FILED
09-08-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2017AP72288

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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INTRODUCTION

This Court should deny Avery's petition for review. As he has done throughout this proceeding, in his petition Avery has egregiously misrepresented the record (as the court of appeals repeatedly noted[1]), the law, the lower courts' opinions, and even his own arguments.[2] The only question

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[1] *See, e.g., State v. Avery*, 2021 WL 3178940, ¶ 67 n.25 ("we note that Avery's counsel misrepresented some key facts underlying this claim in the motion to the circuit court and briefing to this court. . . . That Avery misrepresented the facts is immaterial to deciding his *Brady* and ineffectiveness claims. We point them out because of the high-profile nature of this case . . . and the resulting need, where misrepresentations are particularly egregious, to note where Avery's arguments wholly stray from the facts.").

[2] For example, the State never claimed that bullet FK or FL was used to shoot Halbach in the head. (Pet. 18.) The State's forensic anthropologist found two gunshot wound holes in Halbach's skull bones. (R. 706:150–58.) The medical examiner found the same thing, and opined that the cause of death was two gunshot wounds to the head. (R. 703:50–54, 62–63.) When asked on cross-examination how he could tell either shot was actually fired while Halbach was still alive, and he responded that he could not definitively make that determination—though he had been told by someone else that Halbach's blood was found on one of the bullet fragments, which could have occurred by passing through the brain. (R. 703:62–65.) At *no* point did any State's witness testify that the two bullets recovered from Avery's garage were actually the two bullets used in the fatal shots, as Avery claims. (Pet. 18.) It is Avery, not the court of appeals, who "grossly misinterpreted the State's forensic evidence." (Pet. 18.)

Avery has also miscast his claims in his petition and changes his arguments or raises new ones that he forfeited below; for instance, he now attempts to set up the straw-man argument that the Court of Appeals misapplied *Strickland v. Washington*, 466 U.S. 668 (1984) when evaluating claims that he himself presented as newly-discovered evidence, and *not* ineffective assistance, in the lower courts. (Pet. 13.) The misrepresentations of this sort in Avery's petition regarding both the law and the facts are too numerous to list.

properly raised by this case would be whether the court of appeals erred when it found that Avery's motions failed to plead sufficient facts that were actually supported by some evidence to both overcome the procedural bar of Wis. Stat. § 974.06(4) and *State v. Escalona–Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) and to require an evidentiary hearing.

Even a casual review of the record shows that the court of appeals correctly applied the law and appropriately held that the circuit court was not required to hold a hearing on any of Avery's issues—because Avery's motions were all utterly devoid of factual support sufficient to lead to the conclusions Avery claimed. Avery's motions were insufficiently pled, and the circuit court had discretion to deny them without an evidentiary hearing. So, at best, Avery asks this Court to engage in error correction—of nonexistent errors. This Court is not an error-correcting court.

And there is no compelling legal issue here that meets any of this Court's criteria for review. There is nothing novel, unsettled, or any need for clarification about what a defendant must plead in his section 974.06 motion to be entitled to a hearing or to overcome the procedural bar on raising claims that could have been raised earlier. Wis. Stat. § (Rule) 809.62(1r)(a)–(c). Nor can Avery show that the Court of Appeals' rejection of his claims is in tension with any United States Supreme Court or published Wisconsin cases. Wis. Stat. § (Rule) 809.62(1r)(d)–(e).

In short, despite what he appears to believe, the fact that Avery's case was the subject of a television show does not absolve him from following the well-established rules of Wisconsin procedure; it does not entitle him to a hearing on insufficiently pled claims based only on raw speculation and misrepresentations of the facts; and it does not entitle him to this Court's review of a perfectly sound decision by the Court of Appeals. This case does not meet any of this Court's criteria

for review, and there are no compelling reasons for this Court to hear it. This Court should deny Avery's petition.

ARGUMENT

This case does not meet any of this Court's criteria for review.

This Court's function is to develop and clarify the law. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 49, 326 Wis. 2d 729, 786 N.W.2d 78. Accordingly, this Court does not grant review unless the case presents an important legal issue on which the lower courts need guidance. Wis. Stat. § (Rule) 809.62(1r). This case does not present such an issue.

The section 974.06 motion that Avery filed in June of 2017 was his third motion seeking postconviction relief—he had a direct appeal in 2011, and he filed a previous section 974.06 motion in 2013. The circuit court denied Avery's 2017 motion and his many supplements to it without a hearing because he failed to show a sufficient reason for raising the claims previously, and the record conclusively demonstrated that Avery could not show he would be entitled to relief on any of his claims: Avery misrepresented the conclusions his experts reached, and otherwise relied only on wild speculation and conclusory allegations. The Court of Appeals agreed, holding that Avery had not provided a sufficient reason why most of his claims could not be raised previously, and for those which he did provide a sufficient reason, he had not provided sufficient material facts in his motion that were supported by the record that could establish ineffective assistance of counsel, newly-discovered evidence, a *Brady v. Maryland*[3] violation, or a constitutional due process claim. (Pet-App. 7–54.)

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

Accordingly, there is no law development to be done here. This Court has made it abundantly clear what a defendant must show in a section 974.06 motion to overcome the procedural bar and to entitle the defendant to a hearing. The defendant's motion must provide sufficient material and nonconclusory facts "—*e.g.,* who, what, where, when, why and how—that, if true, *would entitle him to the relief he seeks*." *State v. Allen*, 2004 WI 106, ¶ 2, 274 Wis. 2d 568, 682 N.W.2d 433 (emphasis added); *State v. Sulla*, 2016 WI 46, ¶¶ 29–30, 369 Wis. 2d 225, 880 N.W.2d 659. The defendant cannot just make broad allegations and hope to flesh them out at an evidentiary hearing, as Avery did here. *State v. Bentley*, 201 Wis. 2d 303, 313–14, 548 N.W.2d 50 (1996). Rather, the motion must provide facts to demonstrate "how" the defendant would prove each element of such claims at the hearing, or the court is not required to hold one. *State v. Romero-Georgana*, 2014 WI 83, ¶¶ 63–64, 360 Wis. 2d 522, 849 N.W.2d 668.

This Court has also held quite clearly that the circuit court does not need to hold a hearing if the defendant's motion makes conclusory allegations or if the record conclusively demonstrates that the defendant is due no relief. *Allen*, 274 Wis. 2d 568, ¶ 30; *Sulla*, 369 Wis. 2d 225, ¶¶ 30, 43. In other words, contrary to what Avery claims, it is well-established that the circuit court does not have to grant a hearing on allegations pled in the motion that the record demonstrates are not true. And as the court of appeals properly recognized, the claims Avery made in his motions were misleading, contradicted by the record, speculative, and did not contain sufficient material facts that would establish what he claimed. (Pet-App. 7–54.)

Avery's new experts all reached conclusions that were consistent with Avery's guilt and in his motion Avery simply falsely represented what they said, meaning it would be impossible for him to establish at a hearing that trial or

postconviction counsel were ineffective for failing to conduct these tests, nor could he meet his burden to prevail on a newly-discovered evidence claim. (Pet-App. 18–34.) Virtually all of the contents of the Velie CD were indisputably turned over to the defense along with Agent Fassbender's investigative summary telling Avery what the State found on the Dassey computer, meaning Avery did not plead sufficient facts showing how he could prove a *Brady* violation even if a hearing took place. (Pet-App. 43–46.) And there is no due process right to postconviction DNA testing so Avery did not even plead a cognizable claim about the bone fragments, but even so, Avery did not provide any facts that, if true, would show that if the bones from the Manitowoc Gravel pit were human and the victim's, he could not be killer and the person who put them there. (Pet-App. 48–51.) He did not plead sufficient facts to explain why the bone fragments could be actually or even potentially exculpatory. Accordingly, he failed to plead facts to show how or why this evidence was at all material.

The court of appeals did not require Avery to prove his claims in his motion; it required him to state facts that would lead to the conclusions he reached in his motion if he proved those facts at a hearing. That is precisely the proper pleading standard for a section 974.06 motion. *Allen*, 274 Wis. 2d 568, ¶ 2.

It has also long been settled that this standard also includes providing material facts to establish a sufficient reason why the claims now raised were not raised in a previous motion or on direct appeal. *Escalona-Naranjo*, 185 Wis. 2d at 185. And mere pro se status or indigency—which was the only reason Avery provided for not raising his claims in 2013—is not a sufficient reason. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 27, 389 Wis. 2d 516, 939 N.W.2d 587.

Finally, it is beyond argument that statutory claims, such as Avery's argument that the State violated section 968.205 (which it did not do in any event), cannot be raised in a section 974.06 motion. *State v. Carter*, 131 Wis. 2d 69, 80–81, 389 N.W.2d 1 (1986). The Supreme Court has also made it crystal clear that *Arizona v. Youngblood*[4] does not apply to destruction of evidence postconviction nor recognize a due process right to postconviction DNA testing, meaning Avery did not raise any cognizable constitutional claim regarding the State's releasing some of the bone fragments to the Halbach family after Avery's appeal concluded in 2011. *See District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 72–74 (2009).

In short, Avery's motion did not include sufficient material facts that would entitle him to a hearing because he did not provide sufficient facts that *would entitle him to the relief he seeks*. In other words, his motion was insufficient because he did not allege sufficient facts that were supported by the record to show that he could establish any constitutional violations at a hearing.

So, the record shows that the Court of Appeals did not hold Avery to a higher pleading standard, as he claims. (Pet. 12–20.) It required of him the exact same thing that is required of every criminal defendant who files a section 974.06 motion: sufficient, nonconclusory facts—actual facts, not guesswork, speculation, or fiction—to show that a hearing would not be frivolous. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 64. Avery simply did not meet his pleading burden.

Nor did the court of appeals improperly fail to consider the "cumulative effect" of Avery's claims. The court of appeals "found each of these arguments to be without substance. Adding them together adds nothing. Zero plus zero equals

[4] *Arizona v. Youngblood*, 488 U.S. 51 (1988).

zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

These pleading standards and what constitutes sufficient material and nonconclusory facts to entitle the defendant to a hearing have been fully articulated for decades and in cases too numerous to count. *See, e.g.*, *Nelson v. State*, 54 Wis. 2d 489, 496, 195 N.W.2d 629 (1972); *Bentley*, 201 Wis. 2d at 313–18; *Allen*, 274 Wis. 2d 568, ¶ 30; *State v. Balliette*, 2011 WI 79, ¶ 20, 336 Wis. 2d 358,805 N.W.2d 334; *Romero-Georgana*, 360 Wis. 2d 522, ¶¶ 33–37. There is no need for this Court to rehash them.

This case does not present any novel, unsettled, or important legal issue, and the Court of Appeals' opinion applying the pleading standard is exactly in line with the decisions of this Court and the Supreme Court of the United States. Review here would be simply another walk down the extremely well-trodden path of the pleading standard for section 974.06 motions. There is no need for further clarification of the pleading standard; courts across the state easily and properly apply it every day. This Court's scarce resources should not be spent reviewing the court of appeals' simple and correct application of a standard that has already been exhaustively explained in existing case law.

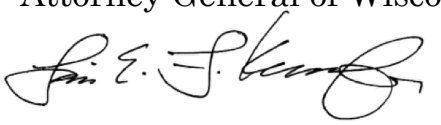
CONCLUSION

This Court should deny Avery's petition for review.

Dated this 8th day of September 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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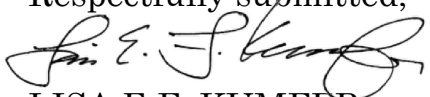
FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this petition is 2,219 words.

Dated this 8th day of September 2021.

Respectfully submitted,



LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

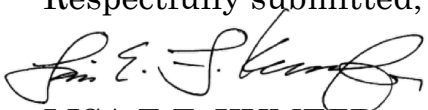
I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 8th day of September 2021.

Respectfully submitted,



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