Putting a Burden of Production on the Defendant before Admitting Evidence That Someone Else Committed the Crime Charged: Is It Constitutional?

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"It is better to risk saving a guilty man than to condemn an innocent one."
—Voltaire

I. INTRODUCTION

Suppose you are charged with a crime, but you are innocent. You know you did not commit the offense, and you have evidence indicating someone else is guilty of the charged crime. Can you introduce that evidence at your trial? Cornelius Perry could not.

Perry was accused of assaulting a woman in Golden Gate Park, near San Francisco. The victim, who was walking through the park, stopped a man who was jogging to ask for directions. The man then began walking with the victim and offered her money from his wallet. The victim refused the money, at which time the man attacked her. The screams of the victim attracted bystanders. A witness chased the attacker and then went to a nearby police station to ask for help. As the witness was leaving the station, he saw a man, Cornelius Perry, standing with his dog on the sidewalk. The witness told the police that Perry was the man he had been chasing.

At his trial, Cornelius Perry testified that he had never entered the park that day. Perry wanted to support his defense by introducing evidence that another man, Wolfe, might have committed the assault and that the victim was confusing Perry with Wolfe. Perry's proffered evidence consisted of the testimony of two witnesses who had been robbed and raped by Wolfe in the same area of the park. One of these attacks occurred exactly three years earlier, and the second occurred only an hour before the assault with which Perry was charged. Perry and Wolfe were both black men of similar height and weight. They both had a distinctive "sectionally braided" hairstyle on the day of the assault. On the afternoon of the assault, Wolfe was wearing a brown leather jacket and blue jeans; Perry wore a light brown jacket and blue warm-up pants. Furthermore, Wolfe had been convicted of both of the previous attacks at the time of Perry's trial. Based on California Rule of Evidence 352, the trial court excluded Perry's evidence that Wolfe may have been the assailant. California Rule of Evidence 352, virtually identical to Federal Rule of Evidence 403, prohibits the introduction of evidence that may unfairly prejudice a party.

The Court of Appeals for the Ninth Circuit upheld the trial court's decision, stating that "[t]he issue was not credibility, but the probity of the evidence compared to its tendency to divert the trial and confuse the jury." The Ninth Circuit also stated that "the evidence offered by

2. Perry v. Rushen, 713 F.2d 1447, 1448 (9th Cir. 1983).
3. Id. at 1449 n.1.
4. Id. at 1455.
Perry was not so closely connected to the issue of his guilt or innocence that its exclusion, based on its lack of probity and its tendency to confuse the jury, violated due process or the right of compulsory process.\textsuperscript{5} The Court concluded that "Perry's evidence... is sufficiently collateral and lacking in probity on the issue of identity that its exclusion did not violate the sixth and fourteenth amendments. California may constitutionally require more cogent evidence than this before opening up collateral issues at trial."\textsuperscript{6} Perry's proffered evidence contained neither a confession of the third party nor a modus operandi unique to both Wolfe's prior crimes and the crime with which Perry was charged. In the court's opinion, the quantum or amount of Perry's evidence indicating someone else committed the charged crime was not only not cogent, it was insufficient.

In contrast, Christopher Lynn Johnson did have more cogent evidence. Johnson was charged with burning down the Randolph County High School, in Wedowee, Alabama. At his trial, Johnson wanted to admit evidence showing that the school principal, Hulond Humphries, committed the charged crime. Johnson argued the evidence would show that Humphries caused considerable controversy when he stated that he would rather cancel the school's prom than allow interracial couples to attend. Humphries' statement and the surrounding controversy and racial tension may have motivated a movement to remove Humphries as principal of the high school. Johnson urged that Humphries may have been motivated to torch the school because of anger over interracial dating at the school and the possible loss of his job. Johnson also wanted to admit evidence that Humphries, the week before the fire, bought five gallons of gasoline and removed several personal items from his office at the school. Other proffered evidence tended to show that Humphries was alone at the school for nearly one hour, approximately three hours before the fire. Finally, Johnson wanted to admit evidence that Humphries twice stated to FBI agents that he burned down the high school, although he quickly recanted each confession.\textsuperscript{7}

Johnson's proffered evidence consisted of motive and opportunity evidence, as did Perry's. But, Johnson's evidence also consisted of a confession to a third party. In essence, the quantum of Johnson's third-party evidence surpassed Perry's. Johnson's defense evidence met a sufficiency standard and was admitted at trial. Perry's evidence failed to meet the requisite standard and the trial court declined to admit the evidence.

This Article considers the problem of admitting evidence of a third party's guilt. Part II will address several different approaches for

\textsuperscript{5} Id.
\textsuperscript{6} Id.
dealing with the problem of admitting evidence of a third party's guilt and will argue that under these approaches or tests, two factors are critical to the admission of such evidence: (1) the nexus or connection between the third party and his commission of the charged crime, as demonstrated by the proffered evidence, and (2) the weight of that evidence or the strength of that connection. Part III will argue that under the prevailing approach in several courts, the burden of proof has been unconstitutionally placed on the wrong party—the defendant. This Article will argue that the burden is properly placed upon the state to oppose the introduction of evidence of a third party's guilt. This conclusion will be based on the following factors: (1) these defenses are not affirmative defenses, (2) these defenses go to a critical element of the government's case, to wit, the identity of the perpetrator, which the government constitutionally has the burden of proving, and (3) it is unconstitutional to burden the defendant with this obligation.

II. THE CASES AND TESTS

Third-party guilt evidence, as indicated in Perry and Johnson, is not a fixed set of evidentiary pieces. Rather, such evidence represents a constellation of possibilities, either excluded or admitted by the piece or in its entirety. Sometimes motive evidence is excluded.9 Sometimes opportunity evidence is excluded.10 Sometimes evidence that a third party committed other similar crimes is excluded.11

8. Professor David McCord has offered an insightful and more detailed analysis of the various tests in his article, "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 (1996). Although Professor McCord labels and describes his categories differently, he reaches substantially the same conclusions concerning the test used in this Article. Professor McCord's thesis addresses neither the burden of proof nor whether the allocation of the burden of proof violates constitutional principles.

9. See, e.g., People v. Mendez, 223 P. 65 (Cal. 1924)(excluding third-party motive evidence that the murder victim had an altercation with several of his Mexican workers, other than the defendant, in the days before the murder). See also McCord, supra note 8, at 940 (collecting cases that include "motive-type" evidence of third-party guilt).

10. See, e.g., United States v. DeNoyer, 811 F.2d 436, 440 (8th Cir. 1986)(excluding evidence that other "deviant sex offenders were operating in the community"); Perry v. Watts, 520 F. Supp. 550, 555 (N.D. Cal. 1981)(excluding evidence that a third party look-a-like was in the same park), aff'd sub nom., Perry v. Rushen, 713 F.2d 1447 (9th Cir. 1983). See also McCord, supra note 8, at 940 (collecting cases constituting "opportunity-type" evidence of third-party guilt).

11. See, e.g., Perry v. Rushen, 713 F.2d 1447, 1455 (9th Cir. 1983)(excluding evidence that a third party had 2 prior convictions for sexual assault, and 1 of those assaults occurred in the same park and on the same day as the charged crime). See also McCord, supra note 8, at 943 (collecting cases constituting "similar crime-type" evidence of third-party guilt). Professor McCord categorizes this type of evidence of third-party guilt as propensity evidence.
other times, a third party’s confession to the commission of the crime is admitted. Courts may admit or exclude evidence that the third party looks like the accused or that the third party possesses or has some connection with the property taken or destroyed. But what is the benchmark for determining the admissibility of third-party guilt evidence when the constitutional rights of the accused clash with the right of the government to run its own trial?

Some courts use Federal Rule of Evidence 401 (or the state’s analogue to 401) and the principle of relevancy to determine the admissibility of third-party guilt evidence. Other courts use a connection test. Some courts use Rule 403 (the prejudice rule) to exclude such evidence.

12. See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973) (reversing the exclusion of the confession and recantation by a third party to a murder); United States v. Johnson, 904 F. Supp. 1303 (M.D. Ala. 1995) (admitting the third party’s confession and recantation to the FBI of burning down a high school). See also McCord, supra note 8, at 945 (collecting cases constituting “confession-type” evidence of third-party guilt). Professor McCord categorizes this type of evidence under the heading of confession/physical evidence.

13. See, e.g., United States v. Green, 786 F.2d 247, 252 (7th Cir. 1986) (admitting that the third party, a co-worker of the accused, looked like the defendant); Perry v. Rushen, 713 F.2d 1447, 1455 (9th Cir. 1983) (excluding evidence that the third party looked like the defendant and wore a similar style and color of clothing); United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980) (admitting evidence that a person other than the defendant matched the description of the robber); United States v. Robinson, 544 F.2d 110, 112 (2d Cir. 1976) (admitting evidence that a third party suspected of 2 armed robberies within 6 days of the charged robbery looked like the man on the surveillance video); State v. Echols, 524 A.2d 1143, 1148 (Conn. 1987) (admitting evidence of a third party look-a-like). See also McCord, supra note 8, at 944 (collecting cases constituting “look-a-like-type” evidence of third-party guilt). Professor McCord categorizes this type of evidence under the heading mistaken identity.

14. See United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980) (admitting evidence that a third party had “used $3,000 in bait bills taken from the [charged bank robbery] to purchase a car the day after that robbery occurred”). See also McCord, supra note 8, at 919-36 (collecting cases constituting “connection-type” evidence of third-party guilt). Professor McCord categorizes this type of evidence of third-party guilt as direct connection evidence.

15. See, e.g., United States v. DeNoyer, 811 F.2d 436, 440 (8th Cir. 1987) (finding irrelevant and upholding the exclusion of evidence (in a sodomy trial involving a 5-year-old victim) that the defendant’s wife’s brother “undressed a five-year-old girl” and that a “neighbor two houses away . . . committed sodomy a year earlier); United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980) (“The district court excluded the evidence as irrelevant. . . . We hold it was error to exclude as irrelevant testimony that another man, matching the description of the . . . bank robber, had used bait money taken in that robbery to purchase a car.”); United States v. Johnson, 904 F. Supp. 1303, 1307 (M.D. Ala. 1995) (holding that evidence that the third party “started the fire meets the requirements of Rules 401 [and] 402 for . . . admissibility”). See also Commonwealth v. Scott, 564 N.E.2d 370 (Mass. 1990) (upholding the exclusion of evidence that others committed the charged crime on relevancy grounds).

THIRD-PARTY GUILT

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evidence,\textsuperscript{17} while still other courts use the United States Supreme Court's balancing test\textsuperscript{18} in conjunction with a "critical and reliable" twist.\textsuperscript{19} Others have adopted a reasonable doubt test,\textsuperscript{20} while other courts apply a combination of all of the tests.\textsuperscript{21} These various tests will be examined below.

A. The Relevancy Test

When applying the relevancy test, courts use Federal Rules of Evidence 401 and 402 (or their state analogues) to determine whether to admit or exclude third-party guilt evidence. Rule 402 provides that

\begin{quote}
Giguere, 439 A.2d 1040, 1043 (Conn. 1981)("We have stated: 'Ordinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which directly connects that third party with the crime.'"). See also State v. Koedatich, 548 A.2d 989, 978-79 (N.J. 1988)(collecting state and federal cases admitting and excluding evidence based on the existence or nonexistence of a "link" or "connection" between the "third party and the victim or the crime"); McCord, supra note 8, at 920-36 (collecting cases applying a connection test in determining the admissibility of evidence of third-party guilt).
\end{quote}

\begin{quote}
17. See United States v. Johnson, 904 F. Supp. 1303, 1307 (M.D. Ala. 1995)(stating "[e]vidence that [the third party] started the fire meets the requirements of Rule[... 403 for admissibility"). See also People v. Hall, 718 P.2d 99, 104 (Cal. 1986). In Hall, the court stated that courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible (Section 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion (Section 352)\[California's Section 352 is the analog to Federal Evidence Rule 403]. . . . Furthermore, courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed, "if the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." Id. (internal citations omitted). See also McCord, supra note 8, at 938-37 (collecting cases applying a Rule 403 test).
\end{quote}

\begin{quote}
18. See Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983)("The Supreme Court seems to have applied a balancing test to resolve such conflicts [the clash between state rules and the defendant's right to introduce evidence], weighing the interest of the defendant against the state interest in the evidentiary rule.").
\end{quote}

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19. Id. at 1455.
\end{quote}

\begin{quote}
20. See People v. Hall, 718 P.2d 99, 104 (Cal. 1986)("[T]hird party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt."). See also McCord, supra note 8, at 937-38 (collecting cases applying a reasonable doubt test).
\end{quote}

\begin{quote}
21. The Ninth Circuit, referring to the Supreme Court's balancing test, mentioned that the "connection of the proffered evidence to the defendant's case is tenuous." Perry v. Rushan, 713 F.2d 1447, 1454 (9th Cir. 1983). It also said the "evidence . . . possessed only slight probative value" and that "Perry's proffered evidence falls far short of the critical and reliable evidence considered in Chambers [v. Mississippi, 410 U.S. 284 (1973)] and Webb v. Texas, 409 U.S. 95 (1972)]." Id. at 1454-55.
\end{quote}
"all relevant evidence is admissible," and Rule 401 defines relevant evidence as "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." Although these courts use the language of the "relevancy rules" when discussing the relevancy test, in effect they look to the weight and the sufficiency of the evidence in connecting the third party with the crime charged. Courts analyze the strength of the nexus between the proffered evidence and the guilt of the third party, and this analysis effectively places the burden of proof on the defendant.

In *State v. McElrath*, the North Carolina Supreme Court used the relevancy test in determining the admissibility of third-party guilt evidence. McElrath wanted to admit a map of his summer home, which was found on the victim of the homicide. The defense theorized that the map indicated the victim had planned to burglarize the defendant's home and that one of the victim's co-conspirators, not the defendant, had killed the victim. In reversing the trial court's exclusion of the evidence, the *McElrath* court stated that

the relevance standard to be applied in this and other cases is relatively lax. After all, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. . . . We note also that the standard in criminal cases is particularly easily satisfied. "Any evidence calculated to throw light upon the crime charged" should be admitted by the court.

Federal Rule of Evidence 401 "[c]ontains a very expansive definition of relevant evidence," and the relevancy standard in criminal cases is "particularly easily satisfied." In determining whether evidence is relevant, the district court must not consider the weight or sufficiency of the evidence, and "evidence need not prove the proposition for which it is offered to be probative." As stated by the Sixth Circuit, "[e]ven if a district court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has even the slightest probative worth." One state supreme court stated that "the relevance standard to be applied . . . in a case dealing with third-party guilt evidence] and other cases is relatively lax."

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25. Id. at 449 (internal citation omitted).
29. Smith v. Georgia, 684 F.2d 729, 736 (11th Cir. 1982).
But despite the laxness of the rules of relevancy, courts do exclude third-party guilt evidence by placing the burden of proof on the accused. In *State v. Renteria*,\(^{32}\) the court addressed the insufficiency of the evidence when applying the relevancy test and ultimately denied the defendant's request to introduce evidence of the prior records of two different third parties. Renteria sought to show, in a possession of heroin case, that the two people accompanying the defendant at the time of his arrest actually possessed the heroin. The court excluded the evidence, however, stating that

> the evidence shows by the unequivocal testimony of the police officers that the defendant was the one person in possession of the heroin. The defendant offered no support for his theory that the [third parties] were in possession of the heroin, he never attempted to subpoena them nor did he testify that they were in possession of the heroin.\(^{33}\)

The court, in excluding the proffered evidence, placed the burden of production on Renteria. Had the defendant subpoenaed the two individuals, or at least attempted to, the court implied that the proffered evidence would have been admissible.

**B. The Connection Test**

Applying the connection test, courts determine the relevancy of evidence of third-party guilt by examining whether the proffered defense evidence directly connects the third party with the charged crime. The courts applying this test use the language of connection, but actually look to the strength of the nexus between the proffered evidence and the guilt of the third party for the crime charged, thus placing the burden of production on the accused.

The Connecticut Supreme Court, in *Siemon v. Stoughton*,\(^{34}\) applied the connection test. The *Siemon* trial court excluded testimony showing that a third party, matching the composite drawing of the assailant, could be placed at the scene of the crime on at least three occasions, months before the charged assault. The Connecticut high court reversed the trial court because "[t]he unusual fact of encountering a nude man in the same area on three occasions was enough to connect the nude man to the crime with sufficient directness to render the evidence admissible."\(^{35}\)

Courts admitting third-party guilt evidence pursuant to the connection test rely on the quantum of evidence adduced by the accused,\(^{36}\) while those excluding such evidence tend to rely on the lack

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33. Id. at 317.
34. 440 A.2d 210 (Conn. 1981).
35. Id. at 214.
36. See State v. Hamlette, 276 S.E.2d 338, 345 (N.C. 1981). In *Hamlette*, the defendant sought to show that the third party had killed the victim because the victim and the third party were rivals for the affection of one Debbie Moss. The defend-
of evidence presented. In State v. Denny, the court used the connection test to exclude evidence that third parties had motives to kill the decedent. In addressing the insufficiency of the defendant's evidence of third-party guilt, or the quantum deficiency of such evidence, the court said that “[w]hile motive has been established, no evidence of either opportunity or direct connection to the crime was proffered. We conclude that the trial court did not abuse its discretion in refusing to admit this testimony.” Again, the court established an evidentiary threshold, a burden of production. If the defendant meets his burden and is able to produce motive evidence or evidence directly connecting the third party with the crime, his other evidence is admissible. But if he cannot secure such additional evidence, all of the evidence is inadmissible.

ant sought to show that the third party initially had been arrested and charged with the shooting, had been present at Moss' house on the day of the shooting, had been chased by the decedent out of Moss' house, had told defendant minutes after the shooting to keep quiet about the shooting, and had lied about the location of the gun used in the shooting. Id. See also Commonwealth v. Keizer, 385 N.E.2d 1001, 1004 (Mass. 1979). The Keizer court found substantial connecting links between the offense charged and the subsequent crime . . . . Both offenses involved a crime of the same type, committed by similar methods in the same vicinity of Boston, by three males of similar description. In addition, similar weapons were used, not just in the generic sense, but in terms of specific characteristics: what appeared to be a square-barrelled pistol and a sawed off shotgun concealed by a paper bag.

Id.

37. See State v. Sturdivant, 155 A.2d 771, 778 (N.J. 1959). In Sturdivant, the defendant, charged with the sodomy-murder of his 4-year-old stepdaughter, sought to admit evidence that his 3-year-old niece had inserted a can opener into the vagina and rectum of the deceased 7 days before the date of the charged crime. But the Sturdivant court excluded such evidence stating “[t]here was no suggestion that defendant could prove the precise injuries allegedly sustained a week before death and then trace a fatal course.” Id. See also State v. Marshall, 353 A.2d 756, 760-61 (Conn. 1974). In Marshall, the defendant sought to introduce evidence that other people had a motive to kill the victim. But, the Marshall court excluded such evidence stating that evidence of the motive of one other than the defendant to commit the crime will be excluded where there is no other proof in the case which tends to connect such other person with the offense. . . . The defendant made no offer of proof to connect anyone else with the murder. . . .

Id. In People v. Luigs, 421 N.E.2d 961 (Ill. App. Ct. 1981), the defendant attempted to introduce a second knife found at the crime scene 24 hours after the assault, asserting that this second knife belonged to the victim's true assailant. The Luigs court, however, excluded the knife, stating that “[t]he record reveals a complete lack of testimony connecting the second knife to the crime.” Id. at 966.


39. Id. at 18.
C. The 403 Test

Courts also use Federal Rule of Evidence 403 (or a state analogue) to determine the admissibility of third-party guilt evidence. Rule 403 provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Although the courts applying the 403 test consider whether the proffered evidence is likely to confuse or mislead the jury, these courts suggest that if enough evidence connecting the third party to the crime charged is present, the evidence will be admissible because it will not confuse and mislead the jury.

In United States v. Perkins, the Ninth Circuit determined the admissibility of third-party guilt evidence according to Rule 403. In Perkins, the defendant in a bank robbery case sought to admit evidence pertaining to certain bank robbery counts that had been dismissed by the government. The defendant contended that the modus operandi of all of the crimes demonstrated that the same man committed each robbery, and therefore the evidence was admissible under Federal Rule of Evidence 404, the similar crimes evidence rule. Nevertheless, the Perkins court excluded the proffered evidence, stating that the "modus operandi of the dismissed counts is not sufficiently similar to the charged offense to support an inference of identity and warrant admission under Rule 404(b)." The court relied on Rule 403 to exclude the proffered evidence. In doing so, the court stated that "even if the evidence was properly admissible under Rule 404(b), it must nevertheless undergo the probative-prejudice balancing required under Rule 403 and may be excluded if the jury is likely to be confused or misled." The Perkins court reasoned that the evidence was not "probative of identity under Rule 404(b) and [was] likely to mislead or confuse the jury under Rule 403." The court concluded that it was not an abuse of discretion to focus on the offense and to avoid distraction that would be caused by discussing "the details of several extraneous robberies."

Arguably, if Perkins had produced more evidence to show the third party's prior crimes were similar to the charged crime, the evidence would have not only been admissible under Rule 404(b), but it also would have passed muster under Rule 403 because the prior robberies would not have been extraneous. This argument also demonstrates

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41. 937 F.2d 1397 (9th Cir. 1990).
42. Id. at 1400.
43. Id. at 1401.
44. Id.
45. Id.
that when courts rely on the Rule 403 test, the burden of proof is placed on the accused. Thus, if the accused can submit enough evidence of similarity, it is admissible; if not, it is inadmissible.

D. The Balancing Test

Some courts use the balancing test to determine the admissibility of evidence of a third party's guilt. Although this test weighs the interests of the accused in proving his innocence against the state's interest in convicting the guilty, the ultimate admissibility decision is based on the strength of the evidence implicating the third party in the crime.

The balancing test weighs and evaluates the following two interests: (1) the legitimate interests of the defendant to present a defense, and (2) the interests of the state to administer fair and reliable trials. In Perry v. Rushen,46 the Ninth Circuit affirmed the denial of federal habeas corpus relief by upholding the exclusion of Cornelius Perry's proffered third-party guilt evidence. The court set forth the following procedure for administering the balancing part of the test:

[T]he court must balance the importance of the evidence against the state interest in exclusion. In evaluating the significance of the evidence, the court should consider all of the circumstances: its probative value on the central issue, its reliability, whether it is capable of evaluation by the finder of fact, whether it is the sole evidence on the issue or merely cumulative and whether it constitutes a major part of the attempted defense. The weight of the state's interest likewise depends upon many factors. The court must determine the purpose of the rule, its importance, how well the purpose applies in the case at hand. The court must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, in excluding unreliable or prejudicial evidence.47

But there is a twist to the balancing test. Even after evaluating, balancing, and weighing the diverse interests, "[w]here the state interest is strong, only the exclusion of critical, reliable, and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected."48

The Perry court applied the balancing test, concluding that the state had a strong interest in the case. In contrast, Perry's evidence fell "far short of" meeting a standard of "critical and reliable" evidence.49 Again, had Perry's evidence more directly connected the third party with the crime charged, it would have been admissible. In this regard, had more evidence connected the third party with the crime, and had the accused met his burden of proof, the court would have admitted the defendant's evidence.

46. 713 F.2d 1447 (9th Cir. 1983).
47. Id. at 1452-53.
48. Id. at 1452.
49. Id. at 1455.
E. The Reasonable Doubt Test

The reasonable doubt test evaluates whether evidence tending to implicate another person must be admitted. Accordingly, if the evidence is of sufficient probative value to raise a reasonable doubt as to the defendant's guilt, it is admissible. Note that courts openly place the burden of proof upon the defendant.

In State v. Conlogue,50 the woman who lived with the defendant confessed to committing an assault, the same crime with which the defendant was charged. The trial court excluded this evidence. The Maine Supreme Court reversed, finding the evidence admissible under the reasonable doubt test. The Conlogue court state that evidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability. As we stated in LeClair, "The court should allow the defendant 'wide latitude' to present all the evidence relevant to his defense, unhampered by piecemeal rulings on admissibility."51

Citing other sources as authority, the Conlogue court concluded that if the proffered evidence of third-party guilt was "too speculative or conjectural or too disconnected from the facts of the case against the defendant."52 In finding the evidence of third-party guilt admissible in Conlogue, the evidence was sufficiently connected to be admissible. In short, Conlogue had met his burden of proof.

F. Combination of Tests

Many courts use combinations of the various tests when determining the admissibility of evidence of third-party guilt. These same courts, however, also rely on the strength of the connection between the evidence of a third party's guilt and the commission of the crime charged. For example in Perry v. Rushen,53 the court used the balancing test, but ultimately excluded the third-party guilt evidence on relevancy grounds because the "evidence . . . possessed only slight probative value on the reliability of the identification."54

The testimony concerning Wolfe would show that another black man, of roughly Perry's height and weight, wearing braided hair and somewhat similar clothing was near the scene an hour before and had a history of sexual assaults. The identification of Perry, however, was strong. The victim positively identified Perry only minutes after the attack. Wolfe had no dog. Wolfe lacked the prominent forehead scar that Perry has, and does not resemble Perry in facial features. Wolfe was clean shaven, while Perry wore a mous-

50. 474 A.2d 167 (Me. 1984).
51. Id. at 172 (citing State v. Le Clair, 425 A.2d 182, 186 (Me. 1981)).
52. Id.
53. 713 F.2d 1447 (9th Cir. 1983).
54. Id. at 1454.
tache and chin whiskers. Finally, although both wore blue pants, Wolfe's jeans were not likely to be mistaken for the warm-up pants worn by Perry.\textsuperscript{55}

Although the \textit{Perry} court used a balancing test, it actually imposed on Perry the burden of production. If Perry had more evidence, it would have been admissible. If Wolfe had, either collectively or individually, a dog, a scar, facial hair, or blue warm-up pants, Perry's evidence presumably would have constituted a sufficient quantum to satisfy the test.

The Eleventh Circuit, in \textit{Cikora v. Dugger},\textsuperscript{56} combined the balancing test with the connection test. In \textit{Cikora}, several witnesses identified the defendant as a burglar. The defendant sought to present to the jury a third party whom the defendant had met in jail. The third party lived in the neighborhood where the burglary took place and fit the witnesses' description of the burglar. In affirming the exclusion of this evidence, the \textit{Cikora} court provided the following reasoning:

As the Ninth Circuit explained in \textit{Perry}, determining what due process mandates in these cases requires a balancing of interests. The Defendant certainly has a strong interest in presenting exculpatory evidence, but the state has an interest in promoting reliable trials, particularly in preventing the injection of collateral issues into the trial through unsupported speculation about the guilt of another party. Due process may require a trial court to allow the introduction of evidence of another party's possible guilt when there is some showing of a nexus between the other party and the particular crime with which a defendant is charged. \textit{Cikora} has made no such showing.\textsuperscript{57}

In \textit{State v. Caulk},\textsuperscript{58} the court mixed the reasonable doubt test and the connection test. In excluding evidence that several unindicted persons may have had a motive to kill the decedent, the court stated that "[e]xculpatory evidence 'must be admitted if it is of sufficient probative value to raise a reasonable doubt, as to defendant's culpability.' However, if the evidence is 'too speculative or conjectural or too disconnected from the facts of the case against the defendant,' the court has discretion to exclude it."\textsuperscript{59} The \textit{Caulk} court found that "[I]t\textquotesingle s the proffered evidence was based almost entirely on hearsay. It contained no specific exculpatory references to other individuals who might have had the motive, intent and opportunity to murder [the victim] . . . ."\textsuperscript{60} In essence, the \textit{Caulk} court excluded the defense evidence because Caulk failed to meet his burden of production. Had Caulk's evidence contained less hearsay and/or contained a reference to a specific third party, his evidence would have had more quantum, and hence, would have been admissible.

\textsuperscript{55} \textit{Id.}
\textsuperscript{56} 840 F.2d 893 (11th Cir. 1988).
\textsuperscript{57} \textit{Id.} at 898 (footnotes omitted).
\textsuperscript{58} 543 A.2d 1366 (Me. 1988).
\textsuperscript{59} \textit{Id.} at 1371 (citations omitted).
\textsuperscript{60} \textit{Id.}
In *People v. Hall*, evidence that a third party had the motive and opportunity to commit the charged crime was excluded under the combination test. The court commented on the failure of the accused to submit a sufficient quantum of third-party guilt evidence. The *Hall* court set forth the rule that to be admissible, the third party guilt evidence need not show "substantial proof of a probability" that the third person committed the act . . . . At the same time, we do not require that any evidence, however remote, must be admitted . . . . As this court observed in *Mendez*, evidence of mere motive or opportunity . . . without more, will not suffice.

Again, *Hall* put the burden of production on the defendant. Because the defense failed to produce enough evidence, what evidence they did have was kept from the jury.

Regardless of the test used, admissibility of evidence of third-party guilt is made on the basis of the weight or strength of the proffered evidence indicating someone else committed the crime charged. If the connection is strong, the evidence is admitted. If it is weak, it is excluded. Courts, in this regard, are placing a burden of proof on the accused for the admission of evidence that someone else committed the crime charged. But, is this constitutional?

### III. BURDENS, AFFIRMATIVE DEFENSES, AND DEFENSE RIGHTS

Although courts are determining the admissibility of evidence of third-party guilt under various tests, the United States Supreme Court has not addressed the issue of the constitutionality of placement of the burden of proof under any of the above-described tests. The gist of the argument is that although a court can place a burden of proof on the accused to prove an affirmative defense such as insanity or self-defense, a court cannot place a burden of proof on the accused when he seeks to admit evidence that disputes the elements of a crime. The state constitutionally bears the burden of proving every element of a criminal charge, and that burden cannot be shifted to the accused. Furthermore, in every criminal charge, the identity of the perpetrator is an element of the crime. When the defendant seeks to present evidence of third-party guilt, the defendant is attacking the identity element of the offense. Unlike the insanity defense, when the defendant is disproving the identity element, the defendant does not admit the element and then present an affirmative defense—a justification or excuse—for committing the crime. Instead, the defendant introduces evidence to show that the prosecution has failed to meet its burden of proving the identity element of the offense.

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62. Id. at 104.
A. Burdens of Proof and Affirmative Defenses

The state has the burden of proving beyond a reasonable doubt every element of the crime charged, and it cannot shift that burden to the defendant. These are firmly established principles of federal constitutional law. The state must prove two elements in every criminal prosecution: (1) that a crime occurred, and (2) that the defendant is the person who committed the crime. The state cannot shift the burden of proof of either of these elements to the defendant. In a criminal trial, the prosecution adduces facts in support of its claim against the accused, and the defendant adduces facts in support of her defense.

The jury has the obligation of resolving the factual dispute. Rules guide the jury in this process. Two such rules establish two different burdens of proof: the burden of production and the burden of persuasion. Although the government has some latitude in drafting statutes and rules of evidence or procedure allocating these two different burdens of proof to either the prosecution or the defense,63 the Due Process Clause of the United States Constitution places limits on this discretion.64 Burdens of production establish the party with the responsibility to adduce evidence on a claim, how much evidence must

63. [It is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."


The State normally may shift to the defendant the burden of production, that is, the burden of going forward with sufficient evidence "to justify [a reasonable] doubt upon the issue." If the defendant's evidence does not cross this threshold, the issue—be it malice, extreme emotional disturbance, self-defense, or whatever—will not be submitted to the jury.

Id. at 230-31 (footnotes and citations omitted). "On many occasions, this Court has sustained a trial court's refusal to submit an issue to the jury in a criminal case when the defendant failed to meet his burden of production." Id. at 231 n.18.

64. There are outer limits on shifting the burden of production to a defendant, limits articulated in a long line of cases in this Court passing on the validity of presumptions. Most important are the "rational connection" requirement of Mobile, J. & K.C. R. Co. v. Turnipseed . . . and also the "comparative convenience" criterion of Morrison v. California . . . . Caution is appropriate, however, in generalizing about the application of any of these cases to a given procedural device, since the term "presumption" covers a broad range of procedural mechanisms having significantly different consequences for the defendant.

Id. at 230-31 n.16 (citations omitted).

Dean McCormick emphasized that the burden of production is "a critical and important mechanism in a jury trial." In his view, "this mechanism has far more influence upon the final outcome of cases than does the burden of persuasion, which has become very largely a matter of the technique of the wording of instructions to juries."

Id. at 232 n.19 (citing CHARLES T. MCCORMICK, EVIDENCES § 307, at 638-639, 639 n.2 (1st ed. 1954)).
be adduced on that claim, and what happens if the burdened party fails to introduce enough evidence to prove the claim.\textsuperscript{[65]} The government bears the burden of proving each of the elements of a crime.\textsuperscript{[66]} As to how much evidence proving these elements must be adduced, there must be enough that a "rational trier of fact" could find "the essential elements of the crime beyond a reasonable doubt."\textsuperscript{[67]} If the government fails to meet its burden of proving each of the elements beyond a reasonable doubt, the trial court must direct a verdict of acquittal at the close of the state's case.\textsuperscript{[68]}


\textsuperscript{[66]} See Patterson v. New York, 432 U.S. 197, 215 (1977)(citing Mullaney v. Wilbur, 421 U.S. 684 (1975), for the proposition that "a State must prove every ingredient of an offense"). See also Jackson v. Virginia, 443 U.S. 307, 315 (1979)(citing In re Winship, 397 U.S. 358, 364 (1970), as the first case to hold that "the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'"). In Jackson, the defendant was convicted of first degree murder. The Court, in discussing the elements of first degree murder stated that "[p]remeditation, or specific intent to kill, distinguishes murder in the first from murder in the second degree; proof of this element is essential to conviction of the former offense, and the burden of proving it clearly rests with the prosecution." \textit{Id.} at 309 (citations omitted)(emphasis added).

\textsuperscript{[67]} Jackson v. Virginia, 443 U.S. 307, 319 (1979). The Jackson Court stated that "[i]n Winship, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" \textit{Id.} at 315 (citations omitted). The Court in \textit{Winship} stated:

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. . . . Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.


\textsuperscript{[68]} See, e.g., Fla. R. Crim. P. 3.380(a):

If, at the close of the evidence for the state or at the close of all the evidence in the case, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal.
As to affirmative defenses, the defendant can be made to bear the burden of production. There is no consensus as to the quantum of evidence that must be adduced by a defendant who carries the burden of production. In some cases, the defendant must adduce more than a scintilla of evidence, and but other courts require enough evidence to raise a reasonable doubt. Regardless of the standard, if the defendant fails to adduce enough evidence, the court will refuse to in-

69. Affirmative defenses are defined by the Model Penal Code of the American Law Institute as "a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence." MODEL PENAL CODE § 1.12(3)(c) (1985). An affirmative defense is also usually defined by the various jurisdictions to be "an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." Martin v. Ohio, 480 U.S. 228, 230 (1987)(quoting from the Ohio self-defense statute). In Leland v. Oregon, 343 U.S. 790 (1952), and Patterson v. New York, 432 U.S. 197 (1977), the Supreme Court has approved designating insanity and extreme emotional distress as affirmative defenses. Each fit the definition of an affirmative defense. Each defense involves an excuse or justification for committing the act, and in each, the facts justifying the defense are peculiarly within the knowledge of the accused. But third-party guilt evidence is neither a justification nor excuse because the facts are not peculiarly within the knowledge of the accused. In fact, the identity of other suspects is usually within the knowledge of the police, if not the prosecutor. Evidence that someone else committed the crime and that the defendant is innocent goes to the proof of an element of the crime because the identity of the criminal is always an element of the prosecution's case in chief. If the prosecutor fails to establish identity, a judgment of acquittal is appropriate.

70. See generally Dressler, supra note 65, § 7.02(B). See also Martin v. Ohio, 480 U.S. 228 (1987)(upholding the placement of the burden of production—and by implication the burden of production—on the defendant to prove self-defense by a preponderance of the evidence); Patterson v. New York, 432 U.S. 197 (1977)(upholding the placement of the burden of production—and by implication the burden of production—on the accused to prove the affirmative defense of extreme emotional distress by a preponderance of the evidence); Leland v. Oregon, 343 U.S. 790 (1952)(upholding the placement of the burden of production—and by implication the burden of production—on the accused to prove insanity beyond a reasonable doubt).

71. See McDonald v. United States, 312 F.2d 847, 849 (D.C. Cir. 1962). The McDonald court stated that

[under Davis v. United States . . . if there is "some evidence" supporting the defendant's claim of mental disability, he is entitled to have that issue submitted to the jury. Under Durham v. United States . . . evidence of a "mental disease" or "mental defect" raises the issue. The subject matter being what it is, there can be no sharp quantitative or qualitative definition of "some evidence." Certainly it means more than a scintilla, yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal.]

Id. (citations and footnotes omitted).

72. See Frazier v. Weatherholtz, 572 F.2d 994, 995 (4th Cir. 1978)(upholding a Virginia jury instruction placing on the defendant the burden of proving self-defense, "but only to the extent of raising in the minds of the jury a reasonable doubt").
struct the jury on the defense. In essence, the court "directs a verdict on the issue of the defense." Burdens of persuasion inform the parties as to which party has the burden of persuading the jury on the particular element or defense, how much evidence must be adduced on the claim to prevail, and what happens if the burdened party fails to adduce sufficient evidence. The prosecution carries the burden of persuasion on the elements of the offense and must prove each of those elements beyond a reasonable doubt. The defendant is entitled to a judgment of acquittal if the prosecution fails to carry its burden.

The defense can be made to bear the burden of persuasion on affirmative defenses. It is constitutionally permissible to require the defendant to prove such defenses beyond a reasonable doubt, although most states assigning the burden to the defendant have required only proof by a preponderance of the evidence. But do third-party guilt defenses constitute affirmative defenses?

73. PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 4(a), at 20 n.7 (1984)("[i]n these cases the court, in effect, directs a verdict on the issue of the defense") (citing cases affirming the refusal to give jury instructions on duress, necessity, and insanity where defendants had failed to satisfy their burdens of production).

74. Id.

75. The government in a criminal case carries the burden of proving the defendant guilty beyond a reasonable doubt. Justice Frankfurter stated that "[i]t is the duty of the Government to establish ... guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" Leland v. Oregon, 343 U.S. 790, 802-03 (1952)(Frankfurter, J., dissenting). See also In re Winship, 397 U.S. 358, 362 (1970)(quoting Justice Frankfurter and stating "that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required"). The defendant does not have the burden of proving himself innocent. See Leland v. Oregon, 343 U.S. 790, 804 (1952)(Frankfurter, J., dissenting)("the State must prove guilt, not the defendant innocence, and prove it to the satisfaction of a jury beyond a reasonable doubt.").

76. See supra note 68 and accompanying text (discussing FLA. R. CRIM. P. 3.380(a)).

77. See Martin v. Ohio, 480 U.S. 228 (1987)(upholding the placement of the burden of persuasion on the defendant to prove the affirmative defense of self-defense); Patterson v. New York, 432 U.S. 197 (1977)(upholding the placement of the burden of persuasion on the accused to prove the affirmative defense of extreme emotional distress); Leland v. Oregon, 343 U.S. 790 (1952)(upholding the placement of the burden of persuasion on the defendant to prove the affirmative defense of insanity).

78. See Leland v. Oregon, 343 U.S. 790 (1952)(upholding the placement of the burden of persuasion on the accused to prove insanity beyond a reasonable doubt).

79. See Martin v. Ohio, 480 U.S. 228 (1987)(upholding the placement of the burden of persuasion on the defendant to prove self-defense by a preponderance of the evidence); Patterson v. New York, 432 U.S. 197 (1977)(upholding the placement of the burden of persuasion on the accused to prove the affirmative defense of extreme emotional distress by a preponderance of the evidence).
Does evidence that someone other than the accused committed the crime constitute an affirmative defense, or does it negate an element of the crime? The distinction is crucial. If evidence of a third party’s guilt is in the nature of an affirmative defense, the government can place a burden of persuasion on the accused wishing to raise such a defense. But, if such a defense negates an element of the crime, i.e., the identity of the accused as the perpetrator, it is unconstitutional to exclude such evidence by shifting the burden of production or persuasion for third-party guilt to the accused.

Defenses can be divided into two categories: defenses that negate the elements of a crime,80 and affirmative defenses81 that seek to explain, justify, or excuse the conduct of the accused.82 Examples of defenses that negate elements of the crime charged include alibi, mistake, and impossibility.83 Examples of defenses that constitute affirmative defenses or justification/excuse defenses include self-defense, defense of others, and insanity.84

Third-party guilt evidence is not an affirmative defense for three reasons. First, it does not meet the common definition of the term “affirmative defense.” Second, defendants possess a constitutional right to raise the defense of third-party guilt, whereas defendants have no constitutional right to raise affirmative defenses. Third, the defense of third-party guilt is in the nature of an alibi defense and the defense of alibi is not an affirmative defense.

First, the Florida Supreme Court, in *State v. Cohen*,85 embraced the opportunity to define affirmative defenses when it said an “affirmative defense” is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, “Yes, I did it, but I had a good reason.”86

A third-party guilt defense clearly is not an affirmative defense pursuant to the *Cohen* standard. The defense does not assume the

80. Robinson calls these defenses “failure of proof” defenses and defines them as “nothing more than instances where, because of the 'defense,' the prosecution is unable to prove all the required elements of the offense.” ROBINSON, supra note 73, § 21, at 70.
81. See supra note 69 and accompanying text (discussing which defenses constitute affirmative defenses).
82. See Model Penal Code § 1.12 (3)(c) (1985) (stating that “a ground of defense is affirmative, within the meaning of . . . this Section, when: . . . (c) it involves a matter of excuse or justification”).
83. See generally ROBINSON, supra note 73, § 22 (discussing failure of proof defense).
84. See generally ROBINSON, supra note 73, §§ 24-25 (discussing justification and excuse defenses).
85. 568 So. 2d 49 (Fla. 1990).
86. Id. at 51-52.
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charges to be correct; it does not establish a valid excuse, or justification, or right to engage in the conduct. It does, however, concern itself with the elements of the crime, i.e., identity, but it does not concede them. Furthermore, such a defense does not say, “Yes, I did it, but I had a good reason.” The third-party guilt defense says “No, I did not do it, and I have evidence of who did.”

Affirmative defenses are also defined by the Model Penal Code as defenses that are “peculiarly within the knowledge of the accused.” It is easy to see why defenses such as insanity and self-defense constitute affirmative defenses. First, the details of the defense really are peculiarly within the knowledge of the accused. But the details of the third-party guilt defense are not “peculiarly within the knowledge of the accused.” In fact, information concerning suspects other than the accused is often peculiarly within the knowledge of the police or the prosecution.

Second, a defendant in a criminal case has no constitutional right to raise an affirmative defense. Therefore, since the government has the greater right to eliminate the defense entirely, the government has the lesser right to place limitations or burdens of proof on the exercise of the gratuitously granted state right. But an accused does have a constitutional right to adduce evidence “tending to show that a third party committed the crime charged.” Hence, because the state “lacks the greater power to exclude the evidence entirely,” the state is also prohibited from placing limitations (i.e., burdens of proof) on

87. See supra note 66 and accompanying text.
89. See Walton v. Arizona, 497 U.S. 639, 681 (1990) (Blackmun, J., dissenting). In Walton, the dissent discussed the Court’s statements in Patterson v. New York, concluding that Patterson rested upon “the argument that ‘the greater power includes the lesser.’ Since the State constitutionally could decline to recognize the defense [the affirmative defense of extreme emotional disturbance] at all, it could take the lesser step of placing the burden of proof upon the defendant.” Id. (citing Patterson v. New York, 432 U.S. 197, 207-09 (1977)).
90. State v. Koedatich, 548 A.2d 939, 976 (N.J. 1988) (“In Chambers v. Mississippi, ... the Supreme Court 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.” (citations omitted)).

[The Court’s decision thus rested upon an argument that “the greater power includes the lesser”: since the State constitutionally could decline to recognize the defense at all, it could take the lesser step of placing the burden of proof upon the defendant. That reasoning is simply inapposite when a capital defendant introduces mitigating evidence, since the State lacks the greater power to exclude the evidence entirely.]

Id. The reason the State lacks the greater power in a capital sentencing proceeding is because the capital accused has a constitutional right to present mitigating evidence. See Lockett v. Ohio, 438 U.S. 586 (1978).
the defendant’s constitutional right to admit third-party guilt evidence.

Third, third-party guilt evidence resembles an alibi defense, and alibi is not an affirmative defense. Alibi does not constitute a justification or excuse for committing the crime. It does not have the effect of saying “I admit I did the crime but I was justified or excused,” as is the case with true affirmative defenses such as insanity or self-defense. Alibi is a defense that negates an element of the crime. It negates the element of identity.

The government carries the burden of proving two elements in every case it files and prosecutes. The government must prove that a crime was committed and that the defendant is the person who com-

92. An alibi defense in essence says “I could not have committed the crime because I was somewhere else.” The third-party guilt defense in essence says “I could not have committed the crime because someone else did.”

93. See, e.g., People v. Huckleberry, 768 P.2d 1235, 1238 (Colo. 1989)(“An alibi defense essentially denies that the defendant committed the act charged, while an affirmative defense basically admits the doing of the act charged, but seeks to justify, excuse, or mitigate it.”). See also State v. Phegley, 826 S.W.2d 348, 355 (Mo. Ct. App. 1992)(“Although the allegation is defensive, alibi is not a true defense. That is because, where the presence of the defendant at the place and time of the crime is essential to guilt, the burden is always on the prosecution to prove such presence beyond a reasonable doubt.”); Greene v. Texas, 928 S.W.2d 119, 125 (Tex. App.-San Antonio 1996)(“Alibi is not a statutory defense and it is not an affirmative defense. Alibi is not a defense within the accurate meaning of the word, but is a fact shown in rebuttal of the state’s evidence.”).


A minority of jurisdictions consider alibi an affirmative defense. See, e.g., Simmons v. Dalsheim, 543 F. Supp. 729, 737 (S.D.N.Y. 1982)(“The defense of ‘alibi’ is plainly an affirmative defense that seeks to negate an element of the crime charged, to wit, the requirement that the defendant must have committed the acts constituting the crime charged.”); States v. Alexander, 245 S.E.2d 638, 637 (W. Va. 1983)(“[A]libi is an affirmative defense but does not relieve the prosecution of proving beyond a reasonable doubt the actual presence of the accused at the time and place of the commission of the crime when personal presence is essential thereto.”); State v. Kopa, 311 S.E.2d 412, 417 n.2 (W. Va. 1983)(“In West Virginia, . . . alibi has long been characterized as an affirmative defense. . . . However, this Court recognizes that this characterization . . . places West Virginia in the minority.” (citations omitted)).
mitted the crime.\textsuperscript{94} The defendant who raises alibi says "I did not do the crime; I was somewhere else at the time." The government can constitutionally assign a burden of production to a defendant wishing to raise the defense of alibi.\textsuperscript{95} Even if the defendant fails to meet that burden, the court cannot exclude the defense evidence on this issue from the jury.\textsuperscript{96} In other words, the defendant has a constitutional right to place evidence of alibi before the jury. The jury may not receive an instruction from the court on his evidence if defendant fails to meet his burden of production. His evidence on the issue, however, cannot be totally excluded from consideration by the jury.

A third-party guilt defense sounds like an alibi defense. It says "I did not do the crime, but I know who did." But the defendant in a criminal case has the constitutional right to admit alibi evidence. Does the defendant in a criminal case have the constitutional right to present evidence of a third party's guilt?

**B. The Constitutional Right to Admit Third-Party Guilt Evidence**

The defendant, in raising third-party guilt as a defense, is not raising identity as a new issue in the case. Identity already is an issue because it is an element of every criminal offense. But the court, in imposing a burden of production on the accused and then eliminating defense evidence that does not meet that burden, is limiting the defense's ability to contest that issue before the jury.

The Sixth Amendment provides that an accused has the right to compulsory process for obtaining defense witnesses.\textsuperscript{97} The United States Supreme Court, in *Washington v. Texas*,\textsuperscript{98} interpreted that amendment as standing for the proposition that "the right to offer the testimony of witnesses, and to compel their attendance . . . is in plain

\textsuperscript{94} See \textit{Florida Standard Jury Instructions in Criminal Cases} § 2.03 (1992) ("[T]he State has the burden of proving the following two elements: (1) The crime with which the defendant is charged was committed. (2) The defendant is the person who committed the crime.").

\textsuperscript{95} See \textit{Robinson}, supra note 73, § 69 n.8 (citing cases placing the burden of production on the defendant for proof of alibi).

\textsuperscript{96} See id. § 69 n.13 ("Where a burden of production is employed to exclude alibi evidence rather than to merely deny a special instruction on alibi, this exclusion may reduce the prosecutor's burden of production.")(citing Constantino v. State, 224 So. 2d 341 (Fla. Dist. Ct. App. 1969), for the proposition that "finding that the exclusion of alibi evidence may have reduced the government's burden of adducing evidence of the defendant's presence at the crime scene, by eliminating the need to rebut the defendant's evidence").

\textsuperscript{97} The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. amend. VI.

\textsuperscript{98} 388 U.S. 14 (1967).
terms the right to present a defense . . . .”99 Thus, since 1967, the Supreme Court has recognized, under the Confrontation Clause of the Sixth Amendment, the right of a defendant to present reliable and exculpatory evidence and witnesses in his defense. This right is incorporated through the Fourteenth Amendment and made applicable in all state prosecutions.100 The state is prevented from arbitrarily excluding defense evidence.101 In Washington and in Rock v. Arkansas,102 the United States Supreme Court held that it was unconstitutional for a state to use its rules of evidence to preclude entire classes of defense evidence, specifically accomplice’s testimony in Washington and hypnotically refreshed testimony in Rock.103

None of the courts that have used the various tests to exclude evidence of a third party’s guilt have addressed the argument that the exclusion of such evidence unconstitutionally shifts the burden of production to the defense. While the United States Supreme Court has not addressed this specific argument, it has dealt with the constitutionality of excluding evidence of a third party’s guilt. In Chambers v. Mississippi,104 the Court “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.”105 Likewise, the Court has reversed trial court decisions where a state or federal court used its procedural or evidentiary rules to exclude such evidence.106

In Chambers, a third party confessed to the crime charged, murder, but then recanted. Chambers wanted to call the third party to the

99. Id. at 19.
100. Id. at 18-19 (recognizing for the first time a defendant’s Sixth Amendment right to present a defense as applicable to the states through the Due Process Clause of the Fourteenth Amendment).
101. Id. at 23 (“The framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.”).
103. Id. at 55; Washington v. Texas, 388 U.S. 14, 22-23 (1967).
105. See Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (“Due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. . . .”); id. at 302 (“State evidentiary rules may not be applied mechanistically to defeat the ends of justice.”). See also Green v. Georgia, 442 U.S. 95, 97 (1979)(“Regardless of whether the proffered testimony comes within Georgia’s hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue . . . .”).
stand and cross-examine him about the confession, but the Mississippi trial court prohibited the defense from putting the third party on the stand. The trial court based its ruling on that state's voucher and hearsay rules. As to voucher, the state rule provided that if a party placed a witness on the stand, that party vouched for the witness' credibility and the calling party could not impeach its own witness. As to hearsay, the third party's confession was an out-of-court statement offered to prove the truth of the matter asserted.

The United States Supreme Court reversed the trial court's exclusion of the proffered third-party guilt evidence, finding that Mississippi's rules could not be applied "mechanistically to defeat the ends of justice." Likewise, burdens of proof could not be applied mechanistically to trump the constitutional right of the accused to present third-party guilt evidence.

In Chambers, it was fair to the state to admit the evidence of the third party's guilt; the state was in a position to rebut Chambers' evidence because the third party, McDonald, was in court and could be examined by the state. But what if the third party is not available? What if he refuses to testify or is otherwise unavailable? How can the state be in a position to rebut such testimony?

The Court dealt with this issue in Green v. Georgia. In Green, the defendant sought to prove that he was not present at the crime scene when his codefendant committed a murder. Green attempted to introduce the testimony of another witness who had testified for the state at the codefendant's trial. According to the new witness' testimony, the codefendant told the witness that the codefendant shot the victim after ordering Green to run an errand. The trial court excluded the evidence under the hearsay provision of Georgia's evidence code. The Court, in reversing Green's conviction and in ordering the admission of the testimony, emphasized that because the state had found the proffered evidence sufficiently reliable to use it against the co-defendant and base a sentence of death upon it, that the testimony was reliable enough to be admitted in Green's trial. In essence, since the state had used the statement to get a death sentence in another trial, it was unfair to refuse to admit the hearsay statement in Green's trial. Similarly, a defendant (1) who has some evidence of a third party's guilt, but that party has not confessed, or (2) who lacks a large quantum of evidence of the third party's guilt, perhaps can argue based on Green that it would be unfair to allow the state to exclude such evidence merely because the state has chosen to target, charge, and develop the evidence against the defendant as opposed to the third party. After all, the defendant's evidence against the third party

108. Id. at 97.
might be insubstantial because it had to be secured without the investigatory power and cooperation of the prosecutor and other law enforcement agencies. Why should the defendant be punished because the state selected the defendant for prosecution as opposed to the third party?

Even if a defendant has a constitutional right to present certain evidence, the government can place some conditions on the exercise of those rights. A defendant, for example, has a constitutional right to testify, but the defendant cannot take the stand and refuse to be cross-examined. Therefore, the state could probably constitutionally require pretrial notice when a defendant intends to present evidence of a third party's guilt, which would require the defendant to provide the particulars of the defense to the state.

But the government can go only so far. The government could not, for example, place the burden of production for the alibi defense on the accused and then exclude any alibi evidence because the defendant failed to satisfy his burden of production.109

The Supreme Court has, on occasion, upheld exclusions of defense evidence over Sixth Amendment objections based upon the government's need to ensure reliable and fair trials. The defendant's right to present such evidence is not absolute, and "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."110 If the state interest is strong enough, even relevant and reliable evidence can be excluded.111 In this regard, the "Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system."112

109. See State v. McGarry, 83 N.W. 718, 719 (Iowa 1900)(stating that alibi evidence "is admissible always, without regard to its weight, and is for the consideration of the jury").
111. See Washington v. Texas, 388 U.S. 14, 23 n.21 (1967)(referring to the exclusion of evidence under testimonial privileges such as the attorney-client privilege).
112. United States v. Nobles, 422 U.S. 225, 241 (1975). In Nobles, the defense attorney's investigator interviewed pretrial certain key prosecution witnesses. During the trial, defense counsel sought to impeach the in-court testimony of those prosecution witnesses by calling the investigator to the stand to testify to certain prior inconsistent statements. The trial court said the investigator's report, after an in camera hearing excising any matters irrelevant to the witnesses' statements, would have to be given to the prosecution after the investigator testified. When defense counsel stated they did not intend to produce the report, the court ruled the investigator could not testify about his conversations with the prosecution witnesses. The Supreme Court upheld the preclusion sanction, stating that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half truth."
The Supreme Court had occasion to explore the conflict between defense witness preclusion and the Sixth Amendment right to present a defense in *Taylor v. Illinois*. In *Taylor*, the trial court excluded an important defense witness who was not disclosed to the state until after the trial had begun. The Court, in rejecting the defense argument that the preclusion sanction is unconstitutional per se, discussed the court's role in ensuring the reliability of evidence admitted at trial. Justice Stevens, writing for the majority, stated that "[i]t is . . . reasonable to presume that there is something suspect about a defense witness who is not identified until the 11th hour has passed." Justice Stevens stated that the Sixth Amendment did not "allow presumptively perjured testimony to be presented to a jury," and the "mere invocation of that right [to offer the testimony of witnesses on a defendant's behalf] cannot automatically and invariably outweigh countervailing public interests." Justice Stevens called for a balancing process to protect the "integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process . . . ."

Thus, courts have upheld the exclusion of a witness when a party willfully violates the discovery rules to gain a tactical advantage in litigation. "In *Taylor*, for instance, it was 'plain that the case fit into the category of willful misconduct in which the severest sanction is appropriate.'" Moreover, "most circuit court cases affirming exclu-

114. *Id.* at 410-16. See also Lori Ann Irish, *Alibi Notice Rules: The Preclusion Sanction as Procedural Default*, 51 U. Cm. L. Rev. 254, 255 (1984)(arguing that the use of the preclusion sanction for a violation of alibi notice rules is not a "denial of a constitutional right but merely the consequence of a defendant's failure to [timely] assert the constitutional right [to testify/present an alibi] at the appropriate point in the litigation").
116. *Id.* at 416.
117. *Id.* at 414.
119. Bowling v. Vose, 3 F.3d 559, 561 (1st Cir. 1993).
sion in response to discovery violations involve willful conduct."\textsuperscript{120} The Ninth Circuit went further, interpreting Taylor to mean that exclusion is permissible only when the case involves misconduct.\textsuperscript{121}

But there are two differences between the Taylor facts and third-party guilt evidence. First, third-party guilt evidence, unlike the evidence in Taylor, is not "presumptively perjured" testimony; it does not involve misconduct.\textsuperscript{122} Second, contrary to Taylor, third-party guilt evidence need not meet the same standards of reliability that other defense evidence must meet.\textsuperscript{123} Thus, since the accused in a criminal case has a constitutional right to admit third-party guilt evidence, and since such evidence constitutes neither an affirmative defense nor evidence of misconduct, the exclusion of any such evidence is unconstitutional.

The defendant has a constitutional right to admit evidence that someone else committed the crime charged. The government might be able to require him to give notice of his intent to rely on a defense of third-party guilt, thereby forcing him to divulge the particulars of that defense pretrial.\textsuperscript{124} Courts, however, cannot constitutionally prohibit the defendant from introducing any evidence that someone else committed the crime unless the defendant presents a requisite quantum of evidence. This is particularly true where the defendant's inability to obtain enough evidence is due to the state's decision to prosecute the defendant as opposed to the third party.

\textsuperscript{120} Id.
\textsuperscript{121} Id. at 562.
\textsuperscript{122} Id.
\textsuperscript{123} See Perry v. Watts, 520 F. Supp. 550, 556 (N.D. Cal. 1981)("[T]he federal cases indicate that the discretion of the trial judge may not be exercised as broadly as in the California courts in excluding evidence that a third party committed the crime charged, and there appears to be a definite preference for the admission of such evidence."). The District Court for the Northern District of California commented on the lenient federal rule of admissibility of third-party guilt evidence stating that although the federal courts have not established a standard test to be applied in all cases where evidence that a third party may have committed a charged offense is sought to be introduced, the courts are lenient in allowing such evidence, and minimize the discretion in the trial judge to exclude such evidence. Id. at 557 (footnote omitted). See also People v. Hall, 718 P.2d 99, 117 (Cal. 1986)(stating that California courts "should avoid a hasty conclusion such as the trial court's finding in the present case that evidence of a third party's guilt was 'incredible.' Such a determination is properly the province of the jury.").

\textsuperscript{124} Such is the case when the accused seeks to raise the defense of alibi. See, e.g., Fla. R. Crim. P. 3.200 (requiring pretrial notice of a defendant's intent to raise an alibi defense and requiring the defendant to include in the notice where he was at the time of the crime and the names and addresses of the witnesses who will establish such facts). Such procedures have been found to be constitutional. See Williams v. Florida, 399 U.S. 78 (1970)(finding Florida's alibi notice provisions constitutional).
IV. CONCLUSION

Federal and state courts use various tests to determine the admissibility of third-party guilt evidence, and each test constitutes a state-imposed burden of production. Because third-party guilt evidence does not constitute an affirmative defense, and because the accused in a criminal trial has the constitutional right to introduce such evidence, it is unconstitutional to exclude the evidence pursuant to any existing test.125

In 1978, four young black males were arrested, tried, and convicted for a brutal rape and double murder.126 The four denied their guilt, but despite their claims of innocence, they served eighteen years in prison before being released in 1996.127 They were released because they were innocent; someone else committed the crimes with which they were charged. In 1980, Kevin Lee Green was tried and convicted for murdering his unborn baby and nearly beating his wife to death.128 Green maintained his innocence before, during, and after his conviction. Green served seventeen years in prison. But he was innocent. He was freed in 1996, and now an imprisoned rapist has been charged with the murder of Green's baby and the attack on his wife.129

We may be unable to prevent the conviction of all innocent people by admitting third-party guilt evidence, but we surely cannot protect innocent people if we shift the burden of proof to the defendant, who is usually incarcerated and ill equipped to investigate whether someone

125. If the trial court must admit all third-party guilt evidence, there is some concern that the introduction of such evidence by the defense and the rebuttal of this evidence by the prosecution will waste valuable resources of trial courts. The trial court, however, could place time limits on the defense and the prosecution for the introduction and rebuttal of this evidence. See United States v. Reaves, 636 F. Supp. 1575 (E.D. Ky. 1986) (imposing time limits on various stages of the trial in a tax fraud case). See also Patrick E. Longan, The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials, 35 Ariz. L. Rev. 663 (1993). Professor Longan discusses a proposal submitted by the United States Supreme Court to the Congress to amend Rule 16 of the Federal Rules of Civil Procedure to “permit trial judges to enter ‘an order establishing a reasonable limit on the length of time allowed for the presentation of evidence.’” Id. at 664-65. Longan argues that “[t]rials without judicial intervention will tend to last too long. The parties do not take into account the costs to the system or to other litigants when they calculate how long to take in trial.” Id. at 718 (internal citations omitted). He concludes that “[i]f there is room to shorten trials and not sacrifice justice in the cases that are tried, courts should do so.” Id.


127. Id.


129. Id.
else committed the crime. After all, we already admit much third-party guilt evidence. Surely, we can afford to admit the rest.