STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2017AP2288

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY, SR.,

Defendant-Appellant.

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OF WISCONSIN

DEFENDANT-APPELLANT'S 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*

Defendant-Appellant, Steven A. Avery, Sr., ("Mr. Avery") by his undersigned attorneys, Kathleen T. Zellner and Steven G. Richards, moves this Court to stay this appeal and remand the cause for a hearing on a claim for relief in connection with the State's violation of Wis. Stat. § 968.205 and *Youngblood v. Arizona.* In support of this motion, Mr. Avery states as follows:

1. Undersigned counsel has uncovered the State's violation of Wis. Stat. § 968.205 where it failed to (1) preserve certain suspected human bone evidence and (2) notify Mr. Avery and his attorneys of record of its intent to destroy such evidence. Mr. Avery hereby moves for a remand to the circuit court to conduct proceedings consistent with the claim alleged herein.

Factual Overview

2. 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 ("Mr. 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] Mr. Kratz claimed that Ms. Halbach was murdered and mutilated in Mr. Avery's garage and burn pit. (696:48, 51). Mr. Kratz attempted to link the following forensic evidence to Mr. Avery because of its proximity to his residence:

a. The .22 Marlin Glenfield firearm above Mr. Avery's bed, which was identified as the murder weapon. (696:67, 80–81).
b. The bullet with Ms. Halbach's DNA on it in Mr. Avery's garage, which was allegedly fired from his .22 Marlin Glenfield gun. (696:97).
c. The location of Ms. Halbach's RAV-4 on the Avery Salvage Yard with Mr. Avery's blood and her blood in it. (696:82–86, 89). The human remains detection dog, Brutus, alerted on the RAV-4, indicating that a "deceased person has been there." (696:61).
d. Ms. Halbach's electronic devices in Mr. Avery's burn barrel. (696:70, 96).
e. The RAV-4 license plates near Mr. Avery's residence. (696:81).
f. The RAV-4 key in Mr. Avery's bedroom. (696:71).

3. Mr. Kratz claimed that the proximity of Mr. Avery's burn pit to his residence was particularly incriminating to him. (696:74–75). Mr. Kratz specifically 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

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

> 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).

4. In his closing argument, Mr. Kratz told the jury that the location of the bones in Mr. Avery's burn pit was the most important evidence of Mr. Avery's intentional murder of Ms. Halbach. Prosecutor Kratz told the jury the following:

> We could start with the moment or with the visual or with the image of that man, Steven Avery, standing outside of a big bonfire, with flames over the roof, or at least over the garage roof, and the silhouette of Steven Avery, with the bonfire in the background and the observation made by some witnesses . . . . And that moment by the way, although dramatic and although important, should tell the whole story.

(715:35)

5. At Mr. Avery's trial, his trial defense counsel, Jerome Buting, stressed the importance of the bones found in the Manitowoc 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).

6. Prosecutor Kratz stated in his rebuttal at trial: "These bones in the quarry, I'm going to take 20 seconds to talk about, because the best anybody can say is that they are possible [*sic*] human." (716:78). Prosecutor Kratz acknowledged the importance of having the bones identified as human, but he dismissed the defense

claim that the bones were human because of the lack of scientific verification for that claim.

7. 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).

8. Therefore, the identification of the Manitowoc County Gravel Pit bone fragments as Ms. Halbach's is material because it is apparently exculpatory and potentially useful in proving the murder and mutilation did not occur in a location tied exclusively to Mr. Avery. No reasonable trier of fact could conclude that, if Mr. Avery murdered and mutilated Ms. Halbach in the Manitowoc County Gravel Pit, he would move her bones from the Gravel Pit to his own burn pit and thereby incriminate himself.

I. The State's illegal transmittal of the bones to the Halbach family

9. 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 Manitowoc County Gravel Pit. (December 17, 2018, Defendant-Appellant's Motion to Stay Appeal and Remand the Cause for New Scientific Testing ("December 17, 2018 Motion")). 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 Manitowoc County 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. Therefore, no reasonable trier of fact could conclude that, if Mr. Avery murdered Ms. Halbach in the Manitowoc County Gravel Pit, he would move her bones to his own burn pit, thereby implicating himself.

10. Thus, Mr. Avery argued, if the Rapid DNA testing identifies Ms. Halbach's bones in the Manitowoc County 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. There is, therefore, a reasonable probability that such testing would undermine confidence in the jury's verdict.

11. On December 28, 2018, this Court denied Mr. Avery's motion, finding that the scope of this 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 is not necessary to decide the instant appeal.

12. After filing Mr. Avery's December 17, 2018, Motion, undersigned counsel discovered a previously undisclosed police report ("September 20, 2011 report"). Specifically, a third party provided counsel with a copy of the report. (Attached and incorporated as **Exhibit A** is a copy of the September 20, 2011 report).

13. The September 20, 2011, report reflects the Calumet County Sheriff's Department's transfer of multiple suspected human bones from the Manitowoc County Gravel Pit to the Wieting Funeral Home for return to Ms. Halbach's family.[2]

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[2] Defendant does not know whether the Halbach family buried or cremated the suspected human bones.

14. Specifically, the suspected human bones from the Manitowoc Quarry—property tag numbers 7411, 7412, 7414, 7416, 7419—were returned to the Halbach family, according to the September 20, 2011 report. The exhibits attached to Mr. Avery's December 17, 2018 Motion describe the location of the suspected human bones in the Manitowoc Gravel Pit, as reflected in Dr. Leslie Eisenberg's ("Dr. Eisenberg") report. (Group Exhibit 1 to the December 17, 2018 Motion)

15. 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 undersigned counsel's office entire file pertaining to WSPDO's representation of Mr. Avery.

16. The September 20, 2011 report is not present in undersigned counsel's file kept on this case. (Attached and incorporated herein as **Exhibit B** is the affidavit of Kurt Kingler, law clerk for undersigned counsel).

17. On January 3, 2019, undersigned counsel contacted Ms. Hagopian to request that she confirm whether she had ever seen the September 20, 2011 report.

18. Counsel has obtained an affidavit from Ms. Hagopian. (Attached and incorporated herein as **Exhibit C** is Ms. Hagopian's affidavit).

19. In her affidavit, Ms. Hagopian explains 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 undersigned 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.

20. 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, on September 20, 2011, during the pendency of Mr. Avery's appeal,[3] the Calumet County Sheriff's Department, together with Assistant Attorneys General Thomas Fallon ("Attorney Fallon") and Norman Gahn ("Attorney Gahn"), arranged for the return of certain suspected human bones from the Manitowoc County Gravel Pit to the family of Teresa Halbach. On September 22, 2011, Attorneys Hagopian and Askins filed their petition for review in the

[3] Defendant notes that, while State tendered the evidence at issue here to the family of Teresa 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 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.

Wisconsin Supreme Court. (469:1–2). That petition was denied on December 14, 2011. (470:1–2).

21. The State, without notifying Mr. Avery and his attorneys and during the pendency of Mr. Avery's direct appeal, caused material and potentially exculpatory evidence to be transmitted to the Halbach family for its potential destruction by cremation or burial.

22. On January 24, 2019, undersigned counsel received her own copy of the September 20, 2011 report from the Calumet County Sheriff's Office and was able to verify the accuracy of the report provided to Ms. Hagopian.

II. Because the State violated Wisconsin's preservation of biological evidence statute, Mr. Avery's due process rights were per se violated. His conviction can not stand.

23. 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.

24. It is beyond question that the State violated § 968.205 when it failed to (1) preserve the suspected human bone evidence and (2) notify Mr. Avery and Ms. Hagopian of its intent to do the same because the suspected human bones were biological evidence collected in the course of the State's investigation of Mr. Avery, which ultimately led to his conviction. Additionally, the human bones were—at minimum—suspected of belonging to the victim in the crime of which Mr. Avery was convicted. Therefore, the suspected human bones recovered from the Manitowoc County Gravel Pit are properly considered within the ambit of § 968.205(2).

25. 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]

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

26. 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 *Arizona v. Youngblood*, 488 U.S. 51, 56–58 (1988); *State v. Greenwold*, 189 Wis. 2d 59, 67 (Ct. App. 1994).

27. 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.

28. While the U.S. 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*, 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.*

29. In *Greenwold*, 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.*

30. Thus, the *Greenwold* 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 useful;" and (2) if the evidence is merely "potentially useful," did the destruction of the evidence result from the government's bad faith. *Id.* at 67–68.

31. 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 useful 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.

32. 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).

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

34. When examining the test set forth in *Greenwold*, 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.[5]

(a) ***Materiality***

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

36. 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.

37. However, in the context of addressing the materiality of evidence 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

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[5] See generally Nathan T. Kipp, *Comment: Preserving Due Process: Violations of the Wisconsin DNA Evidence Preservation Statutes as Per Se Violations of the Fourteenth Amendment*, 2004 Wis. L. Rev. 1245.

significant role in the suspect's defense," and efforts to obtain postconviction relief. *Trombetta*, 467 U.S. at 488–89.

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

(b) ***Usefulness of evidence preserved under Wis. Stat. § 968.205***

39. 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 useful" as defined in *Greenwold*.

40. 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).

41. Similarly, "potentially useful" 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.

42. These categorical requirements for "potentially useful" 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.

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

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

44. Lastly, because the statues 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*.

45. 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.

46. 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 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 useful."

47. 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 prescribed by law, such conduct indicates "bad faith."

48. A violation of the DNA preservation statute constitutes "bad faith." This conclusion is not undermined by the Wisconsin Court of Appeals's adoption of the "official animus" standard in *Greenwold*. 189 Wis. 2d at 69. The *Greenwold* 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* as a per se showing of "bad faith" under *Youngblood.*

49. Additionally, the State acted in "bad faith" where it was on notice that the trial court had ordered preservation of certain items of DNA evidence yet proceeded to effectuate the loss of biological evidence within its control. On April 4, 2007, the trial court entered an order 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. (396:2).

50. It is clear that the parties have broadly 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 facilitated the destruction of suspected human bones recovered in the Manitowoc County Gravel Pit.

51. That the State knew it bore a duty to preserve biological material at the time it facilitated the potential destruction of the suspected human bones 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*. *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).

(d) ***Application***

52. 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*; 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.

53. As described more fully above, the first step in the *Greenwold* analysis is an inquiry into the first two steps of the *Trombetta* test: whether the destroyed evidence was apparently exculpatory. *Greenwold*, 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 exculpatory nature, then the court must vacate the conviction. *Trombetta*, 467 U.S.

at 488–89. If, however, the evidence is not deemed apparently exculpatory," then Wisconsin courts should apply the *Youngblood* test under the second step of the *Greenwold* analysis. *Youngblood*, 488 U.S. at 56–58; *Greenwold*, 189 Wis. 2d at 67–68.

54. Under the *Youngblood* test, courts would examine whether the evidence was "potentially useful," 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, described fully above, the evidence must be considered "potentially useful." 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 DNA evidence preservation statute is violated because such a violation means that a law enforcement agency acted outside the scope of its normal practice by destroying evidence it knew had to be preserved in compliance with Wisconsin law.

55. In the instant case, the suspected human bones are "potentially useful," meaning that retesting of the suspected human bones from the Manitowoc County Gravel Pit could demonstrate Mr. Avery's alleged actual innocence. It is indisputable that the State violated the DNA evidence preservation statute by returning the suspected human bones to the Halbach family. Mr. Avery's due process rights under *Youngblood* had been violated.

56. 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 is the reversal of the criminal defendant's conviction. Therefore, the case should be remanded to the circuit court to conduct proceedings to determine if there has been a due process violation and how that violation should be remedied.

57. Mr. Avery has brought this issue to the court's attention in a timely manner. He does not want to waive this issue by not addressing it at this time. The appeal must be stayed and this issue must be remanded to the circuit court for proceedings that should include a hearing in which Deputy Jeremy Hawkins, Sgt. Inv. Mark Wiegert, Attorney Thomas Fallon, and Attorney Norman Gahn would be subjected to cross-examination concerning the illegal transmission, without notice to Mr. Avery's prior counsel, and the presumed destruction of the Manitowoc County Gravel Pit suspected human bones. The undisclosed September 20, 2011 report contradicts Mr. Kratz's representations to the jury that "[t]hese bones in the quarry, I'm going to take 20 seconds to talk about, because the best anybody can say is that they are possible [*sic*] human." (716:78). The State by its actions has implicitly admitted that the bones are not only human, but that they belong to Ms. Halbach. The State cannot credibly argue that it returned animal bones to the Halbach family for burial or cremation. The State's actions demand that further proceedings be conducted to determine if Mr. Avery's due process rights have been violated and if the State acted in bad faith in returning the suspected human bones to the Halbach family.

III. Conclusion

Wherefore, undersigned counsel respectfully requests that this Court enter an order staying this appeal and remanding the cause to the circuit court for proceedings to determine whether the State has violated Wis. Stat. § 968.205 and *Youngblood v. Arizona*.

Dated this 24th day of January, 2019.

Respectfully Submitted,

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CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
05-0157-955

File Number

TYPE OF ACTIVITY: Return Items

DATE OF ACTIVITY: 09/20/11

REPORTING OFFICER: Deputy Jeremy Hawkins

On 09/20/11 at approximately 9:00 a.m., I (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. Attorney GAHN and Attorney FALLON viewed the items under the property tags and, along with Dr. LESLIE EISENBERG's report, determined which bones could be returned to the HALBACH family.

Ledger No. 05-187; Property Tag #8318, contents sifted from burn pit near STEVE's residence/garage. The human bones from Property Tag #8318 were removed from the container and photographed.

Ledger No. 05-199, Property Tag #7924, unidentified material suspected to be bone, and Property Tag #7925, unidentified material charred, were removed and photographed.

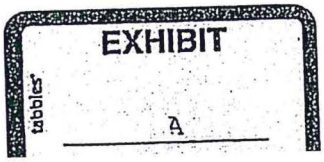
Ledger No. 05-201, Property Tag #7936, unknown material suspected to be bone, Property Tag #7943, bone fragments, and Property Tag #7944, bone fragments, were removed from storage and photographed.

Ledger No. 05-208, Property Tag #8675, the human bones were separated from the rest of the contents and photographed.

Ledger No. 05-209, Property Tag #7964, burnt bone pieces from barrel #2, the human bones were removed from the rest of the contents and photographed.

Ledger No. 05-255, Property Tag #6200, teeth, Property Tag #6197, suspected bone fragments, the separated human bone was removed. Property Tag #8118, suspected bone fragments, the separated human bones were removed. Property Tag #6200, #6197 and #8113 were photographed.

Ledger No. 05-257, Property Tag #8148, suspected bone fragments, the separated human bone fragments were removed and photographed. Property Tag #8150, teeth, was removed and photographed. Property Tag #8140, bone fragments, the separated human bones fragments were removed and photographed.



Ledger No. 06-86, Property Tag #7411, possible bone fragments, Property Tag #7412, possible bone fragments, Property Tag #7414, bone fragments, Property Tag #7416, suspected human bone fragments, Property Tag #7419, suspected human bone fragments, Property Tag #7420, suspected charred item resembling bone, Property Tag #7421, unidentified suspected bone, Property Tag #7426, bone fragments, Property Tag #7434, bone fragments, were all removed and photographed.

After all bone fragments that were determined to be able to be returned to the HALBACHS by Attorney FALLON and Attorney GAHN were completed, the items were transferred to WIETING FUNERAL HOME in the presence of Sgt. Inv. MARK WIEGERT and myself. The packaging for all the items returned was retained by the CALUMET COUNTY SHERIFF'S DEPARTMENT in secure storage.

Deputy Jeremy Hawkins
Calumet Co. Sheriff's Dept.
JH/bdg

STATE OF WISCONSIN **CIRCUIT COURT** **MANITOWOC COUNTY**

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-CF-381
	)	
STEVEN A. AVERY, SR.,	)	Honorable Judge Angela Sutkiewicz,
	)	Judge Presiding
Defendant.	)	

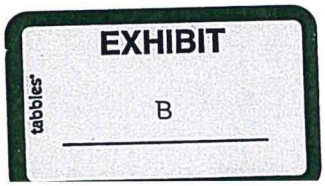
AFFIDAVIT OF KURT KINGLER

Now comes your affiant, Kurt Kingler, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit

2. I have been employed as a law clerk by Kathleen T. Zellner & Associates, P.C., since July 2015. I am a law student at Loyola University Chicago School of Law.

3. On December 19 and 20, 2018, under instruction from Ms. Zellner, I searched our Avery case file for a copy of the Calumet County Sheriff's Department reported dated September 20, 2011, authored by Deputy Jeremy Hawkins. A copy of that report—sent to Zellner & Associates by an interested civilian who was aware that the report had been produced pursuant to a third-party's FOIA request—is attached and incorporated herein as Exhibit A.



4. Our case file includes without limitation the circuit court record transmitted to Mr. Avery by the State Public Defender, the trial file built by Dean Strang and Jerome Buting, the postconviction and appellate files built by Suzanne Hagopian and Martha Askins of the State Public Defender, the files of prior postconviction attorneys Thomas Aquino and Philip Hoff, the postconviction file built by Mr. Avery, and the file built during Zellner & Associates' representation of Mr. Avery.

5. My search was exhaustive.

6. I did not find the September 20, 2011, Hawkins report in our case file as described above in ¶ 4.

FURTHER AFFIANT SAYETH NAUGHT

Kurt Kingler

State of Illinois
County of DuPage

Subscribed and sworn before me
this 24th day of January, 2019

Notary Public

OFFICIAL SEAL
SCOTT T PANEK
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:02/13/21

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
05-0157-955

File Number

TYPE OF ACTIVITY: **Return Items**

DATE OF ACTIVITY: **09/20/11**

REPORTING OFFICER: **Deputy Jeremy Hawkins**

On 09/20/11 at approximately 9:00 a.m., I (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. Attorney GAHN and Attorney FALLON viewed the items under the property tags and, along with Dr. LESLIE EISENBERG's report, determined which bones could be returned to the HALBACH family.

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Deputy Jeremy Hawkins
Calumet Co. Sheriff's Dept.
JH/bdg

STATE OF WISCONSIN **CIRCUIT COURT** **MANITOWOC COUNTY**

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-CF-381
	)	
STEVEN A. AVERY, SR.,	)	Honorable Judge Angela Sutkiewicz,
	)	Judge Presiding
Defendant.	)	

AFFIDAVIT OF SUZANNE HAGOPIAN

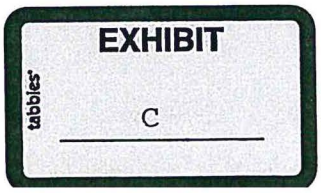
Now comes your affiant, Suzanne Hagopian, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief.

2. In July 2007, I was appointed appellate counsel for Mr. Avery by the Wisconsin State Public Defender. My co-counsel, Martha Askins, and I represented Mr. Avery throughout his direct appeal until 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).

3. During that time, Attorney Askins and I were Mr. Avery's attorneys of record.

4. In 2016, the State Public Defender provided to the Law Firm of Kathleen T. Zellner & Associates, P.C. ("Zellner Law Firm") our entire file pertaining to our representation of Mr. Avery. Prior to the Zellner Law Firm's representation of Mr. Avery, we had delivered to



him all of the transcripts and our copy of the circuit court record. Thus, the Office of the State Public Defender has not retained any of its file from our representation of Mr. Avery.

5. On January 3, 2019, the Zellner Law Firm sent me a copy of a Calumet County Sheriff's Department report dated September 20, 2011. (This report is attached and incorporated herein as **Exhibit A**).

6. I have no recollection of having seen this report before the Zellner Law Firm delivered it to me on January 3, 2019. Nor do I 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 Teresa Halbach. I believe I would recall having seen this report or having a conversation with a representative of the State pertaining to the release of items of evidence.

7. As noted above, Mr. Avery's direct appeal concluded on December 14, 2011, when the Wisconsin Supreme Court issued its order denying Mr. Avery's petition for review.

FURTHER AFFIANT SAYETH NAUGHT

Suzanne Hagopian

State of Wisconsin
County of Dane

Subscribed and sworn before me
this 17th day of January, 2019

Notary Public

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.
05-0157-955

File Number

TYPE OF ACTIVITY: **Return Items**

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REPORTING OFFICER: **Deputy Jeremy Hawkins**

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Deputy Jeremy Hawkins
Calumet Co. Sheriff's Dept.
JH/bdg

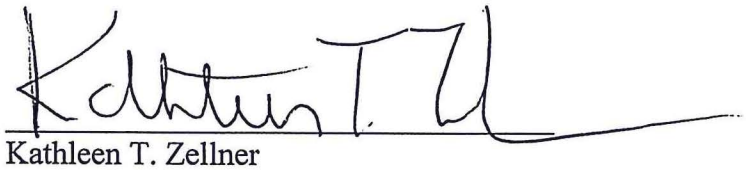
CERTIFICATE OF SERVICE

I certify that on January 24th, 2019, a true and correct copy of Defendant-Appellant's Motion to Stay Appeal and Remand the Cause for Proceedings on Claims for Relief in Connection with the State's Violation of Wisconsin Statute § 968.205 and *Youngblood -v- Arizona*, was furnished via electronic mail and by first-class U.S. Mail, postage prepaid to:

Manitowoc County District Attorney's Office
1010 South 8th Street
3rd Floor, Room 325
Manitowoc, WI 54220

Attorney General's Office
Ms. Lisa E.F. Kumfer
Ms. Tiffany Winter
P.O. Box 7857
Madison, WI 53707

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



Kathleen T. Zellner