State of New Hampshire
Supreme Court

NO. 2006-0150

2006 TERM

JULY SESSION

LAWRENCE SLEEPER

v.

WARDEN, NEW HAMPSHIRE STATE PRISON

STATE'S APPEAL OF FINAL DECISION OF
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF PETITIONER/APPELLEE LAWRENCE SLEEPER

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

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QUESTION PRESENTED

I. Did the *habeas corpus* court properly determine that the comments by some jurors gave rise to a colorable claim of jury error, and that due to the trial court's failure to timely investigate, Mr. Sleeper's substantial state and federal constitutional rights to a fair trial were violated?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Underlying Facts

As narrated by this Court in Lawrence Sleeper's direct appeal from his conviction, the underlying facts of this case are as follows:

> In 1997, S.R. met the defendant. At that time, she was approximately ten or eleven years old. Soon after meeting him, she was invited to accompany him on a motorcycle ride to the White Mountains. With her father's permission, S.R. went on the ride. During the return trip, the defendant stopped the motorcycle and touched S.R.'s breasts beneath her shirt. She did not tell her father, because she "didn't think he would believe [her]." As a result of this incident, the defendant was charged with one count of felonious sexual assault. Over time, S.R.'s father became close friends with the defendant. S.R. began spending time with him and his mother at the home they shared. During her visits, S.R. sometimes brought along her friend, K.H.
>
> Following the death of the defendant's mother in January 2000, S.R. and K.H. began sleeping at the defendant's home on weekends. In March, the defendant started performing oral sex on both girls during their visits. Except for a two-month period during the summer of 2000, the defendant continued performing oral sex on S.R. and K.H. at least every other weekend until the summer of 2001. These incidents resulted in two pattern counts of aggravated felonious sexual assault-one for the assaults committed against each girl.
>
> Approximately three months after the defendant began performing oral sex on the girls, he engaged in sexual intercourse with them. S.R. testified at trial that the defendant had sexual intercourse with her at least once each month, over the course of a year. K.H. testified that the defendant had sexual intercourse with her on one occasion. These events gave rise to one pattern count of aggravated felonious sexual assault for acts perpetrated against S.R., and one count of felonious sexual assault for the act committed against K.H. K.H. further testified that the defendant digitally penetrated her on multiple occasions. As a result, the defendant was charged with pattern aggravated felonious sexual assault. He was ultimately convicted on all counts.

State v. Sleeper, 150 N.H. 725, 726-27 (2004) (citations omitted) (minor formatting changes).

II. Trial

At trial, the entirety of the evidence consisted of testimony by three people: S.R., K.H., and Mr. Sleeper. No one testified for very long: S.R.'s testimony is 73 pages, K.H.'s testimony is 47 pages, and Mr. Sleeper's testimony is 44 pages. Together S.R. and K.H. provided the allegations as related by this Court.

Mr. Sleeper's testimony consisted of clear and definite denials of the various allegations. He denied he had any sexual contact with S.R (Sarah), *Nov. 20, 2002 Trial Trn.* at 167, 187, and with K.H (Katie). *Nov. 20, 2002 Trial Trn.* at 190. But Mr. Sleeper also offered an explanation of why the girls were angry with him and could have fabricated the allegations. He explained that during the period of friendship with Sarah's father (though whom he met both Sarah and Katie), he experienced the death of his mother with whom he had a close relationship and who lived with him, he was diagnosed with the same disease that had taken his mother and he underwent surgery for it, and that he also met a woman and got married. These events changed the focus of his life. Mr. Sleeper also explained that Sarah had taken his car and with it done damage to his property, and had also stolen some tools from him, which prompted Mr. Sleeper to bar the girls from his home. The motive to fabricate was the resulting falling-out with Sarah's family and the anger or abandonment the girls probably felt.

III. Jury-Room Statements Following Trial

Mr. Sleeper was convicted, and the jury was polled, just after noon on November 22, 2002. *Nov. 22, 2002 Trn. passim.* Immediately after the verdict, the trial judge (*Edward J. Fitzgerald, III*, J.) spoke privately to the jury, *id.* at 7, to thank its members for their service, and to discharge them.

During the conversation, the judge recalled that the foreperson told the judge "the prosecution put on all this evidence and we (the jury) kept asking why he (the defendant) didn't put on any evidence that he didn't do it." ORDER (Nov. 26, 2002), ***Sleeper's Appx.*** at 25. A court employee also in the jury room recalled that the foreperson said, "there was all these accusations and evidence being offered . . . but the defendant did not really offer anything or explain why he was not guilty." *Id.* From the order it is apparent that this conversation took place *before* the jury was discharged. *Id.* ("Immediately following the jury's return of guilty verdicts . . . , the undersigned justice went to see the jury *to dismiss* them and thank them for their service.") (emphasis added).

On November 26, four days after the verdict and the trial judge's conversation with the jurors, the court issued an order notifying the parties, explaining the judge's concern that "the comments could reflect improper burden shifting on the part of the jury," and inviting the parties to file memoranda of law regarding the "use of a juror's 'testimony' to impeach a verdict." *Id.* The defendant filed a motion to reconvene the jury, to which the State objected. *State's Appx.* at 20, 30. Three months later, the court denied the motion, finding that "[t]he comments . . . do nothing more than reflect on the jury's proper function of weighing the credibility of each and every witness that testifies including the defendant and do not reflect a general burden shifting to

the defendant." ORDER ON DEFENDANT'S MOTION TO RECONVENE JURY (Feb. 18, 2003), *Sleeper's Appx.* at 27.

Mr. Sleeper took a direct appeal of his conviction to this Court. Among the questions posed in his notice of appeal was "[w]hether the trial court erred in denying the defense motion to reconvene the jury because the foreman's comments to the trial judge indicated the [] jury shifting the burden [of] proof to the defense?" NOTICE OF APPEAL, *State v. Lawrence Sleeper*, Sup.Ct.No. 2003-0254 (Apr. 20, 2003), at 3, question 4, *Sleeper's Appx.* at 28, 30. The issue was not pursued in Mr. Sleeper's brief by his appointed counsel, and the Supreme Court issued its opinion without regard to the matter. *Sleeper*, 150 N.H. at 725.

Having lost his liberty under circumstances in which the jury's application of the presumption of innocence can be questioned, *In re Kerry D.*, 144 N.H. 146, 148 (1999) ("When court action results in the loss of a constitutionally protected liberty interest, it may be collaterally attacked by way of petition for writ of habeas corpus after the time for direct appeal has expired."), for a variety of reasons Mr. Sleeper brought an original petition for writ of *habeas corpus* in the New Hampshire Supreme Court. On September 30, 2005 this Court issued an order "dismiss[ing] without prejudice to petitioner seeking relief from the superior court in the first instance." He then filed a petition for writ of *habeas corpus* in the Merrimack County Superior Court, *State's Appx.* at 1, which heard oral argument. The court (*Arthur D. Brennan*, J.) granted the writ and ordered a new trial, DECREE ON PETITION FOR WRIT OF HABEAS CORPUS (Jan. 27, 2006), *Sleeper's Appx.* at 33, which the State appealed.

Mr. Sleeper remains incarcerated in the Merrimack County House of Corrections presumably awaiting re-trial. *See*, ORDER, *State of New Hampshire v. Lawrence Sleeper*, N.H. Sup.Ct.No. 2006-0201 (July 13, 2006) (granting State's assented-to remand for hearing on bail).

SUMMARY OF ARGUMENT

Mr. Sleeper first notes that courts "must investigate colorable claims of improper influence on the deliberative process" and that juror comments that betray a mixed-up burden of proof constitute such a claim. He thus argues that the court erred when it failed to investigate, but rather discharged the jury and then alerted the parties.

Mr. Sleeper then points out that the court's delay in taking action cost Mr. Sleeper the ability to timely determine whether the jury acted properly, and that it put him in the position of requesting relief that is hard to get. He then suggests several investigatory procedures which could have been used before the opportunity for meaningful action had disappeared.

He then counters the State's argument that this *habeas corpus* proceeding is procedurally barred by noting that the issue raised here is different than the issue in his direct appeal. Finally, he notes the remedy for the court's breach is a new trial.

ARGUMENT

I. Trial Court's Failed its Duty to Investigate

A. Trial Court Must Take Corrective Measures When it Appears the Jury has Misconceived its Duty

Trial courts "must investigate colorable claims of improper influence on the deliberative process." *State v. Smart*, 136 N.H. 639, 659 (1993). *See also, United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 442 (1st Cir. 1993) ("When a non-frivolous suggestion is made that a jury may be biased or tainted by some incident, the [trial] court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial.") (holding that court's questioning of suspected juror was adequate investigation).

To be "colorable," or "non-frivolous" a claim must "satisfy a rather low threshold of significance." *Neron v. Tierney*, 841 F.2d 1197, 1202 (1st Cir 1988). Misapplication of the burden of proof by shifting it to the defendant in a criminal case constitutes jury error. *See In re Winship*, 397 U.S. 358 (1970); *State v. Wentworth*, 118 N.H. 832 (1978); U.S. CONST. amd. 14; N.H. CONST. pt. I, art. 15.

"Investigate" means more than just inviting memos; it means questioning those with relevant information. *Ortiz-Arrigoitia*, 996 F.2d at 436; *Neron*, 841 F.2d at 1202 (commending trial court for scheduling "prompt evidentiary hearing"); *Danaher v. Department of Labor, Licensing & Regulation*, 811 A.2d 359, 377 (Md.App.,2002) (investigate means a 'careful search' and a 'systematic inquiry') (citing dictionaries); *Tallahassee Furniture Co., Inc. v. Harrison*, 583 So.2d 744 (Fla.App. 1991) (investigate means to conduct a thorough evaluation); *In re Pennell*, 583 A.2d 971, 973 (Del.Super.1989) ("To investigate means 'to search into as to learn the facts;

inquire into systematically.'") (quoting dictionary).

"Where it appears that the jury has misconceived its duty, it is the 'imperative duty' of the court to take corrective measures." *Vatistas v. Hickens*, 121 N.H. 455, 456 (1981) (quoting *Sigel v. Boston & Maine R.R.*, 107 N.H. 8, 27 (1966)).

B. Jury-Room Statements Betray a Misconception of the Jury's Duty

According to the trial judge, the jury foreperson said, "the prosecution put on all this evidence and we (the jury) kept asking why he (the defendant) didn't put on any evidence that he didn't do it." According to another court employee, as reported by the trial judge, the juror said, "there was all these accusations and evidence being offered . . . but the defendant did not really offer anything or explain why he was not guilty."

The trial consisted of testimony by the two complainants and by Mr. Sleeper. Contrary to the State's assertions, in his testimony Mr. Sleeper explained the genesis of his relationships with the complainants, Sarah and Katie, and offered possible motivations for their allegations.

Mr. Sleeper testified that he was acquainted with Sarah's father, Mike, for many years through other friends, *Nov. 20 Trn.* at 169-70, and that he and Mike became close friends in 1999. As Mr. Sleeper and Mike developed their friendship, Sarah began spending time at Mr. Sleeper's house. During that period, Mr. Sleeper's elderly mother was alive and living in Mr. Sleeper's house. She also enjoyed visits by Sarah, who sometimes brought her friend Katie. *Nov. 20 Trn.* at 175. The relationships among the families grew so that it was like an extended family, including exchanges of gifts on birthdays. *Nov. 20 Trn.* at 198.

Mr. Sleeper explained that he was employed in the construction industry and didn't have to work on weekends and during longer periods in the winter. *Nov. 20 Trn.* at 165, 177. Mike's

work frequently took him out of state on weekends. *Nov. 20 Trn.* at 173-75 Consequently, Sarah frequently spent nights at Mr. Sleeper's home. *Nov. 20 Trn.* at 199.

Several events occurred which soured the relationships, however. First, Mr. Sleeper's mother was diagnosed with cancer in the summer of 1999, and died in January 2000. Second, Mr. Sleeper was also diagnosed with cancer a month after his mother's death, and he underwent surgery for the condition in July 2000. Third, during this same period, Mr. Sleeper met a woman, Elaine, and began dating her in May 2000. Elaine moved into Mr. Sleeper's home in June 2001, and they got married in September, 2001. *Nov. 20 Trn.* at 188-90. Fourth, Sarah and a friend took Mr. Sleeper's car, drove it, and caused some damage to his driveway. *Nov. 20 Trn.* at 184. Similarly, Sarah and a friend apparently stole an expensive tool from him. *Nov. 20 Trn.* at 184, 206. These two incidents resulted in what Mr. Sleeper considered a breach of trust.

His mother's death, his own illness, the beginning of a relationship with a woman who shortly became his wife were large events in Mr. Sleeper's life, and left him with less time and patience for Sarah. *Nov. 20 Trn.* at 186. That, combined with the incidents involving his car and tools, caused Mr. Sleeper to ban Sarah from his house. *Nov. 20 Trn.* at 183. This apparently caused a rift among the formerly close families.

The jury-room statements following Mr. Sleeper's trial may be ambiguous. And there is little doubt, as the State points out, that the jury had to evaluate the credibility of the three witnesses. But the statements are so at odds with Mr. Sleeper's testimony – he *did* offer "evidence that he didn't do it," *did* "explain why he was not guilty," and *did* suggest a motive for the girls' falsehoods – that the jurors' comments cast doubt on the propriety of their deliberative process. To the extent that the trial court record is relevant in this *habeas* proceeding, it cements

the *habeas* court's finding that the jurors' comments are not merely about weighing credibility, but that they call into question the jury's understanding of the burden it was supposed to apply.

In any event, the comments raise a significant enough concern to warrant an investigation, and the trial court's incantation that it was ruling "[i]n the context of this case" does nothing to dispel it. Even if there were to be an ultimate determination that no improper burden shifting occurred, the court erred by not providing a forum for questioning those who were there.

II. Discharging Jury With Only the Possibility of Reconvening Prejudiced Mr. Sleeper

By discharging the jury and *then* calling for requests for remedies, the court put Mr. Sleeper at a severe disadvantage.

A. General Rule is that Jurors Cannot be Recalled

The general rule is that jurors cannot be recalled, and the logic for the rule is persuasive and aged:

> If it were once settled that the affidavits of jurors could be received to prove that they had misunderstood the instruction given them by the court, and that such misunderstanding was a legal ground for granting a new trial, the consequences would be most mischievious. For a very little tampering with individual jurors after the trial would enable any party to procure such affidavits and no verdict could be permitted to stand.

Tyler v. Stevens, 4 N.H. 116, 118 (1827).[1]

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[1]At some point after announcing its verdict, the concern for biasing the jury noted in cases such as *Tyler v. Stevens*, 4 N.H. 116 (1827), becomes overwhelming. Courts differ greatly regarding what that point is. It may be determined by the formal pronouncement of discharge, *see e.g., State v. Dunbar*, 772 A.2d 533 (Vt.,2001); *People v. McGee*, 636 N.W.2d 531 (Mich.App.,2001); *Commonwealth v. Brown*, 323 N.E.2d 902 (Mass. 1975); *West v. State*, 92 N.E.2d 852 (Ind. 1950); *Clark v State*, 97 SW2d 644 (Tenn. 1936) (jury could not be recalled after it had been formally discharged regardless of whether members consorted with public), by whether the verdict is deemed complete and accepted by the court, *see e.g., People v. Lee Yune Chong*, 29 P. 776 (Cal. 1892), by whether the jury has separated and had an opportunity to be influenced by outside interests, *see e.g., Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926), *cert. denied*, 271 U.S. 681 (although judge had told jury it was discharged, jury recalled as it was "still not dispersed" and "no one has spoken to them"); *Montanez v. People*, 966 P.2d 1035 (Colo. 1998); *State v. Green*, 995 S.W.2d 591 (Tenn.App. 1998) (jury could not be recalled even though were being escorted by bailiff who reported no jurors had conversed with public, because jury had opportunity to do so); *People v McNeeley*, 575 NE2d 926 (Ill.App. 1991) (jury recalled where members were still under control of bailiff and in the courtroom); *State v Fornea*, 140 So 2d 381 (La. 1962) (jury recalled when members still in jury box, no evidence that any had spoken to outsiders), by whether the jury had actually "thrown off their characters as jurors, and had mingled with their fellow citizens free from any official obligation," *State v Edwards*, 552 P2d 1095 (Wash.App. 1976) (jury could be recalled even though discharged because had not actually had any contact with outsiders); *People v. Lee Yune Chong*, 29 P. 776 (Cal. 1892), by whether the party opposing reassembly could prove contamination actually occurred, *Masters v. State*, 344 So 2d 616 (Fla.App. 1977) (recall several minutes after discharge where no evidence of outside influence), by whether the members of the jury left the presence of the court, *see e.g., Hayes v. State*, 214 So.2d 708 (Ala.App.1968) (no reassembly where jurors left the court's "immediate, continuous control"); *People v. Rushin*, 194 NW2d 718 (Mich.App. 1971) (reassembly not allowed where jurors had left the courtroom); *Melton v. Commonwealth*, 111 S.E. 291 (Va. 1922) (reassembly not allowed where jurors had left the "presence of the court"), by a measure of time during which the jury is out of the presence

(continued...)

B. Exception is Narrow and Burden to Overcome General Rule is Heavy

The State accurately adverts, however, that the general rule contains an exception which allows juries to be recalled for the purpose of investigation.

But the exception is narrow, and the defendant bears a heavy burden to overcome the general rule. "Of course the power of sending out a jury for a further consideration, after they had once separated, with the understanding that their duties had been discharged, should be very sparingly and cautiously exercised." *Nims v. Bigelow*, 44 N.H. 376, 381 (1862) (emphasis added).

C. Exception Rarely Applied in Criminal Cases

There is no known application of the exception in criminal cases in New Hampshire. In *State v. Cross*, 128 N.H. 732, 738 (1986), cited by the State, a week after the conviction the jury foreperson "was in the venire panel from which a jury was to be chosen for another criminal case." "[T]he juror indicated a belief that a defendant's failure to testify would be some indication of guilt, although he was uncertain whether his views would affect his judgment." Because the juror "was not asked whether this belief would prevent him from applying the correct constitutional standard, a matter of real significance in light of his statement that he 'agreed' with

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[1](...continued)
of the court, *West v. State*, 340 S.W.2d 813 (Tex.Crim. 1960) (reassembly allowed where separation was "momentary"), or by determining whether the defect in the verdict can be characterized as technical or substantive, *see e.g., Commonwealth v. Johnson*, 59 A.2d 128, 130 (Pa.1948) ("In some instances the jury may be reassembled to correct or amend their verdict when the defect is merely one of form, or is apparent on its face, or is of such nature that the court itself could have corrected it without the aid of the jury."); *Curry v. Commonwealth*, 406 SW2d 733 (Ky. 1966) (allowing recall for correction of defect in form of verdict one day after jury discharged and members had returned to community).

Whatever standard is employed, when the judge in Mr. Sleeper's case visited the jury and heard its comments, the point-of-no-return had *not* been reached. The jury was still in the custody of the court, it had not been discharged, it had rendered its verdict just moments before, the members had no opportunity to mingle with outsiders, and no actual mingling took place.

the 'concept' of the defendant's right to silence," this Court found that there was not a sufficient basis to recall the jury in the first case nor to put the *Cross* verdict in doubt. Thus *Cross* does *not* establish that the exception applies to criminal cases.

All of the known cases in New Hampshire which have recalled juries to revisit verdicts are civil. And the law in other jurisdictions betray significant doubt that the exception applies to criminal cases:

> Although the courts have, on occasion, relied on views and rationales developed in civil cases, several courts have stated salient reasons for treating criminal proceedings differently from civil trials. It has been said that it is apparent that there must be an essential difference in the return of civil and criminal verdicts because, in a civil case, the parties are in parity, but in a criminal case, the defendant is encircled by constitutional and statutory protections which are not available to the prosecution. It has been considered that a criminal defendant has the right to demand strict compliance with every requirement in his or her favor, but also has the power to waive at least some of the requirements where it is to his or her benefit to do so. In addition to the differing nature of the criminal process itself as a reason to distinguish civil cases from criminal cases, the double jeopardy clause represents a particularly profound point of departure. Courts have stated that, because the double jeopardy clause articulates a clear policy in favor of finality in criminal proceedings in favor of the accused, the courts should be slow to allow a criminal verdict to be revisited, particularly when the jury has been discharged, and the members have separated. It has been considered that, although public policy might weigh heavily in favor of a similar policy in civil cases, there is no constitutional provision which requires such a result. Based on the policies of constitutional and statutory protections traditionally afforded only to criminal defendants, some courts have considered, as a factor in determining whether a jury may be properly reconvened, whether the recalling of a jury inured to the benefit of the defendant. On the other hand, where a strict approach against allowing a jury to amend, correct, or change the verdict was applied in a prior civil case, such cases have been treated as conclusive authority on the issue in later criminal appeals.

Annotation, *Criminal Law: Propriety of Reassembling Jury to Amend, Correct, Clarify, or Otherwise Change Verdict after Jury Has Been Discharged, or Has Reached or Sealed its Verdict and Separated*, 14 A.L.R. 5th 89, §2(a).

Moreover, most of the civil cases in New Hampshire in which juries were recalled involve obvious errors in the verdicts, such as miscalculated damages awards. *See e.g., Drop Anchor Realty Trust v. Hartford Fire Ins. Co.*, 126 N.H. 674 (1985); *Bothwick v. LaBelle*, 115 N.H. 279 (1975); *Zebnik v. Rozmus*, 81 N.H. 45 (1923).

D. Prejudice Heightened by Passage of Time

The trial court was confronted with an undischarged jury whose members cast some doubt on the propriety of the verdict. Rather than take immediate action, the court discharged the jury. To remedy its impetuous discharge, the court later called for motions and pleadings. But the problem was heightened by the amount of time which had passed:

> If nothing occurred between [jurors] separation and reassembling to disturb their impartiality and fair-mindedness, there could be no objection to submitting it to them with proper instructions; but, if the circumstances showed that during this interval the jurors had become disqualified to properly discharge their duties, the question would have to be submitted to another jury upon a new trial.

Winslow v. Smith, 74 N.H. 65 (1906).

Mr. Sleeper's case was closely watched by the press, garnering daily coverage in both local and state-wide newspapers. *See e.g.*, Allison Steele, *15-year-old girls testify in rape trial; Lawrence Sleeper denies allegations*, CONCORD MONITOR, Nov. 21, 2002; Allison Steele, *Sides close arguments in Sleeper trial; Jury begins its deliberations*, CONCORD MONITOR, Nov. 22, 2002; Allison Steele, *Sleeper is found guilty on all counts; He could serve more than 40 years for felony sexual assault*, CONCORD MONITOR, Nov. 23, 2002. The court was aware of the daily press coverage. *Nov. 20 Trn.* at 207.

As the trial court pointed out in both its orders on the matter, soon after discharge the jury was polluted by its contact with the press. ORDER (Nov. 26, 2002), *Sleeper's Appx.* at 25;

ORDER ON DEFENDANT'S MOTION TO RECONVENE JURY (Feb. 18, 2003), *Sleeper's Appx.* at 27.

In its trial court memorandum of law, the State makes that point: "Three weeks have passed since the jury rendered their [sic] verdict. Any further inquiry would necessarily be limited to jurors' after-the-fact statements as to the deliberations process." MEMORANDUM OF LAW (POST-TRIAL COMMENTS BY JURORS) (Dec. 20, 2002), *State's Appx.* at 34, 41.

The passage of time before the court took any action coupled with the jury's press quotes are conditions which are likely to have "disturb[ed] their impartiality and fair-mindedness," putting Mr. Sleeper at a disadvantage in his effort to recall the jury after it had been discharged.

E. Court's Interest in Impeachment of Verdict Using Juror's Statements

Four days after the jury was discharged, in its invitation to file pleadings and memos, the trial court wrote:

> The parties may on or before December 16, 2002, file motions requesting any relief deemed appropriate . . . . Any motion ***shall*** be accompanied by a detailed memorandum of law supporting the parties' position ***with specific reference to use of a juror's 'testimony' to impeach a verdict.***

ORDER (Nov. 26, 2002), *Sleeper's Appx.* at 25. Although it is true that Mr. Sleeper was free to request any relief he wished, the court made clear that the focus of the pleadings was to be the court's authority to use jurors' statements to impeach a verdict – an issue that virtually could not be won by the defendant.

But regardless of the language of the court's invitation, the only rational relief Mr. Sleeper could have requested after the jury was discharged was to recall the jury for the purpose of impeaching its verdict; the court's interest in its authority to use the jurors' statements to impeach the verdict was logical. But by the time of the invitation, the opportunity for an immediate, pre-

discharge investigation had gone by. It was the court's *delay* in calling for a remedy that put Mr. Sleeper in a virtually unwinable legal box, and therefore further prejudiced him.

III. Investigatory Procedure and its Possible Results

What sort of investigation is appropriate depends upon the circumstances of the case. *See United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 443 (1st Cir. 1993) ("The trial judge is not . . . shackled to a rigid and unyielding set [of] rules and procedures that compel any particular form or scope of inquiry. Rather, in light of the infinite variety of situations in which juror misconduct might be discerned and the need to protect jurors and the jury process from undue imposition, the trial judge is vested with the discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was prejudicial.").

The most obvious sort of investigation in Mr. Sleeper's case would have been to subject the jury to questioning by either the attorneys or the court, and to make a record. Even more propitious would have been to summon another judge to officiate, and allow the attorneys to also question Judge Fitzgerald and the unnamed court employee identified in the court's order. Any other investigatory procedure which would have allowed the parties to determine whether the jury applied an improper burden would likewise have been adequate.

Neither of the two procedures suggested would have taken an extraordinary amount of time or judicial resources. If there was not sufficient time to immediately conduct the investigation, or another officiating judge could not have been quickly summoned, the court could have informed the jury that it was not yet discharged, that the standard keep-mum order was still in effect, *see Nov. 20 Trn.* at 207, and that jurors should return on the following Monday for further proceedings.

If after such an investigation it was apparent that the jury properly understood and applied the correct burden of proof, the court would have been correct to then discharge the jury. If,

however, after the investigation it became apparent that the jury misapplied the law, the court could have applied whatever remedy might have been appropriate: perhaps reassembling the yet-undischarged jurors, re-instructing them on the proper burden, and requesting them to re-deliberate the verdict; or taking whatever action might have been appropriate in light of the facts learned from the investigation. *See Bothwick v. LaBelle*, 115 N.H. 279 (1975); *Wisutskie v. Malouin*, 88 N.H. 242 (1936).

Whatever actions could have been taken, it is clear that the one chosen by the trial court – discharging the jury before any investigation – was not appropriate. The court did nothing to determine the meaning of the jurors' comments, or whether the jury properly applied the law. The court alerted the parties and invited motions and memos four days later; several weeks then passed during which the parties wrote and filed their pleadings. By that time, the opportunity for meaningful action had disappeared.

IV. This *Habeas Corpus* Proceeding is Not Procedurally Barred

A. Issue on Direct Appeal and Issue in *Habeas Corpus* Proceeding are Different

The issue presented in this *habeas corpus* proceeding is different than the issue litigated in the trial court and listed (but not pursued) in Mr. Sleeper's direct appeal.

By the time the trial court alerted the parties to the comments made by the jurors and their possible import, the jury had already been discharged. Thus, regardless of the language of the trial court's invitation for pleadings, the only remedy available was a request to reconvene the jury. As noted by the trial court in its invitation, a necessary subsidiary issue to reconvening the jury is the court's authority to entertain juror testimony to impeach its verdict. It is because of the *timing*, not the language of the invitation, that Mr. Sleeper's trial counsel filed a "Motion to Reconvene Jury," and that the memorandum of law in support of it dealt exclusively with the issue of impeaching a verdict with juror testimony. MOTION TO RECONVENE JURY (Dec. 16, 2002), *State's Appx.* at 20; DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONVENE JURY (Dec. 16, 2002), *State's Appx.* at 22. Likewise, the question presented, but not pursued, in Mr. Sleeper's direct appeal was "[w]hether the trial court erred in denying the defense motion to reconvene the jury . . . ." A review of the Notice of Appeal and the cases cited in it reveals that the question presented there was limited to the use of juror testimony to impeach the verdict, NOTICE OF APPEAL, *State v. Lawrence Sleeper,* Sup.Ct.No. 2003-0254 (Apr. 20, 2003), *Sleeper's Appx.* at 28, and did not include the issue presented here – the trial court's failure to immediately investigate. Both trial and appellate counsel acted properly in this regard, and the fact that ineffective assistance of counsel has not been alleged is of no moment.

This *habeas corpus* action deals with the issue of the court's duty to investigate *before* the

jury was discharged. Because the trial court dismissed the jury before alerting the parties of the comments, the opportunity for a timely pre-discharge investigation had already passed. There would have been no reason for trial counsel to raise an issue that had already been mooted by the trial judge having already discharged the jury.

In *Avery v. Cunningham*, 131 N.H. 138 (1988), Avery raised the issue of whether he was competent to stand trial after trial, but prior to his direct appeal. The matter was first litigated in a series of post-trial pleadings during which the direct appeal was held in abeyance. After several trips to the federal district court, the direct appeal was reinstated, during which the matter of Avery's competence was again litigated in the trial court. This Court held that the issue of competency was procedurally barred from being litigated in a subsequent ***habeas*** proceeding. Summarizing, this Court wrote:

> The petitioner in this case had actual knowledge of the competency issue and raised it before the trial court shortly after his conviction. He had raised it in a ***pro se***, post-trial motion before the superior court in December of 1975. In 1976 he was provided an opportunity to pursue a motion to have the superior court reconsider his motion to vacate judgment. He again presented the issue in a ***pro se*** writ of habeas corpus before the federal district court in November of 1981. Furthermore, the petitioner was provided an opportunity to file a ***pro se*** supplemental brief before this court in his 1984 appeal, at which time the issue of the denial of his motion to set aside on the grounds of incompetency would have properly been before this court for review. The petitioner, however, never filed the supplemental brief. Accordingly, since the petitioner had both knowledge of the issue and an opportunity to raise it properly before this court on direct appeal, but failed to do so, he has procedurally waived the issue for collateral review.

Avery v. Cunningham, 131 N.H. at 143.

Mr. Sleeper's ***habeas corpus*** action deals with the pre-discharge duty to investigate. The direct appeal dealt with post-discharge reconvening. There is no intellectual sleight-of-hand in making the distinction, and consequently this ***habeas*** proceeding is not procedurally waived.

B. Purpose of Procedural Waiver Does Not Apply Because Court, not Mr. Sleeper, Caused Witnesses' Unavailability

The purpose of the same-issue procedural bar rule is to:

> ensure[] an orderly and nondisruptive presentation of claims. [It] serves to discourage parties from sitting on their claims until circumstances are more advantageous. To hold otherwise might "encourage defendants serving lengthy sentences to lie back and wait, and to attack the basis of the sentencing after witnesses with relevant knowledge have died or have otherwise become unavailable, or after pertinent records have become routinely destroyed, lost or otherwise unavailable."

Id. at 143-44 (quoting *Diaz Torres v. United States*, 564 F.2d 617, 619 (1st Cir.1977)).

In Mr. Sleeper's case, it was the court's impetuous discharge, and not Mr. Sleeper, that created the unavailability-of-witnesses problem noted in *Avery* and *Diaz Torres*. The jurors individually and collectively had the relevant information regarding whether they improperly applied the burden of proof. By discharging the jurors, they dispersed and were shortly and foreseeably polluted by their contact with the press, and therefore made essentially unavailable. Had the trial court retained them while alerting the parties in accord with its duty to investigate, the jury's collective knowledge of its actions would have been preserved. Mr. Sleeper did not sleep on his rights strategically awaiting the unavailability of witnesses – the problem was created by the trial judge.

Accordingly, *Avery v. Cunningham* does not apply to Mr. Sleeper's situation, and this *habeas corpus* proceeding is not procedurally barred.

Even if *Avery* applies here, this Court should hear the merits of Mr. Sleeper's case because the jurors' comments give rise to a significant constitutional concern that the wrong burden of proof was applied during his trial.

V. Remedy is a New Trial

The only available way to restore Mr. Sleeper's right to proof beyond a reasonable doubt is by holding a new trial. *See e.g., Hackett v. Boston & M. R.* R., 89 N.H. 514 (1938) (new trial is only available remedy for jury error of improperly averaging damages); *Leighton v. Sargent*, 31 N.H. 119 (1855) (new trial based on juror use of liquor during deliberations).

The *habeas* court in this case granted Mr. Sleeper a new trial. DECREE ON PETITION FOR WRIT OF HABEAS CORPUS (Jan. 27, 2006), *Sleeper's Appx.* at 33. The decree also ordered a bail hearing. The hearing was held, but due to error by the bail court which has been acknowledged by the State before this Court, *see,* ORDER, *State of New Hampshire v. Lawrence Sleeper*, N.H. Sup.Ct.No. 2006-0201 (July 13, 2006) (granting State's assented-to remand for hearing on bail), Mr. Sleeper remains incarcerated. To ensure that he regains his liberty in a timely manner, upon affirming the writ of *habeas corpus*, this Court might consider establishing a date certain – perhaps soon after this Court's mandate – for the State to notify Mr. Sleeper whether it intends to re-prosecute.

CONCLUSION

Based on the foregoing, Mr. Sleeper respectfully requests this honorable court to affirm the issuance of a writ of *habeas corpus*, to release Mr. Sleeper from the custody of the State forthwith, and to order the State to notify Mr. Sleeper by a date certain whether it intends to re-prosecute him.

Respectfully submitted,

Lawrence Sleeper
By his Attorney,

Law Office of Joshua L. Gordon

Dated: July 31, 2006

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Lawrence Sleeper requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on July 31, 2006, copies of the foregoing will be forwarded to Nicholas Court, Esq., Office of the Attorney General.

Dated: July 31, 2006

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

APPENDIX