



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 25, 2018

Ms. Sheila T. Reiff
Clerk, Wisconsin Court of Appeals
110 East Main Street, Suite 215
Post Office Box 1688
Madison, WI 53701-1688

Re: *State of Wisconsin v. Steven A. Avery*
Case No. 2017AP2288
Dist. II

RECEIVED

MAY 25 2018

CLERK OF COURT OF APPEALS
OF WISCONSIN

Dear Ms. Reiff:

Enclosed for filing in the above matter are the original and four copies of the Response in Opposition to the Motion to Supplement the Appellate Record. A copy of this response has been served by mail on counsel for defendant-appellant.

Sincerely,

Tiffany M. Winter
Assistant Attorney General

Lisa E.F. Kumfer
Assistant Attorney General

FOR #1071646

TMW/LEK:ln

Enclosures

c: Kathleen T. Zellner
Counsel for Defendant-Appellant

Steven G. Richards
Counsel for Defendant-Appellant

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2017AP2288

RECEIVED
MAY 25 2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

**RESPONSE IN OPPOSITION TO THE MOTION TO
SUPPLEMENT THE APPELLATE RECORD**

INTRODUCTION

Plaintiff-Respondent State of Wisconsin opposes Defendant-Appellant Steven A. Avery's motion to supplement the record. Avery seeks to add material to the record that was not before the circuit court when it denied Avery's Wis. Stat. § 974.06 motion and motions for reconsideration. Pursuant to Wis. Stat. § (Rule) 809.15, the record on appeal is limited to the record before the circuit

court when it made the decisions under review by this Court. Avery cannot alter the appellate record with material that was not before the circuit court when it made the decision being appealed. This Court should deny Avery's motion to supplement the record.

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. That is the appeal currently pending before this Court.

On May 15, 2018, Avery filed a motion to supplement the record with a CD received from the State on April 17, 2018. He claims that this CD “contains information exculpatory to [Avery].” (Motion at 1, 6.) He makes no assertion that this CD was before the circuit court when it entered the final order from which he is appealing.

RELEVANT LAW

“The rule is well established” that review by this Court is limited to the record made in the circuit court. *State ex. rel. Wolf v. Town of Lisbon*, 75 Wis. 2d 152, 155, 248 N.W.2d 450 (1977). “This [C]ourt is bound by the record, and the record is not to be enlarged by material” not considered by the trial court. *Id.*

Motions to supplement an appellate record are governed by Wis. Stat. § (Rule) 809.15(3). Wisconsin Stat. § (Rule) 809.15(3) states that “[a] party who believes that the record, including the transcript of the reporter’s notes, is defective or that the record does not accurately reflect what

occurred in the circuit court may move the court in which the record is located to supplement or correct the record.”

Motions to supplement the record are, therefore, confined to the correction of an appellate record that does not accurately reflect what occurred in the circuit court, or that is missing material that the circuit court had before it. A party cannot file a motion under Wis. Stat. § (Rule) 809.15(3) to add facts to the appellate record that were not before the circuit court.

ARGUMENT

This Court should deny Avery’s motion to supplement the record. Avery asks to supplement the appellate record with a CD that was never filed in or considered by the circuit court. Avery is not attempting to correct a defective record. *See* Wis. Stat. § (Rule) 809.15(3). He is attempting to alter the record with material that the circuit court did not consider when making the decisions that are before this Court on review.

Moreover, Avery’s motion does more than request that the record be supplemented. He attempts to raise a new

alleged *Brady v. Maryland*, 373 U.S. 83 (1963), violation that was not raised in his Wis. Stat. § 974.06 motion or any part of his motion for reconsideration. Consequently, it is not properly before this Court on appeal. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) (“issues not raised or considered in the trial court will not be considered for the first time on appeal.”). If Avery believes he has an arguable claim, and the evidence to support it, “[t]he time to develop a factual record is before the circuit court, not . . . before this [C]ourt.” *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 77, 373 Wis. 2d 348, 891 N.W.2d 803.

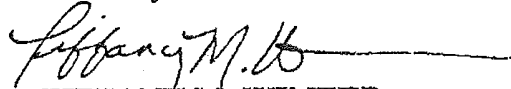
CONCLUSION

This Court should deny Avery's motion to supplement the record with material that was not before the circuit court.


Dated this 25th day of May, 2018.

Respectfully submitted,

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