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Introduction

Defenses to criminal allegations take numerous forms. In some cases, a defendant may assert a defense such as mistaken identification, essentially claiming that even though a crime may have been committed by someone, he did not commit it. And in yet other cases, a defendant may wish to be more specific with his defense, and claim not only that he did not commit the crime, but that *he knows who did*.[1]

The defendant who asserts this defense—commonly called the "wrong-person defense" because the defendant is claiming that the government charged the wrong person—faces numerous and unexpected hurdles.[2] As many trial judges believe prosecutors only charge guilty defendants, courts are extremely hostile to even the strongest wrong-person defense.[3] In fact, when deciding whether a wrong-person defense is admissible, many courts have abandoned the concept of relevancy, which is a very low threshold for the admissibility of the government's evidence.[4]

Instead, before these courts will allow a defendant to present evidence that someone else committed the crime, the defendant must meet heightened pretrial standards of admissibility, which are far

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1 *See infra* Part III.

2 *See infra* Part IV.

3 *See infra* Part IV.

4 *See infra* Part III.

more demanding than what a prosecutor would have to prove to convict a defendant at trial.[5]

The rules that govern the admissibility of the wrong-person defense infringe on the constitutional right to present a defense. Parts I and II of this Article discuss the right to present a defense in general, and demonstrate why this particular constitutional right is different than most other rights. For instance, unlike Fourth and Fifth Amendment rights, there are no legitimate government interests that compete with a defendant's right to present a defense. Therefore, there is no justification for excluding a defendant's evidence of innocence. Part III delves deeper into this issue by discussing the wrong-person defense as a subset of the right to present a defense.

Part IV explains the major pitfalls awaiting a defendant who pursues the wrong-person defense. In short, when a defendant attempts to prove that a specific third party committed the crime, a trial court will employ numerous unreasonable rules, along with several evidentiary double standards, to exclude a defendant's evidence before trial even begins. Often, a defendant is then left with no viable defense for trial, which all but guarantees his conviction. Further, even in the rare case that a defendant can satisfy the judge and win the right to present a wrong-person defense to the jury, he may face additional difficulties at trial.

In light of the various problems associated with the wrong-person defense, Part V proposes the necessary legal reform: abolish the heightened standard for the admissibility of the defendant's evidence and instead admit the evidence if it is relevant. However, given the stagnant nature of legal reform in American criminal courts, the defendant who wishes to assert a wrong-person defense does not have the luxury of waiting for change. Therefore, Part VI proposes a viable alternative to the wrong-person defense, which can be implemented immediately under existing law.

The alternative defense proposed in Part VI uses all of the same evidence as the wrong-person defense, but it does not have any of the pitfalls. That is, instead of taking on the burden of proving to the trial judge and the jury that a specific third party is guilty of the crime, the alternative defense uses the same evidence for a different purpose: to attack the quality of the police investigation and the prosecutor's decision to charge the defendant.

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[5] *See infra* Parts IV.C–D.

The most significant advantage of the alternative defense is that the United States Supreme Court has already declared it an integral part of the constitutional right to present a defense.[6] Under this defense, a defendant is permitted to use the same evidence of third-party guilt, but is not required to satisfy the heightened, and often impossible, test for admissibility under the wrong-person defense.

Part VI discusses other, significant advantages for the defendant who attacks the police investigation and prosecutorial charging decision, instead of attempting to prove the guilt of a specific third party. Under the alternative defense, the defendant avoids the various traps associated with the wrong-person defense, while still casting reasonable doubt on his guilt. Part VI also addresses some practical concerns in presenting the alternative defense.

I. ALL RIGHTS ARE NOT CREATED EQUAL

A criminal defendant's constitutional rights often compete with other interests, including law enforcement's interest in obtaining physical evidence of crimes and the prosecutor's interest in convicting the guilty. When these interests collide, the government usually prevails. Judges often use the government's interests as justification for violating a defendant's individual rights.

Consider, for example, the Fourth Amendment right of privacy. The Supreme Court has held that, even when a defendant conclusively establishes law enforcement has violated the Fourth Amendment, only in the *rarest* of cases may the trial judge suppress the resulting physical evidence at the defendant's criminal trial.[7] That is, in nearly all cases of privacy right violations, the defendant is entitled to no remedy whatsoever.[8]

The Fifth Amendment right against self-incrimination provides a similar example. Even when law enforcement interrogates an in-custody suspect without first informing him of his *Miranda* rights—or, more commonly, when law enforcement ignores a suspect's attempts

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6 *See infra* Part VI.

7 Herring v. United States, 555 U.S. 135, 140 (2009) ("Indeed, exclusion has always been our last resort, not our first impulse, and our precedents establish important principles that constrain application of the exclusionary rule.") (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

8 *Id*. at 155 (Ginsburg, J., dissenting) ("[T]he majority leaves Herring, and others like him, with no remedy for violations of their constitutional rights.").

to invoke his *Miranda* rights—the exclusionary rule is anemic. The prosecutor may still use the suspect-turned-defendant's statement as rebuttal evidence at trial,[9] and might be able to use any physical evidence that was derived from the illegally obtained statement.[10]

These constitutional violations are tolerated, and even encouraged, because our society sometimes places a higher value on the government's interests than our individual rights. Even the Supreme Court would rather see the constitutional rights of all citizens reduced to "shambles"[11]—and in some cases, pushed to the brink of elimination—before a single, factually guilty person is allowed to escape conviction, no matter how minor his transgression.[12]

However, not all constitutional rights can be dismissed so effortlessly with this short-sighted, conviction-obsessed thinking. Rather, there is a separate, higher class of constitutional rights—rights that simply have no legitimate competing interests—that should never be violated and should never be subordinated to the government's goal of winning convictions.

The most obvious example of this higher class of constitutional rights is the Sixth Amendment right to the effective assistance of counsel. If defense counsel performs incompetently at a criminal trial—for example, by sleeping during the prosecutor's examination of witnesses—a defendant's right to the effective assistance of counsel is

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[9] *See* Sandra Guerra Thompson, *Evading* Miranda*: How Seibert and Patane Failed to "Save"* Miranda, 40 VAL. U. L. REV. 645, 646 (2006) (discussing multiple exceptions to the exclusionary rule, including the use of illegally obtained statements as rebuttal evidence).

[10] *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1550 (2008) (discussing incentives for the police to violate *Miranda* to obtain physical evidence). Some states, however, offer greater protection under their state constitutions, and will exclude physical evidence that is derived from *Miranda* violations. *See, e.g.*, State v. Knapp, 2005 WI 127, ¶83, 285 Wis. 2d 86, 700 N.W.2d 899, 2005 Wisc. LEXIS 395 (holding that physical evidence obtained as a direct result of an intentional violation of *Miranda* is inadmissible under Article I, Section 8 of the Wisconsin Constitution).

[11] Michigan v. Bryant, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting) (discussing the current state of Confrontation Clause jurisprudence after a series of opinions beginning with *Crawford v. Washington*).

[12] *Herring* is an excellent illustration of the Court's misplaced priorities. 555 U.S. 135. The Court has adopted a framework that will admit, rather than suppress, ill-gotten evidence in all but the rarest of circumstances. This, of course, provides the police with an incentive to violate, rather than respect, citizens' constitutional rights. *See* Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 474-77 (2010) (demonstrating how the police are always better off by violating citizens' Fourth Amendment rights).

violated.[13] When this right is violated, no legitimate, competing interest is advanced. Everyone, including the police and even the prosecutor, loses if the defendant is convicted. When the government's evidence goes uncontested and unchallenged, there can be no confidence in the conviction. Rather, there is a substantial risk an innocent defendant was wrongly convicted, and the true perpetrator went unpunished and remains free to commit more crimes.[14]

Similarly, the right to present a complete defense at a criminal trial also falls into this higher class of constitutional rights.[15] When a defendant *does* have competent counsel, but the judge prevents defense counsel from presenting evidence of innocence at trial, no legitimate, competing interest is served. If the defendant is convicted without presenting a defense, everyone loses. When the jury hears only the government's evidence and theory of the case, there is no assurance that the proper result was reached. And again, the risk remains that an innocent individual was wrongly convicted, and the true perpetrator remains at large.[16]

Because there is no legitimate interest that competes with a defendant's right to present a defense, it is critical to the fair administration of our criminal justice system that a defendant is allowed to present his theory of the case and his evidence of innocence at trial. However, attempting to present this evidence may be an intense, uphill, and unsuccessful battle.[17]

II. THE RIGHT TO PRESENT A DEFENSE

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses

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13 More accurately, falling asleep during the jury trial should, but does not always, result in a finding of ineffective assistance. *See, e.g.*, Muniz v. Smith, 647 F.3d 619, 621 (6th Cir. 2011) (holding that defense counsel's nap during the trial did not constitute ineffective assistance).

14 *See infra* note 16.

15 *See infra* Parts II, III.

16 In today's hyper-vigilant, tough-on-crime world, the risk of wrongful convictions is often trivialized. But earlier American courts recognized the risk and treated it far more seriously. *See, e.g.*, Paulson v. State, 94 N.W. 771, 774 (Wis. 1903) ("While it is awful that such a tragedy as this may happen in a civilized community, and the guilty man escape punishment, it is inexpressibly worse that the law itself should add thereto the still more terrible crime of imprisoning for life an innocent person; thus subjecting the community to two crimes, instead of one, and leaving the criminal still unpunished.").

17 *See infra* Part II.

> of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.[18]

Presenting a complete defense may take several forms. For example, regardless of the crime charged, a defendant may present a mistaken identification defense or an alibi defense. For intent-based crimes such as criminal property damage, a defendant may testify his actions were accidental, not criminal. For violent crimes such as battery, a defendant may present evidence demonstrating he exercised a privilege, such as self-defense or the defense of others. Or, to rebut any charge, a defendant may simply present evidence no crime was ever committed, and the accuser was mistaken or even lying.

Generally, a party to a criminal case may introduce evidence only if it is relevant. Relevancy is an incredibly broad standard. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."[19]

In application, the relevancy standard renders nearly every piece of potential evidence admissible.[20] It is not necessary that the evidence conclusively prove or disprove a fact. Rather, to be relevant, the evidence merely must have a tendency to make a fact "more or less probable."[21] Further, the fact for which the evidence is being offered need not be an element of the crime charged. Instead, the fact may demonstrate a person's particular character trait, a person's reason for doing something, a person's behavior either before or after the alleged crime, or any other fact that is even remotely "of consequence" to the jury's ultimate verdict.[22]

The broad definition of relevance is best demonstrated by the types of evidence the government is routinely permitted to present

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[18] Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)) (internal quotation marks omitted).

[19] FED. R. EVID. 401. For a definition of relevance under state rules, *see, e.g.*, State v. Hungerford, 267 N.W.2d 258, 269 (Wis. 1978) ("The Judicial Council Committee's Note to Wis. Stat. sec 904.01 indicates that the rule was intended to broadly define relevancy.").

[20] Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 NEB. L. REV. 272, 278 (1997) ("Federal Rule of Evidence 401 contains a very expansive definition of relevant evidence, and the relevancy standard in criminal cases is particularly easily satisfied.") (internal quotation marks omitted).

[21] FED. R. EVID. 401.

[22] *Id*.

against a criminal defendant. The most illuminating example is "other acts" evidence, where a prosecutor uses a defendant's completely unrelated prior acts—including acts that are decades old,[23] acts that were never criminally charged,[24] acts for which a defendant was tried and acquitted,[25] and acts that were not wrongful in any sense of the word[26]—to demonstrate a defendant's motive, intent, plan, or absence of mistake when committing the crime for which he is on trial.

Of course, the test for whether evidence is admissible at a criminal trial is, or at least should be, the same for both the prosecutor and the defendant. However, when the defendant attempts to introduce evidence in his own defense, a double standard starts to emerge: on the one hand, the government is permitted to introduce virtually any evidence it wishes, provided it meets the incredibly low hurdle of relevancy; on the other hand, the defendant's proffered evidence is often excluded because a judge decides, for example, that it would be confusing to the jury.[27] And, counter-intuitively, the more specific a defendant's proffered evidence of innocence, the greater the risk a court will bar the defendant from presenting that evidence to a jury.[28] When this happens, as the next Section demonstrates, the jury will hear only the government's side of the case. If the defendant is convicted through this process, society can have little confidence that the government convicted the correct individual.

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23 *See, e.g.*, State v. Veach, 2002 WI 110, ¶40, 225 Wis.2d 390, 648 N.W.2d 447 (finding that although eleven years had passed since the prior acts, the evidence had at least some probative value as to motive and whether the charged act had occurred).

24 *See, e.g.*, State v. Gray, 590 N.W.2d 918, 929 (Wis. 1999) ("[O]ther acts evidence may consist of uncharged offenses.").

25 *See, e.g.*, Dowling v. United States, 493 U.S. 342, 354 (1990) (permitting the government's use of other acts for which the defendant was acquitted, and rejecting the defendant's argument that "the government may not force a person acquitted in one trial to defend against the same accusation in [another trial]").

26 *See, e.g.*, State v. Johnson, 245 N.W.2d 687, 693 (Wis. 1976) ("It was evidence of prior 'acts' of the defendant, not necessarily wrongful and not necessarily criminal, which were relevant to the issue of willfulness.").

27 Brett C. Powell, Comment, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023, 1051 (2001) (arguing that, in the context of the wrong-person defense, "the more significant the defense's evidence, the more courts would be compelled to exclude it").

28 *Id.*

III. GETTING MORE SPECIFIC: THE WRONG-PERSON DEFENSE

"It is clear that police have a strong incentive to 'clear' cases . . . . Once such cases are cleared, however, police have little incentive to investigate further, especially if that investigation may weaken the case already built."[29] This approach to crime investigation—"we got our suspect and we're sticking to him"—is certainly economical from law enforcement's perspective. However, such tunnel vision can also lead to the arrest and prosecution of an innocent defendant. When this happens, a defendant may assert not only his own innocence, but also a third party's guilt.[30]

Directing the blame to another person has been labeled the wrong-person defense. It is also known by other names, including the "third-party defense," the "other-suspect defense," and the "alternative-perpetrator defense." Prosecutors, many of whom believe the government's charging decisions are infallible despite overwhelming evidence to the contrary, have mockingly called it the SODDI—or "some other dude did it"—defense.[31]

Regardless of the label, when a defendant attempts to demonstrate a third party actually committed the crime, the court often changes the test for the admissibility of evidence. That is, many courts completely abandon the relevancy test and instead impose a much more stringent and unreasonable standard on the defendant—often with bizarre and blatantly unconstitutional results.[32]

To present a wrong-person defense to the jury, many courts first require the defendant to satisfy a three-part test demonstrating (1) there is direct evidence connecting the third party to the crime, (2) the third party had the opportunity to commit the crime, and (3) the third

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[29] Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643, 1690 (2000).

[30] *See* John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069 (2007) (discussing the importance of narrative and the power of completing the story for the jury).

[31] *See e.g.*, James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send A Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 676 n.194 (1995).

[32] *See* Everhart, *supra* note 20, at 285-98 (arguing that third-party guilt evidence involves an element of the crime—identity—rather than an affirmative defense; therefore, imposing a higher burden of proof on the defendant for the admission of such evidence violates our fundamental constitutional right to present a defense); Powell, *supra* note 27, at 1053 (arguing that third-party guilt evidence is often excluded because the courts impose a "heightened threshold of admissibility" which is a due process violation).

party had motive to commit the crime.[33] If the defendant fails any one of these prongs—a conclusion that courts seem quick to draw—he may be left without a defense. That is, "trial courts across the nation routinely apply heightened standards . . . to alternative suspect evidence, usually resulting in its exclusion."[34]

Courts often justify these "heightened standards" for admissibility by assuming the truth of the very thing that must be proved at trial: the defendant committed the crime charged.[35] After assuming the defendant's guilt, it is merely a small step for courts to elevate the interests of the third party above the defendant's. "[I]t is hard to justify telling a criminal defendant who [ ] asserts innocence that a third person's rights outweigh his or her right to present a defense."[36] Nonetheless, that is the reality.[37]

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[33] Courts often call this three-part test the "legitimate tendency test." Powell, *supra* note 27, at 1050 ("In order to meet the criterion of most manifestations of the legitimate tendency test, a criminal defendant is required to show motive and opportunity as well as direct evidence placing the third party at the scene."). There is some variation among the states in the labels that courts place on the three-part test, and even some variation in the language of three prongs themselves. *See* Lissa Griffin, *Avoiding Wrongful Convictions: Re-examining the "Wrong-Person" Defense*, 39 SETON HALL L. REV. 129, 146 (2009) (discussing the numerous labels used to describe the defendant's burden of proof); Robert Hayes, Note, *Enough is Enough: The Law Court's Decision to Functionally Raise the "Reasonable Connection" Relevancy Standard in State v. Mitchell*, 63 ME. L. REV. 531, 536-41 (2011) (discussing the tests for admissibility in several different jurisdictions). Further, some states do not impose a three-part test, and instead claim to allow a wrong-person defense if the defendant satisfies Federal Rules of Evidence 401 and 403. However, as a practical matter, even these courts will frequently exclude the wrong-person defense because, they claim, it would confuse the jury as to the issue of the defendant's guilt. Blume et al., *supra* note 30, at 1081-83.

[34] Hayes, *supra* note 33, at 533.

[35] Griffin, *supra* note 33, at 131 ("[C]ourts 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."); Hayes, *supra* note 33, at 546 ("[T]he criminal justice system presumes that prosecutors and law enforcement have apprehended the correct suspect, and, subsequently, increases the likelihood of a wrongful conviction.").

[36] Suni, *supra* note 29, at 1675.

[37] *See, e.g.*, State v. Jones, 678 N.W.2d 1, 16 (Minn. 2004) (requiring that "alternative perpetrator evidence . . . ha[ve] an inherent tendency to connect the other party with . . . the crime" in order to "safeguard[ ] the third person from indiscriminate use of past differences with [the crime victim]"). Placing the interests of accusers, witnesses, and other third parties above those of the defendant has a long history in criminal law, and is not unique to the wrong-person defense. For example, so-called rape-shield laws have barred defendants from presenting powerful evidence of innocence because the evidence could possibly be offensive or embarrassing to an accuser—the person that prosecutors and the courts often anoint as "the victim" long before the trial even begins. *See, e.g.*, State v. Pulizzano, 456 N.W.2d 325 (Wis. 1990) (upholding Wisconsin's rape-shield law and requiring a defendant to satisfy a five-prong test before being

IV. PITFALLS OF THE WRONG-PERSON DEFENSE

Courts have created at least eight specific pitfalls for the defendant who attempts to assert a wrong-person defense as part of his constitutional right to present a defense. These pitfalls start with the relatively benign and then escalate to the bizarre and irrational. Each is identified and explained below.

A. *Notice Requirement*

The first danger in presenting a wrong-person defense is the pretrial notice requirement. Many defenses, such as self-defense or a misidentification defense, typically do not require that the defendant notify the prosecutor and the court of his strategy before trial. Instead, the defendant merely presents his chosen defense in his opening statement, through the examination of witnesses, and then again in his closing argument.

However, many courts treat the wrong-person defense differently by requiring the defendant to file a pretrial notice informing the prosecutor of the details of his defense.[38] These details include the identity of the third party the defendant believes committed the crime, the third party's motive to commit the crime, the specifics regarding the third party's opportunity to commit the crime, and the direct evidence linking the third party to the crime. If a defendant fails to give proper notice of these specifics, he will likely be foreclosed from presenting his defense at trial.[39]

This notice requirement places the defendant at a tremendous disadvantage for several reasons. First, it requires the defendant to disclose far more about his defense than the prosecutor is required to disclose about the government's case. This requirement exceeds the

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allowed to introduce otherwise relevant evidence). *See, e.g.*, State v. Dunlap, 2002 WI 19, ¶20, 250 Wis. 2d 446, 640 N.W.2d 112, 2002 Wisc. LEXIS 19 (holding that Wisconsin's rape shield law barred the admissibility of evidence of victim's prior sexual conduct including masturbating, touching men in the genital area, and "humping the family dog").

[38] *See, e.g.*, State v. Cotto, 865 A.2d 660, 670 (N.J. 2005) ("First, when a criminal defendant seeks to cast blame on a specific third-party, he or she must notify the State in order to allow the State an opportunity to properly investigate the claim."); State v. Dechaine, 572 A.2d 130, 134 (Me. 1990) (requiring pretrial notice because "a defendant cannot be allowed to use his trial to conduct an investigation that he hopes will convert what amounts to speculation into a connection between the other person and the crime").

[39] *See Cotto*, 865 A.2d at 670 (justifying exclusion of wrong-person defense even though defense counsel "did not receive the information until the last minute").

bounds of the typical discovery statute that requires the prosecutor to disclose names of witnesses and to give the defendant the opportunity to inspect physical evidence. As a result, the notice requirement operates as a one-way street by requiring the defendant, but not the prosecutor, to provide a roadmap of his strategy and theory of the case. The prosecutor, who nearly always has superior investigative resources in the first place, is thus provided with a tremendous, additional advantage.

Second, and far more significantly, the notice requirement is actually a misnomer. Far from merely requiring that the defendant notify the prosecutor of the defense to allow time for adequate preparation, the defendant must actually seek the court's permission before presenting the defense to the jury.[40] As demonstrated in this Article, most courts share the prosecutor's misconception that the government's charging decisions are infallible. As a result, courts are generally hostile to the wrong-person defense.[41]

B. *Offer of Proof*

Although it is simple in theory, the three-part test for the admissibility of a wrong-person defense is too complex for many trial judges to apply. As judges tend to disfavor the defense to begin with, the complexity poses a significant risk for a defendant. More specifically, many trial judges will exclude the defense because they confuse two distinct concepts: the *admissibility* of the evidence and the *weight* of the evidence.[42]

When ruling on a defendant's pretrial motion to use the wrong-person defense, judges should merely decide the admissibility of the evidence by determining whether the offer of proof satisfies the three-part test.[43] For example, assume that a defendant is charged with armed robbery, and asserts a mistaken identification defense combined with a wrong-person defense; that is, the defendant did not

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[40] *See supra* Part III.

[41] Griffin, *supra* note 33, at 131 ("[C]ourts 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."); Hayes, *supra* note 33, at 546 ("[T]he criminal justice system presumes that prosecutors and law enforcement have apprehended the correct suspect, and, subsequently, increases the likelihood of a wrongful conviction.").

[42] *See* Everhart, *supra* note 20, at 277-78.

[43] *See supra* Part II.

commit the crime and, further, he wants to tell the jury who did. His pretrial motion to the court would include the identity of the third party along with an offer of proof stating (1) the nature of the evidence against the third party—for example, the names of the eyewitnesses who will testify that they saw him rob the victim, (2) the evidence of the third party's opportunity—for example, the third party's admission to the police that, although he claims not to have robbed the victim, he was present at the time, and (3) the third party's motive—for example, financial gain.

Based on this hypothetical offer of proof, the defendant should be allowed to present his wrong-person defense to the jury.[44] However, some trial judges mistakenly take over the function of the jury and focus on the weight of the evidence rather than its admissibility, imposing heavier pretrial burdens on the defendant.[45] For instance, some trial judges erroneously require the defendant to prove the three prongs of the test by "clear and convincing evidence."[46] Other trial judges require that the defendant's third-party guilt evidence be at least as strong, in the judge's opinion, as the prosecutor's evidence.[47] This is an especially odd test; if a trial judge determines the defendant's evidence is at least as strong as the prosecutor's evidence, the judge is implicitly finding that a jury could not find guilt beyond a reasonable doubt, and would, in theory, be required to enter a directed verdict of acquittal.

Other judges will exclude a third-party defense if *the police* believe the defendant committed the crime.[48] These trial judges are essentially deciding that if the government believes a defendant is

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[44] *See, e.g.*, Milenkovic v. State, 272 N.W.2d 320, 326 (Wis. Ct. App. 1978) (An offer of proof "should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt.").

[45] Everhart, *supra* note 20, at 277 ("Although these courts use the language of the 'relevancy rules' when discussing the relevancy test, in effect they look to the weight and sufficiency of the evidence . . . ."); Suni, *supra* note 29, at 1685 (arguing that jurors, not judges, must be solely responsible for determining the weight of the evidence).

[46] State v. Jones, 678 N.W.2d 1, 16 (Minn. 2004).

[47] *See* State v. Adams, 124 P.3d 19, 27-29 (Kan. 2005) (finding that where the State had a "wealth of evidence against the defendant, both direct and circumstantial," and the defendant could not proffer competing evidence linking a third party to the injuries and crime scene at the pertinent time, excluding such evidence was not an abuse of discretion).

[48] *See* State v. Renteria, 520 P.2d 316, 317 (Ariz. Ct. App. 1974) (holding that the trial judge was correct in denying defendant's introduction of third party evidence where there was "unequivocal testimony of the police officers that the defendant was the one person in possession of the heroin").

guilty, he has no right to present his defense of choice; this decision makes the trial a mere formality. Similarly, other trial judges have required "a preliminary showing of 'substantial probability' of third party guilt," instead of the correct test in their jurisdiction: whether the evidence is "capable of raising a reasonable doubt of defendant's guilt."[49]

But the confusion does not stop with trial judges. Even putting aside the incredibly long period of time involved in an appeal—after all, justice delayed is often justice denied—there is no guarantee that an appellate court will grant a defendant relief from a trial judge's error.[50] For example, one appellate court found the trial judge erred by imposing the wrong pretrial burden of proof, but refused to correct the judge's mistake.[51] In that case, *People v. Hall*, the appellate court held the trial judge should have allowed the defendant to present his wrong-person defense because it "could [have] raise[d] a reasonable doubt as to [the] defendant's guilt."[52] The appellate court ultimately deemed the error harmless and upheld the conviction because it was "not reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error."[53]

Notably, a finding that certain evidence "could [have] raise[d] a reasonable doubt as to [the] defendant's guilt" necessarily means "a result more favorable to [the] defendant" could have been reached, had the evidence been admitted at trial.[54] Although the appellate court's peculiar holding in *Hall* could conceivably be reconciled on other grounds,[55] this case demonstrates how the complexity of the three-part test may work against a defendant and deny him the constitutional right to present a wrong-person defense.

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[49] People v. Hall, 718 P.2d 99, 104 (Cal. 1986).

[50] *Id*. at 105.

[51] *Id*. at 103.

[52] *Id*. at 104.

[53] *Id*. at 106.

[54] *Id*. at 104, 106.

[55] In defense of the appellate court's convoluted decision, it appears that the court believed that, despite the trial court's exclusion of the defendant's wrong-person defense, defense counsel was, at least to some degree, able to back-door the defense and present some evidence that a third party, and not the defendant, committed the crime. By operating under this belief, the appellate court fails to recognize the difference between (1) structuring a wrong-person defense and then fully executing it during trial and (2) incidentally introducing a few pieces of evidence while trying to comply with the court's order prohibiting the defense.

C. *Evidence Linking the Third Party*

The third pitfall of the wrong-person defense is that a defendant must provide direct evidence linking the third party to the crime. This problem is threefold. First, the government bears no such burden to convict the defendant. In fact, a conviction may be based on a single, highly implausible allegation that is unsupported by any evidence.[56] Even when an allegation is made by the defendant's alleged coconspirator—a person who has a strong incentive to shift blame from himself to the defendant—the allegation need only be supported by "slight evidence," including evidence of "the defendant's conduct before and after the crime."[57] This is the first of many double standards. When a defendant offers evidence of the third party's 'conduct before or after the crime' in support of a wrong-person defense, courts typically find such evidence insufficient, and exclude the defense.[58]

Second, requiring the defendant to provide direct evidence of the third party's guilt is highly problematic because the police, not the defendant, control the evidence at the crime scene as well as during the course of the criminal investigation. By the time the various government agents decide which pieces of evidence they will collect and preserve, which suspects will be the focus of the follow-up investigation, and which crimes will be charged in the pleadings, many months and sometimes many years have passed.[59] It is often impossible for a defendant to go back in time and find the necessary direct evidence against the third party.[60]

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[56] Griffin, *supra* note 33, at 132 ("[A]lthough 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."). For an example of how easily the state can convict a defendant, *see, e.g.*, State v. Brown, 2008 WI App 64, 311 Wis. 2d 489, 750 N.W.2d 519, 2008 Wisc. App. LEXIS 189 (upholding sexual assault conviction based only on testimony of accuser-child that he believed he was touched sexually, was sleeping at the time it happened, but believed it was not a dream because he had "a different dream" that night). The conviction was upheld because the term "evidence," at least in the context of the government's case, is defined to include the accusation itself. *See* WIS. J.I. CRIM. 103.

[57] Klinect v. State, 501 S.E.2d 810, 812 (Ga. 1998).

[58] *See, e.g.*, State v. Chaney, 967 S.W.2d 47, 55 (Mo. 1998) (stating that third-party's repeated lies to the investigating officers demonstrated his "guilty conscience," but did not constitute the direct evidence needed to permit the defendant's use of a wrong-person defense).

[59] *See, e.g.*, Shields v. State, 166 S.W.3d 28, 30 (Ark. 2004) (stating that police did not target defendant until two years passed from the date of the crime).

[60] Suni, *supra* note 29, at 1688 (arguing that defendants are often unable to provide direct evidence of third-party guilt, "not because the evidence does not exist, but because the system

Third, despite being at a disadvantage relative to the police, a defendant may still have a strong wrong-person defense with evidence of the third party's motive and even some evidence of guilt. However, many courts respond by creating an arbitrary—and rather curious—distinction between circumstantial evidence of third-party guilt and direct evidence of third-party guilt.[61] From there, a court may easily hold that the defendant's proffered evidence is merely circumstantial and exclude the defendant's wrong-person defense for lack of direct evidence.[62] This is yet another double standard. When evaluating the prosecutor's evidence at trial, circumstantial evidence is always acceptable; direct evidence is never required to convict the defendant.[63]

The results that flow from these arbitrary classifications and double standards are alarming: "the fact that the alternative perpetrator may have made threats against the victim, or was seen with blood on his hands in the vicinity of the crime, or had assaulted the victim two weeks before the crime, have been deemed insufficient[,]" and courts have excluded those wrong-person defenses.[64] Even where a third party "was seen fleeing from the scene of the crime" and admitted to killing other people and burying them "in the very woods in which the victims' bodies were later found[,]" one court still considered the defendant's evidence "too threadbare to be admissible."[65]

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makes this evidence difficult or impossible to obtain. . . . [T]he investigative options available to the defense fall far short of those available to the prosecution and police."); Griffin, *supra* note 33, at 131 ("Rarely does an accused possess the resources required to adequately investigate and prove that someone else committed the crime.").

61 *See, e.g.*, *Chaney*, 967 S.W.2d at 54-55 (Mo. 1998) (holding that even though the third-party was a known pedophile and repeatedly lied to police when being investigated for the child-victim's death, this amounted merely to circumstantial evidence, and did not constitute the direct evidence needed to permit the defendant's wrong-person defense); State v. Adams, 124 P.3d 19, 28 (Kan. 2005) (trial court mistakenly relied on distinction between "circumstantial evidence" and "direct evidence" to exclude defendant's wrong-person defense.). State v. Evans, 62 P.3d 220, 227 (Kan. 2005) (trial court mistakenly relied on distinction between "circumstantial evidence" and "direct evidence" to exclude defendant's wrong-person defense.).

62 *Adams*, 124 P.3d at 29; *Evans*, 62 P.3d at 227.

63 Powell, *supra* note 27, at 1051 (arguing that, because "the prosecution may obtain a conviction on nothing more than circumstantial evidence, this means that the defendant and the state are entering the adversarial system on unequal footing"). In fact, courts often instruct juries that, with regard to the prosecutor's case, "Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact." WIS. J.I. CRIM. 170.

64 Suni, *supra* note 29, at 1677 (discussing various cases where the wrong-person defense was excluded for lack of the right kind of evidentiary link).

65 Blume et al., *supra* note 30, at 1081 (discussing the holding of Watson v. State, 604 S.E.2d 804, 812 (Ga. 2004)).

Creating these baseless evidentiary standards to exclude a defendant's relevant evidence "impairs a defendant's right to present a defense, interferes with the right to trial by jury, and undercuts the requirements of proof beyond a reasonable doubt. Moreover, it increases the risk of convicting an innocent person."[66]

D. *The Third Party's Motive*

The most significant pitfall of the wrong-person defense is the requirement that the defendant prove the third party's motive. There are two issues with this requirement. First, no such requirement is placed on the government. In fact, many judges specifically instruct the jury the prosecutor is *not* required to prove a defendant's motive to win a conviction.[67] Once again, the three-part test for admissibility creates a double standard and requires the defendant to prove more in his defense than the government must prove in its prosecution. Second, a person's motive for committing a crime is often impossible to deduce, which places an insurmountable burden upon the defendant.

The absurdity of the motive requirement is best demonstrated by a Wisconsin case where the defendant asserted a wrong-person defense to allegations that he killed three victims with three different murder weapons.[68] Fortunately for the defendant, the DNA of an unknown male was found on all three of the murder weapons,[69] thus providing direct evidence that a third party committed the crimes. Further, a witness saw one of the victim's ex-boyfriends at the scene two days before the murders, and stated he was arguing with the victim because she had broken off their relationship and was refusing to have sex with him.[70] The third party's access and proximity to the crime scene provided him the opportunity to commit the crimes.

However, even though the defendant proved a third party's opportunity and presented direct evidence of a third party's involvement, the court held the defendant failed to meet the third prong of

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66 Suni, *supra* note 29, at 1682.

67 *See, e.g.*, WIS. J.I. CRIM. 175 ("Motive refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, *the State is not required to prove motive on the part of a defendant in order to convict*.") (emphasis added) (internal quotation marks omitted).

68 State v. Koepp, 2012 WI App 73, ¶¶1-6, 342 Wis. 2d 250, 816 N.W.2d 351, 2012 Wisc. App. LEXIS 386.

69 *Id*. at ¶¶3-6.

70 *Id*. at ¶¶4-8.

the test: proving the third party's motive.[71] The court determined it "is not reasonable to infer that a single denial of sex after a night out would have provided motive to brutally kill [the victim] and her children a week later, when the denial of sex did not result in violence at the time[.]"[72] As a result, the court upheld the trial court's exclusion of the wrong-person defense.[73]

This decision brings to light major issues about fairness in our of criminal justice system. The motive the defendant attributed to the third party—committing a violent crime of passion out of anger over a failed relationship—was at least as reasonable as the motive the state attributed to the defendant: that he "killed [the victim] to keep her from exposing an affair."[74] Despite this, the defendant's motive was rejected by the trial court and the appellate court, and his defense was excluded.[75]

This case also highlights the larger problems with the motive requirement. First, the jury in this particular case was specifically instructed that "the State is *not* required to prove motive on the part of a defendant in order to convict."[76] If the state need not prove the defendant's motive to convict him, then defendant should not have to prove the third party's motive before being allowed to present his defense to the jury.

Second, what if the third party who was present at the scene of the crime and arguing with the victim, and whose DNA was found on *all three* murder weapons, simply didn't have a rational motive? The defendant should not be foreclosed from presenting his defense because the third party was mentally deranged, extremely intoxicated from alcohol or other drugs, or caught up in an emotional, irrational crime of passion.

The right to present a defense should not hinge on such an arbitrary rule and absurd double standard. Yet, when a defendant attempts to employ a wrong-person defense, he risks being shut down by the court before the trial even begins.

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71 *Id*. at ¶¶13-15.

72 *Id*.; *see also* Hayes, *supra* note 33, at 545 (discussing how courts simply dismiss third-party motives as weak without any analysis or discussion).

73 *Koepp*, 2012 WI App 73, at ¶¶13-15.

74 *Id*. at ¶¶1-3.

75 *Id*. at ¶¶13-15.

76 WIS. J.I. CRIM. 175.

E. *Confusing the Jury*

Even when a defendant demonstrates his wrong-person defense meets all three prongs of the test, he faces yet an additional snag: a trial judge may still exclude the evidence if, in his mind, its relevance is outweighed by the possibility it will "confuse or mislead the jury" when deciding the defendant's guilt.[77] Evidence is commonly excluded for this reason, even in states that purport to judge admissibility of the wrong-person defense on relevancy grounds rather than the three-part test.[78]

However, this concern over jury confusion is disingenuous. First, if the evidence is relevant, then the supposed reason for its exclusion is the very thing that makes it admissible. The purpose of relevant defense evidence is to cause the jury to doubt the defendant's guilt—creating doubt is, after all, the legitimate, underlying purpose of all defenses in our adversarial system.[79] Second, if the court believes the evidence is not relevant, there is no risk that it will confuse the jury. More specifically:

> [I]f the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.[80]

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[77] State v. Jones, 678 N.W.2d 1, 16-17 (Minn. 2004); *see also* Wiley v. State, 74 S.W.3d 399, 406-07 (Tex. 2002) (excluding the defendant's wrong-person defense because of "a great threat of confusion of the issues" and the risk that the evidence "might have led the jury astray, turning the focus away from whether the [defendant]—the only person whose actions were on trial—[committed the crime]"); Perry v. Rushen, 713 F.2d 1447, 1455 (9th Cir. 1983) (excluding evidence of third-party guilt because of "its tendency to divert the trial and confuse the jury").

[78] *See* Blume et al., *supra* note 30, at 1081-84 ("regardless of whether a jurisdiction adopts a [three-part] test or a 401/403 [relevancy] test, its courts often use aspects of both standards when applying the law to the specific facts of a case").

[79] Smithart v. State, 988 P.2d 583, 588 (Alaska 1999) (The test for admissibility should be "whether the evidence offered tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of a *third party* beyond a reasonable doubt.") (emphasis in original).

[80] People v. Hall, 718 P.2d 99, 103 (Cal. 1986) (quoting 1A WIGMORE, EVIDENCE § 139, p. 1724 (Tillers rev. ed. 1980)); *see also* Blume et al., *supra* note 30, at 1085-86 ("[S]ocial science research suggests that . . . jurors are not so easily duped as this fear suggests. . . . Courts therefore do not need heavy restrictions on third party guilt evidence to prevent jurors from scurrying after speculation about an alternative perpetrator when there is no evidence to support such a theory.").

When a court claims it is concerned the jury will acquit a defendant out of confusion,[81] it has created yet another double standard. To illustrate this hypocrisy, consider the problem of prosecutorial misconduct. When a prosecutor makes a highly prejudicial, inflammatory, and unethical closing argument to help him win convictions, a trial judge usually refuses to grant a mistrial, and instead simply instructs the jury that "closing arguments do not constitute evidence."[82] Then, even in cases of egregious prosecutor misconduct, an appellate court will uphold the conviction because "juries are assumed to follow the instructions given to them."[83]

However, when deciding whether a defendant may present a wrong-person defense, the court completely loses faith in the jury. First, the jury is given an instruction stating: "A reasonable doubt is *not* a doubt which is based on mere guesswork or *speculation*. . . . While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt."[84] Second, as the appellate courts have told us ad nauseam, "juries are assumed to follow the instructions given to them[.]"[85]

Given this jury instruction and the binding legal presumption the jury will follow it, courts should not worry that juries will be confused over allegedly speculative third-party guilt evidence. The courts' confidence in the wisdom of juries should not so quickly turn from complete trust in the jurors' ability to ignore inflammatory prosecutorial misconduct to complete distrust in the jurors' ability to weed-out speculative wrong-person defenses. The courts' trust of juries should not suddenly diminish in the context of wrong-person defenses, where the risk of the jury "getting it wrong" is nonexistent. That is, the more speculative the defendant's third-party guilt evidence, the less likely a jury would believe it.

In short, "[a]llowing trial courts to exclude evidence that advances a defendant's theory of defense because of a risk that juries may be confused or distracted . . ." serves no legitimate purpose what-

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81 *See* Suni, *supra* note 29, at 1686 ("At its core, the [direct evidence] doctrine appears to be based largely on a fear of prejudice to the government in the form of 'erroneous acquittals.'").

82 State v. Mayo, 2006 WI App 78, ¶4, 292 Wis. 2d 485, 713 N.W.2d 199, 2006 Wisc. App. LEXIS 2-76.

83 *Id*.

84 WIS. J.I. CRIM. 140.

85 *Mayo*, 2006 WI App at ¶4.

soever and, further, "is inconsistent with values embodied in the Sixth Amendment right to trial by jury."[86]

F. *Additional Hurdles*

Even when a defendant meets all three prongs of the test, he faces another pitfall: The court may still exclude the wrong-person defense by imposing extra and unexpected hurdles. These hurdles often take the form of a raised evidentiary bar for the defendant. For example, the court may hold the defendant did not satisfactorily prove the third party did not have an alibi.[87] Forcing the defendant to attempt to prove a negative, especially when he does not control the collection of evidence and the course of the police investigation, is an impossible burden.

Or, for example, even in the face of overwhelming evidence of a third party's guilt, the court may hold that the defendant's proffered evidence does not necessarily rule out the possibility of *two* perpetrators.[88] That is, it might be true that the third party committed the crime, but, the reasoning goes, that does not necessarily prove that the defendant did not *also* commit the crime.

These legal gymnastics create an evidentiary hurdle that lies far above and beyond anything the prosecutor is required to prove to win a conviction. That is, the prosecutor is not required to prove that the defendant did not have an alibi before he may try him for the crime. Therefore, the defendant should not have to prove that the third party did not have an alibi.

Similarly, the prosecutor is not required to prove that the crime was committed by the defendant alone. In fact, prosecutors are allowed to propose numerous party-to-the-crime theories at trial—including that the defendant committed the crime alone, aided and abetted others in committing it, or merely conspired with others to

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[86] Suni, *supra* note 29, at 1685 (quoting Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621, 636 (1998)) (internal quotation marks omitted).

[87] State v. Koepp, 2012 WI App 73, ¶¶15-16, 342 Wis. 2d 250, 816 N.W.2d 351, 2012 Wisc. App. LEXIS 386 (excluding the defendant's wrong-person defense in part because "there was simply no way to determine whether [the third-party] had an alibi for the night in question").

[88] People v. Hall, 718 P.2d 99, 103 (Cal. 1986) (upholding the exclusion of the defendant's wrong-person defense because "no testimony or circumstantial evidence limited the number of perpetrators" of the crime).

commit it—and courts might not even require juror unanimity on which theory is correct in order to convict.[89] Therefore, the defendant should not have to prove that the third party acted alone.

G. *The Rules of Evidence*

Even when a trial court approves a defendant's use of the wrong-person defense, presenting the specifics of the defense at trial can be incredibly challenging. An example from Missouri illustrates this challenge. In *State v. Chaney*, the defendant sought to demonstrate to the jury that the alternative perpetrator was a pedophile, and therefore had motive to commit the child-victim crime with which the defendant was charged.[90] In that case, the court excluded the alternative perpetrator's prior sexual conduct as inadmissible character evidence.[91] However, in *State v. Barnard*, when the prosecutor sought to demonstrate to the jury that the *defendant* was a pedophile, the *defendant's* prior sexual history was admissible to show his motive to commit the crime.[92]

An example from Minnesota also illustrates this challenge. A defendant that wants to demonstrate to the jury that the alternative perpetrator has numerous prior arrests for crimes similar to the one with which the defendant is charged—evidence known in Minnesota as reverse-Spreigl evidence—finds that courts routinely exclude such evidence.[93] However, if the prosecutor wants to prove to the jury that the *defendant* has prior, similar arrests, the rules suddenly change: one appellate judge confessed that "his work on a few hundred reverse-Spreigl cases leaves him certain that if the state had offered similar

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[89] *See* Holland v. State, 280 N.W.2d 288, 293 (Wis. 1979) (holding that juror unanimity with regard to whether the defendant conspired, aided and abetted, or acted alone is not required in order to convict a defendant, notwithstanding the defendant's supposed right to a unanimous verdict).

[90] State v. Chaney, 967 S.W.2d 47, 54-55 (Mo. 1998).

[91] *Id*.

[92] *See* State v. Barnard, 820 S.W.2d 674, 678 (Mo. Ct. App. 1991) ("[T]he current trend is toward a policy of liberally allowing the admission of evidence of prior sex crimes under one of the exceptions to the inadmissibility rule. Missouri allows for such testimony under both the motive exception and the common scheme or plan exception.").

[93] Jayna M. Mathieu, Note, *Reverse-Spreigl Evidence: Challenging Defendants' Obligation to Exceed Prosecutorial Standards to Admit Evidence of Third Party Guilt*, 86 MINN. L. REV. 1033, 1034-35 (2002) ("[C]ourts tend to reach different results in Spreigl and reverse-Spreigl cases. Contrary to a Spreigl scenario, when defendants attempt to introduce reverse-Spreigl evidence, trial courts frequently exclude it.").

incidents against the defendant, the evidence likely would have been admitted."[94]

The various types of other evidentiary double standards are too numerous to itemize here. Nonetheless, virtually any rule of evidence, especially the rule against hearsay,[95] provides a tremendous opportunity for a court to limit or even exclude the details of a defendant's wrong-person defense. Alarmingly, most courts regularly elevate these rules of evidence—or, more accurately, their hyper-technical and often erroneous interpretation of the rules—above the defendant's constitutional right to present a defense, despite the Supreme Court's holding that the right to present a defense should trump the rules of evidence.[96]

H. *The Burden of Proof at Trial*

Finally, even when a defendant can leap all of the hurdles established by the court and is allowed to present a wrong-person defense to the jury, he still faces a serious potential pitfall: He may, as a practical matter, have the burden of proof at trial. Although the burden of proof legally lies with the prosecution in all criminal cases, "presenting any defense carries the risk of having the jury reject the defense rather than focusing on the weakness of the State's case."[97]

In other words, if the defendant gets into a "story-battle[ ]" with the prosecution, "[t]he side who can offer a story which the juror accepts as the 'best' explanation of the evidence presented, and the closest match to his or her own narrative, will win the juror's vote in the end."[98] And, because the police control the crime scene and shape

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94 Mathieu, *supra* note 93, at 1035 (discussing the trial court's exclusion, and one appellate judge's concession, in State v. Gumtow, No. C4-96-663, 1997 WL 161858 (Minn. Ct. App. Apr. 8, 1997)).

95 *See, e.g.*, State v. Grega, 721 A.2d 445, 453-56 (Vt. 1998) (excluding defendant's wrong-person defense, including prior inconsistent statements and statements not offered for their truth, because the court believed they constituted hearsay); State v. Cotto, 865 A.2d 660, 670 (N.J. 2005) (excluding defendant's wrong-person defense because it was "inadmissible hearsay").

96 Powell, *supra* note 27, at 1029 ("[T]he Supreme Court affirmed the principle that . . . rules of evidence were subject to constitutional limitations."); Hayes, *supra* note 32, at 534-35 (discussing numerous arbitrary rules of evidence that have been declared unconstitutional in their application).

97 State v. Brown, 2008 WI App 64, ¶7, 311 Wis. 2d 489, 750 N.W.2d 519, 2008 Wisc. App. LEXIS 189.

98 Blume et al., *supra* note 30, at 1089.

the course of the investigation, there is a good chance the government's story will be more persuasive than the defendant's.

Therefore, the wrong-person defense is a risky defense that should only be attempted after careful consideration of all the options, including the option of presenting alternative defenses, or even no formal defense at all.[99]

V. LEGAL REFORM: RETURN TO RELEVANCY

The necessary reform in the law of the wrong-person defense is simple and parallels the pitfalls of the defense detailed above. Reform begins by abolishing the three-part test for admissibility in jurisdictions in which it is used. There is simply no justification for courts to insist a defendant must provide direct rather than circumstantial evidence of third-party guilt, while at the same time instructing the jury that, with regard to the prosecutor's case, circumstantial evidence is just as good as direct evidence.[100] Further, there is no reason for courts to require a defendant to prove the third party's motive to commit the crime, when the jury is instructed that the prosecutor is not required to prove the defendant's motive.[101]

Instead, the test for admissibility should be the same as that for any other line of evidence: relevance.[102] Further, the test must not determine whether a court believes the defendant's wrong-person defense *as a whole* is relevant. Under this type of analysis, trial judges inevitably confuse the weight of the evidence with its admissibility and often exclude the defense because, in their opinion, it is not strong enough.[103] Rather, the relevancy test must apply to each piece of the defendant's evidence *individually*.

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[99] Of course, asserting that the state failed to meet its burden of proof on one or more elements of the crime charged *is* a defense, but not a "formal defense" in the sense of presenting an alternative theory of what happened.

[100] *See supra* Part IV.C.

[101] *See supra* Part IV.D.

[102] Powell, *supra* note 27, at 1027 (calling "for the abolition of the [three-part test] in favor of consistent application of Federal Rules of Evidence 401 and 403"). For an alternative proposals for reform, *see* Blume et al., *supra* note 30, at 1104-08 (arguing for evaluation of the defendant's wrong-person in its entirety, but under the lower standard of whether there is probable cause to believe the third-party committed the crime); Griffin, *supra* note 33, at 155 (arguing for evaluation of the defendant's wrong-person defense under a "credible basis" standard which would give rise to the presumption of admissibility).

[103] *See supra* Part IV.B.

For example, if the defendant is aware of a third party's motive to commit the crime, even without being able to prove opportunity or to provide direct evidence of third-party guilt, that motive evidence is always relevant. Similarly, if the defendant can show that a third party had the opportunity to commit the crime, even without an apparent motive or direct evidence of guilt, that opportunity evidence is always relevant. Further, if the defendant can produce circumstantial evidence of third-party guilt or evidence of the third party's consciousness of guilt, even without direct evidence, that circumstantial evidence is always relevant. Any one of these pieces of evidence is always relevant and would be sufficient to convict the defendant if the prosecution offered such evidence against him.[104] Therefore, this same type of evidence should be admissible against the prosecution in an attempt to raise reasonable doubt concerning the defendant's guilt.

Second, courts should not require a defendant to divulge his wrong-person defense before trial through pretrial offers of proof or motions to admit evidence,[105] just as courts do not require the government to divulge its theory of the case before trial.

Third, courts should never exclude a wrong-person defense based on the possibility that it could confuse the jury. Excluding third-party guilt evidence because of jury confusion or similar pre-textual reasons is currently a common judicial tactic, even in states and federal courts that do not explicitly apply the stringent, three-part test for admissibility.[106] However, because creating reasonable doubt about the defendant's guilt is the legitimate purpose of all defense evidence—and, further, because a truly speculative wrong-person defense will only make the government's case look stronger—the wrong-person defense creates no risk of an erroneous acquittal.[107]

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[104] *See supra* Parts IV.C–D.

[105] *See supra* Part IV.A. However, a defendant may still have to provide an alibi notice, depending on the particular facts of the case (e.g., if the defendant not only claims that he is innocent, but also claims to have been somewhere completely different at the time of the alleged crime), and the particular state's alibi notice requirement. *See also* Everhart, *supra* note 20, at 296 (comparing the wrong-person defense with the alibi defense, stating that "the state could probably constitutionally require pretrial notice when a defendant intends to present evidence of a third-party's guilt . . .").

[106] *See* Blume et al., *supra* note 30, at 1081-84 ("[R]egardless of whether a jurisdiction adopts a [three-part] test or a 401/403 test, its courts often use aspects of both standards when applying the law to the specific facts of a case.").

[107] *See supra* Part IV.E.

Finally, courts should not impose new, additional hurdles for the defendant to leap, such as proving the third party did not have an alibi or proving the precise number of perpetrators involved in the crime.[108] Similarly, courts also should not elevate the rules of evidence, even when accurately applied, above the defendant's constitutional right to present a defense.[109]

Although these recommendations are both straightforward and desperately needed, the undeniable reality is that proposals for legal reform are typically of little or no value. Even the most logical proposals to change the most obvious problems may simply be ignored by the state supreme courts and the Supreme Court of the United States.[110] Further, in the rare cases where courts do attempt legal reform, they often wait many decades after a constitutional problem has been identified.[111] Even then, courts typically lack the fortitude and the practical knowledge necessary to truly constrain prosecutorial and judicial abuses of individual rights.[112]

VI. AN ALTERNATIVE THEORY OF DEFENSE

As a practical matter, defense counsel who wishes to present evidence of third-party guilt does not have the luxury of waiting for legal

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108 *See supra* Part IV.F.

109 *See supra* Part IV.G.

110 For example, an overwhelming amount of social science research demonstrates that show-up identification procedures lead to false identifications and wrongful convictions. But despite having this evidence for decades, only a handful of state courts have even attempted any reform to protect defendants' due process rights, and the United State Supreme Court has done absolutely nothing. Further, those state courts that have attempted reform have left the police and prosecutors with numerous loopholes that allow them to continue their use of highly suggestive identification procedures. *See generally* Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381 (2010) (exposing the judicial abuses associated with show-up identifications and advocating reform in this area).

111 *See generally id.* at 381-82.

112 *See generally id.* As another example, the Supreme Court recently admitted that it had been misinterpreting our right of confrontation. For decades the Court had permitted prosecutors to use hearsay evidence to convict defendants without any opportunity for cross-examination. To correct this problem, the Court issued multiple decisions with multiple dissents over a seven-year period (2004-2011), and has created a new legal standard that inevitably incorporated every single one of the flaws that it was attempting to cure. This has left defendants' right of confrontation as weak as it was when the Court embarked on its seven-year reform effort. *See generally* Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1302-05 (2011) (evaluating the Supreme Court's attempt to resurrect the confrontation clause and arguing that its attempt has been unsuccessful).

reform. Instead, counsel must consider alternative defenses and make a strategic decision in light of the facts of the particular case and the existing case law in the relevant jurisdiction. One alternative defense maintains, as does the wrong-person defense, that the defendant did not commit the crime. However, instead of attempting to tell the jury who *did* commit the crime, this alternative defense focuses on the incompetence of the government's investigation and charging decision. This alternative defense is discussed more fully in the following Sections.

A. *Blaming the Police, Not the Third Party*

Understandably, when the defense must concede that a real crime has actually been committed, but disputes that the defendant committed it, counsel's first reaction is to pursue the wrong-person defense. But the problem, as this Article has demonstrated, is that this defense comes complete with numerous pitfalls.[113] The risk, therefore, is that defense counsel's decision to pursue the wrong-person defense could all but guarantee the prosecutor's victory before the trial even begins. Fortunately, counsel is not required to attempt to jump through the hoops of the wrong-person defense. Rather, "a defendant may always generally suggest that someone other than the defendant is guilty of the charged crime."[114]

Under a wrong-person defense, the defendant claims, "I did not do the crime, *but I know who did*."[115] However, the test for the admissibility of such third-party guilt evidence "substantially limits, and in many cases completely prevents, a defendant who says 'not me' from attempting to answer the question 'then who?'"[116] If the trial judge prevents the defendant from answering the question "then who?," defense counsel should strongly consider not even attempting to answer the question. Instead, counsel should consider an alternative defense.

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113 *See supra* Part IV (outlining the many obstacles a defendant must overcome in order to use the wrong-person defense and explaining that even if the defendant overcomes these obstacles, the judge may not admit the evidence as a result of evidentiary ruleles and concerns about the jury).

114 Smithart v. State, 988 P.2d 583, 586 (Alaska 1999).

115 Everhart, *supra* note 20, at 293 (emphasis added).

116 Suni, *supra* note 29, at 1676.

The alternative defense proposed in this Section has two prongs: (1) the defendant did not commit the crime, and (2) the defendant is only on trial for the crime because the government was grossly incompetent in its investigation and charging decision. The first prong of the alternative defense is the same as the first prong of the wrong-person defense; however, the second prong diverges from the wrong-person defense. The alternative defense does not attempt to tell the jury who, specifically, committed the crime. This way, defense counsel avoids the heightened standard for admissibility, and uses the same evidence for the purpose of demonstrating the gross incompetence of the police and the prosecutor. To illustrate the alternative defense, consider this factual scenario:[117]

> The victim was leaving a grocery store in the city when the perpetrator shot her in the head, took her keys, and stole her car. Six eyewitnesses gave statements to the police, but gave dramatically different accounts of the perpetrator's height, age, weight, build, hair length, and facial hair.
>
> Two days later, a third party was seen driving the victim's stolen car. The third party also matched many of the eyewitness's descriptions of the perpetrator. When questioned by police, the third party said that he had bought the car the day after the crime from the soon-to-be defendant, and had nothing to do with the murder-theft. He was also very eager to cast the defendant in a bad light and blame him for the crime.
>
> Over the course of several interviews with the police, however, the third party twice lied about his name, and changed his story numerous times with regard to important details. Some of the details of his various stories even contradicted facts known to the police.
>
> The police also knew that the third party was himself a defendant in pending criminal cases for thefts at the very same grocery store where the victim was shot. The police even knew that the third party was the primary suspect in a different murder-theft case from earlier in the year.
>
> The police did not question the third party about the inconsistencies in his multiple stories, or about his possible motive to blame the defendant and divert the investigation away from himself. Nor did

117 These facts are derived from *Kyles v. Whitely*, 514 U.S. 419 (1995).

> they attempt to match fingerprints found on key evidence against the third party's prints.
>
> During the course of their investigation, the police did conduct photo array identification procedures with the eyewitnesses, but did not include the third party in any of the arrays. Only three eyewitnesses who viewed photo arrays positively identified the defendant as the perpetrator, even though their initial descriptions, given at the scene of the crime, matched the third party's appearance.

For defense lawyers, the above factual scenario initially cries out for the wrong-person defense. It appears the third party had opportunity and motive, and there even seems to be direct evidence of the third party's guilt.

However, as demonstrated above, trial judges often exclude wrong-person defenses that are based on stronger evidence of third-party guilt than the evidence provided in this scenario.[118] Further, satisfying the three prongs of the test for admissibility of a wrong-person defense—including getting the key evidence against the third party classified as "direct" rather than merely "circumstantial"—could be far more difficult than it first appears. In short, defense counsel who files a pretrial motion to use the wrong-person defense faces the substantial risk that his motion will be denied, leaving the defendant with no evidence to present to the jury.

Therefore, after thoroughly investigating the facts of the particular case, researching the jurisdiction's case law in depth, and considering the trial judge's tendencies, defense counsel should consider using the same evidence—or lack of evidence—to attack the incompetent police investigation and the prosecutor's negligent charging decision. In this manner, the alternative defense seeks not to prove the third party's guilt, but instead to create reasonable doubt about the defendant's guilt.

In fact, the scenario outlined above is not hypothetical as it is taken from the United States Supreme Court case *Kyles v. Whitley*.[119]

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118 *See supra* Part IV (outlining the many obstacles a defendant must overcome in order to use the wrong-person defense and explaining that even if the defendant overcomes these obstacles, the judge may not admit the evidence as a result of evidentiary rules and concerns about the jury).

119 *Kyles*, 514 U.S. 419 (1995). The facts that form the basis of the scenario put forth in this Article are scattered throughout the *Kyles* decision. Those detailed facts are not footnoted in this Article as they are not important in and of themselves; rather, they are only used as an example to illustrate the possible alternative to the wrong-person defense.

In *Kyles*, the defendant's first trial resulted in a hung jury, and his second trial resulted in a conviction and death sentence.[120] However, approximately a decade later, the Court reversed the conviction and death sentence and ordered a new trial because the government hid from the defense much of the exculpatory information recounted in the above scenario.[121]

But why would the Court reverse the conviction and death sentence so the defendant could pursue a wrong-person defense, only to have the trial court reject the defense? The answer, of course, is that the Court did not reverse for that reason.[122] Instead, the Court provided a very detailed blueprint for how the exculpatory evidence, including evidence pointing to third-party guilt, would be admissible at the defendant's next trial.[123] The exculpatory evidence outlined in the above scenario would have permitted the defendant to raise reasonable doubt, not by proving the third party's guilt, but by attacking the incompetent police investigation and the prosecutor's negligent charging decision.

The Court's blueprint for the alternative defense included these scathing statements:

> [T]he defense could have attacked the investigation as shoddy[124] . . . . [The evidence] would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation as well[125] . . . . Their disclosure would have revealed a remarkably uncritical attitude on the part of the police[126] . . . . [T]he defense could have examined the police to good effect on their knowledge of [the third party's] statements and so have attacked the reliability of the investigation in failing even to consider [the third party's] possible guilt . . .[127] *A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant* . . .[128] [I]ndications of conscientious police work will

120 *Id*. at 421.
121 *Id*. at 454.
122 *Id*.
123 *Id*. at 445-56, 454.
124 *Id.* at 442 n.13.
125 Kyles v. Whitley, 514 U.S. 419, 445 (1995).
126 *Id*.
127 *Id*. at 446.
128 *Id*. (emphasis added).

> enhance probative force [of the government's evidence at trial] and slovenly work will diminish it.[129] . . . [T]he defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence.[130] . . . Since the police admittedly never treated [the third party] as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt and to sully the credibility of [the] Detective . . .[131] Exposure to [the third party's] own words, even though cross-examination of the police officers, would have made the defense's case more plausible . . .[132] [The evidence] would also have shown that the police . . . never even bothered to check [the third party's] story against known fact.[133] . . . [T]he defense would have had further support for arguing that the police were irresponsible in relying on [the third party] . . . .[134] [The evidence] would simply have underscored the unreliability of the investigation and complemented the defense's attack on the failure to treat [the third party] as a suspect and his statements with a presumption of fallibility.[135] The jury would have been entitled to find that the investigation was limited by the police's uncritical readiness to accept the story . . . [and] that the lead police detective who testified was either less than wholly candid or less than fully informed . . . ."[136]

In its opinion, the Court never indicated the alternative defense requires defense counsel to prove the third party's motive or opportunity or provide direct evidence of third-party guilt. Rather, the crux of the alternative defense is that these factors cannot be known or obtained because the government's investigation was incompetent. The goal is to raise reasonable doubt as to the defendant's guilt. The message to the jury is that, had the police competently or at least fairly investigated the case, the prosecutor never would have charged the defendant in the first place. The distinction is subtle, but critical: instead of trying to prove the third party's guilt, the focus of the defense should be to demonstrate the police were negligent, in part

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129 *Id*. at 446 n.15.

130 *Id.* at 447.

131 Kyles v. Whitley, 514 U.S. 419, 447 (1995).

132 *Id*. at 449.

133 *Id*. at 450.

134 *Id*.

135 *Id*. at 451.

136 *Id.* at 453.

because they failed "even to consider [the third party's] possible guilt . . . ."[137]

In short, a wrong-person defense attempts to tell the jury who, specifically, committed the crime, and runs the risk of exclusion under the three-part test, or similar test for admissibility. However, using the same evidence to focus on the government's incompetence, including its failure to consider the guilt of third parties, renders the evidence admissible under *Kyles*. The Supreme Court's blueprint in *Kyles* also has additional advantages over the wrong-person defense, as explained below.

B. *Advantages of Blaming the Police*

Most importantly, the alternative defense actually renders the defendant's evidence admissible at trial. No defense, no matter how relevant or admissible in theory, is of any value to a defendant if the trial judge prevents the jury from hearing it. The alternative defense has at least five other major advantages.

First, the strategy of attacking the quality of the police investigation—and, consequently, the prosecutor's charging decision—typically does not require pretrial notice or a detailed offer of proof. This places the defendant on equal footing with the prosecutor, and also prevents the judge from developing reasons to exclude the defense.

Second, this approach does not require the defendant—the party with no access to the crime scene, few investigative resources, and no input into the government's investigative decisions—to prove the third party's motive or to provide direct evidence linking the third party to the crime.

Third, this defense cannot be excluded under the theory that it would confuse the jury. Not only did the Court state that a "common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant[,]"[138] but it also stated that "indications of conscientious police work will enhance probative force [of the government's evidence at trial] and slovenly work will diminish it."[139] Therefore, the quality of the police investigation is not a collateral issue, and cannot be said to "confuse the jury," or be

137 Kyles v. Whitley, 514 U.S. 419, 446 (1995).

138 *Id*.

139 *Id*. at 446 n.15.

declared "unfairly prejudicial" to the state—to cover some of the judicial buzzwords routinely used to keep a wrong-person defense from ever reaching the jury.

Fourth, this strategy is more likely to pass any evidentiary hurdles that a prosecutor could raise, including hearsay objections. For example, the Court in *Kyles* determined that even without calling the third party as a witness, his statements would not be hearsay as they would not be offered for their truth.[140] Rather, "exposure to [the third party's] own words, even through cross-examination of the police officers," would have shown that the officers failed to check the statements against known fact, failed to consider the third party's guilt, and "would have made the defense's case more plausible . . . ."[141]

Finally, this defense does not draw the defendant into a "battle of the stories" with the prosecutor, which, in the jury's mind, could shift the burden of proof from the government to the defendant. Instead, this strategy maintains focus on the prosecutor's story, and attacks the foundational investigation upon which that story is built. While the third party's guilt will become obvious to the jury, the defendant has the luxury of focusing on the ways in which the government has failed to meet its burden of proof.

Additionally, the alternative defense does not foreclose defense counsel's ability to present a wrong-person defense. The three-part test for the wrong-person defense was merely the pretrial test for the admissibility of third-party guilt evidence. Once that evidence is placed before the jury by other legal means—here, by attacking the quality of the government's investigation and charging decision—defense counsel's closing argument may include any reasonable inferences from the evidence already presented during trial. That is, nothing should prevent counsel from arguing third-party guilt at that later time, after all of the evidence has been received.

For example, in a scenario where the only other conceivable suspect is a third-party police informant, defense counsel's closing argument could direct blame to that third party based on the evidence adduced at trial when counsel earlier attacked the quality of the police

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140 *Id*. at 449.

141 *Id*. at 449 n.19. Prosecutors will often object on hearsay grounds any time another person's statement is repeated in court. However, in this *Kyles*-type scenario, the third-party's statements to law enforcement are not being offered for their truth, and therefore do not constitute hearsay. Rather, the defendant is offering them for the exact opposite reason: they are *false*, and the police should have known as much.

investigation. Again, if counsel chooses not to take this approach in closing argument, the third party's guilt should be clear to the jury in any event, and counsel may simply maintain focus on the government's failure to meet its burden of proof.

C. *Practical Considerations*

Many cases involving evidence of third-party guilt have sufficient police involvement to justify shifting the defense from proving third-party guilt to attacking the government's investigation and charging decision.[142] Further, in light of the Court's detailed blueprint and highly favorable language in *Kyles*, defense counsel has a basis to argue that the alternative defense is *per se* admissible, even without any pretrial notice to the prosecutor or trial judge.

In addition, the *Kyles* decision does not provide the defense lawyer with any unfair advantage over the prosecutor. As the prosecutor is aware, even when evidence is inadmissible for one purpose, that same evidence can be introduced for a different purpose. And because the prosecutor has more than one way to introduce a given piece of evidence at trial, so too should the defense lawyer.

To illustrate, suppose a prosecutor wants to ask a police-officer witness to repeat a damning hearsay statement at a defendant's trial. The prosecutor knows that, even if he cannot squeeze the statement through one of the dozens of hearsay exceptions, he can simply offer the statement not for its truth, but ostensibly "as an explanation of why the [subsequent] investigation proceeded as it did."[143] This so-called "course of the investigation" exception is then used to admit the evidence that could not otherwise be admitted due to the rule against hearsay.[144]

But, as demonstrated throughout this Article, courts have developed numerous double standards, and defense counsel cannot always rely on the trial judge to apply the rules of evidence fairly. The distinction between arguing a third party is guilty, and arguing the police

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142 The *Kyles*-type defense will be strongest where the police actually knew of, but ignored, crucial evidence favorable to the defense. However, not all cases involving potential third-party guilt will be suitable to a *Kyles*-type defense, and defense counsel must consider all viable defenses after a thorough investigation of the facts, the governing case law, and the trial judge's tendencies.

143 United States v. Eberhart, 434 F.3d 935, 939 (7th Cir. 2009).

144 *See, e.g.*, United States v. Akinrinade, 61 F.3d 1279, 1283 (7th Cir. 1995).

were negligent in not investigating a third party's guilt, is subtle and may become lost if a pro-government trial judge is adjudicating the case. Therefore, defense counsel should take precautionary measures to ensure the admissibility of the alternative defense.

Initially, defense counsel should explicitly draw the distinction between the two defenses as soon as possible. In opening statement, for example, instead of stating that the evidence will demonstrate the guilt of a third party, counsel could explain that despite several pieces of evidence demonstrating the defendant's innocence, the police engaged in tunnel vision and targeted only the defendant. Further, while doing this the police ignored all evidence pointing to other suspects. This grossly incompetent investigation, in turn, led to the prosecutor's erroneous decision to charge the defendant.

The exact language should be more detailed and would vary based on the specific facts of the given case. However, when using the alternative defense, counsel should not assert in his opening statement that he knows who actually committed the crime. Counsel must assert that the evidence will show the defendant is innocent, and has been charged only because of the government's "shoddy" investigative work and charging decision.[145]

Beyond raising the alternative defense in opening statement, counsel should also anticipate mid-trial objections to the alternative defense.[146] The distinction between the two defenses, even though drawn by the Supreme Court, will be ignored by many prosecutors who will want to force the defendant's evidence into the unforgiving paradigm of the wrong-person defense. Therefore, in place of the pretrial notice and motions that would probably be required for the wrong-person defense, counsel should prepare a concise trial brief that clearly draws the distinction between the two defenses, and also demonstrates the admissibility of the alternative defense.

Toward this end, defense counsel's brief should cite the powerful language from *Kyles*, along with any of the state's case law that has specifically adopted the *Kyles* reasoning.[147] The brief should also note

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145 Kyles v. Whitely, 514 U.S. 419, 442 n.13 (1995).

146 Counsel should also ensure that the relevant jurisdiction and venue, and the relevant court within that venue, do not require a *pretrial* notice or motion before presenting the alternative defense.

147 *See, e.g.*, United States v. Sager, 227 F.3d 1138, 1140 (9th Cir. 2000) (holding it was an abuse of discretion for the trial judge to "instruct the jury not to 'grade' the investigation"); Bowen v. Maynard, 799 F.2d 593,613 (10th Cir. 1986) (holding that evidence withheld by the

any pattern jury instructions regarding the burden of proof, the credibility of witnesses, and other relevant topics. The brief must convey to the trial judge two simple legal principles: (1) "a defendant may *always* generally suggest that someone other than the defendant is guilty of the charged crime,"[148] and (2) "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant . . . ."[149]

CONCLUSION

Unlike the right of privacy or the right against self-incrimination, a defendant's right to present a defense at trial has no legitimate, competing interests. Therefore, the government's prosecution should never infringe upon a defendant's fundamental right to present evidence of innocence.[150]

Counter-intuitively, the more specific a defense—that is, when a defendant not only asserts innocence, but also attempts to tell the jury who, specifically, committed the crime—the more likely a court is to keep the defendant's evidence from the jury.[151] In fact, any defense counsel who wishes to pursue the wrong-person defense should do so with great caution, and only after considering the numerous pitfalls associated with the defense, as well as any viable alternative defenses.[152]

One alternative defense begins, as does the wrong-person defense, by asserting that the defendant did not commit the crime. However, the second part of this alternative defense is where the focus changes. Instead of trying to prove who *did* commit the crime, the defense uses the same evidence of third-party guilt to demonstrate the incompetence of the police investigation, including the failure

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state would have been admissible to show that police did not "substantiate or corroborate" allegations against the defendant, and failed to purse a third party who "had ample motivation to kill [the victim]"); Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985) (holding that evidence withheld by the state would have been admissible for "the discrediting, in some degree, of the police methods employed in assembling the case against [the defendant]"); State v. DelReal, 593 N.W.2d 461, 461 (Wis. Ct. App. 1999) (holding that evidence excluded by the trial court was "relevant to attacking both [the officer's] credibility and the quality of the police investigation").

148 Smithart v. State, 988 P.2d 583, 586 (Alaska 1999) (emphasis added).

149 *Kyles*, 514 U.S. at 446 (quoting *Bowen*, 799 F.2d at 613).

150 *See supra* Part II.

151 *See supra* Part III.

152 *See supra* Part IV.

even to consider the guilt of other suspects, which resulted in to the prosecutor's negligent decision to charge the defendant with the crime.[153]

The alternative defense is based on the Supreme Court's decision in *Kyles v. Whitley* and has several advantages over the wrong-person defense. First, it likely would not require the defendant to give pretrial notice of the defense to the prosecutor.[154] Second, it is normally admissible without seeking the trial court's approval, through pretrial motion, to present the evidence.[155]

Third, the alternative defense does not require the defendant to provide the elusive "direct" evidence linking the third party to the crime.[156] Fourth, it does not require the defendant to explain the third party's motive to commit the crime—an absurd and often insurmountable burden that courts place on defendants, but never on prosecutors.[157]

Fifth, because the alternative defense was specifically approved by the Supreme Court, trial courts should not exclude the defense on grounds that it may confuse the jury, or for other pre-textual reasons that are commonly used to exclude the wrong-person defense.[158] Sixth, it is not vulnerable to the additional evidentiary hurdles courts may impose on the unsuspecting defense counsel who pursues the wrong-person defense.[159] Seventh, because the alternative defense attacks the quality of the police investigation, instead of attempting to prove the guilt of a specific third party, it bypasses many otherwise legitimate evidentiary obstacles, including the rule against hearsay.[160]

Finally, because the defendant does not attempt to prove a third party's guilt, but instead attempts to create reasonable doubt by attacking the quality of the government's case, the alternative defense avoids engaging in a battle of the stories, which could, in the jury's mind, shift the burden of proof from the government to the defendant.[161]

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153 *See supra* Part VI.A.
154 *See supra* Part IV.A.
155 *See supra* Part IV.B.
156 *See supra* Part IV.C.
157 *See supra* Part IV.D.
158 *See supra* Part IV.E.
159 *See supra* Part IV.F.
160 *See supra* Part IV.G.
161 *See supra* Part IV.H.

Consequently, in light of the pitfalls associated with the wrong-person defense, and the advantages of using the alternative defense, counsel should carefully research the facts of his case, the trial judge's tendencies, and the case law in the relevant jurisdiction before pursuing either defense. After obtaining all available information, counsel should then consider using the alternative defense to attack the government's case, instead of using the wrong-person defense to prove the guilt of a specific third party.[162]

162 *See supra* Parts IV.B–C.