

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

FILED

DEC 28 2018

CLERK OF COURT OF APPEALS
OF WISCONSIN

Case No. 2017AP2288

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

**RESPONSE IN OPPOSITION TO THE PETITION
TO STAY THE APPEAL AND REMAND THIS CASE
TO THE CIRCUIT COURT**

INTRODUCTION

Plaintiff-Respondent State of Wisconsin opposes Defendant-Appellant Steven A. Avery's petition to stay this appeal and remand the case to the circuit court for consideration of a Wis. Stat. § 974.07 motion.

The issue before this Court is whether the circuit court properly denied Avery's Wis. Stat. § 974.06 motions without

a hearing. The litigation of a Wis. Stat. § 974.07 motion is not a “specific issue” related to Avery’s Wis. Stat. § 974.06 motions. Rather, it is a distinct statutory procedure used to both request postconviction DNA testing and seek relief if that testing produces exculpatory results supporting the movant’s claim of innocence.

Moreover, staying this appeal and remanding for the litigation of such motion may result in unnecessary delay and litigation. This appeal has been languishing for a year. The best course of action is either for Avery to voluntarily dismiss this appeal to litigate his Wis. Stat. § 974.07 motion now, or to wait until this appeal is resolved to bring that motion.

BACKGROUND

In 2007, a jury convicted Avery of first-degree intentional homicide for the murder of Teresa Halbach and for possession of a firearm as a felon. His direct appeal concluded when the Wisconsin Supreme Court denied his petition for review in 2011.

In June 2017, Avery filed the Wis. Stat. § 974.06 motion at issue in this appeal alleging a multitude of constitutional errors in his prior proceedings. The circuit court denied his motion without a hearing on October 3, 2017. Avery then filed a motion to reconsider and several supplements to that motion, which the circuit court also denied without a hearing on November 28, 2017. Avery filed a notice of appeal from the circuit court's final written order on November 30, 2017.

On June 7, 2018, this Court retained jurisdiction, but remanded this case to the circuit court to allow Avery to file a supplemental Wis. Stat. § 974.06 motion to litigate a *Brady v. Maryland*, 373 U.S. 83 (1963) claim. The circuit court denied that motion without a hearing as well, and the record was transmitted back to this Court on September 25, 2018.

On December 17, 2018, Avery filed a petition to stay this appeal and remand the case to the circuit court for Avery to litigate a motion for postconviction DNA testing pursuant to Wis. Stat. § 974.07.

RELEVANT LAW

Avery is permitted to petition this Court “for remand to the circuit court for action upon specific issues” pursuant to Wis. Stat. § 808.075(5). The decision to remand is left to this Court’s discretion. *See* Wis. Stat. § 808.075(6) (using the word “may” in respect to this Court’s authority to remand.)

ARGUMENT

Avery seeks a stay and remand so he can litigate a Wis. Stat. § 974.07 motion. The litigation of a Wis. Stat. § 974.07 motion is not a “specific issue” related to Avery’s Wis. Stat. § 974.06 motions that are under review. Rather, Wis. Stat. § 974.07 is a self-contained statutory procedure for both postconviction DNA testing and relief if that testing produces exculpatory results that support the movant’s claim of innocence. Wis. Stat. § 974.07(2), (7)(a)2. and (10). Section 974.07 has specifically defined procedures and burdens, and is a mechanism for relief separate from, and unrelated to, Wis. Stat. § 974.06. A stay and remand under these circumstances would not be remand for a “specific issue” but remand for a new, separate action in the circuit court.

There is little case law addressing Wis. Stat. § 808.075(5) petitions. A petition to stay and remand was found appropriate when there was an ineffective assistance of counsel issue related to the claims under review, when a new claim of ineffective assistance of counsel became available based upon an opinion that this Court issued after the postconviction motion was filed, and when newly appointed counsel discovered new claims of ineffective assistance of counsel that were not addressed by the circuit court. See *In re Pharm*, 2000 WI App 167, ¶ 7, 238 Wis. 2d 97, 617 N.W.2d 163; *State v. Yang*, 201 Wis. 2d 725, 743 n.8, 549 N.W.2d 769;¹ *In re Commitment of Matthew A.B.* 231 Wis. 2d 688, 697, 605 N.W.2d 598 (Ct. App. 1999).

That is not to say that a petition for a stay and remand is only appropriate for remand to litigate a claim of ineffective assistance of counsel. However, in each case, the remand was for a specific issue that was related to the claims already before the court of appeals, and pursued

¹ The stay and remand in *Yang* was granted and then rescinded.

pursuant to the same statutory mechanism. The State is aware of no published decision addressing or noting a petition to stay and remand for a defendant to pursue a wholly different action in the circuit court during the pendency of an appeal. The litigation of a Wis. Stat. § 974.07 motion is not a “specific issue.” It is a new action, and a stay and remand is not appropriate.

The State notes that Avery has the option to voluntarily dismiss this appeal if he wishes to litigate a Wis. Stat. § 974.07 motion now. If he chooses to do so, and if the circuit court grants DNA testing that produces exculpatory results, it is possible that some, or all, of the issues raised in Avery’s Wis. Stat. § 974.06 filings will become moot. The process of winnowing out weaker appellate claims and focusing on those more likely to prevail “is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986). If Avery believes that it is in his best interest to litigate a Wis. Stat. § 974.07 motion now, he can do so by voluntarily dismissing this appeal.

Alternatively, if Avery is not confident that his Wis. Stat. § 974.07 motion will be successful, or not confident that testing will produce exculpatory results, he should wait and see if he prevails on appeal and then decide if it is necessary to litigate a Wis. Stat. § 974.07 motion. A movant can bring a Wis. Stat. § 974.07 motion at any time after conviction or adjudication. Wis. Stat. § 974.07(2). Thus, Wis. Stat. § 974.07 motions are not subject to the procedural bar in Wis. Stat. § 974.06(4). If this Court denies Avery's petition, doing so does not prevent him from litigating a Wis. Stat. § 974.07 motion once this Court disposes of this appeal and remands the case to the circuit court.

Either course of action is preferable to a stay and remand because either has the potential to prevent unnecessary litigation and delay.

CONCLUSION

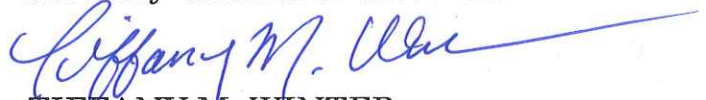
The litigation of a Wis. Stat. § 974.07 motion is not a "specific issue;" it is a new and separate action in the circuit court. And Avery has alternative courses of action that do

not require further delay to this appeal. This Court should deny Avery's petition.

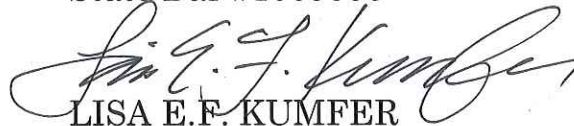
Dated this 28th day of December, 2018.

Respectfully submitted,

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