STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN	)	
	)	
Respondent	)	
	)	
-v-	)	Case No.: 05-CF-381
	)	
STEVEN A. AVERY	)	
	)	
Petitioner	)	

SEPARATE APPENDIX TO THIRD MOTION FOR POST-CONVICTION RELIEF

VOLUME I (APP 1 TO APP 140)

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STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
JAN 30 2007
CLERK OF CIRCUIT COURT

Case No. 05 CF 381

STEVEN A. AVERY,
Defendant.

DECISION AND ORDER ON ADMISSIBILITY OF THIRD PARTY LIABILITY EVIDENCE

The court previously issued its "Order Regarding State's Motion Prohibiting Evidence of Third Party Liability ("Denny" Motion)" on July 10, 2006. That order provided in part as follows:

> "Should the defendant, as part of his defense, intend to suggest that a third party other than Brendan Dassey is responsible for any of the crimes charged, the defendant must notify the Court and the State at least thirty (30) days prior to the start of the trial of such intention. In that event, the defendant will be subject to the standards relating to the presentation of any such evidence established in State v. Denny, 120 Wis. 2d 614 (Ct. App. 1984)."

Pursuant to the court's July 10, 2006 order, the defendant filed "Defendant's Statement on Third-Party Responsibility" on January 8, 2007. The State filed its "Memorandum to Preclude Third Party Liability Evidence" on January 12, 2007. The court heard oral argument on the third party liability issue at a hearing on January 19, 2007.

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While the parties dispute its applicability to the defendant's offer of proof, the leading Wisconsin case on the issue third party liability evidence is *State v. Denny*, 120 Wis. 2d 614 (Ct. App. 1984).[1] The defendant in that case, Kent Denny, was charged with first-degree murder. At trial, he claimed that he had no motive to murder the victim, but that a number of other individuals did. The trial court refused to allow the defendant to present such evidence because it was not accompanied by any evidence that the other individuals had an opportunity to commit the crime or a direct connection to it. The Court of Appeals upheld the trial court's refusal to admit the evidence. In its decision, the court adopted what is known as the "legitimate tendency" test. Under that test, a defendant seeking to introduce evidence asserting the motive of a third party or parties to have committed the crime must produce evidence that such party or parties had the opportunity to commit the crime and that there is some evidence which is not

[1] The defendant has alternately claimed that the Wisconsin Supreme court has or has not adopted the *Denny* legitimate tendency test. In the defendant's June 26, 2006 Defendant's Response to State's Motion to Prohibit Evidence of Third Party Liability (*Denny* Motion), defense counsel recognized that "*Denny* has been adopted by the Wisconsin Supreme Court and Avery acknowledges its application in this case should he seek to introduce evidence of third party liability for Teresa Halbach's death. *See, State v. Knapp*, 265 Wis. 2d 278, 351-52, 666 N.W. 2d 881 (2003), *vacated on other grounds*, 542 U.S. 952 (2004), *reaffirmed on remand*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W. 2d 899." at p. 3. By January 8, 2007, however, the defendant had come to the conclusion that "the Wisconsin Supreme Court has never adopted *Denny*." Defendant's Statement on Third-Party Responsibility at p. 3. The court believes the defendant had it right the first time. The Wisconsin Supreme Court ruled in *Knapp* as follows:

> "The general rule, adopted by this court, concerning the issue is that evidence tending to prove motive and opportunity to commit a crime regarding a party other than the defendant can be excluded when there is no direct connection between the third party and the alleged crime." (Citing *Denny*) 265 Wis. 2d at 351.

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remote in time, place or circumstances to directly connect any third party to the crime.

The defendant in this case initially acknowledged "that the *Denny* rule must be satisfied should he decide to offer third-party liability evidence, other than against Dassey." Defendant's Response to State's Motion to Prohibit Evidence of Third-Party Liability (*Denny* motion) dated June 26, 2006 at p. 1. The defendant now claims, however, that *Denny* is not applicable to this case and that the defendant should be permitted to introduce evidence of potential third party liability on the part of a number of individuals evaluated solely on the basis of its admissibility under §§904.01, 904.02, and 904.03.

The defendant argues that *Denny* does not apply because while the defendant in *Denny* argued that third persons had a motive to commit the crime, "Avery does not propose to suggest that anyone had a motive to kill Teresa Halbach." Defendant's Statement on Third-Party Responsibility, p. 3. The defendant further argues that since the prosecution is not required to prove motive as an element of any of the crimes with which he is charged, he should not be required to prove motive as a prerequisite to submitting evidence of third party liability.

The defendant is correct that since he is not seeking to prove motive on the part of any other third party, this case is not squarely on all fours with *Denny*. *Denny* was not required to specifically address the issue of whether proof of

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motive is a prerequisite to offering third party liability evidence because the defendant offered to show motive as part of his offer of proof. This court cannot conclude, however, that the distinction on the issue of motive means that *Denny* is not controlling in this case. *Denny* required a defendant offering third party liability evidence to show proof of motive, opportunity and a direct connection to the crime. It does not follow that if a defendant is unable to show motive, he is somehow freed from the requirements of the legitimate tendency test. In fact, the most logical reading of *Denny* is that all three facets of the legitimate tendency test must be met for third party liability evidence to be admissible. *Denny* specifically held "our decision establishes a bright line standard requiring that three factors be present, i.e., motive, opportunity and direct connection." *Denny* at 625. The evidence offered by the defendant in *Denny* was ruled inadmissible because it demonstrated motive, but not opportunity or direct connection. There is nothing in the decision to suggest that a defendant who demonstrates opportunity and direct connection is somehow excused from demonstrating motive.

The defendant asserts that *Denny* should not control because no one had a motive to commit the charged crimes. The defense does not provide support for this novel proposition. The court does not view the Amended Complaint as alleging a motiveless series of crimes. Although the court has gleaned from representations made by counsel in the course of these proceedings that evidence

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obtained by the State subsequent to the filing of the Amended Complaint may affect the precise version of what it intends to prove happened, the court does not accept the unsupported statement that no one had a motive to commit the crimes.

The defendant argues that a Wisconsin Supreme Court decision, *State v. Scheidell*, 227 Wis. 2d 285 (S. Ct. 1999) is more analogous to this case than *Denny* and should guide the court's analysis. The defendant in *Scheidell* was charged with attempted sexual assault for having allegedly broken into the residence of a woman in his apartment building through an open window in the early morning hours. The victim testified that her assailant straddled her body while she was in bed in her bedroom, struck her in the face a number of times and tried to pull off her underpants. She testified she identified the defendant, who was wearing a ski mask with holes for his eyes and mouth, as Scheidell and asked him by name what he was doing a number of times. Each time she addressed him by name the assailant hesitated briefly, then struck her again. Eventually, she was able to reach a pistol from her dresser and succeeded in getting the assailant to leave. The assailant never said a word during the entire attack. At trial, the defendant sought to admit evidence of a somewhat similar attack against a different victim committed approximately five weeks later while the defendant was being held in jail. The Supreme Court ruled that the *Denny* legitimate tendency test should not apply the facts in *Scheidell* because where the identity of the third party is

unknown, "it would be virtually impossible for the defendant to satisfy the motive or opportunity prongs of the legitimate tendency test of *Denny*." *Id.* at 296. The court concluded that *Denny* did not apply to other acts evidence committed by an unknown third party. Rather, the court reasoned that when a defendant offers other acts evidence committed by an unknown third party, the court should apply the *Sullivan* other acts evidence test, and balance the probative value of the evidence, considering the similarities between the other act and the crime charged, against the considerations found in §904.03. *Id.* at 310.

The court finds the defendant's argument that *Scheidell* is closer to the facts in this case than *Denny* to be unpersuasive. As pointed out by the State, this case does not involve any unknown third parties. The defendant does not offer any evidence to suggest that some unknown third party committed the crimes charged. The defendant has identified a number of persons by name who he claims were on or near the Avery property on October 31, 2005 and would have had an opportunity to commit the crime. Another distinction is that Avery is not seeking to offer any other acts evidence. Rather, he wishes to offer direct evidence that one or more identified third persons may have actually committed the crime. This is exactly what the defendant in *Denny* attempted to do. Also significant is the fact that while the defendant is *Scheidell* did not know the name of the third party, he did have evidence that the third party had motive, based on his alleged commission

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of a similar crime. While the facts in *Denny* may not be precisely on point with those of this case, they are far more applicable to this case than the facts in *Scheidell*.

The court concludes that the defendant's offer of third party liability evidence must be measured by the legitimate tendency test established in *Denny*. The defendant knows the identity of third parties who may have had an opportunity to commit the crimes. They are identified in his pleading. Unlike the defendant in *Scheidell*, he is not precluded from determining whether any of them may have had a motive to do harm to Teresa Halbach. He simply acknowledges that he has no evidence to offer that other persons with opportunity had the motive to commit the crimes. Thus, if the *Denny* legitimate tendency test applies as it was originally established in *Denny*, and the court concludes that it does, none of the offered evidence is admissible because the defendant does not contend any of the other persons present at the Avery property on October 31, 2005 had a motive to murder Teresa Halbach or commit the other crimes alleged to have been committed against her.

The court acknowledges the remote possibility that an appeals court could choose to distinguish *Denny* and conclude that under some circumstances a defendant could meet the legitimate tendency test by producing evidence of such probative value as it relates to opportunity and direct connection to the crime that

proof of motive is not required. The court is not aware of any decision from any jurisdiction which so holds, but an argument could be made that despite *Denny's* "bright line standard" that "three factors be present," strong evidence of opportunity and direct connection to the crime might make up for the lack of motive evidence. After all, *Denny*, while adopting the legitimate tendency factors from *People v. Green*, 609 P.2d 468, 480 (Cal. 1980), declined to adopt *Green's* conclusion that the evidence submitted be "substantial," in recognition of Wisconsin's more liberal policy on the admission of relevant evidence. *Denny, supra,* at 622-623. Allowing for the possibility an appellate court might permit the defendant to meet the legitimate tendency test requirements by offering other evidence of sufficient opportunity and a direct connection to the crime in the absence of a demonstration of motive, the court will individually examine the persons identified by the defendant who could potentially be responsible for Teresa Halbach's homicide and the evidence the defendant proposes to offer with respect to each person, keeping in mind the admonition of *Denny* that "evidence that simply affords a possible ground of suspicion against another person should not be admissible." *Denny, supra*, at 623.

The opening sentence of the defendant's "Alternative *Denny* Proffer" suggests the weakness of his argument:

> "If the court does conclude instead that *Denny* applies here, then Avery identifies each customer or family friend and each

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> member of his extended family present on the Avery salvage yard property at any time during the afternoon and early evening on October 31, 2005, as possible third-party perpetrators of one or more of the charged crimes."

This offer appears to be an example of the dangers warned of by the court in *Denny*:

> "Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased – degenerating the proceedings into a trial of collateral issues." *Denny*, *supra*, at 623-624.

In this case, the defendant has not identified a large group of people with motive, but rather a large group of people with opportunity. The danger of degenerating the proceedings into a trial of collateral issues remains the same.

1. Scott Tadych. The facts offered by the defendant in support of his argument that Scott Tadych may have potential liability are found at pages 10 and 11 of the Defendant's Statement on Third-Party Responsibility. The offer of proof does not show a correlation between the time Scott Tadych was present on the property and the time Teresa Halbach was reported by others to have been on the property. Other parts of the defendant's offer of proof place Teresa Halbach on the property at about 3:30 p.m. Her business of photographing Steven Avery's vehicle would have been completed well before 5:15 p.m. had the crimes against her not taken place, yet the only proof offered is that Tadych didn't get on the scene until 5:15 p.m. Any claim by Tadych that he saw a fire behind the defendant's trailer

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would appear to be more consistent with the State's theory of the crime than any liability on the part of Mr. Tadych. The defendant does not explain the relationship of the other facts recited to the crime. In the absence of motive, certainly something more would be required than what is alleged to take the information out of the category of speculation. Did Mr. Tadych know who Teresa Halbach was? Did Mr. Tadych know that she would be on the premises on that day? Is there any other evidence that would "directly connect" him to the crime? These questions are not addressed in the defendant's offer of proof.

2. Andres Martinez. The facts offered by the defendant in support of his argument that Andres Martinez may have potential liability are found at pages 11 through 14 of the Defendant's Statement on Third-Party Responsibility. The offer includes evidence that Mr. Martinez can be a violent man, as reflected in the reported November 5, 2005 attack on his girlfriend with a hatchet. There are also indications that he gave conflicting statements to the police department concerning his acquaintance with the defendant and what he knew or did not know about the crimes. Conspicuously missing from the offer is any indication that Mr. Martinez had any opportunity to do harm to Teresa Halbach, let alone a motive to do so. He denies being at the Avery salvage yard on October 31 and the court sees nothing in the offer of proof to indicate that any other person places him on the property on October 31. In addition, there is no indication that he knows who Teresa Halbach

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was or that she would be present on the property on October 31. Again, the offer falls clearly within the range of speculation and far short of meeting the legitimate tendency test, either as specifically stated in *Denny* or as it might be otherwise conceivable applied.

3. James Kennedy. Mr. Kennedy was listed as a third party having potential liability in the defendant's statement, but at oral argument the court was informed by defense counsel that Kennedy himself would not be a suspect, but might be offered as a witness to provide testimony against others. Therefore, the court does not address an offer of proof against James Kennedy as the court understands an offer of proof is not being made.

4. Charles Avery. The evidence proffered against Charles Avery is found at pages 15 and 16. Charles Avery, one of the defendant's brothers, allegedly was present on the salvage yard property on October 31, 2005. While he did not know Teresa Halbach by name, he allegedly knew "the photographer" was expected to be visiting the property on October 31. The defendant indicates that James Kennedy arrived at the Avery Salvage Yard property around 3:00 p.m. and no one was in the office, which was unusual. After about five minutes, Charles Avery appeared from the back of the building. The court is left to speculate how this somehow "directly connects" Charles Avery to the crime. The defendant attempts to derive significance from the fact Charles Avery's trailer home was the

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closest one to the location where Teresa Halbach's vehicle was found, but doesn't say what the distance was. It's the court's recollection from the Preliminary Examination that the trailer homes are not that far from each other and that none of them were very close to the site where the vehicle was found. In any event, the court cannot draw any significance from the facts offered. This is also true for the statement that Earl Avery told police that Charles Avery had spoken to a woman associated with Auto Trader magazine at a time not specified by the defendant. The facts listed arguably show that Mr. Avery would have had an opportunity to commit the crime, but there is no suggestion he had any motive to do so, nor is there any evidence to directly connect him to the crime.

5. Robert Fabian and Earl Avery. What would be an offer of proof against Robert Fabian and Earl Avery is summarized at pages 16 and 17. As near as the court can tell, the only evidence that might tie Robert Fabian to the crime is that he may have used a .22 caliber rifle while rabbit hunting that afternoon and a bullet from a .22 caliber rifle is alleged to have struck Teresa Halbach. There is no evidence relating to motive, opportunity or any other type of direct connection to the crime. The court is not sure that the defense actually intends to offer third-party evidence against Mr. Fabian, but if he does, his offer falls far short.

With respect to Earl Avery, there is no suggestion that he knew who Teresa Halbach was during her lifetime. The defendant asserts that Earl Avery returned to

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the salvage yard driving a flatbed car hauler which could have been used to move Ms. Halbach's Toyota to the place where it was found. There is no evidence offered to suggest that Ms. Halbach's Toyota RAV 4 was not driven to the place where it was found. The defendant does not offer any evidence to suggest it was moved to the place where it was found by a flatbed car hauler. It is alleged that Earl Avery's whereabouts in the salvage yard are unknown until Fabian arrived to hunt rabbits with him late in the afternoon, but there is no suggestion why that would be unusual. The Avery salvage yard is a large parcel of property. The defendant attributes significance to the fact that a .22 caliber rifle would be appropriate for hunting rabbits and it was a .22 caliber rifle bullet that the State asserts was fired into Teresa Halbach's body. There is no suggestion, however, of any evidence to dispute the State's claim that ballistic evidence matches the bullet to a weapon possessed by Steven Avery. Viewing Earl Avery's possible use of a .22 caliber rifle in light of Holmes v. South Carolina, 126 S. Ct. 1727 (2006), the fact that the State will be introducing evidence that the .22 caliber bullet came from a weapon owned by Steven Avery does not alone prevent the defendant from introducing evidence to the contrary. However, for any weapons owned by other persons to be of any more than speculative significance, the court would expect at least evidence that they were tested and could not be ruled out as the weapon from

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which the .22 caliber bullet found was fired. Otherwise, evidence concerning those weapons would bring only confusion and add nothing to the search for truth.

The defendant also makes reference to a golf cart belonging to his mother which Earl Avery drove at about 3:30 in the afternoon on October 31 and the fact that a cadaver dog later "alerted" on a golf cart. The defendant does not elaborate on the significance of the dog "alerting" on the golf cart, what role the defendant asserts the cart may have had in the commission of the crimes, or whether the golf cart used by Earl Avery is the one which was alerted on. The defendant indicates that Earl admitted driving past the location where Teresa Halbach's Toyota was later discovered, but in the absence of any indication as to what time her vehicle was placed at the location where it was found, that fact does not appear to have any special significance.

6. Dassey Brothers. A summary of the offered evidence against Blaine, Bobby, and Bryan Dassey, all Bryan Dassey's brothers, is found at pages 18 and 19 of the Defendant's Statement on Third Party Responsibility. The summary suggests that Blaine, Bobby, and Bryan Dassey may all have been present on the Avery property at or about the time Teresa Halbach is alleged to have been killed. However, along with no allegation of any motive, the facts presented by the defendant do not suggest any direct connection that any of the Dassey brothers would have to the crime, other than the fact they happened to be on the Avery

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property. In the absence of any allegation regarding motive, mere opportunity is insufficient to justify admission of the third party liability evidence.

In summary, with the exception of Scott Tadych and Andres Martinez, the other persons identified by the defendant may have had an opportunity to commit some or all of the crimes charged in the sense that they were near the alleged crime scene at the time of the alleged crimes. The defense fails to offer any meaningful evidence, however, to suggest that any of the persons named were directly connected to the crimes in any way. In the absence of motive, it certainly may be more difficult for the defendant to offer evidence which is relevant and material connecting a third person to the crime. The court simply finds nothing in the offer made by the defendant that goes beyond the level of speculation.

ORDER

The defense is precluded 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.

Dated this 30th day of January, 2007.

BY THE COURT:

Patrick L. Willis,
Circuit Court Judge

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I will ask the foreperson to present the verdicts to the bailiff so that they may be brought forward.

At this time the Court will read the verdicts. On Count 1, the verdict reads as follows: We, the jury, find the defendant, Steven A. Avery, guilty of first degree intentional homicide as charged in the first count of the Information.

On Count 2, the verdict reads: We, the jury, find the defendant, Steven A. Avery, not guilty of mutilating a corpse as charged in the second count of the Information.

On Count 3, the verdict reads: We, the jury, find the defendant, Steven Avery, guilty of possession of a firearm as charged in the third count of the Information.

The verdict on Count 1 is signed by the foreperson of the jury, dated today. The other verdicts are also signed by the foreperson of the jury.

At this time the Court is going to poll the jurors. I will ask the media folks to cut the audio at this time.

Mr. Slaby, were the verdicts as read by the Court, and are they still now, your verdicts

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STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY
BRANCH I

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

WIS. STAT. § 809.30(2)(h) POSTCONVICTION MOTION

PART I: FILED UNDER SEAL

The defendant, Steven A. Avery, by his undersigned attorneys, moves the court pursuant to Wis. Stat. § 809.30(2)(h) for an order vacating his convictions and granting a new trial. The following is shown in support of this motion:

1. Mr. Avery was convicted, following a jury trial, of first-degree intentional homicide contrary to Wis. Stat. § 940.01(1)(a) and felon in possession of a firearm contrary to Wis. Stat. § 941.29(2)(a). The jury found Mr. Avery not guilty of mutilation of a corpse. A fourth count of false imprisonment was dismissed by the court before the case went to the jury.

2. The court imposed a life sentence on the homicide with no opportunity for release on supervision and a ten-year concurrent sentence on the other count. Mr. Avery filed a timely notice of intent to seek postconviction relief from the judgments of conviction entered on June 1, 2007.

3. Subsequently, the court of appeals extended the time for filing a postconviction motion under § 809.30(2)(a) until July 6, 2009.

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I. THE REMOVAL OF THE JUROR DURING DELIBERATIONS AND SUBSTITUTION OF AN ALTERNATE JUROR INTO THE JURY PANEL VIOLATED MR. AVERY'S CONSTITUTIONAL AND STATUTORY RIGHTS AND REQUIRES REVERSAL OF HIS CONVICTIONS.

A. Relevant facts.

Facts currently of record

4. The jury was sequestered for the first time during closing arguments on March 14, 2007, and the jury began deliberations the next day. Of the additional jurors selected during *voir dire*, one, N.S., remained at the end of trial. When the case was submitted to the jurors, the court ordered the additional juror retained and sequestered separate from the deliberating jurors. (Transcript of March 15, 2007, pp. 122-23).

5. During the evening after the first day of deliberations, the court excused a deliberating juror, R.M. At a hearing held the next day, after the juror had been discharged, the court briefly recapped on the record what had occurred the night before:

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

(Transcript of March 16, 2007, p. 4). The court said that upon receipt of this information it contacted Attorney Kratz and both defense counsel by telephone conference call, and counsel authorized the court to "speak with the juror individually and excuse the juror if the information provided to the Court was verified." (*Id.* at 4-5). The court reported that it "did verify that information with the juror and excused the juror last evening." (*Id.* at 5).

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6. In a sealed file memo dated March 16, 2007, the court elaborated on the information it had placed on the record. The court noted that in its conversation with Sheriff Pagel the court learned that R.M.'s stepdaughter was involved in a traffic accident the evening of March 15, in which her vehicle was totaled. The court received no information about any injuries. In addition, the court was told that R.M.'s wife was unhappy about the amount of time her husband had been away because of the trial and was embarrassed by news reports at the time of *voir dire* that R.M. was living off his wife's trust fund. According to the memo, when the court spoke with R.M. by telephone, he sounded depressed and was speaking quietly and slowly. In the conversation, R.M. confirmed the information that Pagel had provided to the court. R.M. mentioned his wife's upset over earlier media reports of the trust fund and the strain the trial placed on their marriage. According to the memo, the court's "reading, without pressing him with questions too specific, was that he felt the future of his marriage was at stake if he was not excused." The court told R.M. that was all it needed to know, and he was excused and driven to his car.

7. At a meeting in chambers the next morning, the court and counsel determined they had three options as follows: declare a mistrial; proceed with 11 jurors; or substitute into the deliberating jury the one additional juror, with the instruction that the jury begin deliberations anew. (Transcript of March 16, 2007, pp. 5-7). After discussing those options with his counsel that morning, hours after R.M. had been discharged, Mr. Avery agreed to proceed with the third option. (*Id.* at 7-8).

8. The court informed the jury that because one of its members had been excused due to "an unforeseen family emergency", N.S. would be participating in the deliberations. (*Id.* at 9-10). The court instructed the jurors to

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begin the deliberations anew, including the election of a foreperson, and each of the 11 jurors answered "Yes" when asked if he or she would follow that instruction. (*Id.*).

Facts to be established at postconviction hearing

9. The defendant expects to establish at a postconviction hearing that, in fact, there was no family emergency when the court spoke with Juror R.M. on the evening of March 15, 2007. R.M.'s wife had not called R.M. or a bailiff that evening to report an accident or other emergency. Rather, the court had granted jurors permission to make calls home to their families while sequestered. After dining with the other members of the jury following the first day of deliberations, R.M. exercised that privilege and called home and spoke with his wife.

10. It is expected that Juror R.M. will testify that he felt discouraged that evening, but his mood was attributable more to what was occurring on the jury than at home. R.M. was frustrated because another juror, C.W., appeared close-minded during deliberations. According to R.M., in the initial vote taken that first day, C.W. was among a minority voting guilty, and R.M. was with those voting not guilty. At dinner, when R.M. commented that the process was stressful and weighing on him, C.W. told R.M. that if he couldn't handle it, he should tell them and get off. R.M. felt intimidated by C.W. and believed that C.W. wanted him off the jury.

11. After dinner, when R.M. called his wife, she mentioned that her 17-year-old daughter had been in an accident. She provided no details. In fact, there was no accident; his stepdaughter had merely had car trouble. R.M. knew his wife was tired of the trial and had earlier been upset by a press report that he lived off her trust fund. In their conversation that evening, his wife did not tell him to come home. Mostly, R.M. was stressed by his exchange with Juror C.W.

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12. Following his call home, R.M. told a bailiff and then Sheriff Pagel that he had a family emergency. R.M. provided few details. In the phone conversation with the judge, which lasted less than five minutes, the judge did not ask if the stepdaughter had been injured in the accident or whether she was hospitalized.

B. Mr. Avery's constitutional and statutory rights were violated when the court discharged a deliberating juror without cause and without following the mandated procedures.

13. The court violated Mr. Avery's federal and state constitutional rights when it discharged a deliberating juror without conducting an on-the-record *voir dire* of the juror in the presence of the defendant and counsel, and without a record establishing cause for discharging the juror. Although the court has discretion to discharge a juror for cause during deliberations, the court must make "careful inquiry" into a juror's request to be excused and "exert reasonable efforts to avoid discharging the juror." ***State v. Lehman***, 108 Wis. 2d 291, 300, 321 N.W.2d 212 (1982). The inquiry should be made "in the presence of all counsel and the defendant." ***Id.***

Procedural errors

14. The court's communication with Juror R.M. outside the presence of Mr. Avery and his attorneys violated both his right to be present at trial and his right to counsel, as guaranteed by Article I, § 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

The constitutional right to be present and assisted by counsel applies when a court communicates with deliberating jurors. ***State v. Anderson***, 2006 WI 77, ¶¶43 & 69, 291 Wis. 2d 673, 717 N.W.2d 74; ***State v. Burton***, 112 Wis. 2d 560, 565, 334 N.W.2d 263 (1983); ***State v. Koller***, 2001 WI App 253, ¶62, 248 Wis. 2d 259, 635 N.W.2d 838. The right to be present with counsel also applies to

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a court's individual *voir dire* of a juror. ***State v. Tulley***, 2001 WI App 236, ¶6, 248 Wis. 2d 505, 635 N.W.2d 807; ***State v. David J.K.***, 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994); *see also* Wis. Stat. § 971.04(1)(c) (defendant shall be present at *voir dire* of jury).

Mr. Avery had a constitutional and statutory right to be present and assisted by counsel when the court conducted a *voir dire* of a deliberating juror who, according to information from the sheriff, was seeking to be excused. To satisfy constitutional and statutory guarantees, the court's communication with Juror R.M. should have occurred in the presence of Mr. Avery and his counsel, as well as counsel for the state, and should have been on the record. *See* Wis. Stat. § 805.13(1) (Once the jury is sworn, "all statements or comments by the judge to the jury … relating to the case shall be on the record."). The court's communication with Juror R.M. outside the presence of Mr. Avery and his attorneys violated Mr. Avery's constitutional and statutory rights.

15. Mr. Avery's right to be present and assisted by counsel during the court's *voir dire* of Juror R.M. was not waived by counsel's agreement that the court speak with the juror.

Waiver of the right to counsel must be made personally on the record by the defendant and must be knowing, voluntary and intelligent. ***State v. Ndina***, 2009 WI 21, ¶31, __ Wis. 2d __, 761 N.W.2d 612; ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Where, as here, the record contains no such colloquy, the defendant did not waive his right to have the assistance of counsel during the court's communication with the juror. ***Anderson***, 2006 WI 77, ¶73. His attorneys' decision to authorize the court to *voir dire* Juror R.M. in their absence could not waive Mr. Avery's right to have counsel present. Indeed, Mr. Avery was not aware that counsel had agreed to the private *voir dire* until the

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following day, after the juror was questioned and discharged by the court. Mr. Avery did not personally and knowingly waive his right to have counsel present during the *voir dire* of Juror R.M.

Similarly, the failure of a defendant or his counsel to object to a court's communication with deliberating jurors in the defendant's absence does not constitute waiver of the defendant's right to be present. *Anderson*, 2006 WI 77, ¶¶63-64; *see also Tulley*, 2001 WI App 236, ¶6 (the right to be present during *voir dire* "cannot be waived"); *State v. Harris*, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999). Here, counsels' agreement that the court communicate with the juror was made without consultation with Mr. Avery. At no point did Mr. Avery agree to waive his right to be present during the *voir dire* of Juror R.M.

The record does not establish cause for discharging the juror

16. The information the court obtained from Juror R.M., as set forth in the court's memo, does not constitute cause for discharging the juror. Excusing the deliberating juror without cause violated Mr. Avery's right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution, and Mr. Avery's right to a unanimous verdict by a 12-person jury guaranteed by Article I, § 7 of the Wisconsin Constitution and Wis. Stat. § 756.06(2)(a). The removal of Juror R.M. without legal justification, that is, without cause required to discharge a deliberating juror, violated Mr. Avery's right to a jury trial as the constitutions guarantee, specifically, his right to a unanimous verdict by the 12 impartial jurors to whom the case was submitted.

The right to a fair and impartial jury entitles a defendant in a criminal case to have his trial completed by a particular tribunal, the one selected to determine his guilt or innocence. *Peek v. Kemp*, 784 F.2d 1479, 1484 (11th Cir.

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1986). In some instances, that right must be subordinated to the public's interest in fair trials designed to end in jury verdicts. *Id.*, *citing* ***Wade v. Hunter***, 336 U.S. 684, 689 (1949). Accordingly, while the issue must be approached with "extreme caution", a court may discharge a deliberating juror for "cause". ***Lehman***, 108 Wis. 2d at 300. However, "it would be prejudicial and constitutionally deficient for a trial judge to excuse a juror during deliberations 'for want of any factual support, or for a legally irrelevant reason.'" ***Peek***, 784 F.2d at 1484, *quoting* ***Green v. Zant***, 715 F.2d 551, 555 (11th Cir. 1983). While a court may dismiss an ill or otherwise incapacitated juror, it has "no discretion whatever to dismiss such a juror who is *not* in fact ill or otherwise incapacitated." ***Green***, 715 F.2d at 556. To do so infringes the defendant's right to have his guilt or innocence decided by a unanimous vote of the 12 impartial jurors to whom the case was submitted.

The court had no authority to discharge Juror R.M. because the information provided to the court, as reproduced in the court's memo, does not provide cause for discharging him one day into deliberations. While the court believed that R.M.'s stepdaughter had been involved in an accident that totaled her car, the court had no information that she had been injured. *Contrast* ***United States v. Chorney***, 63 F.3d 78, 81 (1st Cir. 1995) (cause established where juror's son was killed in construction accident); ***United States v. Doherty***, 867 F.2d 47, 71 (1st Cir. 1989) (cause existed to excuse juror who was extremely upset because ex-wife had died leaving him with two small children).

Although R.M. apparently told the court that he had some marital problems before trial and the trial put an extra strain on the relationship, he had spent just one night away from his wife and family due to the trial, as the jury had only been subject to sequestration beginning the day before. The juror referred to his wife being upset by media reports about his wife's trust fund, but those reports

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had occurred five weeks earlier, at the time of the original *voir dire*. His wife's unhappiness with the news coverage did not constitute reason to excuse him from jury service. While, according to the court's memo, the juror sounded depressed and spoke quietly and slowly, the court could not assess the juror's facial expressions or body language because the communication occurred by telephone. The court's "reading" was that R.M. felt that the future of his marriage was at stake if he was not excused, but the court came to that conclusion "without pressing him with questions too specific ...." (Memo, p. 2). The court did not satisfy its "affirmative duty" to make sufficient inquiry into the circumstances to determine whether the juror, in fact, was unable to continue to serve. ***United States v. Araujo***, 62 F.3d 930, 934 (7th Cir. 1995).

A family member's auto accident, without any indication of a medical emergency, and strain on a marriage, without more, are not cause for discharging a juror during deliberations. *See* ***United States v. Patterson***, 26 F.3d 1127, 1129 (D.C. Cir. 1994) (conviction reversed where judge excused juror who was having chest pains and needed to see a doctor, where judge did not attempt to learn "the precise circumstances or likely duration of the twelfth juror's absence"); ***United States v. O'Brien***, 898 F.2d 983, 985-86 (5th Cir. 1990) (cause established where juror's psychiatrist confirmed that juror, who had previously been hospitalized for depression, was in no condition to continue).

Discharge without cause is structural error

17. The court's removal of Juror R.M. during deliberations without an on-the-record *voir dire* establishing cause and without the presence of Mr. Avery and his counsel is structural error requiring reversal of Mr. Avery's convictions. Denial of the right to an impartial jury is structural error that is not subject to a harmless error analysis. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987); *State v.*

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Tody, 2009 WI 31, ¶44, __ Wis. 2d __, 764 N.W.2d 737. Similarly, denial of a defendant's state constitutional right to the unanimous verdict by a jury of 12 requires automatic reversal of the defendant's convictions. *State v. Hansford*, 219 Wis. 2d 226, 243, 580 N.W.2d 171 (1998); *State v. Cooley*, 105 Wis. 2d 642, 645-46, 315 N.W.2d 369 (Ct. App. 1981) (reversal where defendant did not personally agree to proceed with 11 jurors); *State v. Lomagro*, 113 Wis. 2d 582, 590, 335 N.W.2d 583 (1983) (right to unanimous verdict).

Dismissal of Juror R.M. without cause and without complying with the mandated procedure resulted in Mr. Avery losing his right to a jury as contemplated by the federal and state constitutions, that is, a unanimous verdict from an impartial jury of 12 persons to whom the case was submitted. Once Juror R.M. was discharged, only 11 deliberating jurors remained, and Mr. Avery's trial would not be completed by the 12 who had been selected to determine his guilt or innocence. Denial of Mr. Avery's right to a unanimous verdict from an impartial jury of 12 is structural error requiring reversal without inquiry into harmless error. *United States v. Curbelo*, 343 F.3d 273, 285 (4th Cir. 2003) (removal of juror without cause falls into a special category of errors that defy analysis by harmless-error standards); *Araujo*, 62 F.3d at 937 (convictions reversed where court lacked cause for excusing deliberating juror); *United States v. Ginyard*, 444 F.3d 648, 655 (D.C. Cir. 2006) (same).

In the alternative, failure to follow the mandated procedure was prejudicial

18. Even if discharge of the juror on the existing record were not deemed a structural error, the court's failure to follow the proper procedure before discharging Juror R.M. was prejudicial because, in fact, no cause existed to remove the juror.

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Mr. Avery expects to establish that, in fact, there was no family emergency. Juror R.M. was not ill or otherwise incapacitated. His wife was not ill, and his stepdaughter was neither ill nor injured. There had been no accident, just car trouble. While the trial may have placed some strain on R.M.'s marriage, his wife was not demanding that he come home, and his marriage was not on the brink of collapse. Juror R.M.'s stress and frustration stemmed much less from his family situation than from what had occurred during deliberations and, in particular, from his verbal exchange with another juror.

Removal of a juror is improper if there is any reasonable possibility that its impetus was a problem among jurors due to their differing views of the merits of the case. ***United States v. Symington***, 195 F.3d 1080, 1085-87 (9th Cir. 1999); ***United States v. Samet***, 207 F. Supp. 2d 269, 281-82 (S.D. N.Y. 2002) (juror could not be removed for cause where she became "unhinged" by the process of deliberation, in particular, by her status as a holdout); ***Williams v. State***, 792 So. 2d 1207, 1210 (Fla. 2001) (spectre of jury taint particularly grave where "the removed juror's incapacitation arises directly from participation in the deliberative process"). Here, the true impetus for Juror R.M.'s discharge was his distress over the attitude of another juror who held a view of the evidence contrary to his. R.M. felt intimidated and discouraged by this other juror, stemming from the juror's conduct during deliberations and his comment at dinner essentially goading R.M. to get off the jury. The court had no authority to discharge R.M. Rather, the juror should have been reminded, following an on-the-record *voir dire* with the defendant and counsel present, that "holding to [his] convictions is an essential part of [his] duty as a juror ..." *Samet*, 207 F. Supp. at 275 n.3.

The erroneous removal of the deliberating juror violated Mr. Avery's fundamental rights and requires that his convictions be vacated.

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C. The court had no authority to substitute an alternate juror once deliberations had begun.

19. Even if Juror R.M. was lawfully discharged, which Mr. Avery disputes, his convictions still cannot stand because the option selected after the juror was removed – substitution of the alternate – is not permitted by the governing statute. In *Lehman*, 108 Wis. 2d at 305-06, the supreme court concluded that the relevant statute in effect at that time, Wis. Stat. § 972.05 (1979-80), was silent as to whether the legislature approved of the substitution of an alternate juror after deliberations had begun. In the face of an ambiguous statute, the court held that a circuit court had three options if a regular juror were discharged after deliberations had begun, as follows: (1) obtain a stipulation by the parties to proceed with fewer than 12 jurors; (2) obtain a stipulation by the parties to substitute an alternate juror; or (3) declare a mistrial. *Id.* at 313. Here, the parties chose the second option. However, as shown below, the governing statute is no longer silent – it prohibits substitution of an alternate once deliberations have begun. Consequently, the court had no authority to substitute the alternate when Juror R.M. was discharged, Mr. Avery's consent to that procedure was legally invalid, and to proceed in that manner was reversible error.

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

> 972.10 (7) If additional jurors have been impaneled under s. 972.04 (1) and the number remains more than required at final submission of the cause, the court shall determine by lot which jurors shall not participate in deliberations and discharge them.

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1983 Wis. Act 226 § 6.[1] In 1996, the supreme court amended the civil trial provision, Wis. Stat. § 805.08(2), to allow a circuit court to keep additional jurors until the verdict is rendered, so as to allow for replacement of a juror who becomes unable to complete deliberations. SCO 96-08 ¶46. Significantly, while the supreme court made a technical change in the parallel criminal provision, § 972.10(7),[2] it did *not* alter the language requiring the circuit court to discharge any additional jurors at final submission of the cause. *Id.* at ¶59. Accordingly, the governing statute, now and at the time of Mr. Avery's trial, requires the court to discharge any additional jurors when the case is submitted to the jury. The court had no authority to substitute Juror N.S. during deliberations, as she should have been discharged once deliberations began. *See, e.g.*, ***United States v. Neeley***, 189 F.3d 670, 681 (7th Cir. 1999) (where federal rule at the time required discharge of alternates when deliberations began, court construed rule as forbidding the practice of recalling alternates);[3] ***Commonwealth v. Saunders***, 686 A.2d 25, 27 (Pa. 1996) (state statute that required alternates discharged when jury retired to deliberate barred substitution of alternate juror during deliberations); ***People v. Burnette***, 775 P.2d 583, 586-87 (Colo. 1989) (same).

21. As a matter of law, Mr. Avery could not validly consent to substitution of an additional juror during deliberations. It is well established that the right to a jury trial as guaranteed by Article I, § 7 of the Wisconsin Constitution cannot be waived without statutory authorization. In ***Jennings v. State***, 134 Wis.

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

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

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

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

Mr. Avery could not validly consent to substitution of an additional juror during deliberations because that procedure is not authorized by statute and it diminished, rather than enlarged, his right to a jury trial as contemplated by the Wisconsin Constitution. Specifically, he lost his right to a unanimous verdict by the jury of 12 to whom his case was submitted. *Hansford*, 219 Wis. 2d at 241 (jury of 12 guaranteed); *Lomagro*, 113 Wis. 2d at 590 (unanimous verdict guaranteed). Indeed, in *Lehman*, the court discussed how those rights are jeopardized by post-submission substitution, given that the "eleven regular jurors will have formed views without the benefit of the views of the alternate juror, and the alternate juror who is unfamiliar with the prior deliberations will participate without the benefit of the prior group discussion." *Lehman*, 108 Wis. 2d at 308. Even if upon substitution the jury is instructed to begin deliberations anew, the continuing jurors may still be influenced by the earlier deliberations and the newer juror may be intimidated due to their status as a newcomer to the deliberations. *Id.* at 312. Nor will the new juror have had the benefit of the discharged juror's views. *Burnette*, 775 P.2d at 588; *see also People v. Ryan*, 224 N.E.2d 710, 713

(N.Y. 1966) ("once the deliberative process has begun, it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous deliberations ...").

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

In its colloquy with Mr. Avery on the morning after Juror R.M. had been discharged, the court told Mr. Avery that he had "the right to require a jury of 12 and the right to request a mistrial if the juror is excused." (Transcript of March 16, 2007, p. 8). But the court failed to advise Mr. Avery that substitution of the alternate was an option not permitted by law. And the court did not expressly advise Mr. Avery that by agreeing to that option, he was giving up his right to a unanimous verdict by the 12 jurors to whom the case had been submitted. *See State v. Resio*, 148 Wis. 2d 687, 696-97, 436 N.W.2d 603 (1989) (to validly waive jury trial defendant must be advised of unanimity requirement). Accordingly, the record fails to establish that Mr. Avery's consent to substitution was an "intentional relinquishment ... of a known right or privilege." *Anderson*, 249 Wis. 2d 586, ¶23. In fact, when Mr. Avery agreed to substitution and to forego a

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mistrial, he did not understand that substitution was an impermissible option or the rights that he was giving up.

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

23. In ***Lehman***, 108 Wis. 2d at 313, the supreme court held it is reversible error for a circuit court to substitute an alternate juror for a regular juror after deliberations have begun, absent express statutory authority or the defendant's consent. Since ***Lehman***, the legislature has expressly forbidden juror substitution during deliberations in criminal cases and, accordingly, the defendant cannot consent to substitution. Consequently, as argued above, Mr. Avery's consent was invalid as a matter of law. In the alternative, as also argued above, Mr. Avery's consent was invalid because it was not knowing, voluntary and intelligent. Either way, Mr. Avery did not validly consent to substitution of the additional juror, and, consequently, the supreme court's rule of automatic reversal applies.

D. If Mr. Avery's claims challenging the removal of the deliberating juror and substitution of the alternate were waived, which he disputes, the claims should be reached as plain error, in the interest of justice or ineffective assistance of counsel.

24. For the reasons argued above, Mr. Avery's claims were not waived by counsel's agreement that the court speak privately with Juror R.M. and remove him if the information provided by the sheriff was verified, or by counsel's agreement to substitute an alternate juror once Juror R.M. was removed. However, if this or a higher court were to find waiver, the claims should nevertheless be reached as plain error, in the interest of justice or ineffective assistance of counsel.

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Plain error and interest of justice

25. Some errors, such as occurred here, are so plain and fundamental that the court should grant a new trial despite the defendant's failure to timely object to the error. ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. The removal of a deliberating juror without cause and substitution of an alternate who should have been discharged are errors so fundamental and disruptive of a defendant's constitutional rights that a new trial is warranted under the plain error doctrine or by the court invoking its authority to grant a new trial in the interest of justice under Wis. Stat. § 805.15(1).

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

In ***United States v. Essex***, 734 F.2d 832, 843-45 (D.C. Cir. 1984), the court held that the district court's removal of a deliberating juror without cause was plain error requiring reversal of the defendant's conviction. "The obvious and substantial right of appellant that was denied is her right to a *unanimous* verdict by the *jury of 12* who heard her case and began their deliberations." *Id.* at 844

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

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(emphasis in original). Moreover, no further prejudice need be shown than the fact that the district court removed the deliberating juror without cause, thereby denying the defendant her constitutional right to a unanimous verdict by the 12 jurors to whom the case was submitted. *Id.* at 845. Mr. Avery's constitutional right to a jury trial as contemplated by the state and federal constitutions was violated by the removal of Juror R.M. without cause. The error was not only fundamental, obvious and substantial, the resulting prejudice is inherent and structural so that the state could not meet its burden of proving beyond a reasonable doubt that the error was harmless.

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

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

Id. at 1051, *quoting* ***State v. Harper***, 128 N.J. Super. 270, 278 (App. Div. 1974). As argued above, the court had no authority to substitute the alternate juror once deliberations had begun, and the supreme court's rule of automatic reversal applies. Particularly given the fundamental jury trial rights at stake, reversal of Mr. Avery's convictions under the doctrine of plain error is warranted.

27. In the alternative, the court should use its discretionary reversal authority under § 805.15(1) because the errors prevented the real controversy from

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being fully and fairly tried. The court has broad discretion to order a new trial where the controversy was not fully or fairly tried, "regardless of the type of error involved" and without any showing as to the likelihood of a different result on retrial. ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991). The real controversy was not fully and fairly tried because the errors affected "the very essential duty of having the jury deliberate upon the evidence and agree upon a verdict respecting the defendant's guilt or innocence ..." ***Jennings***, 134 Wis. at 309. The errors deprived Mr. Avery of his right to a unanimous verdict from an impartial jury of 12 persons to whom the case was submitted. The controversy was not fully and fairly tried because of the disruption to perhaps the most critical phase of the trial, the jury's deliberation.

Ineffective assistance of counsel

28. Mr. Avery was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Trawitzki***, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801.

29. Counsel performed deficiently in three respects: (1) by authorizing the court to conduct a private *voir dire* of a deliberating juror without counsel and Mr. Avery present, despite case law clearly granting Mr. Avery the right to be present and assisted by counsel (*see* ¶14); (2) by authorizing the court to discharge Juror R.M. if, in its private *voir dire*, the court verified the information provided by Sheriff Pagel, even though the case law shows that the information the court obtained from the sheriff and communicated to counsel did not constitute cause for removing a deliberating juror (*see* ¶16); and (3) by entering into a stipulation, and advising Mr. Avery to enter into a stipulation, allowing the court to substitute an

alternate juror after Juror R.M. was removed, a procedure that is not permitted by statute (*see* ¶¶19-20).

An attorney's performance is deficient if it falls below an objective standard of reasonableness. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Counsels' performance was objectively unreasonable because all three decisions were contrary to the governing law. ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305 (failure to understand and apply relevant statute was deficient as a matter of law). Nor could the decisions be deemed reasonable strategic or tactical choices. To be reasonable, counsel's strategic decision must be based upon knowledge of all facts and all law that may be available. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

Each decision – to forego an on-the-record *voir dire*, to agree to Juror R.M.'s discharge, to substitute an alternate in lieu of a mistrial – was made without full knowledge of the available facts. After all, the purpose of an on-the-record *voir dire* would have been to obtain facts necessary to determine why Juror R.M. was seeking to be discharged and, in light of the facts gathered, whether removal of that juror was in Mr. Avery's interest. A properly conducted *voir dire* would likely have shown not only that removal of R.M. would be improper because his discontent stemmed from the deliberative process, but also that removal would result in the defense losing a favorable juror. The decision to substitute the alternate was equally ill-informed as counsel had lost the opportunity to assess the relative value to the defense of Juror R.M. versus the alternate.

In addition, counsels' decision, and advice to Mr. Avery, to forego a mistrial and, instead, substitute the alternate was made with the erroneous belief that substitution was legally permissible. Mr. Avery expects counsel to testify that had they known that upon Juror R.M.'s discharge the options were either a mistrial

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or to proceed with 11 jurors, counsel would not have recommended that Mr. Avery proceed with 11 jurors and, instead, would have sought a mistrial.

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

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

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

2d 111, ¶30. The reliability of the proceedings is undermined by the truncated deliberations during which a juror who by statute should have been discharged was swapped for a juror who was discharged without cause. The precise impact of the improper tinkering with the jury during deliberations can never really be known. What is known is that confidence in the reliability of the proceedings is undermined.

II. SHERIFF PAGEL'S PRIVATE COMMUNICATION WITH R.M. CONSTITUTED ERROR AND REQUIRES REVERSAL OF MR. AVERY'S CONVICTIONS.

32. In addition to the above-described errors relating to the court's removal of Juror R.M. without cause, the circumstances leading up to R.M.'s removal also constitute error warranting reversal of Mr. Avery's convictions. Specifically, R.M.'s removal was facilitated by Sheriff Pagel, an interested party to the litigation who was not an officer charged with protecting the jury's sequestration.

33. After deliberations had begun, on the evening of March 15, 2007, Juror R.M. contacted one of the supervising deputies at the hotel where the jurors were sequestered, and asked to be excused because of a family emergency. The deputy did not contact the court, however. Rather, the deputy contacted Sheriff Pagel who came to the hotel where the jurors were sequestered. Once there, Sheriff Pagel spoke with R.M. and then phoned Judge Willis. Sheriff Pagel spoke to the judge with R.M. standing by, and related to the judge that R.M.'s daughter had been in a car accident. Judge Willis contacted counsel and then spoke directly with Juror R.M. Juror R.M. was then excused.

34. By this point in the trial, the jurors were sequestered. Under Wis. Stat. § 972.12, this meant that the jurors were to be kept together and communications prevented "between the jurors and others."

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35. Wisconsin Statute § 756.08(2) further explains the duty to protect jurors from communications with "outsiders" during its deliberations:

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

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

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

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

Mattox v. United States, 146 U.S. 140, 150 (1892).

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

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

Id. at 229.

39. Wisconsin courts have recognized the importance of preserving the jury's independence from outside influences, particularly during its deliberations.

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

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

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

level investigative law enforcement agency in the case. Members of his agency were witnesses for the prosecution. As in *Yang*, Sheriff Pagel should have had no contact with jurors given his alignment with the prosecution.

42. Sheriff Pagel's communication with R.M. falls within the prohibited contact standard articulated in *Remmer*. His contact with juror R.M. was private; that is, his contact was outside the presence of the court, at least initially, and was outside the presence of the parties or the defendant.

43. His contact was also "about the matter pending before the jury" because it related to whether a juror would or could continue to deliberate. As discussed above, R.M.'s request to be excused from the jury was as much about his frustrations and concerns about the deliberations themselves as it was about any personal problems he was having.

44. And, at least the initial communications between R.M. and Sheriff Pagel was without the knowledge or instruction by the court. Instead, Sheriff Pagel was brought into the proceedings by a deputy charged with keeping the jury free from outside influences.

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

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juror. Even if Sheriff Pagel did not explicitly encourage R.M.'s removal, his participation in the private communications is inseparable from the juror's ultimate removal. When Sheriff Pagel talked to R.M. and heard his story, he responded by calling the court. Then R.M. heard Sheriff Pagel repeat his concerns to the judge. By that time, R.M. was locked into his story. In a short time span, R.M. went from talking to a deputy to the Sheriff to the judge in charge of the trial, each time reinforcing his story of his "family emergency." The result of these communications was a change in the make-up of the jury which, as argued above, was prejudicial to Mr. Avery.

46. Sheriff Pagel's private communication with Juror R.M. constituted error that warrants reversal of Mr. Avery's convictions. Sheriff Pagel's private contact with R.M. which resulted in his discharge from the jury constitutes plain error. A "plain error" is an "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." ***Jorgensen***, 2008 WI 60 at ¶ 21. An error is plain when it involves a basic constitutional right that has not been extended to the accused. ***Id.*** A plain error affects the substantial rights of the defendant and permits a trial to proceed in violation of a fundamental condition necessary for a fair trial. ***Virgil v. State***, 84 Wis. 2d 166, 193, 267 N.W.2d 852 (1978).

47. Here, the error was plain because it involved Mr. Avery's basic constitutional right to an impartial jury of the 12 jurors who commenced deliberations. After private communication between the Sheriff and a juror, that juror was discharged without cause. That is plain error.

48. Sheriff Pagel's private contact with juror R.M. also permitted the trial to proceed in violation of a fundamental condition necessary for a fair trial. As noted above, the United States Supreme Court presumes that when a juror has

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private contact with someone outside the jury during deliberations, that contact constitutes prejudicial error. *See* ***Remmer***. That the jury's deliberations are a critical part of the defendant's right to a fair trial is beyond dispute. Where, as here, there is contact that results in removal of the juror involved, the defendant's constitutional right to a jury trial of 12 impartial jurors is implicated.

49. Additionally, as with Mr. Avery's lack of knowing and voluntary consent to excuse R.M. as argued above, by the morning after R.M. was excused, Mr. Avery had already lost what the constitution guarantees, that is, the right to a unanimous verdict by the 12 impartial jurors who were selected to determine his guilt or innocence.

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

51. As argued above, removal of a deliberating juror without cause is the sort of error that has repercussions which are necessarily unquantifiable and indeterminate. The juror's removal in this case was set in motion by a deputy who then contacted Sheriff Pagel, even though Sheriff Pagel was aligned with the prosecution and had not been sworn to assist the court in sequestering the jury.

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Sheriff Pagel should never have had private contact with Juror R.M., and his contact ultimately resulted in R.M.'s discharge from the jury. Sheriff Pagel's role in Juror R.M.'s removal was error that warrants reversal of Mr. Avery's convictions.

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PART II: NOT FILED UNDER SEAL

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

Introduction

52. Prior to trial, the defense sought to introduce evidence that other persons may have been responsible for Teresa Halbach's murder. The parties briefed whether such evidence was admissible under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), and the court ruled that the defense would be barred from presenting evidence that a person other than Brendan Dassey was responsible for the crimes.

53. Mr. Avery renews his claim here that he was entitled to introduce evidence and to argue that other persons may have been responsible for Ms. Halbach's death. He argues below that *Denny* is inapplicable, and that even if it is applicable, the court erred in barring Mr. Avery from presenting third party liability evidence.

Procedural history

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

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55. In light of the court's order, on January 10, 2007, Avery filed the "Defendant's Statement on Third-Party Responsibility." Mr. Avery there stated that he did not kill Teresa Halbach, and that there was "at least a reasonable possibility that one or more unknown others, present at or near the Avery Salvage Yard on the afternoon of October 31, 2005, killed her." Mr. Avery identified several persons as potential alternative perpetrators: Scott Tadych; Andres Martinez; Robert Fabian; Charles and Earl Avery; and the Dassey brothers. Mr. Avery argued that ***Denny*** did not apply to the circumstances in his case, and that as a result, he should not be bound by the three-part test set forth in ***Denny***. He further argued that even if ***Denny*** did apply to his case, he should be permitted to introduce evidence at his trial of several alternative perpetrators in this case.

56. On January 30, 2007, the court entered its "Decision and Order on Admissibility of Third Party Liability Evidence." The court held that ***Denny***'s "legitimate tendency" test applies to any evidence the defendant wished to present regarding potential third parties who might have been responsible for Ms. Halbach's murder. (Court's order of 1/3/07 at 7).

57. Despite this ruling, the court analyzed Mr. Avery's offer of proof regarding third party responsibility to determine whether it might meet an alternative "legitimate tendency" test. That is, the court looked at the defendant's proffer to see whether it stated evidence of such probative value of opportunity and direct connection to the crime that proof of motive is not required. (*Id.* at 7-8).

58. The court ruled that under either the ***Denny*** test or its modified alternative legitimate tendency test, Mr. Avery was barred from presenting evidence of the possible culpability of any third party other than Brendan Dassey.

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A. The *Denny* decision.

59. The defendant in ***Denny*** was charged with homicide. He sought to introduce evidence that he had no motive to kill the victim, but that "any one of a number of third parties had motive and opportunity" to kill the victim in his case. ***Denny***, 120 Wis. 2d at 617. The court prohibited Denny from presenting any evidence that others might have had a motive to kill the victim, ruling it irrelevant. ***Id.*** at 621. The court of appeals affirmed, and articulated a test for the admissibility of this type of third-party responsibility evidence, which it termed the "legitimate tendency" test. The test, the court said, is a bright-line test which involves three factors which the defendant must show: motive; opportunity; and a direct connection between the third person and the crime charged. ***Id.*** at 625.

60. The trial court erred when it concluded that ***Denny*** applies to Mr. Avery's case. ***Denny*** is inapplicable to Mr. Avery's case for four reasons. First, ***Denny*** applies only to those situations where the defendant seeks to introduce evidence of other possible perpetrators' motives to commit the crime, and where the defendant has no such motive. Second, ***Denny*** should not be applied in this case because it is a state evidentiary rule which conflicts with Mr. Avery's constitutional rights. Third, ***Denny*** cannot act as a bar to Mr. Avery's production of evidence because the state opened the door to such evidence. And fourth, ***Denny*** should not apply because it was wrongly decided.

B. *Denny* does not apply to the facts in this case.

61. As noted above, the defendant in ***Denny*** sought to present evidence that others had a motive to kill the victim, but that he had no such motive. He argued that if he could show a motive by others to kill the victim, he could "establish the hypothesis of innocence." ***Id.*** at 622. The trial court barred this

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evidence, and the court of appeals affirmed. The court of appeals warned that if it approved of Denny's attempt to show these other individuals' motives to harm the victim, "a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased—degenerating the proceedings into a trial of collateral issues." *Id.* at 623-24.

62. The *Denny* court's concern that a defendant could turn a trial into a parade of witnesses who had animus towards the deceased, even when they had no other connection to the victim, is unfounded here because no person had a specific motive to harm Ms. Halbach as there was in *Denny*. Unlike Denny, Mr. Avery did not seek to prove that others had animus towards Ms. Halbach. *Denny* must be limited to its facts. It is appropriately applied where the defendant seeks to introduce evidence of others' motives to kill the victim, but it is a poor fit where motive is not at issue. The court's concern that a defendant would turn a trial into a parade of witnesses who had a motive to harm the victim is simply inapplicable here. As trial counsel argued, *Denny* should not control the presentation of evidence here because *Denny* was a "motive" or animus case, and Mr. Avery's case is not.

63. In addition, *Denny* is not a good fit to Mr. Avery's case because here, unlike *Denny*, there was a finite universe of actors identified by the defense who could have been responsible for Ms. Halbach's death. Denny argued that he should be able to present evidence that the victim had angered various people because of his drug dealing ventures, and thus had a number of enemies. Such a claim opened up the possibility of a wide range of third parties, some of whom the defendant did not name. Not so here where the defense could identify individuals with the opportunity to kill Halbach, and where there was at least circumstantial evidence to link them to her.

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64. Mr. Avery's argument that *Denny* is inapplicable to the facts of this case is not unique. Our appellate courts have declined to apply *Denny* in a number of cases where the defendant points to a third party as the one responsible for the crime. For example, in *State v. Oberlander*, 149 Wis. 2d 132, 438 N.W.2d 580 (1989), where the defendant wanted to present other acts evidence of a third party who might have committed the crime with which the defendant was accused, the court simply applied a relevancy test. In *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997), where the defendant claimed he was being framed for a crime that never happened, the supreme court held that *Denny* does not apply. Instead, the court applied the balancing test of Wis. Stat. § 904.03. The court stated that existing rules of evidence would ensure that the jury is not confused, or its attention diverted to collateral issues. "As there is neither a legal basis nor a compelling reason to apply the legitimate tendency test under the circumstances of this case, we hold that the legitimate tendency test is not applicable to the introduction of frame-up evidence." *Id.* at ¶19. And, the court specifically declined to consider whether the legitimate tendency test is "an appropriate standard for the introduction of third-party defense evidence." *Id.* at 705, fn. 6. In *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), where the defendant tried to show that another unknown person committed the crime in light of a unique *modus operandi*, the supreme court held that the other acts standard of Wis. Stat. § 904.04 applies instead of the *Denny* standard. *Id.* at 296-97. And in *State v. Falk*, 2000 WI App 161, 238 Wis. 2d 93, 617 N.W.2d 676, the court ruled that *Denny* did not apply to the defense attempt to introduce evidence of a known alternative perpetrator. In *Falk*, the defendant was accused of child abuse, and he wanted to introduce evidence that the true perpetrator was his wife. The trial court excluded the evidence, but the court of appeals concluded the trial court was

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wrong in applying *Denny*. The court of appeals agreed with the defendant that "*Scheidell* countenances an examination of the legitimate tendency test to determine whether it fits in fact situations that differ from those in *Denny*..." *Id.* at ¶34. The court concluded that the facts before it did not fit the *Denny* framework because of the limited number of people who could have committed the offense. Where the number of people who had the opportunity to commit the crime was small, the court said that *Denny* does not apply.

> In this case—and in most if not all cases where child abuse is the charged offense—there are only a few persons who could possibly have committed the crime besides the accused, because only a few persons have the necessary opportunity: the parent or parents, the babysitter or caregiver, and a limited number of other relatives or friends. ***Therefore, the need to prevent evidence showing that large numbers of others had a motive to commit the crime is not a concern as it was in Denny.*** In addition, direct evidence connecting one of those few persons to the particular abuse charged, such as witnesses other than the child victim or physical evidence, will likely be lacking. In this case, for example, only four persons had the opportunity to injure Laura given the parameters established by the medical testimony. We therefore conclude that the *Denny* legitimate tendency test is not applicable in this case, and to the extent the trial court relied on it in excluding the proffered evidence, it erred.

Id. at ¶34 (emphasis added).

As in *Falk*, Mr. Avery identified a fairly limited number of possible alternative perpetrators. Therefore, the *Denny* framework does not apply to this case.

In sum, the courts have declined to apply *Denny* to a number of third-party liability cases. Likewise, *Denny* should not apply to Mr. Avery's case.

C. *Denny* does not apply here because it is a state evidentiary rule which conflicts with Mr. Avery's constitutional rights.

65. Second, *Denny* should not be applied because it is a state evidentiary rule which conflicts with Mr. Avery's constitutional right to present a defense.

66. The state has broad latitude to establish rules excluding evidence from criminal trials. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). This

latitude has limits, however, because a defendant is also guaranteed the constitutional right to present a complete defense. ***Id.***; ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). Both the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant a "meaningful opportunity to present a complete defense." ***Holmes***, 547 U.S. at 324; ***State v. St. George***, 2002 WI 50, ¶14, 252 Wis. 2d 499, 512, 643 N.W.2d 777. The constitutional right to present a defense includes the right to the effective cross-examination of witnesses against the defendant, and the right to introduce favorable testimony. ***Pulizzano***, 155 Wis. 2d at 645-646; ***St. George***, 2002 WI 50 at ¶14.

67. Assuming *arguendo* that ***Denny*** applies in this case, the trial court's ruling deprived Mr. Avery of his constitutional right to present a defense. He was prevented from advancing a key claim in defending himself against the state's charges: that another individual or individuals were responsible for Ms. Halbach's death. Had Mr. Avery been able to introduce evidence that others may have been responsible for Ms. Halbach's death, counsel would have tried the case differently. They would have called other witnesses, cross-examined witnesses differently, and made a different opening statement and closing arguments to the jury.

68. Mr. Avery's defense at trial was that an unknown person had killed Teresa Halbach, and that the police had framed Mr. Avery for the crime by planting his blood in Ms. Halbach's car and by planting her car key in Mr. Avery's residence. The court's ***Denny*** ruling forced Mr. Avery to limit his frame-up claim to the police. It is anticipated that at a postconviction hearing, trial counsel will testify that had the court ruled that Mr. Avery could present evidence of other potential perpetrators, he would not have been so limited in his defense. Mr. Avery could have presented evidence that others had the motive and the means

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to frame him for Ms. Halbach's death, and that specific other individuals may have killed Ms. Halbach.

69. For example, other individuals, such as Charles and Earl Avery, could have planted the evidence which proved so damning to Mr. Avery' defense. As was shown at trial, Steven had cut his finger, it was bleeding, and Charles and Earl could have planted his blood in the car. Once the court excluded Mr. Avery's third-party liability evidence, it meant that his frame-up defense was limited to law enforcement, who the jury would have been less inclined to suspect than Mr. Avery's brothers. Had Mr. Avery been able to argue his brothers killed Ms. Halbach and then framed him for it, counsel could have argued that police had not framed Mr. Avery, but rather, that they willingly followed their tunnel vision, encouraged by the true killers, to conclude that Mr. Avery was the guilty party.

70. The trial court's ***Denny*** ruling also made it easier for the state to suggest to the jury that if Mr. Avery was claiming the police framed him, the police must also have killed Ms. Halbach. A difficulty with Mr. Avery's defense was that it relied upon a theory that Ms. Halbach's killer or killers were not the same people as those who framed him. As long as the defense maintained that the police did not kill Ms. Halbach, but that they framed Mr. Avery, the defense needed to try to explain how the police would have known she was dead when they framed Mr. Avery. As it was, the defense was vulnerable to the state's claim that if the police were framing Mr. Avery, the defense must be insinuating that the police killed Ms. Halbach. That difficulty would have been obviated had the defense been able to argue that Charles and/or Earl Avery killed Ms. Halbach and framed Mr. Avery for the crime. Even if the jury was inclined to believe that the police framed Mr. Avery for a crime he did not commit, the jury was not going to believe that the police had actually killed Ms. Halbach. Indeed, although

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Mr. Avery consistently maintained at trial that the police did not kill Ms. Halbach, without being able to present evidence of other possible perpetrators, the jury was really left with only two possible killers: the police or Steven Avery.

71. In addition to unfairly limiting Mr. Avery's theory of defense, the court's ***Denny*** ruling impermissibly infringed upon his right to cross-examine the witnesses against him. Cross-examination is implicit in the constitutional right of confrontation, and is essential to the accuracy of the "truth determining process." ***Chambers v. Mississippi***, 410 U.S. 284, 295 (1973), *quoting* ***Dutton v. Evans***, 400 U.S. 74, 89 (1970), *et al*. The denial of the right of cross-examination means the defendant has lost the ability to subject the witness' "damning repudiation and alibi to cross-examination." ***Chambers***, 410 U.S. at 295. The defendant is unable to "test the witness' recollection, to probe into the details of his alibi, or to 'sift' his conscience so that the jury might judge for itself whether [the witness'] testimony was worth of belief." ***Id.***

72. In ***Denny***, it appears the defendant sought to produce motive witnesses. By contrast, in this case, the *state* called as witnesses three of the individuals Mr. Avery identified in his proffer: Scott Tadych; Bobby Dassey; and Robert Fabian. The trial court's ***Denny*** ruling prevented Mr. Avery from exercising his constitutional right to confront these witnesses.

73. The court's ***Denny*** ruling meant that Mr. Avery was barred from exploring one of the biggest motives for these witnesses to lie on the stand: that one or more of these individuals was guilty of the crime. If one or more of these witnesses were guilty of Ms. Halbach's homicide, or had participated in framing Mr. Avery for the crime, they would have had every incentive to point the finger at Mr. Avery. They would have had strong motive to convict Mr. Avery in order to save themselves. As the Minnesota Supreme Court stated in *State v. Hawkins*,

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260 N.W.2d 150, 158 (Minn. 1977): "where the third person is a state's witness with a possible motive to convict the defendant to save himself, the rule admitting otherwise competent evidence of a third person's guilt is especially applicable."

74. Mr. Avery was also unable to test the witness's recollection if the questions strayed into prohibited ***Denny*** territory. For example, Mr. Avery could not impeach Scott Tadych with inconsistencies in his recollection of his whereabouts on October 31, 2005. Had Mr. Avery been able to point the finger at Tadych, he could have shown that Tadych had a motive to lie about when he saw a bonfire, how big the bonfire was, and when and whether he had actually seen "Prison Break" that night. Although Mr. Avery could point out the inconsistencies in Tadych's testimony, he was barred from connecting up the inconsistencies with the possibility that Tadych had killed Ms. Halbach.

75. Counsel's cross-examination of Bobby Dassey was also curtailed by the trial court's ***Denny*** ruling. But for the court's ruling, counsel would have cross-examined Bobby Dassey much more aggressively. For example, counsel would have handled Dassey's testimony about Mr. Avery's "joke" regarding disposing of a body much differently. But for the court's ***Denny*** ruling, defense counsel could have directly confronted Bobby about the "joke" and suggested that Bobby invented this conversation to point the finger at Mr. Avery to divert suspicion from himself. Additionally, counsel could have cross-examined Bobby Dassey regarding his mutual alibi with Scott Tadych.

76. The court's pre-trial ruling prevented counsel from questioning Fabian about the cadaver dog "hitting" on the golf cart that he and Earl Avery drove around the Avery Salvage Yard, shooting rabbits.

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77. Finally, the court's pre-trial ruling prevented defense counsel from directly questioning these witnesses about whether they were responsible for Ms. Halbach's death.

78. The trial court's *Denny* ruling also infringed upon Mr. Avery's right to present favorable evidence. For example, the court's order prevented Mr. Avery from introducing evidence that Bobby Dassey had his own .22 Marlin gun, the same model believed to have been the murder weapon in this case. The ruling prevented Mr. Avery from calling Earl and Charles Avery as witnesses to question their whereabouts on October 31, 2005, and whether they knew Teresa Halbach was coming that day. Earl Avery was said to know every single car on the Avery Salvage Yard property. Defense counsel could have called him to question why he did not notice Ms. Halbach's badly concealed vehicle on the property, even though it was alleged to have been there for days before it was found by the Sturms. Counsel could have introduced evidence of Tadych's character for violence and lack of truthfulness, or of Charles Avery's prior aggressive conduct with women who had visited the Avery Salvage Yard in the past.

79. The court's ruling also affected counsels' opening statement and closing arguments. As argued above, had counsel not been limited by the *Denny* ruling, it would not have needed to rely exclusively on its police frame-up defense. Rather, the defense counsel could have argued that the police indeed had investigative tunnel vision, but that they were simply fooled into thinking that Mr. Avery was the perpetrator, rather than that they actively framed him.

80. The court's ruling also affected the defense closing argument. During his argument, Attorney Buting suggested Bobby Dassey had killed Teresa Halbach. The state vigorously objected, asked for an admonishment, and defense counsel had to backtrack from that argument. (Transcript of March 14,

pp. 214-222). Clearly, the defense was unable to argue that other specific individuals may have been responsible for Ms. Halbach's death. While the defense was able to elicit small bits of testimony to try to impeach the state's witnesses, counsel could not tie those pieces of evidence into a theory for the jury to consider that an alternative perpetrator, such as Bobby Dassey, was guilty of Ms. Halbach's murder.

81. In sum, the court's ***Denny*** ruling impermissibly infringed upon Mr. Avery's right to cross-examination, compulsory process, and the right to present a complete defense. Even if ***Denny*** is an appropriate limiting evidentiary rule, here its application deprived Mr. Avery of his constitutional right to present a defense.

D. Mr. Avery should have been permitted to present evidence of alternative perpetrators because the state opened the door to this evidence.

82. Third, ***Denny*** should not have barred Mr. Avery from introducing evidence of possible other perpetrators because the state opened the door to such evidence.

83. Sherry Culhane, the Technical Unit Leader in the DNA Unit at the Wisconsin State Crime Laboratory (Crime Lab), testified on the state's behalf. She testified that buccal swabs from Barb Janda, Bobby, Brendan and Brian Dassey, and Earl, Chuck, Delores and Allen Avery were all submitted to the crime lab, and that she had prepared DNA profiles based upon these standards. (Transcript of February 23, 2007, pp. 128-132).

84. Culhane further testified, upon the state's questioning, that she tested various pieces of evidence, obtained DNA profiles from those pieces of evidence, and then compared those profiles against not only Steven Avery's profile, but against the other profiles she developed as well. For example, she compared the

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DNA on the key against the profiles of Allen Avery, Brian Dassey, Brendan Dassey, Barb Janda, Bobby Dassey, Earl Avery, Chuck Avery and Delores Avery. (*Id.*, at 183-184).

85. Culhane testified that she compared the DNA profile obtained from a blood stain in Ms. Halbach's car against all of the standards she received at the crime lab, and that the profile was not consistent with any standard she received except for Steven Avery's. (*Id.* at 186-187).

86. The state moved into evidence various crime lab reports, such as Exhibit 315, which contains the profiles developed for Barb Janda, Bobby Dassey, Earl Avery, Charles Avery, Delores Avery, and eliminates them as possible sources from evidence obtained in this case. (*Id.* at 201).

87. Thus, the state elicited evidence in its case-in-chief that other individuals on the Avery property had been eliminated by DNA evidence as perpetrators. As soon as the state introduced evidence that other individuals had been excluded as the DNA source for incriminating pieces of evidence, the state opened the door for the defense to counter with evidence that those individuals and others could have been the true perpetrators of the crimes in this case. Having obtained a ruling that the defense could not introduce evidence of other potential perpetrators, the state could not introduce evidence that others were excluded without opening the door to the previously barred ***Denny*** evidence. *See* McCormick, Evidence, Vol. 1 at §57 (Sixth Ed.), on "curative admissibility"; ***United States v. Bolin***, 514 F.2d 554, 558 (7th Cir. 1975).

E. *Denny* should not apply because it was wrongly decided.

88. Trial counsel argued that, while *Denny* is good law, it is inapplicable under the facts of this case. In spite of this concession, Mr. Avery now maintains that *Denny* was wrongly decided and should be overruled. He recognizes,

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however, that this court lacks the authority to overrule ***Denny***. Nevertheless, he raises the issue to preserve it for appellate review.

89. Although the Wisconsin Supreme Court fleetingly seemed to approve of the ***Denny*** decision in ***State v. Knapp***, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881, in its previous decisions on third-party liability the court specifically stated it would not reach the issue of whether ***Denny*** applies to third party liability cases where motive is not at issue. (*See* ***State v. Richardson***, and ***State v. Scheidell***, discussed above).

90. And, ***People v. Green***, the California case upon which the Wisconsin Court of Appeals rested its decision, has been modified. The California Supreme Court in ***State v. Hall***, 718 P.2d 99 (1986), said that third-party culpability evidence should be treated like any other evidence: "if relevant it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion." Whether the third-party culpability evidence is believable is not a question for the judge; it is a question for the jury. ***Id.***

91. In addition to ***Hall***, other courts apply the principles of our evidentiary rules of Wis. Stat. §§ 904.01 and 904.03 rather than a sort of super-relevancy test as embodied in *Denny*. In ***Beaty v. Kentucky***, 125 S.W.2d 196 (2003), the court held it was error to exclude third-party liability evidence because the defense theory was not so unsupported that it would confuse or mislead the jury. The court reminded that it is up to the jury to decide if the alleged alternative perpetrator defense is credible. And in ***Winfield v. United States***, 676 A.2d 1 (D.C. Ct. App. 1996), the court criticized the trial judge's analysis which it said seemed to reflect "the lingering notion in our decisions that relevance means something different as regards evidence that a third party committed a crime than it

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does in other contexts." The court said: "We now make clear that it does not." *Id.* at 8-9.

92. Further, *Denny* imposes an unreasonably high burden on a defendant to present relevant evidence in his or her defense. Instead of the legitimate tendency test declared by the court of appeals, the defendant should be bound only by the relevancy standard in Wis. Stat. §§ 904.01 and 904.03. Otherwise, the right to present a defense, to compulsory process, and to confrontation are unreasonably burdened. A defendant is denied due process when he is required to shoulder a burden the state is not required to shoulder.

93. Because *Denny* was wrongly decided, and should be overturned, it should not have been applied in this case.

F. The court also erred when it applied an alternative "legitimate tendency" test.

94. As noted above, the court barred Mr. Avery from presenting evidence of alternative perpetrators pursuant to *Denny*. Nevertheless, the court went on to apply a different type of legitimate tendency test in the event a reviewing court would hold that the three-part *Denny* test is inapplicable. The court applied a legitimate tendency test supposing that a defendant could produce such compelling opportunity and direct connection evidence that proof of motive would not be required. (*See* trial court's decision filed January 30, 2007).

95. Just as Mr. Avery argues that the three-apart *Denny* rule should not apply and that *Denny* was wrongly decided, the trial court's alternative two-part legitimate tendency test is inapplicable as well. An examination of the roots of *Denny* shows why.

96. *Denny's* legitimate tendency test was based on an early United States Supreme Court case, *Alexander v. United States*, 138 U.S. 353 (1891). Although

the Court in *Alexander* used the phrase "legitimate tendency," it did not adopt a two or three factor test combining motive, opportunity and a direct connection to the crime, or some combination thereof. Instead, the Court looked at whether the third party's acts and statements in that particular case were so remote or insignificant as to have no legitimate tendency to show that he could have committed the crime. In other words, were the third party's acts and statements too remote and insignificant to have any probative value. This test is essentially the same as the well-recognized balancing test in Wis. Stat. § 904.03. The *Alexander* holding is significantly different from the *Denny* three-part test. Despite its stated intention to follow *Alexander*, the court in *Denny* failed to do so. Instead of adopting a fluid test that would review each case under its own facts, and to then determine whether there is any legitimate tendency to show that the third party could have committed the crime in keeping with *Alexander*, the court erroneously adopted a bright-line three-part test.

97. Similarly, the court here erred in applying a two-factor test, combining opportunity with direct connection to the crime. Following *Alexander*, the court should have applied the relevancy rules in Wis. Stat. §§ 904.01 and 904.03. The court should have examined whether the totality of the facts would tend to show that one or more others named by Mr. Avery could have committed the crimes in this case. No rule of super-relevancy should have been applied.

G. The evidentiary test to be applied here should have been the relevancy tests of Wis. Stat. §§ 904.01 and 904.03, rather than *Denny*.

98. Wisconsin Statute § 904.01 defines relevant evidence, and Wis. Stat. § 904.03 provides for the exclusion of evidence, even when relevant, on grounds of "prejudice, confusion, or waste of time." That is, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." These two evidentiary rules should have controlled to what extent Mr. Avery was permitted to present third-party responsibility evidence.

99. Had the court applied Wis. Stat. §§ 904.01 and 904.03, evidence of third-party responsibility of Scott Tadych, Bobby Dassey, and Charles and Earl Avery would have been admissible.

100. Any evidence which tended to prove that Mr. Avery was not responsible for Teresa Halbach's death would be relevant under Wis. Stat. § 904.01. Relevance is defined broadly, and there is a strong presumption that proffered evidence is relevant. ***Richardson***, 210 Wis. 2d at 707. Relevant evidence is evidence which 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." Given that the state had the burden of proving Mr. Avery committed the homicide in this case, it follows that any evidence he could present which tended to make it less probable that he committed the homicide is relevant. And any evidence Mr. Avery could present which would lead the trier of fact to conclude that another individual committed the crimes in this case would be relevant. As the court said in *State v. Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977), "where the issue is whether in fact the defendant killed the deceased, evidence tending to prove that another committed the homicide is admissible."

101. Evidence which showed that a third party was responsible for Teresa Halbach's death would also have been admissible under the balancing test in Wis. Stat. § 904.03. Such evidence was probative in that it tended to show that Steven Avery was not guilty of the crimes charged. The probative value is not

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outweighed by prejudice because different interests are involved when it is the state who seeks to introduce evidence as opposed to the defendant. The prejudice, if there is any, would be to those persons identified by the defense as possible perpetrators. But they were not parties to the action; they were not represented by the state. Thus, the prejudicial effect of introducing evidence against them was nonexistent. And, this evidence would not have confused the jury or diverted it to collateral issues. It was clear that this case was about whether Steven Avery killed Teresa Halbach. In order to defend himself, he needed to be able to show that others had just as much opportunity to kill her as he did. Some of the relevant witnesses were called by the state. Additional witnesses called by Mr. Avery would not have unduly prolonged the trial. The jurors would not have been confused or diverted to collateral issues. Rather, they would have had a more complete picture of the facts in their task.

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

102. If the court still concludes that *Denny* applies to Mr. Avery's proposed third-party liability evidence, the court erred in ruling the evidence barred under the *Denny* standard. The court's application of *Denny* was unreasonably strict. With respect to motive, the court unreasonably focused only on one type of motive, and that was who would have a motive to harm Teresa Halbach. The court failed to look at an equally important motive, which is the motive to frame Steven Avery for a crime he did not commit. The court also was unreasonably strict in examining other individuals' connection to the crime. A connection to the crime does not require the level of proof to convict, but only such evidence as would cast doubt on Mr. Avery's culpability. Where, as here, others have some type of motive, opportunity, and some connection to the crime,

Mr. Avery should have been permitted to introduce evidence of others' potential culpability. As the court said in ***Beaty v. Kentucky***, the trial court may infringe upon the defendant's right to introduce evidence that another person may be culpable only when the defense theory is "unsupported," "speculative," and so "far-fetched" that it could confuse or mislead the jury. ***Beaty***, 125 S.W. 3d at 207.

Scott Tadych

103. Scott Tadych had sufficient motive, opportunity and a direct connection to the crime such that Mr. Avery should have been allowed to introduce third-party responsibility evidence relating to him.

104. Tadych's motive to kill Ms. Halbach is his violent and volatile personality. According to Tadych's co-workers, Tadych is a short-tempered and angry person capable of murder (Calumet County Sheriff's Department interview, 3/30/06; pp.719-722). Tadych was described as a chronic liar who blows up at people, "screams a lot" and is a "psycho." Another co-worker described Tadych as "not being hooked up right" and someone who would "fly off the handle at everyone at work." (Calumet County Sheriff's Department interview 3/31/06, p. 726).

105. Tadych's previous experiences with the court system show him to be a violent and impulsive person, particularly towards women. In 1994, he was charged in Manitowoc County with criminal trespass and battery. The criminal complaint (Case No. 94-CM-583) alleged that Tadych went to the home of Constance Welnetz at about 3:00 a.m. and knocked on her bedroom window. Welnetz was asleep with Martin LeClair. Welnetz then heard a loud knock on the back door. As she was calling the police, Tadych walked into her home and stated to her: "You will die for this, bitch." In the meantime, LeClair had gone outside to confront Tadych, and Tadych had hit him, knocking him briefly unconscious.

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106. In 1997, the state charged Tadych with recklessly causing bodily harm to Welnetz's son, Ryan, as well as disorderly conduct and damage to property. The complaint alleged that Tadych had accused Welnetz of seeing another man. When she told Tadych to leave, he swung at her and missed, then "went out of control," (see complaint in Case No. 97-CF-237). He pushed and punched Welnetz repeatedly, tried to push her down the basement stairs, pulled her hair, and also punched Ryan Welnetz, then 11 years old. Tadych went outside and ripped the CB out of Welnetz's truck. He damaged other property as well.

107. In 1998, the state charged Tadych with trespass and disorderly conduct for entering the home of Patricia Tadych—his mother—without permission. (Case No. 98-CM-20). When Tadych found that his mother had moved some of his fishing equipment, and that some equipment was missing, he began to yell at her, calling her a "fucker," a "bitch" and a "cunt." Tadych shoved her, nearly causing her to fall.

108. In 2001, Constance Welnetz filed a petition for a temporary restraining order from Tadych (Case No. 01-CV-3). In her petition, Welnetz stated that Tadych had called her repeatedly at work within short periods of time, threatened to "kick her ass," to "turn her over to social services" and to make her life "miserable." He called her a "fucking cunt bitch." He went to her home and pushed his way into her home. He left the home on one occasion only after she picked up the phone to call the police, but then he spit on her car and tried all the car doors to get in. When Welnetz left in her car, Tadych followed her. At one point, Tadych phoned Welnetz and told her that if she would not talk to him and give him "another chance" he would ruin her life and hurt her because she was a "worthless piece of shit."

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109. And in 2002, Tadych again assaulted Welnetz (Case No. 02-CM-449). After Welnetz had tried to "kick Tadych out of her residence" for yelling at her son, Tadych shoved Welnetz against the wall, took her phone and threw it on the floor so she could not call the police. Tadych also twice punched Welnetz in the shoulder with a closed fist.

110. Tadych would also have had a motive to frame Steven Avery. At the time of Ms. Halbach's murder, Tadych was dating Barb Janda, who lived next door to Steven Avery, and who is the mother of Bobby, Blaine, Brendan and Bryan Dassey. If Tadych killed Ms. Halbach, or if one of the Dassey boys had killed her, Tadych would have had a motive to frame someone else for the crime, and Steven Avery would have been a convenient choice for a frame-up.

111. Tadych also had opportunity to kill Ms. Halbach. Janda and Tadych are now married. As her then-boyfriend, Tadych would have been on the property numerous times, and would have had easy access to the property.

112. Tadych testified that he was at the Janda home twice on October 31, 2005. It was Janda's van that Teresa Halbach had come to photograph, and so Barb, and likely Tadych, knew Ms. Halbach would be coming to the yard to photograph the van. Because of the close proximity of the Janda and Steven Avery residences, anyone at the Janda home could see the van and Teresa Halbach coming to photograph the van. Indeed, Bobby Dassey testified that he saw her taking pictures of his mother's car.

113. Tadych also had a direct connection to the crime. Tadych's alibi for the time at which it is believed that Ms. Halbach was killed is Bobby Dassey, who is now Tadych's step-son. Bobby Dassey and Scott Tadych are mutual alibis in this case. Each states that he saw the other while driving, on their way to hunt. (Of course, that they saw each other while driving does not mean that one of them

could not have had a restrained Teresa Halbach in his car at that time). No one else can vouch for their whereabouts during that afternoon.

114. Another co-worker of Tadych reported that Tadych had approached him to sell him a .22 rifle that belonged to one of the Dassey boys. (Calumet County Sheriff's Department report of 3/30/06, p. 725-726). A .22 rifle was believed to be the murder weapon in this case.

115. Additionally, a co-worker stated that Tadych had left work on the day that Steven Avery was arrested, and that he was a "nervous wreck" when he left. Further a co-worker stated that Tadych had commented that one of the Dassey boys had blood on his clothes, and that the clothes had "gotten mixed up with his laundry." (Calumet County Sheriff's Department report of 3/2/06, p. 687).

116. Applying these facts to the three-factor test in ***Denny***, the court erred in concluding it was insufficient to meet the standard for admissibility. Evidence relating to Tadych was relevant because it tended to prove that Mr. Avery was not the guilty party. It would not have confused the jury or unduly prolonged the trial. Likewise, there was no risk that the jury would be misled or confused had Mr. Avery been able to introduce evidence of Scott Tadych's culpability. It was up to the jury, not the court, to decide whether to believe Tadych might have been responsible for the crime.

Charles Avery

117. Charles Avery also potentially had the motive to kill Teresa Halbach. Charles Avery had assaulted his former wife and had an aggressive history with women who came to the Avery Salvage Yard. In 1999, the state charged Charles with sexual assault by use of force of his then wife Donna. The complaint alleged (Case No. 99-CF-155) that Charles had held Donna down and had sexual

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intercourse with her against her will. The complaint also stated that Donna reported that Charles had tried to strangle her with a phone cord, and told her that "if she did not shut up he would end it all."

118. In another criminal complaint filed the same day (Case No. 99-CM-361), Donna Avery stated that Charles had contacted her even though there was a domestic abuse injunction in place. According to the complaint, Charles entered Donna's residence without her permission, that he followed her when she left, and that he again entered her residence without her permission later that night, ripping the phone from her hands when she tried to call the police. Charles also blocked the door when Donna attempted to leave.

119. Charles Avery's aggression extended to women who were customers of the Avery Salvage Yard. For example, Investigator John Dedering of the Calumet County Sheriff's Department interviewed Zina Lavora who had had her car towed by the Avery Salvage business. After the tow, Charles Avery began sending her flowers and repeatedly asking her to go out on dates, which she found to be disturbing. He sent candy to her home, and on one occasion, he rang her doorbell and left her a long gift-wrapped box with a $100 bill. He continued to call her over the next three weeks, and she reported to her co-workers that she was afraid of him. (Calumet County Sheriff's Department report of 11/8/05, p. 159).

120. Another woman who had been a customer had a similar experience with Charles Avery. The same Sheriff's Department report contains a statement by Judith Knutsen that she bought a part for her car through the Avery Salvage Yard. A few months later, in October of 2005, the Avery business towed her car. On October 30, 2005, Knutsen's supervisor gave her a note that she should go to the property the next day to pick up the belongings from her car. She did not go. On November 2, 2005, she phoned the business and spoke with Charles Avery.

Charles told her he had been to her house the previous day to drop off her belongings, and then proceeded to ask Knutsen out for dinner. She refused. Then on November 4, 2005, Charles went to Knutsen's home with her personal belongings which he said he had sorted from her car.

121. Other stories of Charles' aggressive history with women exist. Gary and Daniel Lisowski spoke with law enforcement about Charles. Daniel Lisowski was then dating a young woman whose mother was a single mother. Lisowski reported that Charles had driven by this woman's house repeatedly, would call her to ask her out, and would tell her on the phone that he had seen her in her bathing suit as he had driven by. (DCI Report, Bate stamp 0231).

122. Charles Avery also had a motive to frame Steven Avery for Ms. Halbach's murder, namely jealousy for Steven over money, a share of the family business, and over Jodi Stachowski. When Steven Avery returned to the Salvage Yard after his exoneration, it meant that the Avery Salvage Yard business would no longer be run by just Charles and Earl Avery as Allen Avery was involved less and less in the business. It meant that Steven Avery would also be part of the business. Thus, what looked like a half share in the family business was likely to be a third share with Steven's arrival. Carla Avery, Charles' daughter, told police that Charles "puts up" with Steven working at the yard, but that he does not really want him to work there. (DCI Report, Bate stamp 0657).

123. Steven Avery also looked to be in line to receive a large sum of money as a result of his exoneration. That money may have caused jealousy to Charles that would cause him to want to see Steven off the Avery Salvage Yard. He may even have believed that if Steven were again sent to prison, his lawsuit proceeds might go to him and the other Avery family members.

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124. Charles Avery had also frightened Jodi Stachowski, Steven Avery's girlfriend at the time of Ms. Halbach's murder. While she was in jail, Stachowski had told another woman that she was afraid of Charles, and that shortly after Stachowski and Steven began dating, Charles had come over to Steven's home with a shotgun because he was angry that they were dating. (DCI Report at Bate stamp 0685). Stachowski told this woman that she "was freaked out by Chuckie," and that she had once awoken to find Chuckie in her residence that she shared with Steven. (*Id.*) .

125. Charles also had opportunity to kill Ms. Halbach. As one of the Avery brothers, he was on the property daily, and would have been aware of anyone coming from Auto Trader to photograph cars on the lot. Robert Fabian told police that Charles had asked Steven if "the photographer" had come yet to the yard on October 31, 2005. (Calumet County Sheriff's Department report of 11/10/05, p. 208). On November 6, 2005, Charles told law enforcement that he recalled Steven may have left work to "go and meet with a girl to take some pictures." (DCI Report at Bate stamp 0371).

126. Charles also had a means to frame Steven. For example, after Steven cut his finger, Charles could have smeared Steven's blood from a rag in Ms. Halbach's car. He could have planted the key in Steven's room. Getting rid of Steven would only improve Charles' situation at the Avery Salvage Yard.

127. The location of Charles' residence on the property is suspicious as well. His trailer is located next to the office and the main entrance to the business, so he would be most likely to see people coming to do business at the yard. His trailer is also the closest of any of the residences to the location where Ms. Halbach's car was found. Also, unless Ms. Halbach's car was driven into the

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pit from the rear Radant quarry area, anyone driving her car down to where it was ultimately found would have driven past Charles' trailer.

128. Charles Avery told law enforcement that he spends a "considerable amount of time working in the pit area" and yet he did not notice Ms. Halbach's car. (DCI Report at Bate stamp 0370). He lives alone, and stated he saw no one on the night of October 31, 2005, so he does not have an alibi for that night. (DCI Report at Bate stamp 0371). Charles has access to firearms as he is a hunter and uses the pit when he wants to sight in his guns. (DCI Report at Bate stamp 0374).

129. More information connecting Charles Avery to Ms. Halbach's disappearance and murder may have been obtained had the police not had such tunnel vision in its investigation and had they not been so free with information with Charles about the investigation. The police reports show that law enforcement repeatedly told Charles Avery that Steven was the perpetrator of these crimes, and they told Charles Avery about important aspects of the investigation. For example, an officer with the Marinette County Sheriff's Department told Charles that they had found the key to Ms. Halbach's Toyota in Steven's bedroom, and that they believed that Steven kept the key so he could later move the car from the salvage yard to the shop where he could strip it to ready it for crushing. (DCI Report at Bate stamp 0308). The officer also told Charles that they had found bones and teeth in the burn pit behind Steven's house. (DCI Report at Bate stamp 0309). In a later interview, police told Charles that they believed Steven had opened the road from the Radant Gravel Pit into the Avery Salvage Yard so he could drive Ms. Halbach's car to the back row of the yard. (DCI Report at Bate stamp 0355). The officer told Charles that he "understood how unsettling this must be for Chuck, but he needs to face the fact that his brother killed Halbach." (DCI Report at Bate stamp 0354).

130. This focus on Steven to the exclusion of other suspects like Charles illustrates the failing of the ***Denny*** rule. Here, the police developed only that evidence to support its conclusion that Steven was the perpetrator, and failed to develop evidence to link others, such as Charles, to the crimes. Because the state is in charge of an investigation that will ultimately support its case, it will not be inclined to develop evidence which might assist the defense in suggesting that another individual is the guilty party. Thus ***Denny*** poses a nearly insurmountable hurdle to a defendant attempting to show a third party is responsible for a crime.

Earl Avery

131. Much of the same evidence relevant to Charles Avery would apply to Earl Avery as well. Steven's return meant that Earl's share of the family business may have gone from one-half to one-third. Earl stated to the police his willingness to give information incriminating to Steven, saying that "even if my brother did something, I would tell." (Calumet County Sheriff's Department report at p. 75). Earl's wife was said to have greatly disliked Steven. Earl was on the yard as well, and so would have had access to both Ms. Halbach and to a bloody towel with which to plant Steven's blood in her car.

132. Earl Avery had also been previously charged with sexual assault. In 1995, the state charged Earl Avery with sexually assaulting his two daughters. (Case No. 95-CF-240).

133. Earl Avery also had the means to kill Teresa Halbach. He and Robert Fabian shot rabbits on the Salvage Yard grounds, riding around the property on a golf cart. They were hunting rabbits with guns on the day that Ms. Halbach disappeared.

134. Earl admitted driving the golf cart past where Ms. Halbach's car was found, and although Earl's friend Robert Fabian would say that Earl knew every

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car on the lot, Earl claimed he did not see Ms. Halbach's car. (Calumet County Sheriff's Department Report at p.74-75) (DCI Report at Bate stamp 0330). Although he and Steven were sighting in their guns in the pit on November 4, 2005, he claimed he did not see Ms. Halbach's car. (Calumet County Sheriff's Department report of 11/5/05 at p. 80). Further, a cadaver dog alerted on a golf cart parked in a small garage behind the main residence on the salvage yard property. (Great Lakes Search and Rescue Canine, Inc., Report, Narrative at 2).

135. Earl also knew that Ms. Halbach was coming to the yard on October 31, 2005. He was familiar with the Auto Trader magazine, and Steven had commented to him on October 31st that he had to go home because someone was meeting him from the magazine. (DCI Report at Bate stamp 1278-79).

136. Further, Earl hid from the police when they came to take a DNA sample on November 9, 2005. When the investigators went to his home, he hid in an upstairs bedroom under some clothes. (Calumet County Sheriff's Department report at 194).

137. Both Earl and Charles Avery would have known more about the Avery Salvage Yard than anyone else. They had taken over the day-to-day running of the business as their father, Allen Avery, spent more and more time at their property up north. They had the means and the opportunity to kill Ms. Halbach, to move her car, to plant evidence to incriminate Steven, and then to leave the car so that it would be discovered in a search. This is sufficient connection to the offense to warrant allowing the jury to decide whether it was credible or not to suspect Charles and Earl Avery.

Bobby Dassey

138. Finally, Mr. Avery should have been able to introduce evidence that Bobby Dassey was a possible alternative perpetrator. If Bobby's brother Brendan

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or his soon-to-be stepfather Scott Tadych were involved in the crimes, Bobby would have had a motive to frame Mr. Avery for the crimes.

139. Further, there is some evidence that Bobby did not like Steven Avery. Bobby stated that Steven would lie in order to "stab ya in the back," and that Steven had done this to him in the past. (Calumet County Sheriff's Department report at 92).

140. Bobby also had opportunity as he was at home at the time that Ms. Halbach was on the property. Given that Ms. Halbach was coming to photograph his mother's car, Bobby would have known that Ms. Halbach was coming to the property. Bobby admitted he saw Ms. Halbach and her car as he looked out of the window of his residence. Bobby also had the means to shoot Ms. Halbach; he is a hunter and thus would have access to weapons.

141. Bobby's explanation of his movements on October 31, 2005, is also suspicious. He claimed to have gone hunting after having seen Ms. Halbach on the property, and said that Scott Tadych would say that he and Scott passed each other on the highway on the way to hunting. Strangely, Bobby told the police that Tadych "would be able to verify precisely what time he had seen Bobby." (Calumet County Sheriff's Department report at 91). He did not explain why that time would be so important that Tadych would be able to tell the police precisely what time they had seen each other. In addition, Bobby stated that he had taken a shower before he went hunting, and then Barb Janda said he had taken a shower after returning from hunting. (DCI Report at Bate stamp 0213).

142. A physical examination of Bobby showed that he had scratches on his back. (*Id.*). He told law enforcement that the scratches were from a puppy (*Id.*). The examining physician stated that the scratches looked recent, and that it was unlikely they were over a week old. (*Id.*).

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143. Thus, there is circumstantial evidence tying Bobby Dassey to Ms. Halbach's murder. He admitted to seeing her on the day she disappeared; he had a motive to frame Steven for the crimes; he had the means to kill Ms. Halbach; his leaving and return from his residence is only corroborated by Scott Tadych who saw him driving down the road; he had scratches on his back which he stated were from a puppy; and as Ms. Halbach had been to the property before, Bobby would have been familiar with her. He had sufficient motive, opportunity and connection to the crimes that the court erred in precluding the defense from producing evidence and arguing Bobby was true perpetrator.

144. In sum, the court should have allowed Mr. Avery to introduce evidence and argue from that evidence that other persons could have been responsible for the murder of Ms. Halbach, namely Scott Tadych, Charles or Earl Avery, or Bobby Dassey.

CONCLUSION

For the reasons argued above, Steven Avery, by his attorneys, respectfully requests that the court schedule a hearing to hear evidence and argument, and that the court enter an order vacating the judgments of conviction and granting a new trial.

Dated this 26th day of June, 2009.

Respectfully submitted,

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STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

STEVEN A. AVERY,
Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
JAN 25 2010
CLERK OF CIRCUIT COURT

Case No. 05 CF 381

DECISION AND ORDER ON DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

The defendant, Steven A. Avery, was convicted following a jury trial on charges of party to the crime of first degree intentional homicide and felon in possession of a firearm on March 18, 2007. On June 29, 2009 the defendant filed a motion for postconviction relief seeking a new trial on grounds that (1) the court improperly excused a juror during the course of the jury's deliberations, and (2) the court improperly excluded evidence of third party liability. The defendant's argument includes a claim of ineffective assistance of counsel. An evidentiary hearing on the defendant's postconviction motion was held on September 28, 2009. Following that hearing the court received written briefs from both parties.

FINDINGS OF FACT

From evidence introduced at the postconviction motion hearing and the court record in this case, the court makes the following factual findings:

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two prongs of the legitimate tendency test. Without any admissible evidence of motive, however, the defendant's attempt to meet the *Denny* requirements fails.

Bobby Dassey. The only evidence offered by the defendant to show motive on the part of Bobby Dassey consisted of evidence allegedly supporting a motive to frame Steven Avery. No evidence is offered to suggest Bobby Dassey had a motive to murder Teresa Halbach. Avery suggests that if Brendan Dassey, Bobby's brother, or Scott Tadych were involved in the crimes, Bobby would have had a motive to help them frame Steven Avery for the crimes, presumably based on his relationship with his brother and Scott Tadych. The defendant also offers that Bobby did not like Steven Avery and stated that Steven "would lie in order to 'stab ya in the back.'" Defendant's postconviction motion at p. 57. The speculation that if Brendan Dassey or Scott Tadych had committed the crimes, Bobby Dassey would have had a motive to frame Steven Avery, unsupported by any evidence whatsoever, is too speculative to meet the motive requirement. Likewise, even if Bobby Dassey thought his Uncle Steven was a liar, that is not enough to constitute motive to commit murder. The connection is simply too tenuous. Avery's proffered evidence is not sufficient to show that Bobby Dassey had motive to murder Teresa Halbach.

The evidence offered against Bobby Dassey probably did meet the opportunity and direct connection to the crime requirements of the legitimate

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tendency test because of his presence on the property at the time Teresa Halbach was there. However, without any showing of motive, third party evidence against Bobby Dassey is precluded under *Denny*.

In conclusion, the court stands by its original determination that the defendant was not entitled to introduce *Denny* evidence against any third party because he acknowledged at the time that he could not demonstrate any party had a motive to kill Teresa Halbach. The additional arguments and offers of proof Avery now raises in his postconviction motion were waived by not being presented to the court in a timely manner. Even if those arguments and offers of proof have not been waived, they are still not sufficient to justify the admission of direct third-party liability evidence under *Denny* against Scott Tadych, Charles Avery, Earl Avery or Bobby Dassey.

G. If Denny does not apply, what rules determine the admissibility of Avery's proffered third-party evidence?

For reasons already stated the court concludes that, despite Avery's claimed inability to demonstrate a motive on the part of anyone else to murder Teresa Halbach, his offer of third-party liability evidence is subject to the legitimate tendency test established by the court in *Denny*. Like the defendant in *Denny*,

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December 14, 2011

To:

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Manitowoc County Circuit Court Judge
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Manitowoc, WI 54220-5380

Lynn Zigmunt
Manitowoc County Clerk of Circuit Court
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*Additional Parties listed on Page Two

You are hereby notified that the Court has entered the following order:

No. 2010AP411-CR State v. Avery L.C.#2005CF381

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Steven A. Avery, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

A. John Voelker
Acting Clerk of Supreme Court

Doc. 698

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(1)

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

STEVEN AVERY,
Defendant-Appellant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
FEB 14 2013
CLERK OF CIRCUIT COURT

Case No.:

EVIDENTIARY HEARING REQUESTED

MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06

PLEASE TAKE NOTICE that the defendant-appellant, Steven Avery (hereinafter "Avery"), *pro se*, respectfully moves this Court pursuant to Wis. Stat. § 974.06, for the entry of an order vacating the judgment of conviction and sentence and ordering a new trial and granting him such relief as the Court may deem appropriate.

Avery requests an evidentiary hearing on this motion, and that he be allowed to appear in person or by telephone for this hearing.

STATEMENT OF THE CASE AND FACTS

On October 31st, 2005 Avery met with Teresa Halbach (hereinafter "Halbach") at or near his home to have a vehicle his sister wanted to sell photographed for Auto Trader magazine.

On November 3rd, 2005 Karen Halbach (Halbach's mother) contacted the Calumet County Sheriff's Department. Karen Halbach stated that Halbach had not been seen or heard from since October 31st. Karen Halbach said it was unusual for her daughter not to have had personal or telephone contact with her family or friends for this length of time. Karen Halbach stated that her daughter was driving a 1999 Toyota Rav 4, dark blue in color.

On November 4th, 2005 Manitowoc County Sheriff's Department interviewed Avery at his home. Avery candidly answered questions and allowed the investigator to search his residence.

On November 5th, 2005 the Manitowoc County Sheriff's Department requested Calumet County Sheriff's Department lead the investigation on behalf of the Manitowoc County Sheriff's Department under the doctrine of mutual aid. This was because Avery had a $36,000,000 law suit against Manitowoc County for having previously put Avery in prison illegally.

On November 5th, 2005 officers received information from volunteer searchers that they had located a vehicle matching the description of the vehicle owned by Halbach at Avery Auto

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Salvage. The volunteers were able to gain access to the property through an employee of Avery Auto Salvage. The volunteers provided a partial description of the vehicle's VIN#. Taking this as confirmation that Halbach's vehicle was on the property Calumet County investigators entered Avery Auto Salvage, without a warrant, and began to investigate. Avery's curtilage is located adjacent to the Avery Auto Salvage property.

Soon after, on that same date, a search warrant was sought and obtained. This was the first of many search warrants in this case. Every one of the warrants were issued from judges, but the warrant applications were not presented to these judges. Instead, the actual prosecutor in the case, Kenneth Kratz, signed off on the affidavits. There is no indication in the record that any of the issuing judges ever saw or read these affidavits.

Among these warrants was a warrant issued on November 5th, 2005 that authorized the search of Avery's residence, which was a single-family trailer, Barb Janda's trailer, and the rest of the 40-acre salvage yard. (101:225; 125; 21-2; 337-133). The warrant authorized police to search for Halbach, her vehicle, clothing and camera equipment, forensic evidence and weapons or instruments capable for taking human life. (337:134). A vehicle identified as Halbach's RAV-4 was subsequently obtained. From the pictures taken by the State, there is no indication that this vehicle was sealed prior to being sent to the state crime lab in Madison (hereinafter "lab").

On that same day a warrant was issued to obtain Avery's vehicle and a tow truck belonging to Avery Auto Salvage.

The State charged Avery with first degree intentional homicide, mutilation of a corpse and felon in possession of a firearm. (26). The charges related to the October 31, 2005, death of Halbach.

While being housed in the Calumet County jail ("jail"), Avery met with his attorneys and his private investigator. The jail engaged in active monitoring of his conversations with his attorneys and his investigator. See Exhibits 1, 2, and 3. His attorneys never challenged the information provided them in Exhibit 1. However, Avery only found out about the monitoring by four jail workers through an open records request after his conviction was final.

After nearly five weeks of trial testimony, the case was submitted to the jury. (328:122-23). At that point, the jurors had been sequestered just one day. (327:226). The court retained the remaining alternate juror and ordered her sequestered separate from the deliberating jurors.

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(*Id.*). Juror M. was one of the 12 jurors to whom the case was submitted. (362:12). In a preliminary vote taken during the first day of deliberations, Juror M. voted not guilty. (362:18).

During the evening after the first day of deliberations, the court received a call from Calumet County Sheriff Gerald Pagel indicating that Juror M. had asked to be excused. (329:4). The next day, after Juror M. was discharged, the court prepared a memorandum describing the information he received from Pagel, which is included in a traffic accident, totaling her vehicle, although there was no information about any injuries. Further, the juror's wife was upset about the accident and the amount of time he had been away from the family because of the trial. There was a "suggestion" that they had some marital difficulties before the trial. (*Id.*)

After speaking with Pagel, the court called the district attorney and both defense counsel, who authorized the court to speak with the juror and excused him "if the information provided to the court was verified." (329:4-5).

The court spoke with Juror M. by telephone. None of the court's conversations that evening – with Pagel, the attorneys and the juror – was on the record. The court described its conversation with Juror M. in the memo. (359:2).

When Juror M. arrived home, he learned there was no accident, but rather, his stepdaughter had car trouble. (326:29). At the postconviction hearing, Juror M. testified he had called his wife after dinner following the first day of deliberations to "check in" with her, not because he had any information about a family emergency. (362:20-21). When he spoke with the judge he was uncertain about what was happening at home, but he was also frustrated with the deliberations. (362:59, 68-69). He was disturbed by one juror's comment made at the outset of deliberations that Avery was "fucking guilty." (*Id.* at 18, 36). He was also upset that, when he expressed to another juror at dinner that he was frustrated with the deliberations, the juror who had pronounced Avery "fucking guilty" responded in a sarcastic tone: "If you can't handle it, why don't you tell them and just leave." (*Id.* at 16, 34).

On the morning after Juror M.'s removal, Judge Willis and counsel met in chambers. (329). Avery was not present. Relying on *State v. Lehman*, 108 Wis. 2d 291 (1982), the court and counsel agreed there were three options: proceed with 11 jurors; substitute in the alternate

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with directions that the jury begin deliberations anew; or declare a mistrial. (329:5; 362:96-97, 209; 370:4; App. 150).

In a subsequent 20-minuet meeting with his attorneys Avery learned Juror M. had been let go. (362:99-100, 211). Counsel explained the three options and advised Avery to substitute in the alternate juror and turn down a mistrial. (362:100-01, 211-12). Avery took their advice. Defense counsel testified that, had they recommended a mistrial, Avery would have chosen a mistrial. (362:191).

When Avery was brought to court, Judge Willis engaged in a colloquy with him about the stipulation to substitute the alternate. (329:7-8). The court then informed the remaining jurors that one had been excused and that an alternate would take his place. (329:9-10). The court instructed the jurors to begin deliberations anew. (362:11). The newly-constituted jury returned with verdicts after three more days of deliberations. (331:3-5). The court subsequently sentenced Avery to life imprisonment. (288, 289).

Avery filed a postconviction motion seeking a new trial. (350; 351). He argued he had been deprived of a fair trial based on the handling of the jury once deliberations had begun, as well as the trial court's denial of the opportunity to present third-party liability evidence. (*Id*). Following an evidentiary hearing, Judge Willis filed a written decision and order denying Avery's claims. (370; App. 147-252).

Avery appealed, raising the same issues as those in postconviction motion. In addition, he argued the trial court had erred when it denied his pre-tiral motion to suppress as evidence the key found in Avery's bedroom. The court of appeals affirmed Avery's convictions in a decision recommended for publication. (App. 101-44). The Supreme Court of Wisconsin denied review.

AS GROUNDS THEREFORE, Avery states as follows:

ARGUMENT

I. AVERY WAS DENIED HIS RIGHTS UNDER ARTICLE ONE, § 7 OF THE WISCONSIN CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO COUNSEL

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LEGAL STANDARD

A. The Right to Confer in Private

The Article 1, §7 and Sixth Amendment right to counsel protects the integrity of the adversarial system of criminal justice by ensuring that all persons accused of crimes have access to effective assistance of counsel for their defense. The right is grounded in "the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense." *United States v. Levy*, 577 F.2d 200, 209 (CA3 1978). Although the right to counsel under these constitutional provisions is distinguishable from the attorney-client privilege, the two concepts overlap in many ways.

The Sixth Amendment is meant to assure fairness in the adversary criminal process. *United States v. Cronic*, 466 U.S. 648, 656 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.* at 655 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Because this "very premise" is the foundation of the rights secured by the Sixth Amendment, where the Sixth Amendment is violated, "a serious risk of injustice infects the trial itself." *Id.* at 656 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980)).

The right to counsel exists in order to secure the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); see also *Estelle v. Williams*, 425 U.S. 501, 503 (1976). It follows that the "benchmark" of a Sixth Amendment claim is "the fairness of the adversary proceeding." See *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (citing *Strickland*, 466 U.S. at 695). The Supreme Court has therefore declared that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658. At the same time, however, "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Strickland*, 466 U.S. at 692. This is particularly true with regard to "various kinds of state interference with counsel's assistance." *Id.*; see also *Perry v. Leeke*, 488 U.S. 272, 279-80 (1989) (stating that the Supreme Court has "expressly noted that direct governmental interference with the right to counsel is a different matter" with regard to whether prejudice must be shown, and collecting representative cases where prejudice

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need not be proved); *Cronic*, 466 U.S. at 658 & n. 24 (citing cases in which the Court has discussed circumstances justifying a presumption of prejudice).

The right to counsel would be meaningless without the protection of free and open communication between client and counsel. See *Id.* The United States Supreme Court has noted that "conferences between counsel and accused ... sometimes partake of the inviolable character of the confessional." *Powell v. Alabama*, 287 U.S. 45, 61 (1932). See also *State v. Penrod*, 892 P.2d 729, 731 (Oregon 1995) ("We believe that confidentiality is inherent in the right to consult with counsel; to hold otherwise would effectively render the right meaningless. Accord *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963) ("it is universally accepted that effective representation cannot be had without such privacy"); *see also* cases collected in 5 ALR3d 1360 (1963)).

The right to counsel includes "the right to private consultation with the attorney." *In the Matter of Fusco v. Moses*, 304 N.Y. 424, 433 (1952). Indeed, the very essence of the Sixth Amendment right to effective assistance of counsel is privacy of communication with counsel. *Glasser v. United States*, 315 U.S. 60 (1942); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *United States v. Rosner*, 485 F.2d 1213 (CA2 1973); *State v. Milligan*, 40 Ohio St. 3d 341 (1988). It is clear "that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." *Coplon v. United States*, 191 F.2d 749, 757 (CADC 1951). See *Geders v. United States*, 425 U.S. 80 (1976); *Hoffa v. United States*, 385 U.S. 293 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Rosner*, 485 F.2d 1213 (CA2 1973), cert. denied, 417 U.S. 950 (1974); *United States v. Brown*, 484 F.2d 418 (CA5 1973), cert. denied, 415 U.S. 960 (1974); *Caldwell v. United States*, 205 F.2d 879 (CADC 1953). "As was said by Judge DESMOND in *People v. McLaughlin*, (291 N.Y. 480, 482-283): 'To give it [the right to counsel] 'life and effect *** it must be held to confer upon the relator every privilege which will make the presence of counsel upon the trial a valuable right, and this must include a private interview with his counsel prior to the tiral.'" *Fusco*, 304 N.Y., at 433. See also *State v. Sugar*, 84 N.J. 1, 12-13 (New Jersey 1980); *State v. Holland*, 147 Ariz. 453 (Arizona 1985); *McNutt v. Superior Court*, 133 Ariz. 7 (Arizona 1982).

In *Ellis v. State*, 2003 ND 72, ¶9, the Court stated,

> An essential element of an accused's Sixth Amendment right to assistance of counsel is the privacy of communications with counsel. *State v. Clark*, 1997 ND 199, ¶4 (quoting *United States v. Brugman*, 655 F.2d 540, 546 (CA4 1981). There is a legitimate public interest in protecting confidential communications

between an attorney and a client, see *Clark*, at ¶14 (quoting *State v. Red Paint*, 311 N.W. 2d 182, 185 (N.D. 1981)), and the attorney-client relationship extends to communications between the client and the attorney or the attorney's representative. *See* N.D.R.Ev. 502. See also *State v. Copeland*, 448 N.W.2d 611, 614-16 (N.D. 1989); *Red Paint*, at 184-85.

The Sixth Amendment imposes an affirmative obligation on the State to respect and preserve an accused's choice to seek assistance of counsel, and "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton*, 474 U.S. 159, 171 (1985). See also *Arizona v. Warner*, 150 Ariz. 123, 127-28 (1986); *Wilson v. Superior Court*, 70 Cal. App.3d 751 (1977); *Barber v. Municipal Court*, 24 Cal.3d 742 (1979).

The guarantees of the Sixth Amendment right to assistance of counsel recognize the obvious but important truth that "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty ..." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Without the guiding hand of counsel, an innocent defendant may lose his freedom because he does not know how to establish his innocence. *Powell v. Alabama*, 287 U.S. 45, 69 (1932); see *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972). Because the assistance of counsel is essential to insuring fairness and due process in criminal prosecutions, a convicted defendant may not be imprisoned unless counsel was available to him at ever "critical" point following "the initiation of adversary judicial criminal proceedings," *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). See e.g., *Scott v. Illinois*, 440 U.S. 367 (1979); *Moore v. Illinois*, 434 U.S. 220 (1977); *Argersinger*, supra; *United States v. Wade*, 388 U.S. 218 (1967); *Massiah*, 377 U.S. 201; *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Because the Constitution requires the assistance of counsel and not merely his physical presence, counsel must be effective as well as available. *Cuyler v. Sullivan*, 446 U.S. 335, 344-345 (1980); *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The right to counsel would be an empty assurance if a formal appearance by an attorney were sufficient to satisfy it. *Avery v. Alabama*, 308 U.S. 444, 446 (1940); see *Cuyler*, supra, at 344-45. The circumstances under which a lawyer provides counsel must not "preclude the giving of effective aid in the preparation and tiral of the case." *Powell*, supra, at 71. "A defense attorney's representation must be 'untrammeled and unimpaired' ..." *State v. Bellucci*, 81 N.J. 531, 538 (New Jersey 1980); see *Glasser*, 315 U.S. at, 70 (1942). If

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counsel is not "reasonably competent," *Cuyler*, 446 U.S. at 344; See *McMann*, 397 U.S. at 770-71, or if counsel's ability to be a vigorous partisan has been curtailed, *Bellucci*, 81 N.J. at 540-41, then the assistance provided is not constitutionally adequate. Attorney-client conversations are constitutionally protected and cannot be invaded by the State, *In re Bull*, 123 F. Supp. 389 (D. Nev. 1954); *Cory*, supra, 62 Wash.2d 371. "A defendant and his attorney must be afforded the opportunity to discuss freely and confidentially." *Stuart v. State*, 801 P.2d 1283 (Idaho 1990).

The United States Supreme Court in *Hoffa v. United States*, 385 U.S. 293 (1966), though not finding it warranted in that case, recognized: "it is possible to imagine a case in which the prosecution so pervasively insinuated itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment." *Id.* at 416. The factual circumstances in at least six cases have been held to require dismissal of charges because of the surreptitious interception of attorney-client communications by government agents. See *Cory*, 62 Wash.2d 371, *Graddick v. State*, 408 So.2d 533 (Alabama 1981), *United States v. Orman*, 417 F. Supp. 1126 (D.C. Colo. 1976), *Barber*, 24 Cal.3d 742, *United States v. Peters*, 468 F. Supp. 364 (S.D. Florida 1979), and *Levy*, 577 F.2d 200.

B. Balancing Tests Where the Right to Private Consultation is Infringed Upon

There are no Wisconsin cases that Avery can find that he can point to to inform the Court on this particular point, therefore this appears to be a case of first impression for the Wisconsin courts. Other jurisdictions have addressed this point at length. A clear split exists between the various jurisdictions however, so Avery has compiled the following authorities.

It has been noted in an annotation, *Scope and Extent, and Remedy or Sanctions for Infringement of Accused's Right to Communicate with this Attorney*, 5 A.L.R.3rd 1360, 1365:

> One class of cases in which the courts have had little difficulty in trying to strike a balance between liberty and authority involves "eavesdropping" on counsel-client conversations, either by electronic devices installed in conference rooms or by means of paid informers who gain access to the privileged communications of the defense. In such instances, courts have not hesitated to rule as unconstitutional and in violation of the attorney-client privilege such underhanded methods of the prosecution.

As the Court in *United States v. Rosner*, 485 F.2d 1213, 1227 (CA2 1973):

> In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government.

> ...
> When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge Cardozo's phrase. (*People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).) It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others. See Mr. Justice Holmes dissenting in *Olmstead v. United States*, 277 U.S. 438, 469 (1928).

The majority of the United States Supreme Court cases have rejected the contention that electronic surveillance of attorney-client communications was *per se* prejudicial under *Black v. United States*, 385 U.S. 26 (1966), *O'Brien v. United States*, 386 U.S. 345 (1967), and *Weatherford*, 429 U.S. 545, and will not automatically require a new trial. The Supreme Court ruled that "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." The trial court must make a "'judicial determination'" (most likely a "taint hearing" as described in *Alderman v. United States*, 394 U.S. 165 (1969), of the effect of the overheard conversations on the conversations on the conviction, and if there was "'use of evidence that might otherwise be inadmissible'" the conviction should be reversed for a new tiral. *Id.* at 552.

Upon a showing of probable interception of attorney-client communications by State agents, the Court should require the prosecutor to take affirmative steps to determine the existence of such surveillance and certify his actions and findings to the Court. See, e.g., *United States v. Alter*, 492 F.2d 1016 (CA9 1973). If there has been surreptitious interception of the defendant's attorney-client communications, the trial court should grant broad discovery of the logs, summaries, reports, recordings and transcripts of the intercepted communications. *United States v. Fannon*, 435 F.2d 364 (CA7 1970). If the governmental agency or agent refuses to disclose that information, the pending charges must be dismissed. *Alderman*, supra; *United States v. Seale*, 461 F.2d 345 (CA7 1972).

In light of *Weatherford*, it appears that the petitioner must show (1) a surreptitious electronic interception (2) by government agents (3) of attorney-client communications (4) involving defense plans and strategy or facts concerning the offense charged or under investigation. Proof of these facts is sufficient to raise a presumption of prejudice because the violation of the accused's constitutional right to private communications with his attorney "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser*, supra.

The burden of persuasion should then shift to the State[1] to prove that such interception was not prejudicial, for "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it is harmless beyond a reasonable doubt." ***Chapman v. California***, 386 U.S. 18 (1967). However, "[o]ver time, the rule that began to emerge would have required either a showing of deliberate prosecutorial misconduct or prejudice, but not both. See *State of South Dakota v. Long*, 465 F.2d 65 (1972) ("It is certainly true that where there is gross misconduct on the part of the Government, no prejudice need be shown.") (citing *Black*, 358 U.S. 26, ***O'Brien***, 386 U.S. 345, ***Caldwell***, 205 F.2d 879, ***Coplon***, 191 F.2d 749; ***Fajeriak v. State***, 520 P.2d 759 (Alaska 1974) ("Following *Coplon*, courts have agreed that proof of deliberate eavesdropping upon attorney-client communications automatically invalidates a conviction. The United States Supreme Court implicitly adopted this rule in ***Black v. United States***.")." ***State v. Quattlebaum***, 338 S.C. 441, 447 (2000).

The ***Quattlebaum*** court went on to state:

> *Weatherford* is inapplicable to the case *sub judice*, where a member of the prosecution team intentionally eavesdropped on a confidential defense conversation. We conclude, consistent with existing federal precedent, that a defendant must show either deliberate prosecutorial misconduct *or* prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. The content of the protected communication is not relevant. The focus must be on the misconduct. In cases involving unintentional intrusions into the attorney-client relationship, the defendant must make a prima facie showing of prejudice to shift the burden to the prosecution to prove the defendant was not prejudiced.

Id. at 448-49. *See also United States v. Davis*, 646 F.2d 1298, 1303 n.8 (CA8 1981) (stating no prejudice need be shown where there is gross misconduct by government).

Further, California has noted that *Weatherford* may not be appropriate to guide a state in its balancing test. The California Supreme Court stated in *Barber*, 24 Cal.3d 742:

> It is irrelevant to the reasons underlying the guarantee of privacy of communication between client and attorney that the state is intruding for one purpose rather than for another. "[T]he purpose and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives, and actions." (*In re Jordan*, [7 Cal.3d 930] at 940.) The chilling effect of full

[1] See also *State v. Penrod*, 892 P.2d 729, 732 (1995) (stating "when a defendant contends that his or her right to a confidential conversation with counsel has been unreasonably restricted, it is incumbent upon the state to show that the restriction was justified by the need to collect evidence..."); *State v. Milligan*, 40 Ohio St. 3d 341, 345 (Ohio 1988) ("the burden is upon the state, after a prima facie showing of prejudice by the defendant, to demonstrate that the information gained was not prejudicial to the defendant. See *Commonwealth v. Manning*, 373 Mass. 438, 442-443 (Mass. 1977)").

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> and free disclosure by a client would be the same, whatever the state's asserted purpose for intruding. The intruding state agent by his presence will be privy to confidential communications. Aware of this possibility, a client will be constrained in discussing his case freely with his attorney.

Id. at 753. The Court went on to state:

> Not only is *Weatherford* inapposite, it cannot be used as authority to justify the police action here since the right to privacy of communication between an accused and his attorney has consistently been grounded on California law.

Id. at 755.

In like fashion, the 10th Federal Circuit Court of Appeals stated in *Shillinger, v. Haworth*, 70 F.3d 1132 (CA10 1996):

> Given the Supreme Court's consideration of the requirements of "effective law enforcement" and the absence of purposeful misconduct under the circumstance in *Weatherford*, commentators and courts have suggested that in cases where the prosecution acts intentionally and without legitimate purpose, such intrusions might not wholly governed by the *Weatherford* decision. Specifically, *Weatherford* may not dictate a rule that would require a showing of prejudice in cases where intentional prosecutorial intrusions lack a legitimate purpose. *See Briggs v. Goodwin*, 698 F.2d 468, 493 n. 22 (D.C. Cir.). (noting that "[a] deliberate attempt by the government to obtain defense strategy information or to otherwise interfere with the attorney-defendant relationship through the use of an undercover agent may constitute a *per se* violation of the Sixth Amendment."), reh'g granted, opinion vacated, and on reh'g, 712 F.2d 1444 (D.C. Cir. 1983), cert. denied, 464 U.S. 1040, (1984); *United States v. Morales*, 635 F.2d 177, 179 (CA2 1980) ("[B]ecause the ... evidence ... does not disclose an intentional, governmentally instigated intrusion upon confidential discussions between appellants and their attorneys, the evidence does not support appellants' claim of a *per se* violation of their right to counsel."); 2 Wayne R. LaFave & Jerold H. Isreal, *Criminal Procedure* § 11.8, at 75 (1984) ("*Weatherford's* conclusion that a state invasion of the lawyer-client relationship does not violate the Sixth Amendment unless there is at least a realistic likelihood of a governmental advantage arguably was limited to case in which there was a significant justification for the invasion.").

The *Shillinger* Court went on to state:

> Because we believe that a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a *per se* violation of the Sixth Amendment. In other words, we hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the tiral process must be presumed. In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct. We also note that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692.

Id. at 1142.

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The Third Circuit has adopted the rule that intentional intrusions by the prosecution constitute *per se* violation of the Sixth Amendment. *See United States v. Costanzo*, 740 F.2d 251, 254 (CA3 1984), cert. denied, 472 U.S. 1017 (1985); *Levy*, 577 F.2d at 210. The Second and District of Columbia Circuits, on the other hand, have recognized that prejudice may not be required when an intrusion is intentional, but have not specifically decided. See *Briggs*, 698 F.2d at 493 n. 22; *Morales*, supra, 653 F.2d at 179. The First, Sixth, and Ninth Circuits have held that something beyond the intentional intrusion itself is required to rise to the level of a Sixth Amendment violation. See *United States v. Mastroianni*, 749 F.2d 900, 907 (CA1 1984) (holding that even in the context of an intentional intrusion lacking any justification, "[a] Sixth Amendment violation cannot be established without a showing that there is a 'realistic possibility of injury' to defendants or 'benefit to the State' as a result of the government's intrusion," but placing a "high burden" on the state to rebut the defendant's prima facie showing of prejudice) (quoting *Weatherford*, 429 U.S. at 558); *United States v. Steele*, 727 F.2d 580, 586 (CA6 1984) ("Even where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted.") (citing *Morrison*, 449 U.S. at 365-66); *United States v. Glover*, 596 F.2d 857, 863-64 (CA9) (holding that even in the context of an intentional intrusion into the attorney-client relationship, that "distinction [does not] overshadow [] an important principle to be read from [*Weatherford*]: that the existence or nonexistence of prejudicial evidence derived from an alleged interference with the attorney-client relationship is relevant in determining if the defendant had been denied the right to counsel") cert. denied, 444 U.S. 857, and cert. denied, 444 U.S. 860 (1979).

Under 9th Federal Circuit Court of Appeals precedents, "improper interference by the government with the confidential relationship between a criminal defendant and his counsel violated the Sixth Amendment only if such interference 'substantially prejudices' the defendant." *United States v. Danielson*, 325 F.3d 1054, 1069 (CA9 2002) (citing *Williams v. Woodford*, 306 F.3d 665, 683 (CA9 2002). "'Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial.'" *Id.* (citing *Williams*, 306 F.3d at 682).

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"In cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle. In such cases, it will often be unclear whether, and how, the prosecution's improperly obtained information about the defendant's trial strategy may have been used, and whether there was prejudice. More important, in such cases the government and the defendant will have unequal access to knowledge. The persecution team knows what it did and why. The defendant can only guess." ***Danielson***, 325 F.3d at 1070.

Danielson set forth that once a defendant can show that there has been prejudice "the government ... must show that all the evidence it introduced at trial was derived from independent sources, and that all of its pre-trial and trial strategy was based on independent sources. Strategy in this context is a broad term that includes, but is not limited to, such things as decisions about the scope and nature of the investigation, about what witnesses to call (and in what order), about what questions to ask (and in what order), about what lines of defense to anticipate in presenting the case in chief, and about what to save for possible rebuttal." *Id.* at 1074.

C. Fashioning a Remedy.

It is fortunate in this instance that Wisconsin case law contains a reference to one of the most cited cases that gives guidance on the issue of remedy. In the concurrence to ***State v. Hoyt***, 21 Wis. 2d 310 (1963) Justice Gordon restates the guiding words of *Cory*, 382 Pac. 2d 1019, 1022 (Wash 1963):

> There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first. If the defendant's right to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first. And if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try he case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's tiral strategy.

In *Levy*, 577 F.2d 200, the Court stated:

> Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is.
>
> ...
>
> ... it is unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might

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> benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself.
> ...
> At that point a trial court applying an actual prejudice test would fact the virtually impossible task of reexamining the entire proceeding to determine whether the disclosed information influenced the government's investigation or presentation of its case or harmed the defense in any other way.

Id. at 208.

> ... the interests at stake in the attorney-client relationship are unlike the expectations of privacy that underlie the fourth amendment exclusionary rule. The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free tow-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fat finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of a defendant's disclosure to counsel must be insulated from the government. No sever definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We thing that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

Id. at 209. As in *Cory*, *Levy* came to a similar consideration as to why a case that involved actual disclosure of defense strategy cannot be retried:

> The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprises which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses. More important, public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain. At leas in this case, where the trial has taken place, we conclude that dismissal of the indictment is the only appropriate remedy.

Id.

However, the Court in *State v. Milligan*, 40 Ohio St. 3d 341 (1988), stated, "It is our view that neither mere suppression nor automatic dismissal is appropriate in every case irrespective of the circumstances." The only cases resulting in dismissal of the prosecution have involved the disclosure of trial strategy, *Levy*, 577 F.2d 200; *Peters*, 468 F. Sup. 364; *Orman*,

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417 F. Supp. 1126; *Barber*, 24 Cal.3d 742; *Cory*, 62 Wash.2d at 377 (1963), or interference with the ability of a defendant to place trust and confidence in his attorney, *United States v. Morrison*, 602 F.2d 529, 533 (CA3 1979), *Barber*, 24 Cal.3d at 750-51, 756. Thus, there appears to be agreement that dismissal of a prosecution is the appropriate remedy for official intrusion upon attorney-client relationships only where it destroys that relationship or reveals defendant's trial strategy.

In California, the state Supreme Court stated, "The exclusionary remedy is also inadequate since there could be no incentive for state agents to refrain from such violations. Even when the illegality is discovered, the state would merely prove its case by the use of other, untainted evidence. The prosecution would proceed as if the unlawful conduct had not occurred." *Barber*, 24 Cal. 3d at 759. See also, *Cory*, 382 Pac. 2d at 1022, *State v. Holland*, 147 Ariz. 453, 456 (Arizona 1985); *Commonwealth v. Manning*, 373 Mass. 438, 442-445 (1977).

In *United States v. Morrison*, 449 U.S. 361 (1980), the Supreme Court considered whether dismissal of the defendant's indictment with prejudice was an appropriate remedy for the intentional intrusion upon her Sixth Amendment rights by federal law enforcement agents. Recognizing "the necessity for preserving society's interest in the administration of criminal justice," the Court enunciated the following standard: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional volition and should not unnecessarily infringe on competing interests." *Id.* at 364. The Court went on to describe how similar constitutional violations have generally been remedied:

> [W]hen before trial but after the institution of adversary proceedings, the prosecution had improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted...
>
> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.

Id. at 365 (citing *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Massiah*, 377 U.S. 201).

Morrison makes clear that evidence obtained through an intentional and improper intrusion into a defendant's relationship with his attorney, as well as any "fruits of [the prosecution's] transgression," see *id.* at 366, must be suppressed in proceedings against him.

At the same time, such an intrusion could so pervasively taint the entire proceeding that a court might find it necessary to take greater steps to purge the taint. The court may, for instance, require retrial by a new prosecutor, see, e.g. ***United States v. Horn***, 811 F. Supp. 739, 752 (D. N. H. 1992) (removing the lead prosecutor form the case and ordering her "not to discuss the documents with any prosecutor or witness in this case and not to participate further in any way, directly or indirectly, in the trial preparation or trial of this case"), rev'd in part, 29 F.3d 754 (CA1 1994). Additionally, dismissal of the indictment could, in extreme circumstances, be appropriate. Cf. ***California v. Trombetta***, 467 U.S. 479, 486-87 (1984) (noting that dismissal of the indictment might be appropriate when the government permanently loses potentially exculpatory evidence); ***United States v. Bohl***, 25 F.3d 904, 914 (CA10 1994) (dismissing the indictment because of the government's destruction of potentially exculpatory evidence).

ARGUMENT

Avery's defense team included attorneys Strang and Bueting and investigator Baetz. Any discussions with these persons were protected by the oldest legal privilege known to American law, the attorney-client privilege. However, far more importantly, the Sixth Amendment protects any discussions concerning strategy. The Sixth Amendment right to counsel includes the right to private consultation. Moreover, the denial of that right is a denial of the right to counsel, a structural defect that is not subject to harmless error analysis.

A. THE JAIL MONITORED THE CONVERSATIONS BETWEEN AVERY AND HIS DEFENSE TEAM CREATING A CHILLING EFFECT ON COMMUNICATIONS ON JULY 20th, 2006.

In the present case, Avery and Baetz had been warned by a jail worker on July 20th, 2006 that they were being recorded. This act alone had a chilling effect on Avery's Sixth Amendment rights. Avery was unable to offer full and frank information and could not be probed by his investigator for pertinent information that would or could have aided Avery's investigative efforts. Exhibit 1 is a Memorandum that existed in Avery's attorney's control. Therefore, failure to raise this issue pretrial was ineffective assistance of counsel. *Strickland*, 466 U.S. at

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686. Indeed, the failure to seek out evidence of other recordings or to obtain the recording of this conversation was improper on the part of Avery's defense.

B. THE STATE WAS CONTINUALLY MONITORING AVERY'S PROTECTED CONVERSATIONS WITH HIS DEFENSE TEAM

There is evidence that the statement made on July 20th, 2006 was not mere threat or bluster on the part of this jail worker. After his conviction Avery was able to obtain through an open records request two documents that may have been discoverable but it is certain that the State didn't furnish them to Avery based on his discovery request and that would seem to end any requirement to investigate their existence on the part of Avery or his legal team. Indeed, the recording of privileged attorney-client conversations violates the privilege under both federal and Wisconsin law but, as noted above, where the Sixth Amendment is involved the State has an affirmative obligation to protect Avery's rights. It would be unreasonable to think that his protected conversations were being observed, much less that the content in any way was being relayed to the prosecution.

What Exhibits 2 and 3 show is that *four* officers did just that. On March 17th, 2007 they proved that the warning given Baetz was far from a passing remark, innocuous or otherwise. Further, these two incidents show a pattern of monitoring of which many of Calumet County's jail workers were aware.

C. MONITORING OF AVERY'S ATTORNEY-CLIENT CONVERSATIONS IN THE JAIL

The issue of whether it is improper to monitor the private conversations between a pretrial detainee and his defense team has been well settled. In cases that go back to 1963, there has been extensive commentary on the evils of this practice.

In *Cory*, 62 Wash.2d 371, the Washington State Supreme Court took up the issue of eavesdropping on the confidential conversations between counsel and client in a jail. The Court quoted ***Caldwell***, 92 U.S. App. D.C. 355, 205 F.2d 879, noting, "high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel." *Id.* at 374-75. The Court condemned the actions of the sheriff's office stating, "Not only was the conduct of the sheriff's office in violation of the constitutional provision assuring the right to counsel, but also of the statutory law." ***Id.*** at 378. The Court went on to quote ***People v. Cahan***, 44 Cal. (2d) 434 (1955), where that Court stated, "It is morally incongruous for the state to flout constitutional rights and at the same time demand

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that its citizens observe the law..." *Cory*, 62 Wash.2d at 378. The *Cory* Court finally completed its condemnation of the sheriff department's action by labeling it "the odious practice of eavesdropping on privileged communication between attorney and client" *id.*, and that it was "shocking and unpardonable conduct ..."

In *Black*, 385 U.S. 26, the United States Supreme Court reversed a conviction because federal agents placed a bug in a hotel suite and recoded conversations between Black and his attorney. *Id.* at 27-28. These were reduced to notes and used by the prosecution in trial preparation. *Id.* The High Court concluded, "In view of these facts it appears that justice requires that a new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible." *Id.* at 28-29.

In *State v. Sugar*, 84 N.J. 1 (1980), the New Jersey Supreme Court took up the issue of the recording of a criminal defendant's conversation with his attorney by way of a concealed microphone in the interview room they used. *Id.* at 5. The Court summed up the issue stating, "The question presented is whether the flagrantly illegal conduct of the officers irreparably impaired defendant's rights to the effective assistance of counsel and to a trial uncorrupted by public prejudice." The Court characterized the State's actions by stating, "Our present concern is the outrageous character of the illegal eavesdropping." *Id.* at 7. The Court went to understandable lengths to voice its disgust stating, "We are outraged. We are compelled to say exactly that." *Id.* at 12. "The fact that the individuals responsible for invading defendant's privacy are law enforcement officials heightens our concern and sparks our sense of outrage. It is a 'fundamental precept that courts may not abide illegality committed by the guardians of the law.' *State v. Molnar*, 81 N.J. 475, 484 (1980)." *Id.* at 14. The Court decided that the single incident, though likely criminal, *Id*, was no threat to the case. *Id.* at 15.

In *State v. Quattlebaum*, 338 S.C. 441 (2000), the South Carolina Supreme Court was confronted with a single incident of surreptitious monitoring of confidential attorney-client consultation. That instance was strikingly similar the events of March 17th, 2007 in the present case. "While appellant and his attorney conferred, several sheriffs' officers and a deputy solicitor were present in the detectives office where the privileged conversation between appellant and his attorney was monitored and recorded." *Id.* at 444. The *Quattlebaum* Court addressed the issue of the State's intentional interference with the Sixth Amendment guarantee of private consultation stating, "The integrity of the entire judicial system is called into question

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by conduct such as that engaged in by he deputy solicitor and investigating officers of this case." *Id.* at 449. The Court reversed the conviction. *Id.* at 454. Though it has not yet been established how high up information was passed in the present case, the involvement of the lead investigator's agents is established in the exhibits.

As noted, in the present case the State definitely had been monitoring the protected conversations between Avery and his defense team on at least two occasions. Further, a jail worker clearly stated that *all* conversations in the particular room were being recorded. There can be no doubt that what the monitoring officers at least saw was passed on to Sheriff Pagel. Even if it were true that there were no recordings of the audio portion of any given conversation, the fact that the room was watched is important. Attorneys write things down. Notes prepared in the course of preparing for trial or for the purposes of investigation are protected under the work product doctrine. More importantly, the notes contain strategy. The surreptitious obtaining of defense strategy by the state is grounds for mistrial.

D. REQUEST FOR A HEARING

In *United States v. DiDomenico*, 78 F.3d 294 (1996), the defendants and their attorney met in a federal holding facility in a bugged room. The question of whether the prosecution's lack of involvement was discussed, the Court stated, "even if the prosecution team was not complicit in the bugging, the defendants' right to counsel may have been infringed. It is one federal government after all. If the director of the MCC ordered the bugging, there would be a serious issue of the infringement of that right even if the fruits of the buffing were not turned over to the prosecutors." *Id.* at 301.

Avery asserts that he has presented prima facie evidence that his Sixth Amendment right to private consultation with counsel has been violated. He further asserts that that violation appears far more widespread than the exhibits he has presented, as evidenced by the statement made to Baetz. See Exhibit 1. Therefore, Avery respectfully requests that this Court allow Avery to engage in post-conviction discovery and that a hearing be held to supplement the record.

II. AVERY WAS DENIED HIS RIGHTS UNDER FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE STATE COMMENTED ON HIS SILENCE IN CLOSING ARGUMENTS

Doc. 702

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LEGAL STANDARD

Direct comment on a defendant's failure to testify is forbidden by the Fifth Amendment. *Griffin v. California.*, 380 U.S. 609 (1965). A prosecutor's indirect commentary that the government's evidence on an issue is "uncotradicted," undenied," "unrebutted," "undisputed," etc., will be a violation of the defendant's Fifth Amendment rights if the only person who could have contradicted, denied, rebutted or disputed the government's evidence was the defendant himself. *Freeman v. Lane*, 962 F.2d 1252, 1261 (CA7 1992); *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1302 (CA7 1985); *United States v. Buege*, 578 F.2d 187 (CA7), cert. denied, 439 U.S. 871 (1978); *United States v. Fearns*, 501 F.2d 486, 490 (CA7 1974); *United States v. Handman*, 447 F.2d 853, 855 (CA7 1971).

ARGUMENT

On the 23rd day of the trial Attorney Kratz made reference in his closing arguments to facts presented "contested." **Tr. 4-14-2007, P.55.** Attorney Strang objected to this and asked to be heard on the issue later. The judge then reminded the jury that closing arguments are merely argument and not facts.

Specifically, attorney Kratz stated:

> The facts in this case, as presented, and as I will present to you, are very much so uncontested, uncontroversial, at least most of the facts in this case are uncontroverted.

Tr. 4-14-2007, P.33, Lines 18-21. Attorney Strang's commentary outside the presence of the jury was:

> I initially interrupted Mr. Kratz's argument, reluctantly, and trying to be polite and somewhat circumspect about my comment that it was unwise and improper to describe facts as uncontested. I waited until we got to the PowerPoint slide that said fact number four, and by my recollection, that was the fourth time that the - - counsel for the State returned to the theme of an uncontested fact.
>
> As I say, I was trying to be circumspect, but the concern, of course, was that this comes too close to commenting on the decision of the defendant not to take the stand. Or, for that matter, not to offer witnesses that he did not. Mr. Kratz, in

> responding to my objection I think made the problem substantially worse. I don't have committed to memory, we could go back to the court reporter's notes if we need to, but the rejoinder from counsel for the State was that, you know, if you remember a witness being called, or if you remember someone saying this didn't happen, something to that effect, well, then that's fine, but of course, the suggestion was not called and no one did speak up to contest the fact.
>
> Doesn't warrant a mistrial, but comes way too close to commenting on the Fifth Amendment privilege not to testify and I think warrants some curative step, either by counsel himself, or by the Court, or both.

Tr. 4-14-2007, P.70-71.

> Mr. Avery knows where Teresa's phone is, but Mr. Avery is also - - has the ability to think ahead, has the ability to know that these pone records may, in fact, be gleaned, or may, in fact, be reviewed at some point in the future. And so, although he doesn't block, because there is no reason to block the 4:35 call, he still calls Teresa Halbach. And you can see, or you can ask for those records if you need to.

Tr. 4-14-2007, P.94, Lines 5-14.

The State clearly argues that Avery had technical knowledge of investigation via voicemail systems and that he had created a plan to use the investigative process the State would employ as an alibi. Though attorney Kratz doesn't actually stat this is "uncontested" his phrasing is clear. Without having any foundation in the record to support his speculation that Avery knew how investigators "ask for those records" attorney Kratz made his assertion.

Defense counsel didn't object.

Avery contends that this was a disjointed and disguised continuation of the Stat's effors to implicate his silence. Avery didn't have to prove his innocence. And he's not required to contest anything. The State doesn't get to forma a conclusory argument around his silence. More importantly, the State cannot argue facts not in the record. Whether Avery knew about a State investigator's ability to retrieve voicemail wasn't established. This fact would be necessary for Avery to form the alleged plan to create this "alibi." Only Avery could actually testify to his knowledge. He hadn't take the stand and attorney Kratz's argument was a clear implication of

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Avery's silence. A reasonable juror could have found that Avery had premeditated the murder down to the *last* detail. The detail of an alibi.

III. AVERY WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO A TRIAL BY AN UNBIASED JUDGE

LEGAL STANDARD

The Due Process Clause guarantees litigants an impartial judge, reflecting the principle that "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). Where the judge has a direct, personal, substantial, or pecuniary interest, due process is violated. *Bracy v. Gramley*, 520 U.S. 899 (1997); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Ward v. Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971); *In re Murchison*, 349 U.S. at 137-39.

It is presumed that judges are honest, upright individuals and that they rise above biasing influences. *Tumey*, 273 U.S. at 532; *Withrow v. Larkin*, 421 U.S 35, 47 (1975); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *Tezak v. United States*, 256 F.3d 702, 718 (CA7 2001); *Del Vecchio v. Illinois Dep't of Corr.*, 31 F.3d 1363, 1375 (CA7 1994) (en banc). This presumption however is rebuttable. Sometimes, "the influence is so strong that we may presume actual bias." *Del Vecchio*, 31 F.3d at 1375; see also *Withrow*, 421 U.S. at 47. In rare cases, there may even be evidence of actual bias. See *Bracy*, 520 U.S. at 905; *Bracy v. Schomig*, 286 F.3d 406, 411 (CA7 2002) (en banc).

To prove disqualifying bias, a petitioner must offer either direct evidence of "a possible temptation so sever that we might presume an actual, substantial incentive to be biased." *Del Vecchio*, 31 F.3d at 1380. Absent a "smoking gun," a petitioner may rely on circumstantial evidence to prove the necessary bias. *Bracy*, 286 F.3d at 411-12, 422 (Posner, J., concurring in part, dissenting in part), and at 431 (Rovner, J., concurring in part, dissenting in part).

The absence of any objection warrants that the reviewing court follow "the normal procedure in criminal cases," which "is to address waiver within the rubric of the ineffective assistance of counsel." *State v. Erickson*, 227 Wis.2d 758, 766 (1999) (citing *Kimmelman v.*

Morrison, 477 U.S. 365, 374 (1986); ***Lockhart v. Fretwell***, 506 U.S. 364, 380 n.6 (1993) (Stevens, J. dissenting); ***State v. Smith***, 207 Wis. 2d 258, 237 (1997); ***State v. Vinson***, 183 Wis. 2d 297, 306-07 (Ct. App. 1994)).

The right to counsel includes the right to effective assistance of counsel. , 466 U.S. 668, 686 (citing ***McMann v. Richardson***, 397 U.S. 759, 771 n.14). In order to find that counsel rendered ineffective assistance, the defendant must show that counsel's representation was deficient. ***Strickland***, 446 U.S. at 687. The defendant must also show that he was prejudiced by the deficient performance. ***Id.***

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. ***Id.***, at 688. The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, at 694.

A claim of ineffective assistance of counsel can only be resolved with an evidentiary hearing. ***State v. Machner***, 92 Wis. 2d 797, 804 (1979); ***Massaro v. United States***, 538 U.S. 500 (2003).

Where there is a structural error, such as judicial bias, harmless error analysis is irrelevant. See ***Edwards v. Balisok***, 520 U.S. 641, 647 (1997); ***Bracy***, 286 F.3d at 414; ***Cartalino v. Washington***, 122 F.3d 8, 9-10 (CA7 1997).

ARGUMENT

The Honorable Judge Willis presided over Avery's trial process starting at his initial appearance and preliminary hearing and ending with his sentencing.[2] He also issued several warrants in the case. At the preliminary hearing on December 6th, 2005 Judge Willis determined, as a matter of fact, that there had probably been a crime of murder and that Avery probably committed the crime. **Tr. 12-06-2005, Pages 180-81.** Avery argues that Judge Willis could not preside over the trial as he had already determined that Avery was guilty.

SCR 60.04(4) states in relevant part:

> Except as provided in sub. (6) for waiver, a judge shall recuse himself ... in a proceeding where the facts and circumstances the judge knows or reasonably should know establish knowledge about judicial ethics standards and the justice system and aware of the facts and

[2] Judge Willis also presided over the post-conviction relief hearing and made the ruling on that request.

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> circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:
>
> (f) The judge, while a judge ... has made a public statement that commits, or appears to commit, the judge with respect to any of the following:
> 1. An issue in the proceeding.
> 2. The controversy in the proceeding.

In the preliminary hearing a judge is going further than making a finding of law. He is deciding facts and expressing his opinion of those facts. He is making a public statement that "commits, or appears to commit," him to an issue. That issue is the controversy at the very heart of the charges. He is stating that he believes that **1)** a crime has been a committed and **2)** that the defendant committed it.

Though it is true that the judge's determination is that there was merely probable cause that Avery was guilty and not that he was guilty beyond a reasonably doubt, this is still a finding of fact and an opinion of the outcome of the dispute. As SCR 60.04(4)(f) and **Wis. Stat. § 757.19** make clear judge Willis was required to recuse himself. This failing on his part negates Avery's entire trial and requires a reversal.

The same sentiment was echoed in ***Franklin v. McCaughtry***, 398 F.3d 955 (CA7 2005):

> We are not saying that due process would be offended if a judge presiding over a case expressed a general opinion regarding a law at issue in a case before him or her. *Withrow*, 421 U.S. at 48-49; see *Del Vecchio*, 31 F.3d at 1377 n.3. The problem arises when the judge has prejudged the facts or the outcome of the dispute before her. In those circumstances, the decisionmaker "cannot render a decision that comports with due process." *Baran v. Port of Beaumont Navigation Dist. Of Jeffery County Tex.*, 57 F.3d 436, 446 (CA5 1995); [citations omitted]. Here, the only inference that can be drawn from the facts of record is that Judge Schroeder decided that Franklin was guilty before he conducted Franklin's trial. This is clear violation of Franklin's due process rights.

Id., at 962. As with the judge in *Franklin*, Judge Willis was on record having decided the facts and outcome. From that point forward there was no decision that Judge Willis could make that wouldn't be colored by his preconceived notion that Avery was, in fact, guilty.

The language found in *Franklin* and in SCR 60.04(4) combine to show that Judge Willis was required to recuse himself. However, Avery never objected to Judge Willis continuing to

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preside over his trial. Therefore, Avery may have to establish that this failure to request recusal or a change of venue was the result of ineffective assistance of trial counsel.

Avery asserts that failure to request a change of venue or to request that Judge Willis recuse himself fell below professional norms. As ***Franklin*** points out, when a "judge has prejudged the facts or the outcome of the dispute before [him]" he "'cannot render a decision that comports with due process.'" ***Franklin***, 398 F.3d at 962. There is no reasonable strategy that can be pointed to in allowing a trial to go forward under such circumstances.

Avery also asserts that the result was that he was prejudiced. As ***Franklin*** points out, "the only inference that can be drawn from the facts of record is that [the judge] decided that [Avery] was guilty before he conducted [Avery's] trial." In such a situation prejudice is presumed, as judicial bias is never open to harmless error analysis. ***Edwards***, 520 U.S. at 647; ***Bracy***, 286 F.3d at 414.

Avery also directs the Court's attention to **Wis. Stat. § 971.05** which states in relevant part:

> If the defendant is charged with a felony, the arraignment may be in the trial court or the court which conducted the preliminary examination or accepted the defendant's waiver of the preliminary examination.

Clearly the Wisconsin legislature noted that the "court which conducted the preliminary examination" cannot be the trail court. The language of the statute clearly delineates the difference between the two courts with the word "or." (i.e.: "... the arraignment may be in the trial court or the court which conducted the preliminary examination..." ***Id.*** (emphasis added)). It is a "well-settled rule as to construction of statutes requires every word to be given force if possible..." ***Mutual Life Ins. Co. v. Cohen***, 179 U.S. 262, 269 (1900). In other words, Courts are required wherever possible, "to give force to each word in every statute (or constitutional provision). ***United States v. Menasche***, 348 U.S. 528, 538-539, 99 l. Ed. 615, 75 S. Ct. 513 (1955); see ***Marbury v. Madison***, 5 U.S. (1 Cranch.) 137, 174, 2 L. Ed. 60 (1803)." *Silveira v. Lockyer*, 312 F.3d 1052, 1069 n.24 (CA9 2002).

Given that judge Willis had clearly put on record, as was intended in the judicial process of finding probable cause, that he believed that Avery was in fact guilty of the murder of Teresa Halbach there can be no way that Avery could receive a fair trail. This clearly violated his due process rights as laid out in both the United States and Wisconsin Constitutions. As a result, he had a structural defect that removes any harmless error analysis from the equation.

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In like fashion to ***Franklin***, Avery had a trial that violated due process. Therefore, Avery respectfully requests that his conviction be overturned and a new trial with a judge that has not already determined that he is guilty preside.

However, Avery did fail to move for a change of venue or to request that judge Willis recuse himself. As a result of this ineffective assistance of counsel in failing to make such motions or requests Avery requests an evidentiary hearing under ***State v. Machner***, to supplement the record.

Avery further notes that his post-conviction counsel failed to raise the issue in his petition for post-conviction relief. Therefore, a ***Machner*** hearing is also necessary to establish if it was unreasonable for his post-conviction counsel to fail to raise this issue and if this failure prejudiced him.

IV. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO A POST-CONVICTION HEARING BY AN UNBIASED JUDGE

In like fashion to the obvious denial of his rights to a fair and impartial tribunal in his trial, Avery was entitled to an unbiased judge in his post-conviction relief proceedings. His attorneys failed to request that judge Willis should have recused himself or to request a change of venue.

Avery again requests an evidentiary hearing under ***State v. Machner***, to show that it supplement the record. This is also necessary to establish if it was unreasonable for his post-conviction counsel to fail to raise this issue and if this failure prejudiced him.

V. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO SUPPRESS EVIDENCE

LEGAL STANDARD

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

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searched, and the persons or things to be seized." Fourth Amendment of the United States Constitution.

In *Wilson v. Layne*, 526 U.S. 603 (1999), the United States Supreme Court commented on the history and content of the Fourth Amendment as follows:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.). In his *Commentaries on the Laws of England*, William Blackstone noted that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it be violated with impunity" agreeing herein with the sentiments of antient Rome .... For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." William Blackstone, 4 Commentaries on the Laws of England 223 (1765-1769).

Id. at 609-10.

> The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home: "The right of the people to be secure in his persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV (Emphasis added.) See also ***United States v. United States District Court***, 407 U.S. 297, 313 (1972) ("Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is Directed").

Id. at 610.

ARGUMENT

A. THE WARRANTS WERE VOID FOR LACK OF A COURT SEAL

Writs are required to have a seal of the court, pursuant to **Wis. Stat. § 753.04**, and public documents not under seal are not self-authenticating, pursuant to **Wis. Stat. § 909.02(2)**; in turn, those public documents under seal are self-authenticating. **Wis. Stat. § 909.02(1)**. Because the warrant lacks a seal it is not a valid warrant.

There is a long history in the United States and in Wisconsin of using seals on warrants. In 1977 the Wisconsin Constitution was amended, removing the Constitutional provision in Article VII § 17, requiring all writs and processes issued from a court to have a seal of the court. In that same year Wis. Stat. §§ 753.04 and 753.30 were enacted. **Wis. Stat. § 753.04** lays out

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the requirement that writs have a seal of the court and Wis. Stat. § 753.30(3)1 lays out the procedure and rules for having writs and processes sealed.

Indeed, the requirement that writs have seals has been in force since Wisconsin became a state. The history of the legal requirement is reflected in ***Leas & McVitty v. Merriam***, 132 F. 510, 5-6 (W.D. V.A. 1904), where the Court stated "In *Ins. Co. v. Hallock*, 6 Wall. 556-558 [73 U.S. 556 (1867)], it said: 'The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one.'" And this reflects the thinking of the people of the state at the time that Wisconsin adopted statehood. That the legislature shifted the requirement from the constitution to the statutes does not remove the requirement.

Further, the Wisconsin State Constitution provides that common law is still in force, unless otherwise stated by law. Wis. Const. Article XIV § 13. And **Wis. Stat. § 939.10** expressly points out that, though common law crimes are abolished, common law rules are preserved. The United States Supreme Court has pointed out that "... there was no settled rule at common law invalidating warrants not under seal *unless* the magistrate issuing the warrant had a seal of office or a seal was required by statute ..." ***Starr v. United States***, 153 U.S. 614, 619 (1894) (emphasis added). **Wis. Stat. § 753.05** places a requirement for the Wisconsin Circuit Courts to have seals. Further, **Wis. Stat. § 889.08(1)** points out that a "certificate must be under seal of the court" in order for it to be held as evidence outside of the court that issued it.

The legislative intent is found in the phrasing of **Wis. Stat. § 753.04**. Indeed, the legislature selected to distinguish all writs in general from writs of certiorari. The first sentence of the statute begins with the words "All writs ..." and the second sentence of the statute begins "All writs of certiorari ..." A search warrant has classically been referred to as a "writ of assistance" (Black's law dictionary, 8th Edition at page 1641) and falls under the definition of "writ" as laid out in Black's law dictionary, 8th Edition at page 1640.

The plain language reading of the statute requires that "All writs issued from the circuit court shall be ... sealed with the seal of the court..." Shall is mandatory language, all writs must have a seal of the court, and a search warrant is a writ.

This is not an issue that can be considered a singular incident. This warrant cannot be said to have a mere defect that doesn't affect Avery's rights. In the criminal case against Avery

there were several warrants that had a seal of the court on it. Therefore, this isn't a form over substance issue. This is a habitual ignoring of the well established law Federal common law and State law that warrants that issue without a court seal are void. Avery asserts that only if these officers hadn't habitually ignored the statutory and common law requirement that this issue would be without merit.

Further, similarly situated persons are afforded the statutory protections of the statutory and common law requirements pointed to above in the State of Wisconsin and under long standing common law as asserted by the United States Supreme Court. And Avery has a right to protections created by state law under the Fourteenth's Amendment's procedural Due Process clause. By failing to follow the legal requirements for issuance of a search warrant in Wisconsin Avery's equal protection and due process rights were violated.

B. THE WARRANTS WERE VOID BECAUSE THERE WAS NO RECORD

The warrants are defective because there is no indication that the affidavit was ever seen by the issuing judge. The affidavit is witnessed by the actual prosecutor in the case, attorney Kratz. **Wis. Stat. § 968.23** gives an example of an affidavit for a warrant. At the bottom of the example the legislature took the time to put in the text "..., Judge of the ... Court." Clearly the legislature saw that the United States Constitution requires that a neutral magistrate be *accountably* placed between the State and a defendant. Without a way of knowing that the judges were actually involved in the process of establishing probable cause the procedure was invalid and the warrants are illegal.

In ***Franks v. Delaware***, 438 U.S. 154 (1978), the Supreme Court recognized that the pre-search proceeding was *ex parte* and that a defendant could challenge the information placed before the court. ***Id.*** at 169. Holding an evidentiary proceeding with the actual prosecutor doesn't meet the mandates of the Constitution. See ***Coolidge***, 403 U.S. at 450, 454-55; ***Johnson v. United States***, 333 U.S. 10 (1948); ***Camara v. Municipal Court of San Francisco***, 387 U.S. 523 (1967).

The affidavits for the search warrants act as the only record for the issuance of those warrants. In the present case the judges signed none of the affidavits therefore there is no record

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that they saw them. In other words, there is no record. And without a record, there is no court of record.

VI. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ARGUE A BREAK IN THE INTEGRITY OF THE STATE'S CHAIN OF CUSTODY OF HIS AND HALBACH'S VEHICLE

LEGAL STANDARD

Physical evidence is admissible when the possibility of misidentification or alteration is "eliminated, not absolutely but as a matter of reasonable probability." *United States v. Allen*, 106 F.3d 695, 700 (CA6 1997) (citations omitted). Merely raising the possibility of tampering or misidentification is insufficient to render evidence inadmissible. *United States v. Kelly*, 14 F.3d 1169, 1175 (CA7 1994).

"[T]he prosecution's chain-of-custody evidence must be adequate." *United States v. Ladd*, 885 F.2d 954, 957 (CA1 1989). A break in the chain of custody goes to the weight of the evidence. *United States v. Sparks*, 2 F.3d 574, 582 (CA5 1993); *United States v. Levy*, 904 F.2d 1026, 1030 (CA6 1990), cert. denied, 498 U.S. 1091 (1991). Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly. *United States v. Aviles*, 623 F.2d 1192, 1197-98 (CA7 1980).

All the government must show is that reasonable precautions were taken to preserve the original condition of evidence; an adequate chain of custody can be shown even if all possibilities of tampering are not excluded. *Aviles*, 623 F.2d at 1197. In *Aviles*, the Court concluded that since the seals on the evidence bags were intake when the bags were opened by the chemist who would analyze the evidence, the trial court could reasonably find that the narcotics evidence was in the same condition as when it was purchased.

ARGUMENT

The seals on the doors to Avery's vehicle were broken prior to being taken to the crime lab. Conversely, there were no seals placed on the doors of Halbach's Rav-4. Avery argues that the seals on the doors were either nonexistent or broken. This shows that there was a break in the chain of custody that the jury should have been made aware of.

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VII. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE CHARGE OF FELON IN POSSESSION OF A FIREARM WASN'T SEVERED

LEGAL STANDARD

Joinder is improper when the State joins a strong evidentiary case with a much weaker case in hope that cumulation of evidence will lead to conviction in both cases. *Sandoval v. Calderon*, 231 F.3d 1140 (CA9 2000).

The statutes governing joinder of crimes in Wisconsin state:

> **Wis. Stat. § 971.12 Joinder of crimes and defendants.**
> (1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count from each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more case or transactions connected together or constitution parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.
>
> (3) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials or courts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates anther defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.
>
> (4) TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendant, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such complaint, information or indictment.

Whether severance should be granted lies within the discretion of the circuit court. See *State v. Nelson*, 146 Wis. 2d 442 (1988); *State v. Hoffman*, 106 Wis. 2d 185, 209 (1982) (dealing with substantial prejudice).

ARGUMENT

When Avery was first arrested it was for the charge of Felon in Possession of a Firearm. Eventually that charge expired due to a procedural requirement since the State failed to bring Avery to have a probable cause hearing inside the statutory time limit. Avery was subsequently charged with First Degree Intentional Homicide and Mutilation of a Corpse. Eventually the State recharged the dismissed Felon in Possession of a Firearm charge and it was joindered without objection.

At trial Avery stipulated to the element of being a felon. In so doing Avery introduced evidence against himself that would normally not be introduced to a jury unless he took the stand. The jury was then aware of the fact, by Avery's own admission, that he had been previously convicted of an "infamous crime."

The joindering of this charge was unfair and should have been challenged.

VIII. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL WHEN THEY FAILED TO ARGUE THAT HE WAS ENTITLED TO A NEW TRIAL DUE TO RETROACTIVE MISJOINDER

LEGAL STANDARD

Dismissal of some counts charged in the indictment does not automatically warrant reversal of convictions reached on remaining counts. See *United States v. Pelullo*, 14 F.3d 881, 897 (CA3 1994); *United States v. Friedman*, 845 F.2d 535, 581 (CA2 1988). The Wisconsin Court of Appeals stated the following concerning retroactive misjoinder, in *State v. McGuire*, 204 Wis. 2d 372, 380-81 (Ct. App. 1996):

> We conclude that where an appellate court has determined that conviction on one or more counts should be vacated, even if the defendant did no move for severance before the trial court, the defendant is entitled to a new trial on the remaining counts if the defendant shoes compelling prejudice arising form the evidence introduced to support the vacated counts. We adopt the three-factor analysis or [*United States v.*] *Vebeliunas* [, 76 F.3d 1283, 1293 (CA2 1996)] as the proper method for making this determination.
>
> The three factors to determine whether there is prejudicial spillover are:
> (1) Whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count;
> (2) The degree of overlap the similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and
> (3) The strength of the case on the remaining count.

In *United States v. Lane*, 474 U.S. 438, 449 (1986) the United States Supreme Court stated:

> [A]n error involving misjoinder 'affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750 at 776 (1946).

In *United States v. Pigee*, 197 F.3d 879 at 891 (CA7 1999), the court stated:

> We review the defendant's claim of misjoinder de novo. See *United States v. Sill*, 57 F.3d 553, 557 (CA7 1995). However, "a misjoinder 'requires reversal only if the misjoinder results in actual prejudice because it had substantial and

injurious effect or influence in determining the jury's verdict.'" *United States v. Schweihs*, 971 F.2d 1302, 1322 (CA7 1992), quoting *United States v. Lane*, 474 U.S. 438, 449.

ARGUMENT

In the present case Avery had been charged with mutilation of a corpse. The State's contention was that he destroyed the body of Halbach to cover for his crime. But the State failed to prove its case beyond a reasonable doubt here. Nonetheless, the State had presented evidence that supported this charge that could reasonably have influenced the jury to find Avery guilty on the charge he was convicted of. As a result, Avery is entitled to a new trial that is free of this noncumulative evidence that prejudiced him.

IX. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO DEVELOP AN ARGUMENT BASED ON AVAILABLE INFORMATION THAT THE STATE HAD PLANTED EVIDENCE

Avery's defense attorneys failed to develop evidence that the camera found in a burn barrel on or near his property had been taken from on John Campion. Further, that the tire that was supposedly burnt in the burn barrel couldn't have fit into that barrel. Finally, that a rubber tire burns too hot to leave the plastic components and the aluminum can seen in the evidence pictures in the form it was in. See Exhibits 4 through 10.

Avery asserts that there is evidence available to show that this tire hadn't burnt the contents of the barrel. Most important is that a tire burns exceptionally hot. The components and the can in the barrel would have been destroyed. Anyone whose burnt an aluminum can in a camp fire knows that it becomes ash from a wood fire alone. The idea that a tire fire would do less is absurd.

This opens up the finding of the "evidence" to attack. The State's contention being absurd, Mr. Campion's story becomes plausible. See Exhibits 11 and 12. The State could easily have burnt the phone and other evidence and planted it in the burn barrel.

As Avery had asserted the affirmative defense that he was being framed, it is only reasonable to present evidence and argument that the defense is valid.

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X. AVERY WAS DENIED DUE PROCESS BECAUSE THE COURT WAS INCOMPETENT TO HEAR AN APPOINTED SPECIAL PROSECUTOR

LEGAL STANDARD

A circuit court has subject matter jurisdiction, conferred by the state constitution, to consider and determine any type of action; have, failure to comply with a statutory mandate may result in a loss of competency which can prevent a court from adjudicating a specific case before it. *State v. Kywanda F.*, 200 Wis.2d 26, 33 (1996).

Failure to comply with a statutory mandate may result in a loss of competency to proceed in a particular case. *State v. Zanelli*, 212 Wis. 2d 358, 365 (Ct. App. 1997). The Wisconsin Supreme Court has stated that a circuit court's "failure to follow plainly prescribed procedure which we consider central ... renders it incompetent..." *Arreola v. State*, 199 Wis. 2d 426, 441 (Ct. App. 1996).

ARGUMENT

On April 20th, 2006 judge Willis signed an Appointment of Special Prosecutor under Chapter 978 to allow attorney Thomas J. Fallon to act as special prosecutor on the case. See Exhibit 13. The "OATH TO CONSENT TO SERVE" was not signed by attorney Fallon. Therefore, the court was not competent to hear him under law. Avery's conviction must be overturned as this violated his procedural due process rights. Failure to object or otherwise raise this issue was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to ineffective assistance of post conviction counsel.

XI. AVERY WAS DENIED DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO HAVE AN UNBIASED JURY

LEGAL STANDARD

Under the United States Constitution a criminal defendant in a state court is guaranteed an impartial jury by the Sixth Amendment as applied to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Ristaino v. Ross*, 424 U.S. 589, 595 1976); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Principles of due process alos guarantee a defendant a fair trial by a panel of impartial jurors. In Wisconsin a defendant is entitled to a trial

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by an impartial jury as a matter of state constitutional law under Sec. 7, art. I of the Wisconsin Constitution.

Wis. Stat. § 805.08 (1) states in relevant part:

> Qualifications, examination. The court shall examine on oath each person who is called as a juror to discover wither the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused.

ARGUMENT

A. A JURY FROM MANITOWOC COUNTY HAS A PRESUMPTIVE FINANCIAL INTEREST IN THE OUTCOME

Avery had a multi-million dollar lawsuit pending against Manitowoc County at the time that he was charged and brought to trial. The people of the county, who made up the jury that judged him, were liable to him if he won. Arguably, he was in an excellent position to do just that. His suit focused on the wrongful acts of law enforcement that were discovered due to the efforts of the innocent Project and revealed that his DNA did not match what was found on the victim.

Ultimately, the people of Manitowoc County would be forced to pony up for the wrong that was done to Avery. It may be true that their insurance would cover some or even all of the damages that Avery would have been awarded, however, that wouldn't mean that the people of the county wouldn't have been free of a financial hurt. Indeed, whatever isn't covered by the County's insurance would have been paid directly from the County itself. Further, the insurance rates would have gone up. The jury was composed of a group of twelve persons with a direct financial interest in the outcome. The jury's bias is evident and the case must be overturned.

Failure to raise and argue this issue was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

B. JUROR WARDMAN SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Wardman was a volunteer with the Manitowoc County Sheriff's Department and his son was a sergeant with the department as well. This connection statutorily precluded him from being a juror. Failure to move to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

C. JUROR MOHR SHOULD HAVE BEEN STRUCK FOR CAUSE.

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Juror Mohr was married to the temporary Clerk of Court called in to relieve the work load created by Avery's trial. There was a great deal of concern on the part of the State concerning the implications of maintaining this person as a juror. In particular, the State was concerned that juror Mohr's participation would cause the case to be overturned due to his probable sympathy or additional knowledge of the inner workings of the Clerk of Court's office. The defense argued for maintaining juror Mohr despite the fact that he was acquainted with nearly every person that worked in the office.

There was also concerns that juror Mohr's wife had volunteered information concerning her personal knowledge of the vial of blood found in the Clerk's office. It should be noted that the fact that juror Mohr's wife had volunteered any such information is indicative of her inability to remain tight lipped concerning personal knowledge of evidence even when her husband is a juror. Further, it seems clear that the Mohr couple were lacking in the needed ethical boundaries that a Clerk of Court and a juror would have to have. Be it because they are just an open couple that freely speak or there is a dysfunctional and unhealthy lack of proper boundaries is irrelevant. For whatever reason Mrs. Mohr had shared information that was relevant to the outcome of this case.

Under the circumstances, it is clear that juror Mohr had personal relationships with several persons that worked in the Clerk of Court's office. The fact that they were merely acquaintances is irrelevant, given that his wife clearly spoke freely of her exposure to sensitive evidence. It is reasonable to infer from this that she also spoke about her coworkers in a positive light. Further, juror Mohr would be inclined to view them in a positive light regardless given that they must be persons of the same general personality as his wife. In other words, he would be inclined, as people are, to grant them deference by association. This was not explored nearly enough. And both the State and the judge shared reservations concerning keeping juror Mohr for trial.

Failure to agree to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

D. JUROR TEMME SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Temme had a professional relationship with Manitowoc County District Attorney Rohrer and Manitowoc County Clerk of Court Lynn Zigmunt. She had worked as a legal

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assistant some years earlier with them, knew them on a first name basis, and felt that she could casually engage in conversation with them at any moment. Under these circumstances she should have been struck for cause.

Juror Temme was very clear that she believed that law enforcement officers are less likely to lie under oath than other persons. Indeed, she believed that they are inherently more honest than other persons and always be honest in their answers. She also was clear that there were no circumstances under which they would not be honest, in her mind.

In this juror's mind law enforcement officials are inherently "upstanding." She had a personal relationship with persons who work in the justice system. Her feelings and beliefs were unlikely to be overcome by a jury instruction, no matter what her answer was. Personal beliefs such as these are not fair or impartial. They don't protect a criminal defendant's constitutional rights to an unbiased jury.

Failure to agree to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

E. JUROR NELESEN SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Nelesen had a bias toward the State. He stated that he would be reluctant not to consider Avery's decision not to testify as the Court would instruct him. That is, he would view the right not to take the stand as an indication of guilt.

Further, he stated that he believed that law enforcement was less likely to lie under oath than other persons. Despite the fact that juror Nelesen eventually stated that he would try to view officers as just as likely to lie as anyone else, his initial reaction is very telling. He, in fact, has a friend who is a law enforcement officer. He already believed that a criminal defendant who wouldn't take the stand was trying to hide something. And he was also biased toward law enforcement officers as inherently more honest under oath than the average person.

Finally, this juror expected Avery to show who the actual killer was in this case. As noted by the court, Avery has no such burden under law. But this juror not only believed that law enforcement was more honest than most people but that they make less mistakes. This is evident in that this juror expected Avery to present more than just evidence of his actual innocence, he expected Avery to prove who the actual killer was. This bias, in conjunction with other biasing considerations noted herein, work to show that this juror was in fact a pro law

enforcement person who very much believes that when a person is accused by law enforcement he is more than just probably guilty. His personal philosophy was unlikely to be overcome by a jury instruction no matter what he said. It is clear by the shear number of biasing influences he spoke of that he had deeply rooted feelings on these issues. Under such circumstances, the presumption that a juror will follow a court's instructions should have been considered rebutted.

Failure to move to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

CONCLUSION

For the forgoing reasons Avery respectfully requests that this Honorable Court grant him the relief requested.

Respectfully submitted this 10 day of February, 2013.

Steven Avery

Steven Avery #122987
Wisconsin Secure Program Facility
P.O. Box 9900
1101 Morrison Dr.
Boscobel, WI 53805

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CERTIFICATE OF SERVICE

I certify and state under penalty of perjury that on this day I served a copy of the within MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06 on the plaintiff at the address listed below, by way of prepaid first class mail;

District Attorney Mark Rohrer,
°/° Manitowoc County District Attorney's Office
325 Courthouse
1010 South 8 th Street
Manitowoc, WIS. 54220

Dated 2-10-2013

Steven Avery

Steven Avery # 122987
Wisconsin Secure Program Facility
P.O. Box 9900
1101 Morrison Dr.
Boscobel, Wis. 53805

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STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

STEVEN AVERY,
Defendant-Appellant.

APPENDIX TO DEFENDANT-APPELLANT'S MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06

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(1)

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EXHIBIT LIST

EXHIBIT NUMBER	EXHIBIT DESCRIPTION
1	Memorandum from Conrad Baetz to defense attorneys
2	Jail Inquiry concerning jail workers observing defense
3	Memo from Sheriff Pagel concerning Exhibit 3
4	Picture of burn barrel from distance
5	Picture of burn barrel with tire rim
6	Picture of burn barrel with tire rim
7	Picture of edge of tire rim
8	Picture of contents of burn barrel
9	Picture of contents of burn barrel
10	Picture of contents of burn barrel
11	E-mail to Baetz about Mr. Campion
12	E-mail from Baetz about Mr. Campion
13	Chapter 978 from
14	Personnel Commitee October 10, 2006? 9:00am Juror Wife Moho
15	Excused Juror March 16, 2007, 2 pages
16	Right doors no evidence tape on
17	Rear Cargo Door no evidence tape on
18	Left Door no evidence tape on
19	Left Door no evidence tape on
20	Right Door no evidence tape on
21	Front Hood no evidence tape on
22	Front Hood no evidence tape on
23	Dark cant see
24	No evidence tape on Vehicle
25	Dark cant see Time 17:38:15 on 2005-11-5
26	Dark cant see no evidence tape on Vehicle
27	My car Hood Seal Broken
28	Trunk lid Seal Broken
29	Right Door is good Seal
30	Left Door is Broken Seal

(2)

COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP2288-CR Cir. Ct. No. 2005CF381

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN A. AVERY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Manitowoc County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

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No. 2017AP2288-CR

¶1 PER CURIAM. In 2007, following a jury trial, Steven A. Avery was convicted of first-degree intentional homicide, party to the crime, and possession of a firearm by a felon. We affirmed his convictions on appeal. The issues in this new case concern collateral proceedings: whether the circuit court erred in denying Avery's WIS. STAT. § 974.06 (2019-20)[1] motion and two supplemental motions without a hearing, as well as his motions to vacate and for reconsideration of the first of these motions. We hold that Avery's § 974.06 motions are insufficient on their face to entitle him to a hearing and that the circuit court did not erroneously exercise its discretion in denying the motions to vacate and for reconsideration. Accordingly, we affirm.

OVERVIEW

¶2 We previously summarized the facts of this case in our decision on Avery's direct appeal, *see State v. Avery*, 2011 WI App 124, 337 Wis. 2d 351, 804 N.W.2d 216, and we will discuss below those facts relevant to his collateral attack on his conviction. But for context, this case began in early November 2005 with the disappearance of Theresa Halbach, a twenty-five-year-old professional photographer. Volunteer searchers found Halbach's RAV4 on the forty-acre site of Avery's Auto Salvage, a salvage yard business where Avery and other family members lived and worked. It was believed that Halbach had photographed vehicles at this site several days earlier, per Avery's request. According to State witness Bobby Dassey, Halbach was last seen walking towards Avery's trailer.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

¶3 After finding the RAV4, police searched the Avery property and, over the course of the next four months, discovered and identified evidence including: burned bone fragments in and around a burn pit, with DNA matching Halbach's; both Avery's and Halbach's blood in the RAV4; the remnants of electronic devices and a camera, the same models as Halbach's, in a burn barrel; Halbach's RAV4 key in Avery's bedroom, with Avery's DNA on it; Avery's DNA on the hood latch of the RAV4 (deposited, the State later claimed, by Avery's sweaty hands); and a bullet and bullet fragments in Avery's garage, containing Halbach's DNA.

¶4 The case was tried over a five week period in February and March of 2007. The State's theory was that Avery shot Halbach in the head, in his garage, and threw her in the cargo area of the RAV4. He then burned the electronics and camera, cremated Halbach in a burn pit, transferred the remains to a burn barrel, and hid the RAV4 until he could crush it in the Avery car crusher. The defense argued that law enforcement was biased against Avery, who was pursuing a wrongful conviction lawsuit against Manitowoc County and the Sheriff's Department,[2] and, as a result, planted evidence implicating Avery. The real killer, the defense argued, took advantage of this "investigative bias" to also plant evidence on the Avery property, once early media publicity made it clear that Avery was a key suspect.

¶5 The jury found Avery guilty of first-degree intentional homicide and felon in possession of a firearm. Avery received a life sentence without the

[2] Avery was wrongfully convicted of a 1985 sexual assault and was exonerated in 2003 on the basis of DNA evidence linking the crime to another person.

possibility of extended supervision. In 2009, Avery commenced his direct appeal by filing a motion for postconviction relief, pursuant to WIS. STAT. § 974.02, requesting a new trial. That motion was denied, Avery appealed, and this court affirmed in the aforementioned decision. *See Avery*, 337 Wis. 2d 351, ¶3.

¶6 In 2013, Avery filed a pro se WIS. STAT. § 974.06 motion (the 2013 motion), requesting a new trial. That motion was denied, and Avery appealed. That appeal was stayed and later dismissed on Avery's motion, shortly after he initiated the postconviction proceedings that are the subject of this appeal. In 2017, Avery filed the first of the six motions that are the subject of this appeal.[3] These motions will be analyzed individually, with further discussion of relevant law, but some basic principles apply generally.

¶7 WISCONSIN STAT. § 974.06 provides a mechanism for vacating, setting aside, or correcting a sentence once the time for direct appeal has passed, on constitutional or jurisdictional grounds or where "the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." Sec. 974.06(1); *State v. Romero-Georgana*, 2014 WI 83, ¶32, 360 Wis. 2d 522, 849 N.W.2d 668. Section 974.06(4),[4] however, creates a procedural barrier to

[3] Avery's appeal is from two orders: the circuit court's October 3, 2017 order denying his June 2017 postconviction motion and the court's November 28, 2017 order denying his motions to vacate and for reconsideration of the June 2017 motion. We address these as Motions #1 through #3. After filing his appeal, Avery moved to supplement the appellate record, and to stay the appeal and remand, in two separate motions. We retained jurisdiction and directed Avery to raise his claims to the circuit court in the form of supplemental postconviction motions. We address these as Motions #4 and #5. In April 2021, Avery filed a motion to this court to stay his appeal and remand. We have not yet acted on that motion, so we address and decide it as Motion #6.

[4] In full, WIS. STAT. § 974.06(4) states:

(continued)

review, in that it requires the defendant to raise all grounds for relief in his or her first (postconviction or appellate) motion. *State v. Balliette*, 2011 WI 79, ¶¶35-36, 336 Wis. 2d 358, 805 N.W.2d 334. Thus, a defendant is normally barred from raising issues in a § 974.06 motion that were *or could have been* raised on direct appeal or in a previous § 974.06 motion. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). An exception to this rule exists where the defendant can show a "sufficient reason" for not raising the issue in any prior postconviction proceeding. *Id.*; § 974.06; *Romero-Georgana*, 360 Wis. 2d 522, ¶¶48-50.

¶8 Where, as here, a defendant appeals the circuit court's denial of a WIS. STAT. § 974.06 motion *without* an evidentiary hearing, then the question before us is narrow: whether remand for a hearing is warranted because the circuit court erred in denying the motion on its face. *See Balliette*, 336 Wis. 2d 358, ¶38. Pursuant to § 974.06(3)(c), the court shall "[g]rant a prompt hearing" unless "the motion and the files and records of the action conclusively show that the [defendant] is entitled to no relief." Our supreme court has also determined, however, that a baseline level of specificity applies to all postconviction motions, including those under § 974.06. *See Balliette*, 336 Wis. 2d 358, ¶¶42-43, 58-59. Thus, in order for the reviewing court to meaningfully assess the claim, the

> All grounds for relief available to a person under this section must be raised in [the defendant's] original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

defendant must allege "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he [or she] seeks." *State v. (John) Allen*, 2004 WI 106, ¶¶2, 23, 274 Wis. 2d 568, 682 N.W.2d 433; *Romero-Georgana*, 360 Wis. 2d 522, ¶37. This requirement promotes finality once the defendant has been convicted and sentenced, "minimize[s] time-consuming postconviction hearings unless there is a clearly articulated justification for them," and recognizes that "the pleading and proof burdens ... have shifted to the defendant in most situations after conviction." *Balliette*, 336 Wis. 2d 358, ¶¶53, 58. Accordingly, in the context of a § 974.06 motion, the defendant must describe, with specificity, his or her "sufficient reason" for failing to raise the claim in any earlier proceeding—that is, the defendant must show why his or her claim is not procedurally barred under § 974.06(4).[5] *See Romero-Georgana*, 360 Wis. 2d 522, ¶37.

¶9 We will further discuss some of the contours of this "sufficient reason" exception below, but one point bears mentioning here: ineffective assistance of postconviction counsel can be, and often is, cited as the reason for the defendant's not bringing some claim on direct appeal. The specificity requirement, however, applies just as much in this context. The defendant cannot merely present legal conclusions, summarily arguing that postconviction counsel was ineffective for failing to bring the claims he or she now views as meritorious. *Id.*, ¶¶36, 42. Instead, to be entitled to a hearing, the defendant must raise sufficient material facts demonstrating prior counsel's ineffectiveness—that is,

[5] Of course, a defendant is not required to do so when there has been no prior postconviction proceeding. *See State v. Romero-Georgana*, 2014 WI 83, ¶35, 360 Wis. 2d 522, 849 N.W.2d 668

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that counsel was constitutionally deficient and that such performance was prejudicial to the defendant. *Id.*, ¶¶37-39, 56; *see Strickland v. Washington*, 466 U.S. 668, 687 (1984). Importantly, to show deficiency in this context, the defendant must allege sufficient facts showing that his or her new claim is "clearly stronger" than the claims postconviction counsel in fact brought. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶45-46.

¶10 Whether the circuit court erred in not ordering a hearing involves two potential inquiries, with separate standards of review. The circuit court *must* hold a hearing where the motion is sufficient on its face, unless the record as a whole otherwise conclusively demonstrates that the defendant is not entitled to relief. *Balliette*, 336 Wis. 2d 358, ¶¶18, 50; *State v. Howell*, 2007 WI 75, ¶¶75-77 & n.51, 301 Wis. 2d 350, 734 N.W.2d 48. Whether a WIS. STAT. § 974.06 motion meets this standard—including whether there is a "sufficient reason" for overcoming the procedural bar of *Escalona-Naranjo*—is a question of law that we review de novo. *Romero-Georgana*, 360 Wis. 2d 522, ¶30. If, on the other hand, the motion does not raise sufficient facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," then the circuit court has the discretion to grant or deny a hearing. *Balliette*, 336 Wis. 2d 358, ¶18 (quoting *John Allen*, 274 Wis. 2d 568, ¶9). In such case, we review for an erroneous exercise of discretion. *Romero-Georgana*, 360 Wis. 2d 522, ¶30.

MOTION #1: JUNE 2017 MOTION

¶11 In August 2016, Avery, now represented by counsel, brought a motion for postconviction scientific testing. In November 2016, the circuit court granted the motion, permitting Avery to conduct independent testing of nine trial

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exhibits: seven samples of bloodstain cuttings, swabs, or blood flakes taken from Halbach's RAV4; Halbach's RAV4 key; and a 1996 sample of Avery's blood.

¶12 Based largely on the results of this testing and other investigations, Avery filed a WIS. STAT. § 974.06 motion in June 2017 (the June 2017 motion), requesting a new trial. His motion raises a number of claims[6] falling into three categories for purposes of overcoming the *Escalona-Naranjo* procedural bar. First, Avery alleges that trial counsel was ineffective for failing to fully investigate, or present expert testimony in support of, his theory that he was framed. Second, he brings several claims based on alleged *Brady*[7] violations. Third, he raises claims based on the results of new investigations of a bullet, the hood latch swab of the RAV4, and the RAV4 key, all of which he characterizes as newly discovered evidence.

¶13 The circuit court found that most of these claims were procedurally barred under *Escalona-Naranjo* because Avery had not alleged a "sufficient reason" for not raising them in his 2013 motion or on direct appeal. *See Escalona-Naranjo*, 185 Wis. 2d at 181-82. The court further held that the claims based on "new scientific tests," when considered in the context of the full record, did not allege sufficient facts that, if true, would entitle Avery to relief. *See Romero-Georgana*, 360 Wis. 2d 522, ¶37. The court noted that the new reports on

[6] Avery reframes some of these claims and arguments on appeal, but our review is of the sufficiency of the underlying motion. We analyze that motion on its face, deeming new or newly argued issues forfeited. *See State v. Huebner*, 2000 WI 59, ¶¶10-12 & n.2, 235 Wis. 2d 486, 611 N.W.2d 727. In addition, some of Avery's claims, such as his allegations of prosecutorial misconduct, are not renewed on appeal; these we deem abandoned and will not discuss. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). These principles apply to our analyses of Avery's subsequent motions.

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

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the bullet, hood latch swab, and key were "equivocal in their conclusions" and "ambiguous"; therefore, given "the totality of evidence submitted at trial ... it cannot be said that a reasonable probability exists that a different result would be reached at a new trial based on these reports." Accordingly, the court denied Avery's motion without a hearing.

¶14 We review the sufficiency of this motion de novo; if we determine that Avery was not entitled to a hearing as a matter of law, we then review the circuit court's decision to deny him a hearing for an erroneous exercise of discretion. *See id.*, ¶30. The first, threshold step in this analysis is determining whether Avery has stated a sufficient reason for not raising these claims in his 2013 motion and on direct appeal.

Ineffective Assistance of Trial Counsel

¶15 Avery's claims relating to ineffective assistance of trial counsel are not—and cannot—be based on new or newly disclosed evidence unavailable to trial counsel. By definition, these claims are based on alleged errors of trial counsel, the argument being that Avery was thereby denied his constitutional right to counsel. As with any WIS. STAT. § 974.06 claim, Avery must show that there was a "sufficient reason" that these claims were not raised on direct appeal and in his 2013 pro se motion. *See Escalona-Naranjo*, 185 Wis. 2d at 181-82. And to establish a "sufficient reason" for not raising ineffective assistance of trial counsel claims on direct appeal, Avery must show that his new claims are "clearly stronger" than the claims postconviction counsel actually brought. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶45-46.

¶16 We begin by considering whether Avery has shown a sufficient reason for not having raised these claims in his 2013 pro se petition. We then turn

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to whether Avery has shown a sufficient reason for not raising these claims on direct appeal. It is at this point that the *Escalona-Naranjo* analysis dovetails with the merits of Avery's ineffective assistance of trial counsel claims, because if his new claims are facially insufficient as a matter of law, then postconviction counsel cannot have been ineffective for failing to raise them on direct appeal. Therefore, after we analyze the potential procedural bar of the 2013 petition, we turn directly to whether Avery's remaining claims demonstrate a reasonable probability that, but for trial counsel's unprofessional errors, he would not have been convicted at trial. *See* ***Strickland***, 466 U.S. at 694.

Sufficient reason for failure to raise the claims in the 2013 motion

¶17 As a starting point, although Avery may argue ineffective assistance of postconviction counsel as a sufficient reason for not raising these claims on direct appeal, that argument is *not* available to excuse failings in his 2013 motion. That is because Avery did not have a constitutional right to counsel following his direct appeal. As our supreme court recently observed, there is no constitutional right to counsel on a collateral attack and, consequently, the "vast majority" of WIS. STAT. § 974.06 motions are filed by pro se litigants. *See* ***State ex rel. Wren v. Richardson***, 2019 WI 110, ¶27 & n.21, 389 Wis. 2d 516, 936 N.W.2d 587. The exception would swallow the rule if the mere assertion of pro se status were sufficient to overcome the procedural barrier of *Escalona-Naranjo*. This legal point precludes successive postconviction motions from turning into something akin to Russian nesting dolls, wherein a litigant can simply allege a continuous series of ineffective assistance of counsel claims to justify previous failures to raise an issue. Instead, where there are successive § 974.06 motions, any new motion must be based on something other than ineffective assistance of postconviction counsel.

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¶18 Avery appears to recognize this point, foregoing any claim based on the mere fact that he was without counsel. Nonetheless, his June 2017 motion largely focuses on the quality of his self-representation, providing the following justification for not raising any of his current claims in his pro se 2013 motion:

> [N]umerous unique circumstances are present here that provide sufficient reasons the current claims were not previously presented. Mr. Avery had no way of knowing the factual and legal basis [for] the claims set forth herein. As a learning disabled, indigent prisoner, Mr. Avery simply could not have known them. His attempt to file a meritorious pleading was thwarted by his lack of legal knowledge.
>
> The current motion is the product of over a thousand hours of attorney time, hundreds of hours expended by private investigators, numerous consultations with experts, the expenditure of funds to retain those experts, and more. To expect an indigent prisoner acting *pro se* to compile a meritorious motion under these circumstances would be unreasonable. Mr. Avery's lack of legal knowledge, cognitive deficiencies and the complexity of this unique case provide the sufficient reason that the current claims should be addressed on the merits.

Thus, we construe Avery to offer six (somewhat overlapping) explanations that, taken together, might provide a sufficient reason for not raising his claims in 2013: (1) he was unaware of the legal basis for the claims, (2) he was unaware of the factual basis for the claims, (3) he was acting pro se, (4) he was indigent, (5) he has a learning disability, and (6) this case is particularly complex.

¶19 These explanations do not justify Avery's failure to bring the majority of his claims. Again, the quality of Avery's representation in his prior motion cannot in and of itself constitute a sufficient reason for not raising an issue earlier. Accordingly, we reject Avery's first argument that he "lacked awareness of the legal basis for a claim." "Lack of awareness of the legal basis for a claim" is a term of art that does not merely mean that Avery was not a lawyer or lacked

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legal knowledge. Rather, it means that he could not previously have anticipated a change in the substantive law that opened up a new basis for collateral attack. *See State v. (Aaron) Allen*, 2010 WI 89, ¶44, 328 Wis. 2d 1, 786 N.W.2d 124; *State v. Howard*, 211 Wis. 2d 269, 287-88, 564 N.W.2d 753 (1997), *overruled on other grounds by State v. Gordon*, 2003 WI 69, 262 Wis. 2d 380, 633 N.W.2d 765. Here, Avery's claims are based on well-settled law. *See, e.g., Romero-Georgana*, 360 Wis. 2d 522, ¶¶39-41.

¶20 As to reasons (2) through (6), Avery gives us bare-bones factual conclusions but does not meaningfully explain why the circumstances he describes precluded him from raising most of these issues earlier. *See John Allen*, 274 Wis. 2d 568, ¶¶12, 23. Regarding reason (2), unawareness of the factual basis of the claims, Avery does not explain, and we cannot envision, why he did not have all the facts necessary in 2013 to raise these claims (which, after all, are premised on the further investigation of evidence and witnesses known to Avery at the time of trial). *See State v. Tolefree*, 209 Wis. 2d 421, 426, 563 N.W.2d 175 (Ct. App. 1997). As to reason (3), as explained above, a defendant's pro se status, standing alone, cannot excuse his or her failure to raise claims in a WIS. STAT. § 974.06 motion.

¶21 With one exception—discussed below—Avery's remaining reasons are similarly deficient. Avery simply claims that he has a learning disability and was indigent in 2013, and that his case is complex. He does not cite any law, or develop any detailed argument, as to why these facts, alone or taken together, explain his failure to raise these claims. It appears well established from federal habeas law, from which we can borrow, that reasons such as these are not the sort of grounds on which a procedural bar can be avoided. *See Harris v. McAdory*, 334 F.3d 665, 668-69 (7th Cir. 2003) (petitioner's pro se status, borderline mental

retardation, and organic brain dysfunction did not provide sufficient cause to excuse procedural default of ineffective assistance claim; cause must be based on an "external impediment").

¶22 The one exception we will recognize concerns Avery's contention that, on his own, it would have been impossible for him to have undertaken the extensive investigations later carried out by current postconviction counsel, which resulted in new theories as to how he was framed and additional factual support for previous theories. For example, if Avery believed that forensic testing would have shown that his DNA was planted on the RAV4 key, he of course could have raised the issue in his 2013 motion. But to do so with any chance of success, he would have had to allege that postconviction counsel was ineffective for not raising an ineffective assistance of *trial* counsel claim on that basis, and to succeed on *that* claim, he would have had to show that this new claim was "clearly stronger" than those actually brought on direct appeal. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶45-46. Absent forensic testing supporting the basis for such a showing, this would be an all but impossible task. Thus, "unique circumstances" might exist wherein a pro se defendant is unable to perform or pay for an investigation but later gains the resources to uncover new material facts and develop alternative theories of the crime and, on that basis, can claim a sufficient reason for not previously raising claims based on those theories. We do not perceive the policies underlying *Escalona-Naranjo*—namely, the need for finality in litigation—to preclude this result. Indeed, to hold otherwise could unfairly punish defendants who bring postconviction motions based on all facts known to or reasonably discoverable by them. For *Escalona-Naranjo* purposes, claims based on newly conducted investigations, which could not have been previously undertaken, would appear to be little different than claims based on newly

discovered evidence, *see* ¶43, and we will treat them as such in determining whether they are procedurally barred by virtue of Avery's prior pro se postconviction motion.

¶23 That said, the majority of Avery's ineffective assistance of trial counsel claims are *not* based on investigations that Avery, now represented by counsel, was only recently able to perform.[8] On the other hand, we have identified

[8] There are a number of claims, some overlapping, that cannot be said to be based on new scientific or forensic experiments or investigations by Avery's experts, and which we therefore will not address except to list here. Several of these claims relate to issues that Avery's new experts did explore—and which we discuss in more detail below—but the claims in this list are not themselves dependent on the results of new investigations. Several of these claims also appear, superficially, to be based on some new test or experiment (such as a recreation with a key and a bookshelf), but, crucially, these claims are not dependent on Avery's ability to hire new experts, spend money on new tests, etc. We are allowing Avery to overcome the procedural bar of his 2013 petition by demonstrating that he did not have the resources to earlier uncover the factual bases for his claims, but this cannot extend to simple experiments or recreations that require no expert contribution and/or that could have been easily conducted at some point prior.

(continued)

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seven claims, all premised on the results of forensic testing, that could conceivably fall in this category. So as to address, as nearly as allowable, the merits of his motion, we will assume that Avery has alleged a sufficient reason for not raising these seven claims in his 2013 motion. These claims are that trial counsel was ineffective for failing to:

1. Present a blood spatter expert, who would have found that Avery's blood was planted in the RAV4.

2. Present a blood spatter expert, who would have found that Halbach was not thrown in rear of the RAV4 after being fatally injured.

3. Present a blood spatter expert, who would have determined that the theory counsel presented at trial as

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These claims are that trial counsel was ineffective for failing to: (1) cross-examine some of the State's expert witnesses instead of retaining their own; (2) thoroughly investigate other suspects so as to identify a suspect meeting the requirements of *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984); (3) use available evidence supporting the theory that the RAV4 was moved onto Avery's property by the real killer; (4) investigate Avery's pre-trial belief that his blood was taken from blood drippings in his trailer sink and planted in the RAV4 (this claim, standing alone, does not rely on new investigations; we discuss related claims below); (5) present a DNA expert's opinions about blood being planted in the RAV4 (Avery does not indicate that current postconviction counsel retained such an expert; counsel did retain a "blood spatter expert," whose findings form the basis for other claims discussed below); (6) demonstrate that Halbach's key was planted in Avery's bedroom, by recreating how the key was found; (7) demonstrate that the RAV4 key found in Avery's trailer was a subkey or secondary key, as should have been evident from the 1999 Toyota RAV4 manual; (8) detect and raise a Fourth Amendment challenge regarding DNA testing that allegedly violated the scope of a search warrant; (9) investigate a "chain of custody fabrication" that allegedly allowed law enforcement to illegally collect and then plant Avery's DNA on the RAV4 hood latch (we discuss below claims based on the results of experiments on the RAV4 hood latch); (10) present an expert on police practices and investigations, who would have demonstrated errors in the handling of the investigation; (11) conduct "a simple experiment" to demonstrate that a witness could not have smelled burning plastic (Halbach's electronics and camera) in Avery's burn barrel, as the witness testified to at trial; and (12) investigate "a variety of topics," all based on evidence known to counsel before trial. Avery also argues that Halbach's ex-boyfriend was the real killer, but he does not present any cognizable claim based on this argument. That is, Avery speculates that the ex-boyfriend meets the *Denny* "legitimate tendency" test for introducing trial evidence that a third party committed the crime, but without pointing to any true newly discovered evidence, explaining why trial counsel rendered ineffective assistance during his *Denny* hearing in this regard, or otherwise demonstrating why such conclusion entitles him to a new trial.

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to how Avery's blood was planted in the RAV4 was untenable.

4. Present a trace materials expert, who would have found that the RAV4 key recovered from Avery's bedroom was Halbach's subkey or secondary key.

5. Present a DNA expert, who would have found that Avery's DNA was planted on the subkey by law enforcement.

6. Present a DNA expert, who would have found that Avery's DNA was planted on the RAV4 hood latch.

7. Present a forensic fire expert, who would have found that Halbach's body was not burned in Avery's burn pit

Merits of Avery's claims of ineffective assistance of trial counsel

¶24 We now turn to whether Avery's ineffective assistance of trial counsel claims have alleged "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle [him] to the relief he seeks," *see* ***John Allen***, 274 Wis. 2d 568, ¶2, bearing in mind that he is not entitled to a hearing where the record conclusively demonstrates otherwise, *see* ***Balliette***, 336 Wis. 2d 358, ¶18. In short, Avery must show that a hearing would not be frivolous. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶64.

¶25 Avery cannot make this showing. First, he has wholly failed to demonstrate deficient performance: that trial counsel's "representation fell below an objective standard of reasonableness" by counsel's not retaining experts similar to those he later retained. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶40 (citation omitted). Avery apparently assumes that his findings speak for themselves and that, given the strength of his later claims, the necessity for such experts should

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have been obvious at the time of trial.[9] Avery also assumes, again without explanation, that any experts retained by trial counsel would have reached the same conclusions as his later experts. But even accepting these premises, Avery has not demonstrated prejudice: that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.*, ¶41 (quoting *Strickland*, 466 U.S. at 694).

¶26 Avery's first three claims concern trial counsel's failure to retain a blood spatter expert. Avery argues in his motion that counsel was ineffective because such an expert would have found that his "blood was planted in the RAV4." His retained expert's actual findings, however, are not nearly so conclusive. The expert did not conclude that Avery's "blood was planted" or rule out Avery as the source of the blood. Rather, he determined that the presence of Avery's blood was "consistent with being randomly distributed from a source because his blood is present in some locations but absent in some [other] reasonably anticipated locations" and that "[t]he absence of blood stains in these

[9] Relatedly, Avery fails to demonstrate how the defense strategies that trial counsel did pursue rendered counsel's performance constitutionally deficient. As an example, he points to trial counsel's failure to obtain a blood spatter expert but does not address why counsel's chosen strategy for explaining the presence of his blood in the RAV4 represented deficient performance *at the time of trial*, without the benefit of hindsight. This is a repeated shortcoming in Avery's briefing, both to the circuit court and on appeal, and represents exactly the type of "Monday morning quarterbacking" that we strive to avoid in evaluating a claim of ineffective assistance of counsel. *See Weatherall v. State*, 73 Wis. 2d 22, 25-26, 242 N.W.2d 220 (1976) ("[P]ostconviction counsel ... stress[es] what he would have done differently had he conducted the defense at time of trial. Our court has called this hindsight-is-better-than-foresight approach to be 'Monday-morning quarterbacking' and has made clear that ... it is the right of a defendant and trial counsel to select the particular defense, from among the alternatives available, upon which they elect to rely." (footnotes and citation omitted)); *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.").

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locations is inconsistent with an active bleeder" (the State alleged at trial that Avery's finger was actively bleeding while he was in the RAV4). The expert further determined that the bloodstains were "consistent with an explanation other than Mr. Avery being in the RAV4 and depositing his blood in those locations with his actively bleeding cut finger."[10]

¶27 Certainly, these conclusions tend to support Avery's general theory that he was framed, and their presentation may have been useful at trial. But Avery's burden in a postconviction motion is not merely to point to helpful evidence but to show how its introduction at trial could reasonably have led to a different outcome. *See Strickland*, 466 U.S. 668 at 694. He cannot meet this burden by misrepresenting the expert's results as "demonstrating" that he was framed. Absent additional facts or argument, we cannot assume that such measured support for Avery's frame-up theory would have led to an acquittal.

¶28 Next, Avery argues that counsel was ineffective because a blood spatter expert would have refuted the State's narrative that Halbach was thrown in the rear of the RAV4 after being fatally injured. Avery asserts that, to the contrary, Halbach "was struck on the head after she opened the rear cargo door" and was then "struck repeatedly by" a mallet or hammer—without explaining why

[10] For the purpose of this motion, we accept that these conclusions are based on sound methods. It is unclear, however, how this expert determined that a person actively bleeding in the RAV4 would have left a different blood pattern than what was found in Halbach's vehicle. According to the expert's affidavit referenced in the June 2017 motion, he recreated how blood could be taken from Avery's sink and selectively planted in the RAV4. The June 2017 motion states that (presumably some different) "blood spatter experiments conducted with actual blood on the subject's middle finger conclusively demonstrate that the blood would have been deposited on" additional locations within the RAV4. That experiment is not described in the referenced affidavit, however, so we do not know the methodology supporting this conclusion.

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an alternative finding as to how she was killed supports his theory that he was framed.

¶29 Third, Avery contends that a blood spatter expert could have advised counsel that its trial strategy for explaining the presence of his blood in the RAV4 was flawed (i.e., that such strategy would have failed to persuade the jury). This assertion is entirely speculative; as a matter of law, such guesswork falls well short of demonstrating ineffective assistance of counsel.

¶30 Fourth, Avery argues that counsel was ineffective for not retaining a trace materials expert, who would have found that the RAV4 key recovered from Avery's bedroom was Halbach's secondary key or subkey. But it is, again, completely speculative to assume that the subkey was therefore planted (and not, instead, that Halbach herself was using her subkey and not her main key on the day of her death).

¶31 Avery's fifth and sixth claims concern the retention of a DNA expert. According to Avery, such an expert would have determined that his "DNA was planted on the key" by law enforcement. Avery again misstates the evidence. His expert analyzed DNA from "[a]n exemplar key, reportedly held by Mr. Avery as if to start a car, i.e., gripped by ungloved fingers for twelve (12) minutes." The expert determined that ten times less DNA was deposited on the exemplar key than on the key recovered by law enforcement. The expert further concluded that "[i]f the ... key was indeed 'enhanced,' [i.e., tampered with] then it is likely that some ... personal item of Mr. Avery's was used for this purpose," such as "a toothbrush or a cigarette butt." Thus, once again, the findings of Avery's expert are significantly more ambiguous than what is presented in his motion. We have no reason to doubt the truth of these findings (although we note that the expert did

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not observe Avery holding the key), but simply determining that Avery deposited significantly less DNA in a controlled experiment does not indicate that Avery could not or did not deposit more DNA under other conditions, and it certainly does not demonstrate that law enforcement planted DNA on the key. Thus, even accepting the truth of these new findings, we cannot conclude that there is a reasonable probability that their introduction at trial would have led to a different result.

¶32 Avery's sixth claim is that counsel was ineffective for not retaining a DNA expert, who would have determined that DNA from Avery's sweaty hands "was never deposited [by Avery] on the RAV4 hood latch," demonstrating that "Mr. Avery was being framed." In what is becoming a pattern, Avery has misrepresented the facts. The DNA expert Avery has now hired did *not* determine that Avery "never deposited" the DNA and did *not* state that Avery was framed. Instead, the expert performed a series of experiments on an identical vehicle, wherein volunteers opened the car hood using the hood latch. Only four of the fifteen volunteers deposited DNA, and those four deposited significantly less DNA than present in the swab from Halbach's RAV4 hood latch. From this experiment, the expert extrapolated the possibility that law enforcement could have retrieved and relabeled a swab of Avery's groin (which was collected and discarded for exceeding the scope of a search warrant) as coming from the hood latch. The expert admitted, however, that "the convenience of this explanation ... and the fact that it accounts for the physical findings observed from the analysis ... does not prove evidence tampering, or more precisely, evidence reassignment." Thus, again, we are left with facts that, even if true, would not entitle Avery to relief: in a controlled experiment, the minority of volunteers who deposited sweat on the RAV4 deposited significantly less sweat than on the swab recovered by law