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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2010AP000411 CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

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On Appeal from Judgments of Conviction and an
Order Denying Postconviction Relief Entered
in the Manitowoc County Circuit Court,
The Honorable Patrick L. Willis, Presiding

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# BRIEF OF
# DEFENDANT-APPELLANT

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## ISSUES PRESENTED

I. Did the search of Avery's bedroom during the sixth entry into his trailer home violate the constitutional guarantee against unreasonable search and seizure, thereby requiring suppression of the key to Halbach's vehicle that was found during the search?

The trial court answered: No.

II. Must Avery's convictions be reversed and a new trial ordered because the court barred him from presenting third-party liability evidence, thus depriving him of the right to present a defense?

The trial court answered: No.

III. Must Avery's convictions be reversed and a new trial ordered because, contrary to constitutional and statutory guarantees, the court removed a deliberating juror without cause and substituted an alternate who should have been discharged when deliberations began?

The trial court answered: No.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The appellant does not request oral argument. Publication is warranted, however, because the case raises issues of first impression.

## STATEMENT OF THE CASE

This is an appeal from a judgment of conviction and order denying postconviction relief in Manitowoc County, the Honorable Patrick L. Willis, presiding.

On November 15, 2005, in Manitowoc County, the state filed a criminal complaint charging Steven A. Avery with first degree intentional homicide and mutilation of a corpse. The criminal complaint alleged that Avery had killed Teresa Halbach, a young woman and freelance photographer who had come to the Avery salvage yard to photograph a car for sale. (1).

The case eventually proceeded to trial on February 5, 2007, before the Honorable Patrick L. Willis. (269). A jury convicted Avery of first degree intentional homicide as well as a subsequently added charge of felon in possession of a firearm. (256, 258; App. 101-02). The jury acquitted Avery of mutilating a corpse. (257).

The court sentenced Avery to life imprisonment without the possibility of release on extended supervision for the homicide conviction, and imposed a concurrent ten-year sentence for the possession of a firearm conviction. (288, 289).

Avery subsequently filed a motion for postconviction relief, seeking a new trial. (350; 351). After the parties filed pre-hearing briefs, the court held an evidentiary hearing on the postconviction motion on September 28, 2009. (352, 353, 356, 362). The parties filed post-hearing briefs, and on January 25, 2010, the court denied the postconviction motion in a written order and decision. (370; App.103-208). Avery then filed a timely notice of appeal. (371).

## STATEMENT OF FACTS

Avery sets forth an overview and then a discussion of the facts relevant to the legal issues presented in his appeal.

### Overview of the Evidence Presented at Trial

In October of 2005, Teresa Halbach was 25 years old. She was starting up a photography business and worked as a freelance photographer, taking photographs for Auto Trader magazine. (306:166; 307:21). Auto Trader is a magazine which contains advertisements and photos of automobiles for sale.

In October of 2005, Allan and Delores Avery lived on a 40-acre piece of property in Manitowoc County where Allan Avery had a salvage yard business. (308:11). Two of their sons, Charles and Steven, lived on the property and also worked in the family business. (*Id.*). A third son, Earl, worked at the salvage yard but did not live on the property. (*Id.*). A daughter, Barb Janda, also lived on the property with three of her four sons, Bobby, Blaine and Brendan Dassey. (308:9). Janda was dating Scott Tadych. (316:124; 126). Charles Avery's trailer was located near the salvage yard office. (308:10). Steven Avery and Barb Janda each had a trailer further away from the office. Their trailers were located next to each other. (298:34).

Apart from these residences, there were other buildings in the yard, including the business office and garages, including a garage between the Janda and Steven Avery homes. Much of the property consisted of a "pit" containing cars and other items consistent with a salvage business, including a car crusher and a smelter. (308:13; 15-16).

Before October 31, 2005, Teresa Halbach had been to the Avery salvage yard to take photos several times. (307:22-24). One of the magazine employees explained that the majority of photography jobs were prearranged through the Auto Trader office, but that about ten percent of a photographer's shoots were "hustle shots." (307:45). A hustle shot is not prearranged through Auto Trader; but is arranged by the photographer directly with a customer on the spot. (307:45-46; 100). For example, a potential customer might flag down a photographer at a job to take a picture of another vehicle. Because hustle shots are not prearranged, the Auto Trader office does not know about such shots until after they occur, when the billing would take place. (307:56). A photographer earned more for a hustle shot than a shot prearranged through Auto Trader. (307:45-46). Ms. Halbach did many such hustle shots. (307:56; 100).

In October of 2005, Barb Janda wanted to sell a van. On October 31, Steven Avery phoned Auto Trader and requested that the photographer who had previously taken pictures at the salvage yard come to take pictures of the van. Ms. Halbach notified Auto Trader that she would schedule a stop at the Avery property that day. She also had appointments at two other residences where she photographed cars for sale. (307:122-123; 130). One customer, Steven Schmitz, testified that Ms. Halbach was at his home at about 1:30 p.m. and photographed a car for sale. (307; 122). The other customer, Joanne Zipperer, said that Ms. Halbach was at their home in the mid-afternoon, she thought at approximately 3:00 p.m. (307:129).

That same day, Bobby Dassey was home from working at his third-shift job. (298:35). He testified he was home alone at his mother's trailer, located next to Steven Avery's trailer, sleeping. At about 2:30 p.m., he woke

up and noticed a light green SUV pulling up their driveway. (*Id.* at 36). He testified he saw Teresa Halbach get out of the SUV and begin to take pictures of his mother's van and then walk towards Steven's trailer (*Id.* at 37-38). Bobby went to take a three-to-four minute shower, dressed, and left to go bow-hunting for deer. (*Id.* at 38-39). He thought he left his home at about 2:45 p.m. (*Id.*). When he left, he said that Halbach's car was still in the driveway. (*Id.* at 40).

As Bobby was driving to his deer stand, he passed Scott Tadych, Barb Janda's boyfriend, also driving down the same road. (308:39). Bobby did not get any deer, and returned home at around 5:00 p.m. (*Id.* at 41). He testified he did not see Ms. Halbach's car when he returned. (*Id.*). Bobby watched television and went to sleep for about three hours (*Id.*).

Tadych also went hunting that day. (316:123). Tadych testified that at about 3:00 p.m., he went bow-hunting, and that as he drove on Highway 147, going west, he saw Bobby Dassey driving east. (*Id.* at 124). He testified that earlier in the day, he had visited his mother who was in the hospital in Green Bay. (316:125). Tadych testified that after visiting his mother, and after deer hunting, he went to Barb Janda's home at about 5:00, picked her up, and drove back to Green Bay to again visit his mother. (308:127). They visited until 7:15 or 7:30 p.m., and he again drove to the Avery property to drop Janda off so that she could pick up her car. (*Id.* at 128). Tadych testified that he arrived at the Janda home at about 7:30 p.m. or 7:45 p.m., noticed a big fire just south of Steven Avery's garage, and saw Steven standing by the fire. (*Id.* at 130).

After dropping Janda off at her home, Tadych said he returned home, arriving there before 8:00 p.m., in time to

watch "Prison Break" on television. (308:132). Janda joined him at his home, and she left at about 10:30 or 11:00 p.m. (308:133).[1]

Blaine and Brendan Dassey were also home for at least part of the day on October 31. Blaine, who was 18 years old at the time of the trial, testified he was released from school at 3:05 p.m., and that he took the bus home, as usual, arriving at 3:40 p.m. (316:57). Blaine played on the computer and Brendan played video games. (*Id.* at 69). Blaine testified that Bobby was home sleeping when they walked in from school, and that he and Brendan woke Bobby up when they got home. (*Id.*). Blaine left at about 5:30 p.m. to go trick or treating, returning at about 11:00 p.m. (*Id.* at 64-65).

The school bus driver also testified regarding her observations on October 31, as she, too, was at the salvage yard. Lisa Buchner drove the bus that Blaine and Brendan Dassey rode to and from school every day. (323:108). She dropped the Dassey boys off at the end of Avery road each day at between 3:30 p.m. and 3:40 p.m. (*Id.* at 110). Buchner said that on October 31, when she dropped off the boys off, she saw a woman taking photographs of a van in the driveway. (*Id.* at 111).

John Leurquin was also in the vicinity of the salvage yard on October 31. Leurquin worked for Valders Co-op delivering propane. (323:122). On October 31, he filled his truck at the filling station near the Avery salvage yard at approximately 3:30 p.m. (*Id.* at 126). Leurquin testified that on that day, as he sat at the filling station, he noticed a green SUV drive past the front of his truck going away from the

[1] On cross-examination, Tadych was less sure about when Janda left his home. He had told the police that Janda had stayed the night at his residence. (308:148).

Avery salvage yard in the direction of the highway. (*Id.* at 127-29). Leurquin testified that he later thought it might have been Ms. Halbach's car. (*Id.* at 133).

Earl Avery was also at the salvage yard on October 31. Robert Fabian, a friend of Earl's, testified that he went to the salvage yard shortly before 5:00 p.m. and that when he arrived, Earl was working. (316:118). Earl and Fabian took their rifles and went rabbit hunting on the Avery property, driving a golf cart. (*Id.*).

Teresa Halbach worked with and shared office space with Thomas Pearce. On Thursday, November 3, 2005, Pearce called Ms. Halbach's mother because he was concerned that he had not seen Ms. Halbach for a few days. (306: 200). That same day, Halbach's family reported her missing. (306:170-173). They contacted the police as well as friends who might know of her whereabouts. (*Id.*). Ms. Halbach's friends organized a search for her, and on November 4, 2005, Pam and Nikole Sturm joined in the effort to find Teresa Halbach. (307:197).

Because they believed that the Avery salvage yard was where Ms. Halbach had last been seen, the Sturms went to that property. (307:199-200). Pam Sturm spoke with Earl Avery, and Earl gave them permission to look around. (307:202-203). After a short time, the Sturms located the Toyota RAV4, which was later identified as belonging to Ms. Halbach. (307:209-215). Pam Sturm called Marinette County Sheriff Jerome Pagel and reported that she had found a car she believed was Teresa Halbach's. (*Id.*).

Law enforcement officers soon appeared at the scene, beginning an extensive investigation. They secured the 40-acre property, preventing the Averys and others from entering the property until November 12, 2005. (309:127).

In various searches of the property, police found burned human remains in three different locations, including behind Steven Avery's garage. Bone fragments, including skull fragments, were found. (317:125). A state expert who examined the fragments determined defects in the skull fragments were caused by gunshots. (317:166; 172). The state tested blood found in Ms. Halbach's car and concluded it matched Steven Avery's blood. During the sixth search of Avery's trailer, police found the ignition key to the RAV4. The Crime Lab later tested the key and concluded Steven Avery's DNA was on it.

On November 15, 2005, the state filed a criminal complaint which charged Steven Avery with the murder of Ms. Halbach, as well as mutilation of a corpse.

During subsequent searches in March of 2006, a bullet fragment was found in Avery's garage. Testing revealed Ms. Halbach's DNA on the bullet fragment. A firearm and toolmark examiner testified the bullet fragment came from a rifle found in Steven Avery's trailer. (318:116).

The case proceeded to trial in February of 2007. The theory of defense was that the police framed Steven Avery for a crime he did not commit. The defense claimed that police officers who had access to a vial containing Steven Avery's blood, which was located in the clerk of court's office, planted Steven's blood in Ms. Halbach's car, and that the ignition key was planted as well. The defense claimed that Avery did not kill Halbach, and that he did not know who killed her, but that the police framed him by planting evidence which would lead to his conviction. The motive for the frame-up was retaliation as Avery had sued the Manitowoc Police Department for a previous wrongful conviction and wrongful imprisonment. Indeed, two officers

who found the key, James Lenk and Andrew Colborn, had a month earlier been deposed as witnesses in Avery's lawsuit. (311:138-40; 231-32).

As to the burned human remains, the defense presented an expert who testified the bones may have been burned elsewhere and moved to the location behind Avery's garage. (324:152-53).

The jury ultimately convicted Steven Avery of first degree intentional homicide and possession of a firearm, and acquitted him of the charge of mutilation of a corpse.

**Multiple Entries into Steven Avery's Home Based on the November 5 Warrant**

Following the discovery of Teresa Halbach's vehicle on the property of Avery Auto Salvage, police officers obtained a search warrant authorizing the search of: (1) Avery's residence, which was a single-family trailer located within the salvage yard; (2) the trailer of Barb Janda, also located within the salvage yard; and (3) the 40-acre salvage yard property, containing various outbuildings and numerous vehicles. (101:225; 125:21-2; 337:133; App. 245-49). The warrant authorized police to search for Halbach, her vehicle, clothing and camera equipment, forensic evidence such as blood, hair, fibers and fingerprints, and weapons or instruments capable of taking human life. (337:134; App. 246).

The warrant was issued on Saturday, November 5, 2005. (*Id*.). Between Saturday and Wednesday, November 9, when police obtained a new warrant, law enforcement officers and crime lab personnel entered Avery's trailer on seven occasions. (151:8-16; App. 231-39). They entered

Avery's home twice on Saturday, twice on Sunday, and once each on Monday, Tuesday and Wednesday. (*Id*.).

Significant to this appeal, it was not until the search conducted following the sixth entry, on Tuesday, November 8, that police found lying on the floor of Avery's bedroom a key to Halbach's vehicle. (125:209-10). The key was the only item belonging to Ms. Halbach that was found in the multiple searches of Avery's trailer. (309:199, 206, 221). None of Halbach's blood, hair or clothing was found in the seven searches of Avery's trailer pursuant to the warrant issued on November 5, or, for that matter, in any other searches of his trailer. (311:58-60; 315:33-4, 106).

The search warrant was first executed on Saturday, November 5, when two officers entered Avery's trailer and conducted a ten-minute search looking for Halbach and her clothing. (126:5-6). The officers found nothing. (*Id*. at 6).[2]

At 7:30 p.m. on November 5, four officers re-entered Avery's residence and conducted a two-and-a-half hour search of the 700-square-foot trailer. (125:198-99; 126:133). All four officers – James Lenk, Andrew Colborn, David Remiker and William Tyson – participated in the search of Avery's bedroom. (125:200-02; 311:90). Remiker collected 10 to 20 swabs of suspected blood stains, including from the door frame to Avery's bedroom, and, on his hands and knees, used a lint roller over the carpeting in the bedroom to collect trace hair and other evidence. (126:11-17, 32). Colborn searched a bookcase and desk near Avery's bed and seized handcuffs and leg irons from the bookcase. (311:91). The four officers seized about 50 items that evening,

[2] The day before, police had entered the trailer with Avery's consent and also found nothing. (126:6).

including bedding and a vacuum cleaner bag and filter. (125:200; 126:17-18).

Remiker testified the search continued as long as necessary that evening. (126:18). They left without seizing guns and pornographic magazines due to their uncertainty whether those items were covered by the warrant. (*Id*. at 19). Lenk testified that when the officers left the trailer that evening, he believed they had seized everything of evidentiary value. (125:202-03).

The next day, the two lead investigators – Thomas Fassbender and Mark Wiegert – directed Remiker and Lenk, along with Lieutenant Daniel Kucharski, to re-enter Avery's trailer for the purpose of seizing several guns, including one located in Avery's bedroom, the vacuum cleaner and bedding from the second bedroom. (125:206-07; 126:24-5). The officers were in the trailer for about 25 minutes. (125:206). Also on the evening of November 6, State Crime Lab personnel entered and searched Avery's trailer using alternate light sources to look for blood. (126:87-8). On Monday, November 7, Lenk and two other officers were directed to enter Avery's trailer to obtain the serial number of his computer, which took about five minutes. (125:207-08). The information was used to obtain a search warrant to seize the computer. (126:137; 337:115-20).

The sixth entry and search of Avery's trailer occurred on Tuesday, November 8. (151:14; App. 237). Lenk, Colborn and Kucharski searched the trailer for three-and-a-half hours. (125:208-09; 126:48-9). The officers had been told to seize the computer located in the living room, swab blood stains found in the bathroom by the crime lab, and seize pornography from the bookcase in the bedroom. (125:210; 311:95-6, 122-26). During the course of his hour-long search

of Avery's bedroom that day, Colborn searched the bookcase for pornographic material. (311:123, 125). The officer tipped and twisted the bookcase, pulling it away from the wall. (*Id*. at 126). Lenk left the bedroom to get a box to hold the pornographic material. (*Id*. at 127). When Lenk returned, he noticed a Toyota key on the floor of the bedroom. (125:210; 311:130).

Police made a seventh entry into Avery's trailer on the next day, November 9, before a second warrant was obtained to continue searching the salvage yard, including Avery's residence. (125:212; 126:108; 337:47-55).

Avery moved to suppress evidence obtained pursuant to the search warrant issued on November 5, challenging as unlawful the multiple entries to his home following the more than two-hour search on November 5. (66; 132; 139).[3] Following an evidentiary hearing, the court denied Avery's motion. (151; App. 224-44).

The court concluded, first, that the multiple entries were permissible because, in addition to authorizing a search of Avery's residence, the warrant authorized a search of the entire salvage yard, which, due to its size and contents, necessitated a multi-day search. (*Id*. at 4-6; App. 227-29). Second, even if the multiple entries of Avery's residence were separately evaluated, the court concluded that each entry was justified as a reasonable continuation of the prior searches, with the exception of the seventh entry on November 9. (*Id*. at 6-16; App. 229-39). Third, and of particular significance for this appeal, the court determined that the seizure of the pornographic materials from Avery's bedroom exceeded the scope of the warrant and, therefore,

[3] Avery's motion also challenged the multiple entries to his garage, a claim not pursued on appeal.

were ordered suppressed. (*Id*. at 15; App. 238). Finally, the court ruled that even if some of the re-entries were unlawful, the evidence, except for the pornographic material, was admissible under the inevitable discovery rule. (*Id*. at 16-21; App. 239-44).

**The Defense Effort to Introduce Evidence of Alternative Perpetrators**

Prior to trial, the state moved to prohibit Avery from presenting evidence that a third-party may have killed Teresa Halbach. (56). On July 10, 2006, the court entered a pre-trial order entitled "Order Regarding State's Motion Prohibiting Evidence of Third-Party Liability." (76). The order specified that if the defendant intended "to suggest that a third-party other than Brendan Dassey is responsible for any of the crimes charged, the defendant must notify the Court and the State" of such intention at least 30 days prior to the start of the trial. (76:1). The court further ordered that the defendant would be subject to the standards relating to the admissibility of any third-party liability evidence pursuant to ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). (*Id.*).

Avery subsequently filed the "Defendant's Statement on Third-Party Responsibility." (169). He stated that he did not kill Teresa Halbach, and that there was "at least a reasonable possibility that one or more unknown others, present at or near the Avery Salvage Yard on the afternoon of October 31, 2005, killed her." (169:2). Avery identified several persons as potential alternative perpetrators, including Scott Tadych, Charles and Earl Avery, and the Dassey brothers. (169:15-19). Avery also argued that ***Denny*** did not apply under the facts of this case, and therefore, he was not bound by the test set forth in ***Denny***. (169:2-9). He further

argued that even if ***Denny*** applied, he should be permitted to introduce evidence at trial of several alternative perpetrators. (169:9-19).

On January 30, 2007, the court entered its "Decision and Order on Admissibility of Third-party Liability Evidence." (204; App. 209-223). The court ruled that ***Denny***'s "legitimate tendency" test applies to any evidence the defendant wished to present regarding potential third parties who might have been responsible for Ms. Halbach's murder. (204:7; App. 215). The court went on, however, to analyze Avery's offer of proof regarding third-party liability to determine whether it might meet an alternative "legitimate tendency" test. (204:7-15; App. 215-223).

The court ruled that whether it applied ***Denny*** or an alternative legitimate tendency test, Avery would be barred from presenting any evidence of the possible culpability of any third-party other than Brendan Dassey.[4] (204:15; App. 223).

During the trial, the prosecution was alert to the pre-trial ruling barring evidence of alternative perpetrators. For example, on the second day of trial, special prosecutor Kenneth Kratz raised concerns about defense attorney Dean Strang's opening statement to the jury:

> During Mr. Strang's opening statement, Mr. Strang asked the jury to consider the fact that somebody saw Ms. Halbach after she left the Avery property on the 31st of October. Mr. Strang had even discussed that she may have been taking some other photos and may have made another stop, but invited the jury to believe that

[4] In March of 2006, the state amended the complaint to charge Avery as party to the crime with Brendan Dassey. (22). Dassey and Avery were tried separately.

> somebody had seen the victim and, at least by inference, that somebody else was involved in taking the life of Teresa Halbach; again, contrary to the Court's ruling as to third party liability.
>
> I do not intend to raise objection and ask for a curative instruction with the jury, but should there be testimony, certainly elicited to that fact, the State would be issuing objection.

(307:5).

Although the court stated there was nothing objectionable about Mr. Strang's opening statement, it did sustain the state's objection in another instance involving third-party liability. For example, Michael Riddle, a fingerprint examiner for the Wisconsin State Crime Lab, testified that there was a fingerprint found on the hood of Teresa Halbach's car. (322; 144). Riddle compared the fingerprint to Steven Avery, and determined it did not match. (*Id.*). When defense counsel asked if he had compared the fingerprint to Scott Tadych, a possible alternative suspect, the state objected on relevance grounds. The court sustained the objection. (322:145).

Although preserved, Avery raised the third-party liability issue in his postconviction motion, and trial counsel testified regarding the effect of the court's ruling on their defense of Avery at trial. The trial court again rejected this claim. (370:60-102; App. 162-204).

### The Discharge of Juror Mahler During Deliberations

After nearly five weeks of trial, the jury began deliberations. (328:122-23). At that point, the jurors had been sequestered just one day. (327:226). During the preceding

weeks of trial, jurors were allowed to go home each evening and weekend. (362:11).

When the case was submitted to the jury, the court retained the remaining alternate juror and ordered her sequestered separate from the deliberating jurors. (*Id*.). Richard Mahler was one of the 12 jurors to whom the case was submitted. (362:12). In a preliminary vote taken during the first day of deliberations, Mahler voted not guilty. (*Id*. at 18).

During the evening after the first day of deliberations, the court excused Juror Mahler and sent him home. (329:5). At a hearing held the next day, after the juror had been discharged, the court recapped on the record what had occurred the night before:

> Last evening, sometime around 9 p.m., the Court received a telephone call from Sheriff Pagel indicating that one of the jurors had presented a request to a – one of the supervising deputies over at the hotel, to be excused because of an unforeseen family emergency.

(*Id*. at 4). The court said upon receipt of this information it contacted the district attorney and both defense counsel by telephone conference call, and counsel authorized the court to "speak with the juror individually and excuse the juror if the information provided to the Court was verified." (*Id*. at 4-5). The court reported that it "did verify that information with the juror and excused the juror last evening." (*Id*. at 5).

The court's conversations on the evening of Mahler's removal – with Sheriff Pagel, the attorneys and Juror Mahler – were conducted off the record. The day after Mahler's removal, Judge Willis prepared a memo recounting his recollection of what had occurred. (359; 370:14; App. 116, 250-51). In addition, Mahler and Mr. Avery's attorneys

testified at the postconviction hearing as to the circumstances surrounding Mahler's discharge.

The court's memo described the information it received from Sheriff Pagel as follows:

> Specifically, Rich Mahler was distraught and felt he could no longer serve as a juror. He reported his stepdaughter was involved in a traffic accident earlier in the evening which resulted in the totaling of her vehicle. I received no information about any injuries. His wife was very upset about the accident and of the amount of time Mr. Mahler had been away from the family because of the trial. He reiterated that his family and especially his wife were very embarrassed by news reports at the time of original voir dire that he was living off the proceeds of her trust fund. There was also a suggestion that the juror and his wife had been having some form of marital difficulties before the trial and the juror felt it was vital for his marriage that he be excused.

(359:1; App. 250).

After speaking with Sheriff Pagel, the court contacted the district attorney and Avery's attorneys, Dean Strang and Jerry Buting, by telephone. (370:3; App. 105). Strang and Buting were dining at a restaurant when the call came in. (362:80-82). Both attorneys testified at the postconviction hearing that the situation with Juror Mahler was presented to them as urgent and serious, a crisis. (*Id*. at 83-84, 195).

Attorney Buting's impression was that Mahler's wife had called to report a family emergency. (*Id*. at 204). In fact, however, Mahler testified at the postconviction hearing that he called his wife after dinner simply to "check in" with her when he noticed that other jurors were also calling home on a bailiff's phone. (*Id*. at 20-21, 43-44). When he decided to call home, Mahler had no information about a family

emergency and no indication his wife was trying to reach him. (*Id*. at 21).

Strang recalled being told by the judge that Mahler's stepdaughter had been in an accident and, although no one was killed, whether she or others were hospitalized or injured was unknown. (*Id*. at 91). Buting thought they were told the car was totaled. (*Id*. at 196). Both recalled being told that Mahler's wife was upset about the amount of time he had been away and the car accident was the last straw. (*Id*. at 91, 196). According to Strang, they were told Mahler's wife was threatening to walk out of the marriage. (*Id*. at 91).

Neither attorney wanted Mahler off the jury. (*Id*. at 88, 200). The defense perceived him as a favorable juror or at least someone who would come to his own view of the case. (*Id*. at 87, 200, 247). However, believing there was a crisis, they agreed the judge should speak with Mahler and excuse him if the information provided to the court was verified. (*Id*. at 85, 198).

The attorneys understood when they agreed to Mahler's questioning and removal that the information conveyed to them from the judge was at best secondhand. (*Id*. at 182). However, they did not know that Sheriff Pagel was the conduit between Mahler and the judge. (*Id*. at 92, 138, 204). Buting testified that had he known Pagel had spoken with Mahler, he would have objected and probably moved for a mistrial. (*Id*. at 205-06). He viewed Pagel as an interested party, given he was the supervisor of several law enforcement officers who were state's witnesses at trial and who, in Buting's opinion, should have had no contact with any of the jurors. (*Id*. at 205-07). When he agreed to have the judge speak with Mahler, Buting never expected Pagel would be involved. (*Id*. at 205-06).

After speaking with the attorneys, Judge Willis called Sheriff Pagel, who was at the motel where the jurors were sequestered. (359:2; App. 251). A short time later, Pagel called the judge back and handed the phone to Mahler. (*Id*.).

Although the court's *voir dire* with Mahler was not transcribed, the court's memo described the conversation, which Mahler recalled as lasting about two minutes (*id*.), as follows:

> I could immediately sense that Mr. Mahler was distraught. He sounded depressed. He spoke quietly and slowly. He confirmed the information I'd been told. He indicated he and his wife had had some marital problems before the trial and the trial was putting an extra strain on the relationship. He again mentioned, as he had during individual voir dire of the jurors on Monday, that his wife was upset about the trust fund reports involving a musician juror on the news. Things apparently boiled over when his stepdaughter was involved in a vehicle accident this evening and he was not there to provide support. My reading, without pressing him with questions too specific, was that he felt the future of his marriage was at stake if he was not excused. At that point I told him I'd heard all I needed to know. I thanked him for his service. I indicated that I would not specify the nature of his request to be excused on the record. He thanked me for that. Sheriff Pagel indicated he would have Mr. Mahler transported to his vehicle at Reisterer and Schnell.

(359:2; App. 251).

When Mahler arrived home, he learned there was no accident; his stepdaughter had car trouble. (362:29). Within a few hours, Mahler felt angry with himself for having gotten off the jury. As Mahler testified at the postconviction

hearing, "I felt like I left [sic] myself down and all the parties involved." (*Id*.).

Mahler testified he was frustrated, upset and distraught when he spoke with the judge. (*Id*. at 59, 68-69). His emotions stemmed from two sources, uncertainty about what was happening at home and frustration about the deliberations, specifically, comments made by some jurors during deliberations, followed by what Mahler perceived to be a juror's threatening statement at dinner. (*Id*.). According to Mahler, he was disturbed by Juror C.W.'s comment, made at the outset of deliberations, that "he's fucking guilty" and comments from two other jurors suggesting an unwillingness to look at all the evidence. (*Id*. at 18, 36). In addition, at dinner, when Mahler said he was frustrated with deliberations, C.W. responded, in a sarcastic tone, "If you can't handle it, why don't you tell them and just leave." (*Id*. at 16, 34).

On the night of his removal, Mahler did not tell the judge he was troubled by the deliberations or about the juror's comment. (*Id*. at 27, 29). Instead, he told the judge his stepdaughter had been in an accident. (*Id*. at 59). The judge did not ask if the stepdaughter was hospitalized or injured. (*Id*. at 28). Mahler did not recall telling Pagel that the car was totaled. (*Id*. at 26, 55).

Although Mahler told the judge his wife was upset about the accident, he had no recollection of telling the judge his wife was upset about the amount of time he had been away or that they were having marital problems. (*Id*. at 28, 59-60). In fact, although Mahler sensed his wife of 13 years was upset, he did not believe she would divorce him if he did not come home that night. (*Id*. at 9, 23). As to his wife's upset some five weeks earlier about a press report, Mahler

had told the court three days before, during an on-the-record *voir dire* conducted of each juror, that the incident had no impact on his ability to continue to serve on the jury and he was "here to take in the evidence and weigh it out." When the court discharged Mahler, he had spent just one night away from his home and family due to the trial. (362:11-12).

In its decision denying postconviction relief, the court concluded that Mahler's testimony was not credible to the extent it differed from the court's memo and the testimony of defense counsel. (370:8; App. 110). "[W]hatever exchanges he may have had with juror C.W., his real reason for wanting to be excused from the jury had to do with what he perceived to be problems at home." (*Id*.).

The morning after Mahler's removal, Judge Willis and the attorneys met in chambers. (329). Relying on ***Lehman***,[5] the court and parties concluded there were three options: (1) proceed with 11 jurors; (2) substitute in the alternate with directions that the jury begin deliberations anew; or (3) declare a mistrial, in the absence of an agreement by the parties to proceed with either of the other two options. (329:5; 362:96-97, 209; 370:4; App. 106). Avery's attorneys had not researched whether there had been any changes to the statutes governing alternate jurors following ***Lehman***. (362:98, 209-10). They believed the second option – substituting in the alternate – remained an option permitted under Wisconsin law. (*Id*. at 98-99, 213).

After the in-chambers conference, Strang and Buting met with their client at the jail. (*Id*. at 99, 210). In that meeting, Avery learned for the first time that there had been a problem with a deliberating juror and Mahler had been

[5] ***State v. Lehman***, 108 Wis. 2d 291, 321 N.W.2d 212 (1982).

removed. (*Id*. at 100, 211). Buting testified that Avery was disappointed Mahler was gone because he viewed him as a favorable juror. (*Id*. at 247). In that meeting, which lasted less than 20 minutes, the attorneys explained the three options and advised Avery that they should substitute in the alternate and turn down a mistrial. (*Id*. at 99, 101, 212). Avery followed their advice.

Both attorneys testified they did not recommend proceeding with 11 jurors and, in fact, that option was immediately off the table. (*Id*. at 102-03, 211-12). Moreover, if the options available under the law had been a mistrial or proceeding with 11 jurors, both attorneys would have recommended a mistrial. (*Id*. at 103, 214). Buting testified that they had "presented the wrong set of options to Mr. Avery" because they had not been aware of the statutory changes since ***Lehman*** that barred substitution of an alternate once deliberations had begun. (*Id*. at 244). According to Strang, had they recommended a mistrial, Avery would have chosen a mistrial. (362:191).

At an on-the-record hearing conducted after Avery met with his attorneys that morning, the court conducted a colloquy establishing that Avery understood he had a right to a mistrial but that, instead, he was joining in the stipulation to substitute in the alternate. (329:7-8). The court informed the remaining jurors that because one of its members had been excused due to "an unforeseen family emergency," the alternate would be participating in the deliberations. (*Id*. at 9-10). The court instructed the jurors to begin deliberations anew, including the election of a foreperson, and each of the 11 jurors answered "Yes" when asked if he or she would follow that instruction. (*Id*. at 11-13). The jury returned with verdicts after three more days of deliberations. (331:3-5).

The circuit court rejected Avery's postconviction claims that the removal of the deliberating juror and substitution of an alternate were reversible errors. (370:10-60; App. 112-62). The court concluded that it was appropriate under the circumstances for the court to conduct an off-the-record *voir dire* of Juror Mahler outside the presence of the defendant and attorneys, and that the record establishes cause for the juror's removal. (*Id*. at 10-36; App. 112-38). In addition, the court concluded that substituting in the alternate was permissible, even though it also concluded the governing statute requires any remaining alternates to be discharged when the case is submitted to the jury. (*Id*. at 42-53; App. 144-55).

Avery filed a timely notice of appeal. (371).

## ARGUMENT

I. The Search of Avery's Bedroom During the Sixth Entry Into His Trailer Home Violates the Constitutional Guarantee Against Unreasonable Search and Seizure and, Consequently, Requires Suppression of the Key to Halbach's Vehicle That Was Found During the Search.

A. Introduction and standard of review.

At issue here is the execution of the search warrant, not its issuance. Mr. Avery does not dispute that the warrant was supported by probable cause and described with particularity the places to be searched and the objects to be seized. But the manner in which police executed the warrant at his residence, specifically, the multiple entries and searches of his home, violated the constitutional guarantee against unreasonable searches and seizures.

Both the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. Nowhere is that protection stronger than in a person's home. Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984). The state constitution's counterpart protects the "sacred right" of people to be free from "arbitrary invasion and search" of their homes. ***Shall v. Minneapolis, St. P. & S.S.M.R. Co.***, 156 Wis. 195, 201-02, 145 N.W. 649 (1914).

A search warrant must be executed in a reasonable manner. ***State v. LaCount***, 2008 WI 59, ¶38, 310 Wis. 2d 85, 750 N.W.2d 780; ***Tennessee v. Garner***, 471 U.S. 1, 8 (1985). Whether police conduct violates the constitutional right against unreasonable search and seizure is a question of constitutional fact. ***State v. Tomlinson***, 2002 WI 91, ¶19, 254 Wis. 2d 502, 648 N.W.2d 367. The reviewing court gives deference to the circuit court's findings of fact but independently applies those facts to the constitutional standard. ***Id***.

Here, the evidence was undisputed that the police, indeed multiple officers and crime lab personnel, entered Avery's home seven times over five days after obtaining the warrant. At issue here is the sixth entry and, more particularly, the ensuing search of Avery's bedroom during which police found Halbach's car key.

Three days earlier, four officers had conducted a comprehensive search of the bedroom, which included a search of the bookcase, an officer on his hands and knees looking for trace evidence in the carpeting, and the seizure of many items, including bedding and objects from the

bookcase. The purpose for re-entering and re-searching the bedroom three days later, during the sixth entry, was to seize pornographic material from the bookcase. However, as the circuit court concluded, the warrant did not authorize the seizure of the pornography. Consequently, as shown below, the search of the bookcase, which rather oddly unearthed the key, cannot be deemed a reasonable continuation of the earlier searches. The search of Mr. Avery's bedroom during the sixth entry of his home was unreasonable, requiring suppression of the key.

B. The "one warrant, one search" rule.

Several well-accepted rules govern the execution of a search warrant. A search may not be continued after the objects identified in the warrant have been located and seized. ***State v. Starke***, 81 Wis. 2d 399, 414, 260 N.W.2d 739 (1978). By statute, a search warrant must be executed and returned within five days of issuance. Wis. Stat. § 968.15(1). And, generally, a warrant may be executed only once. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.10(d), p. 767 (4th ed. 2004) (hereafter, "LaFave").

Under the "one warrant, one search" rule, if police enter and search a premises pursuant to a warrant, regardless of whether they find anything to seize, police may not re-enter and conduct another search of the premises pursuant to that same warrant. ***Id***.; *see also* ***McDonald v. State***, 195 Tenn. 282, 259 S.W.2d 524, 525 (1953). A second search under the warrant is barred by the constitutional guarantee against unreasonable search and seizure. ***McDonald***, 259 S.W.2d at 525. If during the five-day life of a warrant police may make an indefinite number of entries and searches, the "warrant could become a means of

tyrannical oppression in the hands of an unscrupulous officer to the disturbance or destruction of the peaceful enjoyment of the home …." ***Id***. at 524-25.

Courts have recognized an exception to the prohibition against more than one entry and search where the subsequent entry is a reasonable continuation of the earlier search. *See*, *e.g.*, ***United States v. Keszthelyi***, 308 F.3d 557, 568 (6th Cir. 2002); LaFave, § 4.10(d), p. 768. For the reasons argued below in part D., the reasonable continuation rule does not save the search of Avery's bedroom during the sixth entry into his home. First, though, Avery must address the circuit court's conclusion that the multiple entries into his home need not be reviewed for reasonableness because the warrant also authorized the search of the 40-acre salvage yard which, given its size and contents, required a multi-day search.

C. Execution of the warrant at Avery's trailer must satisfy the "reasonable" clauses of the federal and state constitutions.

Although the circuit court proceeded to examine the multiple entries to determine if each constituted a reasonable continuation of a prior search, the court concluded that such an examination was unnecessary. (151:5-6; App. 228-29). The court reasoned that because the warrant authorized a search of the entire 40-acre salvage yard, a search that would require several days to complete given its size and contents, "the admitted multiple entries to the defendant's property did not exceed the authority granted by the November 5, 2005 search warrant." (*Id*. at 6; App. 229). Under the court's reasoning, as along as police had not finished executing the warrant with respect to the entire salvage yard property, the officers had unlimited authority to re-enter and re-search

Avery's trailer home. The court's conclusion is contrary to law.

A search warrant is not constitutionally infirm simply because it describes more than one place or building as the object of the authorized search. LaFave, § 4.5(c), pp. 588-92. Therefore, it was permissible for the warrant at issue here to authorize searches of Avery's trailer, Janda's trailer, and the 40-acre salvage yard within which the trailers were located, including scores of junked vehicles and several outbuildings scattered throughout the salvage yard. But joining the three places together in a single warrant does not eliminate the requirement that the issuance *and* execution of the warrant with respect to all three places satisfy constitutional requirements.

It is well settled that when a warrant authorizes the search of two or more dwellings, probable cause must be shown for each dwelling. ***State v. Jackson***, 2008 WI App 109, ¶9, 313 Wis. 2d 162, 756 N.W.2d 623. This is true whether the dwellings are houses or apartments. ***United States v. Hinton***, 219 F.2d 324, 325-26 (7th Cir. 1955). Similarly, where the warrant authorized the search of three trailers located in close proximity to each other in a rural area, evidence from one trailer was ordered suppressed because probable cause was lacking with respect to that trailer. ***Figert v. State***, 686 N.E.2d 827, 833 (Ind. 1997).

These cases demonstrate that a search warrant covering more than one place or dwelling is reviewed to determine if probable cause was shown with respect to each place or dwelling searched. Accordingly, a reviewing court could not refuse to determine if probable cause was established with respect to the Avery residence under the

theory that probable cause was established for a search of the junked vehicles and outbuildings located on 40-acre salvage yard property. Similarly, execution of the warrant at each place to be searched must satisfy the constitutional standard of reasonableness.

If, for example, the warrant had authorized a search of the salvage yard, Avery's residence and Janda's residence for a particular camera belonging to Ms. Halbach, police could not enter Avery's residence under that warrant if the camera had already been found in a search of Janda's residence. ***Starke***, 81 Wis. 2d at 414 (court ordered suppressed 34 items found in the search of a desk conducted after the object of search warrant had been seized). Likewise, under that hypothetical, even if the camera had not yet been found when police were executing the warrant in Avery's trailer, police could not lawfully open a pill box in Avery's bedroom pursuant to the warrant. *See* ***United States v. Ross***, 456 U.S. 798, 824 (1982) ("probable cause to believe undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase"). Such a search would exceed the scope of the warrant and amount to an unreasonable execution of the warrant.

Just as each place or dwelling searched under a warrant must be supported by probable cause, execution of the warrant at each place or dwelling must satisfy the constitutional requirement of reasonableness. Consequently, this court must determine whether the police executed the search warrant at Avery's trailer in a reasonable manner.

D. Where, following the sixth entry into Avery's home, police searched the bedroom for the purpose of seizing items that were beyond the scope of the warrant, the search of Avery's bedroom cannot be deemed a reasonable continuation of a prior search.

Although a warrant may only be executed once, courts have generally recognized that, under certain circumstances, police may temporarily suspend the initial execution of a search warrant and continue the search at another time. ***Keszthelyi***, 308 F.3d at 569, *citing* ***United States v. Bowling***, 351 F.2d 236 (6th Cir. 1965). Avery agrees with the circuit court that the "reasonable continuation rule" is the correct vehicle for analyzing the multiple entries into his trailer. He disagrees, however, with the court's conclusion that the rule saves the search of his bedroom following the sixth entry into his home, during which police were searching for objects in the bedroom, specifically, pornography, that they had no authority to seize.

The appellate courts of this state have not yet examined the legality of multiple entries made on multiple days under the guise of a search warrant. However, the supreme court on three occasions has considered the legality of a subsequent entry following a lawful, warrantless entry and search. In ***State v. Douglas***, 123 Wis. 2d 13, 22, 365 N.W.2d 580 (1985), the supreme court held that the re-entry into defendant's home and seizure of an item from his bedroom 45 hours after police entered and searched the home pursuant to consent violated the Fourth Amendment reasonableness requirement. Even though the home was secured by police throughout that period, the court rejected the state's contention that the second entry was merely a

continuation of the first lawful entry, particularly because of the time that had lapsed between the two entries. ***Id***. at 23-24; *see also* ***Kelly v. State***, 75 Wis. 2d 303, 313, 249 N.W.2d 800 (1977) (consent to search did not carry over to the next day).

In ***La Fournier v. State***, 91 Wis. 2d 61, 69, 280 N.W.2d 746 (1979), the court held that a subsequent warrantless entry within minutes of an entry under the emergency exception was merely a continuation of the first entry. The court wrote that whether a subsequent entry is a continuation of the lawful initial entry "can be determined only in light of the facts and circumstances of each case." ***Id***. at 70. This trilogy of cases shows that *carte blanche* re-entry following a lawful entry is not permitted. Further, these cases support the conclusion that the reasonable continuation rule, which, as applied in other jurisdictions, examines the facts and circumstances of the subsequent entry and initial search, is the proper tool for analyzing multiple entries under a search warrant.

The reasonable continuation rule has two requirements: (1) the subsequent entry must be a continuation of the original search; and (2) the decision to conduct a second entry to continue the search must be reasonable under the circumstances. ***Keszthelyi***, 308 F.3d at 569; LaFave, § 4.10(d), p. 768. Neither was satisfied here, at least not with respect to the search of Avery's bedroom conducted during the sixth entry into his home on the fourth day after the warrant was issued.

Although police conducted seven entries into Mr. Avery's trailer under one warrant, his claim centers on two of the entries, the entry and search on the evening of Saturday, November 5, and the subsequent entry and search

of his bedroom on Tuesday, November 8. During the two-and-a-half hour search on Saturday evening, four officers conducted a thorough search of his trailer home and seized some 50 items. Although that search was actually the second entry after obtaining the warrant, Mr. Avery recognizes that the warrant was not fully executed during the initial sweep that occurred earlier that day when officers went through his trailer looking for Ms. Halbach.

The next three entries following the full-blown Saturday evening search are not at issue, as each could be considered a reasonable continuation of the earlier search. In the third entry on Sunday, police seized guns, the vacuum and bedding from the second bedroom, items that had been located during the previous search. During the fourth entry, made Sunday evening, crime lab personnel, who had not been previously available, used alternate light sources to look for blood. And during the fifth entry on Monday, officers entered the trailer for the sole purpose of obtaining the serial number of Avery's computer, information used to obtain a warrant to seize the computer. None of those entries is challenged as unreasonable. What is challenged is the search of Avery's bedroom conducted during the sixth entry on Tuesday, a search that satisfies neither prong of the reasonable continuation rule.

In determining whether a subsequent entry is a reasonable continuation of the original search, which is the first prong of the test, the focus is on whether the ability of the police to fully execute the warrant was impaired at the time of the initial entry. ***Keszthelyi***, 308 F.3d at 571. Such was the case where officers executing a warrant to search a vehicle were unable to locate the lever to open the hood and, therefore, unable to search under the hood without the help of a mechanic. ***United States v. Gerber***, 994 F.2d 1556, 1558

(11th Cir. 1993). Full execution was similarly deemed impaired where officers executing a warrant at a remote warehouse found so many marijuana plants they were unable to fit them in their cars. ***United States v. Gagnon***, 635 F.2d 766, 768 (10th Cir. 1980). Avery's case, however, is more like ***Keszthelyi***, where during the initial entry of the Keszthelyi's home, police conducted a two-hour search, seized many items and, if necessary, could have stayed longer. The court held that the second entry and search the next day was not a reasonable continuation. ***Keszthelyi***, 308 F.3d at 572.

As in ***Keszthelyi***, officers searched Avery's home for more than two hours on Saturday evening. Avery's home was a small, 700-square-foot trailer, and the search was conducted by no fewer than four police officers. (125:198-202; 126:133). One officer testified that they searched as long as necessary that evening. (126:18). There was no suggestion they had to cut their search short. Another officer testified he believed they had seized everything of evidentiary value. (125:202-03). As it turned out, officers and crime lab personnel were returned to the residence to seize certain, discrete items and to use an instrument to look for blood spots, but, certainly, the full-ranging search, one that had an officer literally on his hands and knees combing the bedroom carpet, was completed when the officers left the trailer that evening. The officers' ability to complete a thorough search that evening had not been impaired.

The second prong of the test, which focuses on the reasonableness of the subsequent entry and search, is also not satisfied. To assess reasonableness, courts look at whether: (1) at the time of the second search, police possessed a reasonable basis for believing the undiscovered evidence remained in the place searched; and (2) police took

appropriate steps to limit the scope of the intrusiveness of the second search. ***Keszthelyi***, 308 F.3d at 572-73.

Those factors must be assessed in light of the circuit court's factual findings as to the reasons for the police to re-enter the trailer for the sixth time on Tuesday, November 8. The court found the officers' purpose was three-fold: (1) to seize, pursuant to a new warrant, the computer located in the living room; (2) to swab blood spots the crime lab had found in the bathroom; and (3) to seize pornographic materials. (151:14-15; App. 237-38). Only the third purpose could have justified an entry and search of the bedroom, given the officers knew from their prior search that the pornography was located on a bookcase in the bedroom. However, the court also concluded that the warrant did not authorize the seizure of pornographic materials. (*Id*. at 115; App. 238). Consequently, the officers had no authority to enter and search the bedroom.

The scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe that it may be found. ***Maryland v. Garrison***, 480 U.S. 79, 84 (1987); *see also* ***LaCount***, 310 Wis. 2d 85, ¶38 ("the search and seizure must be limited to the scope that is permitted by the warrant"). The evidence the police sought, that is, had reason to believe remained in the bedroom, was the pornography and nothing else. However, a search of the bedroom for the purpose of seizing the pornography cannot be deemed a reasonable continuation of the prior search because searching for, and seizing, pornography exceeded the scope of the warrant. Put another way, because under the warrant the police had no authority to seize the pornography, the officers' re-entry and re-search of the bedroom for that unauthorized purpose cannot be deemed anything other than unreasonable.

Even if the warrant had allowed the seizure of pornography, the police did not take steps to limit the scope of the intrusiveness of their search of the bookcase during the sixth entry and, therefore, the search cannot be deemed a reasonable continuation. *See* ***Keszthelyi***, 308 F.3d at 573 ("government took no steps to limit the scope or intrusiveness of the second search of defendant's residence"); *contrast* ***Gerber***, 994 F.2d at 1559 (suspending search until officers had assistance of a mechanic avoided damaging the car). Here, even though ostensibly in the bedroom only to retrieve pornographic material from the bookcase, Sergeant Colborn searched the bedroom for an hour that day. (311:123). Not only that, in the course of his search, Colborn tipped the bookcase to the side and twisted it away from the wall.

> I will be the first to admit, I wasn't any too gentle, as we were, you know, getting exasperated. I handled it rather roughly, twisting it, shaking it, pulling it.

(311:126). After jostling the bookcase, Colborn was "very surprised" to see a car key lying on the floor between the bookcase and bed. (*Id*. at 130-32).

The search of Avery's bedroom during the sixth entry into his home under the warrant was not a reasonable continuation of the prior search. The purpose for searching the bedroom – to seize pornography – exceeded the scope of the warrant. The officers had no authority under the warrant, during their sixth entry, to search Avery's bedroom yet again. The product of that search – the key – must be suppressed.

E. The inevitable discovery exception to the exclusionary rule does not apply to the police discovery of the key in Avery's bedroom.

The trial court concluded that, even if the multiple entries into Avery's home were unlawful under the warrant issued on November 5, evidence discovered during the multiple searches would be admissible under the inevitable discovery exception to the exclusionary rule. (151:16-21; App. 239-244). Thus, the court ruled that the police would inevitably have discovered the Toyota key, presumably pursuant to the warrant obtained on November 9, 2005. The trial court erred. This court should hold that the police discovery of the key does not fall within the inevitable discovery exception to the exclusionary rule.

Evidence seized through unlawful means is generally excluded from use at trial to deter police from violating the Fourth Amendment. In ***Nix v. Williams***, 467 U.S. 431 (1984), the Supreme Court recognized an exception to the exclusionary rule for evidence seized in violation of the Fourth Amendment when that evidence would inevitably have been discovered by lawful means. The Court reasoned that the deterrence rationale of the exclusionary rule is not furthered by suppressing evidence that would inevitably have been discovered by lawful means. ***Id.*** at 444. Therefore, if the prosecution can prove by a preponderance of the evidence that the challenged evidence would inevitably have been discovered, it is admissible. ***Id.***

Wisconsin has also recognized the inevitable discovery exception. ***State v. Kennedy***, 134 Wis. 2d 308, 396 N.W.2d 765 (Ct. App. 1986); ***State v. Schwegler***, 170 Wis. 2d 487, 490 N.W.2d 292 (Ct. App. 1992). ***Schwegler*** set forth a three-part test. The state, as the proponent of the inevitable

discovery claim, must prove by a preponderance of the evidence that:

●there is a reasonable probability the evidence would have been discovered by lawful means but for the police misconduct;

●the leads making the discovery inevitable were possessed by the government at the time of the misconduct; *and*

● prior to the unlawful search, the government was also actively pursuing some alternate line of investigation.

***Schwegler***, 170 Wis. 2d at 500, citing ***United States v. Cherry***, 759 F.2d 1196, 1204 (5th Cir. 1985), *cert. denied*, 479 U.S. 1056 (1987).

While recognizing the validity of the inevitable discovery exception to the exclusionary rule, LaFave cautions restraint in its application. LaFave, §11.4(a), p. 269: "In carving out the 'inevitable discovery' exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe." A rote application of the doctrine will encourage unconstitutional short-cuts and thus undermine the protections of the Fourth Amendment. ***Id.*** Indeed, some courts require a "high level of confidence" rather than the "reasonable probability" language in the first prong of ***Schwegler***. *See* ***United States v. Heath***, 455 F.3d 52, 60 (2nd Cir. 2006); ***United States v. Souza***, 223 F.3d 1197, 1205 (10th Cir. 2000).

Wisconsin courts have recognized the need for caution when applying the inevitable discovery exception:

> The doctrine of inevitable discovery is not an open door through which the fruits of all defective searches may be

> transformed into admissible evidence. The doctrine must be used with restraint and circumspection lest it become a vehicle abrogating the right of all citizens to be free from unreasonable searches and seizures.

***Kennedy***, 134 Wis. 2d at 318.

"Inevitable discovery raises a mixed question of law and fact and is reviewed de novo." ***Keszthelyi***, 308 F.3d at 574. Although determining what would inevitably have happened requires some speculation, the court must "keep speculation at a minimum by focusing on demonstrated historical facts capable of ready verification or impeachment." ***Id.*** (cite omitted).

> By contrast [to the independent source doctrine], inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings.

***Williams***, 467 U.S. 431 at fn. 5.

Here, the state failed to meet its burden of establishing each of the three ***Schwegler*** elements and therefore, failed to establish that the police would inevitably have discovered the Toyota key while searching Avery's home.

Lenk discovered the Toyota key as he, Colborn and Kucharski searched Avery's trailer on Tuesday, November 8. While searching the bookcase in Avery's bedroom for pornographic material, Colborn pulled the bookcase away from the wall, and roughly twisted and shook it. Lenk came into the room with a box to collect the contents of the bookcase and saw the key on the floor. The officers believed

the key must have fallen from the cabinet due to "all the jostling and tipping of the cabinet." (312: 15-16).

To fall within the inevitable discovery exception, the state was first required to prove that the police would have discovered the key by lawful means but for the police misconduct. In some cases, the state has been able to meet its burden by proving that a search would inevitably have occurred pursuant to a routine practice, such as an inventory search of a car, routine pat-down or search incident to arrest, and that the item sought would have been discovered. For example, in ***Kennedy***, the police found a vodka bottle in an impounded car. Even though the search warrant in ***Kennedy*** was defective, the court held that the police would inevitably have found the vodka bottle in the car pursuant to a lawful inventory search. ***Kennedy*** , 134 Wis. 2d at 318. *See e.g.* ***United States v. Rahman***, 189 F.3d 88, 120 (2nd Cir. 1999) (forged passports would have been discovered during search incident to arrest); ***United States v. Cotnam***, 88 F.3d 487, 495-96 (7th Cir. 1996) (money and drugs would have been discovered in search incident to arrest).

In ***Williams***, the state proved that volunteer searchers would have found the murder victim's body even without the defendant's tainted confession, in light of the vast search being conducted by volunteers. There, the evidence showed the volunteer searchers would inevitably have reached the place where the victim's body was located within three to five hours, and that the victim's body was found near a culvert, "one of the kinds of places the teams had been specifically directed to search." ***Williams***, 467 U.S. at 449.

Here, the state did not introduce any evidence that any officer would inevitably have discovered the Toyota key in a subsequent lawful search. Rather, the state simply pointed to

the fact that it obtained a second warrant, and therefore, discovery of further evidence was inevitable.

That the police obtained a subsequent warrant does not mean the key would inevitably have been discovered, however. A "search, unlike some other aspects of police work, is peculiarly unpredictable." It is "difficult to ascertain whether tainted items, especially if hidden when found, would also have been discovered in the course of a legal search." ***United States v. Allen***, 436 A.2d 1303, 1311 (D.C. 1981), *quoting* "Note, The Inevitable Discovery Exception to the Constitutional Exclusionary Rules," 74 Colum. L. Rev. 88 (1974).

Indeed, Lenk, who discovered the key, testified that the bookcase had already been searched on November 5. (312: 100). No key was found during that search. The police searched the trailer for two and one-half hours and did not discover any key. Given that the bookcase had already been searched once and no key had been found, its subsequent discovery cannot be deemed "inevitable."

Rather, if the key was secreted in the bookcase as the officers surmised, it was only due to the twisting, shaking and pulling of the bookcase that the key was discovered. The prosecution presented no evidence that this method of searching was standard procedure for its law enforcement officers. This search was not analogous to a routine inventory search which readily turned up a piece of physical evidence. Without proof that the police routinely searched items of furniture in this fashion, the state cannot meet its burden of proving that the key would inevitably have been discovered in a subsequent lawful search.

The lack of proof of the "inevitability" of discovery was a critical factor in ***United States v. Ornelas-Ledesma***, 16 F.3d 714 (7th Cir. 1994), *vacated and remanded on other grounds*, 517 U.S. 690 (1996). There, police conducted a ***Terry*** stop of two men as they sat in their car. The police asked for permission to search the car, which was granted. ***Id.*** at 716. An officer noticed a loose panel on the passenger's door and suspected that drugs were concealed behind the panel. ***Id.*** The officer pried the panel open and discovered cocaine, leading to the defense challenge to the search. The state argued that even if the officer's search for the cocaine was illegal, the drug-sniffing dog later on the scene would inevitably have discovered the cocaine. The magistrate upheld the seizure of the drugs in part based on inevitable discovery by the drug-sniffing dog. ***Id.*** at 720-721.

The court of appeals rejected the magistrate's reliance on inevitable discovery because the state had failed to prove that the dog would inevitably have discovered the drugs. The court refused to speculate on the dog's drug detection skill, noting that "[n]o evidence was presented concerning the dog's capabilities." ***Id***. at 721.

Also important is the small size of this particular piece of evidence. In ***Williams***, the question was whether a child's body would have been discovered. In ***Kennedy***, the evidence seized was a vodka bottle. In ***United States v. Satterfield***, 743 F.2d 827, 845 (11th Cir. 1984), the evidence seized was a shotgun. While not dispositive, the small size of the key is a factor in determining whether it would inevitably have been found.

The state presented no historical facts capable of ready verification that either Colborn or another officer, under other circumstances, would have handled the bookcase in such a

way as to dislodge the key—if that is in fact what happened—allowing it to fall into plain view for another officer to discover. Without such proof, the state has not met its burden under ***Williams*** and ***Schwegler***.

Rather than focusing on whether the police would inevitably have found the key, the trial court focused on whether the police would inevitably have sought a second warrant. The court said the state was required to prove by a preponderance of the evidence that it *would have* sought the second warrant absent any evidence acquired during any illegal search of Avery's house and garage, and not just that it *could have* obtained such a warrant. (151:18; App. 241). As argued above, however, this analysis assumes too much. It assumes that, with proper warrant in hand, the police inevitably would have found the Toyota key. The state, however, failed to prove this inevitability.

Also overlooked at the trial court level is the context in which the bookcase was searched, leading to discovery of the key. The officers were manipulating the bookcase while collecting pornography. The trial court held, however, that because pornography was not listed in the warrant, the police unlawfully seized the pornography. And, no later warrant authorized pornography to be seized. Therefore, it is simply not reasonable to conclude that a subsequent search, which did not authorize the seizure of pornography located in the bookcase, would have led to the discovery of the key.

The state also failed to establish the second prong of ***Schwegler***: that the leads making the discovery inevitable were possessed by the government at the time of the misconduct. ***Schwegler***, 170 Wis. 2d at 500. On this point, the state argued it continued to accumulate leads which would have made the discovery of evidence inevitable. (141:5).

The state noted the discovery of blood in Ms. Halbach's car on November 8, and that a sample of the blood in the car matched Avery's DNA profile. (*Id.*). It also noted the discovery of the license plates for Ms. Halbach's car in the salvage yard, as well as human remains found in the burn pit. (*Id.*). The state argued that "other searches were underway for evidence that supported the continuing search of defendant's residence and garage." (*Id.*).

The inevitability argued by the state is not the inevitability of discovery, but rather the inevitability that it would focus on Steven Avery as its chief suspect. The additional leads, such as the blood and human remains, focused the police on Avery, and may have led them to seek the second warrant on November 9. But the leads did not make it inevitable that the police would look for and find the Toyota key hidden in a bookcase in Avery's bedroom.

By contrast, a true example of this second prong of ***Schwegler*** is found in ***State v. Lopez***, 207 Wis. 2d 413, 559 N.W.2d 264 (Ct. App. 1996). In ***Lopez***, the police were working with an informant who had been reliable in the past. The informant identified Lopez as the source for marijuana, and stated that Lopez had 35 to 40 pounds of marijuana in his home. ***Id.*** at 421-22. With that and additional information, the police obtained a search warrant and searched Lopez's home. During the search, one officer noticed a locked freezer. He asked Lopez for the key which Lopez provided. The officer opened the freezer, finding approximately 48 pounds of marijuana. ***Id.*** at 424.

Lopez challenged the discovery of marijuana in his freezer, arguing that the marijuana would not have been discovered but for an illegal search and illegal questioning of the defendant. ***Id.*** at 427. The court rejected Lopez' claims,

and held in pertinent part that the police would inevitably have discovered the marijuana in Lopez' freezer. ***Id.*** at 428. The court concluded that the police had leads which made discovery of the marijuana inevitable, including the informant's tip and the officer's observation of the locked freezer during the execution of the search warrant.

The court noted that the officer had already decided to search the freezer before asking Lopez for the key. ***Id.*** Therefore, even if the search of the freezer could be construed as the fruit of an illegal interrogation, the court concluded the marijuana would inevitably have been discovered. The officer intended to search the freezer either with or without consent, and once the freezer was opened, the marijuana would be plainly visible. ***Id***.

The third prong of the inevitable discovery exception in ***Schwegler*** is that prior to the unlawful search, the government was also pursuing some alternate line of investigation. ***Schwegler***, 170 Wis. 2d at 500.

In ***Williams***, the untainted alternate line of investigation was the volunteer searchers who would have discovered the victim's body. In ***United States v. Hammons***, 152 F.3d 1025 (8th Cir. 1998), the alternative line of investigation was that the police intended to call a drug sniffing dog to the scene if the suspect did not consent to a search, and the district court found that had the dog been called, it would have alerted on the package containing cocaine. ***Id.*** at 1030.

In other cases, the alternate line of investigation relied upon by the state is the obtaining of a search warrant, as in ***State v. Pickens***, 2010 WI App 5, 323 Wis. 2d 226, 779 N.W.2d 1. Pickens was detained outside a hotel because the police suspected he and others were involved in illegal

drug activity in the hotel. ***Id.*** at ¶1. The police searched Pickens as well as the hotel room where he was staying, resulting in incriminating evidence. ***Id.*** While searching the hotel room, the police located a safe and opened it with a key they had obtained during the search of Pickens. Pickens moved to suppress evidence obtained in the searches, including the search of the safe.

This court ruled the contents of the safe inadmissible, concluding in pertinent part that the inevitable discovery doctrine did not apply to the safe's contents. ***Id.*** at ¶48. The court rejected the state's argument that by the time the police had searched the safe, they had enough information to obtain a search warrant for the safe, and that inevitable discovery should apply. The state argued that the police would inevitably have acquired a search warrant and thus would have legally obtained the contents of the safe. ***Id.*** at ¶49. The court was not persuaded, concluding that the state had failed to establish it was actively pursuing a legal alternative—a warrant—prior to the unlawful search. ***Id***. at ¶50.

Key to the court's holding was that the record showed the police had not pursued a warrant *before* its search of the safe. In so holding, the court relied on ***Cherry***, *supra*, where the court stressed the record must show the police were actively pursuing a warrant at the time of the unlawful search in order to salvage evidence discovered under the inevitable discovery exception. ***Id***. at ¶49. There, the court suppressed certain evidence because the record showed that at the time of the search, "the agents had not even begun taking notes for the purpose of drafting an affidavit, a necessary prerequisite to the procurement of a warrant." ***Cherry***, 759 F. 2d at 1206.

Likewise, in ***United States v. Reilly***, 224 F.3d 986 (9th Cir. 2000), the court emphasized the requirement that the police be actively seeking a warrant at the time of the unlawful action: "to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment." In ***Satterfield***, 743 F.2d at 846, the court rejected the state's inevitable discovery claim because, at the time of the unlawful action, the state "had not yet initiated the lawful means that would have led to the discovery of the evidence." That lawful means did not exist until several hours later when the state obtained a warrant. ***Id.***

Here, the police were not in the process of procuring a second search warrant when they discovered the Toyota key. Therefore, the state cannot meet the requirement that prior to the unlawful search, it was also pursuing an alternative line of investigation in the form of a search warrant.

The state argued pretrial that it was indeed pursuing an alternate line of investigation at the time of the search on November 8, even though it had not yet applied for the November 9th warrant. (141:5). The state listed its lines of investigation: active searches of the 40-acre Avery property; the burn barrel in the vicinity of Steven Avery's trailer, in which items such as a palm pilot, camera and cell phone were found; interviews of various individuals; and the discovery of human remains. But one thing the state did not do is seek a new warrant to search the trailer. Under the above cases, because the state was not actively seeking a second warrant at the time of the unlawful discovery of the key, the state has not met the third prong of the ***Schwegler*** test: that prior to the

unlawful search, the government was also pursuing an alternate line of investigation.

The trial court, however, accepted the state's argument that the government was actively pursuing an alternate line of investigation, pointing to "the search efforts of other areas within the scope of the warrant…." (151:20; App. 243). While law enforcement did search other locations on the property, the state has not established that it was in the process of obtaining a second warrant at the time the police found the key. Nor has it identified any other means by which it would have discovered the key. The state, therefore, has failed to meet its burden under ***Schwegler***.

In sum, the state failed to prove by a preponderance of the evidence that there was a reasonable probability that the key would have been discovered by lawful means but for the police misconduct; that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and that prior to the unlawful search, the government was also actively pursuing an alternate line of investigation. Therefore, the trial court erred as a matter of law when it concluded that the key was admissible under the inevitable discovery exception to the exclusionary rule.

## II. Avery's Convictions Must Be Reversed and a New Trial Ordered Because the Court Barred Him from Presenting Third-Party Liability Evidence, Thus Depriving Him of the Right To Present a Defense.

Steven Avery has always maintained that he did not kill Teresa Halbach. Before trial, he asked the court to allow him to introduce evidence that certain other persons, including his brothers, his nephews, and his sister's boyfriend, all of whom were regularly at the Avery salvage yard, may have killed her. Thus, his defense plan was two-

fold: I did not kill Ms. Halbach, and here are other persons who may have killed her. (169). While the trial court allowed Avery to defend himself by demonstrating that he was not the killer, it ruled that he could not present evidence that other named persons could have been the killer, with the exception of Brendan Dassey. (204:15; App. 223). That ruling deprived Avery of his rights to present a defense and to a fair trial.

At the outset, it is important to be clear about the trial court's pretrial ruling in light of the court's postconviction decision. The court stressed that it did not prevent Avery from arguing that *someone* else murdered Teresa Halbach; its ruling only prohibited him from presenting evidence that *specific* other individuals were the perpetrators. (370:62; App. 164). As shown below, there is a significant difference between permitting a defendant to say he did not do the crime and permitting the defendant to say he did not do the crime *and* let me tell you who I think did. Further, the court's suggestion that the ruling did not curtail Avery's argument is incorrect. A court order which bars the presentation of certain evidence means that counsel will not be able to make arguments based on excluded evidence to the jury. Defense counsel in this case could not argue a theory of defense based on evidence it could not present.

The United States Constitution and the Wisconsin Constitution guarantee criminal defendants a meaningful opportunity to present a complete defense. ***Holmes v. South Carolina***, 547 U.S. 319, 324 (2006) (internal cites omitted); ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). Whether the right is rooted in the due process clause, or the compulsory process or confrontation clauses of the Sixth Amendment, the defendant has the fundamental right to defend himself. ***Holmes*** at 324. "The rights granted by the

confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial." ***Pulizzano***, 155 Wis. 2d at 645, *citing* ***Chambers v. Mississippi***, 410 U.S. 284, 294-95 (1973). Thus, Steven Avery had a constitutionally guaranteed right to present a complete defense to the charges against him.

While a defendant has a right to present a defense, that right is not unlimited. The state has broad latitude to establish rules excluding evidence from criminal trials. ***Holmes***, 547 U.S. at 324; ***Pulizzano***, 155 Wis. 2d at 646. For example, Wis. Stat. §972.11, the so-called "rape shield" statute, at issue in ***Pulizzano***, does not on its face violate a defendant's right to present a defense. ***Id.*** However, as in ***Pulizzano***, the circumstances of a particular case may mean that the state statute impermissibly infringes on a defendant's constitutional right to present a defense. In such a case, the state statute is trumped by the right to present a defense. There must be a compelling state interest before a state evidentiary rule can overcome the defendant's constitutional rights. ***Id.*** at 654.

The state evidentiary rule involved in this case is the "legitimate tendency" test articulated in ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). The trial court here relied on ***Denny*** in denying Avery's request to present evidence that other specific persons were responsible for Ms. Halbach's murder. The trial court's application of ***Denny*** to Avery's case is an issue of law which this court reviews *de novo*.

***Denny*** adopted a "legitimate tendency" test that the defendant must meet before being permitted to introduce evidence that a third-party may be responsible for the crime with which the defendant is charged. ***Id.*** at 623. This

legitimate tendency test requires the defendant to establish three elements: a direct connection between the third person and the crime, as well as motive and opportunity:

> The "legitimate tendency" test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime. (cite omitted).
>
> Thus, as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible. By illustration, where it is shown that a third person not only had the motive and opportunity to commit the crime but also was placed in such proximity to the crime as to show he may have been the guilty party, the evidence would be admissible.

***Id.*** at 624, (cites omitted).

The trial court erred when it concluded that ***Denny*** applied to Avery's effort to introduce third-party liability evidence. First, to the extent that ***Denny*** applies, Avery's constitutional right to present a defense trumps the evidentiary rule articulated in ***Denny***. Second, ***Denny*** applies only to those situations where the defendant seeks to introduce evidence of other possible perpetrators' motives to commit the crime, and where the defendant has no such motive. Third, the state in this case introduced evidence that other persons were excluded as perpetrators by forensic evidence, opening the door to the defense to present evidence tending to show others may have killed Ms. Halbach.

Alternatively, if ***Denny*** does apply, the court erred in concluding Avery did not meet his burden. Avery's showing

as to Scott Tadych, Bobby Dassey and Charles and Earl Avery met the ***Denny*** test.

Finally, Avery challenges the validity of ***Denny***.

A. Avery's right to present a defense overrides the legitimate tendency rule in ***Denny***.

As in ***Pulizzano***, this case involves the conflict between a state evidentiary rule—here the ***Denny*** legitimate tendency test—and the defendant's constitutional right to present a defense. And, as in ***Pulizzano***, the state rule must yield to the defendant's right to present a defense. Even though the state has important and legitimate interests in its evidentiary rules, those interests are not of a constitutional magnitude. ***Pulizzano***, 155 Wis. 2d at 654.

The defendant in ***Denny*** was charged with homicide. He sought to introduce evidence that he had no motive to kill the victim, but that "any one of a number of third parties had motive and opportunity" to kill the victim in his case. ***Denny***, 120 Wis. 2d at 617. The court prohibited Denny from presenting any evidence that others might have had a motive to kill the victim, ruling it irrelevant. ***Id.*** at 621. The court of appeals affirmed, articulating the three-part "legitimate tendency" test of motive, opportunity, and a direct connection between the third person and the crime. ***Id.*** at 625. The court warned that if it approved of Denny's attempt to show these other individuals' motives to harm the victim, "a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased—degenerating the proceedings into a trial of collateral issues." ***Id.*** at 623-24.

Thus, the state's interest in ***Denny*** was the possibility that a trial would be unduly lengthened, and that the trial would turn into a parade of witnesses that would confuse the issues and mislead the jury. Those concerns are unfounded in this case, and are outweighed by Avery's right to present a defense.

There is no indication the trial in this case would have been unduly lengthened by allowing Avery to present evidence of possible alternative perpetrators. Two of the possible alternative suspects were called by the state as witnesses, Scott Tadych and Bobby Dassey. All that would have changed with these witnesses would have been the nature of the cross-examination. Further, the defense would not have taken the scattershot approach as ***Denny*** involved. Rather, as Strang testified at the postconviction hearing, the defense "would have settled on one or more people as to whom we thought we had the best case, that they had committed the crime." (362:111). The theory of defense would have been shaped around the person the defense thought probably committed the crime. (362:112).

The court's ruling dramatically affected the conduct of the defense. Trial counsel testified that the court's pretrial ***Denny*** ruling affected every trial decision they made, from deciding what tone to take with witnesses, cross-examination, the narrative of both the opening statement and closing arguments, the decision-making regarding what witnesses to call, how to blunt the state's theory of the case and how to present the jury with a coherent theory to maximize the probability that their client could be acquitted. And, rather than confuse the jury, allowing the defense to present evidence of third-party perpetrators would have clarified the defense for the jury, and would have given them a clearer

view of the opposing narratives of both the state and the defense.

The state interest in limiting the length of a trial and in focusing the issues at that trial is outweighed by Avery's right to present a defense.

B. ***Denny*** does not apply in this case because, unlike ***Denny***, Avery did not seek to defend himself based on motive.

Alternatively, ***Denny*** does not apply in this case because the facts in ***Denny*** are very different. Specifically, the ***Denny*** court's concern that the trial would turn into a parade of witnesses with animus against the victim is simply inapplicable in this case. The focus on motive as addressed in ***Denny*** is misplaced in this case. The crime here is by all appearances a senseless act of violence rather than a crime impelled by a specific motive such as revenge. Where, as here, motive is not at issue, the ***Denny*** three-part test, which requires the defendant to prove motive for a third-party, is inapplicable.

Neither Avery nor any of the possible alternative perpetrators had an identifiable motive to kill Teresa Halbach. Avery did not seek to prove that other third persons had animus towards Ms. Halbach, and therefore killed her as did the defendant in ***Denny***. Since Avery did not attempt to show that he had no animus towards the victim but that others did, ***Denny*** is inapplicable.

Because ***Denny*** so limits the defense ability to mount a complete defense when a third-party may be the true offender, it is important to limit ***Denny*** to its facts. It is appropriately applied where the defendant seeks to introduce

evidence of others' motive to kill the victim, but it is a poor fit where, as here, motive is not at issue.

In addition, ***Denny*** is not a good fit to this case because here, unlike ***Denny***, there was a finite universe of individuals who could have been responsible for Ms. Halbach's death. Denny argued he should be able to present evidence that the victim had angered various people because of his drug dealing ventures, and thus had a number of enemies. Such a claim opened up the possibility of a wide range of third parties, some of whom the defendant did not name. That is different from the approach the defense would have taken here. As Strang testified at the postconviction hearing, had the court not prohibited third-party liability evidence, "the theory of defense would have been shaped around the person we thought probably committed the crime." (362:112). Thus it would not have been a scattershot approach, but rather focused on a specific third-party.

There is precedent for the court to conclude that the ***Denny*** framework cannot be molded to the particular facts of a case, and that the existing rules of evidence suffice to control admission of evidence. In two Wisconsin Supreme Court decisions, the court declined to apply ***Denny*** in cases involving third parties. Although not directly controlling here because of factual differences, the cases are instructive because they illustrate the limits of ***Denny***, and caution against shoe-horning a case into the ***Denny*** framework when it is not appropriate to do so.

In ***State v. Richardson***, 210 Wis. 2d 694, 563 N.W.2d 899 (1997), the court refused to adopt the legitimate tendency test for determining the admissibility of a frame-up evidence. ***Id.*** at 699.

Richardson was charged with sexual assault and false imprisonment of a 14-year-old girl. ***Id.*** The state moved pretrial to exclude evidence that Richardson was in the process of divorce, that Richardson's estranged wife had phoned Richardson's divorce attorney and made the sexual assault allegations against him, and further, that Richardson had obtained a restraining order against his wife. ***Id.*** at 699-700. Richardson's proposed theory of defense was that his wife was framing him for a crime that never occurred, even though there was substantial evidence that a crime had occurred and that Richardson was the guilty party. The state argued the evidence would cause the trial to degenerate into a trial of multiple collateral issues. The trial court granted the state's motion, and the court of appeals reversed. The supreme court reversed the court of appeals.

The supreme court said that where the proposed defense was that someone was lying to frame him, the ***Denny*** legitimate tendency test did not apply:

> Richardson's proposed defense alleged that the victim was lying in an effort to frame him, not that someone else had committed the crime. Thus, ***Denny*** is not applicable to this case.

***Id.*** at 705.

Avery concedes that the facts in ***Richardson*** are different in that Richardson evidently did not admit that a crime had occurred, but instead claimed that he was framed for a crime that did not occur. Nevertheless, the cases are analogous in that in ***Richardson***, as here, the defendant sought to make a frame-up defense. In ***Richardson***, the frame-up motive was animosity in a divorce; here, the frame-up motive was police animosity towards the defendant. And in that sense, the cases are analogous. In both cases, the acts

of the third-party would explain the context of the crime and would flesh out for the jury the defendant's theory of defense.

***Richardson*** is also instructive because the court noted that Wisconsin's existing rules of evidence, such as relevancy, would ensure that the jury would not be confused by collateral issues as the state had argued. ***Id.*** at 705. Likewise, here, the jury would not have been confused by collateral issues had Avery been able to introduce evidence of an alternative perpetrator. Rather, the issues would have been more clear to the jury as it would have had the benefit of Avery's complete defense: I did not do it and I will tell you who I believe did it. The court did not need to apply ***Denny*** to prevent juror confusion.

Finally, ***Richardson*** is instructive in light of its footnote 6, where the court wrote: "We do not consider whether the 'legitimate tendency' test is an appropriate standard for the introduction of third-party defense evidence." ***Id.*** This footnote does not endorse the legitimate tendency test, and points out that it was the court of appeals, not the supreme court, that adopted the legitimate tendency test in ***Denny***.

Two years later the supreme court decided ***State v. Scheidell***, 227 Wis. 2d 285, 595 N.W.2d 661 (1999). In ***Scheidell***, the defendant was charged with sexual assault. He attempted to introduce evidence of a similar crime committed by an unknown third-party while he was in jail in order to prove that the victim had mistaken his identity. ***Id.*** at 294. On review, the supreme court rejected the state's argument that ***Denny*** should apply where the defense seeks to introduce evidence of a unique *modus operandi* on the issue of identity: "We do not agree that ***Denny*** can be molded to fit the facts of this case." ***Id.*** at 287.

The court concluded it would be impossible for a defendant whose claim is that an unknown third-party committed the crime to meet the legitimate tendency test. A defendant who does not know who committed the crime would be unable to show motive or opportunity. ***Id.*** at 296. "Thus, a defendant simply could not meet his or her burden under the legitimate tendency test when the alleged third-party is unknown." ***Id.*** at 297. The court said:

> If we were to apply *Denny*'s legitimate tendency test to unknown, third-party evidence, the bright line test established in *Denny* would be rendered meaningless or a defendant would face an insurmountable barrier to admissibility. Because there is neither a legal basis nor a compelling reason to apply the legitimate tendency test in this case, we hold that the test is not applicable to the introduction of allegedly similar crime evidence that is committed by an unknown third party. *Denny* simply does not apply to this type of other acts evidence.

***Id.*** (footnote omitted).

The court added the following footnote: "We do not consider whether the legitimate tendency test is an appropriate standard for the introduction of third-party defense evidence offered to prove something other than motive." ***Id.*** at fn 9.

***Scheidell*** is different from this case in that the defendant there sought to present evidence of the signature or *modus operandi* of a crime committed while he was in jail. Here, Avery did not claim that someone else unknown to him had committed a similar crime at another time. But the conclusion the supreme court reached is telling: putting the burden on a defendant to prove motive, opportunity and direct connection when the defendant does not know who did the

crime is virtually impossible. It is fundamentally unfair to put that burden on a defendant.

As was shown by the trial attorneys' testimony in this case, the defendant's theory of defense informs every aspect of the trial. When a defendant says he did not do the crime but that someone else did, that defense is unfairly truncated when he is barred from introducing evidence as to the true perpetrators. After all, when jurors make decisions, narrative plays a key role. John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 Am. Crim. L. Rev. 1069, 1087-88 (Summer, 2007). That is, jurors try to fit evidence into a coherent story. Therefore, it is critical that a defendant, in order to present a complete defense, be permitted to present his narrative—his coherent story—to the jury.

This case illustrates the effect of a ruling that the defendant may present only half of his defense (I did not do the crime) but is prevented from presenting the other half of the defense (let me show you who might have committed the crime).

For example, the trial court's ruling prevented the defense from cross-examining Bobby Dassey as a suspect rather than simply as a witness. As noted above, Bobby Dassey was at the salvage yard during the same period of time that Teresa Halbach was said to be there. He said he saw her on the property, saw her taking pictures, and saw her walking towards Avery's home. (298:35-38). According to Bobby, he left his home at about 2:45 p.m. to go hunting, after taking a shower. (298:38-39). His time line, however, contradicts the chronology given by both his brother Blaine and the school bus driver. Blaine testified that he came home from school at about 3:30 or 3:40 p.m., and that Bobby was

not out hunting, but rather was sleeping at home. (316:69). And Lisa Buchner, the bus driver, testified she saw the photographer when she dropped the Dassey boys off at 3:30 p.m., not at 2:45 p.m. when Bobby supposedly saw her taking photographs. (323:111). It is highly unlikely that Ms. Halbach spent 45 minutes taking pictures of Janda's van.

While the defense could point out these timing discrepancies in its cross-examination of Bobby, it could not connect for the jury why it mattered: that Bobby may have killed Teresa Halbach. As Buting testified at the postconviction hearing, the state was able to characterize Bobby Dassey as a neutral witness rather than as a potential perpetrator. (362:220). Buting testified:

> But the way you cross-examine somebody when they are an interested witness who is trying to save their own skin, because they could be a guilty party, is very different than the way you cross-examine a witness when your hands are tied and you are not allowed to do that.
>
> So, …you may be able to present inconsistencies in the versions—various versions of a witness, from one time to the next, and I think we did that, but without showing a motive for the witness to fabricate, you leave the jury with, and you leave the State with the ability to just argue, well, these are minor inconsistencies. They don't matter. This is an otherwise uninterested party.

(362:221).

Attorney Strang testified that there was a "very good possibility that Bobby Dassey would have been cross-examined by me as someone who potentially was a murderer." (362:117). For example, Bobby testified that Avery had asked him and a friend if they wanted to help him

dispose of a body. (298:48-49). While the defense was able to diffuse this through testimony that Avery intended this remark as a joke, Strang testified that he could have handled the testimony differently but for the court's third-party liability ruling. (308:27-28). This comment "could have been handled as something that Bobby Dassey never heard and was saying to point an accusatory finger at his uncle." (362:118). "That [comment] could have been handled as a blame shifting effort by someone who himself was culpable, rather than having to handle it as, oops, you made a mistake, you didn't really mean to suggest that Mr. Avery was serious about that." (*Id.*).

Strang also testified that he would have cross-examined Bobby Dassey more fully on the "mutual and mutually exclusive alibi that he and Scott Tadych offered each other…." (362:118). That alibi placed him away from the salvage yard during the time Ms. Halbach may have been murdered. Because the defense could not accuse Bobby as a possible perpetrator, it would have made no sense to attack Bobby on cross-examination as to his alibi.

The record shows the prosecution was not going to allow the defense to suggest that Bobby Dassey was the real perpetrator. Special prosecutor Kratz objected to Buting's closing argument when he said: "So when the State tells you that Bobby Dassey is this credible witness, who's the last person to see Teresa Halbach alive, maybe he's right, if he's the killer. Or Scott Tadych, his only alibi." (327:208). Kratz immediately objected "on third-party liability" and asked to be heard outside the presence of the jury. (327:209). Buting said he would rephrase and even withdraw his statement, and Kratz continued to object. (*Id.*). The court reserved a ruling until later when it suggested that Strang, in his closing argument, "clarif[y]" that Buting only mentioned

Bobby Dassey to illustrate the police officers' investigative bias and failure to look at other suspects. (327; 219-220). The next day, Strang was forced to back off of Buting's statement about Bobby Dassey. His "clarification" of Buting's statement shows just how hamstrung the defense was by the court's pre-trial ruling:

> [Buting] *doesn't mean to tell you that, for instance, Bobby Dassey murdered Teresa Halbach. We don't mean to tell you that someone else murdered Teresa Halbach*. It's really kind of a point, we don't have a police department, you don't have a police department.
>
> We're not going to be able to solve the murder, if Steven Avery did not do it.

(328:6; emphasis added).

Nor could the defense cross-examine Scott Tadych as a possible perpetrator. Attorney Strang testified that he would have projected to the jury in his attitude, tone of voice and manner of questioning "the view that he was a probable murderer." (362:119). He would have tried to develop the improbability of Tadych's mutual alibi with Bobby Dassey, "including the improbability of the whole notion that these two guys going hunting, you know, Dassey at Tadych's place, and Tadych somewhere past Dassey's place." (362:119-120).

A review of Tadych's testimony also suggests fodder for cross-examination in that he testified that on the day Teresa Halbach disappeared, he did not go to work, and that he twice visited his mother at a hospital in Green Bay, which is some distance from the Avery property. (316:123, 127,

134). He testified that he was hunting at 3:00 p.m.,[6] after having passed Bobby Dassey who was heading out to hunt, that he picked up Barb Janda at 5:00 p.m., that he went to the hospital in Green Bay until about 7:15 or 7:30 p.m., and that he was back at Janda's at about 7:30 or 7:45 p.m. (316:123-128).

Strang testified at the postconviction hearing that he would also have considered calling other witnesses to suggest Tadych was the true perpetrator. For example, he would have considered calling witnesses to testify about Tadych's temper, his attempt to sell a .22 caliber long rifle shortly after Halbach's murder, and his "bolting out of work, ashen faced, shortly after this, when he heard that one of the Dassey boys either had been arrested or was being questioned by the police." (362:120).

The court's third-party ruling was particularly limiting in light of Avery's theory of defense. Avery maintained that the police framed him for a crime he did not commit by, for example, planting his blood in Ms. Halbach's car. Had the defense been able to argue to the jury that another individual was the true killer, it would have had the chance "to blunt the thrust of the prosecution argument…which was, if you are saying the police planted evidence to frame Mr. Avery, or to make it appear that Mr. Avery committed the crime, if you're saying that, then you must also be saying that the police killed Ms. Halbach, which we weren't saying." (362:112). Because the defense was "unable to point to the person" who truly killed Ms. Halbach, the defense was "wide open on the flank to that prosecution attack." (*Id.*).

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[6] When questioned by the police, Tadych said he got home from the hospital in Green Bay at about 3:15 p.m., which suggests he did not pass Bobby Dassey on their way to go hunting. (316:135-136).

In sum, ***Denny*** should not apply to this case because ***Denny*** involved an effort to present evidence of motive, whereas motive is irrelevant in this case. In other cases where ***Denny*** is a poor fit, courts have not been reluctant to apply the standard rules of evidence such as relevancy rather than Denny's legitimate tendency test. And, the court's ruling severely hampered Avery's ability to present a defense.

C. Where, as here, the state was able to introduce evidence that certain third parties had been excluded as perpetrators, the defense was unfairly deprived of the ability to counter that evidence.

A central unfairness in this trial was that the state was able to introduce forensic evidence which excluded perpetrators other than Steven Avery, but the defense was unable to introduce evidence that another individual may have been the true culprit. Thus, even though it is the defendant who has the right to present a defense, here the state was able to introduce evidence which excluded possible perpetrators while the defendant was prevented from countering that evidence.

Sherry Culhane, the Technical Unit Leader in the DNA Unit of the Wisconsin State Crime Lab, testified for the state. She testified that buccal swabs from Barb Janda, Bobby, Brendan and Brian Dassey, and Earl, Chuck, Delores and Allan Avery, were all submitted to the crime lab, and that she prepared DNA profiles based upon these standards. (314:128-32). She testified that she tested various pieces of evidence, obtained DNA profiles from those pieces of evidence, and then compared those profiles against not only Steven Avery's profile, but against these other profiles. For example, she compared the DNA on the Toyota key against

the profiles of the above-referenced individuals, and testified that the DNA profile developed from the key did not match any of those individuals except for Avery. (314:181-184). Culhane testified that she performed DNA tests on blood found in Halbach's car and compared the profile against the DNA standards for Steven Avery as well as the other Avery and Dassey family members. She concluded that the DNA profile matched Steven Avery and excluded the other individuals. (314:185-187).

Thus, in order to convict Avery of the crimes, the state was able to introduce evidence not only that his DNA profile matched that found on the evidence, but that his family members were excluded. Yet when the defense asked the state's fingerprint expert whether a print which did not match Steven Avery was compared to Scott Tadych, the court sustained the state's relevance objection, and the expert's answer was stricken. (322:144).

The state ought not be able to introduce evidence that others on the salvage yard were excluded by scientific evidence as the perpetrators while preventing the defense from introducing evidence to the contrary.

D. If ***Denny*** applies, the court erred in excluding defense proffered third-party liability evidence.

If the court concludes that ***Denny*** applies, it should hold that the trial court erred in barring Avery's third-party liability evidence.

The first element of the legitimate tendency test is motive. It is unknown what motive there would have been to

kill Teresa Halbach.[7] Given that the state failed to prove that anyone had a motive, one is left with only possibilities, such as a sexual assault that led to a homicide, or an effort to hide evidence of a crime such as sexual assault or robbery. If those are the possible motives, then Bobby Dassey, Scott Tadych and Earl and Charles Avery would have the same motive as Steven. No evidence was adduced at trial that one of these men would have had more or less of an intention to sexually assault Ms. Halbach than another.

An additional motive may have been involved as well. If someone other than Steven Avery killed Teresa Halbach, that individual would have a motive to save his own skin, and a good target upon whom to place the blame would be Steven Avery. For example, if Charles Avery killed Teresa Halbach, he would have a motive to allow the police to believe that Steven Avery had committed the crime, knowing that the police would willingly follow their tunnel vision to assume that Steven Avery was the guilty party. The true killer would have a motive to pin the blame anywhere but upon himself, and a logical person to blame would be Steven Avery.

The second element of the legitimate tendency test is opportunity. Bobby Dassey, Scott Tadych, and Charles and Earl Avery all had the opportunity to kill Teresa Halbach.[8] According to his testimony, Bobby Dassey saw Teresa Halbach arrive to photograph his mother's van. Charles and Earl Avery both worked at the salvage yard, and

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[7] Notably, no one clearly articulated what motive Steven Avery would have had to kill Teresa Halbach, yet the court still required him to show a motive as to others.

[8] The trial court agreed that Charles and Earl Avery and Bobby Dassey had opportunity and a direct connection. (370:94-96; App. 196-198).

therefore would have known about the photographer who came to take photos for Auto Trader magazine, and would have had access to her when she came to the yard on October 31. Scott Tadych, Barb Janda's boyfriend, had the opportunity as he did not go to work on that day, and by his testimony was at the salvage yard more than once that day. As Janda's boyfriend, Tadych would have known that she was selling her van. Each of these men had the same opportunity to harm Teresa Halbach as did Steven Avery.

Each of these men also had the opportunity to harm Ms. Halbach if one considers the fact that any one of them could have flagged her down for a "hustle shot." Ms. Halbach was reportedly good at doing "hustle shots," which are photography jobs done on the fly, without an appointment. Since a hustle shot is not prearranged and does not appear on the Auto Trader appointment list, there would be no record of the shot.

The third element of the legitimate tendency test is a direct connection to the crime. In ***Denny***, the court listed proximity as an example of a possible direct connection to the crime:

> By illustration, where it is shown that a third person not only had the motive and opportunity to commit the crime but was also placed in such proximity to the crime as to show that he may have been the guilty party, the evidence would be admissible.

***Denny***, 120 Wis. 2d at 624.

The alternative suspects discussed above have a direct connection to the crime in their proximity to the victim. Each was on the salvage yard at some point around the time when Ms. Halbach was there. Charles Avery's trailer is located near the salvage yard office, in eyesight of the driveway to

the Janda and Steven Avery trailers. (308:10). Bobby saw Teresa Halbach that day. (298:37-38). Each was seemingly alone during the afternoon, although Bobby Dassey and Scott Tadych have a mutual alibi in that they claimed they saw the other driving to their separate hunting spots that afternoon. Each would have had access to the spots where human remains were found, including the burn barrel located behind Steven Avery's trailer. Each would have had access to guns. Bobby and Tadych were hunting that day as was Earl Avery. (316:109). Although no testimony was adduced as to Charles Avery's access to guns, clearly there were a number of guns on the property, including guns in Steven Avery's trailer, hanging in plain sight. (14:69).

In sum, although the state introduced forensic evidence which directly connected Steven Avery to the crime, other connections existed for these other individuals. The connections should have been sufficient to allow the defense to introduce evidence of potential third-party liability.

### E. ***Denny*** should not apply in this case because it was wrongly decided.

***Denny*** was wrongly decided and should be overruled because it improperly imposes upon a defendant a substantial burden of proof. Avery recognizes, however, that this court lacks the authority to overrule ***Denny***. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Nevertheless, he raises the issue to preserve it for review by the supreme court.

The legitimate tendency test requires that before a defendant is allowed to present evidence of third-party liability, the defendant must prove that the alternative perpetrator had the motive, the opportunity and a direct connection to the crime. Thus, the defendant whose defense is that two-part defense here—I did not do the crime but I can

tell you who did—must prove elements the state is not even required to prove, such as motive. While the cases caution that the defendant need not prove third-party liability beyond a reasonable doubt, the defendant must nevertheless show a direct connection between the third-party and the crime. Such a burden of proof conflicts with the constitutional requirement that the state bears the burden of proof in a criminal case, not the defendant. ***Sandstrom v. Montana***, 442 U.S. 510 (1979).

In addition, although the court in ***Denny*** intended to follow ***Alexander v. United States***, 138 U.S. 353 (1891), in crafting the three-part legitimate tendency rule, ***Alexander*** did not, in fact, adopt a two or three-part test combining motive, opportunity and a direct connection to the crime. Instead, the Court looked at whether the third-party's acts and statements in that particular case were so remote or insignificant as to have no legitimate tendency to show that he could have committed the crime. ***Id.*** at 356-357. In other words, were the third-party's acts and statements too remote and insignificant to have any probative value. This test is essentially the same as the well-recognized balancing test in Wis. Stat. § 904.03.

Despite its stated intention to follow ***Alexander***, the court in ***Denny*** failed to do so. Instead of adopting a fluid test that would review each case under its own facts, and to then determine whether there is any legitimate tendency to show that the third-party could have committed the crime in keeping with ***Alexander***, the court erroneously adopted a bright-line three-part test.

## III. Avery's Convictions Cannot Stand Because, Contrary to Constitutional and Statutory Guarantees, the Court Removed a Deliberating Juror without Cause and Substituted an Alternate Who Should Have Been Discharged When Deliberations Began.

### A. Summary of argument.

Several errors occurred at perhaps the most critical stage of Mr. Avery's trial, when the 12 chosen jurors were deciding his guilt or innocence.

After the first day of deliberations, the court discharged one of the deliberating jurors and sent him home. It did so without an on-the-record *voir dire*, without Avery and counsel present, and without a record establishing cause for removal. Discharging the deliberating juror without cause denied Avery his right to a unanimous vote of the 12 impartial jurors to whom the case was submitted. It also left only 11 qualified jurors.

Another error occurred the next morning when an alternate juror was substituted into the deliberating jury. This "remedy" is not permitted by the governing statute, which requires that any alternates be discharged before deliberations begin.

Each error, whether viewed independently or together, requires reversal of Avery's convictions, as it impermissibly altered the makeup of the jury during deliberations. Avery's convictions were the product of truncated deliberations during which an alternate who by law should have been discharged and sent home before deliberations even got underway was swapped for a juror who should not have been discharged, but

instead, should have completed his jury service with the other 11 jurors to whom the case was submitted.

None of the errors should be deemed waived because each flowed from the court's failure to conduct a *voir dire* of the deliberating juror in the presence of Avery and his attorneys, and that deficiency could not be waived except personally by Avery, which did not occur. However, if waiver is found, Avery is still entitled to relief under any of three theories: plain error, interest of justice or ineffective assistance of counsel.

B. The court's removal of a deliberating juror without following the mandated procedure and without a record establishing cause for removal impermissibly altered the makeup of the jury charged with determining Avery's guilt or innocence.

1. The removal of a deliberating juror without cause violates a defendant's fundamental rights.

The removal of a deliberating juror implicates fundamental constitutional rights, specifically, the right to a fair and impartial jury, the right to a unanimous verdict by a jury of 12 persons, and the due process right to a jury trial in the manner guaranteed by state law. ***Peek v. Kemp***, 784 F.2d 1479, 1483 (11th Cir. 1986).

Included within the constitutional jury trial right is the defendant's "'valued right to have his trial completed by a particular tribunal.'" ***Crist v. Bretz***, 437 U.S. 28, 36 (1978), *quoting* ***Wade v. Hunter***, 336 U.S. 684, 689 (1949). This right lies at the foundation of the rule that jeopardy attaches when the jury is empaneled and sworn, as it serves as a bar on

needless discharges of juries. ***Crist***, 437 U.S. at 36. This right, sometimes referred to as "the interest of an accused in retaining a chosen jury," ***id***., also serves as a limit on a court's authority to discharge an empaneled juror. ***Peek***, 784 F.2d at 1483-84. "Like the unjustified declaration of a mistrial, the unjustified replacement of an empaneled juror may jeopardize the defendant's rights regardless of the judge's precise motivation, and whether or not the judge is biased or acting in bad faith." ***Hinton v. United States***, 979 A.2d 663, 682 (D.C. 2009).

At times, the right to have the trial completed by a particular tribunal must be subordinated to the public's interest in fair trials designed to end in just verdicts. ***Peek***, 784 F.2d at 1484, *citing* ***Wade***, 336 U.S. at 689. Accordingly, a court may discharge a deliberating juror but only after a "careful inquiry" made in the presence of the defendant and all counsel and only upon a showing of "cause." ***State v. Lehman***, 108 Wis. 2d 291, 300, 321 N.W.2d 212 (1982). A court has no authority, however, to remove a deliberating juror without a record establishing cause.

> [I]t would be prejudicial and constitutionally deficient for a trial judge to excuse a juror during deliberations "for want of any factual support or for a legally irrelevant reason."

***Peek***, 784 F.2d at 1484, *quoting* ***Green v. Zant***, 715 F.2d 551, 555 (11th Cir. 1983). Removing a juror without cause, as occurred here, infringes the defendant's right to have his guilt or innocence decided by a unanimous vote of the 12 impartial jurors to whom the case was submitted.

2. The court removed Juror Mahler without following the procedure required by ***Lehman***.

To ensure that jurors are not removed without justification, the supreme court in ***Lehman*** set forth the procedure a court must follow when a juror seeks to be excused either before or after deliberations have begun.

> When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. The juror potentially subject to the discharge should not be present during counsel's arguments on the discharge. The circuit court's efforts depend on the circumstances of the case. The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.

***Lehman***, 108 Wis. 2d at 300 (footnote omitted). In the next paragraph, the supreme court emphasized the need for a record establishing both the facts and the court's exercise of discretion. ***Id***. at 300-01.

Here, the circuit court violated ***Lehman***'s requirements in three respects. First, it did not question Mahler in the presence of Avery and his attorneys, or, for that matter, attorneys for the state. No arguments were heard from counsel following the court's inquiry as to whether cause existed for the juror's removal. Second, no contemporaneous

record was made of the court's *voir dire* of Mahler. Third, the court failed to make a careful inquiry or reasonable efforts to avoid discharging Mahler.

a. Avery's unwaiveable right to be present with counsel.

The court's communication with the deliberating juror outside the presence of Avery and his attorneys violated more than the dictates of ***Lehman***. It also violated Avery's right to be present at trial and his right to counsel, as guaranteed by Article I, § 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. The constitutional right to be present and assisted by counsel applies whenever a court communicates with deliberating jurors. ***State v. Anderson***, 2006 WI 77, ¶¶43 & 69, 291 Wis. 2d 673, 717 N.W.2d 74; ***State v. Burton***, 112 Wis. 2d 560, 565, 334 N.W.2d 263 (1983); ***State v. Koller***, 2001 WI App 253, ¶62, 248 Wis. 2d 259, 635 N.W.2d 838. The right to be present with counsel also applies to a court's individual *voir dire* of a juror. ***State v. Tulley***, 2001 WI App 236, ¶6, 248 Wis. 2d 505, 635 N.W.2d 807; ***State v. David J.K.***, 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994); *see also* Wis. Stat. § 971.04(1)(c) (defendant shall be present at *voir dire* of jury).

A trial runs from jury selection through final discharge of the jury. During that time, the defendant has a right to be personally present "'when anything is done affecting him, or, as it is sometimes put, whenever any substantive step is taken by the court in his case.'" ***Anderson***, 291 Wis. 2d 673, ¶42, *quoting* ***Williams v. State***, 40 Wis. 2d 154, 160, 161 N.W.2d 218 (1968). Consistent with the mandate of ***Lehman***, a substantive step is taken when the court questions a deliberating juror about his or her request to be removed,

necessitating "the presence of all counsel and the defendant." ***Lehman***, 108 Wis. 2d at 300. Certainly, the removal of a juror during deliberations is something that affects the defendant and requires the defendant's presence with counsel.

The circuit court erroneously concluded that Avery had no right to be present with counsel. (370:16-17; App. 118-19). Its reliance on ***United States v. Gagnon***, 470 U.S. 522 (1985), is misplaced as it does not involve a juror who was in the midst of deliberations or who was seeking to be removed. Rather, the juror had simply expressed concern that the defendant was sketching portraits of the jury. ***Id***. at 523. When the court assured the juror that there would be no more sketching, the court did so in the presence of defendant's counsel and on the record. Similarly, in ***United States v. Carson***, 455 F.3d 336, 350 (D.C. Cir. 2006), the juror was questioned in court and on the record, in the presence of the defendant and counsel, following in-chambers questioning by the court. Here, the court conducted a private *voir dire* of Mahler, outside the presence of all counsel and Mr. Avery.

Significantly, Avery's right to be present and assisted by counsel during the court's *voir dire* of Juror Mahler was not waived by his attorneys' agreement that the court speak with the juror.

Waiver of the right to counsel must be made personally on the record by the defendant and must be knowing, voluntary and intelligent. ***State v. Ndina***, 2009 WI 21, ¶31, 315 Wis. 2d 653, 761 N.W.2d 612; ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Where, as here, the record contains no such colloquy, the defendant did not waive his right to have the assistance of counsel during the court's communication with the juror. ***Anderson***,

291 Wis. 2d 673, ¶73. Indeed, Avery was not aware that counsel had agreed to the private *voir dire* until the following day, after the juror was questioned and discharged by the court. Avery did not personally and knowingly waive his right to have counsel present during the *voir dire* of Mahler.

Similarly, the failure of a defendant or his counsel to object to a court's communication with deliberating jurors in the defendant's absence does not constitute waiver of the defendant's right to be present. ***Anderson***, 291 Wis. 2d 673, ¶¶63-64; *see also* ***Tulley***, 2001 WI App 236, ¶6 (the right to be present during *voir dire* "cannot be waived"). Here, counsel's agreement that the court communicate with the juror was made without consultation with Avery. At no point did Avery agree to waive his right to be present during the *voir dire* of Mahler. Avery was not told about the court's communication with, and removal of, Mahler until it was too late for him to participate.

The fact that only Avery himself could waive his right to be present with counsel during the court's communication with Mahler highlights the significance of that communication. Indeed, each error that came next – removal of Mahler without cause and substituting in an alternate who should have been discharged – would likely have been avoided had the court conducted, as the law requires, an on-the-record *voir dire* with the defendant and all counsel present.

b. No contemporaneous record made of the *voir dire*.

***Lehman*** requires that the record support the court's decision to discharge a juror. ***Lehman***, 108 Wis. 2d at 301. The court must set forth on the record the basis for its exercise of discretion, and it must be supported by facts that

are of record. ***Id***. at 300-01. Certainly, that is best accomplished by questioning the juror on the record. *See* Wis. Stat. § 805.13(1) (Once the jury is sworn, "all statements or comments by the judge to the jury … relating to the case shall be on the record.").

Here, the court's communication with Juror Mahler consisted of an off-the-record telephone conversation. Although the next day the court prepared a memo recalling the events of the prior evening, the memo is a poor substitute for a transcript. Indeed, there are gaps and inconsistencies.

The memo reports that Sheriff Pagel told the court the stepdaughter's car was totaled. But the memo makes no mention of Mahler telling the judge the car was totaled. Rather, it simply states that Mahler "confirmed the information I'd been told." (359:2; App. 251). According to the memo, Mahler referred to some marital problems and strain on his marriage due to the trial, but exactly what Mahler told the court is unknown because the conversation was not reported. At the postconviction hearing, Mahler denied telling either Pagel or the court that the car was totaled or that he was having marital problems.

It is "unfortunate," as the court concluded, that "Mahler was not questioned on the record in the presence of the defendant and counsel for both sides …." (370:32; App. 134). The resulting record regarding Mahler's removal is inconsistent and incomplete.

c. No careful inquiry or effort to avoid discharging the juror.

In ***Lehman***, the supreme court directed that the circuit court has a "duty … to make careful inquiry into the substance of the request and to exert reasonable efforts to

avoid discharging the juror." ***Lehman***, 108 Wis. 2d at 300. Further, the "court must approach the issue with extreme caution to avoid a mistrial by … needlessly discharging the juror …." ***Id***. The court did not satisfy that duty before discharging Mahler.

The memo's brief description of the court's communication with Mahler is consistent with Mahler's recollection that their conversation lasted only a couple of minutes. The court did not ask if the stepdaughter was hospitalized or injured. As to the state of Mahler's marriage, the memo confirms the court did not pose specific questions but, instead, inferred that the marriage was at stake if Mahler was not excused. "My reading, without pressing him with questions too specific, was that he felt the future of his marriage was at stake …" (359:2; App. 251). According to the memo, after being told something about an accident and marital strain, the judge told Mahler that was all he needed to know, he thanked him for his service, and he sent the juror home. The memo reflects a cursory, not careful, inquiry.

The court's duty to make a careful inquiry into the substance of the juror's request to go home does not require "impromptu marriage counseling" (370:22; App. 124), but it does require "a searching inquiry in order to determine a juror's continuing availability." ***United States v. Ginyard***, 444 F.3d 648, 653 (D.C. Cir. 2006). The court's "duty of inquiry extends beyond what might otherwise appear to be reasonable inferences from known facts when uncertainties about the juror's continuing availability persist." ***Id***. Here, the court could not rely on its "reading" that Mahler's marriage was at stake. The court had a duty to press Mahler with specific questions to determine if the court's reading was accurate.

To satisfy its "affirmative duty" to inquire into the circumstances affecting a juror's continuing ability to serve, the court may need to investigate the matter beyond questioning the juror. ***United States v. Araujo***, 62 F.3d 930, 934 (7th Cir. 1995). If a juror is ill, the court may need to contact her physician to determine the extent of the illness and when the juror may be able to return. ***United States v. O'Brien***, 898 F.2d 983, 985-86 (5th Cir. 1990) (juror's psychiatrist confirmed that juror, who had previously been hospitalized with depression, was in no condition to continue). If a juror might lose a job opportunity due to lengthy deliberations, contact with the potential employer would have been appropriate and preferable to the trial court "end[ing] its inquiry too soon …." ***Ginyard***, 444 F.3d at 655. Here, further inquiry was needed to determine the seriousness of the accident, facts that should have been easily obtained from Mahler's wife, if not from Mahler himself.

The court or even the bailiff could have asked Mahler a single question to determine if a true emergency existed that needed to be dealt with that night. Information that the stepdaughter was not hospitalized and not otherwise injured surely would have indicated that the matter could wait until the next morning. If Mahler did not know whether she was injured, his lack of knowledge would have signaled that perhaps this was not a true emergency. After all, had the stepdaughter been injured, one would expect his wife to have told him that in their phone call. In any case, Mahler could have found out the answer by placing another call to his wife.

In its postconviction decision, the court concluded its response, including its *ex parte* communication with Mahler, was reasonable given the circumstances of the case. While the situation with Mahler arose about 9 p.m. and the attorneys and court personnel were several miles from the courthouse,

nothing would have prevented the court from convening that evening. Certainly, had the jury returned with a verdict at that hour, the court personnel and parties would have traveled to the courthouse. Indeed, the verdict in this case was returned on a Sunday, and court was held for that purpose. (331).

The potential removal of a deliberating juror requires no less response from the court and parties than does the return of verdict. After all, if the deliberating juror is let go, only 11 jurors remain and the trial may well end at that point, in a mistrial. While ***Lehman*** says the court's "efforts depend on the circumstances of the case," its requirements apply to jurors seeking removal before or during deliberations. ***Lehman***, 108 Wis. 2d at 300. But the stakes are much higher when, as here, a juror seeks removal during deliberations and, consequently, the greatest care is required before the court removes a deliberating juror. The constitutional guarantees of unanimity and holding the prosecution to its burden of proof are jeopardized if "jurors may opt out at will." ***United States v. Essex***, 734 F.2d 832, 842 (D.C. Cir. 1984).

The court's failure to make a careful inquiry into the substance of Mahler's request is particularly troubling because of conflicting evidence as to what was really going on. After having been discharged, Mahler learned that there was no accident, just car trouble. Also, at the postconviction hearing, Mahler testified that his reasons for wanting off the jury stemmed, in part, from comments made by other jurors, in particular the suggestion by one at dinner that he should go home. (362:16-18, 34-36).

Although the court did not believe that was the reason Mahler wanted off, the court accepted that the exchange with Juror C.W. may have occurred. (370:34; App. 136). If, in

fact, Mahler was seeking removal in part because of a problem with another juror or due to strain from the deliberative process, the specter of jury taint is particularly grave. ***United States v. Symington***, 195 F.3d 1080, 1087 (9th Cir. 1999) (removal improper if any reasonable possibility it was related to juror's views on the merits of the case); ***United States v. Samet***, 207 F. Supp. 2d 269, 281-82 (S.D. N.Y. 2002) (mistrial required where juror became "unhinged" by deliberations). The true circumstances surrounding Mahler's removal are difficult to discern because the court failed to conduct the careful inquiry, on the record and in the presence of the defendant and counsel, that ***Lehman*** requires.

3. The court removed Juror Mahler without a record establishing cause for his removal during deliberations.

While a court has discretion to discharge an incapacitated juror during deliberations, the court has "no discretion whatever" to dismiss a juror who is not in fact incapacitated. ***Green***, 715 F.2d at 555. To do so infringes the defendant's right to have his guilt or innocence decided by a unanimous vote of the 12 impartial jurors to whom the case was submitted. *See* ***Essex***, 734 F.2d at 840-41; ***Hinton***, 979 A.2d at 681-82.

Juror Mahler was not incapacitated, and there was no cause for his removal. Excusing Mahler without cause violated Avery's right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution, his right to a unanimous verdict by a 12-person jury guaranteed by Article I, § 7 of the Wisconsin Constitution, and his due process right to a jury of 12 as guaranteed by

Wis. Stat. §§ 756.06(2)(a) and 972.02(2). The removal of Mahler without legal justification, that is, without "cause" required to discharge a deliberating juror, violated Avery's right to a jury trial as the constitutions and statutes guarantee, specifically, his right to a unanimous verdict by the 12 impartial jurors to whom the case was submitted.

A circuit court's decision to remove a deliberating juror will be reviewed for an erroneous exercise of discretion. ***Lehman***, 108 Wis. 2d at 300-01. The proper exercise of discretion requires the court to make a reasonable decision based upon the governing legal standard and the facts of record. ***State v. Oberlander***, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989). The facts set forth in the court's memo do not amount to cause for removing a deliberating juror.

The memo identified two facts on which the court's decision to discharge Mahler was premised. First, his stepdaughter had been involved in a car accident. Second, he was having marriage problems due in part to the strain of the trial. Particularly given the skeletal facts before the court, neither presented the sort of crisis or incapacitation that would constitute cause for relieving a juror of his duty to complete deliberations.

While Mahler told the judge his stepdaughter had been in an accident and Sheriff Pagel apparently told the court the car had been totaled, the court had no information that the stepdaughter was hospitalized or injured. Indeed, the memo noted the court "received no information about any injuries." (359:1; App. 250). Certainly, the death or severe injury of a family member may provide cause for discharging a juror. *See* ***United States v. Chorney***, 63 F.3d 78, 81 (1st Cir. 1995) (cause established where juror's son was killed in

construction accident); ***Cherry v. Director, State Bd. of Corrections***, 635 F.2d 414, 416-17 (5th Cir. 1981) (sudden death of juror's parent). And if a juror himself is injured in an auto accident, cause may exist for his removal, depending on the seriousness of the injuries. *Compare* ***United States v. Armijo***, 834 F.2d 132, 134-35 (8th Cir. 1987) (a "close case" for removal where juror suffered broken bones and would be unavailable until the next week); *With* ***Callan v. Peters Construction Co.***, 94 Wis. 2d 225, 247-48, 288 N.W.2d 146 (Ct. App. 1979) (no cause to remove juror who was slightly injured in accident).

Here, the court had no information that anyone, much less Mahler's stepdaughter, had died or been injured in the accident. Although the court believed the accident involved serious property damage to the vehicle, a damaged car is hardly cause for allowing a juror to leave deliberations following a five-week jury trial. Even the court acknowledged in its postconviction decision that the accident would not have been grounds to remove Mahler. (370:21; App. 123). Rather, according to the court, it was the accident plus the report that Mahler's marriage was in trouble that formed the basis for the court's decision to excuse him. (*Id*.).

Information about trouble in Mahler's marriage fares no better than vague information about a supposed accident. As noted above, the memo does *not* state that Mahler told the court the future of his marriage was at stake if he was not excused. This was the court's "reading" of the situation, which the court arrived at "without pressing him with questions too specific …." (359:2; App. 251). According to the memo, Mahler said he had some marital problems before trial, and the trial was putting an extra strain on the relationship. Also, Mahler referred to his wife's earlier upset about a news report that he was living off her trust fund.

(*Id*.). For three reasons, neither comment supports the court's decision to remove Mahler.

First, at that point, Mahler, like all the other jurors, had spent only one night away from home. While serving on a jury may well be a strain on the juror and his or her family, Mahler was going home every night at what would have been the end of a work day, and he was home every weekend. Whatever strain was caused by the trial, it was considerably less than had the jury been sequestered during the entire trial, as was apparently the case in ***United States v. Doherty***, 867 F.2d 47, 71 (1st Cir. 1989), which the court relied upon in its postconviction decision. There, after 54 days of trial and three days of deliberations, a juror was removed due to a problem at home. His former wife had died, leaving him with two small children, who were upset about being cared for by the juror's second wife "during his long absence." ***Id***. at 71. In contrast, Mahler's absence was one night.

Second, his wife's upset about the trust fund report had occurred five weeks earlier, at the time of the original *voir dire*. If her unhappiness with the news coverage did not constitute reason to excuse Mahler from jury service before the trial began, it certainly should not have been cause to remove him during deliberations. Moreover, the court knew when it spoke to Mahler that night that only three days before Mahler told the court and parties in an individual *voir dire* that his wife's earlier upset had no impact on his ability to continue to serve on the jury.

Third, whatever concerns Mahler expressed about his marriage, those concerns were intertwined with the report of an accident that, in fact, did not occur. In its decision, the court wrote that "the details of the accident, even if known with more specificity, would not have changed the more

serious juror problem, which was Mahler's preoccupation with the future of his marriage." (370:22; App. 124). That is not true. According to the memo, "[t]hings apparently boiled over when his stepdaughter was involved in a vehicle accident this evening and he was not there to provide support." (359:2; App. 251). If Mahler had known that there was no accident, just car trouble, much of his concern about his absence from home would seemingly have evaporated and with it, the court's concern about a hopelessly distracted juror.

Generally, cause has not been found to dismiss a deliberating juror unless the juror is "seriously incapacitated." ***Araujo***, 62 F.3d at 934. This standard was not satisfied where, after having already lost a day of deliberations to weather-related problems, the court discharged a juror who was stranded on the side of the road and unable to leave his car. ***Id***. at 932-34. Nor was cause shown where a juror complained he risked losing a job opportunity if deliberations continued much longer. ***Ginyard***, 444 F.3d at 653.

Even a juror's verified illness may not justify removal. In ***United States v. Patterson***, 26 F.3d 1127, 1128-29 (D.C. Cir. 1994), the trial court abused its discretion by failing to conduct an inquiry into the availability of a 68-year-old juror before discharging her even though the court knew the juror suffered severe chest pains over night and had excused her three hours earlier because her doctor wanted to see her immediately.

Here, the record does not show that Mahler was seriously incapacitated. He may have felt upset, even distraught, after the first day of deliberations, but the facts known to the court – a family member's auto accident with no medical emergency and strain on a marriage – do not

constitute cause for discharging a deliberating juror. If marital strife and some sort of property damage at home were cause for discharge, jurors could quite easily opt out of their duty when deliberations became unpleasant or stressful. Protecting the constitutional guarantees to a unanimous verdict from the 12 to whom the case is submitted requires more.

4. The court's removal of Juror Mahler without cause, which left 11 deliberating jurors, is structural error.

The court's removal of Juror Mahler during deliberations without a record establishing cause, which flowed from the absence of an on-the-record *voir dire* in the presence of Avery and his attorneys, is structural error requiring reversal of Avery's convictions.

Structural errors affect the very "framework within which the trial proceeds, rather than simply … the trial process itself." ***Neder v. United States***, 527 U.S. 1, 8 (1999). These errors deprive defendants of basic protections without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." ***Rose v. Clark***, 478 U.S. 570, 577 (1986). In addition, determining whether an error is structural may rest "upon the difficulty of assessing the effect of the error." ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 149 n.4 (2006).

Errors affecting the makeup and size of the jury have generally been treated as structural errors that are not subject to a harmless error analysis. Denial of the right to an impartial jury is structural error. ***Gray v. Mississippi***, 481 U.S. 648, 668 (1987); ***State v. Tody***, 2009 WI 31, ¶44, 316 Wis. 2d 689, 764 N.W.2d 737. The seating of a juror who should have been removed for cause is structural error.

***United States v. Martinez-Salazar***, 528 U.S. 304, 316 (2000). Denial of a defendant's state constitutional right to the unanimous verdict by a jury of 12 requires automatic reversal of the defendant's convictions. ***State v. Hansford***, 219 Wis. 2d 226, 243, 580 N.W.2d 171 (1998); ***State v. Cooley***, 105 Wis. 2d 642, 645-46, 315 N.W.2d 369 (Ct. App. 1981) (reversal where defendant did not personally agree to proceed with 11 jurors); ***State v. Lomagro***, 113 Wis. 2d 582, 590, 335 N.W.2d 583 (1983) (right to unanimous verdict).

Significantly, federal courts have treated the removal of a juror without a record establishing cause, thereby resulting in the case to proceeding with only 11 jurors, as structural error requiring reversal with no further showing of prejudice. ***Ginyard***, 444 F.3d at 655; ***United States v. Curbelo***, 343 F.3d 273, 285 (4th Cir. 2003); ***Araujo***, 62 F.3d at 937; ***Patterson***, 26 F.3d at 1129; ***Essex***, 734 F.2d at 845-46.

Removal of a juror without cause is structural error because, like other such errors, it has "repercussions that are 'necessarily unquantifiable and indeterminate.'" ***Curbelo***, 343 F.3d at 281, *quoting* ***Sullivan v. Louisiana***, 508 U.S. 275, 282 (1993). Whether the case then proceeds with 11 jurors or by substituting in an alternate, whenever a deliberating juror is removed without cause, the makeup of the jury is changed without legal justification. The court has altered the basic framework by which the defendant's guilt or innocence will be determined.

Once Mahler was discharged, only 11 deliberating jurors remained, and Avery's trial would not be completed by the jury to whom the case was submitted. As a result of the court's unauthorized tinkering with the jury, Avery lost the opportunity to obtain a unanimous verdict from the 12 jurors

to whom the case was submitted. The removal of Juror Mahler is structural error.

C. Avery's convictions cannot stand because the court had no authority to substitute an alternate juror once deliberations had begun.

Even if Juror Mahler's removal was with cause, which Avery disputes, his convictions still cannot stand because the option selected after the juror was removed – substitution of the alternate – is not permitted by the governing statute.

In ***Lehman***, 108 Wis. 2d at 305-06, the supreme court concluded that the relevant statute in effect at that time, Wis. Stat. § 972.05 (1979-80), was silent as to whether the legislature approved of the substitution of an alternate juror after deliberations had begun. In the face of an ambiguous statute, the court held that a circuit court had three options if a regular juror were discharged after deliberations had begun, as follows: (1) obtain a stipulation by the parties to proceed with fewer than 12 jurors; (2) obtain a stipulation by the parties to substitute an alternate juror; or (3) declare a mistrial. ***Id***. at 313.

Here, the parties chose the second option. However, as shown below, the governing statute is no longer silent – it prohibits substitution of an alternate once deliberations have begun. Consequently, the court had no authority to substitute the alternate when Mahler was discharged, Avery's consent to that procedure was legally invalid, and to proceed in that manner was reversible error.

1. Substituting an alternate is not permitted during deliberations in a criminal case.

Whether an alternate may be substituted for a discharged juror during deliberations is a question of statutory interpretation. Statutory interpretation presents a question of law that an appellate court reviews *de novo*. ***State v. Fischer***, 2010 WI 6, ¶15, 322 Wis. 2d 265, 778 N.W.2d 629.

At issue is Wis. Stat. § 972.10(7), which post-dates ***Lehman*** and reads as follows:

> **(7)** If additional jurors have been selected under s. 972.04 (1) and the number remains more than required at final submission of the cause, the court shall determine by lot which jurors shall not participate in deliberations and discharge them.

The plain meaning of "discharge" is "to end formally the service of," to "release from duty." *Webster's Third New International Dictionary*, p. 644 (1993). The plain meaning of the statute is clear. Any alternate jurors who remain when the case goes to the jury must be discharged. They cannot be held for any purpose, including as occurred here, to replace a deliberating juror. The legislative history reinforces that conclusion.

The statute in existence when ***Lehman*** was decided, Wis. Stat. § 972.05 (1979-80),[9] expressly allowed substitution of an alternate before final submission. It did not specify whether alternates had to be discharged at final submission. In ***Lehman***, the defense argued that the statute should be construed as requiring discharge of alternates at final submission. ***Lehman***, 108 Wis. 2d at 302. The supreme court did not go that far in its construction of § 972.05. Rather, it concluded that the statute was silent on whether alternates could be substituted in during deliberations. ***Id***. at 305.

Within a year of ***Lehman***, the legislature responded in 1983 Wis. Act 226 by repealing § 972.05 and creating § 972.10(7) for criminal cases and Wis. Stat. § 805.08(2) for civil cases. Both required that if additional jurors remain at the time of final submission, the court shall "determine by lot which jurors shall not participate in deliberations and discharge them." 1983 Wis. Act 226, §§ 1 & 6. In its note to § 972.10(7), the legislature made clear that this language was a response to ***Lehman***. *Id*. at § 6. The relevant statute was no longer silent. It required discharge of any remaining alternates, foreclosing the option of substituting in an alternate during deliberations.

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[9] **972.05 Alternate jurors.** If the court is of the opinion that the trial of the action is likely to be protracted, it may, immediately after the jury is impaneled and sworn, call one or 2 alternate jurors. … If before the final submission of the cause a regular juror dies or is discharged, the court shall order an alternate juror to take his place in the jury box. ….

The legislature's response is not surprising given ***Lehman***'s concerns about the "wisdom and constitutionality" of permitting substitution of an alternate after deliberations have begun. ***Lehman***, 108 Wis. 2d at 305. While the court's concerns fill seven pages, the tone of the court's discussion is reflected in the following excerpt, which the court premised with the statement that "[t]wo essential features of the right to trial by jury" in Wisconsin are that the jury consist of 12 persons and reach a unanimous verdict.

> Twelve people must have the opportunity to review the evidence in light of each juror's perception, memory and reaction and to reach their consensus through deliberations which are the common experience of all of them. Each of the twelve must have the opportunity to persuade the other members of the jury and to be persuaded by them. If, during deliberations, a juror is discharged and another substituted, the eleven regular jurors will have had the benefit of the views of the discharged jurors while the alternate will not. The eleven regular jurors will have formed views without the benefit of the views of the alternate juror, and the alternate juror who is unfamiliar with the prior deliberations will participate without the benefit of the prior group discussion. If deliberations have progressed to the point where the eleven regular jurors are in substantial agreement, the alternate juror may find it difficult to persuade and convince the eleven who have already come to an understanding.

***Id***. at 307-08 (internal citation and footnote omitted). As the supreme court subsequently commented, "The rationale of *Lehman* is basically that, as a matter of good policy – fairness and due process – a jury be a deliberating body, all of whose members, the same members, work together throughout the factfinding process." ***State v. Koput***, 142 Wis. 2d 370, 387, 418 N.W.2d 804 (1988).

Given concerns about the wisdom of permitting substitution during deliberations, ***Lehman*** held that such authority should not be inferred from a silent statute and that the erroneous substitution in that case was, and in all future cases will be, reversible error. ***Lehman***, 108 Wis. 2d at 307. Against that backdrop, the legislature chose to expressly prohibit substituting in an alternate during deliberations, in both criminal and civil cases.

If any doubt could remain as to the legislature's response to ***Lehman***, it is put to rest by the fate of a proposed amendment to what became Act 226. The amendment would have added language to §§ 805.08(2) and 972.10(7) providing, in relevant part, as follows:

> If a regular juror dies or is discharged after final submission of the cause, the court shall order an alternate juror to take his or her place. If there are 2 or more alternate jurors, the court shall select one by lot. Upon selection, the alternate juror becomes a regular juror. The court shall reassemble the jury and reinstruct the jurors under s. [805.13 (5)/972.10 (5)]. The judge shall instruct the jurors to restart their deliberations.

Assembly Amdt. 1 to 1983 SB 320, contained within the drafting file to 1983 Wis. Act 226, at the Legislative Reference Bureau. This amendment failed. The legislature rejected an amendment that would have allowed substitution of an alternate during deliberations.

Twelve years later, in 1996, the supreme court amended the civil statute, § 805.08(2), to allow a court to hold additional jurors until the verdict is rendered. SCO 96-08 ¶46. Specifically, the civil statute was changed and continues to provide, in relevant part, as follows:

> The court may order that additional jurors be selected. In that case, if the number of jurors remains more than required at the time of the final submission of the cause, the court shall determine by lot which jurors shall not initially participate in deliberations. The court may hold the additional jurors until the verdict is rendered or discharge them at any time.

Wis. Stat. § 805.08(2). The Judicial Council Note states that the last sentence was added "to allow courts to keep additional jurors to replace any juror who might not be able to complete deliberations. Deliberations would begin anew with the additional juror in place." SCO 96-08 ¶46, Judicial Council Note, 1996. Significantly, while the supreme court made a technical change in the parallel criminal statute, § 972.10(7),[10] it did *not* alter the language requiring the court to discharge any additional jurors at final submission of the cause. *Id*. at ¶59.

The 1996 revision is significant because it shows that although substitution of an alternate during deliberations became lawful in civil cases, it remained prohibited in criminal cases. If the "discharge" requirement created post-***Lehman*** does not bar substitution during deliberations, there would have been no need for the supreme court to amend the civil statute to permit such substitution. In addition, while permissible in civil cases, substitution of an alternate during deliberations remains unlawful in criminal cases where the stakes are generally higher.

Accordingly, the governing statute, now and at the time of Avery's trial, requires the court to discharge any additional jurors when the case is submitted to the jury. The court had no authority to substitute an alternate during

[10] The word "impaneled" was changed to "selected".

deliberations, as the alternate should have been discharged once deliberations began. *See*, *e.g.*, ***United States v. Neeley***, 189 F.3d 670, 681 (7th Cir. 1999) (where federal rule at the time required discharge of alternates when deliberations began, court construed rule as forbidding the practice of recalling alternates);[11] ***Commonwealth v. Saunders***, 686 A.2d 25, 27 (Pa. 1996) (state statute that required alternates discharged when jury retired to deliberate barred substitution of alternate juror during deliberations); ***State v. Dushame***, 616 A.2d 469, 471 (N.H. 1992) (same); ***People v. Burnette***, 775 P.2d 583, 586-87 (Colo. 1989) (same).

Substitution of the alternate following Mahler's removal was unlawful and, as shown below, requires reversal of Avery's convictions.

2. Under holdings of the supreme court, the unlawful substitution of an alternate during deliberations is reversible error.

Under ***Lehman***, the unlawful substitution of an alternate during deliberations is reversible error. The supreme court declared that "hereafter we shall view substitution of an alternate during deliberations as reversible error …." ***Lehman***, 108 Wis. 2d at 312. The court left open the option of the defendant consenting to substitution, but that was when the statute was silent. Because the statute now bars substitution, any substitution of an alternate during deliberations in a criminal case is reversible error, even when the substitution is with the defendant's consent.

[11] Fed. R. Crim. P. 24(c) was subsequently amended to allow alternates to be retained so they could replace a discharged juror during deliberations.

That conclusion is dictated not only by ***Lehman*** but by other supreme court cases declaring that a criminal defendant cannot consent to a procedure that diminishes his or her constitutional right to a jury trial unless a statute authorizes that procedure.

In ***Jennings v. State***, 134 Wis. 307, 309-10, 114 N.W. 492 (1908), the supreme court deemed invalid a defendant's agreement to proceed with 11 jurors when one failed to appear for deliberations because no statute at that time allowed for waiver of a 12-person jury. And the supreme court held that a defendant could not validly waive the right to a jury trial altogether where no statute authorized the waiver. ***State v. Smith***, 184 Wis. 664, 672-73, 200 N.W. 638 (1924). Accordingly, a criminal defendant may not validly consent to a procedure that diminishes his constitutional right to a jury trial unless a statute expressly authorizes that procedure. ***State v. Ledger***, 175 Wis. 2d 116, 127, 499 N.W.2d 198 (Ct. App. 1993) (defendant could agree to a 13-member jury because it enlarged his jury trial right).

Avery could not validly consent to substitution of an additional juror during deliberations because that procedure is not authorized by statute and it diminished, rather than enlarged, his right to a jury trial as contemplated by the Wisconsin Constitution. Specifically, he lost his right to a unanimous verdict by the jury of 12 to whom his case was submitted. ***Hansford***, 219 Wis. 2d at 241 (jury of 12 guaranteed); ***Lomagro***, 113 Wis. 2d at 590 (unanimous verdict guaranteed). Any claim that substituting an alternate enhanced rather than diminished Avery's constitutionally-guaranteed jury trial right cannot be squared with ***Lehman***, where the court wrote:

> [I]f substitution were allowed there would be an inherent coercive effect upon an alternate who joins a jury after

> deliberations begin and there was the possibility that a juror who disagrees with the other jurors might be coerced into feigning incapacity in order to be relieved of sitting on the jury.

***Lehman***, 108 Wis. 2d at 310, *citing* ***United States v. Lamb***, 529 F.2d 1153 (9th Cir. 1975). Even if upon substitution the jury is instructed to begin deliberations anew, the continuing jurors may still be influenced by the earlier deliberations and the newer juror may be intimidated due to their status as a newcomer to the deliberations. ***Lehman***, 108 Wis. 2d at 312. Nor will the new juror have had the benefit of the discharged juror's views. ***Burnette***, 775 P.2d at 588; *see also* ***People v. Ryan***, 224 N.E.2d 710, 713 (N.Y. 1966) ("once the deliberative process has begun, it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous deliberations …").

Because substitution of an alternate diminishes the constitutional jury trial right and is prohibited by § 972.10(7), Avery's consent to substituting the alternate after Mahler's removal was invalid as a matter of law.

Even if consent was not barred as a matter of law, Avery's consent was invalid because it was not knowing, voluntary and intelligent. A defendant's waiver of his right to a jury trial must be made personally, and the court must engage in an on-the-record colloquy with the defendant establishing that the waiver is made knowingly, voluntarily and intelligently. ***State v. Anderson***, 2002 WI 7, ¶23, 249 Wis. 2d 586, 638 N.W.2d 301. These requirements apply not only to a complete waiver of the right to a jury trial but also to a defendant's consent to a procedure that diminishes his constitutional right to a jury trial. ***Cooley***, 105 Wis. 2d at 645-46 (consent to proceed with 11 jurors).

In its colloquy with Avery on the morning after Mahler was discharged, the court told Avery that he had "the right to require a jury of 12 and the right to request a mistrial if the juror is excused." (329:8). But neither the court nor his attorneys advised Avery that substitution of the alternate was an option not permitted by law. The record is undisputed that Strang and Buting believed substituting the alternate was legally permissible, and, with that belief, they steered Avery to that option and away from a mistrial. They had not researched the statutory changes since ***Lehman***. As Buting put it, they "presented the wrong set of options to Mr. Avery." (362:244).

The record establishes that Avery's consent to substitution in lieu of a mistrial was not an "intentional relinquishment … of a known right or privilege." ***Anderson***, 249 Wis. 2d 586, ¶23. When Avery agreed to substitute the alternate and forego a mistrial, he did not understand that substitution was an impermissible option.

In addition, Avery's consent was not voluntary because it was obtained after the deliberating juror was removed. By that point, he had already lost what the constitution guarantees, that is, the right to a unanimous verdict by the 12 impartial jurors who were selected to determine his guilt or innocence.

In sum, ***Lehman*** held it is reversible error for a circuit court to substitute an alternate juror for a regular juror after deliberations have begun, absent express statutory authority or the defendant's consent. Since ***Lehman***, the legislature has expressly forbidden juror substitution during deliberations in criminal cases and, accordingly, the defendant cannot consent to substitution. Consequently, Avery's consent was invalid as a matter of law. In the alternative, Avery's consent was

invalid because it was not knowing, voluntary and intelligent. Either way, Avery did not validly consent to substitution of the additional juror in lieu of a mistrial, and, consequently, the supreme court's rule of automatic reversal applies.

D. If Avery's claims challenging the juror's discharge and substitution of the alternate were waived, which he disputes, he is still entitled to relief under the doctrines of plain error, in the interest of justice or ineffective assistance of counsel.

Each error was the product of the first, to which the state also voiced no objection, which was the failure to question Mahler on the record and in the presence of the defendant and all counsel. As argued above, Avery did not waive his right to be present with counsel during the court's *voir dire* of Mahler. Because that unwaived error was the catalyst for every other error – Mahler's removal without cause and substitution of an alternate who should have been discharged – the waiver doctrine is a poor fit for any of Avery's claims. Indeed, the circuit court agreed Avery could directly challenge the propriety of the court's actions. (370:55; App. 157).

If, however, the claims are deemed waived, they must nevertheless be reached, and Avery's convictions reversed, because the errors constitute plain error, relief is warranted in the interest of justice, or Avery was denied effective assistance of counsel.

1. Plain error and interest of justice.

Some errors, such as occurred here, are so plain and fundamental that the court should grant a new trial despite the defendant's failure to timely object to the error. ***State v.***

***Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. The removal of a deliberating juror without cause and substitution of an alternate who should have been discharged are errors so fundamental and disruptive of a defendant's constitutional rights that a new trial is warranted as plain error or by the court invoking its authority to grant a new trial in the interest of justice under Wis. Stat. § 752.35.

Under the plain error doctrine in Wis. Stat. § 901.03(4), a conviction may be vacated when an unobjected to error is fundamental, obvious and substantial. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "'[W]here a basic constitutional right has not been extended to the accused,' the plain error doctrine should be utilized." ***Id***., *quoting* ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984).

In ***Essex***, 734 F.2d at 843-45, the court held that the district court's removal of a deliberating juror without cause was plain error requiring reversal of the defendant's conviction. "The obvious and substantial right of appellant that was denied is her right to a *unanimous* verdict by the *jury of 12* who heard her case and began their deliberations." ***Id***. at 844 (emphasis in original). Moreover, no further prejudice need be shown than the fact that the district court removed the deliberating juror without cause, thereby denying the defendant her constitutional right to a unanimous verdict by the 12 jurors to whom the case was submitted. ***Id***. at 845. While that case then proceeded with 11 jurors, Avery was in no better position. He, too, was left with only 11 deliberating jurors, and the "cure" of substituting an alternate was unlawful.

Similarly, substitution of the alternate juror during deliberations was plain error. The New Jersey Supreme

Court applied plain error to reverse the defendant's convictions even though the defendant at trial specifically sought removal of the juror and substitution of an alternate after the jury had returned with partial verdicts. ***State v. Corsaro***, 526 A.2d 1046, 1052 (N.J. 1987). The court's reasoning is equally applicable here.

> In light of the centrality of jury deliberations to our criminal justice system, errors that could upset or alter the sensitive process of jury deliberations, such as improper juror substitution, "trench directly upon the proper discharge of the judicial function"; for this reason such errors are "cognizable on appeal as plain error notwithstanding their having been precipitated by a defendant at the trial level."

***Id***. at 1051 (citation omitted). As argued above, the court had no authority to substitute the alternate juror once deliberations had begun, and the supreme court's rule of automatic reversal applies. Particularly given the fundamental jury trial rights at stake, reversal of Avery's convictions under the doctrine of plain error is warranted.

In the alternative, the court should use its discretionary reversal authority under § 752.35 because the errors prevented the real controversy from being fully and fairly tried. The court has broad discretion to order a new trial where the controversy was not fully or fairly tried, "regardless of the type of error involved" and without any showing as to the likelihood of a different result on retrial. ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991). The real controversy was not fully and fairly tried because the errors affected "the very essential duty of having the jury deliberate upon the evidence and agree upon a verdict respecting the defendant's guilt or innocence …" ***Jennings***, 134 Wis. at 309. The errors deprived Avery of

his right to a unanimous verdict from an impartial jury of 12 persons to whom the case was submitted. The controversy was not fully and fairly tried because of the disruption to perhaps the most critical phase of the trial, the jury's deliberation.

2. Ineffective assistance of counsel.

Avery was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Trawitzki***, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801. Whether counsel was ineffective is a mixed question of law and fact. ***State v. Guerard***, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. The circuit court's factual findings will not be disturbed unless clearly erroneous, but the ultimate issues of whether counsel's performance was deficient and prejudicial are reviewed independently. ***Id***.

a. Deficient performance.

Counsel performed deficiently by: (1) authorizing the court to conduct a private *voir dire* of Mahler without counsel and Avery present, despite case law clearly granting Avery the right to be present and assisted by counsel; (2) authorizing the court to discharge Mahler if, in its private *voir dire*, the court verified the information provided by Sheriff Pagel, even though the case law shows that the information the court obtained from the sheriff did not constitute cause for removing a deliberating juror; and (3) entering into a stipulation allowing the court to substitute an alternate juror after Mahler was removed, a procedure that is not permitted by statute.

An attorney's performance is deficient if it falls below an objective standard of reasonableness. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Counsel's performance was objectively unreasonable because all three decisions were contrary to governing law. ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305 (failure to understand and apply relevant statute was deficient as a matter of law). Nor could the decisions be deemed reasonable strategic choices. To be reasonable, counsel's strategic decision must be based upon knowledge of all facts and law that may be available. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Each decision – to forego an on-the-record *voir dire*, to agree to Mahler's discharge, to substitute an alternate in lieu of a mistrial – was made either without full knowledge of the available facts or without a correct understanding of the governing law.

The first two deficiencies – agreeing to have the court speak with and remove a deliberating juror – were factually ill-informed. After all, the very purpose of an on-the-record *voir dire* would have been to obtain facts necessary to determine why Mahler was seeking to be discharged and, in light of the facts gathered, whether removal of that juror was in Avery's interest.

Based upon their conversation with Judge Willis, both attorneys were left with the impression that the situation with Mahler was urgent and serious, a crisis. But their impression was based upon incomplete facts and false assumptions. Strang believed whether the stepdaughter or others were injured was still unknown. The court's memo states it had received "no information about any injuries" when the court spoke with the attorneys, implying that, indeed, there were no injuries. Buting thought Mahler's wife had called the motel to report an emergency. She had not. Buting thought the

stepdaughter's car was totaled. It wasn't, and although Pagel may have made that statement, the judge's memo does not say Mahler told the judge the car was totaled. The misperceptions are not surprising to anyone who has ever played the child's "telephone" game, where information is passed from one person to another, its meaning changing with each telling. In part to avoid such miscommunications, the law contemplates that the defendant and attorneys be present when a juror who is seeking discharge is questioned. The attorneys knew the information conveyed to them from the court was, at best, secondhand, which should have prompted them to want to hear the information firsthand.

Of course, it is impossible to know exactly what would have been elicited had Mahler been questioned in the presence of Avery and his attorneys. At a minimum, the questioning would likely have revealed the following: Mahler's wife had not called to report an emergency; when Mahler called his wife to "check in," mention of an accident was not immediate but only after other conversation; and Mahler had no details about the supposed accident. Those facts would have suggested that whatever happened with the stepdaughter was not a crisis, which was the truth.

The questioning would most certainly have revealed that Sheriff Pagel had spoken with Mahler and, in fact, was the conduit between Mahler and the judge. Any hint of Pagel's involvement would have produced an objection from Buting and perhaps a motion for mistrial. Instead, Buting agreed to Mahler's removal without any knowledge of Pagel's involvement.

The questioning may also have revealed, consistent with Mahler's postconviction testimony, that his distress was due, in part, to the deliberative process and, particularly, to

comments by other jurors, even a perceived threat by one, who held a view of the evidence that differed from Mahler's. That information would have sent a red flag that his removal was not only improper but contrary to Avery's interests. It would have confirmed what Avery and his attorneys suspected, that Mahler was a favorable juror.

While Buting did not know Avery and his attorneys had a right to be present when Mahler was questioned, Strang believed an objection would have prompted the judge to simply let Mahler go without even speaking with him. However, Strang's belief was never tested because he raised absolutely no question or concern in the conference with the judge. According to the attorneys' recollection, the judge had allowed them time to converse and get back to the judge before deciding how to proceed, suggesting some willingness to accommodate their requests. Moreover, agreeing to have the court not only speak with Mahler but to also discharge him if the information was "verified" was of little value because it left defense counsel in the dark and out of the loop. The agreement did not call for the judge to report back to the attorneys before discharging Mahler. The agreement did not contemplate the court making a record of his conversation with Mahler. Indeed, the attorneys did not know what Mahler told the court until after he was let go, and even that was secondhand.

Counsel's decision, and advice to Avery, to forego a mistrial and substitute the alternate fares no better, because it was based on a mistaken understanding of the law. Both attorneys believed substituting the alternate was legally permissible. Neither had checked the current statute governing alternates in criminal cases, nor the statutory changes since ***Lehman***. Both attorneys testified that if the options available under the law had been a mistrial or

proceeding with 11 jurors, they would have recommended a mistrial. They also believed Avery would have taken a mistrial had they recommended it.

b. Prejudice.

In some instances, prejudice is presumed once deficient performance is established. ***State v. Smith***, 207 Wis. 2d 258, 278, 558 N.W.2d 379 (1997) (prejudice presumed where attorney failed to object to prosecutor's breach of the plea agreement); *see also* ***State v. Behnke***, 155 Wis. 2d 796, 806-07, 456 N.W.2d 610 (1990) (prejudice presumed where counsel absent from reading of verdict); ***State v. Johnson***, 133 Wis. 2d 207, 223-24, 395 N.W.2d 176 (1986) (prejudice presumed where counsel failed to raise issue of client's competency). Part of the rationale behind presuming prejudice is the difficulty measuring the harm caused by the error or ineffective assistance. ***Smith***, 207 Wis. 2d at 280.

As argued above, removal of a deliberating juror without cause has repercussions which are necessarily unquantifiable and indeterminate. ***Curbelo***, 343 F.3d at 281. That error, along with the erroneous substitution of an alternate, taints the process by which guilt was determined. The errors inherently cast doubt on the reliability of the proceeding. Accordingly, Avery is not required to prove actual prejudice. ***Id***. at 285; ***Essex***, 734 F.2d at 845 ("In cases involving secret jury deliberations it is virtually impossible for a defendant to demonstrate actual prejudice."); *see also* ***Owens v. United States***, 483 F.3d 48, 66 (1st Cir. 2007) (prejudice presumed where counsel failed to object to closure of jury selection because denial of right to a public trial is structural error).

In the alternative, if prejudice is not presumed, Avery is still entitled to relief because the errors undermine confidence in the reliability of the proceedings. The prejudice test in an ineffective assistance claim focuses not on the outcome of the trial but on the reliability of the proceedings. ***Love***, 284 Wis. 2d 111, ¶30.

The precise impact of the improper tinkering with the jury during deliberations can never really be known. But what is known is that the court had no authority to remove Mahler because, in fact, no cause existed to remove him. And his removal significantly altered the jury's makeup in that a juror whose preliminary vote was not guilty was erroneously let go. In addition, Avery gave up his right to a mistrial based on incorrect legal advice. As a result, Avery's fate rested upon disrupted deliberations during which a juror who by law should have been discharged was swapped for a juror who by law should not have been discharged. Confidence in the reliability of the proceedings is undermined.

## CONCLUSION

Mr. Avery respectfully requests that the court reverse the judgments of conviction and the order denying postconviction relief, and remand for a new trial

Dated this 21st day of June, 2010.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form requirement of Rule 809.19(8)(b) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 29,117 words. A motion seeking permission to file a brief of this length is filed with this brief.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 21st day of June, 2010.

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# CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of June, 2010.

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