

Introduction

Michael Griesbach inadvertently makes a very good case toward the end of his book that is primarily about Steven Avery's 1985 sexual assault convictions that DNA evidence proved he was innocent of committing, that Mr. Avery is also actually innocent of his 2007 murder conviction for which he is currently serving a sentence of life in prison.

Unreasonable Inferences The True Story of a Wrongful Conviction and Its Astonishing Aftermath

By Michael Griesbach
(Point Beach Publishing, 2010)

Review by Hans Sherrer

Michael Griesbach was one of the prosecutors in Manitowoc County, Wisconsin who after reviewing Steven Avery's case agreed in 2003 to sign a stipulation that his 1985 convictions related to a sexual assault should be vacated. Avery was subsequently released after 18 years of wrongful imprisonment. *Unreasonable Inferences* is Griesbach's account of the Avery case based on both publicly available information and his inside knowledge. Although Griesbach is a lawyer, *Unreasonable Inferences* is a very readable book that uses a minimum of legal jargon in explaining how Avery was prosecuted, convicted, and imprisoned for the assault of a woman he had never met, and that occurred when he was miles from the crime scene.

Penny Beerntsen went for a one-hour run on a sunny day in July 1985 in a park and adjoining state forest along Lake Michigan's shore in Manitowoc County. Penny wore a watch to keep track of her time. At 3:10 p.m. she saw a scraggly man who was fully clothed and wearing a coat even though the temperature was in the mid-80s. She reached her half-way point at 3:30 p.m. and turned around. At 3:50 p.m. Penny again saw the scraggly man. After accosting her, the man beat and sexually assaulted her. Fifteen minutes after the attack began the man fled into the forest at 4:05 p.m. Where Penny was assaulted was about 1/2 mile from the nearest parking lot.

Steven Avery was a young rabble-rouser in Manitowoc County, although he had never been convicted of a violent crime. Manitowoc County's sheriff didn't like Avery, and when he learned of the attack on Penny he

Has Steven Avery Twice Been Wrongly Convicted Of Heinous Crimes?

had the gut feeling Avery was the perpetrator. Based on his suspicion the sheriff immediately ordered Avery's arrest, even though he didn't know what Avery had been doing that day, and there was no evidence linking him to the crime.

Avery was charged with the assault after Penny selected him from a photo array of mugshots she was shown while hospitalized.

Unreasonable Inferences shows that before Avery's trial in December 1985 there were many large red flags he was the wrong man.

First, he didn't match key physical characteristics of Penny's assailant she described when she was first interviewed by the police. Penny had close contact with her assailant in broad daylight, and she said he was 5'-6" to 5'-7", he had brown eyes, and he was in his early 30s. In contrast Avery is 5'1", he has blue eyes, and he was 23 at the time of the attack.

Second, Penny stated repeatedly that her assailant had clean hands and smelled clean, while Avery had been pouring concrete that afternoon and he had chronically dirty and greasy hands from constantly working on automobiles and he didn't have good personal hygiene.

Third, Penny was assaulted in a sandy area, but no sand was found in any of Avery's shoes, clothes, or on the floor mat or seat of his Chevy Blazer.

Fourth, neither Avery nor his Blazer was seen anywhere in the park or the surrounding area on the day of Penny's attack.

Fifth, a dozen relative and non-relative alibi witnesses established that on the afternoon of the assault Avery had been helping pour concrete at his parent's auto salvage yard until 3:30 p.m., and that he, his wife and his five children, including twins born six days earlier, didn't leave there until 4:30 p.m. The salvage yard is 12 miles inland from where Penny was assaulted. It was not possible for Avery to have concocted his alibi. He was arrested hours after Penny's assault and he was held incommunicado for eight days from his family and friends. It was during those eight days that Avery's alibi witnesses gave police statements that matched their testimony at his trial about his

whereabouts the afternoon of the attack.

Sixth, alibi witnesses also established that when Avery and his family left the salvage yard they drove to Green Bay where they first went through the drive-thru at a Burger King, then they went through a drive-thru car wash, and the receipt for a paint purchase establishes that at 5:13 p.m. they bought some paint at a Shopko in Green Bay — 36 miles from where Penny was assaulted. The Shopko check-out clerk confirmed the paint was bought by Avery and that his family was with him.

Seventh, it was improbable that the timeline of Penny's assault from 3:50 to 4:05 p.m. allowed time for Avery to have committed it unless he was speeding significantly above the speed limit after he finished pouring concrete at the salvage yard at 3:30 p.m. It was physically impossible if one considered that Penny first saw her assailant at 3:10 p.m. when Avery's alibi witnesses established he was 12 miles away pouring concrete.

Eighth, a man believed to be Penny's attacker called her at her home two days after the assault and it wasn't Avery, because he was held incommunicado at the jail for eight days and he didn't make any calls during that time.

Yet, Penny's in-court identification of Avery was sufficient to overcome the facts supported by numerous alibi witnesses that excluded him as her assailant. After deliberating for three days Avery was convicted of sexual assault, attempted murder, and false imprisonment. He was sentenced to 49 years in prison.

In 1995 a lawyer hired by Avery's parents filed a post-conviction motion for DNA testing of loose pubic hair collected from Penny and biological material recovered from scrapings underneath her fingernails. The motion was granted. There was insufficient biological matter from the pubic hairs to test, but testing of the fingernail scrapings resulted in identification of a DNA profile that didn't match Avery or Penny.

Avery's subsequent motion for a new trial was based on the exculpatory DNA evidence, and that the prosecutor violated Avery's right to due process by failing to disclose that prior to his trial the Manitowoc County sheriff identified an alternate suspect seen by witnesses at the park who matched Penny's description of her assailant. That new trial motion was denied.

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Steven Avery cont. from p. 3

Then in 2000 the Wisconsin Innocence Project (WIP) agreed to represent Avery to seek testing and retesting of the pubic hairs and the fingernail scrapings by state of the art DNA testing techniques. Over the prosecution's intense opposition the WIP's motion to test the evidence was granted. One of the pubic hairs was not only found to exclude Avery, but the DNA profile was complete enough for comparison with the profiles stored in the Wisconsin and FBI's DNA databases. That comparison resulted in a DNA hit for Gregory A. Allen who was serving a 60-year sentence in Wisconsin for a 1995 rape.

Michael Griesbach was a prosecutor in Manitowoc County when the DNA test results were reported and Allen was identified as the source. Griesbach and the District Attorney exhaustively reviewed Avery's case file and trial transcript. In light of the new DNA evidence that excluded Avery but implicated Allen, and the many inconsistencies in the trial evidence, Griesbach and the DA were convinced of Avery's innocence and signed a stipulation that his convictions should be vacated. Avery was released in 2003 after almost two decades in prison.

Griesbach's recounting of what the Manitowoc County Sheriff and the DA did in 1985 to ensure Avery was convicted is one of the most interesting parts of *Unreasonable Inferences*. One thing is certain: If the sheriff had not relied on his gut to pin Penny's assault on Avery before the crime was investigated it is likely the right man would have been charged with the crime and convicted instead of Avery. Allen matched Penny's description and the description of the witnesses the DA concealed from Avery's trial lawyer, he had a number of sex related convictions, he was identified as a suspect after Avery's arrest, and prior to Avery's trial several prosecutors in the Manitowoc County DA's Office voiced their opinion to DA Vogel that they were convinced Allen assaulted Penny.

Whether or not he intended to do so, Griesbach lays out a scenario in *Unreasonable Inferences* that Avery wasn't wrongly convicted so much as he was deliberately framed by Manitowoc County's Sheriff and DA who knew he didn't fit the facts of Penny's assault. The best that can be said of the people involved in Avery's prosecution is they based it on unreasonable inferences based on suspicions and not hard evidence he assaulted Penny. After Avery's release he filed a \$36 million

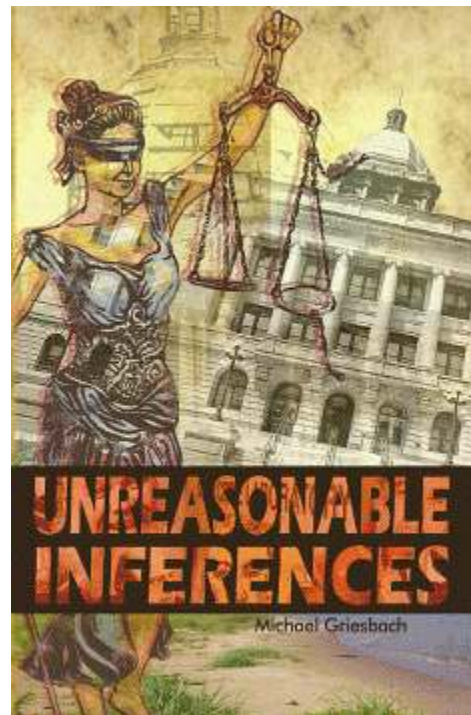
federal civil rights lawsuit against Manitowoc County, its former sheriff Thomas Kocourek, and its former District Attorney Denis Vogel. Avery was living a respectable life and he was on track to collect many millions from Manitowoc County from his lawsuit.

Then something surreal happened: Teresa Halbach – a photographer who had been to Avery's Auto Salvage at least 15 times to photograph vehicles for *Auto Trader* magazine – disappeared on October 31, 2005, a day when she was at the salvage yard photographing a car. Her SUV was found by itself on the edge of the salvage yard four days after she disappeared. Her remains were found in a fire pit during an intensive search of the salvage yard property.

The police decided Avery was the last person to have seen her alive, and he was arrested and charged with the crime.

The prosecution's case was based on a number of remarkable coincidences, and Avery's lawyers made it clear they believed he had been framed to ensure he wouldn't win his civil rights lawsuit and collect many millions in compensation from Manitowoc County. Among those coincidences are:

- Halbach's SUV was "found" by itself next to the salvage yard *four days* after she disappeared, in an area that had been thoroughly searched by the police. Avery couldn't have driven it there after the area was searched because it was sealed off by the police for eight days after her disappearance, and only the police had access to the area.
- During the police's *seventh search* of Avery's trailer on the auto salvage yard property, and *after* Halbach's SUV was found, the keys to her SUV were "found" in his bedroom by two sheriff deputies who had been deposed several weeks earlier in Avery's civil suit. Avery couldn't have put the keys there because the salvage yard was sealed off by the police for eight days after Halbach's disappearance, and only the police had access to his trailer.
- An unsealed vial of Avery's blood was found by his lawyers in a box of documents at the courthouse.
- Two tiny spots of Avery's blood were "found" on the seat cover of Halbach's SUV – yet none of Avery's skin cells or blood was found on the door handles, steering wheel or gearshift lever that would have been present if he had been in the vehicle and driven it with a bleeding hand to where it was found.



- A bullet fragment was "found" in Avery's garage after it had been thoroughly searched a number of times by the police, but there was no way to determine where it came from.

Several months after Halbach's murder Avery's 16-year-old nephew Brendan Dassey was also charged when after a number of intense interrogations he "confessed" to involvement in the crime. Dassey's "confession" included so many details that didn't jibe with the crime scene that on its face it has the earmarks of being a false confession. Among other things:

- Dassey stated that he and Avery both raped Halbach while she was "naked and bound face up on the bed." That is improbable because none of Dassey's DNA was found in the bedroom or anywhere in Avery's trailer.
- Dassey stated that Avery stabbed Halbach in the stomach in his bedroom, Dassey cut her throat, and then Avery strangled her. That didn't happen because Dassey would have bled profusely yet not a single trace of her blood was found in the bedroom or anywhere else in Avery's trailer. Furthermore, there was no sign of a struggle in the trailer.
- Dassey stated he cut some of her hair off. That is improbable because not a single hair of Halbach's was found anywhere in the bedroom or elsewhere in the trailer.
- Dassey stated that he and Avery then

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carried Halbach's body to Avery's garage. That is improbable because he didn't say she was wrapped in anything and not a single trace of her blood or any of her hairs was found anywhere from inside the trailer all the way to the inside of the garage.

- Dassey stated that in the garage Avery shot Halbach about 10 times with a rifle, including several times in the left side of her head. That didn't happen because there would have been significant blood splatter, but there was none, and no bullet holes were found from bullets passing through her head and body. Also, Dassey would have bled from her wounds yet not a trace of her blood was found in Avery's garage,

Dassey recanted his confession and the prosecution didn't subpoena him to testify at Avery's trial.

When it became apparent during Avery's 2007 trial how weak the prosecution's case was and that Avery's claim of being framed had some traction, a rush examination of the two blood spots found in Halbach's car was conducted by the FBI to determine if the blood preservative EDTA was present. If it was present that would be evidence the blood was planted by the police and it came from the unsealed vial of blood found by Avery's lawyers in the court file. There was no scientific protocol to test for the presence of EDTA, so in a matter of days the FBI lab created one. The test they developed excluded the presence of EDTA. However, as an experimental test that had not been verified through replication by other laboratories or peer reviewed by any independent experts, the accuracy of the new test was unknown as was its rate of producing false positive and false negative results.

Testimony about the result of the FBI lab's experimental EDTA test would not be admissible in federal court under the *Daubert* standard, and it wouldn't be expected to be admissible in states that rely on the *Fry* standard for admissibility of expert testimony. However, Judge Patrick Willis admitted the testimony by an FBI crime lab technician that the spots tested negative for the presence of EDTA. Avery's lawyers countered with the expert testimony of a laboratory quality control auditor who questioned the accuracy of the "FBI's hastily developed testing protocol that wasn't designed to rule out the presence of EDTA in the bloodstains because the limits of the analysis machine weren't low enough to find it in such a small

amount of blood."

Although the testimony of Avery's expert was more scientifically valid than that of the FBI's technician, the gravitas of the FBI lab effectively meant the testimony by the FBI technician took the air out of Avery's defense that he had been framed for the crime by the Manitowoc County Sheriff and DA.

Avery was convicted in March 2007 of first-degree intentional homicide and illegal possession of a firearm. He was sentenced to life in prison.

Not incidentally, Avery settled his lawsuit for \$400,000 prior to his trial so he would have funds to pay the lawyers he retained to defend him against the charge he murdered Halbach.

During Dassey's trial that began in April 2007 the prosecution was allowed to introduce his confession. Dassey was convicted of first-degree intentional homicide, mutilation of a corpse, and second-degree sexual assault. He was sentenced to life in prison.



Brendan Dassey during his trial in 2007 (WFRV)

Griesbach makes it clear he believes Avery and his nephew murdered Halbach – but the case he lays out in his book strongly supports that Avery had nothing to do with the murder and that just as he and his lawyers claimed, he was framed for a second time by the Manitowoc County Sheriff's Office and the District Attorney's Office.

Judge Willis provided invaluable assistance to the prosecution by making at least two key rulings: First he barred the jury from hearing details of the role the Manitowoc County Sheriff's Department and DA had played in Avery being convicted in 1985 of a crime he didn't commit. Second, Judge Willis allowed "expert" testimony regarding the hastily developed protocol to test for the presence of EDTA in the two spots of blood on the seat of Halbach's SUV – even though there had been no peer review of real world testing of the protocol to determine its accuracy and the probability of false positives. Griesbach glosses over the key role played by the judge's invaluable assistance to the prosecutors in securing Avery's convictions in 2007, and also in 1985 when among other things the judge ruled in the prosecutions favor on 18 of the 20 pre-trial motions filed by the defense.



Steven Avery during his trial in 2007

Unreasonable Inferences is one of the more important books written about the conviction of an innocent man because Griesbach lays out from his perspective as a prosecutor that the system didn't fail in convicting Avery in 1985 of the sexual assault of a woman he had never met in his life, but it worked exactly as the judge, the police and the prosecutor intended it to function. *Unreasonable Inferences* also makes it clear that it wasn't the system that discovered the evidence proving Avery was innocent, but outsiders who only succeeded after overcoming the system's substantial obstacles to establishing his innocence.

Although the book's title comes from the way Avery was convicted for assaulting Penny in 1985 based on unreasonable inferences drawn from the available evidence, based on the case Griesbach lays out it is equally applicable to Avery's conviction for Halbach's murder. Only the future holds the answer to whether evidence will be discovered proving Avery and his nephew are innocent and they will be exonerated of Halbach's murder.

Unreasonable Inferences is highly recommended to every person interested in wrongful convictions. A person can find the book interesting and learn from it regardless of their level of interest or knowledge about wrongful convictions.

Unreasonable Inferences is available in softcover [from Amazon.com](http://www.amazon.com) for \$19.95. It is also available as a [Kindle e-book](#).

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