STATE OF WISCONSIN

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

DISTRICT II

Case No. 2010AP000411 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. This Court Should Order a New Trial at Which the State Is Barred from Presenting the Key to Halbach's Vehicle That Was Seized During an Unlawful Search of Avery's Bedroom.

A. The officers' re-search of Avery's bedroom during the sixth entry into his home and while seizing items beyond the scope of the warrant does not satisfy the reasonable continuation test.

The parties agree that the legality of the November 8 search of Mr. Avery's bedroom depends on whether the search satisfies the reasonable continuation rule. The state does not attempt to defend, and this court should reject, the circuit court's alternative conclusion that the police had unlimited authority to re-enter and re-search Avery's trailer as long as the police had not finished executing the warrant with respect to the entire 40-acre salvage yard property. Rather, as the state concedes, the November 8 search, during the sixth entry into Avery's trailer, is constitutional only if, under the two-prong test, the search is a reasonable continuation of the prior searches.

The first prong – requiring that the subsequent entry be a continuation of the original search – focuses on whether the ability of police to fully execute the warrant was impaired at the time of the initial entry. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.10(d), p. 768 (4th ed. 2004), *citing* ***United States v. Keszthelyi***, 308 F.3d 557, 572 (6th Cir. 2002). The state relies on Agent Fassbender's testimony that he knew when the two-and-a-half hour search of Avery's trailer ended at 10 p.m. on

November 5 that the residence would be searched again, "based on the weather and lighting conditions, exhaustion of the searchers." (126:93-94). For three reasons, Fassbender's testimony does not establish the sort of "impairment" needed to justify what occurred here: a second, three-and-a-half hour search of Avery's 700-square-foot trailer conducted three days later.

First, Fassbender's complaints about rain, lighting and exhaustion are tainted by his testimony that he believed the warrant gave law enforcement carte blanche to go in and out of Avery's residence as many times as they wanted. (126:111). His erroneous belief that police had unfettered authority to re-enter and re-search likely colored his decision that the officers could stop the search on November 5 and conduct another full-blown search at their discretion.

Second, Fassbender's testimony is contradicted by testimony of two of the searching officers – Remiker and Lenk – who believed their search had *not* been suspended due to conditions or the hour. Remiker testified that the four officers continued the search as long as necessary that evening, no one ordered them out of the trailer and no one put a time limit on the search. (126:18). Having collectively seized some 50 items (126:17-18), Lenk left the trailer believing they seized everything of evidentiary value. (125:203). Even Fassbender conceded none of the four officers complained they were too tired to continue. (126:132).

Third, Fassbender's complaints do not amount to an impairment or obstacle that courts have found to justify continuing a search to a later time. For example, in ***United States v. Squillacote***, 221 F.3d 542, 554-55 (4th Cir. 2000), relied upon by the state, the warrant itself limited the search

of defendants' residence to the hours between 6 a.m. and 10 p.m., thereby requiring officers to suspend their search each night and resume the following morning. No such restriction appears in the warrant here. In ***United States v. Gerber***, 994 F.2d 1556, 1561 (11th Cir. 1993), the "unexpected obstacle" encountered by police executing a warrant to search a vehicle was their inability to open the hood without the assistance of a mechanic. The search was suspended until a mechanic was available, thereby avoiding damaging the vehicle. ***Id***. In contrast, here, the searching officers testified nothing prevented them from continuing the search that night, if necessary.

The twin decisions to stop the search of Avery's trailer on November 5 and to conduct another, even longer search on November 8 were not the product of some impairment but, rather, a choice made by law enforcement. That choice is incompatible with the reasonable continuation rule, which does *not* reject the long-standing principle that a warrant may be executed once. ***Keszthelyi***, 308 F.3d at 568-69. Contrary to the state's application here, the rule was not meant to allow re-entry for the purpose of conducting another complete search, as occurred in Avery's home on November 8. *See* LaFave, § 4.10(d) p. 768, n.186.

The reasonable continuation rule has generally been confined to two circumstances. Under the first, police actually minimize the intrusion by conducting two entries rather than one. For example, in ***United States v. Bowling***, 351 F.2d 236, 240-41 (6th Cir. 1965), officers recorded serial numbers of suspected stolen items and checked them overnight to determine which were stolen, rather than seizing all suspected property during the first entry. *See also* ***Gerber***, 994 F.2d at 1561 (second search with mechanic's assistance avoided damage to vehicle). Under the second, the

subsequent entry and search are carried out for a narrowly-defined purpose, such as to recover a specific piece of evidence left behind during the initial search. *See* ***United States v. Kaplan***, 895 F.2d 618, 623 (9th Cir. 1990) (police returned to office two hours after initial search to obtain files identified in the warrant that were not given to them during the initial search).

Here, the state does not contend that the multiple searches somehow fostered Avery's Fourth Amendment protections or that the November 8 search was discrete and narrowly tailored. Rather, arguing the officers had authority to conduct another thorough search, the state balks at Avery's argument that the circuit court determined the purpose of the officers' entry on November 8 was limited to seizing the computer located in the living room, swabbing blood spots previously found in the bathroom and seizing pornographic materials previously seen in the bedroom. (State's brief at 12-13).

The state's argument fails because the second prong of the reasonable continuation rule, which requires that the decision to conduct a second search be reasonable, is not satisfied unless "the police took appropriate 'steps to limit the scope of the intrusiveness of the second search.'" LaFave, § 4.10(d), p. 768, *quoting* ***Keszthelyi***, 308 F.3d at 573. The state's argument ignores this limitation and impermissibly allows a subsequent search that is, in effect, a complete do-over, not a mere continuation.

The state also ignores what the officers were doing when the key was discovered: seizing pornography from Avery's bedroom that they had no authority to seize. The heart of Avery's argument on the second prong is that re-entry and re-search of the bedroom on November 8 cannot be

deemed "reasonable" given the trial court's determination that the seizure of the pornography exceeded the scope of the warrant. Execution of a warrant that is unlawful cannot at the same time be reasonable.

The state does not contest the court's ruling that seizure of the pornography was unlawful, nor does the state dispute that the key was discovered when the police were unlawfully seizing the pornography. If the search of the bedroom was limited to seizing pornography found in the previous search, the search was nevertheless unreasonable because it exceeded the scope of the warrant. If, as the state argues, the search of the bedroom was not limited in that manner, the search was still unreasonable because, contrary to the second prong of the reasonable continuation test, police did not take appropriate steps to limit the intrusiveness of the subsequent search. Either way, the search that produced the key was unreasonable and violated the state and federal constitutions.

B. The inevitable discovery exception to the exclusionary rule does not apply to the key.

As both parties note, a three-part test applies to the inevitable discovery exception. The state must prove that: (1) there is a reasonable probability the evidence would have been discovered by lawful means but for the police misconduct; (2) the leads making the discovery inevitable were possessed by the government at the time of the misconduct; *and* (3) prior to the unlawful search, the government was also actively pursuing some alternate line of investigation. (Brief-in-chief at 36; state's brief at 14, citing ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992).

In his brief-in-chief, Avery argued the state failed to prove the police would inevitably have discovered the key. (Brief-in-chief at 39). It is not surprising the state would have difficulty proving that a small item, apparently hidden, would inevitably be discovered during a search given the idiosyncratic and unpredictable nature of police searches. After all, this was not a routine search, such as the search of an impounded vehicle.

The state characterizes Avery's argument as requiring a routine practice before inevitable discovery can apply. (State's brief at 16). Avery does not contend that a search must be pursuant to a practice or routine before inevitable discovery applies. However, the state must prove inevitability somehow, and the easiest way to prove inevitability will be where police have followed a routine procedure. Here, the state cannot establish the agents would inevitably have found this key in a subsequent search pursuant to a warrant. The state has not explained why the agents would have conducted the search in the exact same way on November 9 as on November 8 and that they would inevitably have jostled, tilted, twisted and shaken the bookcase so as to dislodge the key.

The state argues this case is similar to ***Keszthelyi***, where the police found cocaine behind a stove during a second search. (State's brief at 16). The court there concluded the cocaine would inevitably have been discovered because the agent who discovered it "readily located the cocaine behind defendant's stove…." ***Keszthely***, 308 F.3d at 574. In the first search, agents discovered weapons, money, a scale and surveillance equipment, but only four grams of cocaine. ***Id.*** at 563. It is not surprising then that the agent stated he "felt very strongly that there was something there that had not been located" in the first search, being more

cocaine. ***Id.*** In the subsequent search, the agent noticed the oven was moveable, and he discovered cocaine when he moved it aside. ***Id.***

No such similarity exists here. The agents did not articulate a suspicion that something must have been secreted away in Avery's bedroom. The handling of the bookcase was to seize the pornography, not to search for a small hidden item. And, moving a moveable oven is different from twisting and shaking a piece of furniture.

Further, as agents knew on November 4 that Halbach's car was found in the salvage yard, they would have wanted to find the key as quickly as possible. The state does not explain why, not having found the key during their first five searches of Avery's 700-square-foot trailer, they would inevitably have found it during their seventh search.

The state next argues the second ***Schwegler*** prong, that the government possessed the leads making the discovery inevitable at the time of the search on November 9. (State's brief at 16-17). The leads the state points to are the blood in Halbach's car and the human remains in the burn pit. (*Id.*).

The state incorrectly asserts that Avery has effectively conceded the second prong of inevitable discovery. (State's brief at 17). The leads, such as the blood and human remains, caused the police to focus on Avery. This does not mean, however, the police possessed leads making discovery of the key inevitable.

Further, the November 9 warrant application proves the leads would not inevitably lead to the discovery of the key. The warrant application included not only Avery's home but also the homes of Charles Avery, Allen Avery and

Barb Janda, all of whom lived on the salvage yard property. (337:47-55).

Finally, the state argues it met the third prong because prior to the search in which the key was discovered, the government was actively pursuing an alternate line of investigation. (State's brief at 17-23). Avery argued in his brief-in-chief that, to meet this prong, the police must have been in the process of procuring a second search warrant when they discovered the key. (Brief-in-chief at 45).

Not surprisingly, the state disagrees with this requirement as it concedes the record is unclear whether the police were in the process of procuring a second warrant when they discovered the key. (State's brief at 18). As the proponent of the evidence, however, the state was responsible for making the record as to when it applied for the warrant.

The state also asks the court to adopt the test articulated in ***United States v. Tejada***, 524 F.3d 809 (7th Cir. 2008) regarding the third prong. The court there rejected a rule that the police must have been in the process of procuring a warrant in order to meet that prong. ***Id.*** at 813. The court instead adopted a test requiring the government "to prove that a warrant would certainly, and not merely probably, have been issued had it been applied for." ***Id.***

Although the court refused to require the police to be in the process of procuring a warrant, it expressed reservations about the state's ability to invoke inevitable discovery. It distinguished its facts from a case where the police simply search a home without a warrant and defend their conduct by invoking inevitable discovery. "If that defense prevailed, the requirement of obtaining a warrant to search a person's home would be out the window." ***Id.*** at 813-14.

Even with this qualifying language, this court should reject the ***Tejada*** test because it undercuts the warrant requirement and conflicts with ***State v. Pickens***, 2010 WI App 5, 323 Wis. 2d 226, 779 N.W.2d 1. If the state need only prove a warrant would have been issued if sought, the police may skip the application process so long as it is "certain" a warrant would issue. ***Id***. at ¶49. The police would be encouraged to search without first going through a magistrate.

The state also argues that requiring the police to be in the process of securing a warrant to meet the third prong conflicts with ***State v. Weber***, 163 Wis. 2d 116, 471 N.W.2d 187 (1991). The evidence at issue in ***Weber*** was a cassette tape in Weber's car. On the tape, Weber confessed to numerous crimes. The police played the cassette tape while inventorying the contents of the car, and Weber moved to suppress. ***Id.*** at 124, 127. The supreme court held that although there was no warrant for the tape, and evidently none was being sought, the tape was nevertheless admissible under, *inter alia*, the inevitable discovery doctrine. ***Id.*** at 144.

Although the police in ***Weber*** were not in the process of obtaining a warrant for the tape, they did have a different and very strong alternative lead, that being Emily Weber, Weber's wife. Weber had taken Emily for a car ride, representing he had a "surprise" for her. Weber severely beat Emily in the car, nearly killing her. ***Id.*** at 122. Emily later told police that while she was in the car, Weber mentioned the tape to her "on and off" and she thought the tape had something to do with the "surprise." ***Id.*** at 141. She also told them she tried to play the tape, but Weber would not let her. ***Id.*** The supreme court concluded that in light of the police interview of Emily Weber, the discovery of the tape and its contents was inevitable. ***Id*** at 144.

A rule requiring the police to be actively seeking a warrant does not conflict with ***Weber***. ***Weber*** simply illustrates that the police must have some alternative lead, whether the procuring of a warrant or an alternative investigative source like Emily Weber. If not, the police may not rely on inevitable discovery to salvage the unlawful discovery of evidence. Unlike ***Weber*** and the cases discussed in Avery's first brief, the police were not in the process of procuring a warrant, nor did they have another line of investigation that would inevitably have led to the discovery of the key.

C. The error in admitting the key was not harmless.

The state argues that any error in admitting the key was harmless for two reasons: the state's case at trial was compelling, and the key was the strongest evidence to support Avery's theory of the defense. The state's claims do not establish, beyond a reasonable doubt, that its use of the key at the trial—the only property belonging to Teresa Halbach found in Avery's home—was harmless.

The state's case was not nearly as compelling as it represents. For example, the state points to Bobby Dassey's testimony that he saw Halbach arrive at the property, watched her photograph his mother's van, saw her walk towards Avery's trailer as he went to take a shower, and that he then left at 2:45 p.m. Bobby Dassey's chronology is contradicted by another of the state's witnesses, however, Blaine Dassey. Blaine testified that Bobby was asleep when he got home from school, as usual, at 3:40 p.m. If Blaine is correct that Bobby was home asleep at 3:40 p.m., Bobby did not leave his home at 2:45 p.m. Blaine's testimony also undercuts the mutual alibi of Bobby and Scott Tadych. According to

Blaine's testimony, Bobby and Tadych could not have seen each other on the road at about 3:00 p.m. because Bobby was home sleeping.

Bobby's testimony also conflicts with that of the bus driver who dropped Blaine off after school, and who testified that she saw a woman taking photographs, presumably Halbach, much later than did Bobby, at about 3:45 or 3:50 p.m. (323:108-111).

John Leurquin testified that as he was filling his truck on October 31, he saw a green SUV drive by, away from the salvage yard, at about 3:30 p.m. He said he thought it might have been Halbach's car. (323:122-126).

The state points to Blaine's testimony that he saw Avery throw a plastic bag into an actively burning burn barrel at 3:50 p.m., and that he saw Avery watching a bonfire near his home at 11:00 p.m. Blaine also testified, however, that he had told the police on two occasions that he never saw Avery throw a plastic bag onto the fire, but that they kept asking him questions until he changed his answer. (316:101). He also testified he did not know who was standing by the fire. (*Id*. at 71).

The state points to Scott Tadych's testimony about a purple car which appears to be irrelevant. The purple car was only a reference point in the state's questioning of Tadych, and Tadych did not testify that the purple car was even there on October 31. (316:129). And, if the state is suggesting that this was Halbach's car, the evidence is quite consistent that her car was teal or blue-green. In addition, Tadych's testimony about the height and timing of the fire he saw behind Avery's garage differs from his statement to the police. (316:143).

The next series of facts the state cites to do not link Avery to the crime at all. That Halbach's car was found in the salvage yard with her blood inside links her killing to the salvage yard property and all of those on that property. That Halbach's remains, clothing and other personal effects were found on the property provides a link between her murder and anyone on the property, including those who would have access to Avery's backyard. These findings, however, do not specifically link her murder to Avery.

The state also refers to the blood evidence found in the car that was determined to be from Avery. But this blood evidence was a central part of the defense, which was that police, who had access to Avery's blood, had planted it.

The state also cites to the toolmarks testing showing the bullet fragments found on Avery's garage floor came from the gun found in Avery's home. The toolmarks examiner was vigorously cross-examined by the defense, however, and the jury may have concluded the marks were not from Avery's gun at all. Further, even if the gun in Avery's home was the weapon that killed Halbach, the jury could have inferred that the Dassey brothers, who lived next door, took the gun from his wall and used it. Earl and Charles Avery, who worked on the salvage yard, could have entered Steven's trailer and taken the gun and used it in his garage. The mobility of a gun and questions about the markings on the bullets make the gun evidence less compelling than the state represents.

The state also argues that the prosecutor's closing argument shows the discovery of the key was not very important to the state, noting that Kratz only spent 17 lines discussing the key. The state's claim is disingenuous, given that Kratz devoted hundreds of lines to discussing Halbach's

vehicle. Discovery of the key was monumental for the state because it effectively put a piece of Halbach's vehicle in Avery's bedroom.

Kratz began his closing argument by commenting that this was a "big" case with an enormous amount of evidence. (327:34). The evidence Kratz chose to discuss first was Halbach's Toyota RAV4, the discovery of which within the salvage yard was a "watershed" moment that changed not only the course of the case but "the lives of everybody in this room." (327:34-36). Kratz spent the next 26 pages discussing Halbach's vehicle. (327:36-62). Given the prosecutor's identification of the car as the most important piece of evidence, the state is hard-pressed to argue on appeal that the discovery of the key to this vehicle, secreted in Avery's bedroom, was of little value to the state.

Indeed, as Kratz argued, not only was the key found in Avery's bedroom, it contained Avery's DNA.

> This key is the key for Teresa Halbach's vehicle. This key, found in Mr. Avery's bedroom, has a full, a complete, a 15 out of 15 match for Mr. Avery's DNA. That is significant evidence.

(327:120-21).

Against this backdrop, the state's further argument that the key was strong evidence for the defense is absurd. As Attorney Buting told the jury, "the most obvious lack of evidence" was the absence of any of Halbach's blood or DNA in Avery's trailer. (327:153). But her key was hidden away there. While the defense attempted to diffuse this evidence with a theory that the key was planted, Kratz responded that, if the jury bought that argument, the jury would also have to

conclude that the police planted Avery's DNA on the key and killed Halbach.

> … are you willing to say that these two otherwise honest cops came across a 25 year old photographer, killed her, mutilated her, burned her bones, all to set up and to frame Mr. Avery. You have got to be willing to say that. You have got to make that leap. Because of this question right there, where did they get the key.

(328:70). In fact, the defense was not claiming that police killed Halbach, but the defense could not explain how the officers would have gotten her key.

Discovery of Halbach's key in Avery's bedroom was the equivalent of the discovery of a "smoking gun." It was the sort of evidence any homicide defendant would want to prevent the state from using. Indeed, the key was among the evidence the defense sought to suppress. The state fails to show beyond a reasonable doubt that its use of the key at trial did not contribute to the verdict. Consequently, the erroneous denial of Avery's suppression motion is not harmless.

II. Avery Was Denied a Fair Trial by the Court's Refusal to Permit Third-Party Liability Evidence.

Avery agrees with the state that the applicable standard of review of the trial court's decision to bar third-party liability evidence is *de novo*. (State's brief at 37-38). Because the court's ruling implicates Avery's constitutional right to present a defense, the issue before this court is one of constitutional fact.

A. The trial court's ruling.

The state's brief again raises the question of precisely what the court's pretrial order prohibited. The state asserts

the order permitted Avery to argue that "the evidence that was admitted at trial demonstrated that other individuals, named or unnamed, may have committed the crime." (State's brief at 39).

The court's order, however, specifically prohibited the defense "from offering any direct evidence that a third party, other than Brendan Dassey, participated in the commission of the crimes charged in the Amended Information." (204:15). Having been prohibited from eliciting evidence of third-party liability, it would have been improper for the defense to argue to the jury that named individuals were guilty of these crimes. "Argument on matters not in evidence is improper." ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980). The semantic parsing of the court's ruling—that Avery *could not present evidence* of named third party suspects but *could argue* third-party suspects—is unfair because it suggests defense counsel should have given an improper closing argument.

As Kratz argued to the court when he vehemently objected to Buting's closing argument:

> If the Court excludes evidence of third party liability, and there's no evidence in the record, how does Mr. Buting think that he can comment on that evidence, or lack of evidence. He can't. I mean, it absolutely flies in the face of the third party liability court order.

(327:218).

Buting's testimony at the postconviction hearing shows he also believed he could not name other persons as the possible perpetrator, and his reference to Bobby Dassey as the possible murderer was "a slip of phrasing." (362:224). Buting testified:

> The most I could do was argue that the State failed to investigate other possible suspects. I couldn't name any. I couldn't explain why someone would lie because I believed they were a suspect. I couldn't do any of that.

(362:224).

The parties clearly believed the defense could not present third-party liability evidence, and as a result, could not argue particular alternative suspects to the jury.

B. The effect of the ruling.

Because third-party liability hinges on facts, it is important to correct a misstatement in the state's brief. The state writes: "There was no evidence adduced at trial that anyone saw or heard from Ms. Halbach after Bobby Dassey saw her walking towards Avery's trailer." (State's brief at 26). This is incorrect. Lisa Buchner, the school bus driver who dropped Blaine and Brendan Dassey off at their driveway every school day testified that when she dropped them off on October 31, between 3:30 and 3:40 p.m., she saw a woman taking photographs of a van in the driveway. (323:108-111). This would have been about an hour after Bobby Dassey said he had seen Ms. Halbach walking towards Avery's trailer and 45 minutes after Bobby Dassey said he had left his home to go hunting. (298:35-40).

The state argues that Avery has not shown that the trial court's order prevented him from presenting any "significant" evidence. (State's brief at 38-44). The state also complains that trial techniques such as counsel's "attitude, tone of voice and manner of questioning are not evidence…," and should not be considered. (State's brief at 41). While it is true that trial techniques are not evidence, they are an important part of the theory of the case and the narrative the defense seeks to

present. As Attorney Strang testified at the postconviction hearing, he tries to give the jury a "coherent narrative" when he gives his opening statement, one which "embraces and advances the theory of defense." (362:110). He testified that attitude and tone towards witnesses are "part of the courtroom mosaic" that is considered by juries. (362:175). Buting stressed the need to give the jury a theory that not only was Avery innocent, but also offer an alternative suspect, particularly because of the "great deal of prejudice against Mr. Avery in the community…." (362:218-219). In other words, defense counsel wanted to give the jury a "story" through evidence and argument to persuade the jurors to acquit Avery not only because they had reasonable doubt about his guilt, but also because they were persuaded another individual was guilty.

Trial counsel's postconviction testimony is echoed in the literature regarding jury decision-making. "Empirical studies have shown that—more than legal standards, definitions or instructions—narrative plays a key role in the juror decision-making process." J. Blume et al., "*Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*," 44 Am. Crim. L. Rev. 1069, 1086 (2007). "It is now widely accepted, and empirical research demonstrates, that narrative plays an important role throughout the entire trial process." *Id.* at 1088. Jurors organize and interpret trial evidence as they receive it by placing in into a story format. *Id.* In the end, "[j]urors expect parties to tell a story about the events of a crime that makes sense. They expect a story that possesses 'narrative integrity.'" *Id.* at 1103, footnote omitted. And this story, or narrative, is the manifestation of the defendant's right to present a defense.

Thus while Strang testified he did not have direct evidence, for example, that Bobby Dassey killed Teresa Halbach, he could have presented a circumstantial case as the state had done with Avery. (362:173) For example, Bobby's deer hunting alibi was "improbable," his recollection of the time frames was different from that of the bus driver who drove the same route every day, and he had access to Avery's trailer and gun. (*Id.*) Similarly, Strang testified he could have presented a circumstantial case against Scott Tadych that would have allowed the inference that he was the killer, such as his mutual alibi with Bobby Dassey, and changes in his story that included when he saw flames at Avery's home and the height of the flames. (362:176-77).

Another example of the constraints on the defense was the handling of Bobby's testimony that Avery had joked about disposing of a body. The state accurately notes that this testimony came on Bobby's direct, and argues that "it would have been strange to suggest through cross-examination that Bobby had invented the conversation to shift the blame from himself to Avery." (State's brief at 41-41). The state's argument ignores the full record, however.

After Bobby's direct testimony and during a break, the defense objected, arguing a discovery violation. (298; 69-73). Indeed, the defense was so concerned about Bobby's testimony that it moved for a mistrial, arguing the testimony amounted to a confession of a crime from Avery to his nephew. (298:73). The court denied the mistrial motion, and the defense was left with Bobby's testimony, which "joking" or not, the defense viewed as extremely prejudicial.

The state minimizes the effect of the trial court's ruling by arguing "there was abundant evidence that Avery murdered Teresa Halbach." (State's brief at 44). The case

against Avery was not nearly as compelling as the state describes, as argued in Section I.C. of this brief.

In short, much of the other evidence the state cites is not specific to Avery at all. Evidence that Halbach's car was found in the salvage yard covered with branches, her blood was found in her car, investigators found bone fragments in an area behind Avery's garage, Halbach's remains were burned, and rivets from her pants were found among the burned remains tends only to show that she was murdered in the vicinity of the salvage yard. (State's brief at 27-29). None of this evidence specifically ties Avery to her murder as opposed to others with ready access to the salvage yard such as Bobby Dassey, Scott Tadych or Earl or Charles Avery.

C. The ***Denny*** framework.

In his first brief, Avery argued that his constitutional right to present a defense overrides the state evidentiary rule articulated in ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). There is no dispute that the ***Denny*** "legitimate tendency" test is a state evidentiary rule which restricts a defendant's ability to present evidence. The rule bars a defendant from presenting evidence of an alternative perpetrator unless the defendant can establish motive, opportunity and a direct connection to the crime. As such, the legitimate tendency test poses a higher burden on the defendant than a simple relevancy standard. It requires the defendant to show not only that the evidence has a tendency to make it less likely that the defendant committed the crime, but also to affirmatively show that another individual had the motive, opportunity and direct connection to the crime.

The state does not respond directly to Avery's argument that the legitimate tendency test burdens Avery's right to present a defense, but merely states that the ***Denny***

rule, and rules like it, are "widely accepted" rules which regulate the admission of evidence. (State's brief at 46). The state fails to acknowledge that a defendant's right to present a defense may in some cases require the admission of testimony that would otherwise be excluded under a state's evidentiary rules. *See* ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973), ***State v. Pulizzano***, 155 Wis. 2d 633, 647-48, 456 N.W.2d 325 (1990).

Avery argued in his brief-in-chief that ***Denny*** must be limited to its facts and to motive cases. Avery had no intention of presenting numerous witnesses with animus towards Halbach as was feared in ***Denny***. In response, the state argues that Avery instead intended to "include anyone who set foot on the Avery Salvage Yard property" on October 31. (State's brief at 46). It argues that Avery never narrowed his list of potential third-party suspects, and therefore, the court did not have notice of a more limited list of suspects. (State's brief at 47). The state's complaint has no merit because the trial court analyzed each potential third party suspect individually in its pretrial ruling, including Scott Tadych, Charles and Earl Avery and the Dassey brothers, and in each instance, ruled that Avery had failed to meet his burden.

The state observes that the supreme court approved the legitimate tendency test in ***State v. Knapp***, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded*, 542 U.S. 952 (2004), *reinstated in material part*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. Unlike Avery's case, in ***Knapp***, the circuit court ruled the defense *could* present evidence of an alternative suspect. ***Knapp,*** 265 Wis. 2d 278 at ¶158. The state appealed on this and other grounds. The state contended that the circuit court erred in both its hearsay and ***Denny*** analyses. ***Id.*** at ¶160. The state limited its ***Denny***

challenge, however, to the "direct connection" prong. ***Id.*** at ¶161.

The supreme court affirmed the trial court's decision to allow the third-party evidence, and in so doing, applied a liberal construction of what a "direct connection" could be. It concluded that the most important element of the direct connection test was that the evidence put the third party "in relative *proximity* to the location where the homicide occurred and near the time of the murder." ***Id.*** at ¶182 (italics in original). It also stated that the possibility an alternative suspect had lied to the police established a direct connection to the crime. ***Id.*** In this case, of course, Bobby Dassey, Scott Tadych and Earl and Charles Avery were in relative proximity to the murder. Further, if Tadych and Bobby lied to the police about their whereabouts, this would satisfy the direct connection prong under ***Knapp***.

The state also distinguishes ***State v. Scheidell,*** 227 Wis. 2d 285, 595 N.W. 661 (1999) because there the defendant was unable to identify the alternative suspect while Avery could and did identify possible alternative suspects. (State's brief at 50). It argues the trial court here correctly concluded it was not "virtually impossible for [Avery] to satisfy the motive or opportunity prongs of the legitimate tendency test." (*Id*.). This conclusion is fundamentally flawed because the fact that a defendant may be able to name an alternative perpetrator does not mean that the defendant can therefore establish a motive for that person. Knowing the identity of the person does not mean one knows the person's motive.

D. Disallowing third-party liability evidence was unfair given the state presented evidence excluding alternative suspects.

The state next addresses Avery's argument that it was unfair to exclude third-party liability evidence when the state introduced evidence which excluded possible alternative suspects. The state first argues that Avery does not cite authority for this proposition. (State's brief at 51). Avery's unfairness argument is based on the guarantee of fundamental fairness in criminal prosecutions. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." ***State v. Heft***, 185 Wis. 2d 288, 302, 517 N.W.2d 494 (1994), *quoting* ***California v. Trombetta***, 467 U.S. 479, 485 (1984). Where the state presents evidence excluding alternative suspects, it is fundamentally unfair to bar defense evidence tending to incriminate alternative suspects.

Adding to the unfairness is that the state was able to portray as neutral witnesses the very witnesses the defendant wanted to treat as suspects. For example, during closing argument, Kratz said Bobby Dassey was "an eyewitness without any bias." "[He] is an individual that deserves to be given a lot of credit." (327:91). Kratz continued: "That all becomes important and becomes more important when, after leaving for hunting, he sees Teresa's SUV still parked next to the van, next to his mom's van that's for sale, but Teresa is nowhere to be found." (327:91-92). In addition, Kratz unfairly questioned whether the defense had given the jury an alternative to Avery as the perpetrator, arguing there were two explanations to Ms. Halbach's burned effects in the burn barrel: "one is that the defendant killed her and burned it, and *the other one, I guess, the defense wants you to just come up*

with on your own." (328:109-110, emphasis added). Knowing the defense was prohibited from naming an alternative suspect, this argument was unfair and improper.

The state argues that Avery has pointed to only one line of inquiry successfully objected to by the state, and that was the defense question whether the crime lab had checked to see if a print had matched Scott Tadych. (State's brief at 51-52). That the defense litigated the case within the boundaries of the court's pretrial ruling should not be held against it.

E. Avery carried his burden under ***Denny***.

If ***Denny*** applies, Avery had the burden of showing a third-party's motive, opportunity and direct connection to the crime. The state argues that Avery has failed to establish a motive for any alternative perpetrator. (State's brief at 52-53). As an example of why motive is "essential," the state argues that otherwise, a murder at the halftime of a Bucks game would lead to the defendant attempting to argue that everyone in attendance could be the perpetrator. (State's brief at 53). The state's example is absurd. What might not be absurd, however, would be that the five people sitting in close proximity to the victim and who visited the concession stand near the time the victim went might be suspects. This example is more analogous to the facts here.

And while the state advances this colorful stadium example, it fails to explain why motive is not similarly crucial for the state to prove, when the state brings to bear vast resources not available to the defense, but the defendant must nevertheless prove a motive for an alternative suspect.

As for the second and third prongs of the legitimate tendency test, the state does not contest that Bobby Dassey,

Scott Tadych and Charles and Earl Avery all had opportunity to kill Teresa Halbach as they all were on the property on October 31, and all had access to every part of that property. If proximity satisfies the direct connection test as stated in ***Knapp***, all four of these individuals had a direct connection to the crime as well. All would have been familiar with Ms. Halbach as she had previously been to the property to photograph cars. And if Bobby Dassey and Scott Tadych lied in their testimony and in their statements to the police, this would also constitute a direct connection to the crime. ***Knapp***, 265 Wis. 2d at ¶182.

In sum, Avery sought to persuade the jury that another individual, and not Avery, was the true killer. The state does not argue that allowing Avery to make this case to the jury would have unduly lengthened the trial or confused the jury, likely because it is clear the trial would not have been much longer or confusing to the jury.

III. The Removal of a Deliberating Juror Without Cause and Substitution of an Alternate Who Should Have Been Discharged Are Errors Warranting Reversal.

A. The court should reject the state's preclusion arguments.

The state's claims of forfeiture, invited error and judicial estoppel fail because the errors at issue – removal of a deliberating juror without cause and substitution of an alternate who should have been discharged – stem from a procedure that violated Mr. Avery's right to be present and his right to be assisted by counsel. Neither of those rights could be waived by the actions of his attorneys, rendering inapplicable preclusion doctrines of forfeiture, invited error or estoppel.

The state recognizes its preclusion arguments are inapplicable to the denial of Avery's right to be present. (State's brief at 59). But the state ignores Avery's claim that the trial court's procedure also violated his right to counsel. As argued in Avery's brief-in-chief (at 72-74), neither right could be lost by his attorneys' agreement that the court question and remove Juror Mahler. Both the right to counsel and the right to be present could be waived only by Avery himself and only if the record established the waiver was knowing, voluntary and intelligent. ***State v. Anderson***, 2006 WI 77, ¶¶63-64, 73, 291 Wis. 2d 673, 717 N.W.2d 74. The record contains no such waiver, and the state does not contend otherwise.

The court's use of, and the attorneys' agreement to, a procedure in violation of Avery's rights was the impetus for the errors at issue, that is, the improper removal and substitution of jurors. Because the errors arose from constitutional violations not subject to waiver, the state's preclusion arguments fail.

Finally, the court should expend little energy on the preclusion claims because, even if there were some sort of forfeiture by Avery's attorneys, which he disputes, the court must still reach the merits of the legal issues presented in order to address his claims of ineffective assistance of counsel, plain error and relief in the interest of justice.

B. The trial court's private, off-the-record *voir dire* of Mahler does not comply with constitutional guarantees and the requirements of ***Lehman***.

The state agrees that "as a general rule" a defendant has the right to be present and assisted by counsel during *voir dire*. (State's brief at 60). Nevertheless, echoing the trial court, the state cites two federal cases from which it argues

for an exception that would allow a court to remove a deliberating juror after an unrecorded, *ex parte voir dire*. Avery's response is two-fold. First, the cases cited provide no such support. Second, the state's argument is incompatible with ***State v. Lehman***, 108 Wis. 2d 291, 300-01, 321 N.W.2d 212 (1982), which calls for an on-the-record *voir dire*, in the presence of the parties, when a juror seeks removal.

Neither case cited by the state involves a deliberating juror who was removed following an *ex parte voir dire*. The *voir dire* in ***United States v. Gagnon***, 470 U.S. 522 (1985), did not involve a deliberating juror or a juror seeking removal. Rather, the juror had simply expressed concern that the defendant was sketching portraits of the jury. ***Id***. at 523. The court's communication with the juror occurred on the record and in the presence of defendant's counsel, who was allowed to question the juror. ***Id***. at 523-24. Although ***United States v. Carson***, 455 F.3d 336, 350 (D.C. Cir. 2006), involved a deliberating juror, the court questioned the juror in court, on the record and in the presence of the defendant and counsel, following in-chambers questioning by the court. The state has not cited a case where the court removed a deliberating juror after an *ex parte*, unrecorded *voir dire* of the juror. Moreover, here, the juror was not even present in person, as the *voir dire* was conducted by telephone.

The state offers little argument to dispute Avery's contention that ***Lehman*** required an on-the-record *voir dire* of Mahler with the parties present. Again echoing the trial court, the state notes the lateness of the hour and the scattered locations of the judge and parties. While ***Lehman*** allows consideration of "the circumstances of the case," the most important circumstance is whether the juror seeking removal is in the midst of deliberations. The procedural safeguards set

forth in ***Lehman*** apply whenever a juror seeks removal, whether before or during deliberations. Those safeguards must be most stringently followed when the request arises during deliberations when the 12 jurors are weighing and discussing the evidence. At that stage, it is critical that the parties be present and the *voir dire* recorded, as contemplated by ***Lehman***, because a juror's removal may well result in the end of trial as only 11 jurors will remain. Despite the hour and their locations, the parties and court personnel surely would have convened for return of a verdict. No less is required when a deliberating juror seeks to be removed.

Moreover, the other glaring "circumstance" of this case is that a single question from a bailiff to Mahler or his wife about whether the stepdaughter was injured would likely have made clear that no further follow up was even required that evening. After all, if the stepdaughter was unharmed, which was the only reasonable inference from Sheriff Pagel's information, there was no emergency. The situation could wait until the court convened the next day.

Perhaps the greatest flaw in the state's defense of the *ex parte voir dire* of Mahler is its failure to recognize the constitutional rights at stake when a juror wants out of deliberations. In jeopardy is the defendant's right to a unanimous verdict by the 12 jurors to whom the case was submitted.

> The rationale of *Lehman* is basically that, as a matter of good policy – fairness and due process – a jury be a deliberating body, all of whose members, the same members, work together throughout the factfinding process.

State v. Koput, 142 Wis. 2d 370, 387, 418 N.W.2d 804 (1988). ***Lehman***'s procedural requirements are aimed at

protecting the integrity of the deliberative process, thereby protecting the defendant's jury trial rights.

Arguing that violation of a defendant's right to be present during *voir dire* may be harmless error, the state cites a case in which the trial court examined three members of the venire outside the presence of the defendant and attorneys. ***State v. Tulley***, 2001 WI App 236, ¶8, 248 Wis. 2d 505, 635 N.W.2d 807. Excusing members of the venire does not implicate the constitutional rights infringed when a court removes a juror during deliberations, thereby disrupting the deliberative process and leaving only 11 deliberating jurors. The situations are not comparable. Indeed, as argued in Avery's brief-in-chief and below in subsection D., the improper removal of a deliberating juror can never be harmless.

C. The record does not show that Mahler was seriously incapacitated and, therefore, he was removed without cause.

In arguing that the court removed Mahler without a record establishing cause, Avery relies upon three legal principles that the state does not contest. First, a court has no authority to discharge a deliberating juror except upon a record establishing cause for removal. ***Lehman***, 108 Wis. 2d at 300. Second, cause requires a showing that the juror is "seriously incapacitated." ***United States v. Araujo***, 62 F.3d 930, 934 (7th Cir. 1995). Third, removal of a deliberating juror who is not seriously incapacitated violates 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. ***Peek v. Kemp***, 784 F.2d 1479, 1483 (11th Cir. 1986); *see also* ***Hinton v. United States***, 979 A.2d 663, 681-82 (D.C. 2009). Because the state does not contest these

principles, this court should accept that they govern the trial court's removal of Mahler.

Significantly, the state cites no cases to support its contention that cause existed for Mahler's removal. Nor does the state attempt to distinguish the cases cited by Avery supporting his argument that a family member's auto accident without injuries and strain on a marriage do not amount to serious incapacitation. (Brief-in-chief at 80-83).

Rather than address the sort of injury or illness of a juror, or the death of a family member, found to constitute serious incapacitation, the state prefers to ignore the underlying facts or absence of facts on this record. Rather, according to the state, the facts matter less than their impact on the juror. (State's brief at 64). This argument should be rejected for three reasons.

First, the existence of cause is not determined based upon the juror's subjective belief that he or she cannot continue. There must be facts supporting an objective conclusion that the juror is seriously incapacitated. Accordingly, the trial court has a "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." ***Lehman***, 108 Wis. 2d at 300. A juror cannot excuse himself from deliberations simply by conveying to the court that he is distraught or distracted. The underlying facts or reasons for the juror's state of mind are essential to determine if the juror is actually incapacitated.

Second, as to Mahler's state of mind, the state emphasizes a concern that Mahler was preoccupied by marital problems. But Mahler did not tell the court that he believed the future of his marriage was at stake if he did not go home that night. Rather, that was the court's "reading, without

pressuring him with questions too specific …." (359:2; App. 251). The court cannot rely upon mere inferences gleaned from a telephone conversation with the juror. It has a duty to make a "searching inquiry" into the actual facts. ***United States v. Ginyard***, 444 F.3d 648, 653 (D.C. Cir. 2006). Here, the known facts included that Mahler had spent only one night away from home due to the trial, and, just three days before, Mahler told the court that his wife's upset some five weeks earlier about a press report did not affect his ability to continue to serve.

Third, information about the supposed auto accident demonstrates why the facts must be established in order to determine whether the juror was so distracted and distraught so as to be rendered seriously incapacitated. After all, the court's memo linked the accident and marital problems, stating that "[t]hings apparently boiled over when his stepdaughter was involved in a vehicle accident this evening and he was not there to provide support." (359:2; App. 251). If the court had determined through a more careful inquiry that there was no accident, just car trouble, Mahler's concern about his stepdaughter and his marriage would likely have evaporated, as would the court's belief that Mahler was preoccupied and distracted.

The state notes that Avery's experienced trial attorneys also agreed to Mahler's removal. But the attorneys were reacting to secondhand information containing gaps and inaccuracies. They were told the car was totaled, something Mahler did not tell the court. Buting assumed, wrongly, that Mahler's wife had called to report an emergency. Strang assumed whether there were injuries was still unknown. Their assumptions would have been dispelled had Mahler been questioned in the manner contemplated by ***Lehman***.

Their assumptions, unsupported by facts, do not amount to cause permitting the removal of a deliberating juror.

Finally, an in-person, on-the-record *voir dire* with Avery and the attorneys present would likely have impressed upon Mahler the gravity of the situation. Perhaps Mahler himself would have realized he was not only capable of continuing to deliberate, it was a duty he wanted to fulfill. As it was, within a few hours of discharge, Mahler regretted having gotten off the jury (362:29), further supporting what even the court's memo shows: Mahler was not seriously incapacitated.

D. The removal of Mahler without cause was structural error.

The state does not dispute that removing a juror without cause and proceeding with 11 jurors has been treated as structural error. Indeed, the state acknowledges that Avery cited five federal cases in which courts, faced with that circumstance, reversed with no showing of prejudice. (Brief-in-chief at 85). Rather, the state contends that Avery was not left with 11 deliberating jurors when Mahler was excused because the alternate was substituted the next day. The state's arguments ignores two critical points: (1) substitution of the alternate was statutorily impermissible; and (2) regardless of whether an alternate joins the deliberations, the erroneous removal of a deliberating juror has stripped the defendant of his right to have the case decided by the 12 jurors to whom it was submitted.

Contrary to the state's contention, Avery has cited cases where the court reversed with no showing of prejudice even though, after a juror's removal, an alternate was substituted and the case was decided by 12 jurors.

In ***State v. Dushame***, 616 A.2d 469, 470-71 (N.H. 1992), the trial court discharged a juror during deliberations and, contrary to state statute, substituted an alternate and directed the jury to begin deliberations anew.[1] The jury returned guilty verdicts. The New Hampshire Supreme Court reversed without a showing of prejudice because the error "touches upon the integrity of the deliberative process of the jury and therefore requires special consideration." ***Id***. at 472. Because the trial court had no authority to substitute an alternate for a deliberating juror, "a jury of only eleven qualified jurors decided the defendant's fate." ***Id***.; *see also* ***People v. Ryan***, 224 N.E.2d 710, 712-13 (N.Y. 1966) (unlawful substitution of alternate during deliberations, although with consent of defense counsel, required reversal with no showing of prejudice).

The same is true here. Once the court discharged Mahler, there were only 11 jurors qualified to continue the deliberations because the court had no authority to substitute the alternate during deliberations. Accordingly, Avery was in no better position than the defendants in the federal cases who, upon removal of a juror without cause, were left with 11 jurors.

The state fails to recognize that the unlawful removal of a deliberating juror is appropriately deemed a structural error because, although the impact of the error is difficult to assess, the error cannot fully be "cured" by substituting an alternate, even if substitution was statutorily permitted.

Like other structural errors, the removal of a deliberating juror without cause has repercussions that are

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[1] New Hampshire's statute, similar to Wisconsin's, required alternates to be discharged upon final submission of the case to the jury. ***Id***. at 471.

necessarily unquantifiable and indeterminate. ***United States v. Curbelo***, 343 F.3d 273, 281 (4th Cir. 2003). What is clear, though, is that the defendant has been denied the "obvious and substantial right … to a unanimous verdict by the jury of 12 who heard [his] case and began their deliberations." ***United States v. Essex***, 734 F.2d 832, 844 (D.C. Cir. 1984) (emphasis in original). As recognized in ***Dushame***, 616 A.2d at 472, removal of a deliberating juror alters and casts doubt upon the deliberative process.[2]

As our supreme court warned, if an alternate is substituted for a discharged juror, the substituted juror will not have the benefit of the views of the discharged juror, the 11 regular jurors will have already formed views before the alternate's arrival, and the alternate will participate without the benefit of the prior group discussion. ***Lehman***, 108 Wis. 2d at 307-08. Even if the jury is instructed to begin deliberations anew, as occurred here, "'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 (quoted authority omitted).

The weight of authority supports Avery's contention that the improper removal of Mahler is structural error.

E. The court had no authority to substitute an alternate during deliberations, even with the parties' consent.

The state contends that the language in ***Lehman*** allowing a court, upon the parties' stipulation, to substitute an

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[2] The state cites ***United States v. Josefik***, 753 F.2d 585, 587 (7th Cir. 1985), where the court found no prejudice, but, there, the jury had been deliberating only nine minutes before a juror was excused.

alternate juror during deliberations survives the subsequent statutory changes. Its contention is incompatible with the plain language of the governing statute and the legislative history.

Nowhere in its brief does the state quote Wis. Stat. § 972.10(7), perhaps because the language is contrary to its contention. The statute reads:

> (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*.

(Emphasis added). The statute requires a court to discharge any remaining alternates when the case is submitted to the jury. The plain meaning of "discharge" is "to end formally the service of: release from duty <~ a soldier> <~ a jury>." *Webster's Third New International Dictionary*, p. 644 (1993). Thus, an alternate who has been discharged is no longer a juror. She has been relieved of her duty and cannot replace a deliberating juror.

In light of this language, the trial court concluded, as the state acknowledges, that it erred when it held and sequestered an alternate once deliberations began. (370:46; App. 148). But the trial court also concluded, and the state appears to agree, that the statute does not bar a court, with the parties' agreement, from recalling a discharged juror for purposes of substituting that person into deliberations. This construction must be rejected.

The language of § 972.10(7) contemplates that a discharged juror "shall not participate in deliberations …." The legislature has directed what a court must do if any additional jurors remain at final submission. The court shall

determine by lot "which jurors shall not participate in deliberations" and then "discharge" them. Once that has occurred, there are only 12 jurors; those who have been discharged are no longer jurors and no longer available for substitution.

As a practical matter, the court's conclusion that it could not hold and sequester the remaining alternate but, with the parties' consent, could recall and substitute that person into deliberations makes no sense. The court could not reasonably recall an alternate who had not been sequestered and, therefore, was subject to outside influences, and insert that person into a sequestered, deliberating jury. The practical difficulties illustrate why a command to discharge is incompatible with the notion that substitution during deliberations is permitted with the parties' consent.

Not surprisingly, in civil cases, where the legislature has permitted substitution of alternates during deliberations, the statute contemplates the court will hold the additional jurors. Wis. Stat. § 805.08(2). Further, the civil statute, unlike § 972.10(7), provides that upon final submission the court shall determine by lot which jurors shall not "*initially* participate in deliberations." (Emphasis added).

The meaning of § 972.10(7) is plain. In criminal cases, only 12 jurors may remain when deliberations begin; any additional jurors must be discharged. The legislature has foreclosed the possibility of substitution during deliberations, even upon the parties' agreement.

The legislative history shows that after ***Lehman*** the legislature was dissatisfied with a "silent statute" that the supreme court interpreted as allowing substitution during deliberations if the parties agreed. The legislature repealed that statute and enacted one requiring discharge of alternates,

thereby barring the option of substitution once deliberations have begun. The legislature's intent is clear from the history, summarized below.

- The statute in effect when ***Lehman*** was decided, Wis. Stat. § 972.05 (1979-80), expressly allowed substitution before deliberations and did not require that alternates be discharged at final submission.

- In the face of a "silent statute," ***Lehman*** holds that substitution during deliberations is permitted only upon the parties' stipulation. ***Lehman***, 108 Wis. 2d at 313.

- Within a year after ***Lehman***, the legislature repealed § 972.05 and created § 972.10(7), along with a parallel civil provision, requiring a court at final submission to determine "which jurors shall not participate in deliberations and discharge them." It rejected an amendment that would have permitted substitution during deliberations. Its note to § 972.10(7) cites ***Lehman*** and states that "[u]nneeded jurors … may not participate in deliberations." 1983 Wis. Act 226.

- Thirteen years later, the supreme court amended the civil statute, § 805.08(2), to allow a court to hold alternates for the purpose of substitution during deliberations, but the court made no such change to § 972.10(7). SCO 96-08 ¶¶46, 59.

Although ***Lehman*** permitted substitution during deliberations with the parties' consent, the legislature quickly removed that option. Indeed, the legislature's response was likely fueled by ***Lehman***'s lengthy discussion of the dangers inherent in mid-deliberation substitutions. *See* ***Lehman***, 108 Wis. 2d at 307-12. The state's contention that stipulated, mid-deliberation substitutions are permissible is inconsistent

with the legislative history, much less the plain language of § 972.10(7).

The state relies on ***Josefik*** to support its contention that Avery is not entitled to relief because the parties agreed to the substitution. There, the court concluded that the recalling and substituting of an alternate who had been discharged violated the federal rule but was not reversible error because the defendants had agreed to the procedure. ***Josefik***, 753 F.2d at 587-88. ***Josefik*** is of little utility given the case law in this state holding that a defendant cannot consent to a procedure diminishing their constitutional jury trial right, unless the procedure is authorized by statute. (*See* Avery's brief-in-chief at 93). Although the governing statute was silent when ***Lehman*** permitted a defendant's consent to substitution, the statute is no longer silent – substitution during deliberations is prohibited. Accordingly, Avery could not validly consent, as a matter of law, to the substitution because it diminished rather than enhanced his constitutional jury trial right, specifically, his right to a unanimous verdict by the 12 jurors to whom the case was submitted.

F. Relief is warranted, despite any waiver, as plain error, in the interest of justice or due to ineffective assistance of counsel.

Because the state offers little response to Avery's claim for relief as plain error or in the interest of justice, as to those claims he relies on the arguments in his brief-in-chief (at 96-99).

As to ineffective assistance of counsel, the state complains that much of Avery's claim of deficient performance is based on Mahler's testimony at the postconviction hearing that the court found incredible. In

fact, however, Avery relies primarily on the testimony of his two trial attorneys and on what can only be deemed undisputed facts.

The attorneys' testimony revealed that their agreement to have the court speak with and remove the deliberating juror was based on incomplete facts and false assumptions. They assumed Mahler's wife had called to report an emergency, that the stepdaughter's car was totaled and that perhaps the stepdaughter or others were injured, none of which was true. Indeed, the state failed to present any evidence at the postconviction hearing contradicting Mahler's testimony, and on those matters his testimony was largely consistent with the trial court's memo. Nor were the attorneys aware that Sheriff Pagel, supervisor of several state witnesses, was acting as a conduit between Mahler and the judge, a fact that Attorney Buting found particularly objectionable.

While the trial court and state may be correct that the information the judge received from Pagel and then conveyed to the attorneys raised concerns about Mahler's ability to continue to serve, the information gave rise only to concerns, not cause for removal. The latter could only be determined by an on-the-record *voir dire* with Avery and his attorneys present. By giving up that opportunity, to which Avery was certainly entitled, the attorneys gained nothing for their client and lost the opportunity to retain a juror possibly favorable to the defense.

Arguing against Avery's claim that prejudice under these circumstances should be presumed, the state acknowledges that prejudice has been presumed when a defendant was denied counsel at a critical stage. A court's communication with a deliberating jury is a critical stage at which the right to counsel attaches. ***Anderson***, 291 Wis. 2d

673, ¶69. The denial of the right to counsel during the *voir dire* of a deliberating juror seeking removal must fall within the sort of deprivation of counsel for which prejudice is presumed. Certainly, counsel has a greater role at a *voir dire* conducted mid-deliberations than at return of the verdict, where prejudice has been presumed. ***State v. Behnke***, 155 Wis. 2d 796, 806-07, 456 N.W.2d 610 (1990). After all, the defendant may risk losing a juror inclined to find him innocent. Even if the juror's leanings are unknown, the juror's removal may end the trial as only 11 jurors will remain.

Here, the presumption of prejudice is particularly appropriate because the denial of Avery's right to counsel at Mahler's *voir dire* was the catalyst for every other error. As a result of counsel's agreement to the court's private questioning of Mahler, Avery lost the ability to: (1) have his attorneys question Mahler; (2) observe Mahler's demeanor; (3) argue whether there was cause for his removal; (4) assess whether Mahler was a favorable juror, as the attorneys suspected, and whether his removal would be contrary to Avery's interests; and (5) obtain a unanimous verdict from the 12 jurors who began deliberations. All of that was lost before Avery even knew there was an issue with a juror. When he was finally informed, the juror was gone, and his attorneys advocated for a "fix" – substitution of an alternate – unaware that was legally impermissible.

The state's response, that Avery lost nothing because he was found guilty by 12 jurors, is simplistic and sanctions truncated deliberations involving a juror who was removed without cause and another who should have been discharged but was dropped into the deliberations.

CONCLUSION

Avery requests that the court reverse the judgments of conviction and the order denying postconviction relief, and remand for a new trial at which the car key is suppressed.

Dated this 22nd day of December, 2010.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 11,106 words. A motion seeking permission to file a reply brief of this length is filed with this brief.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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Dated this 22nd day of December, 2010.

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