STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN, *Respondent*, v. STEVEN A. AVERY, SR., *Petitioner*.	On remand from the Wisconsin Court of Appeals, Second District, Case No. 17-2288 Case No. 05 CF 381

SUPPLEMENTAL § 974.06 MOTION FOR POST-CONVICTION RELIEF PURSUANT TO STATE'S VIOLATION OF WIS. STAT. § 968.205 AND *YOUNGBLOOD v. ARIZONA*

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Now comes Defendant, Steven A. Avery ("Mr. Avery"), by and through his current postconviction attorneys, Kathleen Zellner and Steven Richards, and hereby respectfully moves this Court pursuant to Wis. Stat. § 974.06 and the Wisconsin Court of Appeals' order of February 25, 2019, for an order reversing the judgment of his convictions and sentence and ordering a new trial. In support of this supplemental motion, Mr. Avery states as follows:

Introduction

In 2007, the State spent an enormous amount of time and effort perpetrating a fraud upon Steven Avery's ("Mr. Avery") jury. In order to win Mr. Avery's conviction and exclude everyone else as the perpetrator, the State had to convince the jury that Mr. Avery alone was connected to the crime scene. To establish a crime scene linked only to Mr. Avery the State created a narrative that Teresa Halbach ("Ms. Halbach") was murdered in Mr. Avery's garage and burned in his burn pit. It was essential to the success of the State's narrative that all of Ms. Halbach's remains were located within yards of Mr. Avery's residence. If the crime scene was a quarter of a mile away in

the Manitowoc Gravel Pit ("Gravel Pit") then the State's theory would have been refuted that Ms. Halbach never left the Avery property alive on October 31, 2005. If Ms. Halbach's remains were actually in the Gravel Pit then the defense would have been able to substantiate and not just speculate about an alternative theory that someone else murdered Ms. Halbach and moved her bones to Mr. Avery's burn pit to frame him. In order to successfully convict Mr. Avery, the State presented a false forensic story to the jury which claimed that the bones in the Gravel Pit were "not evidence" because they were not human, therefore they could not have been Ms. Halbach's.

The State's misrepresentations to the jury were not uncovered until 2019. The State, by its actions in returning Manitowoc Gravel Pit bones to the Halbach family in 2011, has implicitly admitted that the bones were not only human but that they belonged to Ms. Halbach. This stunning action and admission undermines the State's entire theory at trial that was used to convict Mr. Avery and undermines confidence in the integrity of his verdict.

The issue on remand is did the State violate *Youngblood v. Arizona* when it returned the human bones to the Halbach family in 2011, without giving notice to Mr. Avery or his counsel, in violation of Wis. Stat. § 968.205 and the April 4, 2007 trial court order? The answer is indisputably yes. The State took the unilateral action of commingling the human bones from three locations, thereby destroying any possibility that the Gravel Pit bones could be identified as human and subjected to more sensitive DNA testing to determine their identity. The admissions of the State that Ms. Halbach's bones were in the Gravel Pit changed the scene of the crime to a location which is contrary to all the representations made to the jury by Prosecutor Kenneth Kratz ("Prosecutor Kratz") to obtain Mr. Avery's conviction. In 2007, the State misrepresented to the jury known facts and concealed evidence. In 2011, the State acted in bad faith when it violated Wisconsin and federal law by returning human bones to the Halbach family. In 2018, the State continued its

pattern of concealment with the Appellate Court until it was caught. Mr. Avery is entitled to have his conviction reversed and granted a new trial.

Procedural Background

On December 17, 2018, Mr. Avery filed a Motion to Stay Appeal and Remand the Cause for New Scientific Testing. (Said motion is attached and incorporated herein as **Exhibit 1**). Mr. Avery requested to perform newly available DNA testing on the Gravel Pit bones. The Motion was denied by the Appellate Court on December 28, 2018, as premature. (The December 28, 2018 Appellate Court Order is attached and incorporated herein as **Exhibit 2**). On January 24, 2019, Mr. Avery filed a Motion to Stay Appeal and Remand the Cause for Proceedings on Claims for Relief in Connection with the State's Violation of Wis. Stat § 968.205 and *Youngblood v. Arizona.* (Said motion is attached and incorporated herein as **Exhibit 3**). On January 29, 2019, the State filed a Response in Opposition to Avery's Third Petition to Stay the Appeal and Remand this Case to the Circuit Court. (The State's response is attached and incorporated herein as **Exhibit 4**). On February 1, 2019, current postconviction counsel filed Defendant-Appellant's Reply to the State's Response in Opposition to Avery's Motion to stay the Appeal and Remand the Cause to the Circuit Court. (Defendant-Appellant's reply is attached and incorporated herein as **Exhibit 5**). On February 11, 2019, current postconviction counsel filed a letter with the Appellate Court, attaching additional undisclosed documents. (The February 11, 2019 letter is attached and incorporated herein as **Exhibit 6**). On February 13, 2019, current postconviction counsel filed a second letter with the Appellate Court, attaching further undisclosed documents. (The February 13, 2019 letter is attached and incorporated herein as **Exhibit 7**).

On February 25, 2019, the Appellate Court granted Mr. Avery's Motion to Remand to permit him to pursue a supplemental postconviction motion, raising "claims for relief in connection with the State's violation of Wis. Stat. § 968.205 and *Youngblood v. Arizona*." (Said Order is attached and incorporated herein as **Exhibit 8**, at page 3).

The Appellate Court specifically made the following findings:

1. "The State's objection does not address the merits of Avery's claimed statutory and constitutional violations, and it has not responded to Avery's supplemental filings alleging the possible destruction of evidentiary items which, it appears, the parties previously agreed to preserve."
2. "Having considered the parties' submissions, we determine that the best course of action is to grant Avery's motion to stay the appeal and to remand and to remand under Wis Stat. § 808.075(5). . . . Though we are not required to remand, we determine that this procedure strikes an appropriate balance given the specific circumstances of this case. Due to this case's extensive history, there is a benefit to having existing claims developed or litigated while they are relatively fresh, rather than positioning the claims to be procedurally barred in a future proceeding."
3. "*[W]e desire a ruling on the merits* so that all claims to date can be considered in a single appeal. The briefing in this appeal has not commenced. There appears to be some potential overlap between the "old" and "new" issues."

(**Exhibit 8**, at p. 2) (emphasis added).

Factual Overview

The State's Case

The State's conviction of Mr. Avery was based almost exclusively on forensic evidence. At trial, the State told the jury that all of the incriminating forensic evidence was in close proximity to Mr. Avery's residence. Prosecutor Kenneth Kratz ("Prosecutor Kratz"), in his opening statement, relied upon several computer-generated scene models which allegedly illustrated the location of incriminating forensic evidence and its link to Mr. Avery. (696:100).[1] Prosecutor

[1] Mr. Avery shall cite the record on appeal as "(document number:page number(s))."

Kratz claimed that Ms. Halbach was murdered and mutilated in Mr. Avery's garage and burn pit. (696:48, 51).

Prosecutor Kratz's Opening Statement

Prosecutor Kratz claimed that the proximity of Mr. Avery's burn pit to his residence was particularly incriminating to him. (696:74-75). In his opening statement, Prosecutor Kratz told the jury:

> [T]his particular computer generated animation is important to embrace or to – for a jury to look at in the case because the burn area is clearly visible. How close it is to Mr. Avery's garage; how close it is to the trailer; how close it is to the other area, what's called the curtilage, that is the area that surrounds Mr. Avery's property, all becomes important.

(696:76–77)

> Dr. Eisenberg will identify all of these bone fragments. She'll identify, from a female skeleton and from examples that are used, all of the different parts of Teresa that were found.

(696:90)

> And as I mentioned, at least briefly, before other analysis of bone and tissue, other things to point to, if in fact the State even question whose bones and whose tissue it is behind Mr. Avery's property.

(696:98)

The State's Expert regarding the Bones

The State's examination of its forensic anthropologist, Dr. Leslie Eisenberg ("Dr. Eisenberg"), about the Gravel Pit bones focused exclusively on the non-human bones and three "possible" human bones associated with Tag #8675. Despite the fact that the Calumet County ledger sheets referred to multiple human bones in three additional piles in the Gravel Pit, (attached and incorporated herein as **Exhibit 9**) Prosecutor Thomas Fallon ("Prosecutor Fallon") never once questioned Dr. Eisenberg about her worksheet which described those human bones in the Gravel

Pit. (Dr. Eisenberg's bone evidence report is attached and incorporated herein as **Group Exhibit 10**). Dr. Eisenberg was asked the following questions by Prosecutor Fallon about the suspected human pelvic bone in the Gravel Pit:

> Q And in terms of that, uh, suspected bone fragment, can you say to a reasonable degree of scientific certainty that that was human bone?
>
> A Um, I cannot.
>
> Q And why is that?
>
> A Um, I did not, uh — there, um, are — There is the potential for, um, using, um, microscopes to look, for example, to try and confirm if suspected human bone might actually be human bone or animal bone, but given the condition of the remains, I did not believe, um, that cutting into the bone, uh, that they would survive that — those kinds of tests, and so I did not perform them.

(706:170)

Prosecutor Fallon chose to emphasize the other non-human bones associated with the pelvic bone while ignoring all of the other human bones in the Gravel Pit. On redirect examination, Dr. Eisenberg testified:

> Q. All right. Now, just so that we're crystal clear on this, the various fragments from the gravel pits southwest of the property, originally you were only able to determine one was clearly nonhuman. In your subsequent review and analysis, you determined several more were clearly not human; is that correct?
>
> A. That's correct.
>
> Q. And as a matter of fact, there was only three left that you had a reasonable suspicion on that could be human; is that correct?
>
> A. That could possibly be human, that is correct.
>
> Q. And as a matter of fact, as you sit here today, you cannot tell us that those bones, to a reasonable degree of anthropological or scientific certainty, are human, can you?

A. I cannot.

(707:42–43)

Prosecutor Kratz's Closing Argument

In his closing argument, Prosecutor Kratz emphasised the bones in Mr. Avery's burn pit:

> [H]e [Mr. Sturdivant] found the bones, the small bone fragments intertwined, or mixed in with the steel belt from tires. All right. The bones being intertwined and mixed in is the State's, or one of the State's, strongest argument for this being the primary burn site.

(715:97)

Prosecutor Kratz also focused on the elimination of other burn sites:

> Mr. Pevytoe, as you heard, however, also recalled that the bone fragments were intertwined with the steel belts and, I believe, rendered similar opinions as to the primary burn site. Mr. Pevytoe also eliminates other burn locations.

(715:99)

Prosecutor Kratz emphasized the number of human bones in Mr. Avery's burn pit:

> What she also tells you, is that every bone, at least a part of every major bone group has been recovered from the burn area, from that which is behind Steven Avery's garage.

(715:105)

Prosecutor Kratz told the jury the events at these two locations—Mr. Avery's garage and burn pit—told "the whole story," and only one person committed this crime. (716:119). [2]

[2] In the *Dassey* opinion, the court references the State's theory that Brendan participated in raping and murdering Ms. Halbach with Mr. Avery, which contradicts the State's theory in Mr. Avery's trial that he was the only perpetrator. *Dassey v. Dittman*, 877 F.3d 297 (7th Cir. 2017). In Brendan's trial, Prosecutor Kratz claimed that Ms. Halbach was killed by Mr. Avery stabbing her in the stomach, Brendan slitting her throat, and Mr. Avery manually strangling her. Prosecutor

In his closing argument, trial defense counsel, Jerome Buting ("Mr. Buting"), stressed the importance of the bones found in the Gravel Pit when he said:

> [I]f that body was burned somewhere and then moved and dumped on Mr. Avery's burn pit, then Steven Avery is not guilty, plain and simple. . . . Now that is why the State has gone to such trouble avoiding the fact that the bones were moved, that's why you heard nothing about it here. Because it does not fit with their theory that Avery is guilty.

(715:148–49).

Other Incriminating Evidence linking the Manitowoc County Gravel Pit to the crime scene

In addition to the human bone fragments found in the Gravel Pit, there is an abundance of old and new evidence establishing that the crime scene was in the Gravel Pit and not at Mr. Avery's residence and garage. Ms. Halbach's body was put in the Dassey-Janda burn barrel and transported to the Gravel Pit after sunset. The body was burned in the burn barrel, and the odor was detected by Travis Groelle on CTH Q. (749:21).

The scent and cadaver dogs reports corroborate that Ms. Halbach and her vehicle were in the Gravel Pit. (621:11–18). Specifically, the cadaver dogs hit on two burn piles in an area of large concrete slabs in the Gravel Pit. (621:18). Blood from an unknown male was found on a rock in the vicinity of the Gravel Pit bone piles and excluded Mr. Avery. (Wisconsin State Crime Laboratory item CX (298:1–6)). (Quarry Bone Pile and Scent and Cadaver Dog Maps are attached and incorporated herein as **Exhibit 11**).

Witness testimony has also linked the Gravel Pit to the crime scene. (588:171–74; 621:224–28). The edited flyover video shows no tire tracks on November 4, 2005, leading to

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Kratz claimed Ms. Halbach was killed in Mr. Avery's trailer, not shot in Mr. Avery's garage. (588:143). *See Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000).

where the RAV-4 was found, but tire tracks leading to the RAV-4 were present on November 5, 2005, strongly suggesting that the vehicle was driven from the Gravel Pit onto the Avery property and planted. (Attached and incorporated herein as **Group Exhibit 12** is the flyover video).

The State's Illegal Transmittal of the Bones to the Halbach Family

Mr. Avery's Motion to Stay and Remand for Scientific Testing

On December 17, 2018, Mr. Avery filed a Motion to stay and remand this appeal for scientific testing of several suspected human bones recovered from the Gravel Pit. (*See* **Exhibit 1**). Specifically, Mr. Avery proposed Rapid DNA testing that has been successfully used to obtain DNA identifications from bones burned to a degree similar to those recovered from the Gravel Pit. This testing, argued Mr. Avery, is relevant and material because the identification of the bones as Ms. Halbach's is compelling evidence that her murder and mutilation did not occur in a location connected exclusively to Mr. Avery by the State.

Thus, Mr. Avery argued, if the Rapid DNA testing identifies Ms. Halbach's bones in the Gravel Pit, two inferences are reasonable: (1) Mr. Avery is not the murderer; and (2) the bones recovered from Mr. Avery's burn pit were planted.

On December 28, 2018, the Appellate Court denied Mr. Avery's motion for DNA testing of the bones, finding that the scope of the pending appeal is limited to a review of the circuit court's orders denying Mr. Avery's Wis. Stat. § 974.06 motions and that further scientific testing of evidence was not necessary to decide the instant appeal. (*See* **Exhibit 2**).

The Discovery of the Previously Undisclosed September 20, 2011 Police Report and Updated Ledger Sheets

After filing Mr. Avery's December 17, 2018 Motion, current postconviction counsel received a copy of a previously undisclosed police report from a third party. On January 24, 2019, current postconviction counsel received her own copy of the September 20, 2011 report from the Calumet County Sheriff's Office. (The September 20, 2011 report is attached and incorporated herein as **Exhibit 13**). On February 8, 2019, current postconviction counsel received updated ledger sheets that had never been previously disclosed to prior counsel. Those updated ledger sheets confirm the September 20, 2011 disposition of the human bone fragments to the Halbach family. (The previously undisclosed updated Calumet County ledger sheets are attached and incorporated herein as **Exhibit 14**).

The September 20, 2011, report reflects that Deputy Jeremy Hawkins of the Calumet County Sheriff's Department "along with Sgt. Inv. Mark Wiegert of the CALUMET COUNTY SHERIFF'S DEPARTMENT, Attorney Thomas Fallon and Attorney Norman Gahn, removed from evidence all property tag numbers that contained **human bone**." (**Exhibit 13**, p. 1114) (emphasis added). Attorney Norman Gahn ("Attorney Gahn") and Prosecutor Fallon viewed the items under the property tags and, along with Dr. Eisenberg's report, "determined which bones could be returned to the HALBACH family." (**Exhibit 13**, p. 1114).

Specifically, Dr. Eisenberg's report identifies by tag number human bone fragments from the Gravel Pit—property tag numbers 7411 (human), 7412 (human), 7413 (human), 7414 (human), 7416 (human), 7419 (human), 7420 (undiagnostic), 7421 (possible human), 7426 (possible human), 7434 (possible human), 8675 (possible human). Dr. Eisenberg identified 7 tag numbers as having human bone fragments, 1 tag number as "may be human," and 3 tag numbers as being "possibly human." (*See* **Group Exhibit 10**). A chart based upon Dr. Eisenberg's report

identifying the human bone fragments from the Gravel Pit that were returned to the Halbach family is attached and incorporated herein as **Exhibit 15**. A chart based upon Dr. Eisenberg's report identifying the 11 tag numbers of human bone fragments from Mr. Avery's burn pit that were returned to the Halbach family is attached and incorporated herein as **Exhibit 16**. A chart based upon Dr. Eisenberg's report identifying the 2 tag numbers of human bone fragments from the Dassey-Janda burn barrel (barrel #2) that were returned to the Halbach family is attached and incorporated herein as **Exhibit 17**. At trial, Dr. Eisenberg testified as to the location of three burn areas: Mr. Avery's burn pit, the Dassey-Janda burn barrel, and one location in the Gravel Pit. (707:27).

In 2016, Suzanne Hagopian ("Ms. Hagopian") of the Wisconsin State Public Defender's Office ("WSPDO"), who had been Mr. Avery's prior postconviction and appellate attorney, provided to current postconviction counsel's office her entire file pertaining to WSPDO's representation of Mr. Avery.

The September 20, 2011 report is not present in current postconviction counsel's file kept on this case. (The Affidavit of Kurt Kingler is attached and incorporated herein as **Exhibit 18**). On January 3, 2019, current postconviction counsel contacted Ms. Hagopian to request that she confirm whether she had ever seen the September 20, 2011 report.

Current postconviction counsel has obtained an affidavit from Ms. Hagopian. (Ms. Hagopian's affidavit is attached and incorporated herein as **Exhibit 19**). In her affidavit, Ms. Hagopian explains that her representation of Mr. Avery began in July 2007 and ended when the Wisconsin Supreme Court denied his Petition for Review on December 14, 2011 (the Wisconsin Supreme Court's order was filed in Manitowoc County on December 15, 2011). (470:1-2). On September 20, 2011, Ms. Hagopian and her co-counsel, Martha Askins ("Ms. Askins"), were Mr.

Avery's attorneys of record. Ms. Hagopian has no recollection of having seen this police report before current postconviction counsel delivered it to her on January 3, 2019. Further, Ms. Hagopian does not recall having a conversation with a representative of the State pertaining to tendering items of evidence from Mr. Avery's criminal case to the family of Ms. Halbach. Moreover, Ms. Hagopian avers that, had she seen this report or had a conversation with a representative of the State regarding the return of items of evidence to the family of Ms. Halbach, she believes she would recall it.

Attorneys Hagopian and Askins filed Mr. Avery's Wis. Stat. § 809.30(2)(h) postconviction motion on June 29, 2009. (429:1–28; 427:1–31). That motion was denied by the circuit court on January 25, 2010 (453:1-106), and Attorneys Hagopian and Askins timely appealed on February 10, 2010. (454:1–4). This Court affirmed the circuit court's order denying relief on August 24, 2011. (468:1–44).

Then, as discussed previously, on September 20, 2011, during the pendency of Mr. Avery's appeal,[3] the Calumet County Sheriff's Department, together with Prosecutor Fallon and Attorney Gahn, arranged for the return of human bone fragments from the Gravel Pit and other human bone fragments from Mr. Avery's burn pit and the Dassey-Janda burn barrel to the family of Teresa Halbach. Mr. Avery has provided an affidavit that he, like his attorneys at the time, was never notified that the human bone fragments had been given to the Halbach family. (Attached and incorporated herein as **Exhibit 20** is Mr. Avery's affidavit).

[3] Defendant notes that, while State tendered the evidence at issue here to the family of Ms. Halbach after this Court affirmed the circuit court's denial and before Defendant filed his petition for review in the Wisconsin Supreme Court, his appeal was pending on September 20, 2011. Indeed, pursuant to Wis. Stat. § 808.10, a criminal defendant must file their petition for review within 30 days of the Court of Appeals decision. Therefore, Defendant's appeal was yet pending on September 20, 2011—27 days after the Court of Appeals decision.

On September 22, 2011, Attorneys Hagopian and Askins filed their petition for review with the Wisconsin Supreme Court. (469:1–2). That petition was denied on December 14, 2011. (470:1–2).

Wisconsin's Preservation of Biological Evidence Statute

Wis. Stat. § 968.205 (2001) (amended 2005) governs the preservation of physical evidence collected subject to criminal investigations. § 968.205(2), et seq., provides:

> (2) Except as provided in sub. (3), if physical evidence that is in the possession of a law enforcement agency includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, . . . 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, the law enforcement agency shall preserve the physical evidence until every person in custody as a result of the conviction, . . . has reached his or her discharge date.
>
> (2m) A law enforcement agency shall retain evidence to which sub. (2) applies in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as defined in § 939.74(2d)(a), from the biological material contained in or included on the evidence.
>
> (3) Subject to sub. (5), a law enforcement agency may destroy evidence that includes biological material before the expiration of the time period specified in sub. (2) if all of the following apply:
>
> (a) The law enforcement agency sends a notice of its intent to destroy the evidence to all persons who remain in custody as a result of the criminal conviction,. . . and to either the attorney of record for each person in custody of the state public defender.
>
> (b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:
>
> 1. Files a motion for testing of the evidence under § 974.07(2).
> 2. Submits a written request for retention of the evidence to the law enforcement agency.
>
> (c) No other provision of federal or state law requires the law enforcement agency to retain the evidence.

It is beyond question that the State violated § 968.205 when it failed to (1) preserve the human bone evidence and (2) notify Mr. Avery and Ms. Hagopian of its intent to do the same because the human bone fragments were biological evidence collected in the course of the State's

investigation of Mr. Avery, which ultimately led to his conviction. The purpose of the September 20, 2011 meeting was to identify the human bone fragments of Ms. Halbach and to return them to the Halbach family. (*See* **Exhibit 13**). Therefore, the human bone fragments recovered from the Gravel Pit are properly considered within the ambit of § 968.205(2).

Because § 968.205 does not provide a remedy for convicted persons in the event of a violation, fashioning a remedy is left to the courts—an action Wisconsin courts have yet to take.[4] Mr. Avery submits that this Court should establish the most just and most logical remedy for such evidence preservation violations, i.e., such violations amount to *per se* due process violations. This conclusion is borne out by controlling United States Supreme Court precedent addressing evidence preservation violations. *See*, e.g., *California v. Trombetta*, 467 U.S. 479, 488–89 (1984) and *Youngblood v. Arizona*, 488 U.S. 51, 56–58 (1988).

Taken together, *Trombetta* and *Youngblood* comprise the line of constitutional jurisprudence that outlines the extent of the State's duty to preserve evidence. *Youngblood*, 488 U.S. at 56–58; *Trombetta*, 467 U.S. at 488–90. In each case, the United States Supreme Court promulgated a test to determine whether the destruction of evidence violates a criminal defendant's due process rights. *Id.* The *Trombetta* test focuses on the probative value of the destroyed evidence and whether the evidence possessed exculpatory value that was apparent before its destruction. 467 U.S. at 488–90. The *Youngblood* test, for its part, disregards the probative value of the evidence in favor of examining the government's role in the circumstances that led to the destruction of the evidence. 488 U.S. at 56–58. If a criminal defendant can satisfy either test, then a court will rule the destruction of evidence was a violation of due process and reverse the defendant's conviction. *Youngblood*, 488 U.S. at 54; *Trombetta*, 467 U.S. at 484.

[4] As of this motion, there is no published opinion from a Wisconsin court that addresses a violation of § 968.205.

The due process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the State to preserve exculpatory evidence. *State v. Greenwold,* 181 Wis. 2d 881, 885, 512, N.W.2d 237 (Ct. App. 1994) *(Greenwold I)*. The State's failure to preserve evidence violates and defendant's due process rights if police: (1) failed to preserve evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence that is potentially exculpatory. *State v. Greenwold*, 189 Wis. 2d 59, 67 (Ct. App. 1994) *(Greenwold II)*.

While the United States Supreme Court did not clearly state whether the *Youngblood* test overruled the *Trombetta* test, Wisconsin courts view *Youngblood* as a separate test that complements *Trombetta*. *Greenwold II*, 189 Wis. 2d at 67–68. That is, Wisconsin courts determine whether the *Trombetta* or *Youngblood* tests apply in a case based upon the perceived exculpatory value of the evidence. *Id.*

In *Greenwold II*, the Wisconsin Court of Appeals set forth this approach to the *Youngblood* and *Trombetta* tests after examining the differences between the tests. *Id.* at 67. Because *Youngblood* added a "bad faith" determination to the *Trombetta* materiality inquiry, the *Greenwold* court reasoned that the Supreme Court intended to create two complementary preservation of evidence tests. *Id.*

The *Greenwold II* court synthesized a two-step analysis to address the destruction of evidence. The outcome of this analysis depends upon two specific examinations: (1) whether, by looking to the facts surrounding the crime itself, the destroyed evidence was "apparently exculpatory" or "potentially exculpatory;" and (2) if the evidence is merely "potentially exculpatory," whether the destruction of the evidence result from the government's bad faith. *Id.* at 67–68.

Thus, in Wisconsin, the adoption of either *Trombetta* or *Youngblood* depends upon the probative value of the evidence at issue. *Id.* If the destroyed evidence is apparently exculpatory, Wisconsin courts will apply the *Trombetta* test. *Id*; *see also Youngblood*, 488 U.S. at 57–58; *Trombetta*, 467 U.S. at 489; *United States v. Bohl*, 25 F.3d 904, 910 (10th Cir. 1994) ("To invoke *Trombetta*, a defendant must demonstrate that the government destroyed evidence possessing an 'apparent' exculpatory value. However, to trigger the *Youngblood* test, all that need be shown is that the government destroyed 'potentially exculpatory evidence.'" Wisconsin courts have followed this line of reasoning; for example, the Court of Appeals stated in *State v. Parker*:

> A defendant's due process rights are violated by the destruction of evidence (1) if the evidence destroyed was "apparently exculpatory" and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means; or (2) if the evidence was potentially exculpatory and was destroyed in bad faith.

2002 WI App 159, ¶ 14, 256 Wis. 2d 154, 160, 647 N.W.2d 430, 433.

While the *Trombetta* and *Youngblood* evidence preservation doctrines originally applied only when evidence was destroyed pretrial, the Wisconsin Court of Appeals stated that *Trombetta* and *Youngblood* and Wisconsin's two-part *Greenwold* test are applicable to the postconviction destruction of evidence in *Parker*. 2002 WI App 159, at ¶¶ 13–14 ("There is a long line of cases addressing the pretrial destruction of evidence and a defendant's due process rights. We see no reason why this line of cases should not apply to [a postconviction challenge to the postconviction destruction of evidence]") (citing *State v. Noble*, 2001 WI App 145, ¶ 17).

Mr. Avery submits that, following *Parker*, the *Greenwold II* two-part analysis should be applied to address the State's violation of the DNA evidence preservation statute in the instant case.

When examining the test set forth in *Greenwold II*, Wisconsin courts apply certain presumptions implicit in the DNA preservation statutes. By codifying a right to the preservation—and testing as provided in Wis. Stat. § 974.06—of evidence, the DNA preservation statutes create three presumptions regarding both the materiality of the evidence and the circumstances surrounding its destruction or loss.

(a) Materiality

First, the statutes presume that all biological evidence collected in the course of a criminal investigation and covered by the statutes is material.

The applicability of either *Trombetta* or *Youngblood* depends upon the materiality of the evidence that was lost or destroyed. A hurdle to applying these tests is the impossibility of knowing definitively the material value of evidence that no longer exists. The Supreme Court in *Trombetta* addressed the difficulty of extrapolating materiality from lost evidence: "courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." 467 U.S. at 486.

However, in the context of addressing the materiality of evidence lost or destroyed in violation of Wis. Stat. § 968.205, the Wisconsin legislature has already resolved that problem. Especially when considered together with § 974.07, the DNA evidence preservation statute demonstrates the Wisconsin legislature's recognition of the importance of postconviction DNA testing. These statutes taken together provide for the preservation of biological evidence and, in many instances, DNA analysis thereof. The codified right to DNA preservation and testing shows the legislative intent to ensure that DNA testing of biological evidence plays "a significant role in the suspect's defense," and efforts to obtain postconviction relief. *Trombetta*, 467 U.S. at 488–89.

Therefore, the Wisconsin legislature, through the DNA preservation statute, has placed preserved biological evidence in the class of evidence the United States Supreme Court deemed material as defined in *Trombetta* and *Youngblood*.

(b) Potentially exculpatory evidence preserved under Wis. Stat. § 968.205

Second, following from this presumption of materiality, the DNA evidence preservation statutes further presume that, in every case, biological evidence collected in the course of a criminal investigation is at least "potentially exculpatory" as defined in *Greenwold II*.

In the context of DNA evidence, "apparently exculpatory" evidence contemplates instances where results from testing—or retesting—of biological evidence that excluded the petitioner would exonerate him or her of the crime of conviction. *See* NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 4 (1999).

Similarly, "potentially exculpatory" DNA evidence refers to evidence in cases where "if . . . subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence." *Id.* at 5. In line with the Supreme Court's reasoning in *Youngblood*, this category includes evidence that was "simply an avenue of investigation that might have led in any number of directions," and evidence about which "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S. at 57.

These categorical requirements for "potentially exculpatory" evidence necessarily apply to biological evidence covered by the DNA evidence preservation statute; because preserved evidence test results allow "reasonable persons [to] disagree as to whether the results [of DNA

testing] rule out the possibility of guilt or raise a reasonable doubt of guilt." *Youngblood*, 488 U.S. at 57.

Therefore, evidence covered under the biological evidence preservation statute must be deemed at least "potentially exculpatory" and the loss or destruction of such evidence triggers, at minimum, the *Youngblood* due process analysis. *Youngblood*, 488 U.S. at 58; *Greenwold II*, 189 Wis. 2d at 67–68.

(c) The DNA evidence preservation statute presumes that every violation thereof constitutes "bad faith."

Lastly, because the statutes prescribe the normal course of conduct for Wisconsin law enforcement agencies regarding the collection, preservation, and eventual destruction of biological evidence, every violation of the statues constitutes "bad faith" as defined by *Youngblood* and *Greenwold II*.

The *Youngblood* Court reasoned that law enforcement actions suggesting "bad faith" arise when the "police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." 488 U.S. at 58. This consideration, in turn, hinges "on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 57. In these cases, "bad faith" exists when the conduct of the police is outside the scope of normal practice. *Id.* at 56–58.

The *Youngblood* Court's definition of "bad faith" takes for granted that there are times when the police will not know whether evidence was material before its loss or destruction. The DNA preservation statute eliminates this assumption by creating an affirmative duty to preserve all biological evidence taken from the crime scene. Thus, law enforcement agencies are on notice that biological evidence is deemed important to the successful administration of criminal justice

and therefore may not claim ignorance that the destroyed evidence was at least "potentially exculpatory." *Id.* 56–58.

Wis. Stat. § 968.205 imposes certain duties upon law enforcement agencies. *See* § 968.205(2). At the most basic level, the State bears a duty to preserve all biological evidence collected during the course of an investigation that leads to a conviction. Additionally, the statute sets forth the steps the State must take before lawfully destroying such evidence in its possession. § 968.205(3)(a), (3)(b), (4). Because a violation of the DNA preservation statute means the State did not abide by either the requirements for preservation or the proper destruction of the evidence as required by law, such conduct constitutes "bad faith."

This conclusion is not undermined by the Wisconsin Court of Appeals' adoption of the "official animus" standard in *Greenwold II*. 189 Wis. 2d at 69. The *Greenwold II* court emphasized that "bad faith" does not exist when the destruction of evidence was due to inadvertent or negligent actions on the part of law enforcement. *Id.* However, this exclusion only pertains to two situations where evidence preservation was (1) required by noncodified law enforcement agency policy or (2) not required by any policy. *Id.* Mr. Avery submits that a violation of state law goes far beyond the negligence standard that the "official animus" framework was formulated to replace; that is, a violation of state law should not be analyzed within the context of mere negligence or inadvertence. Indeed, such a violation should immediately trigger "official animus" as adopted in *Greenwold II* as a *per se* showing of "bad faith" under *Youngblood*.

The State was aware of the Apparent Exculpatory Value and Materiality of the Bones prior to their destruction because of the Pre-Trial FBI Examination, Trial Stipulation, and April 4, 2007 Order

The apparent exculpatory value and materiality of the bones was apparent to the State, prior to their destruction, as is demonstrated by its efforts to conduct a DNA examination of the bones

pre-trial. That examination by the FBI was unsuccessful at that point in time. The parties entered into a stipulation at trial, which stated that the FBI conducted no DNA examination of the possibly human bones from the quarry pile south of the Avery salvage yard due to the degraded condition of the bone fragments. (*See* Exhibit D to **Exhibit 25** (707:50–51) and Exhibit E to **Exhibit 25** (247:6–10)). Both the apparent exculpatory value and materiality of the bones was established and would have been apparent to the State, prior to their destruction, by the attempted FBI testing and the Stipulation between the parties, which was entered at Mr. Avery's trial. (*See* Exhibit D to **Exhibit 25** (707:50–51) and Exhibit E to **Exhibit 25** (247:6–10)).

Post-trial, the State was aware of the apparent exculpatory value and materiality of the bones, prior to their destruction, when the trial court entered an order on April 4, 2007, for the Preservation of Blood Evidence and Independent Defense Testing. This order contemplates and allows future DNA testing by Mr. Avery. (395:1–3). In its order, the trial court gave Mr. Avery the opportunity to, at any time, submit items of evidence for DNA testing. (395:2). Both the apparent exculpatory value and materiality of the bones was established by the April 4, 2007 order.

(d) Application

The presumptions created by the DNA evidence preservation statute shape the analysis that Wisconsin courts should undertake when confronted with instances, such as in the instant case, where a law enforcement agency violated the statute. This analysis is grounded in the two-part test set forth in *Greenwold II*; however, it differs to the extent Wisconsin courts apply the presumptions created by the DNA evidence preservation statute. These presumptions, as set forth above, dictate issues at the heart of the test.

Trombetta's "apparently exculpatory" requirement is met

As described more fully above, the first step in the *Greenwold II* analysis is an inquiry into the first two steps of the *Trombetta* test: whether the destroyed evidence was apparently exculpatory. *Greenwold II*, 189 Wis. 2d at 67; *Trombetta*, 467 U.S. at 488–89. This examination asks whether, if the destroyed evidence was subjected to testing or retesting, favorable results would exonerate the petitioner and whether the State was on notice of this fact. If the State failed to preserve evidence that was "apparently exculpatory," and if the State was aware of its apparent exculpatory nature, then the court must vacate the conviction. *Trombetta*, 467 U.S. at 488–89. As stated previously, the apparent exculpatory value of the bones has been demonstrated by the State's efforts pre-trial to have the FBI test the bones and the subsequent Stipulation and April 4, 2007 order.

Youngblood's "potentially exculpatory" combined with "bad faith" requirement is met

If, however, the evidence is not deemed "apparently exculpatory," then Wisconsin courts should apply the *Youngblood* test under the second step of the *Greenwold II* analysis. *Youngblood*, 488 U.S. at 56–58; *Greenwold II*, 189 Wis. 2d at 67–68. Alternatively, under the *Youngblood* test, courts would examine whether the evidence was "potentially exculpatory," and, if so, whether the police acted in "bad faith" when they destroyed the evidence. *Id.* In light of the presumptions created by the DNA evidence preservation statute, the trial Stipulation, the pre-trial FBI examination, and the April 4, 2007 order, as described fully above, mandates that the evidence be considered "potentially exculpatory."

Next, the court considers whether the law enforcement agency acted in "bad faith." As set forth above, the presence of "bad faith" is presumed every time the Wis. Stat § 968.205 DNA

evidence preservation statute is violated. (*See* **Exhibits 19** and **20**). Here, the failure to give notice to Mr. Avery and his attorneys violated the statute. Additionally, the State violated the April 4, 2007 trial court order by giving the bones back to the Halbach family. By returning the Gravel Pit bones to the Halbach family, the State has admitted that the bones are human and that they belong to Ms. Halbach. The State cannot credibly argue that it returned animal bones to the Halbach family for burial or cremation. Both of these violations mean that the State acted outside the scope of its normal practice by destroying evidence it knew had to be preserved in compliance with Wis. Stat § 968.205 and the April 4, 2007 trial court order.

The State's Ongoing Efforts to Conceal the Destruction of the Bones

As previously discussed, Mr. Avery filed a Motion to Stay Appeal and Remand the Cause for New Scientific Testing of the Gravel Pit bones. (*See* **Exhibit 1**). When the State responded to Mr. Avery's motion, it never mentioned that it had effectively destroyed the bones that would have been tested, had the Motion been granted. On February 25, 2019, the Appellate Court order noted that:

> The State's objection does not address the merits of Avery's claimed statutory and constitutional violations, and it has not responded to Avery's supplemental filings alleging the possible destruction of evidentiary items which, it appears, the parties previously agreed to preserve.

(**Exhibit 8**, p. 2).

Both of the State's responses indicate bad faith and a lack of candor in failing to address the destruction of the Gravel Pit bones without informing Mr. Avery, his attorneys, and the Court. (*See* **Exhibit 4**) (12/28/2018 Response in Opposition to the Petition to Stay the Appeal and Remand this Case to the Circuit Court is attached and incorporated herein as **Exhibit 21**). The

State also agreed in a September 18, 2017, meeting with current postconviction counsel to arrange for the testing of the suspected human pelvic bone. (629:1–11).

It is clear that the parties have construed the scope of the April 2007 order to permit testing of a variety of biological samples deemed relevant to the instant case. The State was on notice of this agreement in September 2011 when it effectuated the destruction of human bone fragments recovered in the Gravel Pit.

The State knew it bore a duty to preserve biological material at the time it effectuated the potential destruction of the human bone fragments without notifying Mr. Avery and his attorneys. The State, by taking these actions, acted in "bad faith" and with "official animus" as defined by *Youngblood* and *Greenwold II*. *See*, e.g., *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994) (finding bad faith where government actors destroyed potentially exculpatory evidence when they were on notice that the evidence at issue should be preserved); *United States v. Cooper*, 983 F.2d 928 (1993) (finding bad faith where law enforcement agents destroyed evidence they knew the defendants asked to preserve).

In light of the information that the pelvic bone (Calumet County Sheriff's Department #8675) was categorized as "human" and, therefore, would have been returned to the Halbach family, undersigned counsel made two urgent email requests of Prosecutor Fallon for confirmation of its whereabouts. (*See* **Exhibit 7**). to call undersigned counsel immediately on her cell phone to confirm whether or not the State was in possession of the "human" pelvic bone (#8675). Mr. Fallon has consistently represented to undersigned counsel for the last three years that the State was in possession of the pelvic bone.

Prosecutor Fallon never returned Ms. Zellner's telephone call and, apparently, was instructed not to by his co-counsel, Attorney Mark Williams. Mr. Williams inadvertently called

current postconviction counsel's cell phone at 9:13 a.m. on February 13, 2019, and left a message, intended for Prosecutor Fallon, which stated:

> Hi, Tom. This is Mark Williams. Um, I'll send you an email later today, but I don't think we should do anything or respond to her at all until tomorrow, uh, when we look into the bag and-and see exactly the pelvic bones are in there or not. Um, so I—I would not respond, uh, until we look into the bag, uh, tomorrow morning and then we can talk about it, uh, before we send a response. Thanks a lot. Bye.

On February 17, 2019, Prosecutor Fallon left a voicemail on current postconviction counsel's cell phone, admitting, "Um, yes, uh, many bone fragments were returned to the family." (CD with Attorney Williams's 2/13/2019 and Prosecutor Fallon's 2/17/2019 voicemails is attached and incorporated herein as **Group Exhibit 22**).

Mr. Avery's Experts: Drs. DeHaan, Symes, and Selden

Dr. DeHaan establishes that the bones were planted in Mr. Avery's burn pit

Current postconviction counsel has developed new evidence through her expert, Dr. John DeHaan, who has ruled out, based upon new discoveries in forensic fire science, that Ms. Halbach's body was burned in Mr. Avery's burn pit. Additionally, Dr. DeHaan has demonstrated that the bones were planted in Mr. Avery's burn pit; this evidence also meets the *Trombetta* requirement of "apparently exculpatory." Therefore, Dr. DeHaan's opinions greatly increase the evidence of Mr. Avery's actual innocence and make the destruction of the Gravel Pit human bone fragments an even more egregious constitutional violation. (Supplemental Affidavit of Dr. John DeHaan is attached and incorporated herein as **Exhibit 23**).

Dr. Symes has identified human bones in the Gravel Pit

Another expert of current postconviction counsel, Dr. Steven Symes, a renowned forensic anthropologist, has offered the opinion that Dr. Eisenberg correctly determined in her second anthropological report (*See* **Group Exhibit 10**) that the Gravel Pit bones were human based upon her visual inspection of the bones. Dr. Symes has also been able to identify human ribs and additional human pelvic bones from Calumet County Sheriff's Department items #7411 and #7412. (The Supplemental Affidavit of Dr. Symes is attached and incorporated herein as **Exhibit 24**).

Dr. Selden establishes the State's bad faith by commingling the bones when they were returned to the Halbach family

Mr. Avery's expert, Richard Selden, MD, PhD ("Dr. Selden") has offered the following opinions regarding the commingling effect of the bones:

1. Because the bones were commingled (and their labels removed), it is no longer possible to determine if the victim's bones were present in the gravel pit, or if the bones in the gravel pit were human.
2. Furthermore, presuming the commingled bones, including those from the gravel pit, were cremated, the ability to generate a DNA ID has been irreversibly lost because, following cremation, the sizes of the genomic DNA fragments are too small to yield amplified DNA of the size required. The evidentiary value of testing has been destroyed.
3. Alternatively, presuming the commingled bones, including those from the gravel pit, were buried, the DNA itself has likely been destroyed due to environmental conditions and microbial degradation over the last eight years. As noted in the preceding paragraph, even if such testing could be done, it would be useless because the bones from all three sites were commingled.

4. Testing results would be scientifically invalid because the controlled conditions (including but not limited to a clear understanding of the location of each of the bone fragments) were lost by the actions of the State on September 20, 2011, in disposing, mingling, and destroying the human bones.

Dr. Selden also notes in his affidavit that advances in the last several months have resulted in the development of even more sensitive DNA testing that "allows a fraction of DNA from a single cell to be identified as being of human origin. . . . The opportunity to perform scientific testing to definitively confirm the State's forensic anthropologist's determination that the bones were human has been irretrievably lost for all of the above-stated reasons." (Affidavit of Dr. Richard Selden is attached and incorporated herein as **Exhibit 25**).

Dr. Selden establishes that more accurate and probative results could have been obtained from the Gravel Pit bones with newly developed DNA technology

As stated in his previous affidavit, Dr. Selden opined there would have been a "'reasonable likelihood of more accurate and probative results' that the Gravel Pit samples would generate DNA identifications if processed using ANDE Rapid DNA technologies." (*See* Exhibit 3 to **Exhibit 1**, ¶ 15). Dr. Selden has offered specific details about the improvement in the DNA technology that would have resulted in a DNA identification being made of the Gravel Pit bones:

> 7. My understanding is that in 2006, the FBI determined that performing DNA analysis, including mitochondrial DNA analysis, on the bones in the instant case, would not be effective due to the degraded nature of the remains. I believe that the decision to defer DNA testing was reasonable at the time because the then-current technology was unlikely to be successful.
>
> 8. Today, the decision to defer testing has been validated. DNA Identification technology is dramatically improved as compared to the state-of-the-art in 2006, and my expectation (as originally presented in my affidavit of 17 December 2018) is that this improved technology will allow the successful DNA typing of the bones in the instant case. There are three major advances that lead me to this conclusion.

9. First, DNA typing technology in general and the ANDE system in particular are much more sensitive than was the case in 2006. Improved Short Tandem Repeat primer design and synthesis, improved amplification reaction mixes, and better-controlled thermal cyclers combine to dramatically reduce the limit of detection as compared to 13 years ago. As of approximately 2014, picogram quantities of genomic DNA can now be readily and routinely detected, at least a 50-fold improvement over the 2006 state-of-the-art.

10. Second, the ability of degraded DNA to be analyzed has been significantly enhanced over the past 13 years. These advances have been driven in large part by the FBI's 2017 requirement to utilize 20 CODIS STR markers (instead of 13). The addition of new CODIS STR markers and "mini-STR markers" includes those that can identify smaller, more highly degraded, DNA fragments than possible in 2006.

11. Third, the ANDE system is much more rapid than conventional laboratory bone processing today, let alone that of 2006. ANDE allows results to be generated in less than two hours as compared to the months to years characteristic of conventional processing. One of the major advantages of speed is that it allows many more bone samples in the instant case to be processed essentially immediately. If we assume, for example, that we process 12 samples during the first day, the results from this work will inform the approach to processing the next set of samples on the following day. This immediate feedback, allowing forensic DNA identification to be optimized in real-time, was not possible in 2006. In that era, results might become available months to years later--far too long to have a practical impact on sample processing optimization (again, for the reasons noted above, it was highly unlikely that the 2006 technology could yield useful results under any circumstances).

12. On June 4, 2018, the ANDE Rapid DNA ID system received National DNA Index System (NDIS) approval from the FBI. The approval allows all accredited forensic DNA laboratories to utilize the ANDE system for the processing of buccal swabs and to submit DNA ID data to the Federal DNA database (CODIS) and to search the Federal DNA database with data generated from the ANDE system. The FBI has publicly stated that it intends to allow NDIS-approved Rapid DNA systems to be utilized to test arrestees while in custody in police booking stations as required by the Federal Rapid DNA act of 2017 (passed unanimously in the House of Representatives and Senate). A peer-reviewed manuscript describing this NDIS approval study was published in Forensic Science International Genetics in February 2019.

(**Exhibit 25**).

Clearly, the testing proposed by Dr. Selden would have met the requirements of *State v. Plude*, 2008 WI 58. *Plude* held:

> When moving for a new trial based on the allegation of newly discovered evidence, a defendant must prove: "(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."

Plude, 2008 WI 58, at ¶ 31 (citation omitted).

The State has deprived Mr. Avery of the opportunity to meet the *Plude* requirements and to obtain a new trial.

The State, by its actions, has admitted that the bones are not only human, but also that they belong to Ms. Halbach. The State, without notifying Mr. Avery and his attorneys and during the pendency of Mr. Avery's direct appeal, caused material and apparently and potentially exculpatory evidence to be transmitted to the Halbach family for its destruction by cremation or burial. According to federal and state due process jurisprudence regarding the state's duty to preserve evidence, the appropriate remedy for a violation of Wisconsin's DNA evidence preservation statutes and the additional violation of the April 4, 2007 trial court order in and of itself should result in the reversal of Mr. Avery's conviction. The violation of both orders is indisputably a due process violation that mandates that Mr. Avery be granted a new trial.

Kratz's knowingly false representations during closing argument

The trial statements of Prosecutor Kratz indicate that he understood the exculpatory value of the Gravel Pit bones because he did everything to mislead and misrepresent to the jury that these bones were human. (716:78–79). Prosecutor Kratz violated Mr. Avery's right to due process

where he concealed information and misrepresented to the jury during closing argument that the only human bone fragments were discovered in Mr. Avery's burn pit. (716:78–79).

> So the State believes, and the State argues, that there isn't any question that it is, in fact, Teresa Halbach, and her bones, and her remains, and her teeth, that are recovered just a few feet behind Mr. Avery's garage and trailer.

(715:103)

> But I guess most importantly, when the bones of the victim are found 20 feet or so behind the property belonging to Mr. Avery, you stop looking. You stop looking for people like boyfriends, or other customers, or this kind of a search.

(716:73)

Prosecutor Kratz attempted to refute that the bones had been planted in Mr. Avery's burn pit by telling the jury the following:

> Bones were moved in this case. There's no question of that no question of that. Who moved the bones, to the State, or for the theory of the prosecution is easy. Mr. Avery moved the bones. He moved the big bones. He moved the big bones, the ones he could identify as human bones, from his burn pit, over to his sister's burn barrel. All right. That's a couple hundred feet away.
>
> If you think about the selfishness involved in that particular act, that I think is—is one factor. But I guess more importantly is directing attention away from himself. Might be that first night, might be the 31st, might be the 1st or the 2nd, because he has got a couple of days, as it turns out, before the police officers actually start the investigation.

(716:76)

Prosecutor Kratz deliberately misled the jury about the human bones in the Gravel Pit when he made the following statements:

> These bones in the quarry, I'm going to take about 20 seconds to talk about, because the best anybody can say is that they are possible [sic] human. What does possible human mean? Well, it means we don't know what it is. All right.

> The best anthropologists in the world don't know what these bones are. Dr. Eisenberg didn't know what they were. Dr. Fairgrieve didn't know what they were, he agreed with that.
>
> And you heard a stipulation being read to you by a person by the name of Les McCurdy. Stipulation just means an agreement between the parties, that these bones, we felt it important enough, were sent out to the FBI. And Les McCurdy from the FBI determined that these bones were so degraded, that they were in such a shape that even through testing, what's called mitochondrial DNA testing, whether they are human or not, could not, even by the FBI, be determined.
>
> *So the bones in the quarry are really not evidence in this case.* And so Mr. Strang has made a big deal out of showing you maps, and a little flag, and things like that about a possible bones [sic]. Again, speculation, conjecture, is not part of this case. Facts are going to be what decides this case.

(716:79) (emphasis added).

Prosecutor Kratz was well aware of the contents of these discovery disclosures prior to making his closing argument. He knew that four piles of human bones had been discovered in the Gravel Pit, and he actively misled the jury into believing that none of the bones were human. The Calumet County ledger sheets, Dr. Eisenberg's report, and the Gravel Pit bone pile maps clearly document that there were numerous bone fragments in the Gravel Pit that were human. (*See,* **Exhibits 9, 10, 11**).

"The proper role of the criminal prosecutor is not simply to obtain a conviction, but to obtain a *fair* conviction." *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Thus, a prosecutor may not knowingly argue false evidence to the jury. *Brown*, 951 F.2d at 1015 (citing *Miller v. Pate*, 386 U.S. 1 (1967); *United States v. Brown*, 880 F.2d 2012 (9th Cir. 1989)). A prosecutor's knowingly false statements during closing argument violate a criminal defendant's right to due process. *Id.* at 1017 (collecting cases).

In *Miller*, the defendant was charged with sexually assaulting and murdering the victim. *Miller*, 386 U.S. at 2. A pair of men's "underwear shorts" with dark, reddish-brown stains was

recovered three days after the murder approximately a mile from the crime scene. *Id.* at 3. At the time of trial, the prosecutor knew that the shorts had paint on them, and he even possessed a police report stating that the stains consisted of pain. *Id.* at 6. Nevertheless, the prosecutor consistently and repeatedly misrepresented to the jury that the paint stains were actually the victim's blood. *Id.* The United States Supreme Court concluded that the prosecutor deliberately misrepresented the truth and, in doing so, violated the Fourteenth Amendment. *Id.* at 7.

In *United States v. Toney*, 599 F.2d 787 (6th Cir. 1979), three masked men robbed a bank in Ohio. Shortly after the robbery, money taken from the bank was found during a search of Toney's residence. *Id.* at 788. Toney claimed that he was going to participate in the robbery with Willie and Henry but got nervous and backed out of the plan. *Id.* A third man, Jimmie King, took his place. *Id.* Toney maintained that he won the stolen bills the next day when gambling with a group of friends, which included King. *Id.* King was arrested and gave a statement in which he admitted to gambling with Toney on the date of the robbery. *Id.* at 789.

At Toney's trial, King invoked his 5th Amendment privilege against self-incrimination. *Id.* The trial court then held that King's post-arrest statement was inadmissible. *Id.* During closing argument, the prosecutor argued as follows:

> I would ask you also to concentrate on this one fact: . . . Have you heard any testimony from any witness either the Government brought forward or the Defense brought forward that Jimmie King did any gambling that night?
>
> Jimmie King was there, but Jimmie King, no witness has testified to you or told you, did any gambling on the night of the 13th or the 14th, and there is no testimony that he was gambling or anywhere near a gambling place on the 13th or 14th in the afternoon.
>
> I submit to you, cut through the smoke screen. It is the Defendant's contention he got the money from Jimmie King.

Id. at 790.

The prosecution went on to argue that Toney's defense should be rejected because he had not produced any evidence to support his claim that he had been gambling with King after the robbery. *Id.*

The Sixth Circuit reversed Toney's conviction. The court noted that the prosecutor argued that there was no evidence to support Toney's claim knowing full well that evidence did corroborate his claim, *i.e.*, King's statement. The court held the prosecutor's knowingly false argument to be "foul play," and reversed Toney's conviction. *Id.* at 790–91.

Several other cases likewise hold that where a prosecutor makes closing argument he knows to be untrue—even if not necessarily contradicted by the evidence or testimony admitted at trial—the defendant's right to due process is violated. *E.g.*, *Brown*, 951 F.2d at 1014–17 (prosecutor's argument that motive for murder was robbery, despite knowing that victim's property had been recovered by hospital personnel, violated due process); *People v. Kirby*, 4 Mich. App. 201, 144 N.W.2d 651 (1966) (prosecutor's argument that there was no evidence supporting the defendant's alibi, despite knowing that there was a witness who offered some corroboration for it not offered at trial, constituted reversible error); *State v. Weiss*, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372 (prosecutor's argument that defendant was untruthful when he testified he denied the crime to police, despite possessing police reports wherein the defendant denied the crime, was a "foul blow" that required reversal).

Prosecutor Kratz clearly concealed that there were numerous Gravel Pit bone fragments that were human and dismissed the suspected human pelvic bone position of trial defense counsel as speculative. (716:78–79). Because of Prosecutor Kratz's misrepresentations to the jury, Mr. Avery's conviction must be reversed.

Disqualification of Judge Sutkiewicz

Although not strictly required by the Wisconsin Code of Judicial Conduct, Judge Sutkiewicz should disqualify herself from presiding over any further proceedings in this matter. By virtue of having presided over the prior civil suit filed against Mr. Avery by the Halbach family for the death of Teresa Halbach, Judge Sutkiewicz should recuse herself from the pending postconviction case, and it should be reassigned to a different judge. Judge Willis recused himself from the Halbach's civil suit because he had presided over the criminal case, including the direct appeal and postconviction § 809.30(2)(h).

"Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us." Code of Judicial Conduct, SCR 60 Preamble. "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." SCR 60.03. A judge is required to recuse himself or herself in a proceeding when "well informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial[.]" SCR 60.04(4). "Under this rule, a judge must recuse himself or herself whenever the facts and circumstances the judge knows or reasonably should know raise reasonable question of the judge's ability to act impartially, regardless of whether any of the specific rules in SCR 60.04(4) applies." SCR 60.04(4) Comment.

On March 24, 2006, a wrongful death lawsuit was filed against Mr. Avery on behalf of Ms. Halbach's estate. *Halbach v. Avery, et al.*, Manitowoc County Case No. 2006-cv-150. On or about October 29, 2013, Judge Sutkiewicz was assigned to preside over the lawsuit. On November 21, 2013, Plaintiff's counsel filed a motion to voluntarily dismiss the lawsuit. On November 25, 2013,

Judge Sutkiewicz held the plaintiff's motion in abeyance pending the resolution of Mr. Avery's criminal proceedings. It was not until June 8, 2015, after Mr. Avery sent correspondence concerning the voluntary dismissal, that Judge Sutkiewicz granted the plaintiff's motion to voluntarily dismiss the lawsuit.

Having presided over the lawsuit filed by the Halbach family against Mr. Avery, Judge Sutkiewicz's ability to be impartial in the ongoing criminal proceedings against Mr. Avery is reasonably subject to question. Indeed, under the American Bar Association Code of Judicial Conduct, a judge must disqualify herself if she previously presided over the matter in another court. MODEL CODE OF JUD. CONDUCT r. 2.11(A)(6)(d) (AM. BAR ASS'N 2014). *E.g.*, *Ferguson v. State*, 2016 Ark. 319, 498 S.W.3d 733 (judge required to recuse herself from trial for domestic battery after presiding over dependency-neglect hearing related to same accusations). And, Wisconsin tribunals in similar situations have determined that their disqualification from a criminal proceeding after having presided over a civil lawsuit involving the same subject matter is appropriate. *E.g.*, *In re Disciplinary Proceedings Against Kohler*, 2009 WI 24, ¶ 22, 316 Wis. 2d 17, 25, 762 N.W.2d 377, 381. Because Judge Sutkiewicz presided over the civil lawsuit in which Mr. Avery was accused of causing Ms. Halbach's death, she should disqualify herself from further participation in the criminal proceedings involving Mr. Avery.

In a similar vein, Judge Sutkiewicz's prior affiliation with Prosecutor Kratz likewise calls her impartiality into question. Judge Sutkiewicz and Prosecutor Kratz served together on the 5-member Crime Victim's Rights Board in 2007–2008, the exact time frame during which Mr. Avery's criminal case went to trial and he was convicted. Again, Judge Sutkiewicz's association with Prosecutor Kratz advocating on behalf of crime victims at the same time Mr. Avery's criminal case went to trial raises reasonable questions about her impartiality. *E.g.*, SCR 60.04(4)(c) (A

judge shall recuse herself if a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.).

Conclusion

For all of the above-stated reasons, Mr. Avery is requesting that his conviction be reversed and that his cause be set for a new trial and for any other relief that this Court deems appropriate to grant.

Dated this 11th day of March, 2019.

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CERTIFICATE OF SERVICE

I certify that on March 11th, 2019, a true and correct copy of Defendant's Supplemental § 974.06 Motion for Post-Conviction Relief Pursuant to State's Violation of Wis. Stat. § 968.205 and *Youngblood -v- Arizona*., was furnished via electronic mail and by Federal Express, postage prepaid to:

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3rd Floor, Room 325
Manitowoc, WI 54220

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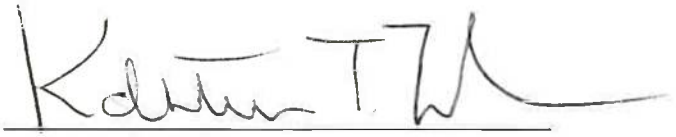
Honorable Judge Angela W. Sutkiewicz
Circuit Court Judge
Sheboygan County Courthouse
615 North 6th Street
Sheboygan, WI 53081

Lynn Zigmunt
Clerk of the Circuit Court
Manitowoc County Courthouse
1010 South 8th Street
Manitowoc, WI 54220



Kathleen T. Zellner