

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-381

STEVEN AVERY,

Judge Angela Sutkiewicz

Defendant.

**RESPONSE TO DEFENDANT'S REPLY IN SUPPORT
OF HIS MOTION FOR SUBSTITUTION OF JUDGE**

The State responds to Defendant's REPLY IN SUPPORT OF HIS MOTION FOR SUBSTITUTION OF JUDGE to make three salient points to clarify the applicable law.

First, the Court of Appeals' Remand Order is specific to litigation regarding the information "recently received" by Avery; *i.e.* the CD containing Investigator Velie's analysis. Court of Appeals Remand Order, 2, June 7, 2018. Meaning, the Remand Order is limited to the *new* information already in the possession of Avery. It does not contemplate motions to substitute judge or additional discovery. Moreover, it does not lift the procedural bar on successive postconviction motions beyond the allowed supplemental motion related to the alleged *Brady* claim surrounding the Velie CD.

Second, this is not an appeal under Wis. Stat. § 809.30. Wisconsin Stat. § 809.30(1)(c) specifically excludes Wis. Stat. § 974.06 motions for postconviction relief. It provides in relevant part, "Postconviction relief means an appeal or a motion for postconviction relief in a criminal case, other than an appeal, motion, or petition

under ss. 302.113 (7m) or (9g), 973.19, 973.195, 973.198, **974.06**, or 974.07 (2)” (emphasis added). Consequently, guidance for the authority of a trial court to act while an appeal is pending is found in Wis. Stat. § 808.075(3). Wisconsin Stat. § 808.075(3) provides as follows: “In a case not appealed under s. 809.30, the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals. Thereafter, the circuit court may act only as provided in subs. (1) and (4).” Subsection (1) fails to provide authority for a trial court to consider a motion to substitute, regardless of whether the underlying action is civil or criminal! It provides: “In any case, whether or not an appeal is pending, the circuit court may act under ss. 801.18 (16), 804.02 (2), 805.15, 805.16, 805.17 (3), 806.07, 806.08, 806.15 (2), 806.24, 808.07 (1) and (2), and 809.12.” Nowhere does Wis. Stat. § 801.58 – the statute authorizing the right to substitute in a civil case – appear. And even if this were a civil case, Defendant fails to meet the requirements of Wis. Stat. § 801.58(7) because the Court of Appeal did not order a new trial, reverse or modify a judgment, or order such that further proceedings are necessary.

Lastly, we again point out that these proceedings are 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. Moreover, no remittitur has been issued in this case as the Court of Appeals retained jurisdiction. Court of Appeals Remand Order, 2, June 7, 2018.

WHEREFORE the State requests that Defendant's Motion for Substitution of Judge be denied. Defendant's arguments are frivolous.

Dated this 2nd day of July, 2018.

Respectfully submitted

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