



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 16, 2021

Ms. Sheila T. Reiff
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RECEIVED

APR 16 2021

CLERK OF COURT OF APPEALS
OF WISCONSIN

Re: *State of Wisconsin v. Steven A. Avery*
Case No. 2017AP2288
Dist. II

Dear Ms. Reiff:

Enclosed for filing in the above matter are the original and four copies of the Response in Opposition to Avery's Fourth Petition to Stay this Appeal and Remand this Case to the Circuit Court. A copy of this response has been served by mail on counsel for defendant-appellant.

Sincerely,

Lisa E.F. Kumfer
Assistant Attorney General

LEK:ln

Enclosures

c: Kathleen T. Zellner
Counsel for Defendant-Appellant

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STATE OF WISCONSIN
 COURT OF APPEALS
 DISTRICT II

FILED
 APR 16 2021
 CLERK OF COURT OF APPEALS
 OF WISCONSIN

Case No. 2017AP2288

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

**RESPONSE IN OPPOSITION TO AVERY'S FOURTH
 PETITION TO STAY THIS APPEAL AND REMAND
 THIS CASE TO THE CIRCUIT COURT**

INTRODUCTION

Plaintiff-Respondent State of Wisconsin opposes Defendant-Appellant Steven A. Avery's fourth petition to again stay this appeal and remand the case to the circuit court for consideration of yet another new Wis. Stat. § 974.06 motion alleging that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by allegedly failing to inform the defense

that a Thomas Sowinski purportedly called law enforcement on November 5, 2005, to say he saw Bobby Dassey moving a car similar to the victim's car. The motion on its face shows that it was filed in violation of Wis. Stat. § 802.05(2), applicable here via Wis. Stat. § (Rule) 809.84, because it was filed for an improper purpose and without a reasonable inquiry into its factual basis.

Staying this appeal and remanding for the litigation of such a motion would result in further unnecessary delay and litigation. This appeal has been languishing for nearly four years now due entirely to Avery's repeated requests to return to the circuit court to litigate procedurally barred claims that have had no factual support. It is reasonable to conclude at this point that he is not pursuing these claims in good faith, but is merely "throwing the proverbial spaghetti at the wall to see what sticks" and delay resolution of this case. *Weidenhamer v. Expedia, Inc.* No. C14-1239RAJ, 2015 WL 7157282, *6 (W.D. Wash. 2015).

Indeed, Avery's new claim is not only unsupported by even a suggestion of corroborating evidence, but this claim is

also mutually exclusive with many of the other claims Avery has pursued in the circuit court and on appeal. All of these allegations cannot be true. Avery's reckless disregard of the truth or falsehood of the allegations he is submitting to the courts alone should be reason enough to deny his petition for remand.

Moreover, this case has now been fully briefed in this Court for nearly a year, and has been submitted to this Court awaiting a decision for nearly five months. Remanding this case to the circuit court to again allow Avery to develop another entirely new constitutional claim is not necessary to decide this fully briefed and long-submitted appeal. It would be inefficient and waste the court's and the parties' considerable resources that have already been expended and further delay this appeal's resolution.

If Avery wishes to pursue yet another claim, the appropriate course is to either wait until this appeal is concluded, conduct a reasonable investigation, and file a new Wis. Stat. § 974.06 motion, or dismiss this appeal so he can pursue it now. If Avery has a sufficient reason why his new

claim could not be raised in any of his previous six motions and some facts to support it, then the claim will not be procedurally barred when this appeal is concluded. If not, the claim is unquestionably procedurally barred already, and another remand would serve only to further delay this litigation and add another incongruous claim to Avery's appellate brief.

Avery has dragged this appeal out long enough. He should either dismiss this appeal, conduct a reasonable investigation into his new claim, and pursue it in the circuit court now; or this fully-briefed, submitted, and years-stagnant appeal should proceed.

BACKGROUND

In 2007, a jury convicted Avery of first-degree intentional homicide for the murder of Teresa Halbach and for possession of a firearm as a felon. His direct appeal concluded when the Wisconsin Supreme Court denied his petition for review in 2011.

In February 2013, Avery, pro se, filed a Wis. Stat. § 974.06 motion alleging that the State had interfered with

his ability to confer with his attorneys, that the State impermissibly commented on his silence during closing argument, that he was deprived of a fair tribunal, and ineffective assistance of counsel. The circuit court appointed an attorney to investigate the claims and ultimately denied the motion without a hearing in November 2015.

In June 2017, Avery filed the Wis. Stat. § 974.06 motion at issue in this appeal alleging that a multitude of constitutional errors occurred in his prior proceedings. The circuit court denied his motion without a hearing on October 3, 2017.

Avery then filed a motion to vacate judgment on October 6, 2017. He additionally filed a motion for reconsideration on October 23, 2017, followed by several supplements to that motion between October 31 and November 17, 2017. The circuit court denied all of these motions without a hearing on November 28, 2017. Avery filed a notice of appeal from the circuit court's final written order on November 30, 2017.

On June 7, 2018, this Court retained jurisdiction but remanded this case to the circuit court to allow Avery to file another Wis. Stat. § 974.06 motion to litigate a *Brady* claim. The circuit court denied that motion without a hearing as well, and the record was transmitted back to this Court on September 25, 2018.

On December 17, 2018, Avery filed another petition to stay this appeal and remand the case to the circuit court for Avery to litigate a motion for postconviction DNA testing of bone fragments collected before trial, pursuant to Wis. Stat. § 974.07. On December 28, 2018, this Court denied the petition, stating that “[t]he scope of this appeal is limited to a review of the circuit court’s orders denying Avery’s Wis. Stat. § 974.06 motions,” and therefore “[g]ood cause to remand [had] not been shown.” (Order of 12/28/18 at 2.) This Court gave Avery a further extension, to February 1, 2019, to file his initial brief. (*Id.*)

On January 24, 2019—a week before his initial brief was due—Avery filed a third motion to stay this appeal and remand the case to the circuit court. This time, he sought to

pursue a new claim that the State violated his due process rights by releasing a portion of potentially human bone fragments to the Halbach family for burial, roughly five years after Avery's trial. This Court again remanded the case to the circuit court to allow Avery to pursue this additional claim. The circuit court denied it without a hearing on August 8, 2019.

This appeal then finally proceeded. The briefing was concluded June 26, 2020. On November 9, 2020, the case was submitted to this Court on briefs. The only step left in this appeal is a decision from this Court.

On April 12, 2021—long after briefing had concluded and after this case had been submitted to this Court for five months—Avery submitted yet another motion for remand. This time, he claims that a new witness, Thomas Sowinski, had come forward to postconviction counsel on April 11, 2021,¹ and said that while he was delivering newspapers to the Avery salvage yard on November 5, 2005, he saw Bobby

¹ Avery's motion says Sowinski came forward April 11th, 2021, but his affidavit is dated April 10th, 2021.

Dassey and an unknown older man pushing a Rav-4 up a hill. Avery claims that Sowinski called the Manitowoc Police to report this later in the day, but police were not interested in this information. Avery claims the State “suppressed” this information and therefore violated *Brady*, 373 U.S. at 87. He seeks remand to pursue this claim in the circuit court.

RELEVANT LAW

Avery is permitted to petition this Court “for remand to the circuit court for action upon specific issues” pursuant to Wis. Stat. § 808.075(5). The decision to remand is left to this Court’s discretion. *See State v. Myers*, 199 Wis. 2d 391, 395–96, 544 N.W.2d 609 (Ct. App. 1996).

The rules of civil procedure apply to appeals and to litigation of Wis. Stat. § 974.06 motions, provided they do not conflict with any specific rules of procedure spelled out elsewhere for such actions and the context of the rule does not manifestly require a different construction. Wis. Stat. §§ (Rule) 809.84; 972.11; *State v. Henley*, 2010 WI 97, ¶¶ 39, 42–50, 328 Wis. 2d 544, 787 N.W.2d 350.

As relevant here, Wis. Stat. § 802.05(2) provides that by presenting a submission to the court, an attorney is certifying “that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:²

(a) The paper is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

(b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

The purpose of this statute is “to place a professional obligation on the attorney as an officer of the court to satisfy [herself] that there are grounds for the action, defense, or motion.” *Gaddis v. LaCrosse Products, Inc.*, 198 Wis. 2d 396, 405, 542 N.W.2d 454 (1996) (citation omitted).

² There is a fourth prong to Wis. Stat. § 802.05(2), but it is related to pleading defenses and so does not apply here.

“The duty to conduct a reasonable inquiry mandates” that an attorney validate the facts being alleged before proceeding with a claim. *Belich v. Szymaszek*, 224 Wis. 2d 419, 431, 592 N.W.2d 254 (Ct. App. 1999). The reasonableness of an attorney’s inquiry into the facts supporting an allegation is determined by considering the following factors: (1) “the amount of time the attorney had to investigate the claims;” (2) “the extent to which the attorney had to rely upon his or her client for the underlying facts;” (3) “whether the case was accepted from another attorney;” and (4) “the complexity of the facts.”³ *Id.* at 430–31.

This provision has intentionally been crafted to replicate Federal Rule of Civil Procedure 11. *See Riley v. Isaacson*, 156 Wis. 2d 249, 255–56, 456 N.W.2d 619 (Ct. App. 1990). Accordingly, courts can also look to cases interpreting

³ There is a fifth factor when assessing pleadings in civil cases: “whether discovery would benefit the factual record.” *Belich v. Szymaszek*, 224 Wis. 2d 419, 431, 592 N.W.2d 254 (Ct. App. 1999). That factor is not relevant here, though, because discovery is not available in appeals nor in criminal postconviction proceedings except in limited circumstances. *See State v. O’Brien*, 223 Wis. 2d 303, 319–20, 588 N.W.2d 8 (1999).

that rule when applying Wis. Stat. § 802.05. *Riley*, 156 Wis. 2d at 255–56.

ARGUMENT

I. Remanding this case for Avery to pursue another new constitutional claim at this late juncture would be inefficient and unduly prolong this appeal.

Avery again asks this Court to stay his appeal and remand his case to the circuit court so he can litigate another new Wis. Stat. § 974.06 motion. The issue Avery claims he would like to pursue is an entirely new claim, alleging a *Brady* violation based on a purported new witness who provided postconviction counsel with an affidavit on April 10, 2021, alleging that he told law enforcement about seeing Bobby Dassey moving a car on November 5, 2005, that resembled the victim's vehicle.

As before, Avery does not seek remand for fact-finding on a specific issue raised in his earlier motions; his motion is another request to pursue a new constitutional claim. Avery admits that this is a new issue that counsel purportedly discovered on April 11, 2021. (Avery's Motion 1.)

This case is now in a distinctly different procedural posture than it was when this Court granted Avery's previous motions for remand in the name of judicial efficiency, however. This case has been fully briefed since June 2020. It has been submitted to this Court for a decision since November 9, 2020. The parties have already expended an enormous amount of time and effort on briefing this appeal. Presumably this Court has already dedicated a considerable amount of this Court's scarce time and resources to addressing the issues already briefed, as well. Given that this appeal is nearing its end rather than in the pre-briefing posture it was when Avery previously sought remand, it makes more sense to conclude this proceeding and for Avery to then file a new Wis. Stat. § 974.06 motion once this case is remitted to the circuit court.

As previously noted, a Wis. Stat. § 974.06 motion "may be made at any time." Wis. Stat. § 974.06(2). And, if "the court finds a ground for relief asserted which for sufficient reason was not asserted" in a previous Wis. Stat. § 974.06 motion, the new motion is not subject to the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157

(1994). Wis. Stat. § 974.06(4); see *State v. Romero-Georgana*, 2014 WI 83, ¶ 35, 360 Wis. 2d 522, 849 N.W.2d 668.

If Avery can establish a sufficient reason for failing to raise this claim in the motions currently under review, the claim will not be barred, and he can file a new Wis. Stat. § 974.06 motion once this appeal has concluded. If he cannot establish a sufficient reason for failing to raise this claim earlier, the claim is already waived, and the procedural bar already applies. *State v. Lo*, 2003 WI 107, ¶ 44, 264 Wis. 2d 1, 665 N.W.2d 756. It would unduly prolong these proceedings further to remand now after considerable time and effort has been expended by the parties and this Court, and this appeal is nearing conclusion. This Court should deny Avery's request for remand.

II. Avery did not conduct a reasonable investigation into his new *Brady* claim before filing this motion, in violation of Wis. Stat. § 802.05.

“At a minimum, the reasonable inquiry standard requires at least some affirmative investigation on the part of the signer.” *Belich*, 224 Wis. 2d at 432. False swearing is a felony, Wis. Stat. § 946.32, and Avery's attorney has an

ethical duty not to present false statements to the public, the State, and the court. SCR 20:3.1; 20:3.3; 20:4.1; 20:8.4. Avery's motion shows, however, that his attorney conducted no affirmative investigation into this claim before filing this motion for remand.

Avery claims in his motion that Mr. Sowinski came forth on April 11, 2021. Avery then filed the motion at issue here on April 12, 2021—with the only factual support alleged for it an affidavit from Sowinski himself full of vague allegations. Avery's motion does not state that his attorney made any effort to substantiate this claim. His attorney did not attempt to perform an open records request with Manitowoc County to see if this conversation ever occurred or whether any record of it existed before filing this motion. She did not try to learn who this female officer Sowinski claims he spoke to might have been or even which female officers were employed with Manitowoc at the relevant time. She apparently did not press Sowinski for any specifics about this allegation that could allow her or the State to investigate it. Indeed, Avery's attorney apparently did not perform so much

as a phone call to try to back up this information before filing this motion.

There is no excuse for this lack of verification. There was ample time to investigate this allegation: as explained, there is no time limit for bringing a Wis. Stat. § 974.06 motion, and if Avery has a sufficient reason for failing to raise this claim in his previous motions it is not procedurally barred. If he does not, the claim is already procedurally barred and pursuing this motion for remand is a fruitless endeavor anyway. Avery's attorney did not have to rely on Avery for the factual foundation underlying the motion; indeed, nothing in Avery's motion suggests he is even aware of this story, let alone that he provided any facts about it. And as mentioned, there were several ways to investigate whether there are any factual underpinnings for this tale; it was not impossible to investigate such that Avery's attorney had to rely on Sowinski alone. This case did not originate with a different attorney, and postconviction counsel has hardly made it a secret that she has been pursuing postconviction relief on Avery's behalf for the past six years. And finally, while this case is complex,

the allegations relayed by Sowinski and underlying the elements of a purported *Brady* violation are not.

“To perform an adequate investigation before proceeding with a claim, it is clear that an attorney may not simply rely on his or her client’s word.” *Belich*, 224 Wis. 2d at 430. It follows, then, that neither may an attorney rely simply on the word of a person like Sowinski: someone who appeared out of the blue for the first time fifteen years after this case began and long after Avery’s appellate brief was filed—this despite extensive media coverage of this case, particularly during the five years this postconviction proceeding has been proceeding—and just fortuitously happens to provide the exact exculpatory story Avery has been seeking, yet for some unexplained reason he failed to provide it to Avery’s attorney until now. The need for an attorney to approach such claims with skepticism and to at least conduct some type of investigation before filing an affidavit attesting to this story’s veracity is particularly heightened where, as here, the attorney has offered a \$100,000 reward for such information.

“A paper filed in the best of faith, even when the lawyer is convinced of the justice of the client’s cause, is sanctionable if counsel neglected to make reasonable inquiry beforehand.” *Riley*, 156 Wis. 2d at 259. “The investigation need not be to the point of certainty to be reasonable.” *Belich*, 224 Wis. 2d at 432. “Nonetheless, the signer must explore readily available avenues of factual inquiry.” *Id.* “A statement that is offered as a positive fact but is actually an extravagant inference from vague recollection does not satisfy this requirement.” *In re Kelly*, 808 F.2d 549, 552 (7th Cir. 1986). Avery’s attorney did not conduct a reasonable inquiry into this claim. Denying remand in this situation is appropriate.

III. Avery’s many remand requests have been filed for an improper purpose warranting denial of his latest request.

The obligations listed in Wis. Stat. § 802.05(2) are independent, meaning that the statute has been violated if any of the prongs has been violated. *Riley*, 156 Wis. 2d at 256. Avery’s disregard for Wisconsin’s rules of procedure and his persistent serial filings show that they have been made for improper purposes: to delay the proceedings, to continually

change his position to make it difficult for the State to respond to his ever-shifting allegations, and to frustrate the courts' ability to reasonably evaluate his claims by burying them in paper.

“Improper purpose’ does not necessarily refer to bad faith or intent to harass. . . . Indeed, any ‘reckless disregard of the duty owed to the court’ can suffice.” *Marceaux v. Lafayette City-Parish Consolidated Government, et. al.*, 14 F. Supp.3d 760, 767 (W.D. La. 2014) (citation omitted). Avery has continually misrepresented the facts, misstated the law, and made claims grounded only in speculation with reckless disregard for their truth or falsity. (See, e.g., R. 603:217–18, 89–91, 152; 615:166–67; compare R. 604:112–13 with Avery’s Appellate Br. 77.) Avery’s conduct shows that his many filings, including this one, were filed for an improper purpose.

Avery has now filed six motions alleging claims that could have been raised in his first Wis. Stat. § 974.06 motion. (R. 496; 603; 631–32; 636; 740; 771.) He has ignored and attempted to circumvent Wis. Stat. § 974.06(4) by continually labeling his successive motions “supplemental,” despite the

fact that each of his previous motions had been denied when he filed his new ones—meaning they could not be “supplements” to his previous motions. *State v. Evans*, 2004 WI 84, ¶ 10, 273 Wis. 2d 192, 682 N.W.2d 784 *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. He has pursued diametrically opposed claims and submitted evidence that he reasonably should know cannot all be true. (*Compare* R. 603:131–36 *with* 631:33–38, 43–46 *and with* Avery’s Fourth Motion for Remand 1–4 (Accusing Strang and Buting of being ineffective for failing to establish Ryan Hillegas as the “only” possible third party perpetrator and claiming Sergeant Colborn planted the Rav-4, then alleging they were ineffective for failing to establish Bobby Dassey as a possible suspect with the same evidence, and now claiming Bobby planted the Rav-4).)

Further, Avery has inappropriately changed his arguments or raised new ones in his reply briefs, giving the State no opportunity to respond. (*See, e.g., Avery’s Appellate Reply Br. 4–7*); *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). He has

buried and burdened both the circuit court and this Court with thousands of pages of exhibits, many of which were unnecessarily repetitively filed multiple times and many that were never discussed in Avery's filings. (*Compare* R. 630:92–141 *with* 741:26–82; *compare also* 740 *with* 739:75–76.) He has leveled completely unjustified accusations of bad faith against the State. (*See, e.g.*, R. 603:87–91; 729:1–2; 771:26–29; Avery's Br. 34.) And finally, he has disingenuously presented his claims to this Court by affirmatively misrepresenting how and when he raised his claims below, changing his claims on appeal, adding new allegations he never presented to the circuit court, and materially misrepresenting the record. (*See* Respondent's Br. 19 n.9, 28–30, 63, 88.)

In short, Avery has engaged in a pattern of “gamesmanship [that] offends the Rules . . . and demonstrates a cavalier lack of candor with this Court” and the circuit court. *Osborn v. Bell Helicopter Textron, Inc.*, 828 F. Supp. 446, 452 (N.D. Tex. 1993). The State is not seeking sanctions here. However, this pattern of conduct shows that Avery's belated

remand request has been made for an improper purpose. This Court should deny his motion.

* * * * *

Again, if Avery no longer wishes to challenge the circuit court's decision denying the claims he raised in the Wis. Stat. § 974.06 motions at issue here, he may voluntarily dismiss this appeal. As noted, his new claim is mutually exclusive with some of the claims he raised previously regarding what theory of defense he believes Strang and Buting should have pursued, and cannot be squared with many of the allegations in his appellate brief. The process of winnowing out weaker appellate claims and focusing on those more likely to prevail "is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986).

Alternatively, if he does not wish to give up his challenge to the circuit court's denial of issues raised in the motions at issue here, he must wait until this appeal is resolved and then determine how he wishes to proceed.

But staying the appeal and remanding the case to the circuit court for fact-finding on another entirely new claim

that Avery has not attempted to verify is not appropriate. Avery's request for a remand is contrary to Wis. Stat. § 974.06(4)'s prohibition on successive postconviction litigation. Wis. Stat. §§ (Rule) 809.19(1), 809.83(2).

CONCLUSION

The litigation of a new Wis. Stat. § 974.06 motion alleging a new *Brady* violation is not a specific issue related to the order Avery is appealing; it is a new and separate action in the circuit court. Avery has alternative courses of action that do not require further delay to this fully-briefed, submitted, and four-year-stagnant appeal. This Court should deny Avery's petition.

Dated this 16th day of April 2021.

Respectfully submitted,

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