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**DISTRICT II**

June 7, 2018

To:

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You are hereby notified that the Court has entered the following order:

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2017AP2288

State of Wisconsin v. Steven A. Avery (L.C. # 2005CF381)

Before Reilly, P.J.

The appellant, Steven A. Avery, by counsel, moves to supplement the record with a compact disc “disclosed to defendant for the first time on April 17, 2018.” Avery alleges that the CD contains exculpatory, material evidence and that State’s failure to disclose the CD earlier violates his due process right to a fair trial under *Brady v. Maryland*, 373 U.S. 83 (1963). The State objects because the CD was not part of the record before the circuit court when it denied Avery’s WIS. STAT. § 974.06 postconviction motion and his motions for reconsideration. Avery

has filed a reply asserting that supplementation is appropriate because although the CD itself was not presented to the circuit court, the facts surrounding the “suppression of the contents of the undisclosed CD to trial defense counsel” are contained in the record through Avery’s prior postconviction motions and the attachments thereto. Avery contends that we should add the CD to the record “because the circuit court had all of the *Brady* issues before it” and “[t]he State should not be rewarded for having suppressed the CD until after the appellate record was completed.”

Avery’s reply misses the point, which is that we are not a fact-finding court and cannot consider items not presented to the circuit court. Based on the assertion that Avery recently received previously withheld discovery or other new information, we retain jurisdiction but remand this case to enable Avery to file an appropriate supplemental postconviction motion in the circuit court. Avery shall file any supplemental postconviction motion within thirty days of the date of this order. The circuit court shall hold proceedings on the supplemental postconviction motion and enter its written findings and conclusions deciding the supplemental postconviction motion within sixty days after the motion is filed. In the event Avery remains aggrieved, the circuit court clerk shall re-transmit the record, including any post-remand papers, according to the procedures described below, and the appeal will continue. In addition to any pre-existing issues, the parties’ appellate briefs shall address any new issues arising from the circuit court’s post-remand order deciding Avery’s supplemental postconviction motion. If Avery is afforded relief pursuant to his supplemental postconviction motion, he may seek dismissal of the pending appeal. If the appeal is dismissed but the State is aggrieved, it may file a notice of appeal from the circuit court’s order deciding any supplemental postconviction motion entered pursuant to this remand. Therefore,

IT IS ORDERED that the motion to supplement the record is denied.

IT IS FURTHER ORDERED that this appeal is remanded forthwith to the circuit court to permit Steven A. Avery to pursue a supplemental postconviction motion in connection with Avery's receipt of previously withheld discovery or other new information.

IT IS FURTHER ORDERED that any supplemental postconviction motion shall be filed in the circuit court within thirty days.

IT IS FURTHER ORDERED that the circuit court shall conduct any necessary proceedings and enter an order containing its findings and conclusions within sixty days after the supplemental postconviction motion is filed.

IT IS FURTHER ORDERED that if Avery intends to order a transcript of any post-remand hearing, he shall do so within ten days after the circuit court enters its order deciding the supplemental postconviction motion. Any such transcript shall be filed and served within twenty days after its request. Avery shall provide the court reporter with a copy of this order.

IT IS FURTHER ORDERED that Avery shall file a statement on transcript within fifteen days after the circuit court enters its post-remand order deciding the supplemental postconviction motion. The statement on transcript shall reflect either that a post-remand transcript has been ordered or that such a transcript is not necessary for this appeal.

IT IS FURTHER ORDERED that the circuit court clerk shall re-transmit the record to this court within twenty days after the later of the entry of the circuit court order resolving the supplemental postconviction motion or the filing of any post-remand hearing transcript, if ordered. The record shall include any papers filed pursuant to this remand.

IT IS FURTHER ORDERED that the appellant shall file an appellant's opening brief presenting all grounds for relief within forty days after the filing of the record.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*