STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY
BRANCH 1

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF WIS. STAT. § 809.30(2)(h) POSTCONVICTION MOTION

PART I: "THE JURY ISSUE"

STATEMENT OF FACTS

After nearly five weeks of trial, the jury began deliberations on March 15, 2007. At that point, the jurors had been sequestered just one day. (Trans. of March 14, 2007, p. 226). When the case was submitted to the jury, the court retained the remaining alternate, Nancy Steinmetz, and ordered her sequestered separate from the deliberating jurors. (Trans. of March 15, 2007, pp. 122-23).

Richard Mahler was one of the 12 jurors to whom the case was submitted. He had never before served on a jury. (Trans. of September 28, 2009, p. 9; hereafter "PC Trans."). 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).

Mahler entered deliberations planning to make a decision after an examination of all of the evidence. (*Id.* at 18). Accordingly, in a preliminary vote taken during the first day of deliberations, Mahler voted not guilty. (*Id.*). He

became frustrated, however, by comments from three jurors that suggested an unwillingness to look at all the evidence. (*Id.* at 36). In particular, Mahler was disturbed by Juror Carl Wardman's comment, made at the outset of deliberations, that "he's fucking guilty." (*Id.* at 18, 36). Due to the jurors' comments and the attitude those comments seemed to convey, Mahler left deliberations that day feeling angry, hopeless and frustrated. (*Id.* at 67).

Mahler's mood worsened during dinner, where he was seated next to Wardman. Without identifying Wardman as a source of his frustration, Mahler commented to Wardman that he was frustrated with the deliberations. (*Id.* at 16, 34). In a sarcastic tone, Wardman responded, "If you can't handle it, why don't you tell them and just leave." (*Id.* at 16). Given Wardman's demeanor and tone of voice and his comment during deliberations, Mahler felt verbally threatened and upset. (*Id.* at 17, 41-42).

After dinner the jurors were taken back to the motel and Mahler retreated to his private room. (*Id.* at 19). Subsequently, he joined other jurors in a common area, where he noticed several calling home using the bailiff's cell phone. (*Id.* at 20, 43-44). Mahler thought he, too, would "check in" with his wife of 13 years. (*Id.* at 9, 21). When he decided to call home, Mahler had no information about a family emergency. (*Id.*). There was no indication his wife was trying to reach him.

Mahler conversed with his wife while the bailiff stood nearby. (*Id.* at 44). He told her he was doing okay. (*Id.* at 22). Mahler did not recount the exchange with Wardman or the jurors' comments that had upset him because, based upon the court's instructions, he believed it would have been improper to talk about the deliberations with anyone, including his wife or a bailiff. (*Id.* at 69-70). At some point during their five-minute conversation, his wife mentioned that his stepdaughter had been in an accident. (*Id.* at 21-22, 48). She did not say that the

stepdaughter was hospitalized or injured in any way. (*Id.* at 21-22). His wife did not say the car was totaled. (*Id.* at 46). Mahler thought his wife sounded upset, but he did not know why. (*Id.* at 23). His wife did not tell him he needed to come home. (*Id.*). At the end of the conversation, Mahler handed the phone back to the bailiff without saying anything and returned to his room. (*Id.* at 49).

Mahler sat in his room for a while. He was worried because he was uncertain about what was happening at home, and he was frustrated and upset about the deliberations and the exchange with Wardman. (*Id.* at 23-24, 50-51). Mahler told a state patrolman stationed outside his door that he needed to speak with a bailiff. (*Id.* at 24). When the bailiff arrived, Mahler told him there was a family emergency he had to deal with at home. (*Id.* at 24-25, 53-54). The bailiff said he would get Sheriff Pagel.

Shortly thereafter, Sheriff Pagel arrived and, perhaps accompanied by the bailiff, came into Mahler's motel room and spoke with him. (*Id.* at 25). Mahler told Pagel he had a family emergency, specifically, that his stepdaughter had been in an accident. (*Id.* at 26, 54-55). Mahler himself was upset, and he may have told Pagel that his wife was upset about the accident. (*Id.* at 55-56). Sheriff Pagel told Mahler he would contact the judge and left. (*Id.* at 57). When Pagel returned, he called Judge Willis on a cell phone, had a very brief conversation and then put Mahler on the phone with the judge. (*Id.* at 58).

According to a memo prepared by Judge Willis the next day, on March 16, 2007, the judge received a call from Sheriff Pagel at about 9 p.m. (PC Hearing Exhibit 1, p. 1). Pagel reported to the judge that Mahler said his stepdaughter had been in an accident and had totaled her vehicle. Mahler testified at the postconviction hearing he had no recollection of telling the sheriff that the car was totaled. (PC Trans. at 26, 55).

As reported in the memo, Sheriff Pagel told the judge that Mahler said his wife was upset not only about the accident but also about the amount of time Mahler had been away from his family because of the trial. (Ex. 1, p. 1). Pagel said Mahler had referred back to his wife's earlier embarrassment about a press report indicating he was living off her trust fund. Recounting the information from Pagel, the memo notes there was "a suggestion" that Mahler and his wife were having marital difficulties before trial and that Mahler "felt it was vital for his marriage that he be excused." (*Id.*). According to Mahler's recollection, he did not tell Pagel he was having marital difficulties or that his wife was upset about the amount of time he had been away. (PC Trans. at 56). Mahler testified that he and his wife were not having marital problems either before his jury service began or five weeks later when the jury was sequestered and began deliberations. (*Id.* at 10, 12-13). His wife remained supportive of his jury service. (*Id.* at 13).

After speaking with Sheriff Pagel, Judge Willis conducted a conference call with the district attorney and the attorneys for Steven Avery, Dean Strang and Jerry Buting. (Ex. 1, p. 1). When the judge's call came in, Strang and Buting were enjoying a drink at dinner following an exhausting five weeks of trial with closing arguments just completed that day. (PC Trans. at 80-82, 194). At the postconviction hearing, Strang and Buting testified that in the phone conference the situation with Juror Mahler was presented to them as urgent and serious, a crisis. (*Id.* at 84-84, 195). Strang recalled being told that the 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 may have been told the car was totaled. (*Id.* at 196). His impression was that the wife had called and, because there was an emergency, was permitted to speak with her husband. (*Id.* at 204). 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).

The attorneys agreed that the judge should speak with Mahler and excuse him if the information provided to the court was verified. (Ex. 1, p. 1; PC Trans. at 85, 198). When the attorneys agreed to this procedure, Buting, who in 28 years as a criminal defense lawyer had never encountered a situation like this, did not consider whether Avery and his attorneys had a right to be present when the juror was questioned. (PC Trans. at 201). Strang testified that he knew Avery and counsel had a right to be present but believed the "best that was going to happen" was for the judge to speak with Mahler. (*Id.* at 85). He believed an objection might prompt the judge to simply let the juror go based upon the information conveyed. (*Id.* at 90-91). Both attorneys testified that they had no strategic reason to try to get Mahler off the jury. (*Id.* at 88, 200).

The attorneys understood, when they agreed to Mahler's questioning and removal, that the information conveyed to them from the judge was at best second-hand. (*Id.* at 182). However, they did not know that Sheriff Pagel was the conduit between Mahler and the judge. (*Id.* at 92, 138, 204). Strang knew the information came from the sheriff's department but did not remember it being attributed to Sheriff Pagel. (*Id.* at 92, 138). 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). Moreover, when he agreed to have the judge speak with Mahler, he never expected that Pagel would be involved in that communication. (*Id.*). Buting viewed Pagel as far from a disinterested person, given he was the supervisor of several law enforcement officers who testified for the state, who, in Buting's opinion, should have had no contact with any of the jurors. (*Id.* at 205-07).

After speaking with the attorneys, Judge Willis called Sheriff Pagel who at that time was in the motel parking lot. (Ex. 1, p. 2). A short time later, Pagel called the judge back and handed the phone to Mahler. (*Id.*). Sheriff Pagel was in Mahler's motel room, standing a couple feet away but close enough to overhear the conversation, as Mahler spoke with the judge. (*Id.*).

According to the judge's memo, Mahler confirmed the information that had been conveyed. (Ex. 1, p. 2). The memo states that Mahler said he and his wife were having marital problems before the trial and the trial was putting extra strain on the relationship. "Things apparently boiled over when his stepdaughter was involved in a vehicle accident this evening and he was not there to provide support." (*Id.*). According to the memo, Mahler made reference to his wife's earlier upset about the press report of a trust fund. The court's "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." (*Id.*). At that point the court excused Mahler. Sheriff Pagel offered to have Mahler transported to his vehicle. (*Id.*).

At the postconviction hearing, 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, the comments made by jurors during deliberations, followed by what Mahler perceived to be Juror Wardman's threatening statement at dinner. (*Id.*). In what Mahler described as approximately a two-minute phone conversation, Mahler did not tell the judge he was troubled by the deliberations. (*Id.* at 27, 29). Instead, he told the judge there was a family emergency, and he needed to go home. (*Id.* at 28).

According to Mahler's testimony, 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 told the judge his wife was upset about

the accident. (*Id.* at 59). He had no recollection of telling the judge that 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 was upset, he did not believe she would divorce him if he did not come home that night. (*Id.* at 23). As to his wife's upset some five weeks earlier about a press report, Mahler had told the court three days before, in the presence of Avery and his attorneys, 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." (Trans. of March 12, 2007, pp. 32-33). When the judge spoke with Mahler on March 15, 2007, he had spent just one night away from his home and family due to the trial. (PC Trans. at 11-12). Although Mahler was upset by the uncertainty of what was happening at home, he believed the situation could have been clarified through some follow up with his family, which did not occur. (*Id.* at 74). Instead, he was let go.

When Mahler arrived home, he learned there was no accident. His stepdaughter had car trouble. (*Id.* at 29). Within a few hours, Mahler felt angry with himself for having gotten off the jury. As Mahler testified, "I felt like I left [sic] myself down and all the parties involved." (*Id.*).

The next morning, Judge Willis and the attorneys met in chambers. The night before, after learning Mahler was excused, Strang found ***Lehman***,[1] which was then discussed at the in-chambers conference. (*Id.* at 95). In light of Mahler's removal, 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. (Trans. of March 16, 2007, p. 5; PC Trans. at 96-97, 209). Avery's attorneys had not researched whether there

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

had been any changes to the statutes governing alternate jurors following the supreme court's decision in ***Lehman***. (PC Trans. at 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 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 that 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).

Believing that substituting in the alternate was legally permissible, Buting and Strang steered Avery to that option and away from a mistrial, in part, because they would not continue to represent him at a retrial. (*Id.* at 101-02, 157-58, 212-13, 235-36). Although given the economic realities Buting viewed the two options akin to a Hobson's choice (*id.* at 212), the retainer agreement did not require counsel to represent Avery at a retrial, the flat fee paid for representation had long been exhausted, and Avery had no additional funds to put toward his legal representation. (*Id.* at 77-78). They also thought the case had gone in about as well as it could have. (*Id.* at 158, 236-37). In his 21 years as a criminal defense attorney, this was the first time Strang had ever told a client to turn down a

mistrial. (*Id.* at 162). Buting agreed it was unusual to decline a mistrial, but the "calculus" was different here because they would no longer represent him. (*Id.* at 236).

Now aware of the statutory changes since ***Lehman***, Buting testified they had "presented the wrong set of options to Mr. Avery." (*Id.* at 244). Their recommendation to substitute in the alternate was based upon a mistaken understanding of the law. (*Id.* at 249). If Buting had been aware that substituting the alternate was not permitted by statute, he would have recommended a mistrial. (*Id.* at 250). According to Strang, had they recommended a mistrial, Avery would have chosen a mistrial. (*Id.* at 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. (Trans. of March 16, 2007, pp. 7-8). The court informed the remaining jurors that because one of its members had been excused due to "an unforeseen family emergency," Steinmetz 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.

SUMMARY OF ARGUMENT

The removal of a deliberating juror implicates fundamental constitutional rights, specifically, the right to a fair and impartial jury, and the right to a unanimous verdict by a jury of 12 persons. It is well settled that the right to a fair and impartial jury entitles a defendant in a criminal case to have his trial completed by a particular tribunal, the one selected to determine his guilt or innocence. ***Peek v. Kemp***, 784 F.2d 1479, 1484 (11th Cir. 1986). At times, that right must be

subordinated to the public's interest in fair trials designed to end in jury verdicts. ***Id.***, *citing* ***Wade v. Hunter***, 336 U.S. 684, 689 (1949). Accordingly, in some instances, 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).

Here, the court discharged a deliberating juror without an on-the-record *voir dire*, without Avery and counsel present, and without a record establishing cause for the juror's removal. In addition, evidence at the postconviction hearing established that, in fact, there was no cause for the juror's removal and the process was further tainted by the involvement of Sheriff Pagel, an unsworn and interested party to the litigation who should have had no communication with any juror, much less with a deliberating juror asking to go home. Moveover, the "remedy" selected by the parties after the juror's removal – substituting in the alternate – is not permitted under Wisconsin law. These errors violated Avery's constitutional and statutory rights to a unanimous verdict by 12 impartial jurors to whom the case was submitted.

None of these errors should be deemed waived because each flowed from the first error, which was the failure to conduct a *voir dire* of Juror Richard Mahler 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 any of these errors were found waived, Avery is still entitled to relief under any of three theories: plain error, interest of justice or ineffective assistance of counsel.

I. AVERY'S RIGHTS WERE VIOLATED WHEN THE COURT DISCHARGED A DELIBERATING JUROR WITHOUT FOLLOWING THE MANDATED PROCEDURES AND WITHOUT A RECORD ESTABLISHING CAUSE FOR HIS REMOVAL.

A. Avery had a right to be present with counsel during the court's questioning of Juror Mahler.

In ***Lehman***, the supreme court set forth the procedure a court must follow when a juror seeks to be excused either before or after deliberations have begun. ***Lehman***, 108 Wis. 2d at 300. The court has a duty "to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror." ***Id.*** Significantly, the inquiry should be made "in the presence of all counsel and the defendant." ***Id.*** That did not occur here. With the attorneys' agreement, the court spoke to Juror Mahler outside the presence of Avery and any counsel. The only other person present, who could have heard Mahler's end of the conversation, was Sheriff Pagel.

The court's communication with a 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).

Avery had a constitutional and statutory right to be present and assisted by counsel when the court conducted a *voir dire* of a deliberating juror who, according to information from the sheriff, was seeking to be excused. To satisfy constitutional and statutory guarantees, as well as the requirements of ***Lehman***, the court's communication with Mahler should have occurred in the presence of Avery and his counsel, as well as counsel for the state, and should have been 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."). The court's off-the-record, private communication with Mahler violated not only ***Lehman*** but also constitutional and statutory guarantees.

B. Avery's right to be present and assisted by counsel could not be waived by his attorneys.

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***, 2006 WI 77, ¶73. His attorneys' agreement that the court *voir dire* Mahler in their absence could not waive Avery's right to have counsel present. 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***, 2006 WI 77, ¶¶63-64; *see also* ***Tulley***, 2001 WI App 236, ¶6 (the right to be present during *voir dire* "cannot be waived"); ***State v. Harris***, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999). 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 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 without counsel being aware of Sheriff Pagel's involvement, as well as 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. Consequently, because each subsequent error flowed from the first error, which the record establishes Avery did not personally and knowingly waive, the court should conclude that none of the errors connected to Mahler's removal were waived.

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

Although the supreme court warned courts to "approach the issue with extreme caution", a circuit court has discretion to discharge a deliberating juror for "cause". ***Lehman***, 108 Wis. 2d at 300. But a court has no authority 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 1484, *quoting* ***Green v. Zant***, 715 F.2d 551, 555 (11th Cir. 1983). While a court may dismiss an ill or otherwise incapacitated juror, it has "no discretion whatever to dismiss such a juror who is not in fact ill or otherwise incapacitated." ***Green***, 715 F.2d at 556. 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.

Excusing Juror 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, and his right to a unanimous verdict by a 12-person jury guaranteed by Article I, § 7 of the Wisconsin Constitution and Wis. Stat. § 756.06(2)(a). 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 guarantee, specifically, his right to a unanimous verdict by the 12 impartial jurors to whom the case was submitted.

Because there was no on-the-record *voir dire* of Mahler, the only record made of the court's reasons for discharging Mahler is the memo prepared the following day.[2] 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

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[2] Although the court referred to its conversation with Mahler at a hearing the next day, the court did not provide details other than to say that the court had received information from the sheriff that a juror had an unforeseen family emergency and the court verified that information with the juror. (Trans. of March 16, 2007, pp. 4-5).

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 her car had been totaled, the court had no information that the stepdaughter was hospitalized or injured in any way. Indeed, the memo noted that the court "received no information about any injuries." (Ex. 1, p. 1). 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); ***United States v. Doherty***, 867 F.2d 47, 71 (1st Cir. 1989) (cause existed to excuse juror who was extremely upset because ex-wife had died leaving him with two small children). Here, the court had no such information. While some car accidents produce injuries, others are mere fender-benders. There is no indication the court even asked Mahler about injuries or property damage or even whether, as the sheriff apparently claimed, the car had been totaled.

According to the memo, Mahler told the court he had been having marriage problems and the trial was putting extra strain on their marriage. However, the court also knew the jurors had spent just one night away from home due to the trial. Again according to the memo, Mahler referred to his wife being upset by a media report about her trust fund. But the court also knew that Mahler had told the court only three days before that his wife's upset, which had occurred five weeks earlier during jury selection, had no impact on his ability to continue to serve on the jury. (Trans. of March 12, 2007, pp. 32-33).

While Mahler may have sounded depressed and spoke quietly and slowly, the court could not assess his facial expressions or body language because the communication occurred by telephone. The court's "reading" was that Mahler felt that the future of his marriage was at stake if he was not excused, but the court

came to that conclusion "without pressing him with questions too specific ...." (Ex. 1, p. 2). The court did not satisfy its "affirmative duty" to make sufficient inquiry into the circumstances to determine whether the juror, in fact, was unable to continue to serve. ***United States v. Araujo***, 62 F.3d 930, 934 (7th Cir. 1995). Although admittedly treading on personal matters, the court had an obligation to press Mahler with specific questions, both about the accident and the state of his marriage. If Mahler was unable to provide answers, further investigation of the situation, perhaps with a call to Mahler's wife, was needed. *See* ***United States v. O'Brien***, 898 F.2d 983, 985-86 (5th Cir. 1990) (cause established where juror's psychiatrist confirmed that juror, who had previously been hospitalized with depression, was in no condition to continue).

Generally, cause has not been found to dismiss a deliberating juror unless the juror is "seriously incapacitated". ***Araujo***, 62 F.3d at 934. Moreover, "if the record does not already make clear the precise nature or likely duration of the juror's inability to serve, the court bears an affirmative duty to inquire further into those circumstances." ***Id.*** When, as here, the further inquiry does not occur and the record fails to establish cause, the court had no authority to remove the juror. *See* ***United States v. Patterson***, 26 F.3d 1127, 1129 (D.C. Cir. 1994) (conviction reversed where judge excused 68-year-old juror who was having chest pains and needed to see a doctor, where judge did not attempt to learn "the precise circumstances or likely duration of the twelfth juror's absence"). A family member's auto accident, without any indication of a medical emergency, and strain on a marriage, without more, are not cause for discharging a juror during deliberations.

D. The court's removal of a deliberating juror without cause 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 held that removal of a juror without a record establishing cause, thereby resulting in the case to proceed with only 11 jurors, is structural error requiring reversal with no further showing of prejudice. ***United States v. Curbelo***, 343 F.3d 273, 285 (4th Cir. 2003) (removal of juror without cause falls into a special category of errors that defy analysis by harmless-error standards); ***Araujo***, 62 F.3d at 937 (convictions reversed where court lacked cause for excusing deliberating juror); ***United States v. Ginyard***, 444 F.3d 648, 655 (D.C. Cir. 2006) (same).

Dismissal of Juror Mahler without cause resulted in Avery losing his right to a jury as contemplated by the federal and state constitutions, that is, a unanimous verdict from an impartial jury of 12 persons to whom the case was submitted. Once Mahler was discharged, only 11 deliberating jurors remained, and Avery's trial would not be completed by the 12 who had been selected to determine his guilt or innocence. Denial of Avery's right to a unanimous verdict from 12 impartial jurors to whom the case was submitted is structural error requiring reversal without inquiry into harmless error.

E. In the alternative, removal of Mahler without a record establishing cause and without following the mandated procedure was prejudicial because, in fact, no cause existed to remove him.

If a showing of prejudice is required, which Avery disputes for the reasons argued above, it is satisfied by evidence establishing that the juror was capable of continuing with deliberations and, therefore, no cause existed in fact for his removal. ***Green***, 715 F.2d at 556-57; ***Green v. Zant***, 738 F.2d 1529, 1532-33 (11th Cir. 1984); ***Peek***, 784 F.2d at 1483-84 (11th Cir. 1986). Evidence at the postconviction hearing established that, in fact, no cause existed for Mahler's removal. Indeed, evidence showed that his removal was particularly improper because some of Mahler's distress stemmed from the deliberative process itself,

including a conflict with a juror who held an opposing view of the evidence. Consequently, Avery was prejudiced by the court's removal of Mahler without following the mandated procedure and without a record establishing cause.

Evidence at the postconviction hearing established there was no family emergency. His stepdaughter had not had a car accident, just car trouble. Mahler was, in fact, frustrated, upset and even distraught when he spoke with the judge. In part, his emotions stemmed from uncertainty about what was happening at home. But his emotions were also attributable to the deliberative process, specifically, to comments made by other jurors in deliberations suggesting a willingness to find Avery guilty without examining all the evidence and to what Mahler construed as a threatening comment by one of those jurors at dinner.

Mahler's anxiety about the uncertainty of matters at home could have been alleviated by further inquiry into the "accident." Moreover, Mahler testified that he and his wife were not having marital problems before trial or when deliberations began, and she had not told him to come home. He did not believe his wife would divorce him if he did not come home that night. The court's perception that "the future of his marriage was at stake if he was not excused" was simply wrong.

Mahler's frustration and distress about the comments of other jurors were certainly not cause for taking him off the jury. Removal of a juror is improper if there is any reasonable possibility that its impetus was a problem among jurors due to their differing views of the merits of the case. ***United States v. Symington***, 195 F.3d 1080, 1087 (9th Cir. 1999). The spectre of jury taint is particularly grave where "the removed juror's incapacitation arises directly from participation in the deliberative process." ***Williams v. State***, 792 So. 2d 1207, 1210 (Fla. 2001). In ***Williams***, the Florida Supreme Court reversed the defendant's murder conviction where a deliberating juror was removed and replaced by an alternate. ***Id.*** at 2011.

Although the trial court had determined the juror's emotional incapacitation was purely personal, the supreme court concluded "it was the juror's previous negative experiences with the criminal justice system, along with the pressures or circumstances of the deliberative process itself, which rendered her presently unable to participate as a juror". ***Id.*** at 1210. The trial court committed reversible error by removing this juror and substituting an alternate. ***Id.*** at 1208.

In ***United States v. Samet***, 207 F. Supp. 2d 269, 281-82 (S.D. N.Y. 2002), the record established that the juror had become "unhinged" by the process of deliberation, in particular, by her status has a hold out. That did not constitute cause to remove the juror under Fed. R. Crim. P. 23(b). ***Id.*** The court's only option was to declare a mistrial. ***Id.*** at 282.

These cases establish that if there is a reasonable possibility that a juror's distress arises from the process of deliberation, including from a conflict among jurors holding differing views of the evidence, the trial court has only two options: send the juror back to continue deliberating or declare a mistrial. ***Symington***, 195 F.3d at 1087. The court does not have cause to discharge the juror and allow deliberations to continue.

Here, evidence at the postconviction hearing established that Mahler's removal stemmed, in part, from his distress over the deliberative process. That distress arose from comments by jurors who seemingly held a view of the evidence and, in fact, a view of Avery's guilt or innocence, that was contrary to Mahler's. The court had no authority to discharge Mahler. Rather, following an on-the-record *voir dire* with Avery and counsel present, the court should have reminded Mahler that "holding to [his] convictions is an essential part of [his] duty as a juror ...." ***Samet***, 207 F. Supp. at 275 n.3. The only other option was to declare a mistrial.

Because, in fact, there was no cause to remove Juror Mahler during deliberations, Avery's fundamental rights were violated and his convictions must be vacated.

II. SHERIFF PAGEL'S PRIVATE COMMUNICATION WITH A DELIBERATING JUROR CONSTITUTED ERROR AND REQUIRES REVERSAL OF AVERY'S CONVICTIONS.

In addition to the above-described errors relating to the court's removal of Juror Mahler without cause, Sheriff Pagel's involvement in the events leading up to Mahler's removal also constitute error warranting reversal of Avery's convictions. Mahler's removal was facilitated by Sheriff Pagel, an interested party to the litigation who was not an officer charged with protecting the jury's sequestration. Sheriff Pagel should have had no contact with any of the sequestered jurors, and he certainly should not have assisted in a juror's removal during deliberations.

After the first day of deliberations, when Mahler told a bailiff he had a family emergency and needed to go home, Sheriff Pagel was called in to respond to the juror's request. Pagel entered Mahler's private motel room and spoke with Mahler. Pagel left the room, telling Mahler he would call the judge. In fact, the judge received a call from Pagel, who related information he said he obtained from Mahler. Eventually, Pagel returned to Mahler's room, dialed the judge, handed the phone to Mahler and stood a couple feet away as Mahler spoke with the judge. When the conversation ended, Pagel transported Mahler to his vehicle. Mahler was no longer a juror.

When Pagel spoke with Mahler, the jurors were sequestered. Under Wis. Stat. § 972.12, this meant that the jurors were to be kept together and communications prevented "between the jurors and others." Wisconsin Statute § 756.08(2) further explains the duty to protect jurors from communications with "outsiders" during its deliberations:

> When the issues have been submitted to the jury, a proper officer, subject to the direction of the court, shall swear or affirm that the officer will keep all jurors together in some private and convenient place until they have agreed on and rendered their verdict, are permitted to separate or are discharged by the court. While the jurors are under the supervision of the officer, he or she may not permit them to communicate with any person regarding their deliberations or the verdict that they have agreed upon, except as authorized by the court.

Even though the jurors were sequestered, the bailiff with whom Mahler spoke that night contacted Sheriff Pagel instead of contacting Judge Willis directly. Sheriff Pagel's involvement in Mahler's removal as a juror was error.

The United States Supreme Court has emphasized the importance of protecting jurors from other persons during their deliberations. In 1892, the Court wrote that:

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. United States, 146 U.S. 140, 150 (1892). The Court reaffirmed ***Mattox*** in ***Remmer v. United States***, 347 U.S. 227 (1954), plainly stating that it is improper for any person to communicate with a juror if that communication is not made pursuant to order of the court. Further, any such communication is "presumptively prejudicial:"

> In any criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.
>
> ***Id.*** at 229.

Wisconsin courts have recognized the importance of preserving the jury's independence from outside influences, particularly during its deliberations. For example, in ***State v. Yang***, 196 Wis. 2d 359, 538 N.W.2d 817 (Ct. App. 1995), the court disapproved of allowing a law enforcement witness to act as an officer in charge of the jurors. The court stated that a trial court "should not permit an officer to serve as a bailiff who has investigated the underlying crime in a case." ***Id.*** at fn. 1. The court continued: "Once a bailiff is sworn, it is imperative that he or she be the only officer having contact with the jurors until the jury has reached a verdict or is discharged by the court." ***Id.***

While recognizing the holdings in ***Mattox*** and ***Remmer***, Wisconsin courts have nevertheless departed from Supreme Court precedent in that Wisconsin courts have required the defendant to show prejudice. That is, while the Supreme Court presumes prejudice when there is contact from an outsider with a juror, Wisconsin courts have required the defendant to show prejudice. Thus, in ***State v. Dix***, 86 Wis. 2d 474, 273 N.W.2d 250 (1979), the court relied on the Supreme Court's language in ***Remmer*** regarding the impropriety of private communications with a juror, but stated that the defendant must show probable prejudice before a new trial will be ordered. ***Id.*** at 490-491. In ***Dix***, the trial judge had spoken with a juror (whom the judge did not recognize to be a juror) about a mutual acquaintance. Further, the bailiffs were said to have made improper comments to some jurors. The court concluded that the contacts were improper, but that there was no showing of probable prejudice to the defendant.

Avery contends that Sheriff Pagel's private communication with Mahler constituted the type of improper communication condemned in ***Remmer*** and ***Mattox***. Sheriff Pagel was not a deputy sworn to keep the jury sequestered. Indeed, it would have been improper for Sheriff Pagel to act as such an officer because he was an interested party in this case. He supervised officers who were

investigators in the case, and his department was supposed to be the chief county-level investigative law enforcement agency in the case. Members of his agency were witnesses for the prosecution. As in ***Yang***, Sheriff Pagel should have had no contact with jurors given his alignment with the prosecution.

Sheriff Pagel's communication with Mahler falls within the prohibited contact standard articulated in ***Remmer***. His contact with Mahler was private; that is, his contact was outside the presence of the court, at least initially, and was outside the presence of the parties or the defendant. His contact was also "about the matter pending before the jury" because it related to whether a juror would or could continue to deliberate. As discussed above, Mahler's request to be excused from the jury was as much about his frustrations and concerns about the deliberations themselves as it was about any personal problems he was having. And, at least the initial communication between Mahler and Sheriff Pagel was without the knowledge or instruction by the court. Instead, Sheriff Pagel was brought into the proceedings by a deputy charged with keeping the jury free from outside influences.

Avery does not concede that he must show prejudice as seemingly required in ***Dix*** and ***Shelton v. State***, 50 Wis. 2d 43, 183 N.W.2d 87 (1971), because these cases are irreconcilable with ***Remmer*** and ***Mattox***. Under ***Remmer*** and ***Mattox,*** prejudice must be presumed when there is communication between a person and a juror during deliberations. Nevertheless, as shown above, the communications between Mahler and Sheriff Pagel were prejudicial to Avery because they led to a change in the makeup of the jury. This is not a case where a deputy contacts the jury about ordering a meal, for example, without the express authority of the trial judge. Rather, what occurred here was a private communication between a juror and a third person that led to the removal of that juror. Even if Sheriff Pagel did

not explicitly encourage Mahler's removal, his participation in the private communications is inseparable from the juror's ultimate removal.

Although counsel did not object to Sheriff Pagel's role in excusing Mahler, the court should nevertheless reverse Avery's convictions based upon the sheriff's private communication with Mahler because counsel did not have an opportunity to object when it really mattered. That is, Sheriff Pagel spoke to Mahler before the court or any of the attorneys were aware of the contact. Therefore, there was no opportunity for anyone to block the private communication before it happened. Requiring an objection at trial allows the trial judge to avoid or correct an error. ***Vollmer v. Luety***, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990). Here, however, there was no opportunity to avoid or correct an error because once Sheriff Pagel spoke with Mahler without the court's knowledge, Mahler's removal was set in motion.

In addition, when Avery's attorneys agreed that the court should speak with Mahler, they did not know of Sheriff Pagel's involvement. In fact, Attorney Buting testified that he would have objected and probably moved for a mistrial if he had known the information came from Mahler to Pagel to the judge. When he agreed to have the judge speak with Mahler, he never expected that Pagel would be involved in that communication.

As argued above, removal of a deliberating juror without cause is the sort of error that has repercussions which are necessarily unquantifiable and indeterminate. The juror's removal in this case was assisted by the sheriff who was aligned with the prosecution and had not been sworn to assist the court in sequestering the jury. Sheriff Pagel should never have had private contact with Mahler, and his contact ultimately resulted in Mahler's discharge from the jury. Sheriff Pagel's role in the juror's removal was error that warrants reversal of Avery's convictions.

III. 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 and untainted by Sheriff Pagel's involvement, 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.

The legislature responded to ***Lehman*** by repealing § 972.05 and creating language in provisions governing civil and criminal trials that required the discharge of any alternate, or "additional" jurors as they were then labeled, when a case is submitted to the jury. 1983 Wis. Act 226 §§ 1, 5 & 6. Specifically, with respect to criminal trials, the legislature created Wis. Stat. § 972.10(7) as follows:

> 972.10 (7) If additional jurors have been impaneled 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.

1983 Wis. Act 226 § 6.[3] In 1996, the supreme court amended the civil trial provision, Wis. Stat. § 805.08(2), to allow a circuit court to keep additional jurors until the verdict is rendered, so as to allow for replacement of a juror who becomes unable to complete deliberations. SCO 96-08 ¶46. Significantly, while the supreme court made a technical change in the parallel criminal provision, § 972.10(7),[4] it did *not* alter the language requiring the circuit court to discharge any additional jurors at final submission of the cause. *Id.* at ¶59.

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 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);[5] ***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); ***People v. Burnette***, 775 P.2d 583, 586-87 (Colo. 1989) (same).

As a matter of law, Avery could not validly consent to substitution of an additional juror during deliberations. It is well established that the right to a jury trial as guaranteed by Article I, § 7 of the Wisconsin Constitution cannot be

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[3] The legislature rejected a proposed amendment that would have allowed substitution of an alternate if during deliberations a juror died or was discharged. Assembly Amdt. 1 to 1983 SB 320.

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

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

waived without statutory authorization. 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). Indeed, in ***Lehman***, the court discussed how those rights are jeopardized by post-submission substitution, given that 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." ***Lehman***, 108 Wis. 2d at 308. 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. ***Id.*** 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 ...").

Even if as a matter of law a defendant could validly consent to post-submission substitution of an alternate, Avery's consent was invalid because it was not knowing, voluntary and intelligent. A defendant's waiver of his fundamental right to a jury trial as guaranteed by the state and federal constitutions must be made personally by the defendant, 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 right to a jury trial as contemplated by the federal or state constitution. ***Cooley***, 105 Wis. 2d at 645-46 (consent to proceed with 11 jurors).

In its colloquy with Avery on the morning after Mahler had been 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." (Trans. of March 16, 2007, p. 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." (PC Trans. at 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 ***Lehman***, 108 Wis. 2d at 313, the supreme court 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, as argued above, Avery's consent was invalid as a matter of law. In the alternative, as also argued above, 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.

IV. IF AVERY'S CLAIMS CHALLENGING JUROR MAHLER'S REMOVAL 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.

As argued above, each error connected with the removal of the deliberating juror and substitution of the alternate derived from the first error – failure to *voir dire* Mahler in the presence of Avery and his attorneys – which only Avery himself could, but did not, waive. Consequently, each of the preceding claims should be addressed as flowing from the first unwaived error. However, even if the claims are deemed waived, they must nevertheless be reached, and Avery's convictions should be reversed, either because the errors constitute plain error,

relief is warranted in the interest of justice, or Avery was denied effective assistance of counsel.

A. 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 with the participation of the sheriff, as well as 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. § 805.15(1).

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).[6]

In ***United States v. Essex***, 734 F.2d 832, 843-45 (D.C. Cir. 1984), 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

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[6] Some authority suggests that § 901.03(4) is limited to unobjected to evidentiary errors. ***Waukesha Co. Dept. of Social Services v. C.E.W.***, 124 Wis. 2d 47, 55, 368 N.W.2d 47 (1985). However, appellate courts have applied the plain error doctrine to more than evidentiary errors. ***Jorgenson***, 310 Wis. 2d 138, ¶¶29-32 (convictions reversed under § 901.03(4) for errors that include prosecutorial misconduct in closing argument); ***State v. Street***, 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996) (arguably improper closing argument analyzed under plain error doctrine); *see also* ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115 (supreme court "has not articulated a bright-line rule for what constitutes plain error").

(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.

Avery's constitutional right to a jury trial as contemplated by the state and federal constitutions was violated by the removal of Mahler without cause. In addition, Sheriff Pagel's impermissible communication with Mahler and facilitation of his removal further violated Avery's constitutional right to a fair and impartial jury. The errors were not only fundamental, obvious and substantial, the resulting prejudice is inherent and structural so that the state could not meet its burden of proving beyond a reasonable doubt that the errors were harmless.

Similarly, substitution of the alternate juror during deliberations was plain error. In a case also involving the substitution of a juror during deliberations, 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 as plain error notwithstanding their having been precipitated by a defendant at the trial level.'

Id. at 1051, *quoting* ***State v. Harper***, 128 N.J. Super. 270, 278 (App. Div. 1974). 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 § 805.15(1) 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.

B. Ineffective assistance of counsel.

Mr. 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.

1. Deficient performance.

Counsel performed deficiently in three respects: (1) by authorizing the court to conduct a private *voir dire* of a deliberating juror without counsel and Avery present, despite case law clearly granting Avery the right to be present and assisted by counsel; (2) by authorizing the court to discharge Juror 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 and communicated to counsel did not constitute cause for removing a deliberating juror; and (3) by entering into a stipulation, and advising Avery to enter 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 the 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 or tactical choices. To be reasonable, counsel's strategic decision must be based upon knowledge of all facts and all 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 would 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 the whole story, which was that Mahler's 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 merits of the case 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 or at least someone who would come to his own view of the case. The attorneys performed deficiently by giving up their opportunity to find out what was really going on with Mahler, a juror who neither attorney had a strategic reason for wanting off the jury.

While Buting did not know Avery and his attorneys had a right to be present when Mahler was questioned, Strang believed that 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.

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 in 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.

2. 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 deficient in failing 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 deficiently failed to raise issue of client's competency to stand trial). 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 and with the sheriff's improper participation are errors that have repercussions which are necessarily unquantifiable and indeterminate. ***Curbelo***, 343 F.3d at 281. Those errors, along with the erroneous substitution of an alternate, taint 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 now 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 let go due, in part, to distress arising from conflict with other jurors who thought Avery was guilty. In addition, Avery gave up his right to a mistrial based on incorrect legal advice. As a result, Avery's fate rested upon truncated 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.

PART II: "THE DENNY ISSUE"

SUMMARY OF ARGUMENT

This court ruled pretrial that Avery could not present evidence that a person other than Brendan Dassey was responsible for the crimes against Ms. Halbach. Unlike the "jury issue" argued in Part I of this brief, the "***Denny*** Issue" was litigated before the trial court. Nevertheless, Avery asks the court to consider whether it erred when it denied the defense the opportunity to present evidence and to argue that other persons were guilty of these crimes. This court has broad discretion under Wis. Stat. § 805.15(1) to reverse Avery's convictions in the interest of justice when it concludes that the real controversy has not been fully tried. The case law reveals two factually distinct ways in which a court may find that the controversy has not been fully tried: when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue

of the case; and when the jury heard improperly admitted evidence which clouded a crucial issue in the case. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). This case presents the former situation: the jury was erroneously not given an opportunity to hear important testimony that bore on the critical issue in this case, and that is who killed Teresa Halbach. The court erred in its exclusion of evidence of possible alternative perpetrators because ***Denny*** was inapplicable, and even if ***Denny*** did apply, the court erred in barring Avery from presenting third party liability evidence.

As the court will recall, trial counsel were questioned at the postconviction hearing not about the applicability of ***Denny***, which is a legal question, but rather about the effect of this court's ***Denny*** ruling. The testimony, therefore, consisted largely of the attorneys' thinking about how they would have tried Avery's case differently. Even though a defendant need not show the likelihood of a different result when the court finds that the real controversy has not been fully tried, it is helpful for the court to have a picture of the effect of its ruling, and the types of evidence that the jury would have had before it but for the court's ruling. Further, should the question of either prejudice or harmlessness arise, it is helpful for the court to have an idea of the consequences of the court's pretrial ruling.

V. THE COURT'S DENNY RULING DEPRIVED MR. AVERY OF A FAIR TRIAL.

In his postconviction motion to this court, Avery argued that the trial court's "***Denny***" ruling deprived him of a fair trial. That is, the court deprived Avery of a fair trial when it ruled that he could not elicit evidence or argue that anyone other than Brendan Dassey was responsible for Ms. Halbach's death.

Mr. Avery advanced several arguments in support of that claim. He argued that: 1) ***Denny*** is inapplicable to this case because ***Denny*** applies only to those cases where the defendant had no motive to commit the crime but wishes to

present evidence that other possible perpetrators had a motive; 2) ***Denny*** is a state evidentiary rule which, when applied in this case, deprived Mr. Avery of his constitutional rights to present a defense and to cross-examine witnesses against him; 3) ***Denny*** does not apply because the state opened the door to the evidence when its witnesses testified about others who were excluded as possible perpetrators; 4) ***Denny*** does not apply because it was wrongly decided and should be overturned; 5) the court erred when it applied an alternative legitimacy test, and 6) that, if ***Denny*** does apply, the court erred when it found that the defense offer of proof as to Scott Tadych, Charles and Earl Avery and Bobby Dassey was insufficient.

The testimony adduced at the postconviction hearing applies in particular to two of these arguments. First, applying ***Denny's*** state evidentiary rule deprived Mr. Avery of his constitutional rights to present a defense and to cross-examine the witnesses against him. Second, the testimony elicited at the hearing illustrates ***Denny***'s inapplicability because the defense had no intention of presenting a parade of witnesses with animus towards the victim as feared in ***Denny***. Rather, the defense would have tailored their approach to a narrow universe of suspects who had the opportunity and means to kill Ms. Halbach.

Further, the testimony adduced at the postconviction hearing shows just how crucial the trial court's pretrial ruling was. Every decision these attorneys made was informed by the trial court's ruling that they could not point the finger at any suspect other than Brendan Dassey. Even though these attorneys strongly believed that they had to do more than show reasonable doubt to gain an acquittal, and that they had to present the jury with a coherent alternative liability theory for their client to prevail, they were hamstrung in their efforts by the trial court's ***Denny*** ruling.

A. The court's *Denny* ruling violated Mr. Avery's rights to present a defense and to confront witnesses against him.

Mr. Avery's case presents a conflict between a state evidentiary rule, here the so-called ***Denny*** rule, and a defendant's constitutional right to present a defense and to cross-examine the witnesses against him. While the state has latitude to enact evidentiary rules which limit a defendant's right to introduce evidence, the state's limiting rules must yield to the defendant's fundamental right to present a defense.

Both the United States Constitution and the Wisconsin Constitution guarantee a defendant the right to present a defense and to cross-examination. "The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution." ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), citing ***Washington v. Texas***, 388 U.S. 14, 17-19 (1967); ***Pointer v. Texas***, 388 U.S. 400, 403-06 (1965). "The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial." ***Id.***, citing ***Chambers v. Mississippi***, 410 U.S. 284, 294-95 (1973).

As ***Pulizzano*** shows, however, the defendant's right to present evidence is not absolute. ***Pulizzano***, 155 Wis. 2d at 646. A defendant is only entitled to introduce relevant evidence that is not substantially outweighed by its prejudicial effect. Thus, a state may enact an evidentiary rule, such as the rape shield law at issue in ***Pulizzano***, which declares that certain evidence in a criminal case is not relevant as a matter of law.

A state evidentiary rule does not, however, trump the defendant's constitutional rights. Whether a defendant's fundamental trial rights are viewed as rooted in the compulsory process and confrontation rights as discussed in

Pulizzano, or are rooted in the Due Process Clause of the Fourteenth Amendment, "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." ***Holmes v. South Carolina***, 547 U.S. 319, 324 (2006).

In his postconviction motion, Mr. Avery argued that the court erred in denying him the opportunity to introduce evidence of, and to argue that, other third persons may have been responsible for Ms. Halbach's death. The postconviction motion hearing testimony showed how the trial court's pretrial ***Denny*** ruling affected the defense, illustrating how the ruling abridged Mr. Avery's right to present a complete defense and to confront the witnesses against him.

Trial counsel testified that the court's pretrial ***Denny*** ruling affected every trial decision they made, from deciding what tone to take with witnesses, the substance of cross-examination of the state's witnesses, the narrative of both the opening statement and the 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. Some of these listed items pertain to evidence. That is, the trial court's ***Denny*** ruling affected what evidence the defense would seek to present to the jury. Others of these listed items, such as the tone taken with witnesses, pertain to what attorney Strang referred to as part of the "courtroom mosaic" that is considered by juries. (PC Trans. at 175). Though less concrete than the evidence presented, the "courtroom mosaic" is part and parcel of the trial. This is particularly true where, as here, the attorneys representing the defendant are so skilled. The court can be sure that, but for its pretrial ***Denny*** ruling, the defense would have been significantly different, as will be discussed in further detail below.

Both attorneys also testified about an additional and perhaps more intangible concern regarding Avery's defense. Each testified that the case was

unique because of Avery's previous exoneration and the horrific and extensive publicity prior to his trial. Mr. Strang testified, for example, that he and Mr. Buting had reached "an accord deeper than ordinary professional obligation" in the case because "this was Steven Avery we were talking about." (PC Trans. at 108-109). "This was somebody who had spent 18 years in a cage for a crime he didn't commit." (*Id.*). And Buting testified that because of the extensive pretrial publicity surrounding the case, he believed that Avery's case "could not be just a reasonable doubt case, where you would pick apart the State's case and leave all these unanswered questions, that it was my feeling from early on, that we really needed to win this case. We really needed to be able to point the finger at another suspect." (PC Trans. At 218). Attorney Buting compared Avery's case to that of O.J. Simpson, stating that if Avery did not kill Ms. Halbach, the jury would want to know who did kill her. "So we really wanted to show the jury that not only was he not guilty, but here's another person there who could have been guilty, or could be guilty, so that they could have some sort of comfort level in returning a not guilty verdict." (*Id.* at 219).

With the trial court's ruling, unless the defense was prepared to accuse Brendan Dassey, they could not point the finger at any other person who could have been guilty of these crimes. Thus, Strang testified that the trial court's ruling certainly affected his opening statement. He testified that, in his opening statement to a jury, he tries to give the jury a coherent narrative that embraces and advances the theory of the defense. (PC Trans. at 110). Had the court not barred him from arguing the culpability of alternative suspects, Strang testified that the defense would have shaped a defense around the person who probably did commit the crime. He said they would have:

> settled on one or more people as to whom we thought we had the best case, that they had committed the crime. And I would have presented a theory of defense in my opening statement that identified

that person or those persons that stopped short of, and explain to the jury why I was not taking on the burden of persuasion in the end of proof beyond a reasonable doubt.

But the theory of defense would have been shaped around the person we thought probably committed the crime. And I would have had a chance in that opening statement to blunt the thrust of the prosecution argument that I expected, 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.

But unable to point to the person we think did, we were—we were wide open on the flank to that prosecution attack. And I would have shaped—tried to shape an opening statement that took that opportunity for attack away from the State.

(PC Trans. at 111-112).

Attorney Buting testified that he, too, would have tried to develop a theory of defense surrounding another possible suspect who would have been on the Avery Salvage Yard property that would have been more coherent than the narrative presented by the state. After all, while the state had forensic evidence which arguably tied Avery to Ms. Halbach's murder, the state's explanation of what must have happened that day leaves many questions unanswered. For example, the state did not have a logical explanation for why, if Steven Avery killed Ms. Halbach in his trailer or garage, he would have placed her body in the back of her car which was located right outside of his trailer, only to then move her body to a burn barrel the short distance right outside of his trailer, leaving the incriminating evidence in the car. The state did not have an explanation for how Ms. Halbach's bones were found in more than one location. On the other hand, attorney Buting testified that the more likely chain of events was that Ms. Halbach had finished photographing Barb Janda's van, and that as she was leaving the Avery Salvage Yard, one of these other suspects on the property flagged her down,

suggested that she take a picture of another car or truck, and ultimately killed her. (PC Trans. at 227). Had this occurred, there would have been an explanation for why Ms. Halbach would have been placed in the back of her vehicle, and that is that she was murdered away from Avery's trailer, but that her body was moved to the burn barrel right outside of his trailer. This would have explained how it was that the propane truck driver would have seen a vehicle like Ms. Halbach's drive past him away from the Avery Salvage Yard.

The court's ***Denny*** ruling also affected how the defense could respond to the finding of Avery's blood in Ms. Halbach's car. As the court undoubtedly recalls, the defense argued that the police had planted Avery's blood in Ms. Halbach's car, and that the source of the blood was the blood vial located in the clerk of court's office. Had the defense been permitted to argue an alternative perpetrator theory, the defense would not have been limited to claiming the police must have planted the evidence. Rather, the defense could have argued that another person on the Avery property had access to bloody rags belonging to Avery, and had used them to plant evidence in Ms. Halbach's car. Attorney Strang testified that the court's ruling "took away the ability to suggest that persons other than law enforcement officers had access to bloody bandages, bloody towels, blood drips that came from Steven Avery." (PC Trans. at 113). He testified that the anticipated testimony from the crime lab analyst that Avery's blood was in the car would be "a big problem for the defense." (*Id.* at 114). The defense needed to be able to explain how the blood got into the car, if it wasn't from Avery, and the ***Denny*** ruling left the defense with only the police as the source of that blood. (*Id.*). Had the court not barred the defense, they could have shown that Avery had indeed cut his finger earlier, that he was bleeding, and that others who were on the property regularly, such as his brothers, would have had access to his trailer and could have retrieved bloody items to plant evidence. (*Id.*).

The theory that the police planted Avery's blood posed another significant problem for the defense that would not have existed but for the ***Denny*** ruling. Attorney Strang testified to the obvious when he testified that a police frame-up defense is "an enormously unappealing defense...." (*Id.*). He explained that a defense claim that the police have framed a suspect is not an argument that most jurors are prepared to accept. (PC Trans. at 115). Had the defense been able to introduce evidence and to argue that someone on the Avery property with access to Steven Avery's trailer had planted the blood in Ms. Halbach's car, the defense would not have been forced into the argument that the only source for the planted blood was the police. The jury would have found it far more palatable to believe that someone else on the property saw the opportunity to frame Steven Avery, and did so.

In the same vein, the trial court's ***Denny*** ruling set up the defense for the claim that Attorney Strang said he knew was coming from the state, and that is that if the defense was arguing that the police framed Avery for Ms. Halbach's murder, the defense must also be arguing that the police killed her. (PC Trans. at 112; 116; 170). Had the defense been able to introduce evidence and to argue that someone else planted the blood evidence, the defense could have then argued a more palatable theory for the police involvement: that they willingly followed their tunnel vision to assume that Steven Avery was guilty, and to seek out only that evidence which supported their tunnel vision theory. Attorney Strang testified that, but for the court's ***Denny*** ruling, the defense could have argued that another individual had killed Ms. Halbach, and this other individual had a motive to put the blame on Avery, which would be to exculpate himself. "And in so doing, [the alternative perpetrator] found a very receptive audience in law enforcement, who were happy to believe [Steven] guilty." (*Id.* at 116).

The court's pretrial ***Denny*** ruling also affected Strang's cross-examination of the state's witnesses, and in particular, that of Bobby Dassey and Scott Tadych. The defense identified both Bobby Dassey and Scott Tadych in its offer of proof as alternative perpetrators. The trial court's ruling meant that the defense had to treat Bobby Dassey and Tadych as neutral witnesses rather than as potential murderers.

Attorney Strang testified that "there's a very good possibility that Bobby Dassey would have been cross-examined by me as someone who potentially was a murderer." (PC Trans. at 117). Acknowledging that the defense was able to cross-examine Bobby Dassey, attorney Buting explained how the approach would have been different:

> 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 know, you may be able to present inconsistencies in the versions—various versions of a witness, for one time to the next, and I think [Strang] 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.
>
> Very different than you would if there was, for instance if it's a snitch in a case, and informant, or somebody who is a suspect who, therefore, has a motive, that a neutral witness wouldn't.
>
> (PC Trans. at 221).

Strang identified several areas he would have been inclined to explore had he been permitted to accuse Bobby Dassey of the crime. For example, he would have cross-examined Bobby Dassey on his "mutual and mutually exclusive alibi that he and Scott Tadych offered each other" (*Id.* at 118). He would have questioned Bobby Dassey about the improbability of his claim that he took a shower before going hunting, and that he and Tadych just happened to see each

other passing on the road. (*Id.* at 120). He would have handled differently Bobby Dassey's testimony regarding Avery's supposed comment about getting rid of a body. Instead of eliciting testimony that Avery's supposed comment was a joke, Strang could instead have handled the testimony as a "blame shifting effort by someone who himself was culpable...." (PC Trans. at 118). "It could have been handled as something that Bobby Dassey never heard and was saying to point an accusatory finger at his uncle." (*Id.*).

Buting testified that the ***Denny*** ruling was also significant because of its effect on the credibility of another witness: the school bus driver. Buting testified that Bobby Dassey's chronology of events that day differed from the school bus driver's recollection of that day, and that the school bus driver could place Ms. Halbach on the Avery property later than Bobby Dassey had said. But because the defense could not impeach Bobby Dassey as a potential suspect, it could not link up why the school bus driver was more credible than Bobby Dassey. And, because the defense could not identify Bobby Dassey as a potential killer, the state could argue to the jury, unrebutted, that Bobby Dassey was more credible than the bus driver. (PC Trans. at 220). Buting testified:

> Well, one reason Bobby Dassey might have appeared more credible than the school bus driver on the timing of all of this, is because we weren't able to cross-examine Bobby Dassey as a potential perpetrator. He was a witness, neutral witness, unbiased. And yet, we had ways of cross-exam—or we would have used ways to cross-examine that would have presented both him and Mr. Tadych as potential suspects that the jury should consider as perpetrators.
>
> (*Id.* at 220-21).

As with Bobby Dassey, the court's ***Denny*** ruling affected the defense cross-examination of Scott Tadych as well. Attorney Strang testified that he would have projected to the jury in his attitude, tone of voice and manner of questioning the view that Tadych was a probable murderer. (PC Trans. at 119).

Not only did the ***Denny*** ruling affect the cross-examination, the handling of Tadych illustrates how the ruling affected Avery's right to compulsory process and to present a defense. As Strang testified, a different ruling would have opened up the possibility of calling witnesses to testify to Tadych's bad temper and Tadych's attempt to sell a .22 caliber long rifle shortly after the murder. (*Id.* at 120). The defense could have called a witness to Tadych "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." (*Id.*).

As Strang testified, because the court's ***Denny*** ruling went against the defense, it is difficult to know precisely in what other ways the ruling changed the defense, including what additional witnesses the defense might have called. Strang said: "The ruling did not go our way so we tried a different case than we would have tried had the ruling gone our way. That's just the nature of pre-trial rulings, significant ones in any event." (PC Trans. at 120-21). The postconviction hearing testimony does show, however, that the case indeed would have been tried differently, and significantly so. Instead of pinning the frame-up exclusively on the police, the defense would have had others on the Avery property who would have had the means and the motive to frame Avery. Instead of treating Bobby Dassey and Scott Tadych as neutral witnesses with minor inconsistencies and improbabilities in their testimony, the defense could have treated them as possible murderers. Instead of attempting to poke holes in the state's theory of prosecution, the defense could have presented a coherent narrative that pointed to other likely suspects, which would explain why the school bus driver saw Ms. Halbach, why the propane truck driver saw her car, why Ms. Halbach's bones were found in several locations and why Avery's blood was in her car, why Scott Tadych's testimony about the start time for "Prison Break" was important, and why it was improbable that Bobby Dassey would take a shower before going

hunting. As Strang testified, the defense would have tried a different and more powerful case.

B. The court erred in applying *Denny* to exclude evidence and arguments of alternative perpetrators because Avery, unlike Denny, would not have presented numerous alternative suspects, but rather, a limited number of possible perpetrators.

The postconviction testimony shows that ***Denny*** is inapplicable to this case because, unlike the situation in ***Denny*** where the defense sought to present a parade of witnesses with animus towards the victim, the defense here would have been more focused.

The defendant in ***Denny*** sought to present evidence that others had a motive to kill the victim, but that he had no such motive. He argued that if he could show a motive by others to kill the victim, he could "establish the hypothesis of innocence." ***State v. Denny***, 120 Wis. 2d 614, 622, 357 N.W.12 (Ct. App. 1984). The trial court barred this evidence and the court of appeals affirmed. The court of appeals 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.

The postconviction testimony shows that ***Denny*** is not a good fit to Avery's case because here, unlike ***Denny***, there was a finite universe of individuals who could have been responsible for Ms. Halbach's death. Denny argued that 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. Not so here where the focus was on persons on the Avery Salvage Yard property, including witnesses called by the state.

Thus, unlike ***Denny***, here the state called witnesses who were identified by the defense as alternative perpetrators. As shown above, had the defense been permitted, it would have cross-examined Bobby Dassey and Scott Tadych as potential murderers. Such a tactic would have only slightly lengthened the trial in light of the fact that the state had already decided to call these witnesses. Moreover, the length of the trial cannot supersede the defendant's right to confront the witnesses against him. Where, as here, the state calls as its own witnesses individuals who the defense has identified as possible suspects, the defense cannot be restricted in its cross-examination as to the witnesses' recollections, explanations, and motives to lie.

In addition, attorney Strang's testimony at the postconviction hearing shows that the defense would not have taken the expansive, scattershot approach feared by the court in ***Denny***. Rather, 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." (PC Trans. at 111). The theory of defense would have been shaped around the person who the defense thought probably committed the crime. (*Id.* at 112). The defense would have been targeted, as attorney Buting testified, to show not only that Avery was not guilty, "but here's another person there who could have been guilty," so that the jury "could have some sort of comfort level in returning a not guilty verdict." (*Id.* at 219).

In this regard, Avery's case is like ***State v. Falk***, 2000 WI App 161, 238 Wis. 2d 93, 617 N.W.2d 676, in which the court ruled that ***Denny*** did not apply to the defense attempt to introduce evidence of an alternative perpetrator. In ***Falk***, the defendant was accused of child abuse, and he wanted to introduce evidence that the true perpetrator was his wife. The trial court excluded the evidence, but the court of appeals concluded the trial court was wrong in applying ***Denny***. The court reasoned that the facts did not fit the ***Denny*** framework because of the

limited number of people who could have committed the offense. Where the number of people who had the opportunity to commit the crime was small, the court said that ***Denny*** does not apply. ***Id.*** at ¶34. Likewise, the number of people who could have committed the crimes in this case was manageable in number: primarily those on the Avery property that day.

The postconviction testimony also supports Avery's postconviction claim that ***Denny*** should not apply just as it did not apply in ***State v. Richardson***, 210 Wis. 2d 694, 563 N.W.2d 899 (1997). In ***Richardson***, the supreme court declined to apply ***Denny*** in a frame-up defense case where the defendant claimed he was being framed for a crime that never happened. The court held that, because "there is neither a legal basis nor a compelling reason to apply the legitimate tendency test under the circumstances of this case, we hold that the legitimate tendency test is not applicable to the introduction of frame-up evidence." ***Id.*** at ¶19. The court explained that the ***Denny*** legitimate tendency test is inapplicable where the defendant claims "that the victim was lying in an effort to frame him, not that someone else committed the crime." ***Id.***

Here, although Avery did claim that someone else committed the crime, he also argued, as in ***Richardson***, that he was being framed for that crime. At trial, Avery argued the police framed him, for example by planting the car key in his trailer. Had he not been prohibited from doing so, Avery also would have claimed that others on the Avery property framed him. As Strang testified, others on the property had access to bloody rags that could have been used to plant blood in Ms. Halbach's car. (PC Trans. at 113-14). Others, such as Bobby Dassey, who pinned the blame on Avery with his testimony about Avery's supposed remark about disposing of a body, could have framed Avery to exculpate himself. (*Id.* at 116).

Thus, because of the frame-up element, the court erred in applying ***Denny*** to this case. The court in ***Richardson*** held that ***Denny*** does not apply to a claim that another has framed the defendant. Here, the defendant claimed he had been framed, either by the police, others on the property, or likely both. In light of ***Richardson***, he should have been allowed to introduce third party liability evidence which included evidence that the true perpetrator framed him.

C. *Denny* does not apply because Avery had no more motive than the alternative perpetrators.

Avery argues above that ***Denny*** is a poor fit to his case because in ***Denny***, the defendant sought to show that a multitude of persons could have killed the victim, whereas here, the number of suspects would have been relatively few. The facts in ***Denny*** are distinguishable for another reason as well, and that relates to motive. The defendant in ***Denny*** argued he should be able to present evidence that the victim had angered many people because he was a drug dealer, and therefore, had a number of likely enemies. He wanted to argue that he had no such motive. By contrast, Avery did not argue in his pretrial filings that any other person would have had a specific motive to kill Teresa Halbach. Thus, the ***Denny*** framework does not fit the facts of this case.

Avery recognizes, however, that in his postconviction motion, he identified a number of facts that suggest a motive by others to kill Teresa Halbach. At paragraphs 103-144, he argues that other individuals had motive and opportunity to kill Ms. Halbach. For example, he cites to court filings which show that Tadych was often violent towards women, and thus could have committed these crimes. (Postconviction motion at ¶¶ 105-109). To the extent that motive is relevant, other persons such as Scott Tadych and Charles Avery had as much motive, if not more, to kill Ms. Halbach. And, others, such as Charles and Earl Avery, had a motive to frame Avery, such as the wish to eliminate him from part ownership of the family

business. Further, any person who killed Ms. Halbach would also have a motive to frame Avery, and would find a receptive audience for suspecting Avery in the local law enforcement. Thus the focus on motive as addressed in ***Denny*** is misplaced here. The crime here is by all appearances a senseless act rather than a crime impelled by a specific motive like revenge. Thus the ***Denny*** framework does not apply.

Avery also argued in his postconviction motion that courts have declined to follow the ***Denny*** framework in other cases where the facts were a poor fit. Avery has already discussed ***Richardson*** and ***Falk***. In addition, in ***State v. Oberlander***, 149 Wis. 2d 132, 438 N.W.2d 580 (1989), the court simply applied a relevancy test where the defendant wanted to present other acts evidence of a third party who might have committed the crime with which the defendant was accused. In ***State v. Scheidell***, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), where the defendant tried to show that another unknown person committed the crime in light of a unique *modus operandi*, the supreme court held that the other acts standard of Wis. Stat. § 904.04 applies instead of the ***Denny*** standard. ***Id.*** at 296-97. In other words, there is ample precedent for a court to conclude that the ***Denny*** framework does not fit the particular facts of a case, and that the appropriate standard to apply is the relevancy standards in Wis. Stat. § 904.01 and § 904.03.

D. *Denny* does not apply because the state opened the door to the third party evidence.

Avery asks the court to conclude that once the state presented evidence which excluded other suspects, he had the right to respond with evidence that other individuals could have been the perpetrator. Sherry Culhane, the Technical Unit Leader in the DNA Unit at the Wisconsin State Crime Lab, testified, for example, as to DNA evidence in the case. She testified that she had buccal swabs from, among others, Bobby Dassey and Charles and Earl Avery, and that she had

prepared DNA profiles based upon these standards. (Trans. of February 23, 2007, pp. 128-132). When she tested various pieces of evidence and obtained DNA profiles from the evidence, she compared the profiles not just to Steven Avery, but also to the others for whom she had profiles. She compared the DNA she found on the Toyota key to the profiles developed for Steven Avery, Brian, Brendan and Bobby Dassey, and Earl, Charles and Allen Avery. (*Id.* at 183-184). She compared the DNA profile obtained from a blood stain in Ms. Halbach's car against all of the standards she had received. (*Id.* at 186-187).

As soon as the state introduced evidence that other individuals had been excluded as the DNA source for incriminating pieces of evidence, the state opened the door for the defense to counter with evidence that other individuals could have been the true perpetrators of the crimes in this case. When one party opens the door to an issue, the court may allow the opposing party to introduce otherwise inadmissible evidence as is required by fundamental fairness. ***State v. Dunlap***, 2002 WI 19, ¶14, 250 Wis. 2d 466, 640 N.W.2d 112. Opening the door, or the curative admissibility doctrine, applies when one party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible. ***Id.***

In this case, given the trial court's ruling that Avery could not present evidence of alternative perpetrators, the state should not have presented evidence that excluded other potential suspects, particularly those whom the defense identified in its offer of proof. Otherwise, the state had the unfair advantage of telling the jury that other individuals could not have been the true culprits, and that the perpetrator had to be none other than Steven Avery. This imbalance was fundamentally unfair. Once the state introduced the notion that no one else could have killed Teresa Halbach, the defense was entitled to rebut that claim.

E. *Denny* does not apply because the case was wrongly decided.

Avery also claims that the court erred in applying ***Denny*** because ***Denny*** was wrongly decided and must be overturned. Avery acknowledges, however, that this court lacks the authority to overrule ***Denny***.

F. If *Denny* does apply, the court erred when it excluded evidence that Bobby Dassey, Scott Tadych, Charles and Earl Avery were potential perpetrators.

Finally, if ***Denny*** does apply, the court erred when it excluded evidence that Bobby Dassey, Scott Tadych, and Charles and Earl Avery were possible alternative perpetrators. Avery argued in his postconviction motion at paragraphs 102-144 that the court applied ***Denny*** too strictly to the defense offer of proof as to Bobby Dassey, Tadych and Steven's brothers, and he will not repeat those claims here. The postconviction testimony did not expand upon those arguments except to show that trial counsel would have tried a different case had the trial court ruled in its favor on the ***Denny*** issue.

CONCLUSION

For the reasons argued above and in his postconviction motion, and in light of the testimony adduced at the postconviction hearing, Steven Avery respectfully requests that the court enter an order vacating the judgments of conviction and granting a new trial.

Dated this 28th day of October, 2009.

Respectfully submitted,

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