STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY
BRANCH 1

STATE OF WISCONSIN,

Plaintiff,

v.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
NOV 13 2009
CLERK OF CIRCUIT COURT

Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

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

I. THE COURT'S REMOVAL OF A DELIBERATING JUROR WITHOUT FOLLOWING THE MANDATED PROCEDURE AND WITHOUT A RECORD ESTABLISHING CAUSE FOR REMOVAL IMPERMISSIBLY ALTERED THE MAKEUP OF THE JURY CHARGED WITH DETERMINING MR. AVERY'S GUILT OR INNOCENCE.

A. The state provides little argument, and no authority, to counter Avery's claim that the court removed a deliberating juror without complying with the procedure mandated by the supreme court.

The state offers little defense of what Mr. Avery believes was the most fundamental error committed in connection with Juror Mahler's removal, which was the court's failure to question Mahler on the record and in the presence of all counsel and the defendant. The state makes no claim that the procedure mandated in ***State v. Lehman***, 108 Wis. 2d 291, 321 N.W.2d 212 (1982), does not apply or, conversely, was satisfied. Indeed, any such argument would be without merit.

The language of ***Lehman*** truly speaks for itself:

> When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have

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

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

Here, there was no questioning of Mahler in the presence of Avery and his attorneys, or, for that matter, attorneys for the state. No arguments were heard from counsel following the court's inquiry as to whether good cause existed for the juror's removal. No contemporaneous record was made of the court's *voir dire* of Mahler. The court removed a deliberating juror without complying with ***Lehman***. The state makes no claim to the contrary.

Since ***Lehman***, the supreme court has made clear that the defendant has a constitutional and statutory right to be present and assisted by counsel whenever the court communicates with deliberating jurors. ***State v. Anderson***, 2006 WI 77, ¶¶43 & 69, 291 Wis. 2d 673, 717 N.W.2d 74. (For additional authority, see p. 11 of Avery's brief-in-chief). The state attempts to distinguish ***Anderson*** by noting that in this case the court consulted with counsel before speaking with Mahler. Its attempt fails because ***Anderson*** guarantees defendants the right to be present and to have their counsel present when the court communicates with deliberating jurors. Mere consultation with counsel is not good enough. Contrary to the state's claim, Avery's right to be present and assisted by counsel during the court's *voir*

dire of Mahler was neither satisfied nor waived by the court's consultation with counsel.

In ***Anderson***, the circuit court responded to several notes from the deliberating jury. With respect to one set of notes, the court responded without consulting the defendant or any attorneys, as the state references in its brief. ***Id.*** at ¶13. However, in response to another request from the jury, the court consulted counsel, but the record was silent on whether the defendant was present. ***Id.*** at ¶12. The state would like this court to believe that consultation with counsel is sufficient and obviates the need for the defendant's presence, but that is not what the supreme court concluded. The supreme court held that, despite the circuit court's consultation with counsel, its communication with the jury during deliberations "outside the presence of the defendant is error, violating the defendant's constitutional and statutory right to be present." ***Id.*** at ¶36.

The supreme court elaborated that the defendant has a right to be present whenever "any substantive step" is taken in the case and that includes a court's communications with the jury during deliberations. ***Id.*** at ¶¶42-43. Consistent with the mandate of ***Lehman***, a substantive step is taken when the court questions a deliberating juror about his or her request to be removed, necessitating "the presence of all counsel and the defendant." ***Lehman***, 108 Wis. 2d at 300.

Anderson provides no support for the state's claim that Avery was not denied counsel at a critical stage. There, the supreme court wrote that "our cases make clear that the right to counsel attaches for communications between the circuit court and the jury during deliberations." ***Anderson***, 291 Wis. 2d 673, ¶69. Avery had a right to be present and to be assisted by counsel when the court questioned Juror Mahler. The court's consultation with counsel and counsel's agreement that the court speak with Mahler outside their presence could not waive Avery's right to be present with counsel, which could only be waived personally

by him and only if the record established a knowing, voluntary and intelligent waiver of his right to counsel. ***Id.*** at ¶¶71-73.

The state misses the point when it notes that counsel met with Avery the morning after Mahler's removal and discussed his options, including a mistrial. By then it was too late. Mahler had been removed. And Avery had been denied his right to be present and assisted by counsel during the court's *voir dire* of Mahler. The prospect of a mistrial was little cure for what Avery had already lost, which was his right to be present and assisted by counsel when, as should have occurred, the court questioned Mahler on the record, heard arguments from counsel about whether good cause existed for his removal, and exercised its discretion whether to remove a deliberating juror. What the state fails to recognize is that the failure to follow the procedure mandated by ***Lehman*** was the preeminent error because from it flowed each other error, that is, Mahler's removal without cause and without counsel being aware of Sheriff Pagel's involvement and then the substitution of an alternate who should have been discharged. The court's failure to comply with the dictates of ***Lehman*** and ***Anderson*** entitle Avery to relief.

B. The state's claim that cause existed for Mahler's removal is unsupported by authority or an analysis of the facts.

The state does not dispute that a record establishing "cause" must exist in order for a court to remove a deliberating juror. Indeed, any such argument would run afoul of ***Lehman***, 108 Wis. 2d at 300.

In its argument under a heading stating that the "record established cause to discharge the juror," the state reviews the facts of three cases cited in Mr. Avery's postconviction motion and asserts each case either does not apply or is distinguishable. Lacking from the state's argument is any authority or, indeed, any

meaningful factual analysis, supporting its claim that the record established cause for Mahler's removal.

The state makes no argument that information indicating Mahler's stepdaughter had been in an auto accident – with no report of any injuries – constituted cause. Rather, it refers only to Mahler's supposed marital strife and asserts this was of greater import than the juror car trouble in ***United States v. Arajuo***, 62 F.3d 930, 934 (7th Cir. 1995). The state's argument misstates the facts surrounding Mahler's removal and is unsupported by authority.

The state's description of the facts as stated in the court's memo is inaccurate. According to the state, "Mahler expressed to the court that 'his marriage might be at stake.'" (State's brief at ¶20). The court's memo does not quote Mahler in that manner. Rather, it was the court's *impression* that Mahler's marriage was at stake, and it was an impression arrived at without "asking questions too specific". The court wrote:

> My reading, without pressing him with questions too specific, was that he felt the future of his marriage was at stake if he was not excused.

(Ex. 1, p. 2). According to the memo, what Mahler had said, in addition to referring to his wife's upset about a media report weeks earlier, was that he had been having marital problems before trial and the trial was putting an extra strain on their relationship. But strain on a marriage simply does not amount to the sort of serious incapacitation required to relieve a juror of his duty to complete deliberations. ***Araujo***, 62 F.3d at 934 ("courts have found just cause to dismiss a juror once deliberations are under way when the juror becomes seriously incapacitated"). The state has not offered any authority even suggesting that strain on a marriage is cause for discharge.

Given that the court's memo concedes it did not press Mahler for specific answers, the state's assertion that the "court probed Mahler's proffered

explanation" is an unconvincing to attempt to distinguish ***Araujo***. (State's brief at ¶20). In ***Araujo***, having been notified that a second juror was having car trouble in bitterly cold weather, the court inquired further and was told by the juror that he was stranded on the side of the road and unable to leave his car. ***Araujo***, 62 F.3d at 932. The Seventh Circuit held that the court had not satisfied its affirmative duty to investigate further, in particular, to determine when the juror might be available, and no cause existed for his removal. ***Id***. at 934. Likewise, here, the court had an affirmative duty to ask specific questions to determine if, in fact, there was a family emergency necessitating that Mahler be relieved of his duties as a deliberating juror. If Mahler could not provide satisfactory answers, such as about the "accident," the court had a duty to either retain Mahler or to probe further, perhaps by contacting Mahler's wife. The court's "reading" that Mahler's marriage was at stake and vague information about an auto accident were not cause for discharge.

While attempting to distinguish the facts of two Eleventh Circuit decisions, the state provides no argument disputing the legal principle for which Avery cited those cases. The principle is this: The defendant in a criminal case has a constitutional right to have his or her guilt or innocence decided by the twelve jurors to whom the case was submitted. That right is violated when a trial court excuses a deliberating juror "'for want of any factual support, or for a legally irrelevant reason.'" ***Peek v. Kemp***, 784 F.2d 1479, 1484 (11th Cir. 1986), citing ***Green v. Zant***, 715 F.2d 551, 555 (11th Cir. 1983) ("***Green I***").

The most significant factual difference between Avery's case and the ***Peek/Green*** cases is what occurred in postconviction proceedings. In ***Peek*** and ***Green***, postconviction testimony established that, in fact, the discharged jurors were incapacitated and unable to continue with deliberations. In ***Peek***, testimony established the juror "was unquestionably too ill to debate or vote at the time of his

excusal." ***Peek***, 784 F.2d 1484. In ***Green***, the juror herself testified she would not have been able to continue as a juror. ***Green v. Zant***, 738 F.2d 1529, 1533 (11th Cir. 1984) ("***Green II***"). Consequently, the Eleventh Circuit found the defendant suffered no prejudice from the trial courts' failure to make a sufficient inquiry before discharging the jurors because, in fact, cause existed for their removal. That is not the situation here, because, as argued below in section D, evidence at the postconviction hearing further weakened the record for Mahler's removal.

The court exceeded its authority when it removed Mahler without a record establishing cause. The court's removal of a deliberating juror without cause violated Avery's right to a jury trial as the federal and state constitutions guarantee, that is, to a unanimous verdict by the 12 impartial jurors to whom the case was submitted.

C. The erroneous removal of Juror Mahler, which left 11 deliberating jurors, is structural error.

The state concedes that the denial of the right to an impartial jury is structural error but then asserts "the holding is limited by circumstances in *Davis*, 199 Wis. 2d 513, 545 N.W.2d 244 (Ct. App. 1996) ...." (State's brief at ¶22). Avery did not cite to ***Davis***, and the state's citation to ***Davis*** is puzzling given that the case does not involve a jury issue.[1] Nothing in ***Davis*** appears relevant to the issues before this court.

The state claims that the removal of Juror Mahler was not structural error because the court "had no knowledge of Mahler's original leanings or that he was misleading the court ...." (State's brief at ¶23). However, federal courts have treated as structural error the removal of a deliberating juror without a record

[1] At issue in ***Davis*** was a police officer's testimony that the defendant refused to submit to a chemical test and whether an officer's testimony was an improper comment on the witnesses' credibility. ***Id.*** at 515.

establishing cause. The courts have done so even though the facts did not suggest the juror was a hold out or how the juror was leaning. *See* ***Araujo***, 62 F.3d at 934-37 (second juror to have car trouble due to frigid temperatures; discharged without cause; conviction reversed); ***United States v. Patterson***, 26 F.3d 1127 (D.C. Cir. 1994) (68-year-old woman went to doctor with chest pains; discharged without cause; conviction reversed); ***United States v. Essex***, 734 F.2d 832, 845-46 (D.C. Cir. 1984) (juror failed to return after weekend when deliberations were set to resume; discharged without cause; conviction reversed). Likewise, the removal of Mahler without a record establishing cause requires reversal of Avery's convictions without any further showing of prejudice.

As noted in the state's recitation of ***United States v. Curbelo***, 343 F. 3d 273 (4th Cir. 2003), where before deliberations a juror was removed without cause, the court explained that removal of a juror without cause is structural error because, like other such errors, it has "repercussions that are 'necessarily unquantifiable and indeterminate.'" ***Id.*** at 281, *quoting* ***Sullivan v. Louisiana***, 508 U.S. 275, 282 (1993). Whether the case then proceeds with 11 jurors or by substituting in an alternate, whenever a deliberating juror is removed without cause, the makeup of the jury is changed without legal justification. The court has altered the basic framework by which the defendant's guilt or innocence will be determined. As a result of the court's unauthorized tinkering with the jury, the defendant has lost the opportunity to obtain a unanimous verdict from the 12 jurors to whom the case was submitted. The unlawful removal of a deliberating juror is structural error.

Nor does it matter, as the state contends, that defense counsel agreed to Mahler's removal. The state erroneously conflates the principles of structural error and waiver. Counsel's actions or inactions could not waive Avery's claim that removal of Juror Mahler was reversible error. As argued above, counsel could not waive Avery's right to be present and assisted by counsel during the court's

questioning of Mahler before his removal. Counsel could not agree to a procedure that left Avery with 11 deliberating jurors. In ***State v. Cooley***, 105 Wis. 2d 642, 645-46, 315 N.W.2d 369 (Ct. App. 1981), the court of appeals reversed the defendant's conviction where his attorney had requested removal of a juror and agreed to proceed with 11 jurors, but the defendant himself had not waived his right to a jury of 12. Similarly, here, reversal is required because Avery himself did not agree to Mahler's removal, an action that left him with 11 deliberating jurors.

D. Prejudice was established by Mahler's testimony at the postconviction hearing.

In response to Avery's argument that he was prejudiced by the court's removal of Mahler, the state asks this court to ignore the evidence presented at the postconviction hearing. But the federal cases that have required a showing of prejudice have looked to evidence presented in postconviction proceedings to determine if, in fact, cause existed for the juror's removal. ***Green II***, 738 F.2d at 1532-33; ***Peek***, 784 F.2d at 1483-84. With respect to the evidence presented at the postconviction hearing in this case, Avery's argument is two-fold.

First, Mahler's testimony established that there was no family emergency. His stepdaughter had not been in an accident. The future of Mahler's marriage was not at stake. The reasons cited by the court for Mahler's removal did not, in reality, exist. The state presented no evidence, and makes no argument, to the contrary.

Second, Mahler's testimony also established that he sought to be removed, in part, because of distress caused by the deliberative process and, in particular, from a conflict with another juror. This evidence does not come "too late to be of any benefit." (State's brief at ¶28). Rather, it shows that not only was Mahler's removal without cause, his removal was particularly problematic because it was

related to a problem among jurors due to their differing views of the evidence. The state does not contest that removal of a juror is improper if there is any reasonable possibility 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). Mahler's testimony established he sought removal, in part, because he felt frustrated and even threatened by jurors holding a view of the case different from him.

Evidence at the postconviction hearing demonstrates that Avery was prejudiced by the court's removal of Juror Mahler without following the required procedure and without a record establishing cause. Not only was there no cause in fact for his removal, the spectre of jury taint haunts this case because Mahler's removal stemmed, in part, from his disagreement with other jurors who, in Mahler's view, were willing to find Avery guilty without a thorough review of the evidence.

II. THE STATE PRESENTED NO EVIDENCE AT THE POSTCONVICTION HEARING, AND MADE NO ARGUMENT IN ITS BRIEF, REGARDING MR. AVERY'S CLAIM THAT SHERIFF PAGEL'S COMMUNICATION WITH A DELIBERATING JUROR IS REVERSIBLE ERROR.

In his postconviction motion, Avery alleged that Sheriff Pagel's private communication with Juror Mahler and his participation in Mahler's removal constituted error and requires reversal of Avery's convictions. At the postconviction hearing, Avery presented evidence establishing that, without defense counsel's knowledge, Sheriff Pagel served as a conduit between Mahler and the court on the night of Mahler's removal.

At the postconviction hearing, the state did not present the testimony of Pagel or any other witness in an effort to contradict Mahler's testimony regarding

Pagel's activities leading up to Mahler's removal. This court should accept those facts as accurate, as the state appears to concede. (State's brief at ¶¶1 & 3).

In its brief, the state offers no response to Avery's argument, which spans 20 paragraphs of his postconviction motion, that Pagel's communication with a sequestered juror is reversible error. Because the state makes no argument to which he can respond, Avery relies on the arguments contained in Section II of both his postconviction motion and brief-in-chief.

III. MR. AVERY'S CONVICTIONS CANNOT STAND BECAUSE THE COURT HAD NO AUTHORITY TO SUBSTITUTE AN ALTERNATE JUROR ONCE DELIBERATIONS HAD BEGUN.

A. The state's proposed construction of Wis. Stat. § 972.10(7) is unsupported by the statute's plain language and the legislative history.

The state concedes that Wis. Stat. § 972.10(7) "ostensibly forecloses the possibilities outlined in" ***Lehman***, specifically, the parties' agreement to substitute an alternate juror during deliberations. Indeed, the statute requires the court to discharge any alternate, or "additional," juror who remains when the case is submitted to the jury.

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

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

The state's proposed, contrary construction, which is premised on legislative history, must be rejected for two reasons. First, the state is using

legislative history to argue for a construction contrary to the statute's plain language. That is not permitted. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶50, 272 Wis. 2d 633, 681 N.W.2d 110. The court must simply apply the plain meaning of the statute, although legislative history may be used, as it was in Avery's postconviction motion and brief-in-chief, to confirm or verify a plain-meaning interpretation. ***Id.*** at ¶51.

Second, and more importantly, the legislative history does not support the state's claim that, notwithstanding the discharge language, the legislature intended to permit substitution of an alternate during deliberations. The state's analysis is flawed because it mischaracterizes the legislature's response to ***Lehman*** in 1983 and then ignores the subsequent legislative changes in 1996.

As the state concedes, the legislative changes made within a year after ***Lehman***, were, in part, a response to ***Lehman***. What the history fails to support is the state's claim that the legislature did not intend to preclude substitution during deliberations. That was precisely the legislature's intent and response to ***Lehman***.

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

---

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

concluded that the statute was silent on whether alternates could be substituted in during deliberations. ***Id.*** at 305.

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

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

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

> eleven regular jurors are in substantial agreement, the alternate juror may find it difficult to persuade and convince the eleven who have already come to an understanding.

Id. at 307-08. The court offered this analysis in support of its conclusions that authority to substitute during deliberations should not be inferred from a silent statute and that the erroneous substitution in that case was, and in all future cases will be, reversible error. ***Id.*** at 307. Against that backdrop, the legislature chose to expressly prohibit substituting in an alternate during deliberations, in both criminal and civil cases.

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

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

Assembly Amdt. 1 to 1983 SB 320, contained within the drafting file to 1983 Wis. Act 226, at the Legislative Reference Bureau. This amendment failed. The legislature rejected an amendment that would have done what the state claims the legislature did in response to ***Lehman***. The state's construction of the discharge mandate added in 1983 is unsupported by the history of Act 226.

The state's legislative history analysis is also incomplete because it fails to address the subsequent changes made in 1996. At that time, the supreme court amended the civil statute, § 805.08(2), to allow a court to hold additional jurors

until the verdict is rendered. SCO 96-08 ¶46. Specifically, the civil statute was changed and continues to provide, in relevant part, as follows:

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

Wis. Stat. § 805.08(2). The Judicial Council Note states that the last sentence was added "to allow courts to keep additional jurors to replace any juror who might not be able to complete deliberations. Deliberations would begin anew with the additional juror in place." SCO 96-08 ¶46, Judicial Council Note, 1996. Significantly, while the supreme court made a technical change in the parallel criminal statute, § 972.10(7),[3] it did *not* alter the language requiring the court to discharge any additional jurors at final submission of the cause. *Id.* at ¶59.

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

Within one year after ***Lehman*** was decided, the legislature expressly prohibited substitution of an alternate during deliberations. In criminal cases, that prohibition remained in force at the time of Avery's trial and remains in force

---

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

today. Substitution of the alternate following Mahler's removal was unlawful and requires reversal of Avery's convictions.

B. Under holdings of the Wisconsin Supreme Court, the unlawful substitution of an alternate during deliberations is reversible error.

The state argues that even if substituting in the alternate after Mahler's removal was statutory error, it does not require reversal of Avery's convictions. Its argument is premised largely on two cases cited in Avery's postconviction motion, ***United States v. Neeley***, 189 F.3d 670 (7th Cir. 1999), and ***Commonwealth v. Saunders***, 686 A.2d 25 (Pa. 1996). The state misconstrues the relevance of ***Neeley*** and ***Saunders***, while overlooking binding authority from the Wisconsin Supreme Court supporting Avery's claim that the unlawful substitution during deliberations is reversible error.

Avery cited ***Neeley*** and ***Saunders*** as further support of his statutory construction argument, specifically, that substitution is not permitted where the governing statute required any remaining alternates discharged when deliberations began. (Postconviction motion at ¶20). Indeed, in ***Neeley*** and ***Saunders***, the courts so held. Beyond that narrow point, ***Neeley*** and ***Saunders*** have little relevance as to whether the unlawful substitution of a juror is reversible error, particularly given the principles set forth in the case law of this state.

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

That conclusion is dictated not only by ***Lehman*** but by other supreme court cases declaring that a criminal defendant cannot consent to a procedure that diminishes his or her constitutional right to a jury trial unless a statute authorizes that procedure. ***Jennings v. State***, 134 Wis. 307, 309-10, 114 N.W. 492 (1908); ***State v. Smith***, 175 Wis. 664, 672-73, 200 N.W. 638 (1924); *see also* ***State v. Ledger***, 175 Wis. 2d 116, 127, 499 N.W.2d 198 (Ct. App. 1993) ("statutory authority is required *to diminish* a defendant's constitutional right to a jury trial") (emphasis in original). Substitution of an alternate during deliberations is prohibited by § 972.10(7). Avery's consent to substituting in the alternate after Mahler's removal was invalid as a matter of law.

The state's claim that substituting an alternate enhanced rather than diminished Avery's constitutionally-guaranteed jury trial right cannot be squared with the language in ***Lehman*** expressing grave concern about the impact of substitution during deliberations on a defendant's state constitutional right to a unanimous verdict from the 12 jurors to whom the case was submitted. In addition to the passage quoted in the preceding section of this brief, the court wrote:

> [I]f substitution were allowed there would be an inherent coercive effect upon an alternate who joins a jury after deliberations begin and there was the possibility that a juror who disagrees with the other jurors might be coerced into feigning incapacity in order to be relieved of sitting on the jury.

Lehman, 108 Wis. 2d at 310, *citing* ***United States v. Lamb***, 529 F.2d 1153 (9th Cir. 1975).

> "Even were it required that the jury 'review' with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations."

Id. at 312, *quoting* Advisory Committee Note on proposed amendments to Fed. R. Crim P. 23(b).

> The decision whether an alternate juror should be permitted to replace a juror who dies, becomes disabled or is otherwise disqualified during the jury's deliberations is a policy decision which should not be made by each circuit court on a case-by-case basis without any established guidelines.

Id. at 313. The legislature responded to this language by prohibiting substitution, showing that the legislature, like the supreme court, viewed substitution of an alternate as a procedure that diminished rather than enhanced the defendant's jury trial right. Certainly, it cannot reasonably be likened, as the state argues, to proceeding with 13 jurors as occurred in ***Ledger***.

Even if as a matter of law Avery could validly consent to substitution of the alternate, his consent was invalid because it was not knowing, voluntary and intelligent. Contrary to the state's claim, the replacement of a deliberating juror with an alternate stripped Avery of his constitutional right to have his guilt or innocence decided by a unanimous verdict of the 12 jurors to whom the case was submitted. If substitution was permitted, which Avery disputes, it necessitated a knowing and voluntary waiver of Avery's right to a jury as the constitution contemplates, which, for the reasons argued in his brief-in-chief, did not occur here.

IV. MR. AVERY'S CLAIMS SHOULD NOT BE DEEMED WAIVED, BUT EVEN IF WAIVER APPLIED, HE IS STILL ENTITLED TO RELIEF.

A. Waiver is a poor fit for the circumstances of this case.

Contrary to the state's claim, the waiver/forfeiture rule should not apply to the unique circumstances of this case for the following four reasons.

First, there is no evidence to suggest that defense counsel engaged in "sandbagging." Both attorneys testified they had no strategic reason for wanting

Mahler off the jury. They perceived him as a favorable juror or at least someone who would come to his own view of the case. Nothing in the record remotely suggests that counsel used the circumstances that arose after the first day of deliberations as a way to remove an unfavorable juror or to set up an issue for appeal. Indeed, both attorneys testified they did not know that substituting in the alternate was legally impermissible. Had they known that, they would have advised Avery to take a mistrial.

Second, the state's suggestion that Avery himself should have objected is ridiculous. The state concedes that the statutory change regarding substitution of alternates was "missed by five experienced criminal law practitioners plus the judge". (State's brief at ¶51). Yet, the state chides Avery for "embrac[ing] the very procedure he now claims is error." (*Id.* at ¶58). Moreover, by the time Avery learned of Mahler's removal, it was too late. The juror, whom Attorney Buting knew Avery viewed as favorable, was already gone. And on what ground should Avery have objected? Should he have known that he had a right to be present and assisted by counsel the night before when Mahler was questioned? Should he have known that cause did not exist for Mahler's removal? Under the state's argument, Avery, who never completed high school, should have been better versed in the law than were the prosecutors, defense counsel and the court.

Third, neither Avery nor his attorneys "invited" the errors. The missteps are as much the responsibility of the state and court as they are the defense. Avery recognizes the errors stemmed from a circumstance occurring at the "eleventh hour," as the state notes, when all participants were undoubtedly exhausted and worn down by the preceding weeks of trial. But, unfortunately, the eleventh hour was, in fact, the most critical time for Mr. Avery because 12 jurors were deliberating his fate. While the timing may well explain why errors were made

and why waiver is inappropriate here, the timing only highlights the enormity of the errors.

Fourth, each error was the product of the first error, to which the state also voiced no objection, which was the failure to question Mahler on the record and in the presence of the defendant and all counsel. As argued above, the law is clear that Avery did not waive his right to be present and to have his counsel present during the court's *voir dire* of Mahler. Because that error was the catalyst for every other error – Mahler's removal without cause and without counsel aware of the sheriff's involvement, as well as substitution of an alternate who should have been discharged – the waiver doctrine is a poor fit for any of Avery's claimed errors.

B. Plain error and interest of justice.

In response to Avery's argument that reversal is appropriate as plain error, the state unsuccessfully attempts to distinguish ***Essex***, ignores Avery's reliance on ***State v. Corsaro***, 526 A.2d 1046 (N.J. 1987), and presents no other authority.

In ***Essex***, even without a proper objection, the court treated the removal of a deliberating juror as "error serious enough to require reversal." ***Essex***, 734 F.2d at 843. The error violated the defendant's "substantial right, in the absence of determined good cause, to the unanimous verdict of the 12 jurors to whom the determination of the cause was duly submitted." ***Id.*** at 845. While that case then proceeded with 11 jurors, Avery was in no better position. He, too, was left with only 11 deliberating jurors, and the "cure" of substituting an alternate was unlawful.

As to juror substitution, the state fails to address ***Corsaro***, in which the court applied plain error to reverse the defendant's convictions due to the improper substitution of an alternate during deliberations. ***Corsaro***, 526 A.2d at 1052. The

court reversed even though the defendant at trial sought both the juror's removal and substitution of an alternate. ***Id.*** at 1048-50.

As argued in Avery's other filings, the court also has discretion to grant a new trial in the interest of justice.

C. Ineffective assistance of counsel.

The state begins its response to Avery's ineffective assistance claim by correctly reciting the three deficiencies alleged: (1) authorizing the court to conduct a private *voir dire* of Mahler; (2) authorizing the court to discharge Mahler; and (3) stipulating to the substitution of the alternate. But the state makes no argument regarding the first two deficiencies, perhaps because those errors cannot be defended. Instead, the state leaps to the third. In doing so, the state ignores the most critical errors. After all, had counsel requested that Mahler be questioned with counsel and Avery present, as the law requires, Mahler may never have been removed and Avery would have received a verdict from the 12 jurors to whom his case was submitted.

As to the decision to substitute the alternate, the state contends the law is unsettled. The law is neither difficult to find nor to decipher. The statute governing the "order of trial" within a chapter governing "criminal trials" specifies that any alternates must be discharged when deliberations begin. Wis. Stat. § 972.10(7). Before deliberations ever began in this case, when there was discussion about retaining an alternate, counsel should have checked the statutes to determine whether retaining an alternate was permitted. The statute is clear; any remaining alternates must be discharged. The supreme court has held that counsel's failure to understand and apply a relevant statute was "deficient as a matter of law." ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305. Counsel's failure to know and apply § 972.10(7) was deficient.

Counsel's advice to Avery that he decline a mistrial and, instead, substitute the alternate was fatally flawed because of counsel's misunderstanding of the law. Counsel steered Avery away from a mistrial with the understanding that substitution was a lawful option. The evidence is undisputed that had counsel known the true options were a mistrial or proceeding with a jury of 11, counsel would have recommended a mistrial and Avery would have agreed.

The state claims that it is "black letter law that prejudice will not be presumed in an ineffective assistance of counsel claim." (State's brief at ¶50). The state is wrong. In its postconviction motion (as well as in its brief-in-chief), Avery cited three decisions from the Wisconsin Supreme Court in which prejudice was presumed in an ineffective assistance of counsel claim. ***State v. Smith***, 207 Wis. 2d 258, 278, 558 N.W.2d 379 (1997) (counsel failed to object to breach of plea agreement); ***State v. Behnke***, 155 Wis. 2d 796, 804-07, 456 N.W.2d 610 (1990) (counsel absent at return of verdict); ***State v. Johnson***, 133 Wis. 2d 207, 223-24, 395 N.W.2d 176 (1986) (counsel failed to raise issue of client's competency). Similarly, prejudice should be presumed here because of the difficulty of measuring the harm caused by the unlawful tinkering with a deliberating jury.

The state gets little traction from the argument that "nothing at the time suggested Mahler was a hold out, or may have been at odds with Juror C.W." (State's brief at ¶52). Rather, this argument illustrates why counsel's agreement to a private *voir dire* and Mahler's removal was both deficient and prejudicial. Counsel lost an opportunity to hear directly from Mahler, to learn the whole story as to why he wanted off, to discover Sheriff Pagel's improper involvement and, perhaps, to recognize that retaining Mahler might be the key to a not-guilty verdict.

"THE *DENNY* ISSUE"

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

At the outset, Avery clarifies the scope of his alternative perpetrator claim. He contends that he should have been permitted to introduce evidence and to argue that Scott Tadych, Charles and Earl Avery, and Bobby Dassey are potential alternative perpetrators. He does not contend that Andres Martinez or Robert Fabian were the true perpetrators. As attorney Strang testified at the postconviction hearing, the defense team would have had a narrow approach at trial. They would have "settled on one or more people as to whom we thought we had the best case...." (PC Trans. at 111). The individuals who would have been the most likely suspects are the four discussed in the postconviction motion and briefs: Tadych, Charles and Earl Avery, and Bobby Dassey.

A. The court should reject the state's preliminary *Denny* arguments.

The state initially points to various strategies that the trial court did not prevent the defense from pursuing. (State's brief at ¶68.). The state argues that the trial court's ***Denny*** ruling did not prevent the defense team from pointing the finger at Brendan Dassey, allowed the defense to argue that some unknown person committed the murder, permitted the defense to argue the police framed Avery, permitted the defense to argue that Teresa Halbach's body was burned somewhere other than Avery's "burn pit," and permitted the defense "to infer that the police ostensibly obtained a sample of his blood from a [vial] which had been kept in the clerk of court's office." (State's brief at ¶68).

Avery concedes that the court's ruling permitted him to point the finger at Brendan Dassey, but the testimony at the postconviction hearing shows the defense would not have accused Brendan Dassey. Attorney Buting testified that Brendan Dassey's purported confession, as reported by attorney Kratz at his press conference, was "simply false...." (PC Trans. at 218). Since the defense believed that the state's case against Brendan Dassey could be "easily disprove[d]," it would make no sense for the defense to point the finger at Brendan Dassey.

The state next asserts that the defense could "argue and suggest that some unknown third person committed the murder." (State's brief at ¶68 (b)). Thus, the state's position is that Avery could say that he did not kill Teresa Halbach, and that someone else killed her, but he could not give the jury possible alternative suspects. The state's argument points out much of the problem with the ***Denny*** legitimate tendency test. Under this test, a defendant can declare his innocence of a crime, say that someone else committed the crime, but cannot offer the jury a specific alternative liability narrative unless that defendant is prepared to assume a burden of proof which he is constitutionally not required to bear. In other words, the defendant can defend himself by saying he did not do the crime, but he cannot take the additional step of showing who he thinks did do the crime. This prohibition on the defense is fundamentally at odds with the constitutional guarantee that the state bears the burden of proof, and that the defendant has the constitutional right to present a defense.

The state's argument also ignores the reality of this case, and that is that Avery's attorneys both testified that they believed that in order for their client to be acquitted, they needed to give the jury an alternative liability theory. (PC Trans. at 108-112; 218-219). Given their client's high profile and the inflammatory pretrial publicity, the defense team believed they needed to give the jury a logical narrative alternative. As Buting testified, they "really wanted to show the jury that not only

was [Avery] not guilty, but here's another person there who could have been guilty, or could be guilty, so that [the jury] could have some sort of comfort level in returning a not guilty verdict." (PC Trans. at 219).

The state next argues that the court's ***Denny*** ruling permitted Avery to claim the police framed him, and that Teresa Halbach's body was burned somewhere other than behind Avery's trailer. (State's brief at ¶68 (c)). This argument misses the point. Of course Avery still had arguments he could make in his own defense, but he was deprived of an argument that his attorneys believed was essential. Trial counsel believed it was absolutely necessary to give the jury an alternative suspect in order for the jury to acquit their client. To say that the defense team could make a different argument than the one they wanted to make is not responsive to the defense claim.

The state next argues that the defense was able to infer, "by skillful cross-examination," that Officers Lenk and/or Colborn obtained a blood vial containing Avery's blood from the clerk of court's office and planted his blood in Teresa Halbach's car. (State's brief at ¶68(d)). As with the argument immediately above, Avery admits that the court's pretrial ruling did not foreclose all possible defenses. It did, however, foreclose a defense that trial counsel discussed during their postconviction testimony: that not only did the police officers have blood available to them from the blood vial to plant in Ms. Halbach's car, but that others, such as Avery's brothers, could have planted Avery's blood in Ms. Halbach's car. Others, such as Avery's brothers, could have taken a bloody cloth from Avery's trailer and planted that blood in Ms. Halbach's car. As Strang testified at the postconviction hearing, a claim that the police planted evidence to frame a defendant is not a claim that a jury wants to believe. (PC Trans. at 115).

B. The court should reject the state's argument that *Denny* is applicable and that it was properly applied.

The state argues that ***Denny*** is absolute, and that if the defendant "wishes to offer evidence that someone else could have committed the crime charged, then they must establish a 'legitimate tendency' that the person was, in fact, involved." (State's brief at ¶69, p. 36). The state continues that the way to establish this legitimate tendency "is through proof of all three components—motive, opportunity, and a direct connection to the crime." (*Id.*). As argued above, this argument points out the fundamental problem with the ***Denny*** legitimate tendency test: it imposes an improper burden of proof on the defendant. It requires the defendant to prove his innocence by proving the guilt of another. Such a burden is in conflict with the constitutional requirement that the state bears the burden of proof in a criminal case. ***Sandstrom v. Montana***, 442 U.S. 510 (1979).

The state argues that Avery must argue against the legitimate tendency test because "he cannot comply with it." (State's brief at 36). First, Avery believes he has met the legitimate tendency test, as he has argued. Second, the state's argument continues to expose the problems with the legitimate tendency test. It is the prosecution, of course, that brings the power and the resources of the state to bear in prosecuting a defendant for a crime. The state chooses whom to question, which alibis to check, which physical evidence to test and ultimately whom to charge with the crime. The defendant makes none of those decisions and has no authority to conduct the type of investigation the state may conduct. Thus the state's argument is a facile one. The defense is limited because it is the state, not the defense, who investigates and prosecutes crimes.

An example of this fact emerged when attorney Fallon asked attorney Strang whether there were witnesses who could have been called to verify Tadych's claim he had been at the hospital. (PC Trans. at 178). Strang testified he

did not know "at all" whether there were witnesses who could have substantiated Tadych's claim, and that if he had been the prosecutor, he would have decided not to look at corroborating evidence for Tadych because Tadych was not available to the defense as a ***Denny*** suspect. (*Id.*).

The state next contends that the supreme court adopted the ***Denny*** legitimate tendency test in ***State v. Knapp***, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881, and that Avery's reliance on ***State v. Oberlander***, 149 Wis. 2d 132, 438 N.W.2d 580 (1989), ***State v. Richardson***, 210 Wis. 2d 694, 563 N.W.2d 899 (1997), ***State v. Scheidell***, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), and ***State v. Falk***, 2000 WI App 161, 238 Wis. 2d 93, 617 N.W.2d 676, is misplaced. (State's brief at ¶¶69-73). Interestingly, in ***Knapp***, the circuit court *allowed* the defense to introduce third party liability evidence at the trial, and it was the state on appeal that argued that Knapp should not have been permitted to do so.

The defendant in ***Knapp*** was charged with murdering Resa Brunner. Resa Brunner was found dead by her husband, Ervin Brunner. Ervin Brunner had an alibi for the time of Resa's death, and that that was he was with another woman, Sharon Maas. At the time of Resa's murder, Maas was living at the home of Richard Borchardt, who died before the trial and who was never interviewed by the police. Knapp was the last person seen with Resa the night of the murder. ***Knapp***, 2003 WI 121 at ¶¶9-11.

At his trial, Knapp wanted to introduce evidence that tended to show that Ervin Brunner murdered Resa Brunner. Knapp wanted to introduce evidence that Ervin Brunner was in relative proximity to the homicide at the time of the murder; that Ervin lied to the police about his whereabouts at the time of the murder; and that shortly after the murder, Maas was observed carrying a paper bag and getting into Brunner's waiting truck. ***Id.*** at ¶166. In ***Knapp***, the state conceded that Ervin

Brunner had a motive to kill Resa, and also the opportunity, but disputed that there was any direct connection between Ervin and the crime. ***Id.***

The circuit court ruled that Knapp could introduce this evidence, and on review, the supreme court agreed that this evidence—the proximity, Ervin's lies, and Maas carrying the paper bag—was enough of a direct connection that Knapp had met the ***Denny*** legitimate tendency test. The court stated the test this way:

> The "legitimate tendency" test asks this court to determine whether the evidence offered is so remote in time, place, or circumstance that a direct connection cannot be made between the third party and the crime itself. ***Alexander***, 138 U.S. at 356-57. However, to show "legitimate tendency" a defendant is not required to prove the guilt of a third party beyond a reasonable doubt in order to have such evidence admitted in his defense. ***Denny***, 120 Wis. 2d at 623. Conversely, "evidence that simply affords a possible ground of suspicion against another person should not be admissible" either. ***Id.***

Id. at ¶¶178.

The supreme court thus analyzed the evidence connecting Ervin Brunner and Maas to Resa's murder, and concluded that Knapp had met his burden of proving a direct connection. The evidence connected Ervin and Maas to the murder because it showed that Brunner had lied about his whereabouts, Ervin and Maas were with each other at the time of the murder, Maas was seen getting into Ervin's truck with a paper bag, "and most importantly, the evidence puts Brunner in Watertown in relative proximity to the location where the homicide occurred and near the time of the murder." ***Id.*** at ¶182.

Avery submits that the evidence in ***Knapp*** of "direct connection" is no more exacting in time, place and circumstance than the proffer he made with respect to Tadych, Bobby Dassey and Charles and Earl Avery. Thus, if ***Denny*** applies as the state argues it must, applying the same level of analysis as that in ***Knapp***, the court erred in excluding Avery's proffered third party liability evidence. It is also

important to note that the court in ***Knapp*** reiterated that a defendant has a constitutional right to present a defense that is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Further, the court recognized that the "defendant's right to present a defense may in some cases require the admission of testimony that would otherwise be excluded under applicable evidentiary rules." ***Id.*** at ¶171.

With respect to ***Oberlander***, ***Richardson***, ***Scheidell*** and ***Falk***,[4] these cases were brought to this court's attention to illustrate that ***Denny*** is not the only way to analyze a defendant's attempt to blame another for the crime he is alleged to have committed. While the facts in these cases may differ, it nevertheless remains that where a defendant points the finger at another suspect, a court is not inextricably bound to the ***Denny*** analysis. Even in ***Knapp***, the court began its analysis with the relevancy standard as the touchstone:

> Defendants have the constitutional right to present witnesses in their defense, however, that evidence must be relevant to the issues before the court. (cite omitted). Pursuant to Wis. Stat. § 904.01, relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. See also Wis. Stat. § 904.02; ***Pharr***, 115 Wis. 2d at 342. In other words, this state recognizes the admission of testimony if it tends to prove or disprove a material fact. ***Denny***, 120 Wis. 2d at 623.

Knapp, 2003 WI 121 at ¶176.

---

[4] Counsel inadvertently cited to the unpublished ***Falk*** case. As the case is unpublished, it should not have been argued as authority in the postconviction motion. Counsel apologizes to the court and counsel for the oversight.

C. The application of the *Denny* rule violated Avery's constitutional rights.

The state next contends that the court's application of the ***Denny*** legitimate tendency test did not violate Avery's constitutional rights because the evidence Avery wanted to present of alternative suspects was not relevant. "Absent the presentation of motive, opportunity, and a direct connection to the offense, such evidence is irrelevant and thus inadmissible." (State's brief at 40). Thus, the state argues that the legitimate tendency test is interchangeable with relevancy.

The state is wrong when it equates the legitimate tendency test with relevancy. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Evidence that has any tendency to make it less probable that Steven Avery killed Teresa Halbach is therefore relevant. Any evidence that has any tendency to make it probable that someone other than Steven Avery killed Teresa Halbach is relevant. As the court said in ***Winfield v. United States***, 676 A.2d 1, 4 (D.C Cir. 1995), relevance does not mean something different "as regards evidence that a third party committed a crime than it does in other contexts." If evidence would be relevant were it *not* proffered in the context of third party liability, it must be relevant *in* the context of third party liability.

The legitimate tendency test, on the other hand, asks for more than relevance. It demands proof of motive, opportunity and a direct connection to the crime. Thus, the test burdens the defendant's right to present a defense because it binds the defendant to a standard higher than relevancy.

It is also vital to recognize that much of what is involved in this debate is not direct evidence that some alternative perpetrator killed Ms. Halbach. The state seemingly expected attorneys Strang and Buting to have developed direct evidence

that some particular person killed Teresa Halbach, and would present the "smoking gun" to prove it. But as the state is aware from its own prosecution of Avery, much evidence is circumstantial rather than direct. As Strang testified, he did not have direct evidence that Bobby Dassey, for example, killed Ms. Halbach. He did have circumstantial evidence, however. Bobby was potentially the last person to admit seeing Ms. Halbach. His only alibi was Scott Tadych. (PC Trans. at 173). His story about deer hunting was improbable. (*Id.*). His recollection of time frames was different than that of the bus driver. (*Id.*). He had access to Avery's trailer and guns of his own. (*Id.*). Strang said: "And, you know, if you're asking for direct evidence, no, I didn't have a confession. We could have presented a circumstantial evidence, in much the same way the State did here, against Mr. Avery." (*Id.*). Yet, even though this circumstantial evidence was just as probative as much of the state's circumstantial case, such as its introduction of evidence that Avery had used the *69 feature on his phone when he called Teresa Halbach, the defense was barred from introducing circumstantial evidence of an alternative perpetrator.

Similarly, the state faults Avery for having no direct evidence that persons other than the police may have framed Avery. (State's brief at 41). Avery did not have to prove that others on the property in fact framed him. He had the right, however, to introduce evidence that was relevant to that possibility: evidence that tended to make it more probable that another person on the property had the motive and the opportunity to frame him.

Avery had a right to present relevant evidence, and evidence that tends to make it more probable that Steven Avery did not kill Teresa Halbach, but that someone else specific killed her, is relevant. It was necessary for Avery to be able to present this alternative suspect defense to defend himself, and the fact that he could not introduce evidence of alternative suspects or to develop for the jury this

alternative suspect theory deprived him of the right to present a defense. This court is well aware of what Strang meant when he testified that even such things as the tone taken with a witness is part of the "courtroom mosaic" that is considered by juries, and that is vital to a defense. (PC Trans. at 175). To say that Strang still had the right to cross-examine Scott Tadych, for example, misses the point and denigrates the adversary process. Even if trial counsel had chosen to impeach every aspect of Tadych's and Bobby Dassey's testimony, whether about when they saw a fire or did not see a fire, when they saw Teresa Halbach, where they were at precise times of the relevant days, and so on, would have been lost on the jury because they could not argue the point: that this witness might be lying because this witness may have killed Teresa Halbach.

D. The State opened the door to the alternative perpetrator evidence.

The state next argues that it did not open the door to alternative suspect evidence when it introduced evidence which excluded other suspects. The state argues that the DNA exclusion evidence was offered for three purposes, none of which opened the door to third party liability evidence. (State's brief at ¶78). First, the state claims that the evidence was offered to refute claims of investigative bias. (*Id.*). In other words, the state wanted to be able to show the jury that it looked at other suspects, but that the evidence pointed to Steven Avery. Framing the issue this way again shows why Avery should have been able to develop his third party liability theory. It is unfair to allow the state to rebut a claim of police investigative bias while at the same time restricting the defense ability to show that some of these same individuals might have committed this crime.

The state also argues this evidence was offered "for purposes of completeness as it related to the presentation of DNA evidence for jury

consideration" and to show the high degree of specificity of this DNA analysis (State's brief at ¶80, p. 43-44). The state explains that it did not know whether the defense would mount a statistical challenge to the DNA evidence, and thus wanted to offer evidence of excluded individuals. (*Id.*). But it does not follow that the state may preemptively eliminate a claim of investigative bias while a defendant is prevented from arguing that another individual could have been the perpetrator. To say that the state had a reason for introducing the evidence does not mean that the defense is precluded from meeting that evidence. The fact that the state had a reason to introduce the evidence does not mean it did not "open the door." Even if Avery had mounted a statistical challenge to the DNA evidence, that does not answer the question of why the state could introduce evidence that other alternative perpetrators were excluded as sources of certain forensic evidence.

Finally, the state argues that the defense did not object to this evidence at trial, and therefore has waived any challenge to this evidence. (State's brief at ¶81). The court should reject this argument. The third party liability claim was extensively litigated and the court had issued its ruling. "The law does not require counsel to ...make a futile objection." ***Schueler v. Madison***, 49 Wis. 2d 695, 707, 183 N.W.2d 116 (1971).

E. The court's alternative *Denny* test.

In his postconviction motion, Avery argued that the court erred when in applied ***Denny***, and also erred when it applied an alternative legitimate tendency test. (Postconviction motion at ¶¶94-97). Avery argued that both versions of the legitimate tendency test, whether consisting of either a two-part or three-part test, are inconsistent with ***Alexander v. United States***, 138 U.S. 353 (1891). In ***Alexander***, the Court did not adopt a two or three factor test combining motive, opportunity and a direct connection to the crime, but rather looked at whether the third party's acts and statements in that particular case were so remote or

insignificant as to have no legitimate tendency to show that the person could have committed the crime. In essence, the test is whether the third party's acts and statements were too remote and too insignificant to have any probative value.

The state does not respond to Avery's discussion of ***Alexander*** or whether ***Denny*** correctly interpreted ***Alexander***. Instead, the state simply argues that if this court erred in applying a different legitimate tendency test, it was to Avery's advantage because the alternative legitimate tendency test required "a lesser burden of production" by Avery. (State's brief at ¶85).

As has been argued at length, Avery maintains that the appropriate standard to apply in deciding whether the defendant may present evidence of alternative suspects is the relevancy standard, and whether the probative value of such evidence is outweighed by its prejudicial effect. Any higher burden is inconsistent with ***Alexander*** and with the defendant's constitutional right to present a defense.

F. If *Denny* applies, Avery's offer of proof met the *Denny* three-part test as to Scott Tadych, Charles and Earl Avery, and Bobby Dassey.

Avery argued in his postconviction motion that if ***Denny*** applies to his proposed third-party liability evidence, the court erred in prohibiting that evidence because Avery's proffer with respect to Scott Tadych, Charles and Earl Avery and Bobby Dassey met the legitimate tendency test. The state argues that the defense proffer failed to meet the ***Denny*** test.

The state begins with Tadych, and argues that Avery has confused Tadych's bad character with a motive to kill Ms. Halbach. (State's brief at ¶¶88-89). The state misreads Avery's argument. The state has never argued that anyone, including Avery, had a motive to kill Teresa Halbach. The state has implied a sexual motive, suggesting that Avery lured Ms. Halbach to his home. And, of course attorney Kratz's press conference regarding Brendan Dassey's purported confession put forth a sexual motivation for the crimes. But the matter of motive

has never been made clear by the state. One could fairly infer that a motive to kill could exist where the perpetrator has a violent nature and contempt for women. Thus, while a violent nature can constitute character evidence, it can also support an inference of motive.

The state next asserts that Avery's claim that others, such as Charles and Earl Avery, might have a motive to frame Avery as opposed to a motive to kill Ms. Halbach is not countenanced as a motive in ***Denny***. (State's brief at ¶90). The state views the idea of "motive" too narrowly. Motive can exist to commit a crime, but it can also exist to frame someone for a crime he did not commit. For example, in ***Beaty v. Kentucky***, 125 S.W. 3d 196 (Supreme Court of Kentucky, 2003), the motive was to frame the defendant, not motive to commit a crime. In ***Beaty***, the defendant was driving a car that belonged to a third party. The defendant was stopped while driving, arrested for operating a motor vehicle while intoxicated, and a search of the car revealed "substantial evidence of illegal drug activity." ***Id.*** at 201. The defendant argued he was merely borrowing the car and did not know about the drugs in the car. The defendant also attempted to elicit testimony that the car's owner was out to frame him due to jealousy, and thus planted evidence in the car. The Kentucky Supreme Court noted that the jury was aware that a third person had the opportunity to place drugs in the car but that the jury was not permitted to hear of that person's motive for doing so. With only the knowledge that there was an opportunity to frame the defendant, and lacking evidence to show why the third person would want to frame the defendant, the defendant's "defense was left in shambles." ***Id.*** at 209.

Therefore, although ***Denny*** does not specifically discuss motive in the context of a frame-up defense, this does not mean that it cannot be applied in that context. At its root, the ***Denny*** legitimate tendency test seeks to ensure there is a connection between the third party and the crime. In the proper context, such as in

Beaty, that direct connection may be the third person's motive to set up the defendant rather than a motive to commit a particular crime.

The state also argues that Tadych had neither opportunity nor a direct connection to the crime. (State's brief at ¶¶91-94). The state's assertion, however, is based upon the assumption that Tadych was truthful in his recounting of his whereabouts on October 31, 2005. For example, the state asserts that Tadych was at the nursing home in Green Bay visiting his mother, that he spent the evening in the company of Barb Janda, and that "it would have been quite the magical feat for Tadych to have slipped into the Salvage yard in late afternoon and early evening of October 31, 2005 to murder Teresa Halbach and plant evidence to frame the defendant." (State's brief at ¶91, p. 48). Strang testified at the postconviction hearing that he did not know "at all" whether anyone could substantiate Tadych's story that he visited his mother that day. (PC Trans. at 178). Strang went on to say that if he were in the prosecutor's position, he "would have decided no such evidence to corroborate Mr. Tadych was necessary because he wasn't available to [the defense] as a ***Denny*** suspect." (*Id.*). In other words, as long as the defense could not allege Tadych was an alternative perpetrator, the state would have no reason to corroborate Tadych's version of events, and the defense would not have any reason to discredit him either. As Buting testified at the postconviction hearing, the defense had to treat Tadych and Bobby Dassey as neutral witnesses (PC Trans. at 220), not biased and incredible witnesses, because to do otherwise would not only have run afoul of the court's pretrial ruling, but also would have confused the jury. Why, the jury would wonder, was the defense impeaching these witnesses when, on the surface, the witnesses seemed to be simply setting forth a chronology into which the state could put Ms. Halbach and Steven Avery.

The same is true for the state's recounting of the DCI Reports on Charles Avery, Earl Avery and Bobby Dassey. The state takes at face value that Charles worked at the salvage yard from 8:00 a.m. until 5:00 p.m. on October 31, 2005, and that he was home alone that night. (State's brief at ¶99, p. 53). The state similarly accepts Earl's and Bobby Dassey's explanations of their whereabouts even though they had the same access to Teresa Halbach as had Steven Avery. The state ignores that much of their case against Steven Avery was circumstantial. Had the state concluded one of these other individuals was the guilty party, it could have similarly constructed a circumstantial case against them.

For example, the evidence shows that Bobby Dassey saw Teresa Halbach photographing Barb Janda's van. Thus, Bobby Dassey was arguably the last person to see Ms. Halbach before she disappeared. He was home alone that afternoon. The Janda/Dassey trailer is right next to Steven Avery's trailer, and is in close proximity to the burn barrel behind Avery's trailer. Bobby Dassey's testimony differed from that of the bus driver in terms of when Ms. Halbach was at the property, calling into question Bobby Dassey's time line. Bobby Dassey has the same type of weapon as that determined to be the murder weapon.[5]

Similarly, Scott Tadych and Charles and Earl Avery were all on the salvage yard property that day, giving them nearness in time and place to Ms. Halbach. Counsel is not aware of a witness who would corroborate that Charles, for example, was never alone that day. Charles' trailer is the closest to where Ms. Halbach's car was found, and as argued in the postconviction motion, can be

---

[5] The state says that there was a "gentleman's agreement" between the state and the defense that, in return for an early return of other hunting weapons, the defense would not claim that any gun other than the one examined by Mr. Newhouse was the gun responsible for Ms. Halbach's death. (State's brief at fn. 14). Undersigned counsel is not aware of such a "gentleman's agreement."

violent towards women and has exhibited stalking-like behavior with women who have been to the salvage yard.

In sum, the state dismisses any suggestion of another perpetrator as rank speculation when in reality, had it chosen to do so, the state could have assembled a credible circumstantial case against Tadych, Bobby Dassey, or Charles or Earl Avery. They had access to Teresa Halbach that day, just as did Steven Avery, and they had no more or less reason to cause her harm than did Steven Avery. This level of direct connection to the offense is equivalent to that in ***Knapp***. Avery should have been permitted to introduce third party liability evidence.

G. *Denny* should be overruled.

Avery argues above, in the postconviction motion and in the first brief that ***Denny*** was wrongly decided and should be overruled. The state argues ***Denny*** was properly decided. If this court concludes that ***Denny*** applies to the facts of this case, an argument that ***Denny*** should not apply as it was wrongly decided should await a higher court.

CONCLUSION

At what was certainly the most critical stage of the trial for Mr. Avery – the jury's deliberation – a series of errors occurred that impermissibly disrupted the makeup of the jury and the deliberative process.

- The court failed to conduct a *voir dire* of Richard Mahler, the deliberating juror who was seeking to be excused, on the record and with the defendant and all counsel present.

- The court removed Mahler without a record establishing cause. Moreover, evidence at the postconviction hearing established there was no cause in fact and that Mahler's removal was particularly problematic because it stemmed, in part, from his frustration with the deliberative process and, in particular, with other jurors who, unlike Mahler, believed Avery was guilty.

- Mahler's removal was further tainted by the involvement of Sheriff Pagel, the supervisor of several officers who testified for the state, who should have had no communication with any sequestered juror, much less one seeking removal.

- The "cure" selected following Mahler's unlawful removal – substitution of an alternate juror – was itself unlawful.

Each error standing alone would be grounds for reversal. Surely, then, Avery's convictions cannot survive the aggregation of these errors. Although counsel agreed to the court's private *voir dire* of Mahler, counsel's agreement could not and did not waive Avery's right to be present and assisted by counsel when Mahler was questioned to determine if cause existed for his removal. Because that first error was the catalyst for each that followed, none of the errors should be deemed waived. But even if waiver is applied, Avery's convictions should be reversed because the errors constitute plain error, relief is warranted in the interest of justice, or Avery was denied effective assistance of counsel.

Further, Avery's convictions should be reversed because he was improperly denied the opportunity to defend himself by adducing evidence and arguing that other specific persons were responsible for Ms. Halbach's murder.

For the reasons argued above, in the postconviction motion and in his first brief, and in light of the testimony presented 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 12th day of November, 2009.

Respectfully submitted,

SUZANNE L. HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179
(608) 267-5177
hagopians@opd.wi.gov

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032
(608) 267-2879
askinsm@opd.wi.gov.

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862

Attorneys for Defendant