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June 26, 2009

Ms. Lynn Zigmunt
Clerk of Circuit Court
Manitowoc County Courthouse
P.O. Box 2000
Manitowoc, WI 54221-2000

Re: ***State of Wisconsin v. Steven A. Avery***
Manitowoc County Case No. 05-CF-381

Dear Ms. Zigmunt:

Please find enclosed for filing in the above case an original Wis. Stat. § 809.30(2)(h) Postconviction Motion. Copies of the motion have been mailed to Judge Willis and the prosecutors.

Consistent with the court's letter of June 17, 2009, a portion of the postconviction motion is being filed under seal. In fact, as you will see, enclosed is a single motion that is divided into two parts. The first part of the motion is being filed under seal; the second part of the motion is not under seal.

Thank you for your assistance.

Very truly yours,

SUZANNE L. HAGOPIAN
Assistant State Public Defender

MARTHA K. ASKINS
Assistant State Public Defender

SLH:vmf
Enclosure

cc: The Honorable Patrick L. Willis
Circuit Judge – Branch 1

Mr. Kenneth R. Kratz
Special Prosecutor

Mr. Norman A. Gahn
Special Prosecutor

Mr. Thomas J. Fallon
Assistant Attorney General

Mr. Steven A. Avery

State Public Defender
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Circuit Judge – Branch 1
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Re: State of Wisconsin v. Steven A. Avery
Manitowoc County Case No. 05-CF-381

Dear Judge Willis:

Please find enclosed a copy of Wis. Stat. § 809.30(2)(h) Postconviction Motion, the original of which we are filing with the clerk of circuit court on behalf of Mr. Avery. Copies of the motion have been mailed to Mr. Kratz and Mr. Fallon. Consistent with the court's letter of June 17, 2009, the motion is divided into two parts, with only the first part filed under seal.

We suggest that the court set the matter for a telephone scheduling conference, perhaps during the week of July 6 or 13, for purposes of scheduling an evidentiary hearing on the motion and to determine if the court would like a written response from the state and reply from the defense before the hearing.

Thank you for your consideration of this matter.

Respectfully yours,

SUZANNE L. HAGOPIAN
Assistant State Public Defender

MARTHA K. ASKINS
Assistant State Public Defender

SLH:vmf
Enclosure

cc: Mr. Kenneth R. Kratz
Special Prosecutor

Mr. Norman A. Gahn
Special Prosecutor

Mr. Thomas J. Fallon
Assistant Attorney General

Mr. Steven A. Avery

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).

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.

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

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.

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

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

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

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***,

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.

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

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,

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

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

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.

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."