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# Avoiding Wrongful Convictions: Re-examining the “Wrong-Person” Defense

Lissa Griffin\*

## I. INTRODUCTION

A criminal defendant has a constitutional right to a “meaningful opportunity to present a complete defense.”<sup>1</sup> Grounded in several different constitutional provisions,<sup>2</sup> this right has been invoked as a defense to criminal charges in a variety of contexts and has been sustained by the Supreme Court on several occasions.<sup>3</sup> Probably no context, however, has been as controversial and difficult for the courts to administer as when a person accused of a crime seeks to prove his innocence by attempting to show that somebody else committed the crime.

This “wrong person” defense<sup>4</sup> was first recognized by the Supreme Court in *Chambers v. Mississippi*<sup>5</sup> in 1976 and was reaffirmed in

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<sup>1</sup> *California v. Trombetta*, 467 U.S. 479, 485 (1984).

<sup>2</sup> *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (locating the right in the Fourteenth Amendment due process clause and the Sixth Amendment compulsory process and confrontation clauses).

<sup>3</sup> See, e.g., *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Washington v. Texas*, 388 U.S. 14 (1967).

<sup>4</sup> The defense that alleges that someone other than the defendant committed the crime has had several names. It has been called the “third-party perpetrator” defense, the “third-party culpability” defense, the “alternative perpetrator” defense, and the “SODDI defense”—an acronym for “Some Other Dude Did It.” See David McCord, “*But Perry Mason Made It Look So Easy!*”: *The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 TENN. L. REV. 917, 920 (1996). The simplest name for the defense seems to be the “wrong person” defense, and that is the name that will be used in this Article. As noted herein, the defense has two parts: first, that the defendant did not commit the crime; and second, that someone else did. The defense as a whole will be referred to as “the wrong-person defense.” The evidence supporting the second prong—evidence that someone else committed the crime—will be referred to as “third-party guilt evidence.”

*Holmes v. South Carolina*.<sup>6</sup> In *Chambers*, the Court reversed a murder conviction in a case in which the defendant offered convincing proof that he was not the killer but was prevented by the trial judge's application of state hearsay rules from proving that a third person admitted several times to having committed the crime.<sup>7</sup> The Court held that the exclusion of this third-party guilt evidence violated the defendant's right to present a complete defense, a right that is guaranteed by the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment.<sup>8</sup>

Most recently, in *Holmes*, also a murder case, the Court reversed a conviction where the defendant's attempt to introduce proof that a third party committed the crime was again frustrated by state evidentiary rules. This time, the state rules prohibited the introduction of third-party guilt evidence where the prosecutor's forensic evidence, if believed, is strong.<sup>9</sup> As in *Chambers*, the Court held that the exclusion of the defendant's proof violated the defendant's right to present a complete defense.<sup>10</sup>

While the *Holmes* Court reaffirmed the constitutional status of the right to present a complete defense,<sup>11</sup> the Court explicitly declined to depart from or criticize current state trial practices that impose, under various tests, an extremely heavy evidentiary burden on an accused to prove that he is innocent by introducing proof of a third party's culpability.<sup>12</sup> However, as this Article demonstrates, the states' treatment of this wrong-person defense is confusing, inconsistent, and insufficiently protective of a defendant's constitutional right to present a complete defense. Indeed, state evidentiary rules typically exclude such evidence unless a defendant can establish a direct and convincing connection between the third party and the crime.<sup>13</sup> Moreover, even when a defendant is able to offer substantial proof of a third party's culpability, state evidentiary rules typically exclude such evidence on the ground that it will confuse and mislead the jury and thereby prejudice the orderly and efficient operation of the trial.<sup>14</sup> When, under the lenient abuse-of-discretion standard for evi-

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<sup>5</sup> 410 U.S. 284 (1973).

<sup>6</sup> 547 U.S. 319 (2006).

<sup>7</sup> *Chambers*, 410 U.S. at 284.

<sup>8</sup> *Id.* at 285, 302–03.

<sup>9</sup> *Holmes*, 547 U.S. at 323–24, 329, 331.

<sup>10</sup> *Id.* at 331.

<sup>11</sup> *Id.* at 324.

<sup>12</sup> *Id.* at 326–27.

<sup>13</sup> See *infra* text accompanying notes 152–64.

<sup>14</sup> See *infra* notes 190, 210–23 and accompanying text.

dentiary rulings, the intermediate court reviews the refusal to admit third-party guilt evidence, the trial court's decision is almost always affirmed.<sup>15</sup> Ironically, then, although there is increasing documentation both anecdotally and empirically that innocent defendants are being wrongfully convicted,<sup>16</sup> the courts continue to exclude proof of a third person's culpability because either they do not believe that the prosecution has charged the wrong person or they do not want the case to be complicated by evidence of someone else's culpability.

The Supreme Court's failure to impose clear standards on the admissibility of third-party guilt evidence arises largely because the wrong-person defense is unique from other defenses. Most defenses seek to counter the prosecution's proof by showing that the defendant did not commit the crime, either because he is not the right person (e.g., alibi, misidentification, false confession, or lying witnesses), that he is not responsible for the crime (e.g., insanity or diminished capacity), or that the defendant is not guilty because the prosecution is unable to prove every element of the crime (e.g., lack of proof of intent, value, and so forth). The wrong-person defense, by contrast, has two discrete parts: first, it seeks to convince the jury that the defendant did not commit the crime, and, second, that some other person did.<sup>17</sup> The constitutional right to present a complete defense embraces both parts.<sup>18</sup> However, the states do not approach the defense as a two-part issue or as a constitutional question; rather, they evaluate it as a question of evidentiary admissibility, looking only at the second prong of the defense—the proffer of third-party guilt proof.

The lower courts' treatment of the wrong-person defense ignores not only the substantive uniqueness of the defense but also the practical difficulties facing a defendant in presenting sufficient evidence to support the defense. Rarely does an accused possess the resources required to adequately investigate and prove that someone else committed the crime. Even when a defendant offers evidence that he has been misidentified, either by impeaching an eyewitness or presenting an alibi, a defendant often lacks the ability to discover and present convincing evidence that connects the real perpetrator to the crime. To be sure, a defendant fortuitously or as a result of investiga-

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<sup>15</sup> See *infra* note 190 and accompanying text.

<sup>16</sup> See The Innocence Project, <http://www.innocenceproject.org> (last visited Jan. 4, 2009) (providing DNA exonerations count of 226 as of Jan. 4 2009).

<sup>17</sup> See, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Holmes v. South Carolina*, 547 U.S. 319 (2006).

<sup>18</sup> See, e.g., *Chambers*, 410 U.S. 284; *Holmes*, 547 U.S. 319.

tion may be able to offer proof that another person had the opportunity, motive, or propensity to commit the crime, that another person confessed to the crime, or that physical evidence connects another person to the crime. However, instead of considering the limited ability of a defendant to produce exonerating evidence, the courts impose a demanding evidentiary standard that mechanically excludes such evidence on the ground that it is collateral, misleading, or prejudicial to the orderly and efficient functioning of the trial.<sup>19</sup>

The lower courts should employ a constitutional analysis consistent with *Chambers* and *Holmes* that protects both states' and defendants' interests. As in the right to present a defense cases generally, the courts should balance the state's interest in reliable proof and orderly trial procedure against the defendant's constitutional right to present a complete defense. Courts should not evaluate the permissibility of a wrong-person defense by mechanically balancing the probative value of proffered evidence against the likelihood that it would create confusion. Instead, the courts should undertake a much more rigorous analysis of the evidence that recognizes the uniqueness of the wrong-person defense. First, the courts should determine whether the defendant has made a threshold showing of innocence by raising a credible claim that he is not the person who committed the crime, either through cross-examination of prosecution witnesses or defense proof. If that foundational requirement is met, the state's interest in excluding evidence against another person is diminished and the defendant's interest in supplementing his claim of innocence is increased. At that point, the balancing test should create a presumption in favor of its admissibility.

The ability of a criminal defendant to present a credible wrong-person defense is more pressing today with the mounting evidence of wrongful convictions through DNA proof.<sup>20</sup> Paradoxically, as it becomes increasingly apparent that innocent people are convicted, the courts continue to refuse to admit proof that someone else really is guilty. Moreover, although a prosecution witness is almost always permitted to point the finger at the defendant with only the barest of reliability protections and no corroboration at all, defense witnesses are routinely prohibited from pointing the finger at someone else. An evolved notion of parity—which lies at the core of due process—

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<sup>19</sup> See *infra* notes 190, 210–23 and accompanying text.

<sup>20</sup> See The Innocence Project, About Us: Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Jan. 4, 2009).

requires a fairer judicial inquiry into the admissibility of wrong-person-defense evidence.<sup>21</sup>

Part II of this Article reviews the history of the right to present a defense and closely examines the United States Supreme Court's modern analysis of that right. Part III analyzes the emergence of the right to present a defense that a third party committed the crime and concludes with a discussion of the Supreme Court's recent decision in *South Carolina v. Holmes*. Part IV then describes the current restrictive implementation of the wrong-person defense by the lower courts. Part V argues that the constitutional right to present a wrong-person defense is being insufficiently protected under current, arbitrary standards, and prescribes a constitutional analysis of the defense that is consistent with the Supreme Court's jurisprudence, more reflective of what the lower courts actually are doing, and that is likely to produce more reliable results.

## II. THE RIGHT TO PRESENT A DEFENSE

The right to present a defense has deep historical roots. Although until the late sixteenth century there was no such right, in 1589 and 1606 Parliament enacted statutes that gave a defendant a limited right to present witnesses, as long as the witnesses were not sworn.<sup>22</sup> Further, a defendant could not compel their attendance.<sup>23</sup>

The right to subpoena witnesses and to have them testify under oath was not recognized until the late seventeenth century.<sup>24</sup> To settle hostilities between England and Scotland, Parliament enacted a statute providing that Englishmen charged with crimes in Scotland would be tried in England where they could subpoena witnesses and place them under oath.<sup>25</sup> Shortly thereafter, Parliament passed another statute giving the same rights to defendants charged with treason in English courts.<sup>26</sup> Interestingly, the basis for that right was par-

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<sup>21</sup> See *infra* notes 22–38 and accompanying text.

<sup>22</sup> See Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 84 (1975).

<sup>23</sup> *Id.* In fact, until 1562, the common law courts did not even have their own power to compel the attendance of witnesses. *Id.* In that year a statute was passed that required witnesses to appear when served with process by courts of record. *Id.* Subsequently, the common law courts began issuing subpoenas. *Id.* at 84–85. They did not exercise this power in favor of defendants, however, because the courts swore only witnesses who testified favorably for the prosecution. *Id.* at 85. By permitting only prosecution witnesses to be sworn and instructing the jury to give greater weight to sworn testimony, the courts skewed the balance heavily in favor of the prosecution. *Id.* at 84–86.

<sup>24</sup> *Id.* at 87.

<sup>25</sup> *Id.* at 87 n.62.

<sup>26</sup> *Id.* at 87.

ity with the prosecution: the statute provided that defendants would have the same power as the prosecution to compel witnesses to testify.<sup>27</sup> Finally, in 1702, the right to swear witnesses was extended to defendants in all felony cases.<sup>28</sup> Compulsory process was extended by the common law courts as well.<sup>29</sup>

The right to present a defense was transported to the Colonies with other rights contained in the royal charters.<sup>30</sup> In addition, nine of the new state constitutions—all but Connecticut, Georgia, New York, and South Carolina—specifically provided for a defendant's right to produce witnesses in his favor.<sup>31</sup> As in England, the states required parity, i.e., "that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case."<sup>32</sup> Ultimately, the Sixth Amendment was drafted to protect that right and was largely uncontroversial.<sup>33</sup> Like its predecessors, the Compulsory Process Clause was intended to mean that the defendant should have a "meaningful opportunity, at least on a par with the prosecution, to present a case in his favor through witnesses."<sup>34</sup>

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<sup>27</sup> See Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1073 & nn.28–29 (1999) (citing 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2190 at 2960 (1st ed. 1904)).

<sup>28</sup> Westen, *supra* note 22, at 87.

<sup>29</sup> Thus, by the time of the revolution, Blackstone stated that "in all ca[s]es of trea[s]on and felony, all witne[ss]es for the pri[s]oner [s]hould be examined upon oath, in like manner as the witne[ss]es against him" and a defendant had "the [s]ame compul[s]ive proce[s]s to bring in [h]is witne[ss]es for him, as was u[s]ual to compel their appearance again[s]t him." 4 WILLIAM BLACKSTONE, COMMENTARIES 345, 354 (emphasis in original).

<sup>30</sup> Westen, *supra* note 22, at 91 & n.78.

<sup>31</sup> *Id.* at 94 & n.94.

<sup>32</sup> *Id.* at 95.

<sup>33</sup> During the constitutional debate, several states refused to ratify without a Bill of Rights, and four of those states specifically proposed provisions for ensuring the defense a right to present witnesses. *Id.* at 96. James Madison, the chief architect of the Sixth Amendment, recognized that he needed the support of Virginia and New York, and that neither would give their support without such a provision. *Id.* at 96–97. Nevertheless, Madison's formulation was not the same as Virginia's, which provided a "right 'to call for evidence.'" *Id.* at 97. Instead, Madison substituted the present language, possibly in reliance on Blackstone's formulations, or simply to satisfy the various states without adopting the recommendation of any single one of them. *Id.* at 97–98. Regardless, the framers adopted James Madison's draft of the Sixth Amendment, almost without debate and largely as proposed. *Id.* at 98.

<sup>34</sup> Unsurprisingly, when the first Congress implemented the compulsory process clause, it specifically articulated the parity-based right to present a defense by giving the alleged treasonor the right "to make any proof that he can produce, by lawful witness" and to have "like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution against him." *Id.* at 100–01 (citing Act of April 30, 1790, ch. 9, § 29, 1 Stat. 119

The first cases asserting a right to present a defense in the Supreme Court were decided pursuant to common law and not on constitutional grounds. The first case, *United States v. Reid*,<sup>35</sup> was an appeal from a murder conviction tried under federal admiralty law, incorporating state law.<sup>36</sup> The lower court excluded the testimony of an accomplice under a Virginia statute that excluded the testimony of an accomplice tried separately from the defendant.<sup>37</sup> The Court upheld the exclusion, ruling that the right to call an accomplice as a defense witness was neither in the Bill of Rights nor the Judiciary Act of 1789.<sup>38</sup>

Gradually the Supreme Court began to articulate due process grounds for a right to be heard in civil cases.<sup>39</sup> From there the Court also found a due process right to present a defense in criminal cases, a right that was violated by exclusion of defense evidence, but only when a defense was prohibited in its entirety. Thus, for example, in 1925 in *Cooke v. United States*,<sup>40</sup> the Court reversed a criminal conviction based on what it found to be a violation of a constitutional right to present a defense. In *Cooke*, the defendant, an attorney, was held in summary contempt based on a letter he had written to a federal judge requesting that the judge recuse himself from several related cases.<sup>41</sup> *Cooke* admitted sending the letter but was prevented at trial from making any statement in his defense.<sup>42</sup> Subsequently, he was convicted.<sup>43</sup> The Supreme Court reversed, holding that the defendant's Fifth Amendment due process right to present a defense was

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(1790) (codified as amended at 18 U.S.C. § 3005 (1970)). Shortly thereafter, in 1807, the compulsory process clause was applied in the infamous treason and misdemeanor trials of Aaron Burr. *Id.* at 101–07. In that case, Chief Justice Marshall held that if the President denied the defense access to evidence that might bear on the defendant's innocence, the prosecution should be dismissed. *Id.* at 107.

<sup>35</sup> 53 U.S. 361 (1 How.) (1852), *overruled by* *Rosen v. United States*, 245 U.S. 467, 469–72 (1918).

<sup>36</sup> *Id.* at 361–63.

<sup>37</sup> *Id.*

<sup>38</sup> Essentially, the Court dealt with state exclusion of evidence not on a constitutional basis but on the basis of state statute or the Supreme Court's supervisory powers. *Id.* at 364–66. It was not until the 1960s that the exclusion of defense evidence was presented as a constitutional issue. See *infra* notes 50–81 and accompanying text. *Reid* was overruled in 1918 by *Rosen*. In *Rosen*, the Court upheld the refusal to disqualify a government witness on the basis of a prior forgery conviction. *Id.*

<sup>39</sup> See, e.g., *Windsor v. McVeigh*, 93 U.S. 274 (1876); *McVeigh v. United States*, 78 U.S. (1 Wall.) 259 (1871).

<sup>40</sup> 267 U.S. 517 (1925).

<sup>41</sup> *Id.* at 532–34, 540.

<sup>42</sup> *Id.* at 537–38.

<sup>43</sup> *Id.* at 532.



violated.<sup>44</sup> The Court recognized a defense right “to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.”<sup>45</sup> Similarly, in *In Re Oliver*,<sup>46</sup> a state habeas corpus case, the defendant testified before a special investigatory body and was charged with criminal contempt.<sup>47</sup> At a secret contempt trial, the judge, sitting as the fact finder, found that the defendant’s grand jury testimony lacked credibility and convicted and sentenced the defendant for contempt.<sup>48</sup> The Court found a violation of the defendant’s right to a public trial and to Fourteenth Amendment due process of law because he was not given “a reasonable opportunity to defend himself . . . .”<sup>49</sup>

The 1960s saw the beginning of the Supreme Court’s modern jurisprudence on the right to present a defense. In a series of five cases culminating with *Holmes v. South Carolina*<sup>50</sup> in 2006, the Court articulated a constitutional right to present a defense that can be violated where the defense is only partially excluded.<sup>51</sup> The right is based on Fifth and Fourteenth Amendment due process as well as the Sixth Amendment rights to compulsory process and confrontation.

First, in 1961, in *Ferguson v. Georgia*,<sup>52</sup> the defendant was prohibited by a state disqualification statute from testifying in his own defense and was permitted only to give an unsworn narrative. Consistent with its practice of deciding cases based on enumerated constitutional rights where possible, the Court held that the state rule violated the defendant’s right to counsel, a right that had already been incorporated against the states through the Fourteenth Amendment’s due process clause.<sup>53</sup> Concurring in the reversal, Jus-

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<sup>44</sup> *Id.* at 537.

<sup>45</sup> *Id.*

<sup>46</sup> 333 U.S. 257 (1948).

<sup>47</sup> *Id.* at 258–59.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 273.

<sup>50</sup> 547 U.S. 319 (2006).

<sup>51</sup> *Id.* at 330–31.

<sup>52</sup> 365 U.S. 570 (1961). The statute at issue in the case was part of a larger statutory scheme that declared a criminal defendant incompetent to testify. *Id.* at 570–71.

<sup>53</sup> In fact, however, as Justice Frankfurter’s concurring opinion notes, *Ferguson* was “not a right-to-counsel case.” *Id.* at 599 (Frankfurter, J. concurring). “It is formalism run riot to find that the division into two separate sections of what is organically inseparable may not for reviewing purpose be treated as a single, appealable unit. This Court, of course, determines the scope of its reviewing power over a state court judgment.” *Id.* at 600. Counsel assisted the defendant at every turn, and he would have said the same thing even if he had been questioned by his lawyer; the problem was that the statement would have carried greater weight if it had been un-

tice Frankfurter would have reached the constitutionality of the disqualification statute and would have held the state statute unconstitutional.<sup>54</sup> In a separate concurring opinion, Justice Clark would also have held the statute to be a violation of due process.<sup>55</sup>

Next, in *Washington v. Texas*,<sup>56</sup> the Court expressly recognized a fundamental right to obtain and present witnesses under the Compulsory Process Clause and held that the Sixth Amendment right was incorporated against the states by the Fourteenth Amendment.<sup>57</sup> Here, as it had in *Rosen*, the Court struck down a state statute that declared accomplices incompetent to testify.<sup>58</sup> The Court clearly identified a constitutional “right to present a defense” based on the compulsory process clause of the Sixth Amendment.<sup>59</sup> Interpreting that right, the Court held that the Texas disqualification rule violated the compulsory process clause because it was arbitrary, i.e., because it was based on “a priori categories that presumed [the witnesses] unworthy of belief . . . without any individual showing that they were untrust-

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der oath. Justice Clark, joined by Justice Frankfurter, would have held that the incompetence statute violated due process. *Id.* at 601 (Clark, J. concurring). The basis of the decision reflects the fact that the compulsory process clause was not yet binding on the states through the Fourteenth Amendment, while the Sixth Amendment right to counsel had already been incorporated. *See id.*; Nagareda, *supra* note 27, at 1076 nn.41–44.

<sup>54</sup> *Ferguson*, 365 U.S. at 600–01 (Frankfurter, J., concurring).

<sup>55</sup> *Id.* at 602 (Clark, J., concurring).

<sup>56</sup> 388 U.S. 14 (1967).

<sup>57</sup> *Id.* at 19.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

*Id.*

<sup>58</sup> *Id.* at 23–24. In doing so, the Court expanded the compulsory process clause to require the actual admission of evidence—the right to put witnesses on the stand—rather than simply a right to a procedure to compel the attendance of witnesses. The Court observed that it would be odd “to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.” *Id.* at 22–23. Commentators agree. *See, e.g.*, AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 132 (1997) (“[I]f the accused, in order to show his innocence, is generally empowered to drag a human being, against her will, into the courtroom to tell the truth, surely he must also enjoy the lesser-included rights to present other truthful evidence that in no way infringes on another human being’s autonomy. These lesser-included rights are plainly presupposed by the compulsory process clause.”). *See also* Nagareda, *supra* note 27, at 1074.

<sup>59</sup> *Washington*, 388 U.S. at 19.

worthy, or that the jury was incapable of properly evaluating their testimony,"<sup>60</sup> and because it "arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."<sup>61</sup> The Court also condemned the rule as disproportionate to the purpose it was designed to serve—to exclude false testimony—because that interest could have been satisfied simply by leaving questions of weight and credibility to the jury.<sup>62</sup> The Court also noted the inherent unfairness of a rule that allowed the prosecution to use the testimony of an accomplice but that prohibited the defendant's use of the testimony.<sup>63</sup>

Next, in *Crane v. Kentucky*,<sup>64</sup> the Court reversed a conviction where the defendant was prohibited from presenting evidence establishing that his confession was involuntary.<sup>65</sup> The trial court found the confession voluntary after a hearing and later at trial precluded the defendant from presenting evidence of the circumstances under which it was made.<sup>66</sup> The Supreme Court reversed, holding that the circumstances of the confession were relevant to its reliability and that the preclusion violated the defendant's right to "a fair opportunity to present a defense."<sup>67</sup> Significantly, the Court in *Crane* identified several sources of the right to present a defense: the due process, compulsory process, and confrontation clauses.<sup>68</sup>

Applying the balancing-of-interests test articulated in *Washington*, the Court found the exclusion of evidence of involuntariness to be unconstitutional. Indeed, in language extremely relevant to the not yet recognized wrong-person defense, the Court explained that "[s]tripped of the power to describe to the jury the circumstances

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<sup>60</sup> Westin, *supra* note 22, at 113.

<sup>61</sup> *Washington*, 388 U.S. at 23.

<sup>62</sup> *Id.* at 22 (citing *Rosen v. United States*, 245 U.S. 467, 471 (1918)).

<sup>63</sup> *Id.*

<sup>64</sup> 476 U.S. 683 (1986).

<sup>65</sup> *See id.* at 683.

<sup>66</sup> *Id.* at 684.

<sup>67</sup> *Id.* at 687. "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690–91 (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

<sup>68</sup> Whether rooted directly in the Due Process clause of the Fourteenth Amendment, *Chambers v. Mississippi*, *supra*, or in the Compulsory Process or confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Id.* at 690 (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (internal citations omitted).

that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?<sup>69</sup> The Court recognized that judges have broad discretion to exclude evidence that poses a risk of confusion, prejudice, or harassment, but concluded that exclusion of this evidence violated due process of law.<sup>70</sup>

*Rock v. Arkansas*<sup>71</sup> was decided next. In *Rock*, the Court recognized a defendant's right to testify as part of the right to present a complete defense.<sup>72</sup> Accordingly, it struck down a state's per se ban on the admission of post-hypnotically refreshed testimony.<sup>73</sup> Although the defendant testified and offered other evidence, the trial court refused to permit her to give hypnotically-refreshed testimony, and she was subsequently convicted.<sup>74</sup> The Supreme Court reversed, holding that the statutory per se ban violated the defendant's right to testify. It found that right, once again, in the due process clause and in the compulsory process clause of the Sixth Amendment, but also as a corollary to the Fifth Amendment's guarantee against compelled testimony.<sup>75</sup>

The Court again relied on the *Washington* balancing test, under which evidentiary restrictions on a defendant's right to present a defense may be sustained only if the restrictions are not "arbitrary or disproportionate to the purposes they are designed to serve."<sup>76</sup> Applying this standard, the Court held that the per se ban was disproportionate to the interest in reliable testimony because there were less restrictive yet sufficient means for the jury to evaluate the reliability of the defendant's hypnotically refreshed testimony (e.g., tapes of the hypnosis sessions, cross-examination of the examiner and of the

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<sup>69</sup> *Id.* at 689.

<sup>70</sup> *Crane*, 476 U.S. at 690.

<sup>71</sup> 483 U.S. 44 (1987).

<sup>72</sup> *Id.* at 49.

<sup>73</sup> *Id.* at 56. The defendant had been charged with murdering her husband. She claimed that the killing was an accident; interviewed by the police at the scene, she stated that it occurred accidentally, during a scuffle over a gun after her husband had beaten her. Her memory of the event was incomplete. After two hypnosis sessions, she recalled that he had not had her finger on the trigger when the gun had fired but that the gun had discharged accidentally after her husband had grabbed her arm. This accidental firing was corroborated by a firearms expert who testified that the gun was defective and capable of firing without the trigger being pulled. *Id.* at 45-47.

<sup>74</sup> *Id.* at 47.

<sup>75</sup> *Id.* at 62.

<sup>76</sup> *Id.* at 55-56.

defendant), as well as evidence to corroborate it. The per se exclusion was arbitrary because it was disproportionate to the state's interest in reliable proof.<sup>77</sup>

Lastly, in *United States v. Scheffer*,<sup>78</sup> the Supreme Court addressed the constitutionality of the army's per se ban against the admission of polygraph evidence. Here, however, the Court upheld the ban. In *Scheffer*, the defendant was convicted by court martial of various crimes, including wrongfully using methamphetamine. He had been working undercover for the army, and his defense was "innocent ingestion"—that he had used the drugs to further his undercover investigation.<sup>79</sup> He testified on his own behalf but was prohibited from introducing polygraph evidence.<sup>80</sup>

The United States Court of Appeals for the Armed Forces reversed. The Supreme Court then reversed the court of appeals and upheld the exclusion. The Court reasoned that there was no consensus that polygraph evidence is reliable and that the per se ban was a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence."<sup>81</sup>

### III. THE RIGHT TO PRESENT A WRONG-PERSON DEFENSE

The constitutional right to present a wrong-person defense has been addressed by the Supreme Court in two opinions: *Chambers v. Mississippi*<sup>82</sup> and *Holmes v. South Carolina*.<sup>83</sup>

In *Chambers*, the defendant was charged with murdering a police officer. His defense had two parts.<sup>84</sup> The first was that he had not

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<sup>77</sup> *Rock*, 483 U.S. at 61.

<sup>78</sup> 523 U.S. 303 (1998).

<sup>79</sup> *Id.* at 306.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 312. In *Scheffer*, the majority held that the *Rock*, *Washington*, and *Chambers* precedents did not support the right to introduce polygraph evidence because, unlike those cases, the exclusion of the polygraph evidence did not "implicate any significant interest of the accused." *Id.* at 316–17. In *Scheffer*, unlike in *Rock*, the defendant fully presented his testimony and no eyewitness was prohibited from testifying. In fact, *Scheffer* had not been barred from eliciting any substantive proof: he had been prevented only from eliciting testimony to bolster his credibility. *Id.* at 317. Justice Stevens dissented. He would have held that a rule barring a defendant "from introducing expert opinion testimony to bolster his own credibility" impairs the meaningful opportunity to present a defense. *Id.* at 331–32 (Stevens, J., dissenting). The evidence was not otherwise available, strongly supported his defense, and its exclusion may have affected the outcome. Accordingly, it unquestionably infringed an important interest of the accused, which Justice Stevens believed had been undervalued by the Court. *Id.*

<sup>82</sup> 410 U.S. 284 (1973).

<sup>83</sup> 547 U.S. 319 (2006).

been the shooter.<sup>85</sup> Only one officer testified that he saw Chambers fire the fatal shots.<sup>86</sup> No weapon was recovered, and there was no proof that Chambers ever owned the weapon.<sup>87</sup> Moreover, although three officers testified that they saw the deceased shoot at Chambers, none of them examined Chambers to see if he was alive or armed.<sup>88</sup> One witness who was standing near the shooting and looking at Chambers said that he was sure that Chambers had not fired the shots.<sup>89</sup>

Chambers' second defense was that one McDonald was the shooter—a wrong-person defense.<sup>90</sup> McDonald had confessed to the murder on four separate occasions; once to Chambers' counsel and to three different friends.<sup>91</sup> One witness to the shooting said he saw McDonald shoot the officer, and the deceased's cousin testified that he saw McDonald with a pistol after the shooting.<sup>92</sup> McDonald was charged with murder, but when he repudiated his confession to counsel at a preliminary hearing, he was released.<sup>93</sup>

At trial, after the state failed to put McDonald on the stand, Chambers called him as a witness in an attempt to introduce his confessions.<sup>94</sup> McDonald repudiated them on the witness stand.<sup>95</sup> Chambers was not permitted to cross-examine him as an adverse witness based on Mississippi's voucher rule, which prevented parties from impeaching their own witnesses.<sup>96</sup>

Chambers then attempted to introduce McDonald's confessions by calling the three people to whom he had confessed.<sup>97</sup> Each of them was a close friend of McDonald, and other evidence corroborated their testimony.<sup>98</sup> The trial court sustained the State's objection to these statements because the state hearsay rule did not include an

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<sup>84</sup> *Chambers*, 410 U.S. at 288–89.

<sup>85</sup> *Id.* at 289.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Chambers*, 410 U.S. at 289.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 291.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Chambers*, 410 U.S. at 291–92.

<sup>97</sup> *Id.* at 292–93.

<sup>98</sup> *Id.* at 293.

exception for statements against penal interest.<sup>99</sup> The state supreme court affirmed.<sup>100</sup>

The Supreme Court of the United States reversed, finding a violation of due process of law.<sup>101</sup> First, it recognized that “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.”<sup>102</sup> The Court held that, in combination, the strict application of the state voucher rule and the refusal to allow the defense to elicit evidence that another person had repeatedly confessed to the crime violated the defendant’s due process rights.<sup>103</sup> Here, where “the testimony rejected by the trial court . . . bore persuasive assurances of trustworthiness”<sup>104</sup> and “was critical to Chambers’ defense,”<sup>105</sup> its exclusion deprived Chambers of his rights “to a fair opportunity to defend against the State’s accusations” and “to present witnesses in his own behalf.”<sup>106</sup>

However, in reversing, the Court attempted to limit the precedential effect of its ruling:

In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establish-

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 302.

<sup>102</sup> *Chambers*, 410 U.S. at 302.

<sup>103</sup> *Id.* at 294, 302.

<sup>104</sup> *Id.* at 302. Each of the “confessions was made spontaneously to a close acquaintance shortly after the murder”; each was corroborated by other evidence (another confession, an eyewitness, testimony that McDonald had a gun immediately after the shooting, prior ownership of a .22 caliber revolver, a statement after one confession that his friend not “mess him up,” and subsequent purchase of a new weapon); and the statement was manifestly against interest. *Id.* at 300–01. Moreover, McDonald was present in the courtroom and “could have been cross-examined by the State, and his demeanor and responses weighed by the jury.” *Id.*

<sup>105</sup> *Id.* at 302. Chambers presented eyewitness testimony that he was not the shooter. *Id.* at 289. Still, the Court held that the excluded evidence was “critical to [his] defense.” *Id.* at 302.

Chambers had, however, chipped away at the fringes of McDonald’s story by introducing admissible testimony from other sources indicating that he had not been seen in the cafe where he said he was when the shooting started, that he had not been having beer with Turner, and that he possessed a .22 pistol at the time of the crime. But all that remained from McDonald’s own testimony was a single written confession countered by an arguably acceptable renunciation. Chambers’ defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald’s statements to cross-examination or had the other confessions been admitted.

*Id.* at 294.

<sup>106</sup> *Id.*

ment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.<sup>107</sup>

In 2006, the Supreme Court decided *Holmes v. South Carolina*.<sup>108</sup> That decision, like *Chambers*, recognized a constitutional right to present a wrong-person defense.<sup>109</sup> In that case, the defendant was convicted of murder and other offenses.<sup>110</sup> Like the defendant in *Chambers*, he had a two-pronged defense: first, that he was not guilty, and second, that someone else committed the crime.<sup>111</sup>

At trial, the prosecution relied heavily on forensic proof.<sup>112</sup> As the first prong of his defense, Holmes introduced expert testimony to show that the forensic evidence had been contaminated and that the police had framed him.<sup>113</sup> For the second prong of his defense, Holmes proffered evidence that one Jimmy McCaw White had committed the murder.<sup>114</sup> White had been in the victim's neighborhood at the time of the assault and had confessed and acknowledged Holmes's innocence four different times.<sup>115</sup> However, at a pre-trial hearing White provided an alibi and, like McDonald in *Chambers*, denied making incriminating statements.<sup>116</sup> The trial court excluded the evidence of White's guilt.<sup>117</sup> It first held, based on state court precedent,<sup>118</sup> that the third-party guilt evidence was inadmissible because it did not "raise a reasonable inference . . . as to [the defendant's] own innocence."<sup>119</sup> The State Supreme Court affirmed, but articulated a more specific, different rule. It held that 'where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's

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<sup>107</sup> *Id.* at 302–03.

<sup>108</sup> *Holmes*, 547 U.S. at 319. Commentators have noted that the right to compulsory process involves fairness and parity: the right is designed to give the defendant the same powers to produce evidence as the prosecutor. See AMAR, *supra* note 58, at 132–34.

<sup>109</sup> *Holmes*, 547 U.S. at 331.

<sup>110</sup> *Id.* at 322.

<sup>111</sup> *Id.* at 322–23.

<sup>112</sup> *Id.* at 322.

<sup>113</sup> *Id.* at 322–23.

<sup>114</sup> *Id.* at 323.

<sup>115</sup> *Holmes*, 547 U.S. at 323.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 323.

<sup>118</sup> *Id.* at 323–24 (citing *State v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941)).

<sup>119</sup> *Id.* (quoting *Gregory*, 16 S.E.2d at 534).



alleged guilt does not raise a reasonable inference as to appellant's own innocence."<sup>120</sup>

In an opinion by Justice Alito, the Supreme Court reversed.<sup>121</sup> First, the Court reiterated the constitutional rule that a state statute or rule that limits the defendant's right to present a defense must not be arbitrary or disproportionate to the purposes it was designed to serve. Applying that standard, the Court held that the defendant's constitutional right to a meaningful opportunity to present a defense was violated by the rule that precluded third-party guilt evidence where the prosecution introduces "forensic evidence that, if believed, strongly supports a guilty verdict."<sup>122</sup>

First, the Court held that the trial judge erroneously relied on the strength of the prosecution's evidence to determine admissibility.<sup>123</sup> The Court explained 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."<sup>124</sup> Thus, the rule was "arbitrary" because it did not rationally serve the purpose it was designed to further.<sup>125</sup> Interestingly, the "purpose" of the rule against the admission of third-party guilt evidence was not identified. The Court did acknowledge the authority of the courts to exclude evidence where its probative value is outweighed by the risk of "unfair prejudice, confusion of the issues, or potential to mislead the jury."<sup>126</sup> Presumably it was these traditional interests that the rule was designed to protect because the Court indicated that the state had not "identified any other legitimate end that the rule serves."<sup>127</sup> Second, the Court held that the ruling was arbitrary because it permitted the lower court to exclude defense evidence based on a presumption that the prosecution's proof was credible and reliable, without any inquiry into the strength of the prosecution's proof.<sup>128</sup> For these two reasons, the exclusionary rule did not serve the legitimate purpose third-party culpability rules are otherwise designed to serve, i.e., "to focus the trial on the central is-

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<sup>120</sup> *Id.* at 324 (quoting *State v. Holmes*, 605 S.E.2d 19, 24 (S.C. 2004)).

<sup>121</sup> *Holmes*, 547 U.S. at 331.

<sup>122</sup> *Id.* at 321, 331.

<sup>123</sup> *Id.* at 330-31.

<sup>124</sup> *Id.* at 331.

<sup>125</sup> *Id.* at 331.

<sup>126</sup> *Id.* at 326.

<sup>127</sup> *Holmes*, 547 U.S. at 331.

<sup>128</sup> *Id.* at 329-30.

sues by excluding evidence that has only a very weak logical connection to the central issues.”<sup>129</sup>

The Court gave no meaningful guidance to the lower courts about the standards that should govern the admissibility of third-party guilt evidence. Justice Alito expressed no preference for the various approaches taken by the lower courts.<sup>130</sup> As noted above, the Court cited opinions from several states that articulated various standards for excluding third-party guilt evidence when it fails to raise a reasonable doubt of the defendant’s guilt, is “so remote and lack[s] such connection with the crime;” “does not sufficiently connect the other person to the crime; . . . [or] is speculative or remote or does not tend to prove or disprove a material fact in issue at the defendant’s trial.”<sup>131</sup> It noted that “[s]uch rules are widely accepted, and neither petitioner nor his *amici* challenge them here.”<sup>132</sup> The Court did not discuss the application of any of these standards.

In addition, the Court weakened even the precedential value of its own opinion as a guide to the lower courts by relying on *Corpus Juris*<sup>133</sup> and *American Jurisprudence*.<sup>134</sup> As scholars have noted, these secondary authorities have virtually no weight or persuasive value and are so general that “lower courts will not adopt quoted material from such sources” as representing the Supreme Court’s view one way or the other.<sup>135</sup>

#### IV. THE WRONG-PERSON DEFENSE IN THE LOWER COURTS

As noted above, the *Holmes* Court explicitly left unchallenged and unexamined the various state court rules governing admissibility of third-party guilt evidence, noting that “[s]uch rules are widely accepted, and neither petitioner nor his *amici* challenge them here.”<sup>136</sup> In short, the Supreme Court has left it up to the states. Unfortunately, the states’ treatment of the wrong-person defense is utterly chaotic; the states have no coherent test for protecting the right to

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<sup>129</sup> *Id.* at 330.

<sup>130</sup> *Id.* at 327.

<sup>131</sup> *Id.* at 327 (internal citations omitted).

<sup>132</sup> *Id.*

<sup>133</sup> *Holmes*, 547 U.S. at 327–28 (citing *State v. Gregory*, 16 S.E.2d 532, 534–35 (S.C. 1941)).

<sup>134</sup> *Id.*

<sup>135</sup> Michael H. Graham, *Evidence and Trial Advocacy: Advanced Workshop Third Party Culpability Evidence*; *Holmes v. South Carolina*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), and *More*, 43 No. 1 CRIM. LAW BULL. 1, 109 (Jan.–Feb. 2007).

<sup>136</sup> *Holmes*, 547 U.S. at 327.

present this defense.<sup>137</sup> Not surprisingly, the decisions yield unpredictable results. Indeed, the standards for admissibility are even articulated in many different and confusing ways. Some courts apply the narrow “direct connection,”<sup>138</sup> or clear nexus<sup>139</sup> test; others ask whether the evidence has a “legitimate tendency” to prove someone else committed the crime, which frequently requires a direct connection.<sup>140</sup> Other courts ask whether the evidence is sufficient to raise a reasonable doubt as to the defendant’s guilt<sup>141</sup> or has a “legitimate tendency” to do so;<sup>142</sup> others employ a probative value versus prejudice balancing test.<sup>143</sup> Under that test, the alleged “prejudice” is not the traditional notion of prejudice. Rather, the prejudice is claimed to result from disruption of the trial with an allegedly collateral issue or from forcing the prosecution to meet the additional proof.<sup>144</sup> Moreover, some courts alternate between these different tests.<sup>145</sup> Additionally, the courts address the issue not as a constitutional matter but as a garden-variety issue of evidentiary admissibility.<sup>146</sup> On appeal, virtually all of the courts review a judge’s exclusion of third-party guilt evidence under the broad abuse of discretion standard for evidentiary rulings rather than under the more exacting standard of review for constitutional violations.<sup>147</sup>

What the lower courts really appear to be doing is excluding third-party guilt evidence where they do not believe that the prosecution has the wrong person. Rather than focusing on the overall proof that the defendant may not be the person who committed the crime (both the first and second parts of the wrong-person defense), courts focus solely on the second part (the piece or pieces of evidence sought to be offered against the third party).<sup>148</sup> This treatment is not consistent with the Supreme Court’s analysis of the issue in *Chambers* and *Holmes*, or with the Court’s long-standing protection of the right to present a complete defense in general; nor is this approach the

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<sup>137</sup> McCord, *supra* note 4, at 938.

<sup>138</sup> See *infra* notes 164–82 and accompanying text.

<sup>139</sup> See McCord, *supra* note 4, at 938–42.

<sup>140</sup> See *infra* notes 198–208 and accompanying text.

<sup>141</sup> See *infra* notes 183–91 and accompanying text.

<sup>142</sup> See *infra* notes 183–91 and accompanying text.

<sup>143</sup> See *infra* notes 209–22 and accompanying text.

<sup>144</sup> See *infra* notes 209–22 and accompanying text.

<sup>145</sup> See, e.g., *People v. Hall*, 718 P.2d 99, 101 (Cal. 1986) (en banc); see also *State v. Cotto*, 865 A.2d 660, 669 (N.J. 2005).

<sup>146</sup> See *infra* notes 209–22 and accompanying text.

<sup>147</sup> See *infra* notes 190–99 and accompanying text.

<sup>148</sup> See *infra* notes 164–222 and accompanying text.

best way to protect the Court's concern about reliability. By attempting to articulate standards of admissibility for only part of the defense rather than balancing prosecution and defense interests in the defense of innocence as a whole and fashioning an appropriate constitutional balancing test for that defense, the lower courts have ended up with no coherent rules at all.

The most exacting state standard of admissibility for third-party guilt evidence requires proof of a "direct connection" or "direct link" between the third party and the crime charged.<sup>149</sup> Under that standard, evidence that a third party may be guilty of the charged crime is inadmissible, regardless of the other proof, unless the defense produces evidence "to directly connect [the] third person to the crime charged."<sup>150</sup> In applying this standard, the courts analyze only the proffered evidence; they do not look at the rest of the proof or whether the first part of the wrong-person defense has been established.<sup>151</sup> That is, there is no evaluation of whether there is a threshold credible basis to believe the defendant may not have committed the crime.

For example, in *State v. Grega*,<sup>152</sup> the defendant was convicted of anal rape and murder of his wife in a vacation condominium. The evidence against him was circumstantial and not very strong. There were no eyewitnesses and no forensic proof to identify him as the killer. He reported the death, was extremely upset when the police arrived, consented to a search, and voluntarily gave several statements to the police.<sup>153</sup> Those statements revealed some inconsistencies. There was evidence that supported the inference that the condominium had been wiped down, and clothing found in the laundry machine contained some blood that could not be identified.<sup>154</sup> Paper towels stained with blood were found in a common trash receptacle in a garbage bag that contained the defendant's fingerprints, a toilet was stopped up by a wad of paper towels, and a box of Marlboro cigarettes were found stuck to the inside of the toilet.<sup>155</sup> The defendant claimed he had been out with his son and returned to find his wife dead.<sup>156</sup>

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<sup>149</sup> See generally McCord, *supra* note 4, at 920–38.

<sup>150</sup> *State v. Grega*, 721 A.2d 445, 454 (Vt. 1998) (alteration in original) (quoting *State v. Gilman*, 608 A.2d 660, 663 (Vt. 1992)).

<sup>151</sup> *Id.*

<sup>152</sup> 721 A.2d 445 (1998).

<sup>153</sup> *Id.* at 449.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 449–50.

There was evidence concerning two painters who were present at the condominium development where the deceased was raped and killed.<sup>157</sup> Both had given false addresses to the police, both were incarcerated for other crimes at the time of the trial, and both testified as prosecution witnesses.<sup>158</sup> One of them had lied to the police about when he arrived home the night of the murder and admitted buying Marlboro cigarettes.<sup>159</sup> The other admitted that he had joked about killing a woman.<sup>160</sup> The defendant proffered additional evidence relating to their sexual practices, history of assaults, threatening behavior, and theft.<sup>161</sup> That evidence was excluded as insufficiently linked to the crime.<sup>162</sup> In addition, a statement by one of them claiming responsibility for the crime was excluded as hearsay.<sup>163</sup> The court found no deprivation of the right to present a defense largely because of the absence of a "direct link" to the actual crimes.<sup>164</sup> It made no reference to whether there was a credible basis to believe that someone other than the defendant had committed the crimes.

Under the same standard, in *State v. West*, evidence of latent, unidentified fingerprints found at the murder scene was deemed inadmissible where there was no explanation for the prints, when they were left, or who had left them.<sup>165</sup> Similarly, in *Klinec v. State*, evidence that a testifying accomplice who had been present at the scene had a violent disposition was excluded because it did not "connect [him] with the corpus delicti, or show that [he had] recently committed a crime of the same or similar nature."<sup>166</sup>

A second standard articulated by the state courts asks whether the proffered evidence is "capable of raising a reasonable doubt" as to a defendant's guilt. That analysis was used in *State v. Cotto*,<sup>167</sup> where the defendant was charged with robbery and related offenses. The defendant presented an alibi defense.<sup>168</sup> He also offered evidence to show that a fellow inmate, a relative of the victims, identified two other people including the victim's cousin, as having planned a simi-

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<sup>157</sup> *Id.* at 453.

<sup>158</sup> *Grega*, 721 A.2d at 453.

<sup>159</sup> *Id.* at 453-54.

<sup>160</sup> *Id.* at 454.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 456.

<sup>163</sup> *Id.* at 455.

<sup>164</sup> *Grega*, 721 A.2d at 456.

<sup>165</sup> *State v. West*, 877 A.2d 787 (Conn. 2005).

<sup>166</sup> *Klinec v. State*, 501 S.E.2d 810, 814 (Ga. 1998).

<sup>167</sup> 865 A.2d 660 (N.J. 2005).

<sup>168</sup> *Id.* at 666.

lar robbery, the inference being that they committed the charged robbery instead of the defendant.<sup>169</sup> That witness repeated the information to the defendant's investigator but refused to testify at trial.<sup>170</sup> At trial, the defendant was identified by the victim, his former girlfriend, who also had identified him immediately after the crime.<sup>171</sup>

The trial court denied the defendant's proffer because, according to the court, the evidence that others had planned a similar robbery had no "rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case."<sup>172</sup> Like many other courts, although it used the reasonable doubt standard, this court ultimately balanced prejudice versus probative value, holding that the proffered evidence was "so speculative and . . . full of conjecture and hearsay . . . [that] the prejudicial value . . . outweigh[ed] the probative value."<sup>173</sup> The appellate court reviewed the trial court's exclusion of the evidence under an abuse of discretion standard and held that the trial court had not abused its discretion.<sup>174</sup>

Similarly, in *People v. Valencia*, the court excluded third-party guilt evidence of motive and opportunity on the ground that the third-party guilt evidence failed to raise a reasonable doubt.<sup>175</sup> In *Valencia*, the court looked only at the evidence sought to be admitted to determine whether that evidence alone raised a reasonable doubt; it did not evaluate whether the proffered evidence, together with the other proof, raised a reasonable doubt about the defendant's guilt.

In *Valencia*, the defendant was convicted of child endangerment and inflicting corporal punishment on a child.<sup>176</sup> He proffered evidence that another person, E., had caused her injuries.<sup>177</sup> The evidence would have shown that E. had lived with the child, had struck the child as well as another child, had a short temper with children, and had admitted being forced to leave the defendant's home because the defendant thought she had acted inappropriately toward

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<sup>169</sup> *Id.* at 669.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 666.

<sup>172</sup> *Id.* at 669 (citing *State v. Fortin*, 843 A.2d 974, 1003 (N.J. 2004)); *see also State v. Koedatich*, 548 A.2d 939, 977 (N.J. 1988); *State v. Fulston*, 738 A.2d 380, 384 (N.J. Super. Ct. App. Div. 1999).

<sup>173</sup> *Cotto*, 865 A.2d at 669.

<sup>174</sup> *Id.* at 670.

<sup>175</sup> *People v. Valencia*, No. C048420, 2006 WL 1545558 (Cal. Ct. App. 3d June 7, 2006).

<sup>176</sup> *Id.* at \*1.

<sup>177</sup> *Id.* at \*4.

the children.<sup>178</sup> In addition, the evidence showed that the defendant had the “narrowest window [of opportunity to injure the child] than a number of people, but in particular, [a narrower opportunity than E.]”<sup>179</sup> The trial court excluded the third-party guilt evidence as showing “no more than ‘perhaps an opportunity’ for E.” to have committed the crimes.<sup>180</sup> The appellate court reviewed the ruling under the abuse of discretion standard and affirmed. Mixing at least two standards of admissibility, the court held that “[n]one of this evidence or speculation raised a reasonable doubt as to [the defendant’s] guilt” and that the evidence had “no tendency in reason to prove any material point and is thus irrelevant.”<sup>181</sup>

A third test used by the courts asks whether the proffered evidence has a “legitimate tendency” to prove that a third party committed the crime.<sup>182</sup> For example, in *State v. Denny*, evidence that any of several third parties had motives to commit the crime as well as criminal dispositions was excluded.<sup>183</sup> Again, although it articulated the standard as “legitimate tendency,” the court also excluded the evidence because it did not show “a direct connection between the [third party] and the crime.”<sup>184</sup>

Hawaii also used the “legitimate tendency” test in *State v. Rabellizsa*.<sup>185</sup> In *Rabellizsa*, the defendant was convicted of murder.<sup>186</sup> The evidence included the testimony of one Mark Paishon that two days

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at \*5.

<sup>180</sup> *Id.*

<sup>181</sup> *Valencia*, 2006 WL 1545558 at \*5. See also *People v. Guillen*, No. B188362, 2006 WL 3262343 (Cal. Ct. App. 2d Nov. 13, 2006). In *Guillen*, the defendant was convicted of possessing various drugs found in his office, car, and trailer. *Id.* at \*1. He sought to present evidence that any one of three men might have placed the drugs in these locations to frame him. *Id.* at \*2. Two of the three had motive and opportunity to commit the crimes, and one of them had previously tried to frame the defendant with a false charge of kidnapping. *Id.* The court held that the evidence was properly excluded because there was “no direct or circumstantial evidence to link any one of these men to the crime.” *Id.* Even though one of the men had previously tried to frame the defendant, the evidence was deemed short of connecting that person to the crime charged. *Id.* at \*3.

<sup>182</sup> See Brett C. Powell, *Perry Mason Meets the “Legitimate Tendency” Standard of Admissibility (and Doesn’t Like What He Sees)*, 55 U. MIAMI L. REV. 1023, 1025 (2001).

<sup>183</sup> *State v. Denny*, 357 N.W.2d 12, 18 (Wis. Ct. App. 1984).

<sup>184</sup> *Id.* at 17.

<sup>185</sup> *State v. Rabellizsa*, 903 P.2d 43, 47 (Haw. 1995). Again, however, the court defined the “legitimate tendency” test as relevance, i.e., that “relevant evidence means evidence having any *tendency* to make the existence of any fact . . . more or less probable.” *Id.* (quoting HAW. REV. STAT. ANN. § 401 (LexisNexis 2008)) (emphasis in original).

<sup>186</sup> *Id.* at 48.

before the victim's death the victim sped down Paishon's street nearly hitting some children, and that Paishon's girlfriend and the defendant's mother were upset by the incident.<sup>187</sup> There was evidence that the victim was screaming at Paishon after he "had told the victim not to speed . . . because 'a lot of kids [were] there.'"<sup>188</sup>

There were no eyewitnesses to the killing; however, prosecution witnesses identified the defendant's car near the scene and leaving the scene of the murder, and a long-time friend of the defendant saw the defendant with a gun at a different location immediately after the shooting.<sup>189</sup> Moreover, as the victim died, he said to his friend Joe, "Joe, Rabellizsa I gonna die."<sup>190</sup> The defendant intended to proffer evidence that the victim had threatened Paishon and "ran him off the road while driving a car," allegedly giving Paishon a motive to kill the victim.<sup>191</sup> Again, the court combined admissibility standards: although it articulated a "legitimate tendency" standard, it held that the evidence of third-party motive was inadmissible because there was no direct or circumstantial evidence linking the third person to the actual perpetration of the crime.<sup>192</sup>

Many courts have now moved away from the more rigid standards and treat third-party guilt evidence under the traditional relevance standard.<sup>193</sup> If the evidence is deemed relevant, its probative

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<sup>187</sup> *Id.* at 44.

<sup>188</sup> *Id.* (alteration in original).

<sup>189</sup> *Id.* at 45.

<sup>190</sup> *Id.* at 44.

<sup>191</sup> *Rabellizsa*, 903 P.2d at 44.

<sup>192</sup> *Id.* at 47.

<sup>193</sup> See, e.g., *People v. Primo*, 753 N.E.2d 164 (N.Y. 2001). There, the defendant was charged with attempted murder based on a shooting. *Id.* at 165. He tried to introduce evidence that the gun used in the shooting had been used two months later by a third party who had been present at the shooting. *Id.* The victim identified the defendant as the shooter. *Id.* at 166. The defendant admitted that he and the victim were arguing, but he claimed that the victim knocked him down. *Id.* After that, the defendant heard gunshots but did not know who fired the gun or that the victim had been wounded. *Id.* The principal issue at trial was whether the defendant was the shooter. *Id.*

Prior to trial, the prosecution produced a ballistics report that linked the gun used in the shooting to a crime two months later committed by one Maurice Booker. *Id.* Two prosecution witnesses placed Booker at the scene. *Id.* Nevertheless, the trial court refused to admit the ballistics report into evidence "stating that 'there [was] not evidence-in-chief before this jury placing Mr. Booker inside [the deli] or even outside [the deli] at a time that's relevant.'" *Id.* (alteration in original). The defendant was convicted of attempted murder. *Id.* The Appellate Division affirmed on the ground that "the defense had 'failed to show a clear link between the third party and the crime in question.'" *Id.* (quoting *People v. Primo*, 704 N.Y.S.2d 112, 112 (N.Y. App. Div. 2000)).



value is balanced against the risk of undue prejudice, jury confusion, or waste of judicial resources.<sup>194</sup> Under this test, too, the courts' analysis is myopic. For example, in *State v. Larson* the defendant was found guilty of murder based on a drive-by shooting.<sup>195</sup> There was credible evidence showing that he was not the shooter: he was not identified as being involved in the shooting and none of the fingerprints or molds of foot prints or tire prints were connected to either the defendant or those who were with him that evening.<sup>196</sup> Moreover, the state's theory "would have required the defendant to drive an average speed of somewhere between 95 and 370 miles per hour."<sup>197</sup> As for the prosecution's case, it was entirely circumstantial. The shotgun used was linked to shotgun shells found near a car the defendant was identified as having been in earlier that evening; he was identified as being in that car by a woman driving by in another car at the same time—she helped the police make a composite sketch of the person she had seen in the car.<sup>198</sup> The witness did not identify the defendant as the driver until the trial.<sup>199</sup> In addition, there was evidence that the defendant's car was capable of driving over one hundred miles per hour and that he drove like a race car driver when drinking.<sup>200</sup>

As the court noted, drive-by shootings are rare in South Dakota.<sup>201</sup> Nevertheless, at trial, the defendant proffered evidence of two other drive-by shootings that night with which he was not even alleged to have been involved.<sup>202</sup> The court refused to admit this evi-

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The Court of Appeals reversed, discarding the "clear link" standard in favor of a simple relevance standard. *Id.* at 167. Under that standard, "evidence is relevant if it tends to prove the existence or non-existence of a material fact, i.e., a fact directly in issue in the case." *Id.*

Noting that the ballistics report was relevant evidence, and that there was proof that Booker was at the scene, the court held "its probative value plainly outweigh[ed] the dangers of delay, prejudice and confusion." *Id.* at 169. Significantly, the court relied in part on the fact that the evidence was relevant to the identity of the shooter, which the defendant placed at issue by admitting his presence at the scene and claiming that he heard a gun shot but did not know from where it had come. *Id.*

<sup>194</sup> See, e.g., FED. R. EVID. 403.

<sup>195</sup> *State v. Larson*, 512 N.W.2d 732 (S.D. 1994).

<sup>196</sup> *Id.* at 734–35.

<sup>197</sup> *Id.* at 736.

<sup>198</sup> *Id.* at 735.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 736.

<sup>201</sup> *Larson*, 512 N.W.2d at 739.

<sup>202</sup> *Id.* The proof the defendant intended to present included evidence that on the evening of the killing, a shot was allegedly fired at a vehicle and marks were found that could have been caused by a shotgun. *Id.* Additionally, later the same night, a witness heard a shotgun blast from a van. *Id.*

dence, and the appellate court affirmed.<sup>203</sup> In excluding the evidence, the court did not look at both parts of the wrong-person defense because it did not evaluate whether the defendant had made a credible showing that he had not been the shooter.<sup>204</sup> Instead, the court held that the probative value of the evidence of the two other drive-by shootings – on its own – did not overcome the state’s interests in reliability and in “promoting orderly and efficient trials.”<sup>205</sup> That is, the admission of the evidence would disrupt the trial with a collateral issue and require the prosecution to meet it. Accordingly, the state appellate court held that the evidence was properly excluded.<sup>206</sup>

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<sup>203</sup> *Id.* at 740.

<sup>204</sup> *Id.* at 739–40.

<sup>205</sup> *Id.* at 740.

<sup>206</sup> The federal courts similarly analyze the admissibility of third-party perpetrator evidence under the relevance standard of Rule 401 of the Federal Rules of Evidence, and then employ the prejudice versus probative value balancing test of Rule 403. Again, this approach applies the same misleading focus on only half of the defense—the degree of nexus between the third-party guilt evidence and the crime and then on the claimed disruption of the trial and prejudice to the government. FED. R. EVID. 401, 403.

A recent example is *United States v. Jordan*, 485 F.3d 1214 (10th Cir. 2007). In *Jordan*, the defendant was charged with killing a fellow inmate. *Id.* at 1216. He sought to show that another inmate had been the killer. *Id.* at 1218. Relying on *Holmes*, the Tenth Circuit reiterated that although the bar for admission of evidence under Rule 401 of the Federal Rules of Evidence is low, the trial courts have discretion to exclude relevant evidence under Rule 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” *Id.* (quoting FED. R. EVID. 403). Under this standard, the court of appeals explained that district courts may deny admission of third-party guilt evidence if it “fails to establish, either on its own or in combination with other evidence in the record, a non-speculative ‘nexus’ between the crime charged and the alleged perpetrator.” *Id.* at 1219.

In contrast, in *Winfield v. United States*, 676 A.2d 1 (D.C. 1996) (en banc), the District of Columbia Court of Appeals reversed a conviction for first degree murder on the ground, inter alia, that the trial court erred in excluding evidence that a third party had a motive to kill the victim and had recently tried to do so. *Id.* at 3, 6. The Court of Appeals rejected the “clearly linked” phraseology and adopted the traditional relevance standard. *Id.* at 3. It qualified that standard, however, as “evidence of motivation of a third party to commit the crime charged risks distracting the jury from the issue of *this* defendant’s guilt or innocence, and in applying the relevance standard the judge may properly take account of that danger.” *Id.*

In *Winfield*, the government presented identification evidence from three eyewitnesses that the defendant had chased down and shot one Deborah Davis. *Id.* However, there was no evidence of a motive for the killing. *Id.* The defense sought to prove that Davis was one of three people who committed an armed robbery, that she had agreed to help the prosecution in the case against the other two perpetrators, and that one of the other participants killed her to silence her. *Id.* In fact, the third party had tried to kill her once before, and when she was finally gunned down, her assailant said “You won’t tell this.” *Id.* On the other hand, a photograph of the

## V. A COHERENT CONSTITUTIONAL ANALYSIS

When it articulated the right to present a defense, the Supreme Court found that right in both the due process clause of the Fourteenth Amendment and in the Sixth Amendment right to compulsory process.<sup>207</sup> Later, as the issue of incorporation arose, the Court held that the right was incorporated through the Fourteenth Amendment as a component of due process of law.<sup>208</sup> Ultimately, in *Holmes*, the Court ruled that whether it is located in the confrontation or compulsory process clauses of the Sixth Amendment or directly in the due process clause, the right to “a meaningful opportunity to present a complete defense” clearly exists and prohibits arbitrary or dis-

alleged third-party killer had been placed in a photo array and none of the witnesses identified him as the killer. *Id.* (internal footnote omitted).

The trial court excluded the evidence that someone else had killed Davis because the third party had not been identified or placed at the scene, there was no proof that the third party knew where Davis could be located, and there was no proof that the third party knew that the victim had testified in the grand jury the day she was killed. *Id.* Interestingly, the trial judge noted “[t]he *inherent ambiguity* of this evidence supposedly linking [the third party] to the murder would not . . . tend to create a reasonable doubt that the defendant who was apparently known by many of the eyewitnesses did not commit the offense.” *Id.* at 4 (emphasis added).

Sitting en banc, the District of Columbia Court of Appeals reversed the conviction. *Id.* at 7. It held that the standard applicable to third-party guilt evidence is the same as that applicable to other evidence, i.e., that evidence is admissible if it will “tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense.” *Id.* at 4–5 (quoting *Johnson v. United States*, 552 A.2d 513, 516 (D.C. 1989)). Once the evidence is deemed relevant, a trial “judge must also balance the probative value of the evidence ‘against the risk of prejudicial impact.’” *Id.* at 5 (quoting *Punch v. United States*, 377 A.2d 1353, 1358 (D.C. 1977)). The trial judge may exclude marginally relevant evidence that risks confusion that may be exacerbated if the government asserts the need to present rebuttal proof. *Id.* The judge has wide latitude to limit the extent of such testimony. *Id.* However, in this case, the evidence of the third party’s motive, the prior attempt to kill the witness, the fact that the witness was killed on the same day she testified in the grand jury, and that the killer had said something about “snitching” when he shot her was highly probative, even in the absence of evidence that the third party had been at the scene. *Id.* at 6. Reversing, the court explained that “a substantial proffer that a third party committed the offense implicates the defendant’s constitutional right to ‘a meaningful opportunity to present a complete defense.’” *Id.* at 6–7 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). Moreover, evidence of similar “recent assaults against the victim stemming from identical motivation” was deemed highly probative. *Id.* at 7.

<sup>207</sup> See *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (finding the right to have defendant’s counsel question defendant to elicit his statement is protected by the Due Process Clause); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (finding that a defendant “has the right to present his own witnesses to establish a defense.”).

<sup>208</sup> *Washington*, 388 U.S. at 17–19.

proportionate limits on a defendant's right to present evidence.<sup>209</sup> As the Supreme Court has stated, there are "[f]ew rights . . . more fundamental than that of an accused to present witnesses in his own defense."<sup>210</sup>

The lower courts' treatment of the wrong-person defense does not protect the defendant's constitutional right to present a complete defense and it does not adequately protect the states' interests in reliability and efficiency. The courts' difficulty in articulating a coherent analysis of the wrong-person defense may be the result of the uniqueness of the defense because it is a two-prong defense—i.e., "I didn't do it and here's who did." Without a threshold examination of the evidence as a whole, and therefore stripped of its context, the lower courts almost inevitably conclude that any individual piece of evidence that someone else might be the criminal is collateral or will disrupt the trial.<sup>211</sup> Only by employing an analysis that addresses the two-pronged nature of the defense can courts adequately and fairly protect the right to present it. That treatment would also be consistent with the analysis the Court used throughout its more general right to present a defense jurisprudence.<sup>212</sup>

Accordingly, the trial courts should treat the wrong-person defense under the following analysis: first, a threshold determination should be made as to whether the defendant has raised a credible basis to believe that he did not commit the crime. If that threshold is met, the defendant's third-party guilt evidence should be admitted under the constitutional balancing test prescribed by the Supreme Court. That test balances the government's interest in reliable proof and orderly procedure<sup>213</sup> against the defendant's right to present a complete defense.<sup>214</sup> Once the defendant has made a credible showing that he is not the person who committed the crime, the defendant's interest should outweigh any government interest in excluding third-party guilt evidence and there should be a presumption in favor of its admissibility.

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<sup>209</sup> *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane*, 476 U.S. at 690).

<sup>210</sup> *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (internal citations omitted).

<sup>211</sup> See, e.g., *supra* notes 166–178 and accompanying text.

<sup>212</sup> See, e.g., *supra* notes 71–77 and accompanying text.

<sup>213</sup> *State v. Larson*, 512 N.W.2d 732, 740 (S.D. 1994).

<sup>214</sup> Once the government's interest in excluding the evidence is identified, the individual's "competing interest must be closely examined." *Montana v. Egelhoff*, 518 U.S. 37, 67 (1996) (citing *Chambers*, 410 U.S. at 295).

A. *The Government's Interest*

The prosecution has no legitimate interest in convicting an innocent person. Moreover, while the state has an interest in reliable proof that may support state evidentiary rules, those rules are unconstitutionally arbitrary and disproportionate when, as in *Crane* and *Rock*, they exclude otherwise reliable evidence.<sup>215</sup> The interest in reliable proof that allegedly requires the exclusion of third-party guilt evidence is surely at its lowest where there is a credible showing that the defendant did not commit the crime.

Moreover, the courts' focus on the probative value of proffered evidence is not the most logical way to protect states' interest in reliable proof. As noted above, the third-party guilt defense is different from other defenses because the defendant rarely has the resources to "make a case" against someone else. He may be able to elicit some sort of proof, but, as the cases show, that proof is rarely going to be sufficiently probative to establish anyone else's direct connection to the crime. It may include motive, opportunity, criminal disposition, or other pieces of proof, but it is unlikely to be complete. On the other hand, the defense does have the ability to raise a credible claim that the defendant did not commit the crime, either through cross-examination of identification witnesses, expert testimony, or evidence. A reliable basis for concluding that the defendant may not have committed the crime is a better way to protect the prosecution from unreliable proof that someone else did it. The focus on that showing is the most fair and logical way to protect the state's interest in reliability.

Regardless of the test articulated, many courts exclude third-party guilt evidence on the ground that it injects collateral issues into the trial or confuses the jury.<sup>216</sup> Where the defense has already raised a credible basis for believing that the defendant did not commit the crime, however, that someone else did it simply is not collateral. Moreover, any concern about jury confusion or alleged risk of speculation is minimized by anchoring the third-party guilt evidence in the threshold showing that the named defendant is not the right defendant. Once that threshold of proof is there, the jury can evaluate the

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<sup>215</sup> *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (finding the opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence"); *Rock v. Arkansas*, 483 U.S. 44, 66 (1987) (noting that unless the state shows that hypnotically enhanced testimony is always untrustworthy, a state's per se exclusion of all such evidence is an arbitrary restriction).

<sup>216</sup> See *supra* Part IV.

third-party guilt evidence in the context of that proof, and speculation thus should be minimized.<sup>217</sup> Finally, where the evidence supports a credible showing that the prosecution has failed to prove the defendant is the person who committed the charged crime, the government cannot claim to be unfairly ambushed by proof that someone else committed it.

### B. *The Defendant's Interest*

In *Chambers* and *Holmes*, each of the defendants proffered evidence that showed that he had not committed the charged crime.<sup>218</sup> In *Chambers*, only one officer testified that Chambers fired the fatal shots.<sup>219</sup> “Although three officers saw [the deceased officer] shoot Chambers . . . none of them examined Chambers to see whether he was still alive” or armed.<sup>220</sup> No gun was found at the scene and “there was no proof that Chambers had ever owned [a gun].”<sup>221</sup> One witness testified that he was looking at Chambers at the time of the shooting and “was sure that Chambers did not fire the shots.”<sup>222</sup> In *Holmes*, the defendant produced an expert witness who undermined the forensic evidence by criticizing police investigatory procedures, and another who supported the defendant’s claim that the police planted a palm print.<sup>223</sup> In these two cases, when the Supreme Court balanced the interests underlying state evidentiary rules that limited the admission of third-party guilt evidence against the defendant’s interest in presenting the proof, it invalidated those state evidentiary rules as a vio-

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<sup>217</sup> In any event, courts are not powerless to assist jurors in evaluating the significance of third-party guilt evidence or of sifting through conflicting identification proof. First, as courts already do, they can instruct the jurors on the Government’s burden of proof, on reasonable doubt, and on credibility. See, e.g., 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL (2008). N.Y. Criminal Jury Instructions 2d - Credibility, <http://www.nycourts.gov/cji/1-General/CJI2d.credibility.pdf> (last visited Jan. 4, 2009); N.Y. Criminal Jury Instructions 2d - Reasonable Doubt, [http://www.nycourts.gov/cji/1-General/CJI2d.presumption.burden.reasonable\\_doubt.pdf](http://www.nycourts.gov/cji/1-General/CJI2d.presumption.burden.reasonable_doubt.pdf) (last visited Jan. 4, 2009). If the evidence warrants, trial courts can instruct the jury, in so many words, that mere suspicion or surmise that someone else might have committed the crime is insufficient to raise a reasonable doubt on its own.

<sup>218</sup> *Chambers v. Mississippi*, 410 U.S. 284, 289 (1973); *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006) (“[T]he petitioner proffered evidence that, if believed, squarely proved that [a third party] not petitioner was the perpetrator.”).

<sup>219</sup> *Chambers*, 410 U.S. at 286, 289.

<sup>220</sup> *Id.* at 289.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Holmes*, 547 U.S. at 323.

lation of due process.<sup>224</sup> With the case in that posture, i.e., once the defendant had created a credible basis to believe he was not the killer, the defendant's interest in telling the jury who actually committed the crime was deemed by the Court to outweigh the government's interests.

This analysis is reflected in the Court's decisions in its three general right to present a defense cases. In *Rock, Ferguson, and Washington*, the defendant produced some evidence tending to prove his defense but was prevented from presenting that defense completely.<sup>225</sup> Again, with the cases in that posture, the Court recognized that the defendant's interest was at its greatest, that the government's interest was small, and that the defendants' interests in presenting a complete defense thus outweighed the states' interest in reliability.<sup>226</sup>

The importance of presenting a complete defense is also confirmed by other disciplines. As other scholars have concluded, "[e]mpirical studies have shown that—more than legal standards, definitions or instructions—narrative plays a key role in the juror decision-making process."<sup>227</sup> Because jurors try to fit evidence into a coherent and complete story,<sup>228</sup> each story must have two characteristics: coverage, or "the extent to which the story accounts for the evidence presented at trial"; and coherence, or "consistency, plausibility and completeness."<sup>229</sup> "The party who can tell the most compelling story which fits best with each individual juror's own narrative (as constructed from the trial evidence, background information . . . and expectations), will emerge the ultimate winner in the case."<sup>230</sup> Thus, the defendant's ability to tell a plausible and complete story about his own innocence is the right to present a complete defense. If the constitutional right means anything, it means that a defendant who claims he did not commit the crime has a right to tell the jury who did.<sup>231</sup>

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<sup>224</sup> *Id.* at 330–31; *Chambers*, 410 U.S. at 295–98, 302–03.

<sup>225</sup> *See supra* notes 52, 56, 71 and accompanying text.

<sup>226</sup> *See supra* notes 52, 56, 71 and accompanying text.

<sup>227</sup> John H. Blume et al., *Every Juror Wants a Story, Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 2 (Cornell Law School Legal Studies Research Paper Series, Paper No. 06-042), available at <http://ssrn.com/abstract=942653>.

<sup>228</sup> *Id.* at 27.

<sup>229</sup> *Id.* at 30–31.

<sup>230</sup> *Id.* at 30.

<sup>231</sup> *See id.* at 31 ("Finally, a story is complete when the structure of the story has all of its parts. Missing information, or lack of plausible inferences about one or more major components of the story will decrease confidence in the explanation." (citing

Moreover, the requirement of direct linkage of the third party under the traditional state tests is fundamentally unfair. As noted above, one aspect of the uniqueness of the wrong-person defense is that the defendant rarely has the resources to make a case against someone else. He may be able to elicit some sort of proof but, as the cases show, courts rarely consider that proof to be sufficiently probative to establish anyone else's direct connection to the crime. On the other hand, through cross-examination of identification witnesses, expert testimony, or other evidence, the defense has the ability to raise a credible claim that he did not commit the crime. The focus on that threshold showing is a fair way to determine whether the second prong of the defense should be analyzed. It is also an effective way to ensure the reliability of third-party guilt evidence—much more effective than expecting the defendant, on his own, to show a sufficient nexus to avoid exclusion of the proof. If the defendant is capable of creating through evidence or cross-examination a credible basis for believing he is not the person who committed the crime, such will be a sufficient protection against the admission of unreliable proof.

### C. *Reliance on Eyewitness Identification Evidence*

A fortiori where the prosecution relies substantially on eyewitness identification testimony third-party guilt evidence should be admitted. As a category of evidence, eyewitness identification, like accomplice testimony, is presumptively unreliable.<sup>232</sup> Indeed, unreliable identification evidence has been responsible for more wrongful convictions than all other causes combined.<sup>233</sup> If the prose-

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Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 527 (1991)).

<sup>232</sup> See *United States v. Wade*, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”).

<sup>233</sup> See *State v. Delgado*, 902 A.2d 888, 895 (N.J. 2006) (“Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country.”) (footnote omitted); EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* vii, xiii (1932) (“Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of these [sixty-five wrongful] convictions.”) (footnote omitted); JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 73 (2000) (“In a study of DNA exoneration by the Innocence Project, [eighty-four] percent of the wrongful convictions rested, at least in part, on mistaken identification by an eyewitness or victim.”); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 283–93 (1988) (describing a study of more than two hundred felony cases of wrongful conviction that found misidenti-



cution is relying on evidence of dubious reliability, then the state's interest in reliability is diminished. Moreover, it is well recognized that jurors give disproportionate weight to identification testimony—in fact, jurors give identification evidence more significance than confession evidence.<sup>234</sup> When jurors see a victim point to a defendant, one who has already been selected for prosecution, they believe it.<sup>235</sup> The Supreme Court held in *Crane*, in overruling the exclusion of evidence at trial concerning the circumstances of a defendant's confession, that if the defendant was “stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered. If the defendant is innocent, why did he previously admit his guilt?”<sup>236</sup> In an identification case, there is one question every rational juror needs answered; if you say the eyewitness is wrong, who did it?<sup>237</sup> As the *Crane* Court continued, “a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.”<sup>238</sup> Similarly, a defendant's case may stand or fall on his ability to tell the jury who committed the crime. The jury is already being overly influenced on what may well be unreliable identification evidence. Third-party guilt evidence is meant to correct this imbalance. The need to dispel the jury's over-reliance on eyewitness identification testimony adds to the defendant's interest in presenting proof of third-party guilt.

In addition, the government's interest in excluding third-party guilt evidence where it relies on eyewitness identification is diminished. As commentators have noted,

[M]istaken eyewitness identifications—the most frequent single cause of wrongful convictions—can convince investigators early in a case that a particular individual is the perpetrator. Convinced of guilt, investigators might then set out to obtain a confession from that suspect, . . . produce a false confession, . . . [and] recruit or encourage testimony from unreliable jailhouse snitches. . . . Forensic scientists, aware of the desired result of their analyses,

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fication to be the single largest source of error, accounting for more than half of cases that had one main cause).

<sup>234</sup> ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1996) (“There is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, ‘That’s the one!’”).

<sup>235</sup> *Id.*

<sup>236</sup> *Crane v. Kentucky*, 476 U.S. 683, 689 (1986).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

might be influenced—even unwittingly—to interpret ambiguous data or fabricate results to support the police theory.<sup>239</sup>

In other words, once the prosecution believes it has the right person, “tunnel vision” sets in and evidence inconsistent with the police theory is not pursued.<sup>240</sup>

Finally, throughout history, a paramount and underlying rationale of the compulsory process clause has been the requirement of parity.<sup>241</sup> The right to compulsory process was intended to give the defense the same right to present evidence as the prosecution.<sup>242</sup> An evolved notion of parity would require that if the prosecution is allowed to produce and rely on notoriously unreliable identification proof, the defense must have an ability to rebut that proof without being subjected to a higher threshold than the prosecution.<sup>243</sup>

#### D. Review for Constitutional Error

Finally, the claimed deprivation of the right to present a wrong-person defense should be reviewed on appeal de novo. The abuse of discretion standard used by the state courts simply is not appropriate for review of a constitutional threshold.<sup>244</sup> If a violation is then found, it should be subjected to constitutional harmless error analysis. If the government proves beyond a reasonable doubt that exclusion of the defense was harmless because the evidence was cumulative or weak, the conviction will not be reversed.<sup>245</sup> In making that determination, the appellate court is required to evaluate the record de novo.<sup>246</sup>

## VI. CONCLUSION

The right to present a wrong-person defense is not being handled effectively by the lower courts. The Supreme Court has left the issue entirely up to the states. The states have an illogical, ineffective,

<sup>239</sup> See, e.g., Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292–93 (2006) (internal footnotes omitted).

<sup>240</sup> *Id.* at 293 n.15 (“[A]ll that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.”) (quoting JOINT CONFERENCE ON PROFESSIONAL RESPONSIBILITY, AM. BAR ASS’N & ASS’N OF AM. LAW SCH., PROFESSIONAL RESPONSIBILITY: REPORT OF THE JOINT CONFERENCE, in 44 A.B.A.J. 1159, 1160 (1958)).

<sup>241</sup> See *supra* notes 24–34 and accompanying text.

<sup>242</sup> See *supra* note 34 and accompanying text.

<sup>243</sup> See *supra* notes 32, 34 and accompanying text.

<sup>244</sup> See *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

<sup>245</sup> *Chapman v. California*, 386 U.S. 18, 22–24 (1967).

<sup>246</sup> See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991).

and disingenuous method of analysis that serves neither the states' nor the defendants' interests. The importance of the wrong-person defense has never been greater, given the unreliability of identification proof and its role in causing wrongful convictions.

Rather than focus solely on the third-party guilt evidence sought to be introduced—treating the issue as a mere evidentiary ruling—the courts should recognize the unique two-pronged nature of the wrong-person defense: “I didn’t do it, and this is who did.” First, the courts should determine whether the defendant has proffered sufficient evidence that he is not the person who committed the crime. Second, if that threshold is established, the third-party guilt evidence should be admitted. That is how the Supreme Court protected the right to present a wrong-person defense in *Chambers* and *Holmes*. This analysis recognizes the constitutional underpinnings of the right to make the wrong-person defense, and it properly balances the state’s interests in reliability and efficiency against the defendant’s unique and powerful interests in presenting a complete defense.