STATE OF WISCONSIN	CIRCUIT COURT BRANCH 3	MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

MEMORANDUM REGARDING WITHDRAWAL OF COUNSEL

BRENDAN R. DASSEY,

Case No. 06 CF 88

Defendant.

Attorney Len Kachinsky of SISSON AND KACHINSKY LAW OFFICES, appointed counsel for Brendan R. Dassey (hereinafter Dassey), submits the following as his memorandum regarding the request of Dassey for appointment of new counsel.

ARGUMENT

I. THE BURDEN OF PERSUASION REGARDING REPLACEMENT OF ONE APPOINTED COUNSEL WITH ANOTHER IS UPON THE DEFENDANT.

When Dassey first raised the issue of a new attorney during the week of May 20-27, 2006, he indicated that new counsel of choice was going to be retained. He presented the undersigned attorney with the name of a specific attorney from the Sheboygan area. The undersigned attorney thereafter confirmed that the named attorney had not been retained. Had that been the case, Dassey's right to counsel of choice would have been implicated. The court's analysis of whether to grant the request would have necessarily required greater deference to Dassey's request.

However, Dassey's actual request was for new **appointed** counsel. The court's considerations must be different. The starting point for the court's analysis is the general rules set forth in State v. Lomax, 146 Wis. 2d 356; 432 N.W.2d 89 (1988). In that case, the Wisconsin Supreme Court held that :

> In evaluating whether a trial court's denial of a motion for substitution of counsel is an abuse of discretion, a reviewing court must consider a number of factors including: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case. *United States v. Allen, 789 F.2d 90 (1st Cir. 1986); United States v. McClendon, 782 F.2d 785 (9th Cir. 1986); Hudson v. Rushen,* [*360] *686 F.2d 826, 829 (9th Cir. 1982), cert. denied, 461 U.S. 916 (1983).*
>
> We believe these factors are consistent with the factors previously set out by this court. For instance, in *State v. Johnson, 50 Wis. 2d 280, 285 n. 4, 184 N.W.2d 107 (1971),* this court stated the defendant must show "good cause" to warrant substitution of counsel.

Id., 432 N.W.2d at 90-91.

This balancing must start with a showing by the defendant of good cause for the substitution. State v. Clifton, 150 Wis. 2d 673, 684, 443 N.W.2d 26, 30 (Wis. App. 1989). Mere disagreement over trial strategy, however, does not constitute good cause. To warrant substitution of appointed counsel, a defendant must show good cause, such as conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." State v. Wanta, 224 Wis. 2d 679, 703, 592 N.W.2d 645, 656 (Wis. . App. 1999). At this point, no such good cause has been established in the record. The undersigned attorney is duly qualified, has no conflict of interest with Dassey, has been in regular communication with him, conducted a through investigation of the available evidence and vigorously litigated the most significant motion in this case thus far: the motion to suppress Dassey's March 1, 2006 statement.

It may be alleged that the undersigned attorney has displayed in meetings with Dassey an insufficiently vigorous belief in his innocence. As the Affidavit Regarding Defendant's Request for New Counsel indicates, the undersigned attorney has discussed with Dassey what evidence would be presented at a trial. He has also asked Dassey to draw his own conclusions as to what the verdict would likely be unless there is substantial evidence to contradict it and inquired into leads that might help develop such evidence. As an Ohio court stated:

> Counsel's belief in their client's guilt is not good cause for substitution. " 'A lawyer has a duty to give the accused an honest appraisal of his case. * * * Counsel has a duty to be candid; he has no duty to be optimistic when the facts do not warrant optimism.' " *Brown v. United States (C.A.D.C.1959), 105 U.S. App. D.C. 77, 264 F.2d 363, 369* (*en banc*), quoted in *McKee v. Harris (C.A.2, 1981), 649 F.2d 927, 932.* " 'If the rule were otherwise, appointed counsel could be replaced for doing little more than giving their clients honest advice.' " *McKee, 649 F.2d at 932,* quoting *McKee v. Harris (S.D.N.Y.1980), 485 F. Supp. 866, 869.*

State of Ohio v. Fentress, 2002 Ohio 2477, Par. 20.

Because of Dassey's intellectual limitations, the court should not require Dassey to express reasons for his request with lawyerly precision. However, Dassey must provide at least a general reason for his request. If Dassey is unable to present at least a colorable claim of good cause for dismissal of counsel, the court's inquiry may end there. However, to protect the record, the court may then wish to address the discretionary issues that require a balancing test.

II. DISCRETIONARY FACTORS MAY FAVOR DENIAL OF DASSEY'S REQUEST FOR NEW COUNSEL.

If Dassey provides a reason for desiring new counsel that is less than that required to mandate replacement of counsel, the court may exercise its discretion under the balancing test set forth in Lomax, *supra*.

The first issue is timing. Dassey's request came just prior to the court's decision on bail

modification motions substantially similar to those raised by both the State and the defense in State v. Steven Avery pending in Branch 1. After a decision on that motion, the court intended to schedule a trial date. Avery's trial is now scheduled to begin on October 16, 2006. Plea discussions were initiated with the undersigned attorney by Special Prosecutor Kratz. It has always been uncertain whether there will be an agreement reached or not. Regardless of whether or not there is an agreement, the State has indicated that it is likely to subpoena Dassey as a witness in Avery's trial. The State could require Dassey to testify if the Avery court granted a State motion for use and fruits immunity pursuant to Sec. 972.08, Wis. Stats. If Dassey refused to testify, he would be subject to contempt sanctions.

To avoid a "taint" issue similar to that that resulted in the reversal of the conviction in U.S. v. Oliver North and others in connection with Iran/Contra cases, the State would undoubtedly prefer that Dassey's trial be conducted before the Avery one. However, the State also apparently believes it could document sufficient evidence existed prior to any grant of immunity to prevail if a trial in this case was conducted after the Avery trial. Reportedly, Avery has suggested to his relatives in monitored jail conversations that they induce Dassey to fire his attorney. If that occurred, it would cause delay and disruption in the State's case preparation in the Avery case. It would also make it more burdensome for the State to call Dassey as a witness at Avery's trial.

Dassey's request was not on the eve of either Avery's or Dassey's trial. However, it did occur at time it would substantially delay proceedings. A new attorney might take several weeks to locate and appoint. During that time, Dassey would be unrepresented. After a new attorney was appointed and made arrangements to pick up the file, the new attorney would need at least a month thereafter to review the massive quantity of discovery materials. Becoming familiar with the investigation conducted in the case would duplicate work already conducted by the undersigned

attorney at public expense.

It is also not clear of the degree to which Dassey's request for new counsel was his own idea or one cajoled upon him by others. The court may be able to get some hint of Dassey's exercise of free choice by his articulation of a reason for the request at the June 2, 2006 hearing. If Dassey's statement sounds rehearsed and if it is preceded by suspicious verbal or nonverbal communication between Dassey and others, the court may have reason to be concerned. The undersigned attorney is also concerned about reports that Avery relatives with divided loyalties have been urging Dassey to fire his attorney for months.

Finally, the undersigned attorney is not convinced there is a substantial breakdown of the attorney-client relationship. Dassey has not complained about motions not being filed, about witnesses not being contacted, about lack of communication or about not getting copies of discovery materials. In fact, he declined an offer early in the case that the undersigned attorney copy at least some of the discovery materials for his use. Nevertheless, the undersigned attorney has provided Dassey with summaries of key evidence in his case and copies of defense motions and briefs.

Because of intellectual limitations and family pressures, Dassey has been reluctant to make decisions. That is hardly unique among criminal defendants. He has been informed that the key decisions in this case are his to make in spite of his age and that the undersigned attorney will honor them even if the undersigned attorney disagrees with their wisdom. That is not a breakdown in the attorney-client relationship. That is just the everyday reality of representing individuals in criminal cases.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that the court inquire of Dassey the reasons for his request for new appointed counsel and then conduct the balancing test required prior to its decision on the request. If the court decides to deny the request for the appointment of new counsel, the undersigned attorney is prepared to continue to represent Dassey vigorously within the bounds of the law. SCR 20:3.1.

Dated this 30th day of May, 2006.

SISSON AND KACHINSKY LAW OFFICES
By: Len Kachinsky
Attorneys for the Defendant
State Bar No. 01018347
103 W. College Avenue #1010
Appleton, WI 54911-5782
Phone: (920) 993-7777
Fax: (775) 845-7965
E-Mail: len@sissonlaw.com

Orig: Clerk of Courts, Manitowoc County, P.O. Box 2000, Manitowoc, WI 54221
Copy: District Attorney Kenneth Kratz, 206 Court Street, Chilton, WI 53014
Brendan Dassey, Sheboygan County Juvenile Detention Center, 527 N. 6th Street, Sheboygan, WI 53081