

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S STATEMENT ON THIRD-PARTY RESPONSIBILITY

I.

INTRODUCTION

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

JAN 10 2007

CLERK OF CIRCUIT COURT

The Court ordered the defense to disclose not later than January 5, 2007, whether it contends that any specific third person, other than Brendan Dassey, committed any of the offenses with which Steven Avery is charged. Later, the Court allowed until January 8. As Avery understands it, the required disclosure is governed by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). In compliance with that scheduling order, Avery now explains the application, or more accurately the inapplicability, of *Denny*.

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(1)

II.

DISCUSSION

A. *Denny Does Not Apply.*

In broad strokes, the defense Steven Avery mounts is that he did not kill Teresa Halbach, and that there at least is 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. Investigative bias against Steven Avery,¹ though, caused law enforcement officers from the start to focus disproportionately on him, to the exclusion of others whose motives, opportunity, and direct connection to the place of the crime were no less than Avery's. That same bias, and quite possibly the perpetrator's recognition of the bias and ensuing decision to exploit the bias, led either law enforcement officers or the perpetrator(s), or both, to plant evidence (including but not limited to Avery's blood in Teresa Halbach's Toyota) that cast suspicion on Steven Avery and further channeled law enforcement attention his way. The question is whether *Denny* speaks to that defense.

¹ That investigative bias stemmed from Avery's federal lawsuit against Manitowoc County and members of its Sheriff's Department related to his 1985 wrongful conviction for rape. Further, the investigative bias was a continuation of, and was confirmed by, the investigative bias that led to that wrongful conviction in the first place. The \$36 million lawsuit and the embarrassment to the Manitowoc County law enforcement community — indeed, embarrassment to the state's law enforcement community at large — of Avery's subsequent exoneration only reinforced and enhanced in 2005 the bias evident in the 1985 wrongful conviction.

On *Denny's* own terms, it applies when a criminal defendant seeks to present evidence that others may have had a motive to commit the charged crime. *Denny*, 120 Wis. 2d at 621, 622, 357 N.W.2d at 16. In that setting, the Wisconsin Court of Appeals adopted a "legitimate tendency" test of relevance (not as stringent as the California "substantial evidence" test that it considered, *see id.* at 622, 357 N.W.2d at 16, citing *People v. Green*, 27 Cal. 3d 1, 164 Cal. Rptr. 1, 609 P.2d 468 (1980)) that requires proof of motive, opportunity, and direct connection. *Denny*, 120 Wis. 2d at 625, 357 N.W.2d at 17. Although the Wisconsin Supreme Court never has adopted *Denny*, neither has the high court undermined it.² As Avery discusses below, however, the Wisconsin Supreme Court also has refused to extend *Denny* in a setting similar to the facts here. *See State v. Scheidell*, 227 Wis. 2d 285, 295-97, 595 N.W.2d 661, 667-68 (1999).

1. For several reasons, *Denny* still is a poor fit with this case. First, on either the prosecution side or the defense side, possible motives are very murky here. Avery does not propose to suggest that anyone had a motive to kill Teresa Halbach. It is in part the very *lack* of motive, on the part of anyone, that makes this case so gripping and disturbing. The decision not to prove another's motive to kill Ms. Halbach in itself takes this case out of *Denny*.

² Avery notes that *Denny* arguably is a reasonable modification of *Lasecki v. State*, 190 Wis. 274, 208 N.W. 868 (1926), which it discusses.

Further, the absence of available proof of motive as to anyone to kill Teresa Halbach — including motive of the two people the state has charged — highlights the inapposite quality of *Denny* here. The prosecution, which of course bears the burden of proof, has no obligation to prove motive in the end and need not offer a shred of evidence bearing on motive. *See generally* Wis. JI-Crim 175; *State v. Berby*, 81 Wis. 2d 677, 686, 260 N.W.2d 798, 803 (1977) (cited in the comment to the jury instruction). That so, it is hard to understand why the accused, who bears no burden of proof and is less well situated to investigate motive than the law enforcement agencies of the state, should by contrast be required to offer proof of the motives of another.

This disparity in evidentiary thresholds is especially troubling in this case. The state has no clear theory on why Steven Avery would have had a motive to murder Teresa Halbach. True, the counts added after the state charged Brendan Dassey suggest sex as a motive, but Dassey's statements in fact claim only that he, Dassey, had sex with Teresa Halbach.³ The state apparently has no other evidence at all suggesting a sexual assault, let alone proving one. And no other plausible motive appears in the discovery that the state has produced to date.

³ Obviously, too, Dassey's statements will not be admissible at all unless he testifies at Avery's trial. *Crawford v. Washington*, 541 U.S. 36 (2004).

A recent United States Supreme Court decision makes the requirement of proof of motive even more troubling on these facts. The Supreme Court's decision in *Holmes v. South Carolina*, 126 S. Ct. 1727 (2006), does not overrule *Denny* but adds an important gloss to it. In *Holmes*, a South Carolina trial court excluded the defendant's proffered evidence that another man committed the rape, robbery and murder of an elderly woman at issue. The South Carolina Supreme Court affirmed, reasoning that the state's forensic evidence — a palm print, fibers, DNA, and blood — was strong enough that the proffered evidence of a third-party culprit did not raise a reasonable inference of the defendant's innocence. *Holmes*, 126 S. Ct. at 1731.

The United States Supreme Court reversed. Although the Court had no general objection to common rules limiting defense evidence of a third-party culprit to that which has probative value outweighing factors like unfair prejudice, confusion of issues and the like, *id.* at 1732 (and the Court cited *Denny* approvingly with cases from many other states, *id.* at 1733 n.*), the South Carolina rule instead was unconstitutionally arbitrary and disproportionate to its purposes. *See id.* at 1731, 1735. Specifically, "the rule is 'arbitrary' in the sense that it does not rationally serve the end" that third-party guilt rules were designed to advance. *Id.* at 1735. The reason is that the South Carolina rule nowhere focused on the probative value

or potential adverse effects of the defendant's proffered evidence; it focused only on the apparent strength, standing alone, of the prosecution's case. *Id.* at 1734.

Applying *Denny* here would be no less arbitrary or disproportionate to the legitimate purposes of rules touching upon the constitutional right to present a complete defense. *See id.* at 1731. Where it is true both that the possible motives for a crime are obscure, or the crime may be motive-less and random in that sense, and that the state bears no burden of showing motive as a predicate to offering evidence of Z's guilt, it is arbitrary and imposes an unjustified burden on the right to present a defense to require of Z a showing of a motive that is unknowable and may not exist before he may offer evidence of X or Y's guilt. The disparity in these evidentiary gateways is arbitrary and indefensible, especially where, as here, the requirement of showing motive may be an insuperable obstacle to both parties.

In any event, the Wisconsin Supreme Court already has refused to extend *Denny* to "fit a situation where the defendant seeks to show that some *unknown* third party committed the charged crime based on evidence of another allegedly similar crime." *Scheidell*, 227 Wis. 2d at 296, 595 N.W.2d at 667 (italics in original).⁴ One of the reasons *Scheidell* cited for not extending *Denny* was the virtual

⁴ Instead, the Wisconsin Supreme Court held that the ordinary *Whitty/Sullivan* three-step analytical framework applies when the defendant seeks to offer other acts evidence committed by an unknown third party to suggest that the unknown third party, not the defendant, was the perpetrator of the charged crime. *Scheidell*, 227 Wis. 2d at 305-06, 595 N.W.2d at 672.

impossibility of satisfying either the motive or opportunity prongs of the *Denny* test when the third-party culprit is unknown. *Id.* at 296-97, 595 N.W.2d at 667-68. This case is very similar. Several members of Avery's extended family as well as customers were on the Avery Salvage Yard property during the approximate time that Teresa Halbach likely was there. In that general sense, Avery can establish their opportunity — to about the same extent that the state can establish Steven Avery's opportunity. But he cannot know the motive if one of them killed Ms. Halbach, because he has no way to know which of them may have done it or why.

Finally, the crimes alleged here are not offenses, on the facts of this case, that necessarily limit guilt to one person. Quite to the contrary, even the state contends that at least two people, Steven Avery and Brendan Dassey, participated culpably. For that matter, given the apparently extensive efforts to conceal the crime or crimes (such as burning Teresa Halbach's body and hiding her car), there seems no reason why the number of perpetrators necessarily is capped at two. *Denny* is not matched well to this sort of situation, in which two or more bad actors may have had very different roles in the offense or offenses, or partial involvement, and also may have conducted themselves more as accessories than as classic principals. While concededly not limited by its own terms this way, *Denny* appears to contemplate a simpler, binary 'not me — him' defense.

2. As a categorical matter, *Denny* does not apply here for a distinct additional reason. An accused always is free to rely on reasonable doubt in an American criminal trial. Like any other accused, Avery may choose not to try to prove that X or Y, whether known or unknown, killed Teresa Halbach, but rather to demonstrate to the jury that the state has failed to prove beyond a reasonable doubt that Avery killed her. To the extent that there are available inferences that X or Y could have killed her (that is, had the opportunity and were in proximity at the right time) and that the state fell short in its investigative efforts to exclude those persons, Avery may rely in part on those inferences. This Court recognized as much in its July 10, 2006, order as to “planted” evidence, albeit in the slightly different context of a frame-up. ORDER REGARDING STATE’S MOTION PROHIBITING EVIDENCE OF THIRD-PARTY LIABILITY (“DENNY” MOTION) ¶ 3 (July 10, 2006).

Here, of course, the state likely will sponsor evidence that various members of the Avery and Janda extended families were present on the salvage yard property during the afternoon hours of October 31, 2005, at or about the time that Teresa Halbach visited the property. The state also likely will adduce evidence that customers came and went during the same time period. For a crime that either is without motive or at least had an unknowable or obscure motive, the opportunity and direct connection to the place of the crime all are about equivalent for every

person at the salvage yard or near the road Ms. Halbach would have traveled during the relevant time period. With the state offering such evidence, the Court hardly could preclude cross-examination or other evidence tending to establish (a) the presence, opportunity, and proximity of such persons, and (b) the relative lack of scrutiny that law enforcement officers gave them, as compared to Steven Avery. *Denny* clearly was not designed to preclude such evidence, or to preclude argument on available inferences flowing from that evidence.

Denny, then, is inapplicable. Avery offers more only on the chance that the Court will disagree.

B. Alternative *Denny* Proffer.

If the Court does conclude instead that *Denny* applies here, then Avery identifies each customer or family friend and each member of his extended family present on the Avery Salvage Yard property at any time during the afternoon and early evening on October 31, 2005, as possible third-party perpetrators of one or more of the charged crimes. These include at least Andres F. Martinez, Robert M. Fabian, Jr., James J. Kennedy, Scott Tadych, Charles Avery, Earl Avery, Bryan Dassey, Bobby Dassey, Brendan Dassey, and Blaine Dassey.⁵ Avery has no way to

⁵ By naming these persons, Avery does not assert that any of them killed Teresa Halbach,
(continued...)

know whether more than one of them may have participated in some way, and specifically does not know whether Brendan Dassey was one of the participants or not. But the following proffered facts establish a legitimate tendency to believe that such persons all had motive, opportunity, and direct connection to the place of the crime. That motive, opportunity, and direct connection either was no less than Steven Avery's, or not sufficiently less to fall below the threshold of legitimate tendency that *Denny* sets.

1. *Customers and Friends.* Scott Tadych put himself at the Barb Janda trailer both at about 5:15 and at 7:30 p.m. on October 31. Barb Janda confirms that Tadych claimed to see a fire behind Steven Avery's trailer, and thought that Avery and one of the Dassey boys was there. Lisa Novachek reports that Tadych did not go to work that day. A few days later, at about the time of Avery's arrest, Tadych left work when he got a phone call from a hysterical young teenaged kid. He was a nervous wreck. Later, he told his foreman that there was some blood on

⁵(...continued)

or that they did not. The simple fact is that Steven Avery says now, as he always has, that he does not know who killed Teresa Halbach. In that respect, Avery places himself in company with everyone else in the world who was not involved in her death.

Avery does identify each of the persons here, as well as Lisa Buchner, Lisa Novachek, Keith Schaefer, Chris Graff, Christopher Avery, Trista Jimenez, K. S., K. H., A. McK., Roberto Brooks, Dawn Hauschultz, and Deanna Hauschultz, as possible defense witnesses at trial. For those persons not already named in the Defendant's Witness List, Avery tenders this proffer as a supplemental witness list.

the boy's clothes and it had gotten mixed up in Tadych's laundry. CASO Report Page 687. According to Tadych's foreman, Tadych is a chronic liar and capable of the murder of Ms. Halbach or of knowing something more about it. CASO Report Pages 719-20. Later, Tadych tried to sell a .22 rifle belonging to one of Barb Janda's kids (the Dassey brothers). CASO Report Page 725. There is a .22 caliber bullet that the Wisconsin Crime Laboratory has identified as bearing Teresa Halbach's DNA. There also is a hole in a skull bone fragment consistent with a .22 caliber bullet.

Robert Fabian and Earl Avery purportedly were hunting rabbits on the Avery Salvage Yard property after either 3:30 or 4:30 p.m. on October 31 (depending on which one's statement of the time counts). Avery addresses Fabian's opportunity and connection to the crime scene below, in the discussion of Earl Avery.

Andres Martinez had been to the Avery Salvage Yard too many times to count, but denied being there on October 31. ACISS Investigative Report No. 05-1776/113 at 3, 4. Indeed, he said he had been to the salvage yard only two or three times in the preceding six months. *Id.* at 4. He denied killing Teresa Halbach. However, on November 5, 2005, he attacked his girlfriend with a hatchet. *Id.* at 3. Then, under law enforcement questioning, Martinez made a notable statement: he said that if the Avery family was saying that he killed Ms. Halbach, he would take the blame for it because he was going to spend the rest of his life in prison anyway.

Id. at 5. Martinez said he met Steven Avery once in prison in 1998, perhaps, but that they were not friends. *Id.* at 4.

Martinez's story then began to change. The following day, Martinez claimed to a Manitowoc County Sheriff's Department sergeant not otherwise involved in this investigation (Sgt. Shallue) that Steven Avery had informed him of a young girl who has come to the salvage yard on several occasions to take photographs. He claimed that Avery told him that he, Avery, was going to kill her the next time she came. Manitowoc County Sheriff's Department Summary at 1 (November 17, 2005). Martinez did not explain why he had made no mention of this the day before, and did not explain why Steven Avery would have said that, if they had met only once seven years earlier.

Twelve days later, when interviewed in the Green Bay Correctional Institution, Martinez said initially that he had changed his mind and did not want to speak. CASO Report Page 980. But he did. He now claimed to be friends with Steven Avery, and said that he "would commonly go to the junk yard [Avery Auto Salvage] sometimes as often as a couple times a day." *Id.* He now claimed that he and Steven Avery had spied on Teresa Halbach from a hill on a previous occasion (admitting now for the first time that he personally had seen Ms. Halbach) and that Avery had taken pictures of her (to date, the state has not claimed that it has

recovered any such pictures). CASO Report Page 981. He claimed that Avery said that he intended to dispose of Ms. Halbach. CASO Report Page 980. And he told an implausible story about Avery suspecting that Ms. Halbach was coming to the house to “pinpoint” Avery for a crime he did not commit. *Id.* Supposedly, Avery also said that Ms. Halbach had a “baggie” that he wanted to get. CASO Report Page 981. Asked why Avery would tell him these things, Martinez now claimed that he and Steven Avery “got along very well” and that “Steven trusted him.” *Id.* Even Martinez’s own son would not support that claim: he denied that his dad had any connection with the Averys other than purchasing parts and said that his dad never had socialized with or hung around the Averys. ACISS Investigative Report No. 05-1776/136 at 4.

A schoolgirl, though, K. S., heard from her friend A. McK. that Martinez, Dawn Hauschultz, Steven Avery and another Steven had been at a bonfire and party at the Avery residence. CASO Report Page 273. A. McK. confirmed that she heard from Dawn Hanes that Martinez and his friend Roberto Brooks were at the Avery property on October 30. K. H., another friend of A. McK., confirmed that Roberto Brooks (who dates her mother) was told by Roberto Brooks that he saw Teresa Halbach on October 30 and that “he knows all about it.” Two Rivers Police Department Detail at 3-4 (November 21, 2005). Brooks denied any connection, but

had only his unsupported claim that he was at home apparently alone most of the day on October 31, 2005. ACISS Investigative Report No. 05-1776/161 at 4. Indeed, Brooks's girlfriend, Dawn Hauschultz, contradicted him in part: she claimed that she also was at home with Brooks on Halloween and that her son Pat was at home, too, because he was recovering from surgery on his foot. CASO Report Page 327. Brooks did admit a long friendship with Martinez. ACISS Investigative Report No. 05-1776/161 at 3.

Most recently, and cryptically, Martinez wrote to Inv. Mark Wiegert on December 4, 2006, that he was "sorry to inform you that there's no possible way for me to help you with the truth in Ms. Halbach case I pray for her family to get the justice they deserve." He said he felt sorry for not coming forward with what he knows about "Mr. Steve A." He ended, "Just a note to tell you that I won't be coming forward to tell what I have heard."

Martinez offered an alibi. His girlfriend's 16-year old son claimed that he had been together for about four hours the afternoon of October 31. CASO Report Page 325. He also claimed to have gone trick-or-treating that evening together. Why a 16-year old boy would not have been in school on a Monday afternoon, or why a 16-year old would go trick-or-treating with an adult, remain unexplored.

James Kennedy acknowledged visiting Avery Auto Salvage at about 10:00 a.m. on October 31 and speaking with Charles Avery, who told him to come back that afternoon for the part he wanted. Kennedy admitted returning at approximately 3:00 p.m. that day. Unusually, no one was in the office, which was "peculiar." Charles Avery appeared from the back side of the building within five minutes after Kennedy yelled several times. Kennedy claimed that only Charles Avery was present when he was there. He also said that he saw grayish smoke emanating from the center of the junk yard pit area. ACISS Investigative Report No. 05-1776/121 at 4.

2. *Family Members.* A number of family members were present at the Avery Salvage Yard on the afternoon of October 31, 2005. To that extent, all had the same direct connection to the place of the alleged crimes as Steven Avery. Likewise they had about the same opportunity to commit the charged offenses. And, in this crime lacking any apparent motive on the part of anyone, none of the other family members had any less motive than Steven Avery himself.

Further, though, there are some additional specific facts that bear on possible third-party culpability. Charles Avery knew that "the photographer" was expected that afternoon, for Robert Fabian admitted overhearing him ask Steven about her. CASO Report Page 208. Charles also knew the purpose of her visit. *Id.*

Again, James Kennedy admitted arriving at the salvage yard at about 3:00 p.m. on October 31, and no one was in the office. ACISS Investigative Report No. 05-1776/121 at 4. That was peculiar and unusual. *Id.* Charles Avery appeared within five minutes from the back side of the building. *Id.* A grayish smoke arose from the center of the junk yard pit area. *Id.* Charles Avery's trailer home is the closest physically to the location in which Teresa Halbach's Toyota was discovered. Moreover, the most likely route down to that location would have taken the Toyota directly past Charles's trailer. Earl Avery told police later that Charles Avery actually had spoken to a woman on the phone, whom he believed was associated with Auto Trader magazine – the magazine that employed Ms. Halbach. CASO Report Page 75.

Note that both Charles and Earl Avery have charging histories of sexually assaultive allegations.

Robert Fabian also asserted that Earl Avery would have known on Monday night, October 31, had Teresa Halbach's car been in the location in which it was discovered, for he knows every car in the yard. *Id.* Like Steven Avery, Fabian also believed that Earl Avery "seemed different" on October 31. CASO Report Page 209. It appears likely that Earl Avery returned to the salvage yard from Rick Royer's repair shop in Manitowoc, driving a flatbed car hauler, sometime after lunch or in

the early afternoon. ACISS Investigative Report No. 05-1776/125 at 4. A flatbed car hauler also could have been used to move Ms. Halbach's Toyota to the place in which it was found. Earl's whereabouts on the salvage yard are unknown until Fabian says that he arrived to hunt rabbits with Earl, perhaps at about 4:30 p.m. CASO Report Page 208. Fabian was vague about his earlier contact with Earl that day, saying only that he "may" have called Earl around 2:00 to 3:00 p.m. on October 31. CASO Report Page 319. But the rabbit hunt that Earl and Fabian claim to have undertaken that afternoon (at and after darkness) would have had them together all over the Avery Salvage Yard property, with one or more long guns appropriate for small game, presumably. The state's theory is that Teresa Halbach eventually was shot with a .22 caliber rifle – a gun fully consistent with a rabbit hunt. They would have been largely unobserved by others. For his part, Earl admitted driving his mother's golf cart with Fabian that afternoon at 3:30 p.m. – one hour before Fabian admits being at the salvage yard. Earl also admitted driving right past the location at which Teresa Halbach's Toyota later was discovered. CASO Report Page 74. A cadaver dog later alerted on a golf cart parked in a small garage behind the main residence (the home of Allan and Delores Avery) on the salvage yard property. Great Lakes Search and Rescue Canine, Inc. Report, Narrative at 2.

The Dassey brothers all were present in the trailer of their mother, Barb Janda, at some points during the afternoon of October 31. That trailer is the closest to Steven Avery's trailer, separated from it by a distance of perhaps 50-100 yards and sharing the same dirt lane. When Barb Janda, mother of the four Dassey brothers, arrived home at 5:00 p.m., she reported that all four brothers were at home. ACISS Investigative Report No. 05-1776/11 at 2. Burned human bone fragments were found in a burn barrel behind the Janda trailer. Forensic Anthropology Case Report (2 of 2) at 6; Inventory Tag No. 7964. The state, of course, contends that Brendan Dassey participated directly in the killing of Ms. Halbach and the burning of her body. But two of his brothers, Blaine and Bobby, and his mother provide an alibi for him at various points, suggesting either that he was not involved or that they also were. See ACISS Investigative Report No. 05-1776/35 at 3-4 (Blaine); CASO Report Page 518 (Bobby). Avery does not discuss Brendan further here, as the state concedes he is a proper subject of *Denny* evidence.

A school bus driver, Lisa Buchner, dropped off Brendan and Blaine together on the day the driver saw a female taking pictures of a van on the Avery Salvage Yard property at about 3:30 p.m. She did not remember whether the two

boys talked with the female photographer or not after disembarking the bus.⁶ CASO Report Page 140.

Bobby Dassey acknowledged seeing the female photographer and her SUV before he left to hunt deer with a bow on October 31. He claims that he left the Janda trailer at 2:45 or 3:00 p.m. that day. CASO Report Pages 90-91. For his part, Bryan Dassey first denied knowing anything when interviewed and then claimed, contrary to his mother's version, that he arrived home on October 31 only after supper. ACISS Investigative Report No. 05-1776/16 at 3-4. He claimed, too, that Bobby saw the photographer leave, which Bobby denied. Barb Janda did not place either Bryan or Bobby in the trailer when she arrived back home at approximately 8:00 p.m. on October 31. ACISS Investigative Report No. 05-1776/11 at 2.

III.

CONCLUSION

On its own terms, *Denny* does not apply to the defense Steven Avery mounts. He may demonstrate and argue that unknown others had no less motive, opportunity, and direct connection to the place of the crime than did he. These

⁶ Note that Buchner, who has no apparent reason to lie, places the woman who must be Teresa Halbach outside and taking pictures when Brendan and Blaine walked down the lane. Both boys could have had direct contact with her and certainly should have seen Ms. Halbach, then. Buchner does not place Steven Avery in the vicinity. This is in sharp contrast to at least some of Brendan Dassey's later statements, in which he claims that Ms. Halbach already was in Steven Avery's trailer when he, Brendan, arrived home from school.

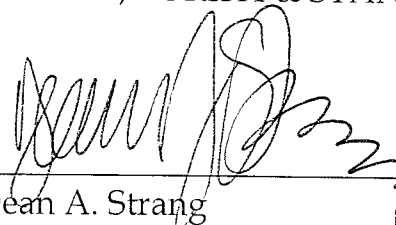
others include at least customers, friends, and members of Avery's extended family present at the Avery Auto Salvage yard in the afternoon and early evening on October 31, 2005. Further, Avery may demonstrate and argue that investigative bias caused law enforcement officers to focus on him at the outset, to the exclusion of equally or more plausible suspects in Teresa Halbach's disappearance and death. Finally, even if the Court concludes that *Denny* applies here, Avery has proffered facts sufficient under that case to permit evidence and argument concerning any or all of the persons he identifies.

Dated at Madison, Wisconsin, January 8, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

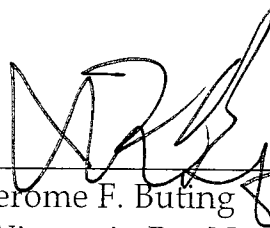
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