby moves this Court to stay this appeal and remand for Mr. Avery to supplement his post-conviction motion with a new witness affidavit establishing a *Brady* violation and a third-party *Denny* suspect. In support of said motion, Mr. Avery states as follows:

BRADY VIOLATION

1. On April 11, 2021, a new witness, Thomas Sowinski (“Mr. Sowinski”) came forward to Mr. Avery’s current post-conviction counsel and attested to the following: Mr. Sowinski was a motor-route driver for Gannett Newspapers, Inc. and delivered papers to the Avery Salvage Yard in the early morning hours of November

5th of 2005. Prior to delivering the newspapers to the Avery Salvage Yard, he turned onto the Avery property and witnessed two individuals, a shirtless Bobby Dassey (“Bobby”) and an unidentified older male suspiciously pushing a dark blue RAV-4 down Avery Road towards the junkyard. The RAV-4 did not have its lights on. After Mr. Sowinski drove by Bobby and the other individual and delivered the papers to the Avery mailbox, he turned around and drove back towards the exit. When he reached the RAV-4, Bobby attempted to step in front of his car to block him from leaving the property. Mr. Sowinski was within 5 feet of Bobby, and his headlights were on Bobby during this entire time. Mr. Sowinski swerved into a shallow ditch to escape Bobby and exit the property. After Mr. Sowinski learned that Teresa Halbach’s car was found later in the day on November 5, 2005, he realized the significance of what he had observed and immediately contacted the Manitowoc Sheriff’s Office and spoke to a female officer, reporting everything he has stated in his affidavit. The Officer said, “We already know who did it.” Mr. Sowinski provided his phone number and was told that the Manitowoc Sheriff’s Office would contact him, but it never did. Attached and incorporated herein as **Group Exhibit 1** is Mr. Sowinski’s affidavit and a photograph he marked of the location of the RAV-4.

2. Bobby was the State’s primary witness against Mr. Avery at his trial. During his opening statement, prosecutor Kratz explicitly informed the jury of the significance of Bobby’s putative observations on the date of Ms. Halbach’s disappearance:

You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive.

(696:104).

3. At trial, Bobby testified that he observed Ms. Halbach's vehicle pull up in his driveway at 2:30 p.m. on October 31, 2005. (689:36). Bobby then observed Ms. Halbach exit her vehicle and start taking pictures of his mom's maroon van right in front of his trailer. (689:37). Bobby testified that he then observed Ms. Halbach walking towards the door of Mr. Avery's trailer. (689:38). The following exchange occurred between Prosecutor Kratz and Bobby:

“Q: After seeing this woman walking toward your Uncle Steven's trailer, did you ever see this woman again?”

A: No.”

(689:39).

4. Bobby then testified that he took a three- or four-minute shower and then left his trailer to go hunting. (689:39). Bobby walked to his Chevy Blazer, which was parked between the trailer and garage. (689:39). Bobby testified that as he walked to his vehicle, he observed Ms. Halbach's vehicle still parked in the driveway. (689:40). Bobby further testified that he did not see Ms. Halbach or any signs of her. (689:40). Bobby testified that when he returned to his trailer around “five-ish,” Ms. Halbach's vehicle was gone. (689:41).

5. During his closing argument, Prosecutor Kratz once again emphasized the importance of Bobby's testimony and vouched for his credibility:

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.

(715:91).

6. To establish a *Brady* violation, a defendant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to an issue at trial. *State v. Harris*, 2004 WI 64, ¶ 13, 272 Wis. 2d 80, 680 N.W.2d 737 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). This court reviews *de novo* whether the facts of a case establish a *Brady* violation. *State v. Rockette*, 2006 WI App 103, ¶ 39, 294 Wis.2d 611, 718 N.W.2d 269. (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). There can be a due process violation “irrespective of the good faith or bad faith of the prosecution.” *Id.* (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). “The prosecution’s duty to disclose evidence favorable to the accused includes the duty to disclose impeachment evidence as well as exculpatory evidence.” *Id.* (citing *Strickler*, 527 U.S. at 280).

7. The State suppressed the evidence of Mr. Sowinski’s report to the Manitowoc Sheriff’s Office that he had witnessed Bobby and another individual in possession of and moving Ms. Halbach’s vehicle onto the Avery Salvage Yard after Ms. Halbach’s disappearance and prior to her vehicle’s discovery. The suppressed evidence from Mr. Sowinski was favorable to the defense and material to the pivotal issue in trial because it would have (1) destroyed entirely the credibility of Bobby as the State’s primary witness; (2) established that Bobby was directly involved in the

murder of Ms. Halbach; and (3) established that Bobby planted evidence to frame his uncle, Mr. Avery.

8. In *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), the Court noted, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” A “reasonable probability” is lower than a preponderance of evidence standard. It is demonstrated where the defense shows that the failure “undermine[d] confidence” in the conviction. *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006).

9. In the absence of the suppressed evidence presented in Mr. Sowinski’s affidavit, Mr. Avery did not receive a fair trial. Mr. Avery had a constitutionally guaranteed right to present a complete defense to the charges against him. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), *citing Chambers v. Mississippi*, 410 U.S. 284, 294–95 (1973). Mr. Avery was deprived of his constitutional right to present a complete defense because of this *Brady* violation committed by the State.

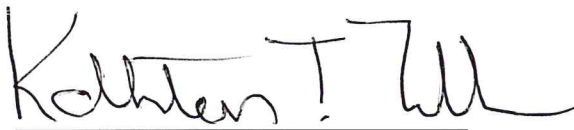
10. Additionally, the Sowinski affidavit greatly strengthens Mr. Avery’s third-party *Denny* claim because the Sowinski affidavit directly connects Bobby to the crime charged. *See State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

CONCLUSION

Wherefore, undersigned counsel respectfully requests that this Court enter an order staying this appeal and remanding the cause to the circuit court to permit Mr. Avery to pursue a supplemental postconviction motion in connection with Mr. Avery's discovery of previously suppressed evidence by the State.

Dated this 12th day of April, 2021.

Respectfully submitted,



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CERTIFICATE OF SERVICE

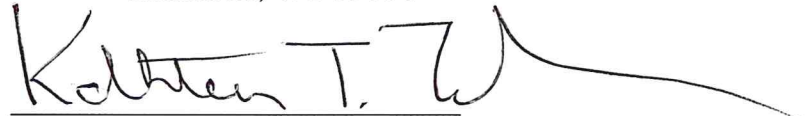
I certify that on April 12, 2021, a true and correct copy of Defendant-Appellant's Motion to Stay Appeal and Remand the Cause for Mr. Avery to supplement his post-conviction motion with a new witness affidavit establishing a *Brady* violation and a third-party *Denny* suspect was furnished via electronic mail and by first-class U.S. Mail, postage prepaid, to:

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Kathleen T. Zellner

STATE OF WISCONSIN,)
)
 Plaintiff,)
)
 v.)
)
 STEVEN A. AVERY,)
)
 Defendant.)

Case No. 05-CF-381
 Honorable Judge Angela Sutkiewicz,
 Judge Presiding

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.
2. I resided in Manitowoc, Wisconsin for over 20 years.
3. In 2005, I was employed as a motor route driver at Gannett Newspapers, Inc. and delivered papers in and around the Avery Salvage Yard. While delivering papers, I drove my personal car, which was a tannish-gold 4-door sedan. I cannot recall the make and model of the car at this time.
4. On Saturday, November 5, 2005, I was delivering papers on the Avery Salvage Yard in the early morning hours before sunrise. I drove down Highway 147 and turned left onto Avery Road. Soon after I turned onto Avery Road, I witnessed an individual who I later realized was Bobby Dassey and another unidentified older male pushing a dark blue RAV-4 down Avery Road on the right side towards the junkyard. Bobby Dassey was



shirtless, even though it was early November. The second man appeared to be in his 50's or early 60's, had a long grey beard, was wearing a worn puffy jacket, had a larger frame, and was around 6 feet in height. The RAV-4 did not have its lights on. Attached and incorporated herein as **Exhibit A** are photographs marked where I saw the RAV-4.

5. I drove down Avery Road towards the mailboxes, left the Herald Times in the mailbox, and turned back around. I felt very afraid as I approached the two individuals because Bobby Dassey attempted to step in front of my car, blocking my exit. I was within 5 feet of Bobby Dassey and my headlights were on the entire time. The older man ducked down behind the open passenger door. I swerved to the right and drove in the shallow ditch to avoid hitting Bobby Dassey. I called out, "Paperboy. Gotta go" because I was afraid for my safety. Bobby Dassey looked me in the eye, and I could tell with the look in his eyes that he was not happy to see me there. I knew that Bobby Dassey and the older individual were doing something creepy.
6. After I learned that Teresa Halbach's car was found on November 5, 2005, I contacted the Manitowoc Sheriff's Office and spoke to a female officer. I reported everything I have stated in this affidavit to the officer. The officer said, "We already know who did it." I provided my phone number and they said they would contact me soon. I never heard back from the police.
7. After watching Season 1 of Making a Murderer, I contacted Avery's trial attorneys to inform them of what I saw. I never heard back.
8. Nothing has been promised or given to me in exchange for this affidavit.

FURTHER AFFIANT SAYETH NAUGHT

Thomas Sowinski

Thomas Sowinski

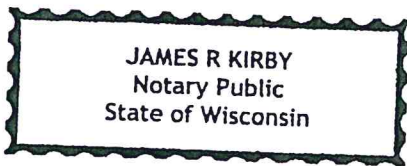
State of Wisconsin
County of MANITOWOC

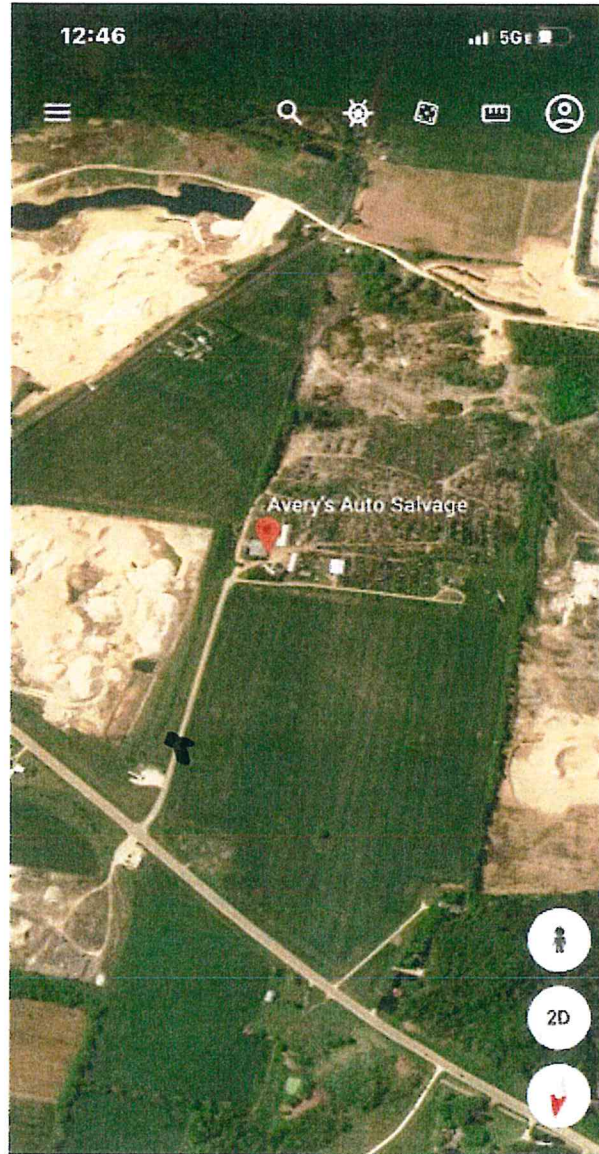
Subscribed and sworn before me
this 10 day of April, 2021.

James R Kirby

Notary Public

My Commission Expires: 7/29/2022





X Avery's Auto Salvage
Salvage yard in Manitowoc County, Wisconsin

Thomas Savitt

