ARTICLES

EVERY JUROR WANTS A STORY: NARRATIVE RELEVANCE, THIRD PARTY GUILT AND THE RIGHT TO PRESENT A DEFENSE†

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ABSTRACT

On occasion, criminal defendants hope to convince a jury that the state has not met its burden of proving them guilty beyond a reasonable doubt by offering evidence that someone else (a third party) committed the crime. Currently, state and federal courts assess the admissibility of evidence of third party guilt using a variety of standards. In general, however, there are two basic approaches. Many state courts require a defendant to proffer evidence of some sort of "direct link" or connection between a specific third party and the crime. A second group of state courts, as well as federal courts, admit evidence of third party guilt if it is relevant under Federal Rule of Evidence 401, or its state equivalent, and not excluded by other rules of evidence, such as 403. While some scholars have lauded the 401/403 approach as the better test, in practice the two tests operate in much the same way and the evidentiary "bottom line" is that the defendant's evidence is frequently deemed inadmissible. Courts have offered two justifications for the strict restrictions on third party guilt evidence: (1) to prevent juror confusion and (2) to guard against fabricated statements by third parties. We explain why these fears are unfounded, and then turn to the focus of this Article: the importance of narrative relevance. Existing evidentiary restrictions fail to consider the role third party guilt evidence plays in shaping the narrative, or story, that the defendant will present to the jury in his defense. Empirical studies have shown that—more than legal standards, definitions or instructions—narrative plays a key role in the juror decision-making process. Without a thorough understanding and consideration of the narrative relevance of third party guilt evidence, restrictions on its use cannot be and are not being appropriately applied because they fail to account for the way in which jurors actually think and process information at trial.

After discussing the importance of narrative relevance, we propose a new test which is more consistent with a defendant's constitutional right to a fair trial and

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to present a complete defense. First, the threshold test for admissibility should be probable cause. If the evidence proffered by the defendant would permit the state to proceed with a criminal prosecution against the third party, then the defendant must be permitted to tell the story of third party guilt. A story for the goose is a story for the gander. Once the threshold test is satisfied, we propose that, with one significant exception, a defendant should be permitted to admit third party guilt evidence if that same evidence would be admissible against the third party were he the defendant. The exception is propensity evidence, as there is no need to balance the probative value of the third party guilt evidence against the danger of unfair prejudice because the third party suffers no prejudice by the admission of the evidence at a trial in which he is not the accused. Thus, admission of propensity (or other character) evidence concerning a third party should not be precluded.

"The universe is made of stories, not of atoms."[1]

INTRODUCTION

Bobby Lee Holmes was well known by the York, South Carolina police department as a troublemaker.[2] Just eighteen years old, he stood six feet, two inches tall and was an athletic 235 pounds. He did not appreciate that Officer Grady Harper was trying to break up his New Year's Eve party. This was not the first time Harper or other police officers had trouble with Holmes. And the local gendarmes suspected that Holmes was involved in a series of local thefts for which they had secured arrest warrants.[3]

On this particular occasion, December 31, 1989, Officer Harper responded to a call regarding a disturbance at the Cannon Court apartment complex and found Holmes drinking beer and arguing loudly with another man in a crowded parking lot.[4] Harper told the group to break it up and go home.[5] Most complied, but Holmes was not one to go quietly. He refused to leave and chose instead to taunt Harper with what Harper thereafter described as "a few choice words."[6]

Harper went back to his car and called for backup. Instead of waiting around for additional officers to arrest him, Holmes jumped into the back seat of his friend

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1. Muriel Rukeyser, *The Speed of Darkness*, *in* A MURIEL RUKEYSER READER 228, 231 (Jan Heller Levi ed., 1994).

2. *See* Joint Appendix Vol. I at 164-66, Holmes v. South Carolina, 126 S.Ct. 1727 (2006) (No. 04-1327), 2005 WL 3279664 [hereinafter Joint Appendix Vol. I]. In keeping with the Article's topic, the facts of the *Holmes* case are relayed in a narrative fashion. The authors assisted in Mr. Holmes's defense and certain details derive from their knowledge of the case and may not appear in the Joint Appendix or Transcript of Record.

3. *See id.* at 179-80, 183-85, 188; Joint Appendix Vol. II at 264, Holmes v. South Carolina, 126 S.Ct. 1727 (2006) (No. 04-1327), 2005 WL 3279666 [hereinafter Joint Appendix Vol. II].

4. *See* Joint Appendix Vol. I, *supra* note 2, at 163-65.

5. *See id.* at 165.

6. *See id.* at 172-73.

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Terrance Digsby's car and the two fled.[7] Within minutes, however, Harper and his backup caught up with the two men and signaled the car to stop. As Digsby brought the car to a halt, Holmes jumped out and ran again.[8] Harper stayed with the car and arrested Digsby while the backup officers pursued Holmes. As Holmes darted in front of the officers' patrol car and rounded the corner of a churchyard, the officers jumped from the car and pursued him on foot.[9] They chased Holmes until he ran through some tall weeds near the roadside, jumped into a ditch, and disappeared. It was 5:20 a.m.[10]

Sometime later that morning, between 6:00 and 7:00 a.m., Mary Stewart heard someone knocking at the front door. Ms. Stewart was eighty-six years old and lived in an apartment about a mile from Cannon Court. When she opened the door, an unidentified man burst into Ms. Stewart's home and began to beat her in the head while demanding money. Ms. Stewart told him that her money was in her purse. The perpetrator took forty dollars from the purse and then pushed her into the bedroom where he anally raped her.[11] Then, the man tore the telephone from the wall in Ms. Stewart's living room and left. When her attacker was gone, Ms. Stewart took a shower "to get the nasty off" and called her friend, Maggie Thrasher.[12] Ms. Thrasher called another friend, Alaine Byers, who drove to the police department for help.[13] Ms. Stewart lived long enough to describe her attacker as "a short, dark skinned fellow, chunky wide," in his late twenties, and with "kind of long hair,"[14] but a head injury she sustained during the attack eventually caused her to fall into a coma.[15] She died ten weeks later, having never regained consciousness.[16]

The first officers to arrive at the scene began collecting evidence from Ms. Stewart's apartment.[17] Officer Dale Edwards collected a single paper towel from Ms. Stewart with which she had cleaned herself after the attack.[18] Edwards also gathered Ms. Stewart's nightgown, robe, and slippers from the bathroom floor where she had dropped them and tossed them into a brown paper bag he found under her kitchen sink.[19] Lieutenant Barnett helped Edwards to fold Ms. Stewart's

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7. *See id.* at 169, 177-78.
8. *See id.* at 170-71.
9. *See id.* at 170-71, 174.
10. *See id.* at 175.
11. *See id.* at 141-42.
12. Transcript of Record at 2183, Holmes v. South Carolina, 126 S.Ct. 1727 (2006) (No. 04-1327) [hereinafter Transcript of Record] (on file with author); *see also* Joint Appendix Vol. I, *supra* note 2, at 141.
13. *See* Transcript of Record, *supra* note 12, at 2162-63, 2167-68.
14. Joint Appendix Vol. I, *supra* note 2, at 142, 149, 159. Both Ms. Stewart and Bobby Lee Holmes are African-American.
15. *See* Joint Appendix Vol. II, *supra* note 3, at 248.
16. *See* Transcript of Record, *supra* note 12, at 3600.
17. *See* Joint Appendix Vol. I, *supra* note 2, at 156-57.
18. *See* Transcript of Record, *supra* note 12, at 2186.
19. *See id.* at 2201, 2215, 2184.

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bed sheets and pillow cases and placed them together in another paper bag. Neither man wore gloves.[20]

At 8:46 a.m., Captain William Mobley arrived and took charge of the investigation. He locked himself inside the apartment and told the other officers to leave so that he could finish processing the scene by himself.[21] Alone inside the apartment, Captain Mobley took photographs and dusted for fingerprints. He collected additional evidence, including a second paper towel which he claimed to have found in Ms. Stewart's bathroom trash can.[22] Like Edwards and Barnett, Mobley failed to wear gloves throughout the evidence collection process. Captain Mobley took all of the evidence he had gathered back to his office and placed it on his desk where, the next day, he inventoried it by sifting through the bags and documenting it in an evidence log. Again, Mobley did not wear gloves, nor did he wash his hands between handling individual items of evidence.[23]

Back at the station, Officer Harper reported that Bobby Lee Holmes had eluded police that morning at Cannon Court, about a mile from Ms. Stewart's home. By 11:30 a.m., Captain Mobley had decided that Holmes, the known troublemaker who had gotten away, was his prime suspect in Ms. Stewart's attack.[24] Mobley did not waste time. Although he had no evidence linking Holmes to the crime, Mobley set out immediately to find him. At 2:00 p.m. that same day, Mobley and Sergeant James Smith found Holmes at home with his father in their apartment and arrested him—ostensibly not for the assault on Ms. Stewart, and not for his conduct early that morning when he ran from police, but for the outstanding theft warrant.[25] Holmes was asleep in his bedroom. Mobley later testified that Bobby's father, Willie Holmes, showed the officers to the bedroom door: "the door opened and Bobby Holmes was standing there. He had on a black hooded kind of pull-over type sweat shirt on and was in his underwear and white socks on."[26]

Mobley told Holmes he was under arrest and directed him to get dressed: "While he was getting dressed, Sergeant Smith was standing there and noticed a blue and white striped tank top laying in a chair at the foot of the bed. And at that time Sergeant Smith noted to me that it appeared the tank top had some blood on it."[27]

The officers asked Holmes where the blood had come from and he told them he had been in a fight the night before: "As a result of that, we asked both Willie Holmes and them if they had any objection if we took that tank top with us."[28]

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20. *See* Joint Appendix Vol. I, *supra* note 2, at 148, 157-58.
21. *See id.* at 180-81; Joint Appendix Vol. II, *supra* note 3, at 206-07.
22. *See* Transcript of Record, *supra* note 12, at 2483.
23. *See id.* at 2559-63.
24. *See* Joint Appendix Vol. I, *supra* note 2, at 183.
25. *See id.* at 179-80.
26. Transcript of Record, *supra* note 12, at 2511.
27. *Id.* at 2512.
28. *Id.*

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Willie Holmes supposedly said it was fine for the officers to take the shirt. Bobby Holmes said nothing. At the station, the officers also took the blue jeans, black sweatshirt, socks and underwear that Holmes was wearing at the time.[29] The investigation was essentially over in less than twenty-four hours. Two months later, the State charged Holmes with criminal sexual conduct, robbery, burglary and murder.[30] The prosecutor subsequently filed a notice of his intention to seek the death penalty. Although the prosecution offered Holmes a very favorable plea bargain which would have resulted in his release after just a few years incarceration, Holmes said no and demanded a jury trial.

Lacking a confession or any eyewitness testimony, the State's case against Holmes was based entirely on forensic evidence. First, the State presented evidence that Holmes's palm print had been found on the interior side of Ms. Stewart's apartment door. Captain Mobley told the jury that when he dusted Ms. Stewart's apartment for fingerprints, he lifted two usable prints—a partial palm print on the interior side of the door, and a second palm print located on the exterior side.[31] Mobley stated that he sent both prints to the State Law Enforcement Division ("SLED") for processing. SLED Agent Steven Derrick later testified that he examined both prints and found that the interior palm print matched the inked standards taken from Bobby Holmes.[32] The exterior print was never identified.

Second, SLED Agent John Barron testified that three sets of consistent fibers indicated contact between Ms. Stewart and Holmes. Agent Barron described how he searched for fiber evidence by hanging each piece of evidence over a table and scraping the fibers onto a sheet of paper:

> [O]ur policy is to deal with one bag of evidence at a time in what we call a clean room, in which the evidence is placed or hung over a clean piece of paper. And the evidence then is picked and scraped for the evidence. The evidence that is found, that is recovered, then is secured. Then the area is cleaned and a new piece of paper is placed down and then another bag of evidence is then processed.[33]

Agent Barron mounted any fibers that he "believe[d to be] probative" on microscope slides and visually compared them for similarities in size, shape and color.[34] He found three sets of fibers which he believed indicated that some of Bobby Holmes's clothing came into contact with items recovered from Ms. Stewart's apartment. First, Agent Barron told the jury that he scraped several black cotton

29. *See* Joint Appendix Vol. I, *supra* note 2, at 186.
30. *See* Joint Appendix Vol. I, *supra* note 2, at 182-83.
31. *See id.*
32. *See* Joint Appendix Vol. II, *supra* note 3, at 209-11.
33. Transcript of Record, *supra* note 12, at 2975-76.
34. *Id.* at 2976.

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and polyester fibers from Ms. Stewart's bed sheets. He compared these fibers with black fibers taken from Holmes's hooded sweatshirt and determined that they were consistent. Similarly, Barron testified that he also found a set of blue acrylic fibers on Ms. Stewart's nightgown which were consistent with the fibers from Holmes's blue jeans. Barron also stated that he had found several brown and gold fibers on Ms. Stewart's nightgown and a similar lump of brown and gold fibers on Holmes's underwear. Both the nightgown and the underwear, he opined, likely came into contact with some third source containing brown and gold fibers. Agent Barron did not attempt to locate this unidentified source.[35]

Finally, FBI Agent Lawrence Presley testified that a spot of blood on Holmes's blue and white striped tank top contained Ms. Stewart's DNA. FBI Agent Frank Baechtel told the jury that a second round of tests confirmed that the striped tank top contained Ms. Stewart's blood. In fact, Baechtel stated that he had found a mixture of both Ms. Stewart's and Holmes's blood on the tank top, on the paper towel recovered at the scene by Captain Mobley, and on Holmes's underwear. Baechtel closed his testimony by telling the jury that the odds of finding another African-American, other than Bobby Holmes, whose DNA could have contributed to these mixtures was 1 in 72 million.[36] "Essentially, what that means," Baechtel explained, "is 99.999999 percent of the population is excluded as to the possible contributor to that [blood] stains."[37] On that high note, the State rested its case.

Holmes's attorneys told the jury that their client was the victim of a rush to judgment resulting from a sloppy investigation by law enforcement officers who failed to pursue other, more credible leads. These same officers, the defense contended, incompetently, and possibly maliciously, collected and tested the forensic evidence. In fact, the defense pointed at Captain Mobley as a potential villain, claiming he had both the motive and the opportunity to plant forensic evidence against Holmes.

With respect to the palm print, former SLED Agent Donald Girndt testified that it was standard procedure to take complete "orienting photos" of all lifted prints to show their precise location at the scene.[38] In this case, however, Captain Mobley failed to properly photograph the prints and, since he processed the scene alone, there was no way to prove that the print actually came from Ms. Stewart's door. Moreover, Girndt noted that a series of vertical lines running through the print found on the interior side of the door (attributed to Holmes) were not present on the print found on the exterior side of the door (the unidentified print). This discrepancy, he explained, meant that the two prints did not come from the same surface. The vertical lines were of the type likely to be found on a rough, unpainted

35. *See* Joint Appendix Vol. II, *supra* note 3, at 226-32.
36. *See* Transcript of Record, *supra* note 12, at 3528.
37. *Id.*
38. *Id.* at 3940-43.

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surface—not on the smooth painted door of Ms. Stewart's apartment.[39] This, Holmes's attorneys argued, was evidence of fabrication.

With respect to the State's fiber evidence, defense expert John Kilbourn testified that, in general, it was of low probative value because the particular fibers in this case are so commonly produced:

> [Here,] where we have a black sweat shirt having black cotton fibers and black polyester fibers, we basically do not have any way of knowing how many hundreds or thousands of those black sweat shirts were produced by this company . . . . Furthermore, we don't know how many other companies use these black fibers to also make black sweat shirts. And we also don't know how many other types of garments might have been made with the same color, black polyester and cotton . . . .[40]

Kilbourn also stated that SLED Agent Barron should have used the "taping method" of fiber collection, in which the fibers are lifted off of evidence with wide pieces of cellophane tape, rather than the scraping method because scraping creates a greater risk of cross-contamination, especially where, as in this case, multiple items of evidence were scraped by the same technician, on the same day, and in the same room. Finally, Kilbourn testified that he had examined the fibers collected by Agent Barron and Barron's test results, and in his opinion, there was no evidence to suggest that any of the items collected from Ms. Stewart's apartment had come into contact with Bobby Holmes's clothing.[41]

Finally, several defense experts addressed the State's DNA evidence. Janine Arvizu, a lab quality assurance consultant, told the jury that the integrity of the blood test results was seriously jeopardized because (1) the chemicals inside the rape kit tubes used to collect Ms. Stewart's blood had expired, causing the blood inside to become too degraded to test; (2) as a result, SLED agents had used a piece of blood-covered cloth cut from Ms. Stewart's nightgown as a "known" sample of her blood when, in fact, it was not a pure sample; (3) moreover, a tube of Ms. Stewart's blood from a second rape kit had been lost and SLED agents had failed to test the remaining items of evidence for chemicals which would verify that the lost tube had not been used to falsely deposit Ms. Stewart's blood on other items of evidence, such as Holmes's clothing; and, (4) the officers' failure to wear gloves, particularly Captain Mobley's failure when he inventoried all of the evidence at once, created a risk that they could have transferred DNA from one item of evidence to the other with their hands.[42] Dr. Peter D'Eustachio agreed that the high risk of contamination in this case rendered the test results unreliable.[43] Aside from

39. *Id.* at 3990-93.
40. *Id.* at 3895.
41. *See id.* at 3898-99.
42. *See id.* at 3760-70.
43. *See id.* at 3804-06, 3814.

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the risk of contamination, however, he testified that he had examined the test results and found that they did not, in fact, reveal a mixture of Holmes's and Ms. Stewart's DNA.[44] The mixture, he found, contained results which neither Holmes's nor Ms. Stewart's DNA could produce as well as other irregularities that could not be explained:

> At the end of the day, it's unreliable tests . . . . [I]t wasn't handled in the way that we now know is necessary to prevent contamination from one item to the next or from outside sources. Known samples, which should clearly give us high quality views of those peoples [sic] DNA were clearly degraded. Known samples were handled too close together in time and place with some unknown samples. And finally, there are some features of the—where the tracings need to be completely interpreted and accounted for in order to be scientifically reliable. There are some features of those tracings that did not get interpreted, and it adds up to a test that is not reliable.[45]

Prosecutor Tommy Pope scoffed at the suggestion that Holmes had been framed and argued that Holmes's attorneys were simply trying to blow smoke by complaining about violations of protocol. "What you have got to do is take from the stand what you heard, apply your common sense and find the truth of the matter," he told the jury.[46] "[I]f you are going to frame [somebody], and it's going to be Bobby Holmes, where is this raping, murdering, beating fellow that actually did this thing?"[47]

No doubt this is exactly the question the jurors had been asking themselves. If the test results were wrong—contaminated, misapplied, or even fabricated—and Bobby Holmes was innocent, who was the real killer? Holmes had offered them no alternative story. He must have done it. The jury convicted him of murder and sentenced him to death.

What the jury did not know was that Holmes did indeed have an alternative story to tell—but he was judicially silenced. The defense team had amassed a wealth of evidence implicating another man, Jimmy McCaw White, as Ms. Stewart's killer. White was a local African-American with a long police record and a history of violence.[48] He was twenty-two years old and wore his hair in a long shag.[49] While Bobby Holmes was partying with his friends a few blocks away, Ms. Meshelley Gilmore saw Jimmy White standing in the parking lot across from Ms. Stewart's apartment as she drove away from her home around 4:00 a.m.[50] He was still standing there, Ms. Gilmore reported, when she returned to her home

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44. *See id.* at 3824-25.
45. *Id.* at 3826-27.
46. *Id.* at 4206.
47. Joint Appendix Vol. II, *supra* note 3, at 338.
48. *See* Joint Appendix Vol. I, *supra* note 2, at 74-80 (recording White's testimony).
49. *See id.* at 14; Joint Appendix Vol. II, *supra* note 3, at 360.
50. *See* Joint Appendix Vol. I, *supra* note 2, at 12.

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approximately forty-five minutes later.[51] Ms. Frenetta Jamison and Ms. Delores Brown both saw White walking toward Ms. Stewart's apartment complex between 4:00 and 5:00 a.m. as they each made their way home from separate places.[52] Eighty-seven year old Annie Boyd, who lived next door to Ms. Stewart, never actually saw Jimmy White on the morning of Ms. Stewart's attack, but she was certain she had heard him when a man knocked on her door during the night and said, "Open the door my man, this is Jimmy, open the door."[53]

Ms. Brown and Ms. Gilmore reported to the police that White was in the right place at the right time to have committed the crime.[54] Captain Mobley sent an officer to talk to White. White claimed he was nowhere near Ms. Stewart's apartment at the time of the attack. He was certain of this because an acquaintance named Joshua Lytle had given him a ride from a bar to his home in Sharon, South Carolina more than four hours before the assault occurred.[55] That was good enough for the York police department. It did not matter that Joshua Lytle said he never gave White a ride.[56] Why waste their time? They had their man.

Feeling secure in Holmes's arrest, White began to boast that he had gotten away with murder. Rumors spread around town that White was the real killer. White's friend, Ken Rhodes, approached him and asked him if the word on the street was true.[57] In response White dropped his head, raised it back up and said coyly, "Well, you know I like older women."[58] Then White admitted that he had done "what they say I did" and bragged that someone else was going to "burn" for it. White added, however, that he did not kill the lady. He knew he had not killed her because he remembered that she was alive when he left her apartment.[59] White made similar statements to Mattie Mae Scott and Thomas Murray.[60] White was later incarcerated on unrelated charges and housed with Steven Westbrook, to whom he also confessed.[61] White also told Westbrook that a York police officer had advised him to keep quiet about the Stewart murder.[62] In addition, there was evidence that White more closely matched Ms. Stewart's description of her perpetrator because White was older, shorter, and had long hair while Holmes's hair was closely cropped.[63]

Holmes proffered this evidence at a pre-trial hearing. The State argued that

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51. *See id.* at 13.
52. *See id.* at 5-9, 95-98.
53. *Id.* at 30.
54. *See id.* at 14-15, 98-99.
55. *See id.* at 80-86.
56. *See id.* at 134.
57. *See id.* at 119.
58. *Id.*
59. *See id.* at 120-21.
60. *See id.* at 106-07, 114-15.
61. *See id.* at 38-43.
62. *See id.* at 41-42.
63. *See id.* at 14, 199; Joint Appendix Vol. II, *supra* note 3, at 360.

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South Carolina's evidentiary restrictions on the admissibility of third party guilt evidence rendered the evidence inadmissible. The trial judge was conflicted. The applicable rule, he noted, comes from *State v. Gregory*, 16 S.E.2d 532 (S.C. 1941), under which evidence of a third party's guilt is admissible if it is inconsistent with the defendant's own guilt and raises a reasonable presumption of the defendant's innocence.[64] "At first blush," the judge admitted, the White evidence seemed to satisfy the *Gregory* standard because a reasonable jury could conclude from Holmes's proffered evidence that White was in the proximity of Ms. Stewart's home near the time of the crime, that White lied about his alibi, and that White confessed to at least four witnesses that he beat and raped Mary Stewart.[65] There was also evidence, however marginal, that White had a motive to commit the crime because of his "penchant" for older women.[66] The trial judge was particularly "bother[ed]" by White's confessions because they "rise to the level of raising some question about [Holmes's guilt]."[67]

The problem, however, was that the trial judge erroneously believed that White's confession statements were inadmissible hearsay.[68] White's confessions were, of course, the "engine" that drove the third party guilt "train."[69] Without them, the trial court held that the remaining evidence against White was not sufficient to create a reasonable presumption of Holmes's innocence.[70] Thus, the entirety of the evidence Holmes had collected concerning White's guilt was excluded from trial. Without the White evidence, Holmes was left with an

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64. *See* Joint Appendix Vol. I, *supra* note 2, at 133-34.

65. *See id.* at 134-35.

66. *See id.* at 135. The evidence included, (1) Ken Rhodes's testimony that White liked older women; (2) Jimmy White's own admission that he had a history of violence against women, including striking a woman in the face and pushing his girlfriend to the ground; and (3) a psychological evaluation of White concluding that he bore scars from physical altercations with both women and men and that he had sexual fantasies of dominance and control causing him to behave inappropriately and unpredictably. *Id.* at 74-79, 90-93, 119, 132.

67. *Id.* at 141.

68. *See id.* at 135. The trial judge ruled that White's statements were hearsay and did not qualify for the hearsay exception for statements against interest under SOUTH CAROLINA RULE OF EVIDENCE (SCRE) 804(b)(3). This ruling was clearly erroneous for several reasons. First, under SCRE 801(d)(1)(A), evidence of any inconsistent statement by a witness who testifies in the trial at issue is exempt from the hearsay rule. Since White testified at the pre-trial hearing concerning the third party guilt evidence issue and presumably would have testified at trial had the trial court not prevented Holmes from calling him as a witness, his previous inconsistent statements were not hearsay. Second, the trial court was also mistaken in its application of SCRE 804(b)(3) governing the "statement against interest" exception to the hearsay rule because it applies only when the declarant is unavailable to testify at trial. As already explained, there was no evidence that White was unavailable to testify. Moreover, even if White had been unavailable, his statements would nonetheless have been admissible under SCRE 804(b)(3), provided they were sufficiently corroborated. The trial court concluded that White's statements did not satisfy the corroboration requirement, but drew this conclusion by misconstruing the standard to mean that the *content* of White's statements had to be corroborated. The standard is not whether White's statements were *true*, but whether they were in fact *made at all*. State v. McDonald, 540 S.E.2d 464, 466 (S.C. 2000). Since four independent witnesses were available to testify that White had made confession statements, there was sufficient evidence to corroborate White's statements.

69. Joint Appendix Vol. I, *supra* note 2, at 135.

70. *See id.* at 137.

argument but no story: the forensic evidence against him was somehow unreliable. Obviously, the jury did not buy it.

Holmes appealed and argued that the trial court erred in excluding the White evidence. The Supreme Court of South Carolina disagreed and affirmed his conviction and sentence.[71] The court noted that in *State v. Gay*, 541 S.E.2d 541 (S.C. 2001), it had "held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence."[72] The court then reviewed the State's forensic evidence against Holmes, ignoring the testimony Holmes had presented to challenge this evidence, and concluded that he "fail[ed] to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. *He simply cannot overcome the forensic evidence against him.*"[73]

The United States Supreme Court granted certiorari and overturned the South Carolina court's decision, stating simply that the standard is "arbitrary" and thereby "violates a criminal defendant's right to have a 'meaningful opportunity to present a complete defense.'"[74]

> Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third party guilt has only a weak logical connection to the central issues in the case. . . .
>
> The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, [Holmes] proffered evidence that, if believed, squarely proved that White . . . was the perpetrator. . . .
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> The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "a meaningful opportunity to present a complete defense."[75]

The Court issued a similar opinion thirty-two years earlier in *Chambers v.*

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71. State v. Holmes, 605 S.E.2d 19 (S.C. 2004), *vacated and remanded by*, Holmes v. South Carolina, 126 S.Ct. 1727 (2006).

72. *Id.* at 24 (discussing State v. Gay, 541 S.E.2d 541 (S.C. 2001)).

73. *Id.* (emphasis added).

74. Holmes, 126 S.Ct. at 1735 (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986), which quotes California v. Trombetta, 467 U.S. 479, 485 (1984)).

75. *Id.* at 1734-35 (emphasis omitted).

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Mississippi, 410 U.S. 284 (1973), a decision we will return to in Part III. In neither opinion, however, has the Court provided a clear explanation as to why such evidentiary restrictions are unconstitutional. The Court has yet to provide a comprehensive discussion of what the right to present a defense really means, and this Article likewise does not attempt to answer that broad question. Our purpose is narrower: we assert that a proper understanding of the right to present a defense must include a proper understanding of the narrative relevance of evidence. Part I of this Article describes the history and current state of third party guilt evidentiary restrictions. Part II explains our conception of narrative relevance. Part III describes the various challenges made to third party guilt restrictions including those successful claims in *Chambers* and *Holmes*. Part IV describes how narrative theory relates to the right to a fair trial and why we should think of evidentiary restrictions in terms of their narrative relevance. Part V proposes a rule that would allow for such a narrative relevance consideration in the admission of third party guilt evidence.

I. EVIDENTIARY RESTRICTIONS ON THIRD PARTY GUILT EVIDENCE

Currently, state and federal courts assess the admissibility of evidence of third party guilt using a variety of standards.[76] In general, however, there are two basic approaches. First, many state courts require a defendant to proffer evidence of some sort of "direct link" or connection between a specific third party and the crime.[77] We will refer to these as the "direct connection" states, despite slight

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76. Third party guilt evidentiary restrictions have a long history in American jurisprudence. From their inception up through the mid-1970s, most American courts followed the old English common law rule that incriminating statements made by a third party were excluded as hearsay and held that only statements against pecuniary or proprietary interests were "sufficiently reliable to warrant their admission at the trial of someone other than the declarant." Lilly v. Virginia, 527 U.S. 116, 129 (1999) (citing Donnelly v. United States, 228 U.S. 243 (1913)). In addition to the rule which categorically refused to recognize any "against penal interest" exception to the hearsay rule, courts developed special restrictions on the admissibility of third party guilt evidence in general as early as the 1800s. *See, e.g.*, Munshower v. State, 55 Md. 11 (Md. 1880); State v. Fletcher, 33 P. 575 (Or. 1893); Stanley v. State, 89 S.W. 643 (Tex. 1905). These third party guilt evidence rules prevented admission of not only out-of-court statements by third parties, but other evidence as well. For example, in *State v. Fletcher*, the Oregon Supreme Court excluded evidence that a third party had confessed to the crime as well as evidence that he had a motive to commit the crime, was seen near the scene of the crime shortly after it occurred, and was wearing clothing matching a witness's description of the perpetrator. *Fletcher*, 33 P. at 577. Modern third party guilt evidentiary restrictions apply to a variety of evidence including motive, opportunity, other crimes committed by the third party, evidence that the third party resembles the accused, or evidence that the third party confessed to committing the crime. This collection of possibilities is typically lumped together for purposes of evaluating whether the entirety meets the relevant standard for admissibility of third party guilt evidence. However, even if the sum of evidence meets the third party guilt standard, it may nonetheless be excluded under other evidence rules.

77. The "direct link" states include: Alaska, Alabama, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Minnesota, Missouri, Nevada, North Carolina, South Carolina, Vermont, Virginia, Washington, West Virginia, and Wisconsin. For an extensive summary of cases excluding third party guilt evidence under the direct link approach, see Brett C. Powell, *Perry Mason Meets the 'Legitimate Tendency' Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023 (2001).

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variations in the tests.[78] Wisconsin, Hawaii and Minnesota, for example, have adopted the "legitimate tendency test," which asks whether the third party guilt evidence has a legitimate tendency to connect a third party with the crime.[79] Georgia and Missouri similarly require that the evidence connect the third party with the corpus deliciti of the crime.[80] Thus in Georgia, James Watson, Jr., charged with murdering a former policeman, could not introduce evidence that another man, Bobby Gray, was seen fleeing from the scene of the crime and later stated that he had killed two people, including a policeman, and buried them in the very woods in which the victims' bodies were later found.[81] The Georgia Supreme Court held that the evidence against Gray did not directly connect him with the corpus deliciti of the crime and was simply "too threadbare to be admissible."[82]

Still other direct connection states require that the defendant present a "train of fact or circumstances, as tend clearly to point out someone other than the accused as the guilty party."[83] For example, in Alabama, William Hall admitted that he had participated with a third party, Wayne Travis, in the burglary of a home where the victim was later found dead from a gunshot wound.[84] Hall maintained, however, that he did not participate in the killing and that he did not know that Travis intended to kill the victim.[85] Hall sought to introduce evidence that Travis had previously been arrested for burglaries in the area, where he had lived most of his life, that Travis had a history of escalating crimes against people in his hometown, and that Travis told a fellow inmate before the murder occurred that he intended to kill an unnamed woman he disliked in the victim's part of town.[86] The Supreme Court of Alabama held exclusion of this evidence was proper because it was not inconsistent with Hall's guilt since Hall admitted to being present during the crime.[87]

A second group of state courts, as well as federal courts, admit evidence of third

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78. In addition to their standards for establishing a "direct link," these states may also sometimes refer to a relevancy standard. Their definition of "relevant," however, is much more stringent than the relevancy standard under FED. R. EVID. 401. *See, e.g.*, Watts v. State, 584 S.E.2d 740, 745 (N.C. 2003) ("Admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.").

79. *See, e.g.*, State v. Rabelliza, 903 P.2d 43, 46-47 (Haw. 1995); State v. Blom, 682 N.W.2d 578, 602-03 (Minn. 2004); State v. Knapp, 666 N.W.2d 881, 918-22 (Wis. 2003), *vacated and remanded on other grounds by* 542 U.S. 952 (2004).

80. *See, e.g.*, Watson v. State, 604 S.E.2d 804, 812 (Ga. 2004); State v. Rousan, 961 S.W.2d 831, 848 (Mo. 1998).

81. *See Watson*, 604 S.E.2d at 812.

82. *Id.* at 812.

83. State v. Caviness, 235 P. 890, 892 (Idaho 1920).

84. *See* Hall v. State, 820 So.2d 152, 156 (Ala. 2001).

85. *Id.* at 155.

86. *Id.*

87. *Id.* at 157.

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party guilt if it is relevant under Federal Rule of Evidence 401,[88] or its state equivalent, and not excluded by other rules of evidence, such as 403.[89] We will refer to this approach as the 401/403 approach. The small number of scholars who have previously addressed the issue of third party guilt evidentiary restrictions have lauded the 401/403 approach as the better test, calling it more flexible and criticizing the varying methods of the direct connection test's application.[90] Several state courts have recently abandoned a direct connection type test in favor of the 401/403 standard, claiming the language of the direct connection test is unhelpful, unclear, and improperly focused on the culpability of the third party rather than on the defendant's guilt or innocence:[91]

> [W]e find the use of the phrase "inherent tendency" unhelpful and agree . . . [that the] language is unclear to a fault: for one thing, a "tendency" does not "inhere"; for another, such tendency seems a matter of weight and credibility of evidence. Whatever its meaning, this rule forces a defendant to prove to a judge's satisfaction that another person "really" committed the crime or was "largely" connected to it. The proper focus in determining relevancy is the effect the evidence has upon the *defendant's* culpability. To be relevant, the evidence need only *tend* to create a reasonable doubt as to the defendant's guilt.[92]

The Supreme Court of Idaho dispensed with its direct connection test, calling it "merely a specialized application of the requirement, now embodied in Idaho Rule of Evidence 403, that a trial court balance the probative value of evidence against countervailing considerations, such as confusion of the issues, undue delay, or waste of time."[93]

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88. Federal Rule of Evidence 401 reads, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

89. In addition to federal courts, the following jurisdictions use the majority approach: Arizona, California, the District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Texas.

90. *See* Powell, *supra* note 77, at 1056-57 (calling for "a renunciation of the 'legitimate tendency' standard and for a uniform application of Rule 403"); 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, 1693 (2000) (quoting Donald A. Drips, *Relevant but Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put on a Defense*, 69 S. CAL. L. REV. 1389, 1421 (1996)) (arguing that third party guilt evidence should be admitted if relevant, unless the trial court finds "that the jury's consideration of the proffered evidence would make an irrational acquittal substantially more likely than a rational acquittal").

91. *See* State v. Kerchusky, 67 P.3d 1283, 1286 (Idaho Ct. App. 2003) (rejecting the direct connection test and embracing the 401/403 standard); *see also* State v. Gibson, 44 P.3d 1001, 1004 (Ariz. 2002) (reaching the same result); People v. Primo, 753 N.E.2d 164, 167 (N.Y 2001) (coming to the same result).

92. *Gibson*, 44 P.3d at 1004 (citations omitted).

93. *Kerchusky*, 67 P.3d at 1286 (citing David McCord, *But Perry Mason Made it Look So Easy!: The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else Is Guilty*, 63 TENN. L. REV. 917, 975 (1996)).

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In practice, however, the 401/403 approach operates in much the same way as the direct connection test. Although the majority approach initially admits most evidence in step one as relevant, the evidence is subject to exclusion in step two if, in the court's discretion, the probative value of the third party guilt evidence is thought to be outweighed by the danger of unfair prejudice, confusion, misleading the jury, or waste of time.[94] Thus, in making the probative/prejudice calculus, a court will often require the defendant to offer evidence directly connecting the third party to the crime before admitting any evidence of third party guilt.[95] Similarly,

> phrases like "clear link" [and direct connection] are usually shorthand for weighing probative value against prejudice in the context of third-party culpability evidence: if there is some "clear link" or "direct connection" between the third-party evidence and the charged crime, courts generally conclude that it is of sufficient probative value to be admissible.[96]

Thus, regardless of whether a jurisdiction adopts a direct connection test or a

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94. *See* FED. R. EVID. 403.

95. *See* People v. Yeoman, 72 P.3d 1166, 1204 (Cal. 2003) (noting that "[t]o be admissible, the third-party evidence . . . need only be capable of raising a reasonable doubt of defendant's guilt," but ultimately concluding that "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime" (quoting People v. Hall, 718 P.2d 99, 99 (Cal. 1986))); People v. Nitz, 820 N.E.2d 536, 545 (Ill. App. Ct. 2004), *aff'd in part and rev'd in part by* People v. Nitz 848 N.E.2d 982 (Ill. 2006).

> A defendant may attempt to prove that someone else committed the crime for which he is charged, but that right is not without limitation. Such evidence is relevant and admissible only if a close connection can be demonstrated between someone else and the commission of the offense. There must be some evidence from which to reasonably infer that a specific individual other than the defendant might have committed the crime. Extraneous conduct not connected with the crime itself may not be shown.

Id. (citations omitted); State v. Koedatich, 548 A.2d 939, 977, 977-79 (N.J. 1988) (noting, initially, that "'[a] defendant of course may seek to prove that another agency produced the death with which he is charged. It would seem in principle to be sufficient if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case,'" but ultimately concluding that "[i]n the instant case, . . . the proffered testimony did not draw a sufficient link between [the third party] and the victim . . . ." (quoting State v. Sturdivant, 155 A.2d 771, 778 (N.J. 1959))); Patterson v. State, 96 S.W.3d 427, 434-35 (Tex. Crim. App. 2002) (determining that, where the defendant was charged with sexual assault, evidence of a third party's semen on a blanket belonging to the alleged victim found at the crime scene was relevant, but that "the relevance of the evidence was outweighed by the danger of unfair prejudice and confusion since it cannot be determined when the semen was placed there, by whom it was placed, when-even on whose blanket it was placed, whether it was even on the alleged victim's bed"). Although most jurisdictions seem to require some kind of direct link, train of fact, or clear connection, there is disagreement over what, exactly, constitutes a direct link. Most majority states and some direct link states define a direct link as one creating a reasonable doubt that the defendant committed the crime with which he is charged. *See, e.g.*, Smithart v. State, 988 P.2d 583, 588 (Alaska 1999). Other courts focus on whether the evidence sufficiently implicates the third party. *See, e.g.*, State v. Rousan, 961 S.W.2d 831, 848 (Mo. 1998); Elliot v. Commonwealth, 593 S.E.2d 270, 287 (Va. 2004); State v. Maupin, 913 P.2d 808, 813 (Wash. 1996).

96. *Primo*, 753 N.E.2d at 168 (citations omitted).

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401/403 test, its courts often use aspects of both standards when applying the law to the specific facts of a case. For example, in *Dickens v. State*, the Indiana Supreme Court claimed its standard for the admissibility of third party guilt evidence was one of relevance: "Evidence which tends to show that someone else committed the crime makes it less probable that the defendant committed the crime and is therefore relevant under Rule 401."[97] Yet, when Dickens was precluded from offering evidence that a third party, Shawn Bailey, was present during the shooting for which Dickens was charged and that the police initially considered Bailey a suspect, the court held that the trial judge was "warranted in concluding that these facts do not make it less probable that Dickens committed the crime," and therefore, properly excluded the evidence where Dickens failed to first present direct evidence of Bailey's guilt.[98] Conversely, although the Texas Court of Criminal Appeals identifies its test as a 401/403 balancing test, it has added an additional element—that the defendant "still must show that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the alleged 'alternative perpetrator.'"[99] This additional hurdle, the court explained, is designed to address "the special problems presented by alternative perpetrator evidence."[100]

Traditionally, courts have insisted that special restrictions on third party guilt evidence are necessary for two basic reasons: (1) to prevent juror confusion; and (2) to guard against fabricated statements by third parties.[101] Many courts have argued that the admission of third party guilt evidence would cause the trial to degenerate into confusing mini-trials of collateral issues related to the third party and divert the jury's attention from the case at hand.[102] Courts also have expressed

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97. Dickens v. State, 754 N.E.2d 1, 5 (Ind. 2001).

98. *Id.*

99. Wiley v. State, 74 S.W.3d 399, 406 (Tex. Crim. App. 2002).

100. *Id.*

101. *See* State v. Fletcher, 33 P. 575, 577 (Or. 1893) (noting a previous case where,

> [e]ven if this letter [written by a third party] could be regarded as a confession . . . that [he] committed the murder, it was only the declaration of a third party—merely hearsay testimony—and upon no rule of evidence admissible. If such declarations were competent upon any trial for homicide, they would tend clearly to confuse the jury, and to divert their attention from the real issue);

see also Munshower v. State, 55 Md. 11, 23 (1880) ("To allow the introduction of [third party guilt evidence] would effect a dangerous innovation upon the law of evidence in criminal cases, and open the door to the most fraudulent contrivances to procure the acquittal of parties accused of crime.").

102. *See* Smithart v. State, 988 P.2d 583, 586-587 (Alaska 1999) (stating that if evidence of third party guilt were admissible, "'it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons' were possible suspects in the murder. In such a system, the resulting trial would be a confusing waste of judicial resources"); State v. Larsen, 415 P.2d 685, 692 (Idaho 1966) (stating that the court is

> not prepared to hold, however, that a bare, out-of-court confession is nevertheless admissible. To do so might have a serious injurious effect on the administration of criminal law for it would open

concern that admission of third party guilt evidence would "open the door to the most fraudulent contrivances to procure the acquittal of parties accused of crime."[103] These concerns can fairly be summed up as a general fear of erroneous acquittals.

There are a number of reasons why such a fear is unfounded, or at least, over-emphasized.[104] First, a focus on this issue ignores the high value our system places on avoiding convictions of the innocent. The presumption of innocence and the standard of proof beyond a reasonable doubt in our system "reflect[] an explicit preference for allowing some guilty people to go free in order to ensure that innocent defendants are not convicted."[105] Second, to the extent a fear of erroneous acquittal is based on the assumption that a defendant could freely offer false testimony with impunity, this fear is also misplaced. It is up to the prosecution to make its case, "and in doing so must disprove the defendant's claim of innocence, regardless of what form it may take."[106] Moreover, the prosecution is not without methods for exposing untruthful testimony, including investigation, cross-examination, and perjury charges for those who offer untruthful testimony.[107] Finally, social science research suggests that such concerns are unwarranted or exaggerated because jurors are not so easily duped as this fear suggests.[108] As we will explain in much greater detail in Part II, jurors are actively engaged throughout the trial process and are generally capable of separating a

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the door to defendants to produce perjured and fraudulent "confessions" by others who, for some unexplained reason, have "disappeared" or are otherwise "unavailable" as witnesses);

State v. Wilson, 406 N.W.2d 442, 448 (Iowa 1987) (holding that, if the defendant had been permitted to introduce evidence of third party guilt, "this trial rapidly could have disintegrated into two trials"); State v. Dechaine, 572 A.2d 130, 134 n.9 (Maine 1990) (holding that, had the defendant been allowed to pursue an alternative perpetrator theory, "the trial of [the defendant] would have turned into the trial of [the third party]," and that "[t]he admission of that evidence would have resulted in 'confusion of the issues, . . . misleading the jury[,] . . . undue delay [and] waste of time'"); *Fletcher*, 33 P. at 577 (holding that third party guilt evidence would confuse and divert the jury's attention); Oliva v. Commonwealth, 452 S.E.2d 877, 880 (Va. Ct. App. 1995) (stating that evidence of third party guilt might confuse or mislead the jury); State v. Denny, 357 N.W.2d 12, 16 (Wis. Ct. App. 1984) (stating that the restriction on third party guilt evidence "is designed to place reasonable limits on the trial of collateral issues . . . and to avoid undue prejudice to the People from unsupported jury speculation as to the guilt of other suspects").

103. *Munshower*, 55 Md. at 23.

104. *See* Dripps, *supra* note 90, at 1402-07 (discussing the countervailing factors, such as protection of the innocent and the defendant's right to present a defense, which must be considered along with the risk of prejudice).

105. Suni, *supra* note 90, at 1687.

106. Powell, *supra* note 77, at 1050.

107. *Id.* Powell also suggests that if these safeguards are not sufficient, increased penalties for perjury and a lowered burden of proof in perjury cases could achieve the same protection without infringing on a defendant's due process guarantees.

108. *See, e.g.*, Richard Lempert, *The Jury's Role in Administering Justice in the United States: Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15, 18 (2002) (arguing that jurors are not "easily biased or confused," but instead are "active, curious, and intelligent processor[s] of information").

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plausible story from an implausible one. 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.

More importantly for our purposes here, however, is that evidentiary restrictions based on these concerns fail to consider the role third party guilt evidence (or lack thereof) plays in shaping the narrative, or story, that the defendant will present to the jury in his defense. Empirical studies have shown that—more than legal standards, definitions or instructions—narrative plays a key role in the juror decision-making process.[109] Without a thorough understanding and consideration of the narrative relevance of third party guilt evidence, restrictions on its use cannot be, and are not being, appropriately applied because they fail to account for the way in which jurors actually think and process information at trial.

A brief survey of recent third party guilt evidence cases throughout the country reveals that, generally, reported third party guilt cases tend to fall on the fringes. In other words, criminal defendants appear to be mostly offering either very strong cases of third party guilt, or evidence so speculative of a third party's involvement that the suggestion of an alternative perpetrator seems ridiculous.[110] Our review of the cases also reveals that, in these instances on the fringes, courts are usually getting it right—i.e., overturning exclusions in the very strong cases and upholding

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109. *See, e.g.*, W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) [hereinafter Pennington & Hastie, *A Cognitive Theory*].

110. *See, e.g.*, Birmingham v. State, 27 S.W.3d 351, 359-60 (Ark. 2000) (holding that evidence of other rapes while the defendant was in jail was too speculative); People v. Yeoman, 72 P.3d 1166, 1203-1204 (Cal. 2003) (holding that the defendant's offering of three possible alternative killers was properly held inadmissible); State v. Francis, 836 A.2d 1191, 1199-1200 (Conn. 2003) (holding that the trial court properly refused to disclose a third party's alcohol treatment records on the grounds that the possibility that this person killed the victim because of alcohol abuse was too attenuated); People v. Kirchner, 743 N.E.2d 94, 113-14 (Ill. 2000) (holding that evidence that a third party possessed the murder weapon weeks prior to the killing was properly excluded); State v. Wilson, 406 N.W.2d 442, 447-48 (Iowa 1987) (holding that evidence of the victim's sexual preferences was not relevant as a reason that a third party may have killed him); State v. Holterman, 687 P.2d 1097, 1101 (Or. App. 1984) ("Rumors, circumstances, and [victim's] fears are not probative of much at all."); State v. Fortin, 843 A.2d 974, 1003-04 (N.J. 2004) (holding that the defendant's evidence of the victim's drug dealing had no connection with her death and was too attenuated); State v. Malick, 457 S.E.2d 482, 485 (W.V. 1995) (upholding the exclusion of the sexual assault on the victim by a third party where the defendant admitted he was the only person with the victim at the time of the assault with which he was charged); *see also* McCord, *supra* note 85, at 938 (finding that "courts across the country arrive at fairly standard and predictable results"); *cf.* State v. Prion, 52 P.3d 189, 193-94 (Ariz. 2002) (holding that the trial court erred in not admitting a litany of evidence regarding a third party who had contact with the victim); Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997) (finding that the trial court erred in precluding the defendant from offering evidence connecting a third party to the crime, including a hair sample retrieved from the garbage bag over the victim's head which excluded the defendant as the source of the hair and implicated the third party. The defendant also proffered testimony to establish motive (the third party's argument with the victim) and opportunity (the third party's unexplained absence and subsequent cover up of being late to work)).

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them in the very weak cases.[111] It is in the rarer middle cases, however, that we think some courts are failing to strike the right balance—and where neither the 401/403 nor the direct connection test, however it is articulated, can guarantee protection of a criminal defendant's constitutional right to present a complete defense. A better grasp of the narrative relevance of third party guilt evidence will provide the proper context for courts to evaluate both the probative value and any prejudicial impact such evidence carries. Thinking of third party evidence issues in these terms will help courts get it right more often in the middle cases and provide a rational explanation to support courts' generally correct decisions in the fringe cases.

II. NARRATIVE RELEVANCE

For more than twenty years, researchers of juror decision-making have recognized the importance of story. Often referred to as "the story model,"[112] "holistic reasoning,"[113] or "narrative theory,"[114] these models reflect a broad "shift away from positivism, neutrality, and objectivism as the dominant standards for legal scholarship and decision-making"[115] and an adoption of the notion that "human

111. *See, e.g.*, *Prion*, 52 P.3d at 193-94 (granting the defendant a new trial where he was precluded from offering evidence that a third party had a motive, opportunity, and propensity to commit the crime with which he was charged); *Kirchner*, 743 N.E.2d at 114 (upholding the exclusion of evidence that a third party had access to the murder weapon one month before the crime occurred, but where it was undisputed that the defendant possessed the weapon immediately prior to and after the crime); *Joyner*, 678 N.E.2d at 389-90 (overturning the trial court's exclusion of third party guilt evidence including motive, opportunity and the fact that a hair recovered at the crime scene bore similar characteristics to the third party's hair); *Malick*, 457 S.E.2d at 485 (upholding the exclusion of evidence that a third party had sexually assaulted the same victim in the same month, but where the defendant conceded that he was the only person present with the victim at the time of the assault with which he was charged).

112. *See generally* Pennington & Hastie, *A Cognitive Theory*, *supra* note 109 (describing the story model).

113. *See generally* Peter Brooks, *Narrativity of the Law*, 14 L. & LITERATURE 1 (2002) (describing narrative relevance in terms of holistic reasoning); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994) [hereinafter Sherwin, *Narrative Construction*] (discussing holistic reasoning).

114. *See generally* John B. Mitchell, *Evaluating* Brady *Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599 (2005) (discussing narrative theory).

115. Sherwin, *Narrative Construction*, *supra* note 113, at 717. Narrative theory rejects the previous line of thinking in which juror reasoning was generally thought to follow some sort of mathematical model, such as Bayesian theory, traditional probability theory, or other algebraic models. *See generally* L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE (1977) (describing mathematical models of legal reasoning); GLENN SHAFER, A MATHEMATICAL THEORY OF EVIDENCE (1976) (describing the different mathematical models); Stephen E. Fienberg & Mark J. Schervich, *The Relevance of Bayesian Inference for the Presentation of Evidence and for Legal Decision Making*, 66 B.U. L. REV. 771 (1986) (describing the application of Bayesian Theory to legal decision making); Martin F. Kaplan, *Cognitive Processes in the Individual Juror*, *in* THE PSYCHOLOGY OF THE COURTROOM 197 (Norbert L. Kerr & Robert M. Bray eds., 1982) (discussing the different mathematical theories). These previously accepted mathematical models posited that jurors reasoned in a strictly linear fashion by evaluating the strength of each piece of evidence individually and then entering that strength into a final calculus to reach an ultimate conclusion. *See generally* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 511-13 (2004) (explaining the rationalist view that legal decision making strictly follows logical paths of inference).

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perception and cognition are never without some interpretive framework within which reality and meaning come into view."[116] That interpretive framework, according to narrative theory, is typically some form of story structure.[117]

It is now widely accepted, and empirical research demonstrates, that narrative plays an important role throughout the entire trial process.[118] First, jurors organize and interpret trial evidence as they receive it by placing it into a story format:

> [T]rials are often fragmented affairs in which evidence comes in a piece at a time, often without any deference to logical order, and at times consists of extensive evidentiary foundations which are unrelated to the substance of the case. Jurors make sense of this by constantly trying to fit the information they are hearing into a story.[119]

In one of the most extensive studies on jury decision making, Lance Bennett and Martha Feldman found that jurors judged disputed versions in criminal trials by reducing them to story format because the story is their most common everyday communicational form.[120] Stories provide useful structures: plot, characters, time frames, motives, and settings, which help jurors process and understand what is otherwise complex and sometimes unfamiliar information.[121]

The story structure also helps jurors solve the problem of information overload in trials by making it possible to continuously organize and reorganize large amounts of constantly changing evidence.[122] Trials are by nature filled with ambiguities; jurors seek to resolve this uncertainty because it is uncomfortable and a barrier to decisive action.[123] Simplification of the evidence into a sensible trial story is necessary to enable jurors to make a decision at all: "Psychologically, we crave meaning. Meaning lends order and control. Chaos is disorienting and unpleasant, especially in matters of life and death. . . . Without coherent stories,

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116. Sherwin, *Narrative Construction*, *supra* note 113, at 717.

117. Legal scholars of critical race theory and feminist theory have long been discussing and employing the power of storytelling. *See, e.g.*, Patricia Williams, *The Obliging Shell: An Essay on Equal Opportunity*, 87 MICH. L. REV. 2128, 2132-37 (1989) (using story to explain "the truth about equality"). *See generally* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (examining the emergence of feminist narrative scholarship); Gerald P. Lopez, Keynote Address, *Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041 (2005) (using story to explain the need for creative methods of solving community problems).

118. *See generally* BENNETT & FELDMAN, *supra* note 109 (describing the role of narrative at trial); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Jury Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992); Pennington & Hastie, *A Cognitive Theory*, *supra* note 109.

119. Mitchell, *supra* note 114, at 612.

120. BENNETT & FELDMAN, *supra* note 109, at 164-68.

121. SUNWOLF, PRACTICAL JURY DYNAMICS 271 (2004).

122. *Id.*

123. *Id.* at 283, 287.

judgment becomes impossible."[124]

Second, trials are essentially "story-battle[s]." In the courtroom, each attorney will tell the jury a different story, present evidence to support that story, and make arguments for why the jury should accept their particular story as "truth."[125] The stories may disagree on plot (what actually happened), they may disagree on motive of central characters (why it happened) or they may disagree on what the consequences of the events should be (what would constitute justice).[126] The jurors then compare their own stories with those offered by the parties. The 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.[127]

Third, jurors essentially "re-story" evidence during deliberations. Professor Sunwolf studied videotaped deliberations from four criminal trials and found that jurors primarily argued with one another during deliberations in story format.[128] At the opening of deliberations in one criminal trial, the foreman began by stating, "I don't know, I'd kind of like to make a story. Then have everybody believe the same story that happened."[129] The jurors deliberated in story form by including not only the actual evidence offered at trial, but imported their own real-life experiences as well as fictionalized trial evidence by engaging in imaginative storytelling.[130]

The research of Nancy Pennington and Reid Hastie, conducted during mock criminal trials, confirms that jurors construct their stories from three general types of knowledge: (1) case-specific information acquired at trial, (2) the juror's own background knowledge and experiences, and (3) the juror's expectations about what makes a complete story.[131] These categories parallel the findings of cognitive psychologists who believe that we give meaning to our experience by placing it into cognitive frames called "schema" or "scripts." These are defined as:

> [T]he mental blueprints that we carry around in our head for quick assessments of what we may or should be seeing or feeling in a given situation. Such blueprints are simplified models of experiences we have had before. They represent a kind of shorthand that transcribes our stored knowledge of the world, describing kinds of situations, problems, and personalities. These models allow us to economize on mental energy: we need not interpret things

124. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 71 (1994).

125. SUNWOLF, *supra* note 121, at 272.

126. *Id.*

127. Pennington & Hastie, *A Cognitive Theory*, *supra* note 109, at 522-23.

128. *See* SUNWOLF, *supra* note 121, at 272-80.

129. *Id.* at 271.

130. *Id.* at 269.

131. Pennington & Hastie, *A Cognitive Theory*, *supra* note 109, at 522.

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> afresh when there are pre-existing categories that cover the experience or condition in question.[132]

For example, Charles Nuckolls illustrates how decision makers draw on schemas to fill in missing information with the following two sentences: "John went to a party. The next morning he woke up with a headache."[133] It is common knowledge that people who go to parties often drink too much and wake up the next morning with a hangover. The point is that the causal explanation "goes considerably beyond the information given."[134] Jurors use schemas and scripts to make inferences from what they know to what they do not know.[135]

The party who can tell the most compelling story, which fits best with each individual juror's own narrative (as constructed from the trial evidence, background information including schemas and scripts, and expectations), will emerge the ultimate winner in the case. There are several factors that determine whether a particular story will be accepted as true. Pennington and Hastie group these factors into two "certainty principles" called "coverage" and "coherence."[136] Coverage refers to the extent to which the story accounts for the evidence presented at trial. "[T]he greater the story's coverage, the more acceptable the story as an explanation of the evidence, and the greater confidence the juror will have in the story as an explanation . . . ."[137] An explanation that leaves much of the evidence unaccounted for is likely to be rejected. Coherence has three related sub-components—consistency, plausibility and completeness.[138] A story is consistent when it does not contain internal contradictions either with other evidence in the case, or with other parts of the explanation.[139] A story is plausible if it corresponds with the juror's general "knowledge about what typically happens in the world."[140] Finally, a story is complete when the "structure of the story has all of its parts."[141] "Missing information, or lack of plausible inferences about one or more major components of the story . . . will decrease confidence in the explanation."[142]

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132. Sherwin, *Narrative Construction*, *supra* note 113, at 700.

133. Charles W. Nuckolls, *Culture and Causal Thinking: Diagnosis and Prediction in a South Indian Fishing Village*, 19 ETHOS 3, 4 (1991).

134. *Id.* at 5.

135. Cognitive psychologists recognize a related phenomenon, which they refer to as "gist memory." *See generally* C.J. BRAINERD & V.F. REYNA, THE SCIENCE OF FALSE MEMORY (2005). A person may have a memory of specific details, or she may remember only an event as a whole. *Id.* at 5. Gist memory is very susceptible to incorporating gist-consistent details when they are suggested because they complete the story. *Id.* at 161-66.

136. Pennington & Hastie, *A Cognitive Theory*, *supra* note 109, at 527 (1991).

137. *Id.* at 528.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 528. Significant gaps in the expected line of a story can be particularly detrimental to a story's coverage and coherence. The research of Dan Simon suggests that the missing information, or lack of plausible explanation for a particular piece of the story, can affect the way in which jurors view other, logically unrelated

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Thus because human beings are essentially "homo narrens,"[143] storytelling is an indispensable tool for lawyers representing defendants in criminal cases. That is why criminal defendants try to tell them. The defendant's ability to tell the right story—and to tell it completely—is a powerful influence on the outcome of a trial and thus central to the protection of his constitutional right to present a complete defense.

III. THE DEFENDANT'S RIGHT TO PRESENT A COMPLETE DEFENSE

In 1967 the United States Supreme Court decided *Washington v. Texas*.[144] The rule at issue in *Washington*, formerly in wide acceptance under the common law and in federal courts, prohibited accomplices from testifying for one another (although the State was free to use an accomplice's testimony against the accused).[145] As a result, when Washington was tried for murder, he was prevented from calling as a witness a third party named Fuller who was willing to confess to the same crime.[146] Fuller was the only other eyewitness to the events of the crime and there was some evidence in corroboration of his guilt. Washington was convicted and sentenced to fifty years in prison.[147] In overturning his conviction, the Supreme Court stated that the Sixth Amendment's Compulsory Process Clause guaranteed a criminal defendant the right to present a defense:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms *the right to present the defense*, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, *he has the right to present his own witnesses to establish a defense.*[148]

The Texas rule on accomplice testimony was invalid, the Court held, because it arbitrarily denied Washington "the right to put on the stand a witness . . . whose

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items of evidence. For example, Simon found that mock jurors who had previously rated such items of evidence as the veracity of an eyewitness's testimony and their beliefs about the accuracy of eyewitness identification in general as moderately strong in a criminal trial, lowered these ratings after the introduction of DNA evidence suggested that the particular testifying eyewitness was incorrect about her identification. In other words, jurors tend to shift their view of individual elements in a story to cohere with their ultimate decision; "sufficiently strong pieces of evidence [or lack thereof] can affect the entire mental model of the case through indirect influences on other variables." Simon, *supra* note 115, at 567.

143. "Man is eminently a storyteller. His search for a purpose, a cause, an ideal, a mission and the like is largely a search for plot and a pattern in the development of his life story." ERIC HOFFER, THE PASSIONATE STATE OF MIND AND OTHER APHORISMS 59 (1955).

144. 338 U.S. 14 (1967).

145. *Id.* at 16-17 & n.4.

146. *Id.* at 16.

147. *Id.* at 17.

148. *Id.* at 19 (emphasis added).

testimony would have been relevant and material to the defense."[149] The State argued that the rule was necessary to prevent perjury by the accomplices—each attempting to swear the other out of the charge, but the Court rejected this reason, stating that it was not a compelling interest:

> [It is] the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge about the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court.[150]

Following its decision in *Washington*, the Court decided a number of cases under the broad doctrine of "the right to present a defense"—although it was not always consistent or clear about the right's origins. In *Chambers v. Mississippi*, the Court held that the defendant was denied "a [fair] trial in accord with traditional and fundamental standards of due process" when application of Mississippi's voucher and hearsay rules prevented Chambers from thoroughly cross examining and presenting prior inconsistent statements against a third party who had confessed to the murder for which Chambers was charged.[151] The Court's opinion intertwined Sixth Amendment and due process principles:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.[152]

The Court also invalidated Arkansas's categorical prohibition on hypnotically refreshed testimony, holding that the rule violated a defendant's right to present a defense.[153] The defendant in *Rock v. Arkansas* was accused of a killing to which she was the only eyewitness. She alleged that she was able to remember the facts of the killing only after having her memory hypnotically refreshed. Because Arkansas excluded all hypnotically refreshed testimony, the defendant was unable to testify about certain relevant facts, including whether the killing had been accidental.[154] The Court held the rule unconstitutional because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections."[155]

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149. *Id.* at 23.

150. *Id.* at 22.

151. 410 U.S. 284, 303 (1973).

152. *Id.* at 294.

153. *See* Rock v. Arkansas, 483 U.S. 44, 57 (1987).

154. *Id.* at 47-49.

155. *Id.* at 61; *cf.* United States v. Scheffer, 523 U.S. 303 (1998) (holding that exclusion of the defendant's polygraph evidence did not violate his right to present a defense where the evidence was not factual and merely served to bolster the defendant's credibility).

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Thus, "[w]hether rooted directly in the Due Process clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[156] The affirmative aspects of this right remain unclear, but the Court has at least explained that it is "abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are '"arbitrary" or "disproportionate to the purpose they are designed to serve."'"[157] In the context of third party guilt evidentiary restrictions, prior to *Holmes*, the Court had decided only one other case—*Chambers v. Mississippi*[158]—the facts of which parallel in many respects the facts of *Holmes*.

A. Chambers v. Mississippi

Chambers was arrested for the murder of a local police officer, Aaron Liberty.[159] Liberty was shot and killed by the bullet of a .22 caliber pistol after a crowd of angry onlookers attacked a group of Woodville, Mississippi policemen while they attempted to execute a warrant for the arrest of a resistant youth outside a bar.[160] Chambers was also shot during the incident. Three friends brought the wounded Chambers to a nearby hospital.[161] When police learned that Chambers had survived the shooting, he was arrested and charged with the murder of Officer Liberty.[162]

One of Chambers's three friends that night was a man named Gable McDonald. Several days after the shooting, McDonald gave a sworn and voluntary confession to Chambers's attorneys that he—not Leon Chambers—had shot Officer Liberty.[163] One month later, at Chambers's preliminary hearing, McDonald repudiated his sworn confession and testified that he had not even been at the scene of the shooting.[164] Instead, he claimed that he and Berkley Turner were having drinks in a nearby café when they heard the shots.[165]

At trial, Chambers tried to introduce evidence showing that McDonald had actually committed the crime.[166] Chambers called McDonald to the stand and successfully introduced McDonald's prior out-of-court confession into evi-

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156. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

157. Holmes v. South Carolina, 126 S. Ct. 1727, 1731 (quoting *Scheffer*, 523 U.S. at 308 (quoting *Rock*, 483 U.S. at 58)).

158. 410 U.S. 283 (1973).

159. *Id.* at 287.

160. *Id.* at 285-86.

161. *See id.* at 287.

162. *Id.*

163. *Id.*

164. *Id.* at 288.

165. *Id.*

166. *Id.* at 289.

dence.[167] On cross-examination by the State, McDonald testified that he had repudiated this confession.[168] Chambers then tried to challenge McDonald's renunciation, but was prevented from doing so when the trial court applied Mississippi's "voucher rule," which prevented a party from impeaching his own witness.[169]

Unable to directly challenge McDonald's renunciation of his prior confession, Chambers sought to introduce the testimony of three other witnesses to whom McDonald had confessed.[170] After testifying that neither he nor McDonald had been in the nearby café at the time of the shooting as McDonald had claimed, Berkley Turner would have told the jury that McDonald had confessed that he was Liberty's killer and had urged Turner not to "mess him up."[171] Sam Hardin and Albert Carter would also have testified to similar confessions McDonald made to them.[172] But the jury heard nothing about McDonald's confessions to these men. His statements were excluded under Mississippi's hearsay rules.[173] Chambers was convicted and sentenced to life imprisonment.[174]

The Supreme Court reversed Chambers's conviction and held that the trial court's application of Mississippi's voucher and hearsay rules, resulting in an exclusion of third party guilt evidence, deprived Chambers of due process of law because it significantly undermined fundamental elements of his defense.[175] The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."[176] This right, the Court held, is among the most fundamental to our system of ordered liberty.[177] The Court acknowledged that, as a general rule, the accused, in exercising his right to present a complete defense, "must comply with [states'] established rules of procedure and evidence."[178] But, "where constitutional rights directly affecting the ascertainment of guilt are implicated," those rules "may not be applied mechanistically to defeat the ends of justice."[179]

The Court made a point to announce that its decision in *Chambers* was not an establishment of any new principle of constitutional law.[180] Nor did the Court intend its holding to "signal any diminution in the respect traditionally accorded to

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167. *Id.* at 291.
168. *Id.*
169. *See id.* at 291-92.
170. *Id.* at 292.
171. *Id.*
172. *See id.* at 292-93.
173. *See id.* at 293-94.
174. *Id.* at 285.
175. *Id.* at 302.
176. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).
177. *Chambers*, 410 U.S. at 302.
178. *Id.*
179. *Id.*
180. *Id.*

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the States in the establishment and implementation of their own criminal trial rules and procedures."[181] Rather, the Court stated that its holding was simply "that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial."[182]

The parameters of *Chambers*'s holding remained unclear. Despite the Supreme Court's disclaimer of any new rule of law, legal commentators consistently referred to it as establishing a generally applicable principle of the right to present a complete defense.[183] There was much disagreement, however, on the specific contours of that right. Professor Churchwell noted the development of the "*Chambers* rule" requiring that:

> The minimal evidentiary criteria which must be met before any declaration can be considered as rising to constitutional stature are these: (1) the declarant's testimony is otherwise unavailable; (2) the declaration is an admission of an unlawful act; (3) the declaration is inherently inconsistent with the guilt of the accused; and (4) there are such corroborating facts and circumstances surrounding the making of the declaration as to clearly indicate that it has a high probability of trustworthiness.[184]

Professor Nagareda characterized *Chambers* as establishing that "the accused in a criminal proceeding has a constitutional right to introduce *any* exculpatory evidence, unless the State can demonstrate that it is so inherently unreliable as to leave the trier of fact with no rational basis for evaluating its truth."[185] Similarly, Professor Westen suggested that *Chambers* established a criminal defendant's "constitutional right to introduce exculpatory evidence at trial if it possesses sufficient 'assurances of reliability to be capable of rational evaluation by a properly instructed jury.'"[186] Professor Clinton argued that the defendant's evidence should be evaluated by a "totality of the circumstances" approach in light of its importance in the defendant's overall case.[187]

Even the Court itself seemed confused about *Chambers*'s implications. Although the *Chambers* opinion made a point to state that its holding was strictly limited to the facts of the case, the Court later treated *Chambers* as establishing a

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181. *Id.* at 302-03.

182. *Id.* at 303.

183. *See, e.g*, Steven G. Churchwell, *The Constitutional Right to Present Evidence: Progeny of* Chambers v. Mississippi, 19 CRIM. L. BULL. 131, 137-45 (1983); Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 800-01 (1976); Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1084 (1999); Peter Westen, *Compulsory Process I*, 73 MICH. L. REV. 71, 151-52 (1974).

184. Churchwell, *supra* note 183, at 138 (quoting State v. Gardener, 534 P.2d 140, 142 (Wash. App. 1975)).

185. Nagareda, *supra* note 183, at 1084.

186. Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 627 n.167 (1977).

187. Clinton, *supra* note 183, at 800.

generally applicable rule of law.[188] At other times, however, the Court reverted back to treating *Chambers* as nothing more than "an exercise in highly case-specific error correction."[189] Justice O'Connor, however, was critical of attempts to limit *Chambers*'s holding:

> The plurality's characterization of *Chambers* as 'case-specific error correction' cannot diminish its force as a prohibition on enforcement of state evidentiary rules that lead, without sufficient justification, to the establishment of guilt by suppression of evidence supporting the defendant's case.[190]

The Court's mixed signals left the lower courts without the guidance necessary to appropriately evaluate the constitutionality of state evidentiary rules governing the admissibility of third party guilt evidence. In fact, lower courts often adjudicate the admissibility of such evidence without reference or regard to constitutional concerns;[191] instead they tend by and large to apply the jurisdiction's applicable rule of evidence and then move on as if *Chambers* had never been decided.[192] Thus, when the Supreme Court agreed to hear *Holmes v. South Carolina*, it was an opportunity to clarify the status and scope of *Chambers* and, more broadly, the criminal defendant's right to present a defense.

B. Holmes v. South Carolina

In part because of the ambiguities surrounding the right to present a defense, and in part because the South Carolina Supreme Court's decision was clearly wrong for several reasons, there were a number of arguments advanced for why the United States Supreme Court should hear and reverse Holmes's case. The National

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188. *See* United States v. Scheffer, 523 U.S. 303, 308 (1998) (citing *Chambers* to support the statement that the exclusion of evidence is unconstitutionally arbitrary or disproportionate where it "has infringed upon a weighty interest of the accused").

189. Montana v. Egelhoff, 518 U.S. 37, 52 (1996).

190. *Id.* at 62-63 (O'Connor, J., dissenting) (citation omitted).

191. The following cases rely entirely on state law regarding the admissibility of third party evidence: Smithart v. State, 988 P.2d 583, 586 (Alaska 1999); Birmingham v. State, 27 S.W.3d 351, 359 (Ark. 2000); People v. Schwartz, 678 P.2d 1000, 1008 (Col. 1984); State v. Francis, 836 A.2d 1191, 1199 (Conn. 2003); State v. Wilson, 406 N.W.2d 442, 447 (Iowa 1987); State v. Davidson, 982 S.W.2d 238, 242 (Mo. 1998); State v. Wright, 817 A.2d 600, 609 (R.I. 2003); State v. Luna, 378 N.W.2d 229, 232 (S.D. 1985).

192. In fact, few states ever discuss *Chambers* beyond its broad proposition that defendants have a right to present a complete defense. With respect to the admission of evidence of third party guilt, New Jersey is alone in its attempt to couch the issue as ultimately a matter of the *Chambers* due process right. *See* State v. Koedatich, 548 A.2d 939, 976 (N.J. 1988) ("[T]he Supreme Court [in *Chambers*] recognized that an accused has a constitutional right under the due process clause of the fourteenth amendment to offer probative evidence tending to show that a third party committed the crime charged."); *see also* State v. Reed, 753 A.2d 1247, 1248 (N.J. Super Ct. Law Div. 2000) (reiterating that "'an accused has a constitutional right under the due process clause of the fourteenth amendment to offer probative evidence tending to show that a third party committed the crime charged'" (quoting *Keodatich*, 548 A.2d at 976)); State v. Fulston, 738 A.2d 380, 384 (N.J. Super Ct. App. Div. 1999) (quoting the *Keodatich* decision). In other states where *Chambers* was cited in third party guilt cases, the claims are often rejected with little discussion. *See, e.g.*, State v. Lewis, 717 A.2d 1140, 1152-53 (Conn. 1998) (rejecting a *Chambers* claim because the defendant did not show the third party was unavailable).

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Association of Criminal Defense Lawyers ("NACDL"), in its amicus brief, argued that South Carolina's decision denied Holmes his "constitutional right to have the jury consider the evidence that he wishes to present in support of his defense" and to "have a jury, rather than a judge, make the ultimate determination of all facts."[193] The NACDL also argued that the South Carolina standard was unconstitutional because it arbitrarily discriminated against "a particular type of defense evidence relating to the issue of whether the defendant is guilty of the crimes of which he is accused" while "the prosecution labors under no similar, special restrictions in seeking to present evidence to a jury supporting its allegations of a defendant's guilt."[194]

The Innocence Project, also as amicus curiae, focused on the fact that the rule permitted exclusion of third party guilt evidence when the prosecution's case was "strong" without evaluating the countervailing evidence, arguing that it undermined the presumption of innocence and violated a defendant's right to a jury trial.[195] The Innocence Project characterized this aspect of the rule as "constitutionally defective as a general matter, inherently illogical and ill-conceived as an evidentiary matter, and is particularly unfair as applied to [Holmes], given the plethora of evidence supporting [his] theory of fabrication and/or contamination of the forensic evidence."[196] An amicus brief from forty professors of evidence law pointed out that, at the very least, the South Carolina Supreme Court's decision should be reversed because the case was factually indistinguishable from *Chambers*.[197]

Holmes's own briefs argued that South Carolina's rule excluding his third party guilt evidence violated his rights to trial by jury, to call witnesses in his defense, and to cross-examine the state's witnesses against him.[198] Holmes also argued that the standard unconstitutionally reduced the prosecution's burden of proving his guilt beyond a reasonable doubt.[199]

In the end, however, the Supreme Court said very little about any of these

193. Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 7-8, Holmes v. South Carolina, 126 S.Ct. 1727 (2006) (No. 04-1327).

194. *Id.* at 12.

195. Brief for Innocence Project Inc. as Amicus Curiae Supporting Petitioner at 4, Holmes v. South Carolina, 126 S.Ct. 1727 (2006) (No. 04-1327).

196. *Id.*

197. Brief for Forty Professors of Evidence Law as Amicus Curiae Supporting Petitioner at 17, Holmes v. South Carolina, 126 S.Ct. 1727 (2006) (No. 04-1327). In fact, the evidence professors argued that the constitutional deprivation in *Holmes* was worse than that in *Chambers* because: (1) "Chambers was allowed to present substantial evidence that Gable McDonald was the real killer, and to argue that defense to the jury," whereas Holmes was entirely precluded from making reference to Jimmy White; and (2) Chambers's third party guilt evidence was excluded by rules that applied to "all parties in all trials," whereas the rule in *Holmes* was one-sided in that it applied only to criminal defendants. *Id.* at 18-19.

198. Brief of Petitioner at 23-50, Holmes v. South Carolina, 126 S.Ct. 1727 (2006) (No. 04-1327) [hereinafter Petitioner's Brief].

199. *Id.* at 34-35.

arguments, leaving the waters nearly as muddied as they were before *Holmes* was decided. The Court began by acknowledging that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"—neglecting to specify whether that opportunity is rooted in the due process, compulsory process, or confrontation clause.[200] The Court stated that its previous decisions, including *Washington*, *Chambers*, *Crane*, *Rock*, and *Scheffer*, establish that the right to present a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve,'" but that courts are nonetheless permitted to employ "well-established rules of evidence . . . to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury."[201]

The Court acknowledged evidentiary restrictions on third party guilt evidence designed to exclude evidence which is "'speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial'" as "widely accepted."[202] South Carolina's *Gregory* standard, adopted in 1941, was such a rule:

> [E]vidence offered by the accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable presumption of his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.[203]

In *State v. Gay*, however, the Court noted that South Carolina "radically changed and extended" the *Gregory* rule by claiming that "'in view of the strong evidence of [the defendant's] guilt—especially the forensic evidence— . . . the proffered evidence . . . did not raise "a reasonable inference" as to [the defendant's] own innocence.'"[204] Similarly, in Holmes's case, the Court stated that the South Carolina Supreme Court had applied a rule that "'where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt' may (or perhaps must) be excluded."[205]

The Court honed in on the fact that South Carolina's rule, while implementing a bar on third party guilt evidence when the State alleged forensic evidence of the

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200. Holmes v. South Carolina, 126 S.Ct. 1727, 1731 (2006).
201. *Id.* at 1731-32 (internal quotations omitted).
202. *Id.* at 1733 (quoting 40A Am.Jur.2d, Homicide § 286, pp. 136-38 (1999)).
203. State v. Gregory, 16 S.E.2d 532, 534-35 (S.C. 1941) (internal quotations omitted).
204. *Holmes*, 126 S.Ct. at 1734 (quoting State v. Gay, 541 S.E.2d 541, 545 (S.C. 2001)).
205. *Id.* (quoting State v. Holmes, 605 S.E.2d 19, 24 (S.C. 2004)).

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defendant's guilt, did not call for any examination of the credibility of the prosecution's witnesses or the reliability of its forensic evidence.[206] The Court pointed out that the South Carolina Supreme Court had completely ignored Holmes's arguments about the unreliability of the prosecution's forensic evidence and yet, in evaluating the prosecution's forensic case, deemed it to be "strong," thereby justifying exclusion of [Holmes's] third party guilt evidence.[207] "The point," the Court stated, "is that by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."[208] Thus, the Court held:

> Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have a "meaningful opportunity to present a complete defense."[209]

The Court's brief opinion in *Holmes* corrected an error, but it answered few of the broad lingering questions about the implications of its previous decision in *Chambers*. At the very least, it established that *Chambers* has some lasting value beyond a mere "exercise of factually specific error correction." Although the opinion says little about what quantum of third party guilt evidence constitutes a "weighty interest of the accused," we know at least that Holmes had one in his case. Finally, the opinion also provides little explanation regarding the constitutional underpinnings of the right to present a defense.

IV. THE RIGHT TO PRESENT A COMPLETE DEFENSE INCLUDES THE RIGHT TO TELL A PLAUSIBLE STORY IF THE DEFENDANT HAS ONE

The Supreme Court's decisions in *Chambers* and *Holmes* establish that, in the context of third party guilt evidence cases, a criminal defendant has a right to present a complete defense which cannot be arbitrarily infringed upon by state evidentiary rules. And yet, these decisions do little to clarify precisely what the right to present a defense actually means. What we advance here is that the right to a fair trial before a jury and the right to present a complete defense must take account of what we know about how criminal trials work and the way in which their participants function.[210] We have explained previously in this Article that

206. *See id.*

207. *Id.*

208. *Id.* at 1735.

209. *Id.* at 1734.

210. *See* Simmons v. South Carolina, 512 U.S. 154, 169-71 (1994) (acknowledging that "most juries lack accurate information about the precise meaning of 'life imprisonment'" and holding that the defendant's due

empirically we know that jurors process the information they receive at trial by shaping it into a story format, and thus, that a defendant's ability to tell a plausible and complete story of his own innocence determines the jury's verdict. In other words: "Law lives on narrative."[211] We are now increasingly coming to recognize that both the questions and the answers in matters of "fact" depend largely upon one's choice (considered or unconsidered) of some overall narrative as best describing what happened or how the world works. Therefore, one essential component of the right to present a defense should include the right to tell a coherent story. A fair legal standard "should relate to the way people learn."[212]

The Supreme Court has already recognized the basic principles of narrative relevance in its decision in *Old Chief v. United States*.[213] The case arose when Johnny Lynn Old Chief was charged with assault with a dangerous weapon, using a firearm in the commission of a crime of violence, and possession of a firearm by a convicted felon.[214] To prove that Old Chief was a felon in possession of a firearm, the government sought to introduce Old Chief's criminal record, which stated that he had previously been convicted of a felony—namely, assault which resulted in a serious bodily injury—and sentenced to five years imprisonment.[215] Old Chief offered to stipulate to the fact that he was a convicted felon and thereby would have violated the felon in possession law if the jury found that he committed the other crimes with which he was charged.[216] The prosecutor rejected the stipulation, arguing that he had the right to prove his case using whatever relevant evidence he wished. The trial judge agreed, and the appellate court affirmed his decision.[217]

The Supreme Court reversed in a 5-4 decision authored by Justice Souter.[218] The Court held that, given the availability of the stipulation, the probative value of the criminal record was substantially outweighed by the risk of unfair prejudice.[219] Although the details of the record would have been "technically relevant," the Court stated that the record did not address anything "in the definition of the prior-conviction element that would not have been covered by the stipulation or

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process rights were violated when the trial court refused to instruct the jury that life, as an alternative to death, carried no possibility of parole); Bruton v. United States, 391 U.S. 123, 135 (1968) (holding that the admission of a codefendant's confession that implicated the defendant at a joint trial constituted prejudicial error even though the trial court gave a clear instruction that the confession must be disregarded with respect to the defendant because "the practical and human limitations of the jury system cannot be ignored").

211. ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000).

212. Blue Cross and Blue Shield of N.J., Inc. v. Phillip Morris Co., 138 F.Supp. 2d 357, 368 (E.D.NY. 2001).

213. 519 U.S. 172 (1997).

214. *Id.* at 174.

215. *Id.* at 177.

216. *Id.*

217. *Id.*

218. *Id.* at 178.

219. *Id.* at 191.

admission."[220] As for the risk of prejudice, the Court stated that "there can be no question" that the name or nature of the prior offense carried a risk of "lur[ing] a juror into a sequence of bad character reasoning."[221]

Despite the reversal, the Court was careful to limit its holding to "cases involving proof of felon status,"[222] and took pains to point out that as a general matter it is "unquestionably true" that the prosecution is entitled to prove its case by evidence of its own choice: "The 'fair and legitimate weight' of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, *but tells a colorful story with descriptive richness*."[223]

Justice Souter acknowledged that "[e]vidence . . . has force *beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum*, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict."[224] Moreover, he recognized a "need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be," and argued that jurors whose expectations are not satisfied may penalize the party who disappoints them.[225] Finally, Justice Souter summarized:

> A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.[226]

With respect to Old Chief, however, Souter stated that the "recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has . . . virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him."[227] Old Chief's stipulation did not leave a "gap" in the prosecution's present story,

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220. *Id.* at 186.
221. *Id.* at 185.
222. *Id.* at 183 n.7.
223. *Id.* at 187 (emphasis added).
224. *Id.* (emphasis added).
225. *Id.* at 188.
226. *Id.* at 189.
227. *Id.* at 190.

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Souter claimed, because it "neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach."[228]

Justice O'Connor dissented, joined by Chief Justice Rehnquist, Justice Scalia and Justice Thomas. Justice O'Connor disputed Justice Souter's conclusion that admission of Old Chief's criminal record was unfairly prejudicial.[229] Justice O'Connor was particularly troubled by what she called the majority's "retreat from the fundamental principle that in a criminal prosecution the Government may prove its case as it sees fit."[230] It is just as likely, she wrote, that a jury will be "puzzled by the 'missing chapter' resulting from a defendant's stipulation to his prior felony conviction .... The jury may wonder why it has not been told the name of the crime, or it may question why the defendant's firearm possession was illegal ...."[231] Thus, there was disagreement about how much detail was needed to tell the story properly, as well as what the trade-off between storytelling and the risk of prejudice should be, but unanimity that storytelling *matters*.[232]

More recently, in *House v. Bell*, the Court made reference yet again to the importance of narrative in a criminal trial. In rejecting the state's argument that new evidence establishing that semen found on the victim's clothing belonged to her husband rather than to the defendant, House, was immaterial because no sexual assault was charged, the Court observed that "[w]hen the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime."[233] The Court then analyzed how a change in this particular item of evidence would impact how the jury saw the entire story:

> A jury informed that fluids on [the victim's] garments could have come from House might have found that House trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative.[234]

In light of this change in the story, the Court observed, a jury might view other circumstantial evidence against House as "still potentially incriminating," but nonetheless far "less suspicious."[235]

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228. *Id.* at 191.

229. *Id.* at 192-93 (O'Connor, J., dissenting).

230. *Id.* at 198 (O'Connor, J., dissenting).

231. *Id.* (O'Connor, J., dissenting).

232. *See* Brooks, *supra* note 113, at 2 (arguing that it is error to "promote a naïve positive valuation of narrative, assuming without further examination that stories are good, and represent the good cause" because "in fact narrative is morally a chameleon that can be used to support the worse as well as the better cause").

233. House v. Bell, 126 S.Ct 2064, 2079 (2006).

234. *Id.*

235. *Id.*

In the context of third party guilt cases, then, which story should the jury be permitted to hear—or perhaps it is better to ask *how much* story should the jury be given? Jurors expect parties to tell a story about the events of a crime that makes sense. They expect a story that possesses "narrative integrity."[236] Some jurors serving on a criminal case may be unwilling or unable to follow legal instructions requiring them to acquit simply if there is "reasonable doubt"—they want to know who did it. Others may be influenced in their assessment whether reasonable doubt is present by whether there is another plausible suspect, and for still others, the evidence of the alternative perpetrator may by itself create a reasonable doubt. The prosecutor in Bobby Holmes's case recognized this reality and took advantage of it in his closing argument by asking, "If Bobby Holmes didn't do this, where is the fellow who did?"[237] When there is credible evidence of a third party's potential guilt, then strict restrictions on admissibility of such evidence unreasonably infringe upon a criminal defendant's right to present a complete defense and his right to a fair trial before a jury.

On occasion, such as in *Old Chief* and *House*, courts have openly acknowledged the idea and import of narrative relevance.[238] For the most part, however, the legal world fails to focus on "'narrative' as a category in the process of legal adjudication."[239] We suggest it is time to look more carefully at the role of narrative relevance, beginning with third party guilt cases, and reconsider our standards in light of what we know about the narrative's role in the jury decision-making process. In the remaining part of this Article, we propose a rule for the admissibil-

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236. *Old Chief*, 519 U.S. at 183.

237. *See* Joint Appendix Vol. II, *supra* note 3, at 264, 338.

238. *See also* Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris Co., 138 F.Supp. 2d 357, 366-67 (E.D.N.Y. 2001).

> The horn-book requirement for admitting evidence is based on the premise that jurors will evaluate evidence rationally, by applying it logically to one material proposition after another, in determining whether the elements of the cause of action have been proved to the requisite degree of probability.
>
> Traditional theory assumes that a jury will decide the relationship between the law and the facts of the case as if solving a puzzle in logic—viewing evidence in pieces and discretely evaluating their connection through formal principles. This view is manifested in the way we assume jurors generally follow instructions and apply law to facts.
>
> More recently philosophical, psychological, and trial advocacy literature, as well as studies of juries, suggest that jurors reason and process information not merely as Aristotlean logicians, but somewhat more holistically, *in terms of stories they can relate to*. This development suggests that evidence rules may be somewhat loosened in their application—subject to Rule 403 problems of prejudice—to admit evidence of the practical consequences of a verdict and to give jurors a larger world context in which to make their decisions.

Id. (emphasis added) (internal citations omitted); United States v. Shonubi, 895 F.Supp. 460, 482-88 (E.D.N.Y. 1995), *vacated by* United States v. Shonubi, 103 F.3d 1085 (2d Cir. 1997) (broadly discussing theories about how decision-makers learn and decide, including classical step-by-step analysis, Bayesian and statistical analyses, biases and storytelling).

239. Brooks, *supra* note 113, at 1.

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ity of third party guilt evidence which assures the right to present a "complete defense" by permitting those defendants with plausible stories to tell them.

V. A PROPOSED RULE

Currently, courts are failing to consider the narrative impact of strict evidentiary restrictions on third party guilt evidence. While the Supreme Court's decision in *Holmes* forbids a court from shutting down the defendant's story *solely* because it deems the forensic aspect of the State's story compelling, it neither suggests that all special third party guilt evidence rules are impermissible nor hints at the contours of constitutionally acceptable rules. Given what we know about the importance of narrative in the juror decision-making process, we think that a revision of special evidentiary rules for third party guilt evidence is in order. To be consistent with the defendant's constitutional right to a fair trial and a complete defense, such a rule must begin by asking whether the defendant *has* a story to tell.

A. A Story for the Goose Is a Story for the Gander

How should we measure whether a defendant has a story? A variety of formulations are possible, but the most attractive is: probable cause. That is, if the evidence proffered by the defendant—assumed to be credible and taken as a whole, and regardless of the strength or weaknesses of the State's case—would permit the State to proceed with a criminal prosecution against the third party, then the defendant must be permitted to tell the story of third party guilt. Probable cause determinations require a practical, common-sense assessment of whether, given all the circumstances, there is a fair probability that the suspect committed the crime.[240] Probable cause is both the standard used to test whether the defendant may be arrested, and the standard for determining whether the State may proceed to trial against the defendant,[241] and its use in these other contexts provides two reasons to recommend it. First, it is familiar, and judges therefore will not need to struggle with a new standard and the appropriate application of that standard to a variety of factual situations; the probable cause standard is routinely applied in all state courts to evidence that is of the very same nature as third party guilt evidence.

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240. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983) (describing probable cause as a flexible, "common sense" determination). Probable cause does not mean more probable than not. *See* McCarthy v. De Armit, 99 Pa. 63, 69 (Pa. 1881) ("The substance of all the definitions [of probable cause] is a reasonable ground for belief of guilt."), *quoted in* Carroll v. United States, 267 U.S. 132, 161 (1925). "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." Maryland v. Pringle, 540 U.S. 366, 371 (2003). The Supreme Court has stated, however, that probable cause is satisfied by substantially less evidence than would justify conviction. Locke v. United States, 11 U.S. 339, 348 (1813). The standard simply requires evidence sufficient "'to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. (7 Cranch) 160, 175-76 (1949) (quoting *Carroll*, 267 U.S. at 162).

241. In some states the grand jury determines whether there is probable cause to issue an indictment, while in others a judge determines whether there is probable cause to "bind over" the defendant for trial.

Second, and more importantly, the probable cause standard compels evenhanded treatment of the State's claim that it has a non-frivolous reason to believe the defendant has committed a crime, and the defendant's claim that he has a non-frivolous reason to believe a third party has committed that crime. A story for the goose is a story for the gander.

The probable cause standard draws an appropriate line between those defendants who do, in fact, have a coherent story of third party guilt to tell and those who are just blowing smoke—just as it draws an appropriate line between legitimate prosecution of suspected crime and unwarranted harassment of potential defendants. Indeed, even if we put aside the emotional toll imposed by unwarranted prosecution and focus solely on economic costs, courts should be at least as worried about frivolously embarking upon an entire trial as they should be concerned about permitting a frivolous detour within a trial. Put differently, if the justification for special third party guilt rules is the purported risk of confusing, unwarranted "minitrials" on third party guilt and/or the risk of wrongful acquittals, that justification cannot be persuasive in situations where we would not find the risk of confusing, unwarranted prosecutions, and/or the risk of wrongful convictions were the story one being told by the other side.

In our view, the reason for any special rule concerning third party guilt evidence is not so much because jurors are unable to recognize the smoke—after all, we assume they can detect prosecution "smoke"—but because we agree that those defendants whose evidence is so thin that their "story" fails the probable cause standard should not be allowed to waste the courts' time with speculation—just as we do not allow prosecutions when the evidence is that thin. Whether this view is right or not, the probable cause threshold addresses courts' traditional concerns about the reliability of third party guilt evidence by ensuring that the evidence is *at least* of the kind and quantity on which the State itself would rely. If, for example, the only evidence of third party guilt the defendant has to offer is that the victim's husband had a motive to kill her for a life insurance policy, such evidence would not be sufficient to pass the probable cause threshold for the introduction of third party guilt evidence, just as it would not be sufficient to permit the State to arrest and/or try the husband for his wife's murder.

Notice that in classic probable cause determinations, proffered evidence must be presumed to be credible, because the question of credibility is a matter left to the jury, and to treat like stories alike, that presumption should apply in assessing whether third party guilt evidence meets the probable cause standard as well.[242] Indeed, *Holmes* does give some guidance on this narrower issue; it makes clear that a test that rejects third party guilt evidence based on the strength of the state's evidence is not constitutional.

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242. In some jurisdictions, there is a small qualification on this presumption: unless the evidence is not credible as a matter of law.

It is also important to notice that all of the proffered evidence must be considered together, and that such consideration should not make reference to whether some of the proffered evidence is or may be inadmissible. However, this is not to say that once the threshold of probable cause is passed, all of the evidence proffered to meet the probable cause standard is then admissible. Just as it is true for the prosecution, defense evidence of third party guilt may be subject to additional evidentiary restrictions.

Once the threshold test is satisfied, we propose that a defendant may admit third party guilt evidence if that same evidence would be admissible against the third party were he the defendant. In other words, could the State offer the White evidence against Jimmy White if the State had opted to try White for the crime rather than Bobby Holmes? If so, then Bobby Holmes (or any other similarly situated defendant) should be permitted to offer that same evidence in his defense at his own trial. If evidence is reliable enough to implicate a defendant, it is reliable enough to exonerate him. This is only fair,[243] in contrast to current third party guilt evidence standards which are, without exception, applied asymmetrically. Not surprisingly, the Supreme Court has held that evenhanded application is a basic due process principle.[244]

In particular, a rule that treats the introduction of hearsay statements made against the declarant's penal interest when offered by the government differently from such statements when offered by the defendant is not justifiable. Thus, for example, FRE 804(3), which permits any statement tending to expose the declarant to criminal liability as admissible when offered by the government, but requires a defendant proffering such a statement to demonstrate "corroborating circumstances [that] clearly indicate the trustworthiness of the statement" is impermissible. While the federal government, or any state, is free to choose to condition admissibility on corroborating evidence, or even to determine that statements against penal interest are insufficiently trustworthy to merit an exception to the hearsay rules under any circumstances, what is impermissible is a rule that finds a form of evidence is "good enough for government work"—but not good enough when proffered by the defense.

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243. Due process is, after all, about fundamental fairness. *See* Powell v. Alabama, 287 U.S. 45, 67 (1932) (explaining that due process is about "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926))); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963) (due process entitles individuals to "fundamental right[s], essential to a fair trial" (quoting Betts v. Brady, 316 U.S. 455, 462-63 (1942))); Pointer v. Texas, 380 U.S. 400, 403 (1965) (same); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (same); *In re* Oliver, 333 U.S. 257, 273 (1948) (due process provides rights "basic in our system of jurisprudence").

244. *See* United States v. Scheffer, 523 U.S. 303, 316 n.12 (1998) (noting that the evidence rule at issue in *Washington v. Texas*, 388 U.S. 14 (1967), was problematic because it burdened only the defense and not the prosecution); *see also* Perry v. Rushen, 713 F.2d 1447, 1452 (9th Cir. 1983) (stating that the rule in *Washington* "did not rationally exclude a class of witnesses particularly likely to lie, because their testimony was considered sufficiently reliable for use by the prosecution. A rule so arbitrary and unfair served no legitimate state aim; the rights of the defendant therefore were decisive").

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Washington v. Texas supplies a strong analogy here. In *Washington*, the Supreme Court labeled "absurd" the notion "that [co-defendants] will lie to save their fellows but not to obtain favors from the prosecution for themselves."[245] It is likewise unwarranted to assume that third parties will willy-nilly make untrue statements implicating themselves merely to exculpate the defendant, caring nothing about their own possible incrimination—but will make such statements only when true if no criminal defendant stands to benefit from the evidence.

Furthermore, an evenhanded rule pays appropriate respect to the jury's role as the "lie detector."[246] Certainly society has an interest in having juries receive all probative evidence.[247] A story for the goose is a story for the gander, and reliable for the goose is reliable for the gander. Hearing the defendant's story and admitting the defendant's evidence when we would hear the State's story and admit its evidence leaves the credibility and weight of such evidence, and the persuasiveness of each story, to the *jury's* determination. As the Supreme Court has repeatedly acknowledged, this is the best—and the constitutionally mandated—method of determining the truth.[248]

This is not to say that the rationale of each and every state or federal evidentiary rule is equally applicable to both prosecution and defense proffers of the same evidence, particularly when the rationale supporting the rule is not simply the reliability of the evidence, but also reflects due process values. The most salient and persuasive candidate for differential treatment is the prohibition against propensity evidence when offered by the State.[249] According to the Supreme Court, the exclusion of propensity evidence in a criminal case is designed to protect the defendant from wrongful conviction: "Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance."[250] In the case of third party guilt evidence, however, the third party is not

245. 388 U.S. at 22-23.

246. *Scheffer*, 523 U.S. at 313 (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)).

247. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 443 (1984) (discussing the inevitable discovery exception to the "fruit of the poisonous tree" exclusionary rule).

248. *See Scheffer*, 523 U.S. at 313 ("Determining the weight and credibility of witness testimony . . . has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" (quoting Aetna Life Ins. v. Ward, 140 U.S. 76, 88 (1891))).

249. This exception applies to evidence which may not be admissible by the State against a defendant under FED. R. EVID. 404(a) or its state equivalent. Evidence which would otherwise be admissible against a defendant under FED. R. EVID. 404(b) is not affected by this exception.

250. Old Chief v. United States, 519 U.S. 172, 181 (1997) (quoting United States v. Moccia, 681 F.2d 61, 63 (3d Cir. 1982)); *see also* State v. Trotter, 632 N.W.2d 325, 333-37 (Neb. 2001) ("The exclusion of other bad acts evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence.").

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on trial and no such risk of wrongful conviction exists.[251] In other words, there is no need to balance the probative value of the third party guilt evidence against the danger of unfair prejudice because the third party suffers no prejudice by the admission of the evidence at a trial in which he is not the accused. Moreover, when propensity evidence is offered by the State against a defendant, it exacerbates an already existing signal of the defendant's guilt. The State's decision to charge and try a defendant for a crime indicates to jurors that the State strongly believes that the defendant is guilty and can provide evidence to support this belief. No such pre-trial signaling occurs in the context of a defendant's decision to offer third party guilt evidence, and the risk of misuse is consequently much less significant. Thus, admission of propensity (or other character) evidence concerning a third party should not be precluded.

B. Applying the Rule

How much difference would an approach based on narrative make? In the truly weak cases, it would make no difference at all. Thus, in *People v. Kirchner*,[252] where the Illinois Supreme Court upheld exclusion of evidence that a third party had access to the murder weapon one month before the crime occurred, but where it was undisputed that the defendant possessed the weapon immediately prior to and after the crime, the result would be the same under our approach; such evidence does not even establish opportunity, let alone probable cause. Likewise, in *State v. Malick*,[253] where a West Virginia court excluded evidence that a third party had sexually assaulted the same victim in the same month, but where the defendant conceded that he was the only person present with the victim at the time of the assault with which he was charged, smoke, not a story, was all that was at

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251. Similarly, rules against admission of withdrawn guilty pleas and statements made in the discussion of such pleas would not apply to third-parties because the exclusion of such statements is intended to protect the accused's right to withdraw a plea and proceed to trial. *See* Kercheval v. United States, 274 U.S. 220, 223-24 (1927):

> Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. . . . [O]n timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. . . . The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.

People v. Spitaleri, 173 N.E.2d 35, 37 (N.Y. 1961).

> The question is not whether a plea of guilty is a confession of guilt and provable as such. *Of course it is*. But we are inquiring into something quite different. We must say whether it is lawful in New York for a court, after allowing a guilty plea to be set at naught, to allow the jury to use that same plea as proof of guilt. Such a distortion of purpose should not be allowed.

Id. (emphasis added) (internal citations omitted). Since the third party's right to trial is not affected by admission of such statements, there is no need to exclude them.

252. 743 N.E.2d 94 (Ill. 2001).

253. 457 S.E.2d 482 (W. Va. 1995).

stake, and the smoke was properly excluded.

On the other hand, a focus on narrative and application of the probable cause threshold would result in a different outcome in *Bryant v. State*. Seventeen year old John Bryant was living with his father Lee, and stepmother, Carol. Bryant had previously been living with his mother, Kristi, but moved in with his father and stepmother after Kristi determined she could no longer control her son's behavior. Bryant had been adjudicated a juvenile delinquent for committing a number of offenses, including stealing from Kristi, threatening her with a baseball bat and choking her on one occasion. Bryant had also threatened to kill his stepmother Carol and expressed hostility toward her in some poetry he had written.[254]

On Tuesday, January 4, 2000, Bryant and Carol got into an argument. When Bryant's father, Lee, returned from work the next day, he found a note from Bryant explaining that he was going to spend the night with a friend. Carol never returned home. Two days later, Lee reported Carol missing. The police eventually discovered Carol's car along a state highway. Her dead body was found in the trunk of the car, wrapped in a blanket. She died from asphyxiation as a result of ligature strangulation. The police arrested Bryant the next day.[255]

At trial, the State offered evidence that Bryant had driven Carol's car near the time of her disappearance; that Bryant told his mother, Kristi, that he could not take any more of Carol's "crap"; and that a pair of Bryant's jeans recovered from the trunk of Carol's car contained Carol's body fluids. The State also put on evidence that Bryant listened to rap music and spent time re-writing the lyrics to certain songs, including one which referenced placing a body in the trunk of a car.[256]

Bryant's defense was that his father, Lee, had committed the murder. He made offers of proof to demonstrate that Carol and Lee's relationship was violent and that Carol wanted to leave Lee. Several witnesses proposed to testify that Lee had a long history of physically attacking Carol; that Lee would often choke Carol during these attacks; and that Carol had told several friends and neighbors that Lee said he would kill her. The trial court excluded this evidence as irrelevant and as hearsay. The jury convicted Bryant and he was sentenced to a total of eighty-one and one-half years in prison.[257] The Indiana Court of Appeals upheld the exclusion, stating that there was no exception to the hearsay rule under which Lee's statement could be admitted, and that the trial court properly concluded that the evidence concerning Lee's history of abuse was "too remote to have any probative value."[258] The court also accused Bryant of trying to "proffer[] this evidence to establish the 'forbidden inference' that if Lee had choked Carol before, then he

254. 802 N.E.2d 486, 491 (Ind. Ct. App. 2004).
255. *Id.* at 492.
256. *Id.*
257. *Id.* at 492-93.
258. *Id.* at 497.

likely choked her and caused her death."[259] Finally, the court rejected Bryant's argument that he was denied the opportunity to present a defense because the trial court did permit him to present limited evidence of Lee's prior bad acts against Carol that were "closer in time to the date of her murder."[260]

Here, we would classify the Bryant case as one in which the defendant had a story that he was entitled to tell. First, Bryant amassed evidence that a third party—his father, Lee—had a motive, opportunity, and propensity to commit the crime. The statements from Lee and Carol's neighbors about Lee's previous attacks, their strained marriage, and Lee's statement that he would kill Carol are more than sufficient to establish probable cause for Lee's arrest. Thus, Bryant had a coherent story of third party guilt and, to protect his constitutional right to present a complete defense, he should have been permitted to tell that story to the jurors, whose job it is to hear and evaluate it for themselves.

Second, any evidence that would be admissible against Lee if Lee were charged with Carol's murder rather than Bryant, should have been admissible in Bryant's case to support his story of an alternative perpetrator. Thus, evidence that Lee had a long history of abuse against Carol, that Lee had choked Carol on previous occasions, and that Lee had threatened to kill her is admissible under our test. Indeed, this would be true even if the evidence had been that Lee had choked *other* women in the past. As we have previously explained, the policy reasons underlying strict limits on the admissibility of prior criminal conduct against the defendant lest it be used to infer propensity simply do not apply to the use of propensity evidence to implicate third parties. Evidence that Lee had a propensity to abuse and choke Carol—even if too old to be admitted against Lee himself, were he tried for Carol's murder—is relevant to Bryant's story that Lee, not Bryant, was the actual perpetrator of the crime, and is therefore admissible.

Moreover, the Indiana court's determination that Bryant's right to present a defense was not infringed because he was permitted to offer *some* evidence in support of Lee's guilt demonstrates precisely why a new standard, which better accounts for the narrative relevance of evidence, is necessary. That Bryant may have been permitted to tell the jury about one or two specific instances of abuse does not provide the jury with the kind of complete, detailed narrative about Lee and Carol's violent history that Bryant wanted to tell. Without the complete picture, the jury was unable to hear a cohesive story of Lee's guilt and therefore had little alternative but to accept the state's counter-narrative of Bryant's guilt. Because the Indiana court failed to understand the narrative import of Bryant's entire story, his ability to present a complete defense was unconstitutionally restricted.

A final example may be useful in demarcating the limits of our test. Valdez was

259. *Id.* at 497-98.
260. *Id.* at 498.

convicted of a robbery-murder in California. The evidence at trial showed that Valdez was one of the last people seen with the victim before his death and that he was seen running from the area near the crime shortly after it occurred.[261] Valdez proposed to offer evidence that when the investigating officer, Detective Guenther, arrived at the scene of the crime, he noticed bloody shoe prints leading toward an alley away from the victim's house.[262] In the alley, Detective Guenther discovered a group of young men and approached one of the individuals, Liberato Gutierrez, who was "extremely nervous" and "shaking."[263] Detective Guenther arrested Gutierrez after observing a spot of blood on his shirt and two spots of blood on one of his boots.

The prosecution objected to the testimony: "Your honor, in—what counsel I think is trying to elicit in this manner is, in fact, that Liberato Gutierrez could be the murderer in this case."[264] Defense counsel emphatically disagreed:

> The purpose of bringing up Liberato Gutierrez, the blood and the shoes, is not what the People are articulating in any shape, fashion, or form. The purpose, your honor, is that you have a very serious matter, you have a murder investigation that's going on. You have footprints that have been established by shoes. . . . You have an individual who has blood on his shirt, there is—the testimony will be that the blood has not been analyzed.[265]

Defense counsel also stated that he wanted to discuss the bloody footprints because they had not been analyzed at all and the police had not explained why the prints were not compared to at least three other men who were in the area at the time of the crime:

> It is not pointing a finger at Mr. Liberato Gutierrez and saying you're the killer, you're the one that took the money. That's not the issue. The issue has to do with whether or not these 12 people can believe and rely upon the investigation that was performed by the Pomona Police Department as well as the Sheriff's Department. And it's important for them to have that information and for them to evaluate that information.[266]

The trial court sustained the prosecution's objection to the testimony, ruling: "The court finds that the probative value of that testimony is outweighed by the necessity of undue consumption of further time. It would create a substantial danger of confusing the issues and of misleading the jury."[267] The Supreme Court of California agreed, stating that third party guilt evidence should be treated "like

261. People v. Valdez, 82 P.3d 296, 306, 310 (Cal. 2004).
262. *Id.* at 302.
263. *Id.*
264. *Id.*
265. *Id.* at 302-03 (omission in original) (emphasis omitted).
266. *Id.* at 303 (emphasis omitted).
267. *Id.*

any other evidence. It is admissible if it is relevant and its probative value is 'not substantially outweighed by the risk of undue delay, prejudice, or confusion.'"[268] The court then held that the trial court did not abuse its discretion in holding that the probative value of an attack on the investigation was minimal and thus, properly excluded.[269]

Valdez's story, although perhaps important to the presentation of his defense, is not really about third party guilt. It is instead about a sloppy police investigation, upon which Valdez claimed the jury should not rely in finding him guilty beyond a reasonable doubt.[270] Although Valdez may have been *able* to establish probable cause against a particular individual and thereby tell a coherent story of third party guilt, he did not try to do so. Instead, he chose to tell a different kind of story—one which our test does not address.[271] That probable cause is the right threshold for third party guilt stories derives from the fact that in telling such stories, the defendant is telling the same kind of story as is the State when it prosecutes a defendant.

CONCLUSION

"A Story is only half told if only one side has been presented."[272]

> Then there came two women that were harlots unto the king, and stood before him. And the one woman said, O my lord, I and this woman dwell in one house, and I was delivered of a child with her in the house. And it came to pass the third day after that I was delivered, that this woman was delivered also: and we were together, there was no stranger in the house, save we two in the house. And this woman's child died in the night; because she overlaid it. And she arose at midnight, and took my son from beside me, while thine handmaid slept, and laid it in her bosom, and laid her dead child in my bosom. And when I arose in the morning to give my child suck, behold, it was dead: but when I

268. *Id.* at 304 n.10.

269. *Id.* at 304.

270. In most cases, every item of evidence a defendant introduces is in some way an attempt to show that someone else committed the crime, and thus might be called "third party guilt evidence"; only in cases where the defendant claims that his actions were justified or excused, or that no crime occurred at all, is the defendant not claiming that a third party was guilty. But in this Article, we have used the term "third party guilt evidence" in a more narrow sense—one in which the defendant desires to point to a specific third party as the alternative perpetrator of the crime with which he is charged.

271. Another example is the modus operandi cases—in which the defendant claims he could not have committed the crime because other crimes with the same modus operandi were committed at a time when it was for some reason impossible for the defendant have been the perpetrator, for example, he was incarcerated at the time. *See, e.g.*, State v. Cook, 847 A.2d 530 (N.J. 2004) (discussing a case in which the defendant advanced a modus operandi defense). The evidence in these cases may or may not make out probable cause against a specific nameable third party, but whether the third party is known or not does not determine whether a coherent story has been told; it is, however, a different kind of story.

272. Icelandic proverb.

> had considered it in the morning, behold, it was not my son, which I did bear.[273]

And then King Solomon ordered the baby to be given to the woman who told this story.

Well, no, of course not. He let the second woman tell her story, which accused the first woman of the same crime: stealing her child. After hearing both stories, Solomon used his wisdom (a cross-examination of sorts) to determine who was telling the truth. Most jurors don't have Solomonic wisdom, but in criminal cases, they are the only Solomons we have; in cases with competing accusations, jurors need to hear both stories before they pronounce a judgment.

273. 1 *Kings* 3:16-21 (King James).

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