

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005 CF 381

STEVEN AVERY,

Judge Angela Sutkiewicz

Defendant.

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**OBJECTION TO MOTION FOR SUBSTITUTION**

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The State objects to defendant's motion for substitution of judge. The defendant's motion is improper and untimely; it must be denied for two reasons. First, a § 974.06 Motion is part of the original criminal action. Wis. Stat. § 974.06(2). Second, this case is before the trial court on a remand, not a remittitur. The Court of Appeals retained jurisdiction of the case. Consequently, there is no right to substitute.

Although these actions are to be handled in a civil nature, a § 974.06 Motion is **part of the original criminal action**. Wis. Stat. § 974.06(2). *State v Starks*, 2013 WI 69, ¶ 41, 349 Wis. 2d 274, 833 N.W.2d 146 (emphasis added). Since this is part of the original criminal action, Wis. Stat. § 971.20 governs the request for substitution of judge. Section 971.20(2) provides "In any criminal action, the defendant has a right to only one substitution of a judge, except under sub. (7). The right of substitution shall be exercised as provided in this section." Subsection (7) provides "(i)f an appellate court orders a new trial or sentencing proceeding, a request under this section may be filed within 20 days **after the filing of the remittitur** by the appellate court, whether or not a request for substitution was made prior to the time the appeal was taken" (emphasis added). In this case, the defendant has already exercised his right to substitute judges when he filed a request for substitution of the Honorable Jerome L. Fox on April 4, 2013. CCAP

Record of *State v. Steven Avery*, 2005 CF 381. The case was then assigned to this court on April 11, 2013. Since these proceedings are part of the original action, this Motion for Substitution of Judge is invalid. Any attempt to substitute judges under § 971.20(7) must also fail.

While § 971.20(7) allows for a second substitution after a successful appeal, Defendant is procedurally ineligible to take advantage of this provision. In this case, the Court of Appeals issued a limited remand order. Defendant's Exhibit "A." This is because the Court of Appeals is not a fact-finding court. Defendant's Exhibit "A," p. 2. The Court of Appeals did not order a new trial. It did not order a new sentencing. Most importantly, it did not issue a remittitur returning jurisdiction to the trial court. "An appellate court's jurisdiction over a cause ceases upon remittitur." *State ex rel. Fuentes v. Wisconsin Court of Appeals District IV*, 225 Wis. 2d 446, 452, 593 N.W.2d 48 (1999). The Court of Appeals retained jurisdiction and simply remanded a particular issue (*Brady* claim) back to the trial court to make findings of fact. Defendant's Exhibit "A," p. 2. In fact, Defendant quotes the operative language in ¶ 8 of his *Motion for Substitution of Judge*. "[W]e retain jurisdiction but remand this case to enable Avery to file an appropriate supplemental postconviction motion in circuit court" (emphasis added). Any attempt to substitute judge at this time is procedurally barred.

Additionally, any claim that § 974.06(6) magically transforms this proceeding into a civil case is mistaken. Defendant argues that Wis. Stat. § 801.58 applies because this is now a civil proceeding. Defendant misreads and misapplies § 974.06(6). It is handled *like* a civil proceeding because § 974.06 was designed to replace state habeas corpus proceedings which were civil in nature. *State v Starks*, 2013 WI 69, ¶ 41, 349 Wis. 2d 274, 833 N.W.2d 146, and *State ex Rel. Haas v McReynolds*, 2002 WI 43, ¶ 11, 252 Wis. 2d 133, 643 N.W.2d 771. Because a claim is *handled like* a civil proceeding that does not make it a civil proceeding. By statute, these postconviction proceedings remain part of the original criminal action. Wis. Stat. 974.06(2).

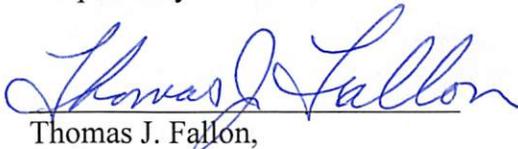
Moreover, any reliance on *State ex rel. Findorff & Son, Inc. v. Circuit Court for Milwaukee County*, 2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679, is wholly misplaced. *Findorff* actually involved a *remand and a remittitur* in a *civil case*. This is not a civil case and there was no remittitur. *Findorff* is inapposite.

Finally, if a defendant were allowed to substitute judges under these circumstances, it would thwart the purpose of § 974.06 and open to door to judicial forum shopping allowing defendants to file multiple postconviction substitution motions in search of a friendly forum.

**WHEREFORE** the State requests that Defendant's Motion for Substitution of Judge be denied. Wisconsin law is quite clear on this procedural issue. Because the law is so clear, this motion lacks validity.

Dated this 26<sup>th</sup> day of June, 2018.

Respectfully submitted



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