STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL BASED ON ALLEGED *YOUNGBLOOD* VIOLATION

Introduction

Steven Avery seeks reversal and a new trial based on an alleged violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988). Avery's motion should be denied without a hearing for the following reasons: 1) his claims are procedurally barred; 2) his claims are not cognizable on collateral attack; 3) even if he could raise a due process claim, he failed to meet his pleading burden; 4) his statutory claim, which is not cognizable, is without merit; and 5) ANDE-Rapid DNA Identification is not authorized or approved for forensic use and therefore cannot be used to test the forensic samples at issue in this claim.

Avery also requests that the Trial Court recuse itself from further proceedings in this matter. There is no basis in the record requiring the Court to consider recusal.

Because this supplemental Wis. Stat. § 974.06 motion involves application of established case law, it can be resolved on briefs, without need for an evidentiary hearing. Further, there is no need for the Court to recuse itself. The State offers the following arguments and begins with Avery's request for recusal.

Request for Recusal

Avery makes two arguments in support of his request for recusal. First, Avery argues the Court should recuse itself because it *presided* over the civil suit *Teresa M. Halbach, et al. v. Steven A. Avery, et al*., Manitowoc Co. Case No. 06-CV-150. Upon closer examination of the CCAP record, the only matter the Court presided over was the Plaintiff's Motion for Voluntary Dismissal. Judge Sutkiewicz was appointed on October 29, 2013, after a request for substitution was made on the original judicial assignment. Plaintiff's counsel, Patrick Coffey, filed a motion for voluntary dismissal on November 21, 2013, and a telephone scheduling conference occurred on November 25, 2013. The Court pointed out that criminal proceedings (a *pro se* Wis. Stat. § 974.06 motion) were still pending. Atty. Coffey asked that the Court hold the Motion for Dismissal in abeyance until the conclusion of the criminal court proceedings. However, two and a half years later, on June 8, 2015, this Court granted Plaintiff's Motion for Voluntary Dismissal. There were no proceedings in the civil case dealing with discovery issues or the presentation of any evidence regarding liability or damages. The Court made no evidentiary decisions in the civil case. Thus, it is clear the Court was not biased by the presentation of any evidence during the proceedings in the civil case. SCR 60.04(4)(a) does not require a court to consider recusal under these circumstances. Avery relies on *In re Disciplinary Proceedings Against Kohler*, 2009 WI 24, 316 Wis. 2d 17, 762 N.W.2d 377. The *Kohler* disciplinary proceeding is distinguishable on its facts and provides no support for consideration of recusal.

First, and most importantly in this disciplinary proceeding, the presiding judge in the underlying criminal action (Judge Harrington) voluntarily recused himself. He was not required to do so. The opinion does not mandate a recusal just because a judge presides over both the civil and criminal cases arising from the same set of facts. In fact, in many of the counties of this state,

judges may very well decide a case in family court, juvenile court, and criminal court when the actions arise out of a common set of facts. In addition, it is also clear that Judge Harrington actually presided over a trial in the civil case which arose out of the same set of facts underlying the criminal case. The underlying facts in the civil and criminal cases involved claims of fraud by a contractor. The issue in the disciplinary proceeding was whether the prosecutor failed to comply with discovery obligations and the corresponding orders of the trial court. Judge Harrington determined the prosecutor failed to comply on numerous occasions. During the course of the civil trial it is possible Judge Harrington may have learned the answer to whether certain canceled checks not provided by the prosecutor during the discovery process constituted exculpatory evidence. It is also possible that Judge Harrington recused himself because he found himself at odds with the prosecutor and wanted to ensure that he gave both the defense and the State a fair trial. The case was assigned to another judge who ultimately dismissed the case with prejudice because of the failure to provide relevant discovery. Based on these facts, there is no reason for the Court to consider recusal when the only thing this Court did was grant the Plaintiff's Motion for Voluntary Dismissal of the civil case against Avery. It is beyond argument that the dismissal of the civil case was favorable to Avery.

Next, Avery requests recusal because Judge Sutkiewicz was a member of the Crime Victim Rights Board (CVRB) with District Attorney Kenneth Kratz during the time the Avery case was being investigated and subsequently tried for homicide in the winter of 2007. This argument also misses the mark.

First, Judge Sutkiewicz was not assigned to handle any of the postconviction motions filed by Avery until Avery filed his first Wis. Stat. § 974.06 motion *pro se* on February 14, 2013. It is a matter of public record that this Court did not receive the judicial assignment for Avery's case

until April 11, 2013.[1] The fact that District Attorney Kratz and Judge Sutkiewicz happened to sit on the CVRB is of no consequence. It is also important to note Judge Sutkiewicz sat on the CVRB as a citizen member and not as a judge. Judge Sutkiewicz left the CVRB when she was appointed to the bench in the summer of 2010.[2] It is also a matter of public record that District Attorney Kratz resigned from the CVRB in October of 2010.[3] It is mere speculation this association somehow biased the Court in the handling of Avery's postconviction cases these many years later. If anything, it is equally possible the Court would look unfavorably upon the prosecution's case given the conduct leading to resignation of District Attorney Kratz.

Preservation & Disposition of Bone Fragments

1. This successive supplemental motion is procedurally barred.

In *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), the Wisconsin Supreme Court created a simple rule designed to limit successive postconviction motions and appeals in criminal cases. A defendant must raise all grounds for relief in his or her "original, supplemental, or amended motion" for postconviction relief, or on direct appeal. *Id.* at 181 (applying Wis. Stat. § 974.06(4)). If a ground for relief was not raised or incompletely raised in a prior postconviction motion or direct appeal, it may not become the basis for a new postconviction motion unless the defendant can demonstrate a "sufficient reason" why the new argument was not previously raised. Wis. Stat. § 974.06(4); *Id.* at 185.

The purpose behind this rule is clear: the promotion of finality in criminal litigation by requiring defendants to bring all available grounds for relief in a single postconviction motion or

[1] *State v. Steven A. Avery*, Manitowoc County Circuit Court Case, 05-CF-381, CCAP entry https://wcca.wicourts.gov/caseDetail.html?caseNo=2005CF000381&countyNo=36&index=0&mode=details Last visited March 20, 2019

[2] https://ballotpedia.org/Angela_Sutkiewicz Last visited March 20, 2019

[3] http://archive.jsonline.com/news/wisconsin/104284273.html/ Last visited March 20, 2019

appeal, unless there are good and sufficient reasons for not doing so. *Id.* There is no dispute that Avery had a direct appeal. There is no dispute that Avery's filings are successive and repetitive. There is no dispute that Avery has chosen to take a piecemeal approach to collateral review. And Avery has not demonstrated a sufficient reason for failing to bring all of his claims in a single postconviction motion or appeal. He simply wants the Court to treat him differently and not apply the procedural bar.

Any claim for a new trial premised upon the failure to previously test the bone fragments or the alleged improper disposition of certain bone fragment evidence is barred because the claims could have been raised previously on several occasions.

The first opportunity to raise this claim regarding the failure to previously test the bone fragments occurred during the direct appeal. Appellate counsel could have raised the claim within the context of ineffective assistance of trial counsel for not requesting further testing after the FBI report was submitted. Since the planted evidence theory was central to the defense, it could have been argued that further testing might have supported the theory.[4] The second opportunity to raise this issue came when Avery filed his first Wis. Stat. § 974.06 motion *pro se* on February 14, 2013. Avery raised claims of ineffective assistance of both trial and appellate counsel in that motion. However, no request was made to test bone fragments to support the planting defense and there was no claim of ineffective assistance of trial or appellate counsel for failing to raise the issue. The third opportunity to raise any claim regarding the bone fragments occurred when current postconviction counsel filed Avery's second Wis. Stat. § 974.06 motion on June 7, 2017. Nowhere in this filing, nor in any of Avery's Motions for Reconsideration filed in the fall of 2017, after this

[4] Then again, further testing might have weakened the argument that Teresa Halbach could have been killed elsewhere. Trial counsel was free to argue inferences in support of their theory based on the absence of a definitive answer.

Court denied the June 7 Motion for Post-Conviction Relief, is there any request to test bone fragments. Despite these failings, Avery could have raised a claim regarding the return of some of the bone fragments in his last supplemental motion on remand.

On April 19, 2018, Avery's private investigator, James R. Kirby, filed a Freedom of Information Act (FOIA) request with the Calumet County Sheriff's Department requesting, among other things, all investigative reports on the Avery case beginning October 31, 2005, through the date of the request, April 19, 2018. (State's Exhibit #3 at 7.) The Calumet County Sheriff's Department handled the matter as a public records request pursuant to Ch. 19 of the Wisconsin Statutes. The Sheriff's Office indicated a willingness to comply and advised Mr. Kirby the cost would be $279.25 at $.25 per page. *Id.* at 5.[5] On April 25, 2018, Mr. Kirby tendered payment in the amount of $279.25. *Id.* at 9-10. The reports (1-1117) were mailed to Mr. Kirby on May 29, 2018. *Id.* at 1. Included in the 1117 pages of investigative reports was the report of evidence custodian Jeremy Hawkins detailing the disposition of certain bone fragment evidence. The report was dated September 20, 2011. Deputy Hawkins' report is numbered pages 1114 – 1115.[6] (Exhibit #2.) Current postconviction counsel acknowledged receiving the investigative reports on or about May 30, 2018, in her Motion to Compel Production of Recent Examination of the Dassey Computer filed in this Court on July 3, 2018. (Mot. Comp. Prod. Rec. Ex. 1, ¶ 2.)

Armed with this additional information, current postconviction counsel could have – and should have – filed a motion in the Court of Appeals asking leave to expand the scope of the Remand Order issued by the Court of Appeals on June 7, 2018, to include claims based on the

[5] 27,925/25 = 1,117. As of May 2018, there were 1117 pages of investigative reports.

[6] Since Mr. Kirby had already paid the fee for the anticipated delivery of 1117 pages of investigative reports and Bunnell did not do the photocopying of the postconviction reports, Kirby was not charged for the 64 pages of postconviction investigative reports.

disposition/return of the bone fragments. Counsel failed to do so. Consequently, any claim regarding the disposition of the bone fragments is barred by application of *Escalona-Naranjo*. The language in *Escalona-Naranjo* is dispositive.

> [I]f the defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion. The language of subsection (4) does not exempt a constitutional issue from this limitation, *unless* the court ascertains that a "sufficient reason" exists for either the failure to allege or to adequately raise the issue in the original, supplemental or amended motion.

Id. at 182-83. Underscore added for emphasis. The motion should be denied as procedurally barred.

2. Even if the claim is not procedurally barred, it cannot be raised in a Wis. Stat. § 974.06 motion

A petition under Wis. Stat. § 974.06 is limited to jurisdictional and constitutional issues. *State v Balliette*, 2011 WI 79, ¶ 34, 336 Wis. 2d 358, 805 N.W.2d 334, *State v. Nickel*, 2010 WI App 161, ¶ 7, 330 Wis. 2d 750, 794 N.W.2d 765. Avery's Motion for New Trial based on an alleged *Youngblood* violation must be denied because he has no cognizable constitutional or jurisdictional claim. At best, he has only a statutory claim and that is not enough.

Avery spends much time and effort arguing the State violated his due process rights when it disposed of some of the bone fragments[7] recovered during the investigation of Teresa Halbach's disappearance and death. Avery relies on *Arizona v. Youngblood*, 488 U.S. 51 (1988). This reliance is misplaced. *Youngblood* and its progeny do not apply to postconviction proceedings. *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009). In *Osborne* the Court determined there is no procedural or substantive due process to DNA testing of the State's evidence in a postconviction proceeding. *Id.* at 72.[8] Similarly, there is no due process right under the

[7] As will be demonstrated later not all bone fragments were provided to the family for burial.

[8] Inexplicably, Avery fails to cite and distinguish Supreme Court precedent directly on point and contrary to his position.

Wisconsin Constitution either because the due process clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the United States Constitution. *State v. McManus*, 152 Wis. 2d at 130, 447 N.W.2d 654 (1989).

Osborne sought access to State evidence so that he could apply new DNA-testing technology that might prove him innocent. Osborne claimed he had a due process right to access evidence during postconviction proceedings so that he could do short tandem repeat (STR) DNA testing. Osborne asserted that such testing was more discriminating then DQ Alpha or RFLP methods that were available at the time of his original trial. However, the Supreme Court rejected his invitation to recognize a freestanding liberty right to DNA evidence testing in postconviction proceedings. *Osbourne* at 72. The Court determined once a defendant has been proven guilty beyond a reasonable doubt after a fair trial he does not have the same liberty interests as a free man. *Id.* at 68-69. If the Supreme Court had concluded there was a due process right, the Court would be short-circuiting the many considered legislative responses being adopted throughout the country by state legislatures to handle postconviction testing issues. *Id*. at 73. The court further opined:

> Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and are substantive-due-process rule-making authority would not only have to cover the right of access but a myriad of other issues. We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. Cf. *Arizona v Youngblood*, 488 US 51, 56 – 58 (1988). If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when? No doubt there would be a miscellany of other minor directives. See, *e.g., Harvey v. Horan*, 285 F.3d 298, 300-301 (CA 4 2002) Wilkinson, C. J., concurring in denial of rehearing).

Id. at 73-74.

Since there is no procedural or substantive due process right to conduct DNA testing – and no recognized constitutional obligation to preserve forensic evidence that might later be tested – Avery has no basis to bring this claim in a Wis. Stat. § 974.06 proceeding. Wis. Stat. § 974.06(1).

This motion should be denied.

3. Even if *Youngblood* applied postconviction, which it does not, Avery has not met his pleading burden.

Two United States Supreme Court cases address the criteria that courts must apply to determine when the State's failure to preserve evidence before trial amounts to a due process violation: *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988).

Under *Trombetta*, 467 U.S. at 488, due process is violated when the defendant shows that the State lost evidence before trial that might be expected to play a significant role in the suspect's defense. To meet this standard, the evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id*. at 489. Evidence does not have apparent exculpatory value if it would have provided "simply an avenue of investigation that might have led in any number of directions." *Hubanks v. Frank*, 392 F.3d 926, 931 (7th Cir. 2004) (quoting *Youngblood*, 488 U.S. at 57 n.*).

Under *Youngblood*, 488 U.S. at 57-58, the defendant establishes a due process violation if he shows that: 1) the State lost or destroyed evidence that is potentially exculpatory; and 2) the evidence was lost or destroyed in bad faith.

There is a well-developed body of Wisconsin case law that follows and applies *Trombetta* and *Youngblood* when addressing whether the State's loss or destruction of evidence before trial violates a defendant's due process rights. To put it succinctly, "[a] defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." *State v. Huggett*, 2010 WI App 69, ¶ 11, 324 Wis. 2d 786, 783 N.W.2d 675 (citation omitted).

The first step in the analysis is whether the bone fragments at issue (recovered from the Radandt Quarry) constitute exculpatory evidence. The bone fragments are not *apparently* or *potentially* exculpatory in any way.

Trombetta limits any due process claim involving the State's failure to preserve evidence to constitutionally material evidence – evidence which "both possess[es] an exculpatory value that [is] apparent before the evidence was destroyed" and where no comparable evidence is available to a defendant by other means. *Trombetta*, 467 U.S. at 488–89. Regarding the *Trombetta* standard, Avery has not established how these bone fragments are anything other than an avenue of investigation that *might* lead in any number of directions. Avery has failed to show in his pleadings how the existence of (assuming *arguendo* that testing would have determined the fragments in #8675 were human) *human* bone fragments found in the quarry a half mile away support any of his arguments that Individual A, or Scott Bloedorn and/or Ryan Hillegas; or Bobby Dassey and/or Scott Tadych are the real killers.

Over the course of the past 2½ years, since the filing of the original Motion for Post-Conviction Scientific Testing on August 26, 2016, Avery has changed his theory of who the real murderer is at least three times. Initially the focus was on Individual A and Individual B (later determined to be Scott Bloedorn), and then the focus shifted to Ryan Hillegas in Avery's June 7, 2017, Postconviction Motion. In that motion Avery claimed the only person who meets the *Denny* test was Ryan Hillegas. (Mot. Post-Con. Rel. 105 *et seq*., June 7, 2017.) Shortly thereafter, in the summer and fall of 2017 Avery turned his attention to Bobby Dassey and Scott Tadych. Since that time, Avery claims Bobby Dassey and Tadych are the real killers and presumably meet the *Denny* Legitimate Tendency Test. (Mot. Recon. 33-38, 43-46, Oct. 23, 2017.) As this Court is aware from prior filings, Bobby Dassey and Scott Tadych (along with Bloedorn and Hillegas) were included

in trial counsels' original Third Party Liability Motion as viable suspects. The Trial Court found the evidence lacking in pretrial (Dec. Order on Def.'s Third Party Liability Motion, Jan. 30, 2007) and again in the Wis. Stat. § 809.30(2)(h) Motion for Postconviction Relief. (Dec. Order on Def.'s Mot. for Postconv. Relief 71-96, Jan. 25, 2010). Presumably, Dassey/Tadych remain his picks. The State will address Avery's pleading deficiencies in this context.

In this most recent filing, Avery spends considerable effort telling the Court what his three experts – Drs. DeHaan, Symes, and Selden – think about the bone fragments. (Def. Sup. § 974.06 Mot. for Post-Con. Relief . . . 25-29, Mar. 11, 2019). But nowhere in that discussion, or anywhere else in the motion is there a discussion of how the *assumed* (but not proven) *human* bone fragments found in the Radandt Quarry advance the theory that anyone other than Avery was the real killer.

Avery's materiality discussion (Def. Sup. § 974.06 Mot. for Post-Con. Relief . . . 17, Mar. 11, 2019) misses the mark. Materiality relates to guilt or innocence and is determined by the facts in a given case and their inter-relationship to other facts and evidence. Materiality has nothing to do with Wis. Stat. §§ 968.205 and 974.07. In *U.S. v. Bagley*, 473 U.S. 667 (1985) the Court defined materiality further and refined the *Brady* rule holding that regardless of the type of request, *favorable evidence is material*, and constitutional error results from its suppression by the government, "*if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.*" *Id.* at 682. Emphasis added. A reasonable probability of a different outcome is shown when the suppression of the evidence undermines the outcome. *Id.* at 678. The bone fragments were not apparently exculpatory.

It is also worth pointing out that in comparing the evidence ledger sheets (Def. Sup. § 974.06 Mot. for Post-Con. Relief . . . , Ex. 9, 11, Mar. 11, 2019) with Deputy Hawkins' report from the events of September 20, 2011 (Exhibit #2), there are many fragments from the quarry

that may or may not be human still in evidence available for testing. Thus, Avery has also failed to establish that he cannot obtain comparable evidence for testing.

Regarding the *Youngblood* standard, the bone fragments were not potentially exculpatory. Further refinement of the *Brady* rule in the pretrial setting occurred in *Youngblood*. There, the Court determined that the good faith or bad faith of the State mattered when the failure to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 57. The Court held that a criminal defendant must show bad faith on the part of the State when the State *fails to preserve potentially useful evidence*. *Id.* at 58. Emphasis added. Absent such a showing, there is no due process violation. *Id.*

The *potential usefulness* of the evidence found in the quarry is debatable. While trial counsel made use of the State's inability to discern whether the fragments [#8675] recovered from the quarry were human. (Trial Tr. Day 14, 10-18, Mar. 1, 2007; and in closing arguments, Trial Tr. Day 23, 139-49, Mar. 14, 2007; Trial Tr. Day 24, 51, Mar. 15, 2007.) Avery fails to show how a definitive determination the fragments were human is material to his most recent theory that Bobby Dassey and Scott Tadych are the real perpetrators. Avery fails to establish how a definitive determination would establish a reasonable probability of a different outcome.

There is no discussion of how and when these assumed human fragments were planted in Avery's burn pit. There are no *facts* supporting when, where, and how Teresa Halbach was killed or burned in a barrel other than the speculative assertions of Avery's experts. There is no discussion how these *assumed human bone fragments* from the Radandt Quarry constitutes evidence that satisfies the Legitimate Tendency Test; such that there is any viable third-party suspect under the rules of *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) and *State v. Wilson*, 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52. There is no analysis of how these now *human*

fragments establish motive, opportunity, or a direct connection to the crime. Moreover, there is no analysis demonstrating why it's not possible that Avery himself placed the bones in the quarry to divert attention from himself and escape detection. After all, bone fragments belonging to Teresa Halbach were found in the Dassey burn barrel. (Trial Tr. Day 13, 230, Feb. 28, 2007.) Avery fails to tell us how a possible third location of Halbach's remains possesses any exculpatory value.

Furthermore, the State did not act in bad faith when it released the bone fragments to the Halbach family. Disposition of some of the bone fragments occurred on September 20, 2011. The Court of Appeals had issued a decision denying Avery's request for new trial on August 24, 2011. In analyzing the circumstances surrounding the disposition of some of the fragments for burial, it is important to note that the bone fragments, human or not, were not part of Avery's direct appeal. *State v Avery*, 2011 WI App 124, ¶¶ 1-3, 337 Wis. 2d 351, 804 N.W.2d 216. There was no pretrial request made by trial counsel and there was no request by appellate counsel during direct appeal to examine any of the bone fragments. The fragments had nothing to do with the issues raised in Avery's direct appeal. As addressed below, the State preserved some bone fragments clearly identified as the remains of Teresa Halbach or that could be identified as being female, human bone. And the State made reasonable efforts to determine the identity, hence importance, of the bone fragments in #8675 when it sent the items to the FBI. The FBI could not test the items. When these items were inexplicably released to the family their origin remained scientifically undetermined. Under these circumstance there is no bad faith.

The mere assertion of a claim of manifest injustice (in this case the alleged destruction of evidence ostensibly resulting from the return of some fragments for burial) does not entitle Avery the requested relief. *State v Allen*, 2004 WI 106, ¶ 14, 274 Wis. 2d 568, 682 N.W.2d 433. Moreover, Avery cannot simply rely on the affidavits of trial counsel (or his experts for that matter)

to carry the day. *Id.* ¶ 23. "[I]n order to secure a hearing on a postconviction motion, [a defendant] must have provided sufficient material facts – e.g., who, what, where, when, why, and how – that, if true, would entitle him to the relief he seeks." *Id.* ¶ 36; *see also, id.* ¶¶ 2, 23. "A 'material fact' is: '[a] fact that is significant or essential to the issue or matter at hand.'" *Id.* ¶ 22 (quoting Black's Law Dictionary). A defendant must allege sufficient material facts "within the four corners of the [postconviction motion] itself." *Id.* ¶ 23. Avery has failed to meet his burden. If he has failed to allege sufficient facts that establish either a *Trombetta* or *Youngblood* violation the motion should be denied.

4. Avery cannot raise a statutory claim in a Wis. Stat. § 974.06 motion, but regardless, the State did not violate Wis. Stat. § 968.205(2).

Avery asserts the State violated Wis. Stat. § 968.205 when it returned bone fragments recovered during the investigation to the Halbach family for burial in 2011. Avery is wrong. The State complied with the directives of Wis. Stat. § 968.205(2).

Wisconsin Stat. § 968.205(2) provides:

> Except as provided in sub.(3), if physical evidence that is in the possession of a law enforcement agency includes <u>any biological material</u> that was collected in connection with a criminal investigation that resulted in a criminal conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 <u>and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense</u>, the law enforcement agency shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date.

Emphasis added.

First, the State preserved representative samples of the bone fragments that were clearly identified as being female, human bone fragments. The State also preserved crime lab item BZ (#7926), the thigh bone fragment collected from the Avery burn pit, with attached human tissue from which mitochondrial DNA testing identified the bone fragment and tissue belonged to Teresa Halbach. In addition, #9597 (two tubs of cranial fragments - occipital and parietal bones, showing

high velocity bullet impact and lead spray; and #9598 (cranial fragments identified as facial pieces) are not among those items returned to the family. *See* Eisenberg report (Exhibit #1, 5-7) Hawkins report (Exhibit #2) Calumet County Evidence Ledger Sheets, (Def. Sup. § 974.06 Mot. for Post-Con. Relief . . . . Ex. 9, 11, Mar. 11, 2019).

Moreover, Wis. Stat. § 968.205(2) should not be interpreted as a mandate to preserve every single piece of biological evidence recovered during an investigation. That would place an unreasonable, if not impossible, burden upon law enforcement. Imagine a crime scene where there are hundreds of blood droplets spread throughout a multi-room crime scene. To mandate law enforcement officers preserve samples of every droplet of blood would be wholly unreasonable and burdensome. This is especially true in cases where someone has been convicted of first-degree intentional homicide and receives a life sentence. It would be unreasonable to insist that law enforcement maintain every single one of those samples throughout the entirety of the prison sentence up until death. Similarly, after autopsy, medical examiners and law enforcement officers routinely release bodies for burial notwithstanding a homicide prosecution is soon to follow. In *Youngblood*, 488 U.S. 51 the court recognized the unreasonableness of preserving every bit of evidence that might have some value down the road at trial when it observed

> [W]e think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, [internal citation omitted] that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, see *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.

Youngblood, at 57-58 (1988). Emphasis added.

Next, Wis. Stat. § 968.205(2) requires that biological evidence be preserved in two

situations: 1) if the biological evidence is identified as belonging to the victim; or 2) it may reasonably be used to incriminate or exculpate any person for the offense. Neither of these conditions exist with respect to the bone fragments recovered from various locations in the quarry.

First, none of the bone fragments recovered from locations in the quarry were positively identified as human, let alone the remains of Teresa Halbach. A few of the bone fragments (#8675) were given the designation of "possibly" or "suspected" human. Report of Dr. Eisenberg (Exhibit #1, 6) and Eisenberg testimony (Tr. Transcript Day 14, 10-18, 42-43, Mar. 1, 2007). In late 2006 /early 2007 prior to trial, the State attempted to have the fragments contained in #8675 further identified. Arrangements were made with FBI S/A Mullen to transport the items to the FBI laboratory in Quantico, Virginia. (Def. Sup. § 974.06 Mot. for Post-Con. Relief . . . 25-29, Ex. #11, Mar. 11, 2019). The FBI examined the fragments and reported that the samples were too degraded to be further analyzed. (Exhibit #4.) Thus, no determination could be made as to whether they were human; and more importantly for this statutory analysis, whether they were the remains of Teresa Halbach. Wisconsin Stat. § 968.205(2) does not mandate the preservation of *suspected*, *unknown*, or *undetermined* biological evidence, just the biological material from Teresa Halbach. Therefore, the State was under no obligation to preserve those bone fragments.

Second, Avery argues pursuant to *Youngblood*, 488 U.S. 51, that the bone fragments were either *apparently* or *potentially* exculpatory. As addressed above, they were not. Moreover, analyzing a claim that the fragments constituted evidence that the state had a statutory obligation to preserve is controlled by Wis. Stat § 968.205(2) – not *Youngblood.* Pursuant to the statutory text, the test is not whether the evidence was apparently or even potentially exculpatory, the test is whether the evidence "may reasonably be used to incriminate or exculpate any person for the offense." The test is not whether the evidence possesses *some* incriminating or exculpatory value

– the test is whether the *evidence itself* could reasonably incriminate or exculpate a person for the offense. Here, it would not. The evidence, alone, if tested, would not prove Avery innocent or guilty. Nor anyone else.

The State did not violate Wis. Stat. § 968.205(2) when it released some of the bone fragments to the family for burial.

5. ANDE, Rapid DNA Identification Technology is not authorized or approved for forensic use. This technology should not be used on forensic samples.

The Federal Rapid DNA Act of 2017 authorized Rapid DNA technology to be used in police booking stations to help identify suspects in the same way a fingerprint is currently used. Congress recognized that Rapid DNA Technology allows for cheek (buccal) swabs to be obtained and placed in a cartridge that slides into the Rapid DNA machine which then reports back a DNA profile. Although the Defendant correctly states that Rapid DNA analysis is allowed for testing buccal swabs, he fails to mention that it is only the testing of buccal swabs that is approved by the lawmakers. The Federal Rapid DNA Act of 2017 specifically stated that "[a]t present, Rapid DNA technology can only be used for identification purposes, not crime scene analysis." (Exhibit #5, Excerpt House Report 115-117, 2). This technology is not approved for testing the samples that the Defendant wants tested.

Importantly, Congress specifically designated the Director of the Federal Bureau of Investigation (FBI) be responsible for issuing standards and procedures for the use of Rapid DNA instruments and resulting DNA analysis. (Exhibit #6, H.R. 510.) The FBI subsequently determined that "[c]heek swabs are ideal for Rapid DNA machines, as they contain large amounts of fresh DNA from one individual." The FBI further observed that "[f]orensic samples vary widely, from the age, exposure and nature of the sample to the amount and quality of DNA it may contain." (Exhibit #7, 2.)

The procedures developed by the FBI concerning Rapid DNA analysis have been endorsed by the Scientific Working Group on DNA Analysis Methods (SWGDAM). SWGDAM is a group of scientists representing federal, state, and local forensic DNA laboratories in the United States and Canada. On October 23, 2017, SWGDAM issued a position statement on Rapid DNA analysis and stated "[c]urrently available Rapid DNA instruments were specifically developed for reference sample buccal swabs taken from persons during the booking process." This is because they "contain high quality single source DNA which makes them ideal" for Rapid DNA application. However, SWGDAM determined that "Rapid DNA technology is not currently suited for crime scene samples . . . ." (Exhibit #8, 1.)

Similarly, the American Society of Crime Lab Directors (ASCLD) – a group that represents managers, directors, and leaders of crime laboratories across the United States spanning the entire range of local, state, and federal government laboratories as well as private labs – issued a position statement on November 15, 2017, determining that Rapid DNA is not approved for use on forensic evidence samples, but is approved for use with single source known reference samples (buccal swabs). (Exhibit #9.)

Finally, the National District Attorneys Association (NDAA) issued a position statement on the use of Rapid DNA technology on January 30, 2018. The NDAA supported "the implementation of Rapid DNA instruments in booking stations utilizing single source arrestee samples; however, NDAA does not support the use of Rapid DNA technology for crime scene DNA samples unless the samples are analyzed by experienced DNA analysts using that technology working in an accredited forensic DNA laboratory." (Exhibit #10.)

Simply stated, Rapid DNA analysis is not approved for crime scene sample analysis. The experts in the field have determined that Rapid DNA testing is not ready for crime scenes. There

is a huge difference between fresh buccal samples and 14-year-old charred and calcined bone fragments. Therefore, the testing proposed by the Defendant cannot be done reliably, if at all, and therefore, should not be done.

Conclusion

Defendant's Motion for Reversal and New Trial cannot be brought in a Wis. Stat. § 974.06 motion. The State did not violate Wis. Stat. § 968.205. Defendant's Motion for New Trial is replete with conclusory allegations and unsupported hypotheses; and the motion is deficiently plead. Lastly, the forensic testing contemplated in Defendant's motion is not authorized or approved by the relevant forensic community. Therefore, the motion must be denied.

Dated this 29th day of March, 2019.

Respectfully submitted,

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