STATE OF WISCONSIN CIRCUIT COURT SAUK COUNTY

STATE OF WISCONSIN,

Plaintiff

vs.

TERRY VOLLBRECHT,

Defendant

DECISION ON POST-CONVICTION MOTION FOR A NEW TRIAL

Case No. 1989 CF 15

The defendant, Terry Vollbrecht, was convicted on October 4, 1989 of sexually assaulting and intentionally killing Angela Hackl, west of Sauk City, Wisconsin, in the early morning hours of June 12, 1987. He was sentenced to life in prison and a consecutive sentence of 15 years in prison. Vollbrecht now moves the Court for a new trial on several grounds.

I. VOLLBRECHT'S CLAIMS

Vollbrecht makes the following claims.

A. Failure to disclose exculpatory materials

1. The State failed to disclose exculpatory materials related to Kim Brown, a potential third-party perpetrator, to Vollbrecht. These materials were:
    a. A Division of Criminal Investigation (DCI) report regarding an interview of Lee McQueen in which Mr. McQueen reports that Kim Brown discussed with him a desire to obtain woman to work for Brown as a prostitute, and that "Brown had talked about holding a woman by tying her up to a post until she agreed to work for him." (Ex. 61).

b. A DCI report regarding an interview of David Kenevan Jr. in which he reports that in the late winter or early spring of 1987, he was informed by Lee McQueen that Kim Brown stated "that it would be a good time to get some girls, tie them up, abuse them and then get rid of them." (Ex. 59)

c. A DCI report of an interview of Donna Davis, who was the wife of the owner of the construction company for which Kim Brown worked during the period of time of the Hackl and Nachreiner homicides, in which Davis provided a DCI agent with Kim Brown's work records for the period of time of both the Nachreiner and Hackl murders. (Ex. 62)

d. A copy of Kim Brown's work records that showed he worked from around 7:00 a.m. until around 5:00 p.m. on both June 11, 1987 and June 12, 1987. (Ex. 3)

e. A 1987 affidavit of William Hoeffler to DCI stating that Kim Brown asked him while they were in jail together after the Nachreiner homicide in 1987, "Have you ever been so fucked up you didn't know what you were doing?" Hoeffler also reported that while speaking of women, Brown stated that he liked "to chain them to a tree, light them on fire" and that he then moved his arm straight out, pointed his finger like a gun and said "boom". The affidavit also stated that "Kim frequently talked about chaining and tying up women and slapping them around. He would get excited and aggressive, his face would light up and he would laugh kind of excited." (Ex. 7).

f. A 1987 journal of William Hoeffler which basically contained much of the same things reported in his affidavit. (Ex. 8) Further, Mr. Hoeffler testified at the motion hearing that he remembered Kim Brown calling women derogatory names. Hoeffler adopted the statements in his affidavit and journal. He stated that he recorded his interactions with Kim Brown in attempt to help his, Hoeffler's, legal situation.

g. A 1987 affidavit of a Francis Lawver to DCI in which he states while in jail in 1987 with Kim Brown after the Nachreiner homicide, Mr. Brown stated in reply to Mr. Hoeffler, that it was better to "chain them up and when done with them, burn them." The affidavit also stated: "He (Kim Brown) told me he knew the Portage are like the back of his hand. That he knew every spot and hill in that area." (Ex. 9).

h. Kim Brown's presentence investigation (PSI) report in which Kim Brown stated: "Well, the only way I could figure of keeping her (Linda Nachreiner) there (at the scene of her murder) 'til I could figure out what to do would be to put [the chain] around her neck and then around the tree. I didn't have it tight enough to choke her, but she couldn't slip it off either." Brown had also tied Nachreiner's feet to the tree using a strip of her pants. Brown also stated that he had brought gloves to the scene to use as a gag but ultimately found them to be unsatisfactory. (Ex. 55, pp.14-16). Brown's PSI further stated that on the day of a the Gage burglary (another burglary that Brown was convicted of), he spent most of the day in Portage at several different bars. On the day of the Nachreiner

homicide, Brown spent time in Portage at a bar, and then after abducting Ms. Nachreiner, he went to several bars in Wisconsin Dells. The PSI also stated that he piled Ms. Gage's clothes on the floor and set them on fire. The PSI also disclosed an incident in 1976, reported by Terri Cappetillo, that Kim Brown came to her door one time with a knife asking for her brother-in-law which scared Ms. Cappetillo. The PSI disclosed that Brown read pornographic books, including the books *History of Torture, Chained & Raped Wife*, *The Captive Debutante, The Case of the Karate Sex Killer*, and the *Raped and Kidnapped Bride*. Brown's wife disclosed that Brown read the books repeatedly and masturbated while reading them, and that Brown would replace the books if something happened to them. (Ex. 55 p. 32).

i. The Nachreiner/Gage criminal complaint against Kim Brown which disclosed some details about both the Gage and the Nachreiner crimes. (Ex. 34).

j. A DCI report regarding the execution of a search warrant on Kim Brown's home in which the books *Captive Debutante, The French Mistress, Raped and Kidnapped Bride, The Case of the Karate Sex Killer,* and handcuffs were seized (Ex. 5); and a return of search warrant for Kim Brown's home showing the seizure of a .357 caliber revolver with cartridges, a hunting knife, rug and carpet samples, the books *Chained and Raped Wife* and *History of Torture*. (Ex. 4).

k. The books, *The History of Torture* (Ex. 19), *Raped and Kidnapped Brides* (Ex. 18), *The Captive Debutante* (Ex. 17), *Chained and Raped Wives* (Ex. 87). These books describe violent, sexual acts against women. (See appendix to Vollbrecht's brief)

2. The State failed to disclose exculpatory materials related to Tom Perschy, a potential third-party perpetrator, to Vollbrecht's defense attorneys.

   a. A DCI report that Michelle Boehnen reported on September 18, 1989, that sometime between 9:00 and 10:00 p.m. during June of 1987, she observed a blond female sitting in the front seat of a Sauk City squad car driven by Officer Thomas Perschy. She stated that she did not know Angela Hackl, but after seeing photos of her in the media, believed that the person she saw that evening was Angela Hackl. (Ex. 1)

3. The State failed to disclose exculpatory materials related to a flawed investigation to Vollbrecht's defense attorneys.

   a. A DCI report in which agents investigating the Hackl and the Nachreiner crimes decided on September 24, 1987, that "Based on the result of these discussions, it was agreed that after reviewing the facts in both investigations—there does not appear to be any similarities which would tie the two homicides to one suspect. The two murders appear to have been committed by different individuals." (Ex. 6).

B. **Newly discovered evidence.**

1. All of the above *Brady* material.

2. Norman Pepin's testimony that in November of 1993, while he was at Columbia Correctional Institution, Kim Brown told him that someone was being punished for the Angela Hackl homicide that didn't do it. Pepin testified that Kim Brown told him that he killed Angela Hackl by shooting her three times, and then hanging her in the tree with a tire chain at "The Pines" in Sauk City. Brown told Pepin not to say anything about this to anyone. At the motion hearing, Brown denied discussing the Hackl homicide with Pepin, and denied any involvement in the Hackl homicide.

Pepin further testified that in February of 1994, he wrote Vollbrecht a letter explaining his conversation with Kim Brown. Pepin was at Oshkosh Correctional at the time and Vollbrecht was at Columbia. Pepin stated that he didn't hear from Vollbrecht and sent another similar letter in March of 1994. Pepin testified that in 2008 or 2009, they spoke at Stanley Correctional Institution and Pepin then provided Vollbrecht's attorneys an affidavit of what he had heard Brown say.

3. James Schultz's testimony that sometime in 1992, shortly before Vollbrecht started working in the library with him, Schultz overheard someone he subsequently identified as Kim Brown tell another inmate that he raped, shot, and tied Angela Hackl to a tree, put brush around her, and was going to light her up but the lighter failed and he just threw the lighter away.

Schultz stated that he passed this information on to Vollbrecht sometime in 1992 and that Vollbrecht was not very interested in it. Schultz testified that he was helping Vollbrecht with his brief to the Wisconsin Supreme Court during this

time period. Schultz ultimately swore out an affidavit in December of 2009 regarding the Brown conversation that he allegedly overheard.

4. Mary Wagner's testimony that the VCR clock had never been set at their home, and therefore Robert Wagner could not have ascertained the time that he heard possible gun shots by reference to this clock, and that Robert Wagner was a habitual drug user during the period between the death of Angela Hackl and the time Wagner reported hearing gun shots and a car during the early morning hours of June 12, 1987. Wagner testified that she heard about the Vollbrecht case on NPR and then contacted Vollbrecht's attorneys in February of 2010. Ms. Wagner testified that she remembered that Vollbrecht's investigator, Charlie Fox, left a card in her door back in 1989.
5. DNA evidence which showed blood and seminal material on the sleeping bag on which Vollbrecht claimed that he and Hackl had consensual sex, and on vaginal swabs taken from Hackl's body. The DNA in the vaginal swabs matched Vollbrecht. None of the DNA matched Brown or Perschy.

C. **Interest of Justice Claim**

1. The real controversy had not been fully tried, which includes all the *Brady* material, the newly discovered evidence, and Scott Evert's testimony of meeting a young male and female near the marsh, where Vollbrecht claimed he and Hackl had had consensual sexual intercourse, in the early morning hours of June 12, 1987. . Evert informed investigators for Mr. Vollbrecht of this in 2000. Mr. Evert was interviewed by investigators in 1987, but only

about boards with nails in them on the road to the marsh. He was not asked if he saw anyone that evening near the marsh.

II. ARE VOLBRECHT'S CLAIMS BARRED UNDER WIS. STAT. §974.06 BECAUSE HE FAILED TO SHOW A SUFFICIENT REASON FOR NOT BRINGING THEM IN A PRIOR POST-CONVICTION PROCEEDING?

The first filter through which the above claims must first flow before further consideration is whether or not there is a sufficient reason for not bringing the claims in a prior post-conviction proceeding. Under Wis. Stat. §974.06(4), the defendant must raise all grounds for relief available to the defendant in earlier motions, and if such a ground is not raised, then that ground may not be raised again unless the court finds there was sufficient reason for either not asserting such claim or not adequately raising it. Wis. Stat. §974.06(4).

"[I]ssues cannot form the basis for a § 974.06 motion unless a 'sufficient reason' exists for the failure to allege or adequately raise the issue on appeal or in a previous § 974.06 motion." *State v. Henley*, 2010 WI 97, ¶ 52, citing *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). The goal of § 974.06 is finality. *Henley*, 2010 WI 97, ¶ 53.

Proceedings under Wis. Stat. § 974.06 are considered civil in nature and the burden of proof shall be on Vollbrecht. Wis. Stat. § 974.06(6).

The Court has held that the burden of proof referred to in § 974.06(6) is the standard of clear and convincing evidence. *State v. Walberg*, 109 Wis. 2d 96, 103-04, 325 N.W.2d 687 (1982). "The clear and convincing burden of proof is required to further the public policy of finality of judgments after the defendant has been given ample opportunity to challenge the conviction by direct remedies." *Id.* at 104.

Vollbrecht argues that the clear and convincing burden of proof only applies to the substance of his claims, and does not apply to whether a claim was available to be asserted at the time of an earlier post-conviction proceeding, or whether a sufficient reason exists as to a claim that was not raised or inadequately raised, in an earlier motion.

The Court has held that "The clear and convincing standard applies in cases where public policy requires a higher standard of proof than in the ordinary civil action." *Walberg*, 109 Wis. 2d at 102. The Court continued, "Because the conviction being challenged has been secured in a proceeding whereby the defendant was protected by the beyond a reasonable doubt standard of proof, and the motion is available only after other post-conviction remedies have been unsuccessful or not utilized, public policy requires that the defendant bear the heavier burden in order to get relief from such a finalized conviction. The clear and convincing burden of proof is required to further the public policy of finality of judgments after the defendant has been given ample opportunity to challenge the conviction by direct remedies. *Walberg*, 109 Wis. 2d at 104.

The Court believes that policy of finality of judgments, as annunciated above, as well as the discouragement of piece-meal post-conviction litigation, supports the clear and convincing standard for not only the substance of a Wis. Stat. §974.06 motion, but also for a Court deciding whether or not a claim was available to be asserted at the time of an earlier post-conviction motion or whether a sufficient reason exists as to why a claim was not raised, or inadequately raised, in an earlier motion.

Vollbrecht brought a direct appeal of his conviction in 1991. On May 9, 1991, the Court of Appeals issued a decision denying relief from the judgment of conviction. Vollbrecht then filed a Wis. Stat. §974.06 motion on January 13, 1992. Hearings on that

motion were conducted on January 30, 1992 and March 11, 1992. The trial court decision was filed on June 22, 1992. The Court of Appeals affirmed the trial court on March 9, 1993.

The Court rules that any material that would have supported a post-conviction claim that was in existence before March 11, 1992 should have been brought by an amended post-conviction motion. The final hearing on the 1992 post-conviction motion hearing was on March 11, 1992. If appellate counsel had knowledge of any claims prior to March 11, 1992, the court believes that it would have been reasonable to raise those in an amended post-conviction motion in 1992. Further, the Court believes that Vollbrecht would have sufficient reason not to bring claims that came to his knowledge after March 11, 1992, because the evidence was closed on his first Wis. Stat. §974.06 post-conviction motion and the matter was then under consideration by the circuit court.

The Court will now examine the evidence as it relates to the above-identified claims. Robert Christianson testified that he was Warren Kenney's law partner at the time Vollbrecht had his trial. Kenney was Vollbrecht's trial attorney. Christianson stated that he consulted on this case with Mr. Kenney. He stated that he did not see any report regarding Michelle Boehnen stating that she saw someone resembling Hackl with Tom Perschy on or around the time Hackl was murdered. He testified that would have been critical information at the time of trial as they were attempting to get evidence of Perschy as a possible third part suspect introduced at trial. Further he testified that he didn't see any reports related to Kim Brown in the Vollbrecht file. Christianson testified that he still had a file labeled "Vollbrecht" in his office, but there was not anything other than miscellaneous items in it. Christianson believed that Mr. Kenney could have taken the

file with him when Kenney retired in 2000. Christianson didn't think Vollbrecht's second group of post-conviction attorneys had ever obtained a copy of the Vollbrecht trial file, but he didn't know if these attorneys obtained a copy of the file from Kenney. Further, he testified that it was usual practice to retain a copy of any file forwarded to new counsel.

Charles Fox testified that he was an investigator working with Attorney Kenney on the Vollbrecht defense. Fox testified that he would receive any reports that Attorney Kenney would receive, and review them for the possibility of further investigation. Fox testified that he had a close working relationship with Kenney on this case. Fox testified that he never saw the Boehnen report regarding Perschy and Hackl (Ex. 1). Fox didn't see the report related to Bruce Henn about possibly seeing a Sauk City Police Car (Ex. 2). He testified that he stopped investigating Kim Brown. He believed that Brown had an alibi by being at work. Fox testified that he did not see a DCI report regarding Kim Brown's work record (Ex. 3). Fox did not see the DCI report regarding a return of a search warrant (Ex. 4). He did not see the report of the additional books recovered from Kim Brown's residence (Ex. 5). Fox didn't see the report regarding the DCI conclusion that the Hackl and Nachreiner homicides were not related (Ex. 6). He didn't see the affidavit of Mr. Hoeffler (Ex. 7). Mr. Fox did not see the Hoeffler journal (Ex. 8). Fox didn't see the affidavit of Mr. Lawver (Ex. 9). Fox believed he had access to all the information Attorney Kenney had. Fox testified that he did no investigation into Kim Brown, including reviewing the Nachreiner case file in Adam's County.

Attorney Jack McManus testified that he was Vollbrecht's primary attorney for his first Wis. Stat.§ 974.06 motion. Attorney McManus testified that he requested the entire trial file from Attorney Kenney, and as far as he knew, received it. McManus

testified that he never saw the DCI report in which Boehnen states she may have seen Perschy with Angela Hackl on the evening of her murder. He stated that that report, he believed, would have resulted in an acquittal. He also did not recall seeing anything regarding Kim Brown, as the name was unfamiliar to him.

Diana Felsman testified that as a law student she worked on the Vollbrecht case with the Innocence Project from fall of 1998 until May of 2000. She testified that she made an open records request with DCI and the Sauk County Sheriff's Department and received a report of a statement given by Michelle Boehnen and Bruce Henn. She testified that she spoke with Attorney Kenney on February 9, 2000. She wanted to compare the documents she had with those Attorney Kenney had. Ms. Felsman testified that she had Kenney's file before meeting with him and had indexed it on February 1, 2000. The Kenney file was in the custody of the law school for a period of time. She looked with Mr. Kenney through his file and did not find the Boehnen document regarding Perschy and Hackl being together. She was not able to find any documents regarding Kim Brown or the Nachreiner homicide. She then indexed Kenney's file (Ex. 12). She did not find any report from DCI concluding there was not any evidence linking the Hackl and Nachreiner homicide. There were no reports regarding Mr. Lawver or Mr. Hoeffler.

On cross-examination, Ms. Felsman stated that Kenney told her if a document was not in the file, he didn't have it. Ms. Felsman also testified that the documents that she indexed were police reports and not necessarily any legal pleadings. Further, she testified that she apparently put together a memo regarding what Attorney Kenney could

have known about Kim Brown from the Brown criminal complaint and search warrants. (Ex. 50).

Ion Meyn testified that he is currently one of the attorneys for Vollbrecht, and works for the Innocence Project. He testified that exhibit 62, the DCI report of Donna Davis regarding Kim Brown's employment, was obtained by the Innocence project in April of 2010; that exhibit 59 which was a DCI interview of David Kenevan was obtained by the Innocence Project in April 2010; that exhibit 42, a report of a Donald Davis that Lee McQueen stated that Kim Brown had told him about a farmhouse in which he wanted to keep woman, tie them up, and get rid of them was first obtained by the innocence project in April 2010; that exhibit 61, a DCI report of an interview of Lee McQueen was first obtained by the Innocence Project in April 2010; and that exhibit 63, a DCI report of an interview of Cindy Brown was first obtained by the Innocence Project in April 2010.

The Court, based on the testimony of Ms. Felsman and Exhibit 50, does not find by the preponderance of the evidence, much less by clear and convincing evidence, that Attorney Kenney did not have in his possession the criminal complaint against Kim Brown (ex. 34) and the search warrants issued for the Kim Brown residence along with the returns on those search warrants at the time of Vollbrecht's trial. Exhibit 4, the search warrant return for the first search of the Brown residence, shows that the book, *History of Torture* and *Chained and Raped Wife* was seized. The second search warrant return shows the seizure of handcuffs and books, including, *The Captive Debutante*, and *Raped and Kidnapped Bride*. Felsman, in exhibit 50, notes the handcuffs and "books related to bondage, torture and rape". (ex. 8). The handcuffs mentioned by Felsman in exhibit 50

shows that the second search warrant and return were in Kenney's file. The return of the first search warrant has the book *History of Torture* and *Chained and Raped Wife*, which matches Felsman's description in exhibit 50 of a book related to bondage and torture, which implies they also had the first search warrant and return. Further, the Court finds it more probable that if they received the second search warrant and return, they would also have received the first search warrant and return.

The defense argues that the existence of these documents in Mr. Kenney's file do not prove that he had them before or after the trial. The Court finds that it is more probable than not that a trial attorney would have obtained these documents while actively representing the defendant, and not after the defendant was convicted. Regardless, if Kenney had these documents in his file, he had to have them prior to the March 1992 post-conviction motion because he was no longer Vollbrecht's attorney at the time of that motion and would have had no reason to add to the Vollbrecht file.

A stipulation was entered into between Vollbrecht and the State, in which the parties agreed that the State could find no documentation in its files that the following items had been turned over to the defense prior to trial; the Boehnen report (Ex. 1), the Davis report (Ex. 3), the search warrant return (Ex. 4), the DCI report regarding search warrant (Ex. 5), the William Hoeffler affidavit (Ex. 7), the Francis Lawver affidavit (Ex. 9); the DCI report (Ex. 10), the criminal complaint against Kim Brown (Ex. 34), and that it was the practice of DCI to identify in its correspondence all items turned over to the defense. (Ex. 73).

The Court finds that Vollbrecht has failed to prove by the preponderance of the evidence, much less by clear and convincing evidence, that the Brown criminal complaint

and both search warrants and returns were not in his trial attorney's file at trial. Therefore, these documents cannot be *Brady* materials or newly discovered evidence.

The Court further finds, by clear and convincing evidence, that the alleged *Brady* claims, with the exception of those related to the Brown criminal complaint and search warrant as discussed above, were not available at the first Wis. Stat. §974.06 motion in 1992. The DCI policy and lack of any evidence showing the disclosure of the alleged *Brady* materials, and the testimony of Christianson, Fox, Felsman, and McManus, that they did not know of the existence of these documents, and the testimony of Meyn as to when he received various documents provides clear and convincing proof that they were never provided by the State before the first Wis. § 974.06 motion.

Additionally, the Court believes that the prosecutor representing the State at the Vollbrecht trial misunderstood his obligation in disclosing *Brady* material, further providing evidence that the above described evidence was not disclosed. He stated: "The case law makes it very clear that the defense is entitled to exculpatory evidence, and there's a fairly high standard for what that means. It's evidence that clearly indicates, if you will, the guilt of a third party or absolutely minimizes the guilt of the defendant. We don't see that sort of evidence in our files." (Trans. 8/9/1989, p. 16-17.)

Further, the Court finds sufficient reason for Vollbrecht not to search for additional evidence from DCI's Nachreiner homicide file because of the prosecutor's assurance at a discovery motion hearing prior to the Vollbrecht trial that the State had nothing that would implicate Kim Brown on the Vollbrecht homicide.

The Court finds, by clear and convincing evidence, that the allegation of newly discovered evidence related to Norman Pepin's testimony regarding a confession of Kim

Brown was first discovered by the defense in 1994 and is not barred by Wis. Stat.§974.06(4). Pepin testified that he sent two letters informing Vollbrecht of this information in early 1994. He stated that he didn't get a response. There is no evidence contradicting Mr. Pepin as to when that information was relayed to Mr. Vollbrecht.

The Court also finds by clear and convincing evidence that the statement of James Schultz that he overheard Kim Brown state that Brown killed Angela Hackl is also not barred by Wis. Stat. § 974.06(4). The date of the conversation between Schultz and Vollbrecht had to have been sometime after May 21, 1992, when Vollbrecht started working as a library clerk and 1993, as Schultz testified that he told Vollbrecht about Brown's statement while Schultz was a law clerk at Columbia Correctional Institution and during the time that Vollbrecht was working on his appeal to the Wisconsin Supreme Court. Schultz testified that he was at Columbia until sometime in 1993. Documents were filed with Vollbrecht in the Wisconsin Supreme Court in July of 1993, after the Court of Appeals affirmed the denial of his first Wis. Stat. § 974.06 motion. (Ex. 101). The Schultz statement is not barred by Wis. Stat. § 974.06(4).

The last claim is newly discovered evidence related to Mary Wagner's testimony regarding the clock and Robert Wagner's drug use at the time of Hackl's murder. The State argues that Robert Wagner's credibility had already been litigated at Vollbrecht's first Wis. Stat. § 974.06 motion, and he should be precluded from raising it again in this motion. The Court believes that the current claim involving the credibility of Robert Wagner is sufficiently different as "the form and nature of the evidence supporting the arguments are dramatically different". *State v. Edmunds*, 2008 WI App. 33, ¶11.

In the first Wis. Stat. § 974.06 motion, Vollbrecht's claim was an ineffective assistance of counsel claim for failure to investigate Mr. Wagner's fishing friends on the night he reportedly heard the gunshots. In this claim, he is making a newly discovered evidence claim involving different evidence—the setting of a VCR clock and Mr. Wagner's drug use. Based on the testimony of Mary Wagner, the Court finds by clear and convincing evidence that she first informed the defendant, through his attorneys, of what she knew about the clock and Robert Wagner's drug use, sometime in February 2010. Therefore, the Court does not find that this claim is barred by Wis. Stat. § 974.06(4).

III. VOLLBRECHT'S *BRADY* CLAIMS

Vollbrecht is entitled to a new trial based on a *Brady* claim that the State failed to disclose exculpatory material, if he shows by clear and convincing evidence that the State failed to disclose evidence favorable to the accused and material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution. Evidence is favorable to an accused if disclosed and used effectively, it may make the difference between conviction and acquittal. It encompasses both exculpatory and impeachment evidence. *State v. Harris*, 2004 WI 64, ¶12. Further, the evidence needs to have been in the exclusive possession and control of the State. *State v. Amundson*, 69 Wis. 2d 554, 573 (1975). The individual prosecutor has the responsibility to learn of any favorable evidence known to others acting on the government's behalf in the case. *Kyles v. Whiteley*, 514 U.S. 419, 437 (1995). The materiality determination is not made by considering each piece of evidence on its own, but by considering the likely net effect of all undisclosed evidence. *Kyles*, 514 U.S. at 437-438.

A. Did the State Fail to Disclose the Alleged *Brady* Material?

First, as discussed above, the Court has already found that Attorney Kenney had in his possession the Brown criminal complaint regarding the Gage burglary and the Nachreiner homicide, and the two search warrants and their returns. If Attorney Kenney obtained them from the State, or through his own investigation, is irrelevant for this analysis. The complaint and search warrants contained information regarding the books. Although Vollbrecht may not have had the books themselves, he knew the titles of them and the nature of them based on the titles. He could have obtained them, as he did for this motion, through his own investigation. He also could have spoken with Brown's wife regarding Brown being the reader of these books. The Court finds that Vollbrecht has not proven by clear and convincing evidence that these documents were not produced by the State, or that these documents were in the sole possession and control of the State.

Based on the discussion above regarding whether or not Wis. Stat. §974.06(4) barred various claims, the Court finds by clear and convincing evidence that the DCI Lee McQueen report (Ex. 61), the DCI David Kenevan report (Ex. 59), the DCI Donna Davis report (Ex. 62) with Kim Brown's work records (Ex. 3), the Hoeffler Affidavit (Ex. 7), the Hoeffler journal (Ex. 8), the Lawver affidavit (Ex. 9), the Brown PSI (Ex. 55), the DCI Boehnen report (Ex.1), and the DCI homicide connection report (Ex. 6) were not produced by the State prior to trial or prior to Vollbrecht's first Wis. Stat. § 974.06 motion.

Further, the Court finds by clear and convincing evidence that these alleged *Brady* documents were in the exclusive possession and control of the State. These documents came from the DCI Nachreiner homicide file and the DCI Hackl homicide file. The documents were in the possession of DCI and some were also in the possession of the

Adams County Sheriff's Department. They were not in the possession of Vollbrecht, or a third party where Vollbrecht would have had knowledge of them and could have obtained them. (See for example, *State v. Cole*, 50 Wis. 2d 449, 457 (Wis. 1971), the type of gun and car in possession of defendant at arrest; *State v. Amundson*, 69 Wis. 2d 554, 573-574 (Wis. 1975), defense witness where the witness is available to the defense and the record fails to disclose an excuse or reason for the failure to question the witness.) Further, Vollbrecht was affirmatively informed by the prosecutor that the State did not have any evidence connecting Kim Brown to the Hackl homicide—a representation which the defense could have reasonably relied upon. (August 9, 1989 Trans., 4).

The State argues that the PSI information was not within the exclusive possession and control of the State because they no longer had the PSI after it was returned to the Court after Kim Brown's sentencing. That argument must fail, because the State, specifically the Brown prosecutor, a fellow prosecutor within the Department of Justice, possessed the information within the PSI, if not the PSI itself. A prosecutor is responsible for knowledge of the material known to law enforcement, and therefore, must certainly be responsible for information possessed by another prosecutor within the same prosecutorial organization. A prosecutor has a duty to disclose exculpatory evidence regardless of whether or not the evidence was in written form. For example, if a key witness informs a police officer that he or she lied and the officer does not write a report documenting this statement, and the prosecutor knows of this statement, the prosecutor surely has the duty to disclose this to defense counsel. See *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. N.Y. 2007).

B. Was the Material Favorable to the Defendant?

The next factor is whether or not the material is favorable to the defendant. Evidence is favorable to the accused if it is exculpatory or impeaching. *Harris,* 204 WI 64, ¶15. The claims based on undisclosed exculpatory evidence relate to the possibility that Kim Brown killed Angela Hackl, the possibility that Thomas Perschy killed Angela Hackl, and the existence of a flawed investigation.

The DCI report regarding Lee McQueen is the first document that was not disclosed. (Ex.61). This document memorializes an interview of Lee McQueen in which it was reported that he said "Brown had talked about getting women to work for him to prostitute themselves as Brown would be the pimp and that he could make money doing that. He also related that Brown had talked about holding a woman by tying her up to a post until she agreed to work for him. McQueen related that most of this talk was bar talk and he thought that Brown was saying it in a joking manner and not serious about what he was saying…." The report further noted that Brown would frequent bars in the Portage area. Mr. McQueen died in 2000. (Ex. 56). The Court finds by clear and convincing evidence that this document is favorable to Vollbrecht as it provides a motive for Kim Brown for abducting and tying up woman. Hackl's body was found hanging with a chain around her neck to a tree. This evidence supports the argument that Brown had a general misogynous motive and did not kill Hackl for a victim specific motive such as animus or jealousy. The Court finds it favorable to the defense.

The next item of evidence is the DCI David Kenevan report (Ex. 59). This report included a statement of Mr. Kenevan of what Mr. McQueen told him about what Kim Brown had told McQueen. The statement was: "…it would be a good time to get some girls, tie them up, abuse them and then get rid of them." Again, for the same reasons

discussed above for Kenevan's actual statement, the Court finds, by clear and convincing evidence, that this report is favorable to the defense.

The next item is the DCI Donna Davis report (Ex. 62) with Kim Brown's work records (Ex. 3). This work record would have shown that on both June 11, 1987 and June 12, 1987, Kim Brown was clocked into work in Portage at about 7:00 a.m. to 5:00 p.m., and would not have been working from 5:00 p.m. on June 11, 1987 until about 7:00 a.m. on June 12, 1987, the period of time that Angela Hackl was thought to have been killed. This provides evidence of opportunity for Kim Brown to have been the murderer of Angela Hackl. The Court finds it to be favorable to the defense by clear and convincing evidence.

The next items to be considered are the Hoeffler Affidavit (Ex. 7) and the Hoeffler journal (Ex. 8). These items contained statements that Kim Brown said that he liked to take women and "chain them to a tree, light them on fire." These items also documented that Brown would frequently talk about chaining women and tying them up and slapping them around. The documents report that Brown would get excited and aggressive while talking about this. Hoeffler testified at the motion hearing in line with these documents. This material again would be evidence of a general motive for harming woman, and a specific motive for chaining them to a tree and lighting them on fire. Again, Hackl was chained to a tree, with brush put around her, arguably, in an attempt to burn her. The Court finds this evidence to be favorable to the defense by clear and convincing evidence.

The next item of evidence is the Lawver affidavit (Ex. 9). In this affidavit, Lawver states that Brown stated when discussing women that he thought rather than

slapping them it was better to "chain them up and when done with them, burn them." He also stated that he knew the Portage area like that back of his hand and knew every spot and hill in that area. Again, the Court finds that it is favorable for the defense for Kim Brown's general motive by clear and convincing evidence. The Court does not find by clear and convincing evidence that the fact that Brown knew the area around Portage to be relevant to the Hackl homicide as her body was found west of Sauk City and not around Portage, and therefore this statement is not favorable to the defense.

The next item of evidence is the parts of the Brown PSI (Ex. 55) in which Kim Brown discusses how he chained Ms. Nachreiner to a tree by her neck after assaulting her and before shooting her, and how he used a piece of her pants to tie her feet to a tree. (Nachreiner's body was found with part of her pants tied to her leg.) Brown also stated that he brought gloves to the scene of the Nachreiner homicide to use as a gag, but found them to be unsatisfactory for the purpose. Also in Brown's PSI was information regarding the Gage burglary, and that he went to bars on the day of the Nachreiner murder. The PSI also disclosed an incident in 1976 reported by a Terri Cappetillo that Kim Brown came to her door one time with a knife asking for her brother-in-law which scared Ms. Cappetillo.

The Court finds by clear and convincing evidence that the information regarding Nachreiner being chained to a tree by her neck is favorable evidence to the defendant as that information may provide a pattern similar to the Hackl homicide as Hackl was found chained to a tree by her neck. Further, Brown's statements that Nachreiner's feet were bound to a tree also shows a more tenuous link to the Hackl homicide as there were a pair of ripped shorts (not panties) found hanging on one of Hackl's feet. (Trial trans. p. 501,

549, 572). Therefore, the Court finds by clear and convincing evidence that these statements were favorable to the defense.

The Court does not find anything else in the PSI to be favorable to Vollbrecht by clear and convincing evidence. First, the Court does not find by clear and convincing evidence that the evidence that Brown had brought gloves to use as a gag to the Nachreiner homicide was favorable to the defendant as there is no evidence that the gloves found in the Hackl case had any connections with the Hackl homicide. Using the other acts analysis under *State v. Sullivan*, discussed below, the court does not find that the details of the Gage crime are probative of motive or identity of the perpetrator of the Hackl homicide, as the Gage crime was a burglary and arson involving the burning of women's clothing and photographs, but not an actual woman. Hackl was raped and murdered and not burglarized. Further, any probative value would be substantially outweighed by confusion of the issues, the danger of unfair prejudice, including the concern that this evidence would be used as propensity evidence, and confusion of the issues. It would not have been admissible at trial.

Likewise, the Court does not find any connection between the Terri Cappetillo incident and the Hackl homicide because the Cappitillo incident was a harassment or threat incident, and not a rape and homicide. Therefore, the Court does not find that these other acts are probative to the issue of identity or motive, and any probative value would be substantially outweighed by the confusion of the issues, and the danger of unfair prejudice.

The next item is the DCI Boehnen report (Ex.1). As Tom Perschy was put forth by the defendant as a third party assailant in the case, and was the subject of a motion and

appeal after trial, the Court finds by clear and convincing evidence that this report was favorable to the Vollbrecht as it provides evidence of a connection between Perschy and Hackl for Perschy to be a third-party suspect in the Hackl homicide.

The next item is the DCI homicide connection report (Ex. 6). This report states that the investigators concluded: "there does not appear to be any similarities which would link the two homicides (Hackl and Nachreiner) to one individual." The Court finds that this information is conditionally favorable to Vollbrecht by clear and convincing evidence. It is favorable only if evidence of Kim Brown as a third-party perpetrator would be allowed into evidence, as it could then be used to cross-examine the principal investigator in the Hackl homicide for failing to recognize the similarities between the two homicides. Vollbrecht argues that this report is evidence of a faulty investigation in general. However, the Court finds that cross-examination on the similarities between the Nachreiner and Hackl homicide would have been very limited if the evidence of Kim Brown as a possible third party perpetrator was not allowed. Therefore, the Court finds that this report is additional conditional *Brady* evidence related to Kim Brown and will consider it with the other Kim Brown related materials.

C. Would Evidence of Kim Brown Been Admissible Evidence Under *State v. Denny* at Vollbrecht's Trial

The Court must now decide whether the sum total of this claimed exculpatory evidence regarding Kim Brown was material to the guilt or innocence of Vollbrecht. The first question is whether or not any of this evidence of a known third party would have been admissible at Vollbrecht's trial had it been disclosed. If it would not have been admissible, it could not have been material to Vollbrecht's guilt or innocence.

The general rule is that evidence of motive of a known party other than the defendant to commit the crime can be excluded when there is no other proof directly connecting that person with the offense charged. There must be more than general proof of opportunity and criminal disposition. There must be, in addition, evidence directly connecting the third person with the offense charged. There must be a "legitimate tendency" that the third person could have committed the crime. To show "legitimate tendency," a defendant is not required to establish the guilt of third persons to sustain a conviction, but evidence that simply affords a possible ground of suspicion against another person is not be admissible. "The "legitimate tendency" test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime. As long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence is admissible. *State v. Denny*, 120 Wis. 2d 614, 622-624 (Ct. App. 1984).

The defense argues that sufficient evidence has been shown to satisfy *Denny*. The State argues that both the *Denny* and the "other-acts" test, pursuant to *State v. Scheidell*, 227 Wis. 2d 285, 305-306 (1999), have to be met before evidence that Kim Brown was possibly the perpetrator would be allowed. The Court believes that the ultimate frame-work the Court uses is the test under *Denny* for known third party perpetrators. However, because Vollbrecht argues that Brown's murder of Linda Nachreiner was similar to the Hackl homicide providing evidence of the identity of Hackl's murderer, the Court also applies the "other-acts" evidence test regarding identity, using the analysis under *State v.*

Sullivan, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), to determine if the "other-acts" evidence provides evidence that directly connects Brown to the Hackl homicide. The Court believes that the *Denny* test is the most demanding test as both motive and opportunity have to be proven, in additional to some evidence that directly connects the third person to the crime charged. (See *Scheidell*, 227 Wis. 2d at 296-97.)

First, the Court considers Kim Brown's motive to kill Angela Hackl. Motive refers to a person's reason for doing something. (See Criminal Jury Instruction 175). The original trial court found no specific motive for anyone in the case—Vollbrecht included. The Court finds the motive for the crime was to sexually assault Hackl and then kill her to cover it up, or to perpetrate violence on Hackl through rape and murder. Hackl's homicide had evidence of a sexual motive as she was found almost totally naked, with torn clothing. She was killed by being shot in her back. Her body was found hanging in a tree by a chain looped around her neck and with brush pulled around her. (Described by the prosecutor at trial as follows: "If you put a match to that, you would have a human sacrifice." Trial Trans. P. 1677).

Mr. Hoeffler and Mr. Lawver testified that Brown stated in 1987 that he liked to chain women to a tree, slap them around, light them on fire, and shoot them. At the motion hearing, Brown denied that he said those things. Hoeffler and Lawver's testimony would be admissible as non-hearsay prior inconsistent statements. Wis. Stat. §908.01(4)(a)1. The Court finds that these alleged statements of Brown provide strong specific evidence of motive to sexually assault and kill Angela Hackl.

The Court finds that Hoeffler or Lawver were both worthy of belief, in other words, within the realm of believability such that a reasonable juror could believe the

evidence. *State v. Carnemolla*, 229 Wis. 2d 648, 661-663, 600 N.W. 2d236 (Ct. App. 1999); *State v. Kiviolja*, 225 Wis. 2d 271, 296, 592 N.W.2d 220 (1999). First, it must be noted that these statements directly contradict Brown, who denied making these statements. Brown was convicted of eight crimes, which bears on his credibility. The Court cannot find that Brown was the paragon of truth, making Hoeffler's or Lawver's statements contradicting Brown unworthy of belief. Further, Hoeffler's and Lawver's statements at the motion hearing were made under oath, and without any apparent reason to fabricate. Neither Hoeffler, nor Lawver, knew Vollbrecht. Neither was attempting to curry favor with anyone, and neither were coerced or pressured to testify. Neither Hoeffler nor Lawver testified much beyond what they had written down in a journal or an affidavit near the time that Brown's statements were made. The Court believes that Hoeffler's and Lawver's statements had indicia of credibility persuasive to a reasonable juror.

The evidence that Kim Brown possessed and read books involving torture, bondage, chaining and raping of women, although not a viable *Brady* claim on its own, provides additional evidence of motive for Kim Brown to kill Hackl.

As for opportunity, the Court finds that Kim Brown resided near Oxford, Wisconsin, and the Nachreiner homicide was about 7 ¼ miles from his house (Ex. 34). Hackl was found dead outside of Sauk City, Wisconsin at a place approximately 30 miles from where Nachreiner's body was found. (Trans. 6/17/10, p. 50.). Therefore, Brown lived about 30 miles from where Hackl's body was found. Brown worked out of Portage, which was within approximately 30 miles of both homicides. According to Vollbrecht, Hackl was alive when she left him at around 3:30 a.m. in Prairie du Sac (he believed the

earliest would have been 3:15 a.m.). The evidence adduced at Vollbrecht's trial was that the Pontiac that was identified as being at Hackl's crime scene was found at 4:45 a.m. on June 12, 1987 along the side of the road near Highway 12. The evidence presented at trial would show a window of opportunity between 3:15 a.m. and 4:45 a.m. on June 12, 1987, or about 1 hour and thirty minutes where Hackl may still have been alive and available to be the victim of Brown. The evidence shows that Brown was clocked out of work at around 5:00 p.m. on the evening before the morning Hackl was murdered. He clocked back in again at around 7:00 a.m. on the morning of the Hackl homicide. The Court finds that Kim Brown was in the general area of the homicide at the time Hackl was murdered. The Court finds that he had limited, but sufficient, opportunity to commit the Hackl assault and homicide.

The Court now considers whether there is some evidence to directly connect Kim Brown to the crime charged which is not remote in time, place, or circumstances. The evidence from Lawver and Hoeffler is that Brown had stated in 1987 that he liked to chain women to trees, light them on fire, and shoot them. Hackl was chained to a tree, had brush piled around her arguable to light her on fire, and was shot. The evidence that Brown read books about rape, chaining up women, bondage, and torture provides additional evidence of motive for a sexually motivated homicide. The Court believes that only a minute percentage of the male population would desire to sexually assault a woman, an even smaller percentage would then murder the victim, and a much smaller number yet would also have the desire to chain the women to trees and burn them. The Court finds that the similarities of what Kim Brown stated he liked to do with women and what was actually done to Angela Hackl is a specific, uncommon, and distinctive motive.

The motive was allegedly voiced by Brown within about two months of the Hackl homicide, by someone who lived about 30 miles from the site of the Hackl homicide.

The Court finds that the facts of Brown's specific and unusual motive provides direct evidence of the imprint and identity of Kim Brown. (See *State v. Bauer*, 2000 WI App 206 ,for the difference between direct evidence and other-acts evidence.)

Brown's specific, distinctive, and uncommon motive to chain women to a tree, assault them, shoot them, and burn them is analogous to a scenario where someone said they desire to murder women and inscribe an "Z" on their foreheads, and a woman is killed and a "Z" is inscribed on the victim's forehead. This distinct motive would be direct evidence of the identity of the murderer. In support of the uniqueness of the circumstances of a raped, chained, and murdered woman in a wooded area, Jerry Guerts, an experienced crime scene investigator with DCI, testified that he had never observed a case other than Hackl were a woman was chained to a tree in a woods, assaulted, and murdered. (Day 3 Trans. P. 249).

Further, Vollbrecht offers "other-acts" evidence to provide some additional evidence to directly connect Brown to the crime. When a defendant is required to show identity, he or she does not have to establish that the two crimes are the "imprint" or "signature" of the third party, nevertheless similarities between the other act evidence and the charged crime must be shown. *Scheidell*, 227 Wis. 2d at 304-305. To be admissible, such other acts evidence must do more than raise conjecture or speculation. The threshold measure for similarity in the admission of other acts evidence with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged. *Sullivan*, 216 Wis. 2d at 786.

The required degree of similarity between the other act and the charged offense and the required number of similar other acts cannot be formulated as a general rule. However, the greater the similarity, complexity and distinctiveness of the events, as well as the relative frequency of the event, the stronger the case for admission of the other acts evidence. Similarities which tend to identify a third party rather than the defendant as the perpetrator of an act also tend to ensure the probity of the other acts evidence. When a defendant proffers other acts evidence committed by an party on the issue of identity, the court must balance the probity of the evidence, considering the similarities between the other act and the crime alleged, against the considerations contained in Wis. Stat. § 904.03, utilizing the *Whitty/Sullivan* framework. *Scheidell*, 227 Wis. 2d at 305-306 (1999).

In comparing two acts for evidence of identity of the actor, one can identify an infinite number of similarities and differences as the comparer can focus upon different details of the acts, or construct different or similar constellations of details to comprise a fact. For example, is the fact that two victims wore something on their feet a similarity or a difference if one wore boots and the other shoes? What if they both wore shoes, but one wore red shoes and the other brown? What if one wore brown lace shoes and the other brown loafers? The issue is never merely the number of similarities or differences.

The probity of other acts evidence for identity depends on whether the similar facts are distinctive and unusual so that the probability of finding the presence of both facts in two different crimes due to chance alone would be relatively low. Further, the distinctive and similar facts must arguably be the consequence of an action of the actor, making it a marker of the actor, and not merely the consequence of another agent that

could create the fact, such as an animal, the weather, or the victim. The larger the number of distinctive, unusual, and similar facts, the more reasonable the inference is that the observed distinctive and unusual similarities may not be a result of mere chance alone. Differences are important if they are of the type that can logically exclude the third party as the perpetrator, or that reduce the probability that an observed fact is distinct, unusual, or similar, or that reduce the chance that that the observed fact was not a consequence of the actor, or that shows that a similarity is merely a random coincidence.

Brown's statement in the PSI shows that after sexually assaulting Linda Nachreiner, Kim Brown had chained her to a tree by her neck that he had in the trunk of his car, and then ultimately shot her in the back of the head in a secluded wooded area where young people had parties called "beer-can alley". He left her body on the ground, partially bound. He took the chain with him after killing her. (Ex. 34 and Ex. 55).

Hackl was found "hanging from a pine tree with her knees just touching the ground" with "a chain around her neck, hooked onto a short little branch above her." (Trial trans. 9/27/89 p. 548). The location of the body was a fire-lane among pine trees in an area where young people had parties. (Trial trans. 9/27/89 p. 545-546). Hackl's body was "was covered with pine boughs and branches, and other debris you would find in this wooded area, leaning from the ground up over the top of her." (Trial trans. 9/27/89 p. 548) Her neck was between two cross lengths of the tire chain and another part of the chain was hooked over a branch. (Trial trans. 9/27/89 p. 549). It appeared that she was dragged to this position. She had been shot three times in the back.

The Court analyzes these "other-acts" using the *Sullivan* analysis. First, the other-acts evidence comprised of the details of Linda Nachreiner's homicide would be

admissible for both motive and identity—both permissible purposes. The second-step in the analysis is to determine if the other acts evidence is relevant, which itself has two facets. *Sullivan*, 216 Wis. 2d at 785.

First, the Court must determine if the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The Court finds that the other acts evidence relates to a determination of the identity of Angela Hackl's murderer which is of ultimate consequence to the determination of the action.

Secondly, the Court then determines whether this evidence has probative value, that is, whether the evidence has a tendency to make a consequential fact more probable or less probable without the evidence. The probative value depends on the nearness in time, place and circumstances of the alleged crime. The greater the similarity, complexity, and distinctiveness of the events, the stronger is the case for the admission of the other acts evidences. *Sullivan*, 216 Wis. 2d at 786.

Linda Nachreiner was murdered on July 28, 1987 and Angela Hackl was murdered on June 12, 1987—about 6 weeks apart. The Court finds that this is very near in time to each other. Nachreiner was murdered in a rural county in a wooded area that was known as a party area for young people near Oxford, Wisconsin, and Hackl was murdered in a rural county in a wooded area that was known as a party area for young people near Sauk City, Wisconsin. These two places are about 30 miles apart. Based on the fact that this is a rural area, Court finds that 30 miles is near in place, as someone driving 60 miles per hour on a country road can cover 30 miles in 30 minutes.

Further, both women were killed in rural adjoining counties where the pool of potential sex killers would theoretically be relatively small. (For example, if there is one

in 100,000 males that would rape and kill a woman, then ceteris paribus, one would expect to find 4 of these males in a geographic area with a population of 400,000 males and only .5 of these males in an area the same size with a population of 50,000 males.) The Court finds, based on distance apart in miles and travel time, and the fact that the areas of the two homicides were not densely populated, that the two murders were close in place.

The Court then considers the circumstances. Both Hackl and Nachreiner were young women killed in a wooded area. That fact, alone, is not particularly distinctive. Both were killed in a place that was known as a party place for young people. That fact is a bit more distinctive, as such a place is different than general woodland or forest land that is common in the counties in which these crimes were committed. Nachreiner was shot once in the back of the head and Hackl was shot three times in her back. Again, the Court does not find that fact particularly distinctive-but the Court does take note that being shot in the back is often considered a different type of homicide than one where the victim is shot in the face or front. Being shot in the back is more of an execution type of homicide, rather than a killing out of anger or during a robbery. Nachreiner had been sexually assaulted. Based on the fact that Hackl was almost naked, and her bra, shorts, and panties torn, there was strong evidence that the Hackl homicide also had sexual motivations. The sexual motivation differentiates these homicides from a killing as a result of a robbery, domestic violence, or specific animus toward a victim. Nachreiner, while alive, was naked from the waist down and had a piece of her jeans tied to her ankle and a chain fastened around her neck and to a tree. Hackl was found naked, except for shoes, with her torn shorts (not her panties) on one foot. She was suspended by a chain

fastened around her neck and to a tree. The perpetrators of both of these homicides chained their victims by the neck to a tree. Brown made a statement in the PSI that he locked a chain around Nachreiner's neck and then locked the other end to a tree. Hackl was found chained to a tree by her neck with a tire chain. The Court finds that fact to be highly distinctive consequence of an action of the actor.

The State argues that the difference between the two situations was that Hackl was dead at the time she was chained, and Nachreiner wasn't. First, no definitive evidence exists to prove or disprove if she was shot first, and then dragged to the tree (there were drag marks), or was first dragged to the tree, hung in the tree, and then shot. At trial, the forensic pathologist testified that he could not be certain whether or not Hackl was chained to the tree before or after she was shot. Further, one could be dragged to a tree when alive, as well as when dead.

The Court believes that hanging Hackl in a tree and putting brush around her to hide her body is not a reasonable inference as a body is hidden better on the ground with brush around it. The Court finds that the fact both women were chained by their necks to a tree to be highly distinctive and complex, and caused by the actor. The Court does not find that the differences in the type of chain used in the homicides persuasively different. The differences in the types of chains do not exclude Kim Brown as a possible suspect. The Court finds that the circumstances of these two crimes were distinct and similar.

The evidence that two sexually related homicides of two young women from adjoining rural counties occurred within six weeks of one another, within 30 miles of one another, is a rare occurrence. However, increasing the probative value is that both were shot in their back in secluded wooded areas that were known as party places for youth.

Increasing the probative value by multiples is the addition of the facts that both victims were both chained around their necks to a tree. The Court finds that the other-acts evidence regarding the Nachreiner homicide has high probative value as to identity.

The final determination is whether or not the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by consideration of undue delay. The Court finds strong probative value of the other-acts evidence, and does not believe that the probative value of this evidence is substantially outweighed by the danger of unfair prejudice to the State, or confusion of the issues, or misleading the jury, or undue delay.

When considering the other-acts evidence regarding the Nachreiner homicide together with the direct evidence of an unusual motive from the Hoeffler and Lawver testimony and Brown's reading habits, the Court finds that Vollbrecht has satisfied *Denny* in providing some evidence of a direct connection with Brown and Hackl's assault and homicide. The Court finds that the evidence of Brown as a potential known third party perpetrator would have been admitted at Vollbrecht's trial had the alleged *Brady* materials been disclosed. Because the Court finds that evidence of Brown would have been admissible at trial, the Court also finds by clear and convincing evidence that Exhibit 6, the DCI report that stated that DCI could find no connection between the Nachreiner and Hackl homicide, was also favorable to the defense.

D. Would Evidence of Thomas Perschy Been Admissible Evidence Under *State v. Denny* at Vollbrecht's Trial

The Court has already found that the report of Michelle Boehnen, in which she stated that she saw someone who she believed to be Angela Hackl on the evening of her murder, to be undisclosed material favorable to the defense. The Court now considers

whether or not any evidence of Tom Perschy as a potential third party perpetrator would have been admissible at trial under *Denny*. If this evidence would not have been admissible, then it could not have been material to Vollbrecht's defense.

First, did Perschy have motive? As mentioned above, the original trial Court found no specific motive for anyone in the case—Vollbrecht included. The other acts evidence regarding Perschy (including that which was offered to the trial judge before Vollbrecht's trial and that which was also adduced at the current motion hearing and offered in Vollbrecht's offer of proof) at worst, shows that Perschy would sexually harass women and pursue them for sex, and that he was involved in some domestic violence situations with women he knew. None of the "other-acts" evidence regarding Perschy would show that he had the specific motive to rape women or kill women. Therefore, the Court finds weak evidence of motive for Perschy, but, as the original trial court found, sufficient general motive to satisfy the *Denny* test.

The Court then considers opportunity. The evidence is that Perschy was with Tammy Straub, and then returned home to his wife during the time that it was alleged that Hackl was murdered. However, Straub did not immediately corroborate Perschy's alibi, but corroborated it after first being allowed by an investigator to spend time with Perschy to get their story straight. Further, Vollbrecht reported that he saw Perschy driving in Sauk City around 3:30 a.m. on the morning of Hackl's murder. The Court, as did the original trial Court, finds that Perschy had opportunity.

The last criterion is whether there is any evidence directly connecting the third person with the offense charged. Vollbrecht argues that this criterion is met because there was some evidence that Perschy, while working as a police officer, was in downtown

Sauk City as the bars were closing when a comment was made by another officer to Perschy about a "skinny blond" (Hackl was apparently a thin blond.). Further, Vollbrecht argues that the withheld "Boehnen report" in which Ms. Boehnen reported on September 18, 1989, that sometime between 9:00 and 10:00 p.m. during an evening in June of 1987, she observed a blond female sitting in the front seat of a Sauk City squad car driving by Officer Thomas Perschy provides the direct link. Boehnen stated that she did not know Angela Hackl, but after seeing photos of her in the media, believed that the person she saw that evening was Angela Hackl. Ms. Boehnen is now deceased.

The Court finds that the Boehnen statement, even if believed, does not provide any evidence that links Perschy to the crime as required by *Denny*, i.e. the assault and murder of Angela Hackl. The Boehnen statement provides evidence that connects Perschy with Hackl between 9:00 and 10:00 p.m. sometime in June of 1987, but does not provide any evidence that connects Perschy with the Hackl assault and homicide. Therefore, even if Boehnen was believed, the Court does not find any direct evidence connecting Perschy to the Hackl homicide.

Further, the Court believes that the inference from Boehnen's identification of Hackl being with Perschy, that he was with her the evening she was murdered, was inherently and patently incredible as it conflicts with all of the evidence adduced at trial, including Vollbrecht's testimony, that Hackl was with her friends before coming to Hondo's bar with her friends, and remained at Hondo's bar until leaving with Vollbrecht. The Court finds that the inference that Perschy was with Hackl on the evening she was murdered is not reasonable, and incredible as a matter of law.

Further, Vollbrecht offers the "other-acts" of Perschy as discussed above that includes his sexual harassment of women and allegations against him of domestic violence as providing the direct evidence of Perschy to the Hackl homicide. (The Court does not find any of the evidence adduced at the motion hearing regarding Perschy's behavior with women to be either *Brady* evidence, or newly discovered evidence as it was all known to Vollbrecht before his trial, or could have been discovered by Vollbrecht before trial.) Regardless, although this evidence was offered for an appropriate purpose, identity of Hackl's assailant, the Court finds all of the "other-acts" evidence offered against Perschy to be dissimilar and not probative of identity. The other acts evidence involved sexual harassment of women, and possibly domestic violence, but not rape and murder. The circumstances and nature of the other-acts evidence are far different than those involving the Hackl homicide as they involve harassment of women he knew in the community and not sexual assault or murder of someone outside the community. Further, the Court finds that any probative value of the other acts evidence against Perschy, which is weak if existent at all, is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

The comments of the officer to Perschy regarding a "skinny blond" and all of the above discussed evidence do not provide direct evidence of a connection between Perschy and the crime. The Court does not find that any offered evidence regarding Thomas Perschy provides a "legitimate tendency" that he committed the crime. This evidence "simply affords a possible ground of suspicion" of Perschy. The Court does not find the Perschy third party evidence to be admissible under *Denny*. Because the Perschy

third-party evidence would not have been admissible at trial, the undisclosed Boehnen report could not have been material to Vollbrecht's defense.

E. Was the Undisclosed Evidence Regarding Kim Brown Material to Vollbrecht's Defense?

The Court will analyze whether or not the undisclosed evidence regarding Kim Brown was material to Vollbrecht's defense by considering all of the alleged exculpatory material. The 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.

The Court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's failure to disclose.

A showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. The *Brady* requirement of materiality is not a sufficiency of the evidence test. Once there has been a showing of materiality sufficient to establish a constitutional violation, that error cannot be harmless. Materiality must be assessed by considering the effect of all of the excluded evidence collectively. *State v. Harris*, 2004 WI 64, ¶¶14-15.

The Court now considers whether or not there is a reasonable probability that disclosure of the alleged *Brady* materials would have resulted in a jury having reasonable doubts as to Vollbrecht's guilt. For the Court to determine if the addition of the alleged *Brady* evidence would have resulted in a different result, the Court must consider the evidence adduced against Vollbrecht during his trial and the possible effects of withheld materials on the presentation of the defendant's case. The Court must consider the strength of the evidence against Vollbrecht. The strength of the evidence is a function of the probability that the fact adduced at the trial or motion was accurately perceived and reported, the strength of the inference from that fact that the defendant is either guilty or not guilty of the criminal charges, the number of such facts, and the resolution of any competing inferences.

The Court finds that the following facts are not in dispute.

1. That Angela Hackl, her friends' Joseph Wilkerson and Rebecca Wilson, and Vollbrecht were in Hondo's bar in Sauk City during the evening of Thursday June 11, 1987 into the early morning hours of Friday June 12, 1987.
2. Hackl, Wilkerson, Wilson, and Vollbrecht were all intoxicated.
3. Vollbrecht was the last known person to see Hackl alive as he and Hackl left Hondo's on Friday June 12, 1987 in the early morning hours after bar time with Vollbrecht driving Hackl's Pontiac LeManns (owned by her boyfriend, and hereinafter "the Pontiac") with Hackl in the passenger seat.
4. Hackl's body was found on Monday June 15, 1987 suspended by her neck by a tire chain hooked to a tree. A similar tire chain was found in the trunk of the

Pontiac, and a set of tire chains had been in the trunk of the Pontiac since Hackl's boyfriend purchased the car.

5. Hackl had been shot to death with three shots from a .22 caliber weapon.
6. Hackl's bra and shorts had been ripped. A pair of ripped panties were found in the floor of the passenger side of the Pontiac.
7. Parts of the Pontiac were found near the place she was found murdered.
8. The Pontiac was found on the northeast corner of Highway 12 and Sauk Prairie road by Ron Lewis, Hackl's boyfriend, early evening on Friday June 12, 1987.

The Court considers some of the evidence the Court finds salient for and against Vollbrecht that that was presented to the jury at trial.

1. Joseph Wilkerson testified that he left the area outside Hondo's on June 12, 1987. He stated that he got to his home in the Spring Green area about 2:45 a.m.. Because it takes about 30 minutes to get from Hondo's to his house, he believed that he and his girlfriend, Rebecca Wilson, left the area outside of Hondo's at about 2:15 a.m.
2. Steven Schroeder testified that as he was heading to work on Friday June 12, 1987, at 4:45 a.m. he observed the Pontiac located partially in the ditch on the northeast corner of Highway 12 and Sauk Prairie Road. He knew the time, as he verified when he clocked in to work on that day, and then subtracted the travel time. He also believed he saw the rear flasher's flashing and then later, didn't see the front emergency flashers flashing.

3. Dale Hager testified that he lives on Jackson Street in Sauk City, knows Vollbrecht, and saw Vollbrecht walking toward the downtown sometime between 5:00 a.m. and 5:30 a.m. on June 12, 1987 when Hager was leaving for work.
4. Randall Walsh testified that he was the bar tender at Hondo's, and closed the bar at 1:45 a.m. on June 12, 1987, and everyone was out of the bar by 2:00 a.m.
5. Ron Lewis testified that he was Hackl's boyfriend and found the Pontiac on the corner of Highway 12 and Old Sauk Road on the evening on June 12, 1987. He also stated that he recovered Hackl's sweater and tank top in the back of the Pontiac. His .22 caliber handgun was missing from the glove compartment. He also found a pair of panties on the floor. They were very dirty and may have been under other things on the floor.
6. Brian Niles testified that he impounded the Pontiac on June 14, 1987. The vehicle was not put in an enclosed area.
7. Manny Bolz testified that he was a detective for the Sauk County Sheriff's Department, and he examined the Pontiac, found pieces missing, and red clover on the undercarriage. Pieces of the Pontiac were found at the murder scene.
8. Dr. Robert Huntington III testified that Hackl died from gunshot wounds to the back. Her body was too decomposed to ascertain much more. He could not state whether or not the chain was placed around her neck before or after she died. He did not do any fingernail scrapings.

9. Patrick Lutz from the State Crime Lab testified that he was unable to identify any finger prints of Vollbrecht.
10. Coila Wegner from the State Crime Lab testified that she did not find any seminal fluid on the sleeping bag, from the swabs of Hackl's vaginal areas, or on the panties recovered from the floor of the Pontiac. Wegner testified that if a woman had sexual intercourse with a male who ejaculated into her vagina and then put her panties back on, that Wagner would expect to find some seminal fluid on the panties.
11. Holly Marx testified that she cut Vollbrecht's hair in June 1987. She stated that he told her that he didn't kill Hackl and if he did, he didn't remember it. She testified that she didn't remember the exact words.
12. Jeri Rakow testified that she was present when Vollbrecht made the statement to Marx and heard the same thing. They heard it on a Tuesday and told the police about it on a Friday.
13. Terry Frey testified that he sold Vollbrecht his Oldsmobile on Saturday June 13th, 1987. Vollbrecht had test driven the vehicle on June 11, 1987. He did not see any keys sticking in the seat when he cleaned his vehicle out on Saturday, nor feel any keys in his back when he drove his vehicle on Friday morning. He testified that he could have missed the keys.
14. Ted Furniss testified that he bought Vollbrecht's Buick on Friday night, June, 12, 1987. The vehicle was delivered on June 13, 1987. Furniss had given Vollbrecht permission to use the vehicle after Vollbrecht delivered it to him

on June 13, 1987 to get parts. He heard Vollbrecht say about Hackl "She ain't in the river. I know exactly where she is buried."

15. Shelly Wells testified that Vollbrecht told her that all he wanted was "a piece of ass" from Hackl.
16. Robert Wagner testified that he lived near the place Hackl's body was found and that he had been out fishing on the evening of June 11, 1987. He stated he had a beer and martini at a bar, and came home. He went to bed, according to his VCR clock, at 2:33 a.m. on June 12, 1987. Ten to twenty minutes later he heard what he thought were firecrackers, but could have been shots, and then 20 minutes later heard a car clanging as it passed by his house.
17. Ronald Mack testified that at about 10:00 p.m. on June 12, 1987, he was driving on Block Road. He testified that he came upon a Buick Electra being operated by someone he later identified as Vollbrecht. Vollbrecht told him that the vehicle was sucking air. The car started and Vollbrecht left.
18. John Dederich testified that he was in a car with Vollbrecht after Hackl's death. Dederich asked about some wire Vollbrecht had in the car. Vollbrecht stated "That is what I will tie the next one up with."
19. Todd Pape testified that on the evening of June 11, 1987, he was a DJ at Hondo's. He remembers Vollbrecht telling him that he lost his keys. He also stated that Hackl requested the song, "Talk Dirty to Me".
20. Thomas Perschy testified that at around 3:25 a.m. he was in downtown Sauk City in his personal vehicle with his uniform on, and this was unusual for him to be down there at that time.

21. Charles Fox testified that he timed how long it took to walk from the Maplewood nursing home to downtown Sauk City and it took 22 minutes. It would take 20 minutes to get from Maplewood to Mr. Hager's place. A round trip from downtown to Maplewood and back would take about 46 minutes.
22. Much of the cross-examination involved an attack on the quality of the investigation with an emphasis on the preservation of evidence contained within the Pontiac.
23. The Court finds that the most compelling evidence against the defendant is the statements he made to the authorities on the occasions that he spoke with police (June 14, 1987; June 15, 1987, June 19, 1987; August 12, 1987; and Sept. 15, 1987) and at his trial.
    a. Vollbrecht made statements that he had left with Hackl at approximately 2:15 a.m. on June 12, 1987 from in front of Hondo's bar. He made statements that he was interested in having sexual relations with her. He stated that he and Hackl had consensual sexual intercourse at an area near a marsh. He stated and testified that he was dropped off by Hackl in the Pontiac at his Buick at about 3:30 a.m., with the earliest being 3:15, after the consensual sex. Based on this testimony, and the testimony of Mr. Schroeder that he found the Pontiac at 4:45 a.m., and the uncontroverted evidence to support the proposition that the Pontiac was at the crime scene, Kim Brown would have had a maximum of 1.5 hours to find Hackl, murder her, and abandon the Pontiac. The lack of time to commit the crime greatly

reduces the probative value of the non-disclosed material regarding Kim Brown.

b. In Vollbrecht's first statement to Detective Fults on June 14, 1987, two days after Hackl disappeared and before her body was found, Vollbrecht stated that when he was dropped off at his Buick, he had forgotten that he had lost his keys the night before. Vollbrecht then stated that he then started walking home, 12 miles away, without first checking whether or not the door to his car was open. He subsequently found that the door to his vehicle was open.

Vollbrecht was a heavy smoker, who had just finished an evening of heavy drinking and had just had sexual intercourse. He testified that he walked for about ½ hour, and then turned around at the Maplewood nursing home area because he was thirsty, tired, and sore. He then walked approximately ½ hour back to his vehicle. He stated that he decided to walk the 12 miles home rather than check the doors to his car, stay at his friend or his sister who lived in town, sleep elsewhere (it was a warm summer evening), or call someone such as his brother to pick him up.

The prosecution argued that the reason Vollbrecht stated he was walking the 12 miles home was because Vollbrecht knew he was observed by Mr. Hager walking to his Buick from the abandoned Pontiac. The distance in time from various points was presented at trial by both a witness for the State and for Vollbrecht. Using Vollbrecht's

witness's longer time estimates, as they favor Vollbrecht, it took Vollbrecht 42 minutes to walk to where he began walking, to the Maplewood area where he turned around, and then back to the Hager residence. This would put him at Mr. Hager's residence sometimes before 4:30 a.m. and not between 5:00 and 5:30. The State presented evidence that the time to walk from the abandoned Pontiac to Hager's residence would have been around 35 minutes. If the vehicle was abandoned at 4:45 a.m., as the testimony of Mr. Schroeder indicated, and Vollbrecht was the one who abandoned it, then Vollbrecht would have been by Mr. Hager's residence around 5:20 a.m. as Hager testified. If the Pontiac was abandoned earlier, any other assailant would have had even less opportunity to assault and kill Hackl. Further, at trial Vollbrecht stated that he used about ½ of an hour up before starting to walk looking for his lost keys, but never checked his car doors to see if they were unlocked.

c. On June 15, 1987, Vollbrecht re-contacted Detective Fults and informed Fults that he had thought more about the vehicle, and remembered he attempted to open the glove box and it was locked.

d. Vollbrecht had first made a statement that he stayed home on the evening of Saturday June 13, 1987. He was then confronted by investigators that someone had picked him out of a line-up and that he was observed at the intersection of Block and Exchange Road that evening. This location was close to where Hackl's body was found,

> and where it would have still been located at the time. Vollbrecht stated to the investigators that his Oldsmobile broke down, although the witness stated he was positive the person was driving a Buick Electra like the one Vollbrecht had owned. Vollbrecht stated that he was heading to town and his brother's house when his vehicle broke-down. He stated that he started to walk to his brother's house several miles away, and then realized that his brother was not home. He then returned to his vehicle, and cranked it and it started. At trial, Vollbrecht testified that when his vehicle stopped, he first attempted to coast it near a friend's house on Center Street. He didn't say why he didn't go to his friend's house. He also stated that he went under the car and was able to repair a fuel line in the Oldsmobile to get it started. He further testified, on cross-examination, that he had been in the woods, on the east side of Exchange Road, which would have been in the vicinity of Hackl's body, to urinate as a car was coming.

Vollbrecht's explanations for his behavior on the morning of the homicide, of attempting to walk 12 miles from Sauk City to his home without first checking the doors to his vehicle (the driver's door was open), and then his explanation of walking from another disabled vehicle to his brother's home without first attempting to fix the vehicle (which he was able to repair as Vollbrecht also testified that he was a competent mechanic and was able to replace ignition switches, door locks, etc.), was well outside of normal human behavior, and provided strong evidence to the jury of Vollbrecht's attempt to cover-up his involvement with the Hackl homicide and his consciousness of guilt.

Further, he was a little too eager to make sure the police knew he touched both the glove box where the gun was, and the trunk area where the tire chains were located.

The Court finds little inference of guilt from the fact that Vollbrecht first stating that he believed that he was home on June 13, 1987, when he was first asked that on September 15, 1987. If Vollbrecht was innocent of the crime, it would not be unusual to not remember something uneventful that happened three months earlier.

The Court recognizes that if the defense had the undisclosed Brown evidence, a more effective cross-examination about the quality of the investigation could have occurred. The Court also notes that some of the evidence presented against Vollbrecht at his trial involved witnesses remembering mundane details in one's life for the first time six months to eighteen months after they happened was weak. Further, the Court finds that some of the comments allegedly made by Vollbrecht to others were not necessarily inculpatory, as it is reasonable that an innocent person being wrongfully accused could also make those comments. Vollbrecht's statement that he saw Perschy downtown at around 3:30, and the presence of clover at the site Vollbrecht said he and Hackl had sex and the presence of it on the Pontiac corroborated his statement. There was no evidence that directly put Vollbrecht at the murder scene, such a transfer of Hackl's blood to Vollbrecht's clothing or car.

As discussed above, Kim Brown would have had at best about 1 hour and 30 minutes to have been able to abduct Angela Hackl, violently assault her, shoot her, hang her body from a tree and place branches around her, and then drive her car back at a slow speed (as the vehicle was severely damaged at the murder scene and evidence was presented at trial that it could only have been driven slowly). The probability of all of that

happening within that short of time window is very low. The Brown evidence, even if believed by a jury, would not have definitively excluded Vollbrecht as Hackl's assailant.

After reading the entire transcript of the trial twice, the transcripts of the motion hearing, and the salient parts of these transcripts many times, and considering all of the evidence adduced at trial along with the alleged Brown *Brady* materials, and understanding that a trial is not a review of the transcripts but more of an aural and emotional event, the Court does not find that there would have been a reasonable probability that a jury would have reached a different result at trial had the above-described *Brady* evidence of Kim Brown been disclosed to Vollbrecht. Therefore, the Court finds that this undisclosed material was not material to Vollbrecht's defense. The Court denies Vollbrecht's request for a new trial on the grounds of undisclosed exculpatory evidence.

IV. VOLLBRECHT'S NEWLY DISCOVERED EVIDENCE CLAIMS

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." To prove a "manifest injustice" on a claim of newly-discovered evidence, a defendant must prove by clear and convincing evidence: (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. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. A "reasonable probability of a different outcome" exists if there is a

reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt. A court reviewing newly-discovered evidence should consider whether a jury would find that the newly-discovered 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. *State v. Plude*, 2008 WI 58, ¶¶32-33.

The Court has recently discussed a reasonable probability of a different outcome. It wrote:

> "Under this test, the dispute as to whether a defendant needs to show that confidence in the outcome of the trial is undermined or make an outcome determinative showing becomes a very fine distinction. That is, we find it difficult to conceive of a scenario in which our confidence in the outcome of a trial would be undermined by newly discovered evidence (which Love categorizes as the lower standard), and where we could not say that the defendant had made an outcome determinative showing as to a reasonable probability of a different result at a new trial (which Love categorizes as the higher standard). Stated otherwise, it seems that our confidence in the outcome of a trial will only be undermined if the new evidence, together with the old evidence, would probably create a reasonable doubt for a jury. Conceding that there may be the rare case where our confidence in the outcome of a trial is undermined, and yet there is only a fifty-fifty or lower chance that the evidence would probably create reasonable doubt in a jury, we conclude that this is not that case. "
> *State v. Edmunds*, 2008 WI App 33, ¶22

The Court notes that the U.S. Supreme Court's formulation of materiality for a *Brady* violation (also adopted by the Wisconsin Supreme Court) is "a reasonable probability of a different result." *Kyles*, 514 U.S. at 506. That case was decided in 1995. The 2008 Wisconsin Supreme Court case of State *v. Plude*, refers to the formulation for newly discovered evidence test as: "A reasonable probability of a different outcome." *Plude*, 2008 WI 58, at ¶33. The Wisconsin Supreme Court is aware of United States Supreme Court decisions. This Court does not have the authority to write a restriction into decisions' of the Wisconsin Supreme Court. If the law is to have any institutional force in society at all, identical phrases must have identical meanings to communicate its force,

absent a specific restriction promulgated by a law making authority—which this Court is not. Although this Court is cognizant of different legal and policy arguments both supporting and opposing a more restrictive meaning for "a reasonable probability of a different result" for newly discovered evidence, this Court is bound by current authority that uses identical terms. It would be an unreasonable interpretation of the law for this Court to hold that identical terms have different meanings, especially when used in the similar context of deciding whether or not a jury could arrive at a different result at trial.

Vollbrecht makes the following claims of newly discovered evidence: 1.) All the above identified *Brady* material, 2.) Norman Pepin's testimony that Kim Brown told him that he killed Angela Hackl, 3.) James Schultz's testimony that he overheard Kim Brown tell another inmate that he raped, shot, and tied Angela Hackl to a tree, and put brush around her and was going to light her up and the lighter failed and he just threw the lighter away, 4.) Mary Wagner's testimony that the VCR clock had never been set at their home, and therefore Robert Wagner could not have ascertained the time that he heard possible gun shots by reference to this clock, and that Robert Wagner was a habitual drug user during the period between the death of Angela Hackl and the time Wagner reported hearing gun shots and the car during the early morning hours of June 12, 1987, and 5.) the DNA evidence that showed the presence of semen and other DNA of unknown individuals on a sleeping bag, and that showed the presence of Vollbrecht's DNA and an unknown person's DNA in the vaginal swabs (the unknown DNA was consistent with a crime lab analyst). None of the DNA matched Brown or Perschy.

A. Was the Evidence Discovered After Conviction?

The first question is whether or not the evidence was discovered after conviction. The Court has already determined that most of the evidence were discovered after Vollbrecht's first Wis. Stat. §974.06 motion (except the evidence of the Brown criminal complaint and search warrants which the Court has found were in the possession of the defense before trial, and therefore is not newly discovered evidence). Because the first Wis. Stat. §974.06 motion was after his conviction, logically these same materials were discovered after his conviction.

B. Was Vollbrecht Negligent in Seeking the Evidence?

The State argues that the defendant was negligent for not learning of Mary Wagner's statement before trial. At the motion hearing, Ms. Wagner testified that she was not contacted by any investigator for Vollbrecht before his initial trial except for one time in which Investigator Fox left a card in her door which she gave to her husband. (6/15/10 Tr. at 134.) At an earlier hearing, Fox had testified that she had closed the door on him. (3/11/91). At the recent motion hearing, Fox did not refute what Mary Wagner had testified to. The Court further finds that leaving a card in someone's door, without additional attempts at follow-up, is not a reasonable effort at seeking Mary Wagner's statement to find that Vollbrecht was not negligent. Even if Ms. Wagner closed the door on Fox, the Court cannot find that one attempt at an interview is sufficient to find that Vollbrecht was not negligent in obtaining a statement from Ms. Wagner about the clock and her husband's use of mind altering substances. The Court does not find that Vollbrecht has proved by clear and convincing evidence that he was not negligent in seeking the evidence related to Mary Wagner. Therefore, the Court finds that the Mary Wagner evidence is not newly discovered evidence.

The Court also needs to address the books that were recovered from Brown's residence. The Court has already found that the return of the search warrants that referenced these books was in the possession of Vollbrecht's trial counsel before trial. The books were not in trial counsel's possession. However, the Court believes that these books could have been discovered before trial, by simply purchasing a copy of them. The Court does not find that Vollbrecht has proven by clear and convincing evidence that he was not negligent in seeking the evidence related to the books. Therefore, the Court finds that the books are not newly discovered evidence.

The Court finds that Vollbrecht has proven by clear and convincing evidence that he was not negligent in obtaining the remainder of the newly discovered evidence as discussed above. Some of the statements related to Brown occurred after trial. The DNA technology was not available until after trial. The Brown material related to Nachreiner was in the possession of the State and Vollbrecht was assured by his trial prosecutor that the State did not possess any evidence linking Brown to the Hackl homicide. The Court finds that Vollbrecht could reasonably rely on the representations of the prosecutor, and therefore Vollbrecht was not negligent in further pursuing the Brown materials in the Nachreiner file.

C. Is the Evidence Material to an Issue in the Case?

The Court finds by clear and convincing evidence that all of the evidence related to Kim Brown is material to an issue in the case, specifically to the identity of the person who murdered Angela Hackl. The Court has already determined that the Brown alleged *Brady* evidence would be admissible under *State v. Denny* above. *A fortiori*, the remaining newly discovered evidence consisting of the statements of Schultz and Pepin

that Brown stated he killed Hackl, would be admissible under *Denny* along with the Brown related alleged *Brady* evidence. The Pepin and Schultz statements provide further direct evidence linking Brown to the crime under *Denny*.

The State argues that both Schultz and Pepin are not worthy of belief. The State argues that a Court cannot allow the testimony of inmates that another inmate committed a crime be the basis for newly discovered evidence as that would open a floodgate to claims of newly discovered evidence by inmates. The State argues for, in effect, a per se rule that inmate testimony cannot form the basis of a valid *Brady* or newly discovered evidence claim. The Court declines to adopt such a rule.

The Court must assess the credibility of these witnesses, as it does other witnesses, to determine if their testimony is worthy of belief, that is within the realm of believability such that a reasonable juror could believe the evidence. *State v. Carnemolla*, 229 Wis. 2d 648, 661-663, 600 N.W. 2d 236 (Ct. App. 1999); *State v. Kiviolja*, 225 Wis. 2d 271, 296, 592 N.W.2d 220 (1999).

Schultz's and Pepin's testimony did conflict with Brown's statement that he didn't say these things to Schultz or Pepin, and that he didn't have anything to do with the Hackl homicide. The statements were not hearsay statements because Brown testified and denied any involvement in the Hackl homicide. The statements were made under oath, and all declarants were subject to cross-examination. Their statements were not inherently inconsistent or illogical. Schultz's and Pepin's demeanor on the witness stand did not confirm deception. The scenario sets up a swearing contest between Schultz and Pepin on one side and Brown on the other. The Court notes that Brown has been convicted of eight crimes, and as stated above was not the paragon of truth. Schultz had

been convicted of two crimes, and Pepin of six crimes. All were serving life sentences. Schultz and Pepin were acquaintances of Vollbrecht, and the circumstances of their making their statements could not rule out that they colluded with each other. These circumstances alone make the credibility of Schultz, Pepin, and Brown dubious.

However, there was no evidence that the statements were made under coercion or duress. Further, Schultz and Pepin are in prison with Kim Brown, and as they testified, their making statements against Brown may put them at risk of danger. This adds additional indicia of credibility.

But most importantly, the statements against Brown are corroborated with the other extrinsic evidence against Brown, specifically the statements of Hoeffler and Lawver and the Nachreiner other-acts evidence. Hoeffler and Lawver were not convicted prison inmates at the time they reported their conversations with Brown, nor are they fellow inmates or acquaintances of Vollbrecht, Pepin or Schultz. The Court has already found that this extrinsic evidence alone was sufficient under *Denny* to introduce the Brown third-party perpetrator evidence. Because in this case (unlike situations that the State warns about in which inmates simply implicate another inmate without extrinsic corroboration of the third-party statement), Vollbrecht has already offered sufficient evidence, independent of the inmate statements, to satisfy *Denny*, the Court finds that Schultz's and Pepin's statements are sufficiently corroborated so that the Court can not find and does not find that Schultz and Pepin are inherently incredible as the Court did in *Carnemolla*, 229 Wis. 2d at 242. Their testimony, with the corroboration, is within the realm of believability such that a reasonable juror could believe the evidence.

The Court has already ruled that the evidence regarding Perschy would not be admissible at trial under *Denny*. Therefore, the Court finds the Perschy evidence would not be material to an issue in the case. Further, as Mr. McQueen is deceased, his statement and Mr. Kenevan's statement regarding what Mr. McQueen said Brown said would all be inadmissible hearsay at trial (and in most ways cumulative to what Hoeffler and Lawver said). The Court does not find that the McQueen and Kenevan statements are material to an issue in the case.

The DNA evidence would be material to whether or not Vollbrecht had sexual intercourse with Hackl, but the Court doesn't believe that issue was material to an issue in the case. Vollbrecht admitted that he had sexual intercourse with Hackl. The issue is whether or not the intercourse was consensual or not. The presence of Vollbrecht's DNA in Hackl's vaginal swab does not prove consent.

The presence of an unknown third-party's semen on an old dirty sleeping bag, and on Ms. Hackl's vaginal swab may have limited relevance to impeaching the investigation that an unknown third party may have deposited the semen. Vollbrecht argues that the prosecutor at Vollbrecht's trial argued that because the sleeping bag was filthy, Hackl would not have consensual sex on the bag. Further, the prosecutor argued that "There is no semen found on the sleeping bag where they supposedly had sexual intercourse." The Court finds that the presence of someone else's semen on a sleeping bag does not make it any less dirty. Further, the Court believes that the prosecutor was referring to Vollbrecht's semen being on the sleeping bag to corroborate Vollbrecht's claim that he had intercourse with Hackl on the sleeping bag. The DNA evidence did not identify Vollbrecht's semen on the sleeping bag.

The presence of the unknown semen on the sleeping bag and on the vaginal swab are both evidence of an unknown third party, and the only part of the DNA evidence that the Court finds material to an issue in the case. It is important that none of the DNA matches Kim Brown or Tom Perschy.

D. Is the Evidence Not Merely Cumulative to What Had Been Presented?

At trial Vollbrecht admitted having consensual sexual intercourse with Hackl. The Court does not find that Vollbrecht has shown that the DNA evidence showing the presence of his DNA in the vaginal swab is not merely cumulative to what had been presented at trial.

The Brown evidence, as discussed above, was not presented at trial, and therefore was not cumulative. The DNA related to the unidentified third party was also not presented at trial and was not cumulative.

E. **Does A Reasonable Probability Exist That Had the Jury Heard the Newly-Discovered Evidence, It Would Have Had a Reasonable Doubt As To The Defendant's Guilt**

To summarize, the surviving newly discovered evidence are the following:

1. The work records of Kim Brown and associated report of Donna Davis. (Ex. 62)
2. The testimony, affidavit, and journal of William Hoeffler where Kim Brown spoke about liking to chain women to a tree, light them on fire, and shoot them.
3. The testimony and affidavit of Francis Lawver that Kim Brown stated he liked to chain women up and when he was done with them, burn them.

4. The statements in the Brown PSI in which he discusses how Brown chained Linda Nachreiner to a tree before he shot her.
5. The DCI report that stated that there didn't appear to be any similarities between the Nachreiner and Hackl homicides.
6. Norman Pepin's testimony that Kim Brown informed him in 1993 that he killed Angela Hackl by shooting her three times, and then hanging her in a tree with a tire chain at "the Pines" in Sauk City.
7. James Schultz's testimony that sometime around 1992, he overheard Brown tell another inmate that he raped, shot, and tied Angela Hackl to a tree, put brush around her and was going to light her up and the lighter failed and he just threw the lighter away.
8. The DNA evidence that an unknown third party's semen was found on the sleeping bag, and on the vaginal swab taken from Hackl's body.

The Court already discussed the evidence adduced at Vollbrecht's trial. The newly discovered evidence is comprised of the alleged *Brady* materials; with the addition of Pepin's and Schultz's statement that Brown stated that he murdered Hackl, and the DNA evidence of an unknown third party. The test is not to determine which side had the more credible evidence, but to determine whether or not there was a reasonable probability that a jury, hearing all of the evidence at trial and the above described newly discovered evidence, would have a reasonable doubt as to Vollbrecht's guilt. *McCallum*, 208 Wis. 2d at 475.

Considering the alleged Brown *Brady* evidence alone, a jury could have found the alleged *Brady* evidence credible and also found that the evidence did not directly refute

Vollbrecht's guilt. However, the statements of Pepin and Schultz that Brown admitted killing Hackl is evidence that is mutually exclusive with Vollbrecht's guilt. If Brown killed Hackl, then Vollbrecht could not have killed her. (Unless the jury would believe Brown made the statements but the statements were not true, or that both Brown and Vollbrecht were involved in Hackl's murder.) The Court finds that the evidence of Brown's alleged confession to the Hackl homicide, in the context of all of the other evidence against Kim Brown as discussed above, has significant potential exculpatory power as the inference from these statements is strong that Vollbrecht was not guilty of the Hackl homicide.

The Court has considered all of the evidence presented at Vollbrecht's trial, and the evidence adduced at the most recent, lengthy post-conviction motion hearing, including the demeanor of all of the witnesses at that hearing. The Court finds there is a reasonable probability that after a jury considered all of the evidence presented at Vollbrecht's trial and the newly discovered evidence regarding the evidence of Brown's specific and distinct motive—to fasten women to trees with a chain, to shoot them, and to burn them—and Brown's alleged confessions to the Hackl homicide, it would have a reasonable doubt that Vollbrecht is guilty.

However, the Court cannot find that this probability is above 50%. The Court believes that the probability is somewhat higher than 50% that a jury would still convict Vollbrecht after hearing all of the evidence. However, the Court also believes the probabilities are close, and that the addition of this newly discovered evidence undermines the confidence in the jury's guilty verdict at trial. Therefore, the Court grants the defendant a new trial on the grounds of newly discovered evidence.

V. IS VOLLBRECHT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE?

Vollbrecht also moves the Court for a new trial in the interest of justice on the grounds that the real issue had not been fully tried. The real issue had not been fully tried when the jury was erroneously not given the opportunity to hear important testimony related to an important issue in the case or when the jury considered improperly admitted evidence that clouded a crucial issue. The Court does not have to find a substantial probability of a different result on retrial, but can grant a new trial to accomplish the ends of justice because the real issue was not fully tried. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). The broad discretionary review power of granting a new trial in the interest of justice should be used sparingly and only in exceptional circumstances. *Armstrong*, 2005 WI 119, at ¶181, Roggensack dissent.

Vollbrecht offers the testimony of Scott Evert who testified that he remembered on the night of Hackl's homicide he saw a young man and woman driving on Lueder's road, which is a road on which Vollbrecht claimed he and Hackl had driven that evening to a marsh along the river. He didn't report that information to anyone until sometime in 2000. The male was driving and the female was in the back of the car. Evert testified that the person he saw in 1987 looked like Vollbrecht. He first made that identification thirteen years later, and at the motion hearing twenty-three years later. Like everyone, Vollbrecht would have aged. He also identified the vehicle at the motion hearing as being the Pontiac. (6/15/10, p. 15.). The Court finds that this testimony regarding the identification of a person and a vehicle so many years after the fact is not worthy of belief, that is, it isn't within the realm of believability such that a reasonable juror could believe the evidence.

Vollbrecht also argues that all of the other evidence that Vollbrecht offered, discussed by the Court above, supports his interest of justice claim. The Court has read the transcripts of his case carefully. The Court has concerns about the wrongfully admitted testimony of his sexual relationships with two women that were found to be harmless in his original appeal, and the withheld evidence. However, when the Court considers the entire record, and after the Court has already granted him the relief above, the Court declines to grant a new trial in the interest of justice.

THIS IS A FINAL DECISION FOR APPEAL PURPOSES.

Dated: January 10, 2011

By the Court:

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Steven G. Bauer
Circuit Court Judge

cc. Keith A. Findley
Stephen P. Hurley
Barbara L. Oswald