STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S RESPONSE TO STATE'S MOTION TO PROHIBIT EVIDENCE OF THIRD PARTY LIABILITY (*DENNY* MOTION)

I.

INTRODUCTION

The State seeks an order prohibiting Steven Avery from arguing or otherwise introducing any evidence or inference that third parties other than Steven Avery or Brendan Dassey are responsible for the homicide of Teresa Halbach unless Avery identifies "with specificity, the individual or individuals responsible for the victim's death," and further satisfies the "legitimate tendency" test of *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984). The State also seeks to extend the *Denny* test and a similar degree of specificity to prohibit any argument or evidence that evidence against Avery was "planted." (State's Motion at 1-2).

Avery acknowledges that the *Denny* rule must be satisfied should he decide to offer third party liability evidence, other than against Dassey, but denies the

State's implication that the recent United States Supreme Court decision of *Holmes v. South Carolina*[1] increased the defense burden to satisfy the *Denny* rule. Avery further rejects the State's assertion that *Denny* applies to any defense effort to challenge the authenticity of the evidence the State presents against him.

II.

ARGUMENT

A. The *"Denny"* Rule.

In *State v. Denny*, the court considered what limits reasonably could be placed on a defendant's effort to ascribe responsibility to a third party for the crime charged. The court imposed the "legitimate tendency" test as follows:

> We believe that to show "legitimate tendency," a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. On the other hand, evidence that simply affords a possible ground of suspicion against another person should not be admissible. 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. The "legitimate tendency" test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime.
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> Thus, as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible. By illustration, where it is shown that

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[1]126 S.Ct. 1727 (May 1, 2006).

> a third person not only had the motive and opportunity to commit the crime but also was placed in such proximity to the crime as to show he may have been the guilty party, the evidence would be admissible.

120 Wis. 2d at 623-24 (citations omitted). *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.[2]

However, Avery disagrees with the State's implication that *Holmes v. South Carolina* has made the *Denny* burden more difficult in this case. The State claims that *Holmes* held that "where there is 'strong forensic evidence' of a defendant's guilt, evidence of third-party liability does not raise a reasonable inference as to the defendant's innocence." On the contrary, that was the very proposition put forth by the South Carolina court which the United States Supreme Court expressly rejected in *Holmes*.

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[2]The State also cites *State v. Avery*, 213 Wis. 2d 228, 570 N.W.2d 739 (Ct. App. 1997), for the well-established proposition in *Denny* that evidence which merely affords a possible ground of suspicion against another should not be admissible. (State's Motion at 2). Avery notes the irony of the State's citation to the decision which affirmed his wrongful conviction in an earlier case after the first of his post-conviction DNA exclusions was rejected by the court of appeals - a decision which caused Avery to remain behind bars an additional six years before further DNA exclusions proved his innocence. That court of appeals decision, which imposed a higher burden of proof for a new trial on the grounds of newly discovered evidence, was recently criticized by the Wisconsin Supreme Court which expressly withdrew *Avery*'s language imposing that burden on a defendant. *See State v. Armstrong*, 2005 WI 119, ¶159-62, 700 N.W.2d 98.

In *Holmes*, the defendant was tried for the rape and robbery of an elderly woman in her home. The prosecution relied heavily on forensic evidence that appeared strong: the defendant's palm print was found inside the victim's home, fibers consistent with the defendant's sweatshirt and blue jeans were found on the victim's sheets and clothing, and blood and DNA evidence linked the defendant to the victim's underwear and tank top. 126 S.Ct. at 1730. However, as a major part of the defense,

> [Holmes] attempted to undermine the State's forensic evidence by suggesting that it had been contaminated and that certain law enforcement officers had engaged in a plot to frame him. [Holmes'] expert witnesses criticized the procedures used by the police in handling the fiber and DNA evidence and in collecting the fingerprint evidence. Another defense expert provided testimony that [Holmes] cited as supporting his claim that the palm print had been planted by the police.

Id. The defendant also tried to introduce evidence that another man had attacked the victim, but the trial court excluded the evidence, applying South Carolina's version of the *Denny* rule, on the grounds that it raised a "bare suspicion upon another." *Id.* at 1731.

The United States Supreme Court acknowledged the constitutionality of rules like *Denny* that exclude defense evidence that does not sufficiently connect the other person to the crime, but also recognized a long line of cases which hold that, whether rooted in Due Process or the Sixth Amendment, the Constitution

guarantees a criminal defendant a "meaningful opportunity to present a complete defense." *Id.* at 1731-32, *citing Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986); *Washington v. Texas*, 388 U.S.14, 22-23 (1967); *Chambers v. Mississippi*, 410 U.S.284, 302 (1973); and *Rock v. Arkansas*, 483 U.S. 44, 61 (1987). This right to present a defense is abridged by evidence rules which infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. *Id.* at 1731.

The Supreme Court in *Holmes* found that the South Carolina court had "radically changed and extended" its state court *Denny*-type rule by applying against Holmes a new rule that "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt" may or perhaps must be excluded. *Id.* at 1733-34. The United States Supreme Court expressly rejected such a rule as a violation of the defendant's constitutional right to present a defense. This South Carolina rule caused a court to determine the strength of the prosecution's case while looking only at that party's evidence: "[b]ut that logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." *Id.* at 1734. Where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of its case cannot be assessed

without making the sort of factual findings reserved to a jury. *Id.* "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 1735.

Thus Avery submits that *Holmes* does not stand for the proposition alleged in the State's motion that "where there is strong forensic evidence of a defendant's guilt, evidence of third-party liability does not raise an inference as to the defendant's innocence." (State's Motion at 2). Any consideration of the supposed strength of forensic evidence the State alleges against Avery so as to preclude him from offering evidence that another person committed the crime against Teresa Halbach would be a denial of his constitutional right to present a defense.

B. The *Denny* Rule May Not Be Applied to a Defendant's Challenge to the Authenticity or Reliability of the State's Evidence.

The State seeks to impose a radical new extension of the *Denny* rule to any defense "suggestion that evidence was 'planted.'" The State argues the Wisconsin's "legitimate tendency" test should be used to determine the admissibility of such a "far-reaching, conspiratorial theory." (State's Motion at 2-3). Avery first notes that the defendant in *Holmes* presented that very theory of defense, yet the United States Supreme Court neither required the "legitimate tendency" rule for such a defense,

nor characterized it as a "far-reaching, conspiratorial theory."[3] Second, the State cites no authority for such an extension of the *Denny* rule, and the *Holmes* decision demonstrates the risk of later appellate reversal should such a radical extension be imposed in Avery's case.

Any defendant has an undisputed right to challenge the authenticity, integrity, relevance, credibility, reliability, or bias of the prosecution's evidence. A defense theory that evidence was "planted" is nothing more than an assertion of one or more of such challenges. The party who seeks to introduce evidence bears the burden of establishing first its authenticity under § 909.01,[4] including a proper chain of custody, and then its relevance under § 904.01. Then, even if the prosecution's evidence is admissible, a defendant may challenge at trial the reliability, integrity or credibility of the evidence and prosecution witnesses involved with the evidence, including their bias.[5] That may be accomplished through cross examination, that

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[3]Though uncommon, evidence planting has been known to occur. *See, e.g. State v. Lee*, 778 So.2d 656 (La. App. 2001) (affirming motion for mistrial and suppression of evidence where trial court found prosecutor planted evidence in defendant's pants pocket); *Chamberlain v. Montello*, 954 F. Supp. 499, 512 (N.D.N.Y. 1997) (granting habeas where officer committed perjury and planted evidence linking inmate to bicyclist's death and prosecution expert framed defendant and testified falsely).

[4]*City of New Berlin v. Wertz*, 105 Wis. 2d 670, 676, 314 N.W.2d 911 (Ct. App. 1981)(question of authenticity is preliminary to question of admissibility); *B.A.C. v. T.L.G (In re Paternity of J.S.C)*, 135 Wis. 2d 280, 289-90, 400 N.W.2d 48, 53 (Ct. App. 1986) (concept of "chain of custody" is covered by rules of authentication, and must be established before expert testimony on blood tests).

[5]*State v. Williamson*, 84 Wis. 2d 370, 383-85, 267 N.W.2d 337, 343-44 (1978), *overruled on other grounds by Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729 (1981) (bias or prejudice of a witness

(continued...)

"great engine of truth,"[6] or by the defense's own witnesses, lay or expert, or by a defendant's own contradictory evidence.

Avery has no burden to prove his innocence in this case; neither must he prove that evidence was "planted" by a particular known individual, as the State argues. All Avery, or any defendant, need do is put the State to its proof. Avery can challenge the authenticity, credibility or reliability (and therefore the weight) of the State's evidence and witnesses and it is then up to a jury to decide whether there is a reasonable doubt as to his guilt. The State is free, of course, to rebut, if it can, the defense challenge to the credibility or authenticity of its witnesses, whether that challenge takes the form of an argument that prosecution evidence was "planted" or that it is for some other reason not worthy of belief.

The State cites no authority which requires a defendant to provide notice or to prove "who planted evidence against the defendant, and what evidence the defendant claims was planted." (State's motion at 3). Such a rule would impose an impossible burden when the police are suspected of wrongdoing, because they are in control not only of the physical evidence itself, but the record-keeping process designed to limit and record access to evidence, and which could therefore be

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[5](...continued)
is not collateral and may be challenged by extrinsic evidence).

[6]*State v. Stuart*, 2005 WI 47, ¶26, n. 7, 279 Wis 2d 659 695 N.W.2d 259, *quoting California v. Green*, 399 U.S. 149 (1970).

manipulated without leaving any record of tampering. A defendant may thus challenge the credibility or authenticity of potentially altered or planted evidence whether or not the source or nature or the wrongdoing can be particularly identified.

Finally, there is no requirement in the law that Avery provide any more advance notice to the State of his intent to challenge the authenticity, relevance or reliability of each and every aspect of the State's case than he does by entering a plea of not guilty. Avery has provided that notice by entering his plea of not guilty, but, if need be, freely provides the State further notice that he intends to put the prosecution to its proof[7] on each of the charged offenses in this case.

III.

CONCLUSION

Steven Avery acknowledges that he must satisfy the *Denny* rule as to evidence of third-party liability for the homicide of Teresa Halbach. But Avery denies that the *Holmes* decision extends that rule in the manner implied by the State. Finally, Avery asks this court to reject the State's attempt to impose the *Denny* rule on a defense challenge to the integrity of some of the prosecution's evidence or witnesses.

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[7]The only exception to this being the "felon" element in the charge of Possession of a Firearm by a Felon, to which Avery will stipulate.

Dated at Brookfield, Wisconsin, June 26, 2006.

Respectfully submitted,

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