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Evidence of a Third Party's Guilt of the Crime that the Accused is Charged with: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0

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Evidence of a Third Party’s Guilt of the Crime that the Accused is Charged with: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0

*Edward J. Imwinkelried**

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INTRODUCTION

If the extent of the media coverage is the criterion, “the Trial of the 20th Century” was the California prosecution of O.J. Simpson for murder in 1995.¹ In both his opening statement and his closing argument, defense counsel Johnny Cochran famously claimed that the Los Angeles police had been guilty of “a rush to judgment.”² Cochran argued that reasonable doubt existed in part because the Los Angeles police had failed to follow up on leads suggesting the guilt of third parties other than Simpson.³

That argument has a long pedigree. Perry Mason was the legendary fictional defense attorney created by Earle Stanley Gardner.⁴ Perry not only won all his cases—indeed, in most instances, he gained a dismissal of the charges at the preliminary hearing. Even more impressively, he won the acquittals by establishing that a third party had committed the crime with which Perry’s client was charged. Before the conclusion of every hearing, Perry’s trusty investigator, Paul Drake, always arrived at the last moment and handed Perry a file containing the evidence unmasking “the real culprit.” The Perry Mason novels and television series helped popularize the Some Other Dude Did It (“SODDI”) defense.

However, Perry was a fictional character who did not have to surmount the evidentiary problems faced by defense attorneys in the

1. Joe Nelson, *Veteran AP Reporter Linda Deutsch Had Front Row Seat to O.J. Simpson’s “Trial of the Century,”* WHITTIER DAILY NEWS (June 11, 2014, 8:28 PM), <http://www.whittierdailynews.com/arts-and-entertainment/20140611/veteran-ap-reporter-linda-deutsch-had-front-row-seat-to-oj-simpsons-trial-of-the-century>.

2. William Claiborne, *Simpson Defense Decries “Rush to Judgment,”* WASH. POST, Sept. 28, 1995, at A1; Andrea Ford & Jim Newton, *Simpson Defense Charges “Sinister” Rush to Judgment Trial: Cochran Says in Opening Statement That Police Overlooked and Manufactured Evidence. He Suggests That Blood Found on Nicole Simpson Points to Different Killer,* L.A. TIMES, Jan. 26, 1995; *CNN Transcripts: O.J. Simpson Trial, Day 157—Part 6, Aired at 9/27/95 6:40:00 PM,* CNN, <http://www.cnn.com/US/OJ/daily/9-28/transcripts/trans6.html> (last visited Sept. 4, 2015).

3. Jim Newton & Andrea Ford, *Simpson Offering \$500,000 Reward for Tips in Case Investigation: Defense Says Other Possible Suspects were Ignored,* L.A. TIMES, July 21, 1994.

4. See generally David McCord, “But Perry Mason Made It Look So Easy!”: *The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Some Else Is Guilty,* 63 TENN. L. REV. 917 (1996); 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).

real world. In most jurisdictions in the real world when a defense attorney attempts to assay a SODDI defense, he or she encounters substantial hurdles.⁵ Most jurisdictions subscribe to a special relevance test, namely, the so-called “direct” or “clear” link standard.⁶ As we shall see in Part I, if the defense wants to create reasonable doubt by pointing the finger of guilt at a third party, the defense must present more than evidence that the third party had a motive or opportunity to commit the charged crime; rather, there must be substantial evidence tying the third party to the actual commission or perpetration of the charged offense.⁷ The defense not only has to marshal that quantum of proof, to make matters worse, as Part II explains, the defense’s proof of the third party’s guilt must satisfy both the hearsay rule and the character evidence prohibition.⁸ In the real world, the defense rarely prevails on a traditional SODDI defense.⁹ For that matter, unless the defense counsel can overcome all these barriers, the trial judge might not even instruct the jury on the defense.¹⁰

A 2006 capital murder case, *Holmes v. South Carolina*,¹¹ might have given the United States Supreme Court a chance to review the constitutionality of these restrictions. The prosecution had substantial evidence of Holmes’s guilt,¹² including fingerprints, fiber analysis, and DNA evidence.¹³ Holmes not only argued negatively that the forensic evidence was flawed, Holmes also affirmatively contended that the real culprit was Jimmy McCaw White.¹⁴ The defense attempted to introduce evidence that White had been in the neighborhood at the time of the crime and that White had both admitted to committing the crime and asserted that Holmes was “innocent.”¹⁵ However, at a pretrial

5. Peter A. Joy & Kevin C. McMunigal, *The Alternative Perpetrator Strategy*, CRIM. JUST. Winter 2003, at 32–34 (discussing the majority view).

6. *Id.* at 34.

7. See *infra* Part I (discussing the current split of authority over the requirements to assert the SODDI defense).

8. See *infra* Part II (discussing the SODDI defense 2.0 in which the accused presents evidence to show that the police failed to properly investigate the guilt of a third party who plausibly committed the charged crime).

9. See the discussion of the unsuccessful SODDI defense in the California prosecution of David Westerfield in Joy & McMunigal, *supra* note 5, at 32. The authors mention some of the practical problems facing a defendant contemplating relying on a SODDI defense.

10. See, e.g., *Alexander v. United States*, 138 U.S. 353 (1891).

11. The original state supreme court opinion is *State v. Holmes*, 464 S.E.2d 334 (S.C. 1995). On post-conviction review, Holmes obtained a new trial. *State v. Holmes*, 605 S.E.2d 19 (S.C. 2004). When the new trial resulted in a conviction, Holmes petitioned the Supreme Court.

12. *Holmes*, 464 S.E.2d at 333–34.

13. *Id.* at 334.

14. *Id.* at 336.

15. *Id.*

hearing, after White denied the statements, the trial judge excluded the evidence of White's possible guilt of the charged crime.¹⁶ In doing so, the trial judge relied on *State v. Gregory*,¹⁷ a South Carolina case adopting a version of the "direct link" standard.¹⁸

On appeal, the South Carolina Supreme Court affirmed the trial judge's ruling and Holmes's conviction.¹⁹ However, the supreme court affirmed the ruling on a different rationale.²⁰ The supreme court turned to *State v. Gay*,²¹ a 2001 South Carolina precedent. The supreme court read *Gay* as holding that where there is "strong evidence of an appellant's guilt—especially" when there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable doubt as to the appellant's own innocence.²²

The United States Supreme Court reversed.²³ However, in part because of the way the case was briefed before the Court, the Court did not reach the issue of the constitutionality of the "direct link" test prescribed by *Gregory*.²⁴ Instead, the Court faulted the *Gay* approach to assessing the probative value of the evidence of third-party guilt.²⁵ Writing for a unanimous Court, Justice Alito declared, "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."²⁶ Although the Court reaffirmed the accused's general constitutional right to present critical exculpatory evidence, the Court did not have occasion to comment on the validity of the "direct link" restriction on that right. The upshot is that in most jurisdictions today, that restriction continues to hinder defense counsel who want to rely on a traditional SODDI defense.

However, in recent years the defense has evolved. Increasingly, defense counsel are presenting a variation of the defense—the SODDI defense 2.0. In a traditional SODDI defense, the accused tries to create reasonable doubt by presenting admissible evidence of the third party's

16. *Id.* at 338.

17. *People v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941).

18. *Id.*

19. *Id.* at 536.

20. *Id.*

21. *State v. Gay*, 541 S.E.2d 541 (S.C. 2001), *abrogated by* *Holmes v. South Carolina*, 547 U.S. 319 (2006).

22. *State v. Holmes*, 605 S.E.2d 19 (S.C. 2005), *overruled and vacated by* *Holmes v. South Carolina*, 547 U.S. 319 (2006).

23. *Holmes v. South Carolina*, 547 U.S. 319 (2006).

24. *Id.* at 324, 328–31.

25. *Id.*

26. *Id.* at 331.

guilt of the charged offense. As we have seen, when the accused invokes a traditional SODDI defense, the defense counsel must not only present a certain quantum of proof.²⁷ In addition, that proof must be capable of running the admissibility gauntlets of the hearsay and character rules.

In the emerging version of the defense, as in *People v. Simpson*, the accused endeavors to generate reasonable doubt by making the more limited argument that the police neglected to pursue plausible investigative leads about third parties who might be the real culprit.²⁸ The defense's choice of this version of the SODDI defense has important consequences. As Part II explains, the new variation of the defense not only reduces the quantum of proof that the defense must present to make out a submissible case for the jury; reliance on this defense also eliminates the need for the defense testimony to satisfy the hearsay and character exclusionary rules.²⁹ Significantly, in two 2014 decisions, one federal³⁰ and one state,³¹ the courts approved the SODDI defense 2.0. Moreover, the courts, the United States Court of Appeals for the Second Circuit and the Utah Court of Appeals, squarely held that the trial judge's exclusion of the testimony that the accused proffered to substantiate the defense amounted to constitutional error, namely, a violation of the accused's constitutional right to present crucial exculpatory evidence. Concededly, the Supreme Court has not characterized a violation of that right as "structural" error, automatically mandating reversal; rather to warrant reversal, the error must be prejudicial.³² However, when the error is constitutional in nature, *Chapman v. California* teaches that the prosecution must shoulder the burden of proving that the error was harmless beyond any reasonable doubt.³³

The thesis of this Article is that the two 2014 decisions correctly concluded that accused have a constitutional right to present a SODDI 2.0 defense. The first two Parts of the Article are descriptive. Part I reviews the traditional SODDI defense, describes the quantum of proof that the defense must present and explains why the defense must

27. See *supra* note 9 and accompanying text.

28. See, e.g., *Newton & Ford*, *supra* note 3.

29. See *infra* Part II (describing the SODDI defense 2.0).

30. See generally *Alvarez v. Ercole*, 763 F.2d 223 (2d Cir. 2014).

31. See generally *State v. McCullar*, 335 P.3d 900 (Utah Ct. App. 2014).

32. See generally *Arizona v. Fulminante*, 499 U.S. 279 (1991) (explaining that the courts apply the "harmless error" test to see if the admission of such testimony is harmless beyond a reasonable doubt).

33. *Chapman v. California*, 386 U.S. 18, 24 (1967).

comply with the strictures of the hearsay and character rules when the defense elects to rely on this version of the SODDI defense.³⁴ Part II compares and contrasts the new variation of the SODDI defense demonstrating that a submissible case under SODDI 2.0 requires less evidence of the third party's guilt than under the traditional version.³⁵ Distinguishing the two versions of the defense, Part II further elaborates why the SODDI defense 2.0 obviates the need for the defense to dot the i's and cross the t's of the hearsay rule and the character evidence prohibition.³⁶

Finally, Part III addresses the most serious objections to the SODDI defense 2.0.³⁷ One is the contention that unlike the traditional SODDI defense, without more the SODDI defense 2.0 is incapable of generating the reasonable doubt justifying an acquittal.³⁸ The second objection is that when there is seemingly a consensus that there should be significant restrictions on the traditional SODDI defense, it is wrong-minded to apply such minimal limitations to the SODDI defense 2.0.³⁹ Part III considers, but ultimately rejects, both objections. The Article concludes that the Second Circuit and Utah Court of Appeals reached the correct result in upholding the SODDI defense 2.0 and freeing that defense from the limitations constraining the traditional SODDI defense.

I. A DESCRIPTION OF THE TRADITIONAL SODDI DEFENSE

There is a split of authority over the requirements for mounting the traditional SODDI defense based on evidence that a third party in fact committed the charged crime.⁴⁰

A. *The Majority View*

When the defense opts to present a traditional version of the SODDI

34. See *infra* Part I (discussing the current split of authority over the requirements to assert the SODDI defense).

35. See *infra* Part II (discussing the SODDI defense 2.0 in which the accused presents evidence to show that the police failed to properly investigate the guilt of a third party who plausibly committed the charged crime).

36. See *infra* Part II.

37. See *infra* Part III (evaluating the legitimacy of the SODDI 2.0 defense).

38. See *infra* Part III.A (evaluating the objection prosecutors may raise for the SODDI 2.0 defense because the inferences made are too speculative to create reasonable doubt).

39. See *infra* Part III.B (evaluating the objection prosecutors may raise regarding the SODDI 2.0 defense because there are minimal requirements in order for it to be raised).

40. Compare *State v. Koedatich*, 548 A.2d 939 (N.J. 1988), with Joy & McMunigal, *supra* note 5, at 34, and Zachary El-Sawaf, Comment, *Incomplete Justice: Plugging the Hole Left by the Reverse 404(b) Problem*, 80 U. CIN. L. REV. 1049, 1051–52, 1055–60 (2012).

defense, the defense counsel can present one or both of two types of evidence.

1. Evidence of the Third Party's Involvement in the Charged Crime

In 1891, the Supreme Court rendered its decision in *Alexander v. United States*.⁴¹ Alexander was charged with murdering his partner in a livestock business.⁴² An eyewitness saw the two men riding together to their camp.⁴³ The witness then heard several gunshots.⁴⁴ The witness next saw the accused riding alone and leading a horse with no rider.⁴⁵ At trial, the accused attempted to develop a traditional SODDI defense.⁴⁶ The accused wanted to present evidence that the decedent had been having an affair with a married woman and the woman's husband had searched for the decedent—evidently motivated by a desire for revenge.⁴⁷ The trial judge ruled that even if the accused presented all the proffered evidence, the evidence would not warrant instructing the jury on a SODDI defense.⁴⁸ The Supreme Court affirmed the ruling.⁴⁹ The Court reasoned that third-party evidence must have a “legitimate tendency” to establish the third party's guilt of the charged crime.⁵⁰ Although the proffered evidence tended to show that the woman's husband had a motive to kill the decedent, standing alone, motive evidence was insufficient to support a SODDI defense.⁵¹

Given *Alexander*, most lower courts have devised some variation of the “direct”⁵² or “clear”⁵³ link or connection⁵⁴ test. These courts reject “conjunctural”⁵⁵ and “speculative”⁵⁶ showings of the third party's guilt.

41. See generally *Alexander v. United States*, 138 U.S. 350 (1891).

42. *Id.* at 351.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 356.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 356–57.

52. See, e.g., *Armstrong v. Hobbs*, 664 F.3d 1137, 1139 (8th Cir. 2011).

53. See, e.g., *Thompson v. Sirmons*, 617 F. Supp. 2d 1129, 1138–39 (W.D. Okla. 2008); *Winfield v. United States*, 676 A.2d 1 (D.C. 1996). But see *People v. Primo*, 753 N.E.2d 164 (N.Y. 2001) (overturning the “clear link” test that New York had previously followed).

54. See, e.g., *Guam v. Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993); Bourgon B. Reynolds, *Constitutional Law—It Wasn't Me!* *Zinger v. State and Arkansas's Unconstitutional Approach to Third-Party Exculpatory Evidence*. *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993), 34 U. ARK. LITTLE ROCK L. REV. 191, 191 (2011).

55. *Birmingham v. State*, 27 S.W.3d 351, 354 (Ark. 2000).

56. *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998); *United States v. Johnson*, 904

The accused's evidence should "point[] unerringly"⁵⁷ to the conclusion that the third party committed the charged offense.⁵⁸ More specifically, in these jurisdictions, it is not enough to show that the third party had either a motive or an opportunity to commit the charged crime.⁵⁹ Rather, there must be substantial evidence⁶⁰ directly connecting the third party to the actual commission⁶¹ or perpetration⁶² of the charged crime. For example, evidence of the third party's suspicious post-crime conduct, such as flight from the locale, is inadmissible.⁶³

It is true that many commentators have criticized the majority view.⁶⁴

F. Supp. 1303, 1307 (M.D. Ala. 1995); *People v. Lewis*, 28 P.3d 34 (Cal. 2001), *cert. denied*, 535 U.S. 1019 (2002); *People v. Brown*, No. 11CA0556, 2014 WL 6486126, at *3 (Colo. App. Nov. 20, 2014) (noting that the police did not investigate a "suspicious" vehicle that had been seen in the victim's neighborhood two days before the murder; the defense investigation established only that the vehicle belonged to the Jefferson Hills Corporation, a residential juvenile mental health facility; the court remarked that "any possible connection between the Jefferson Hills Corporation and the victim was merely speculative").

57. *State v. Vanderhall*, 226 S.E.2d 402, 404 (N.C. 1976).

58. *State v. Easley*, 662 S.W.2d 248 (Mo. 1983); *State v. Wynn*, 666 S.W.2d 862 (Mo. Ct. App. 1984); *Vanderhall*, 226 S.E.2d at 402.

59. *Rogers v. Wong*, 637 F. Supp. 2d 807, 824–25 (E.D. Cal. 2009); *People v. Hartsch*, 232 P.3d 663, 686–87 (Cal. 2010), *cert. denied*, 562 U.S. 985 (2010); *People v. DePriest*, 163 P.3d 896, 932–33 (Cal. 2007), *cert. denied*, 552 U.S. 1190 (2008); *People v. Prince*, 156 P.3d 1015, 1061 (Cal. 2007); *People v. Avila*, 133 P.3d 1076 (Cal. 2006), *modified* (Aug. 2, 2006); *People v. Harris*, 118 P.3d 545, 564–67 (Cal. 2005), *cert. denied*, 547 U.S. 1065 (2006); *People v. Yeoman*, 72 P.3d 1166, 1202–05 (Cal. 2003); *People v. Von Villas*, 13 Cal. Rptr. 2d 62, 100–01 (Cal. Ct. App. 1992), *cert. denied*, 508 U.S. 975 (1993); *People v. Jackson*, 1 Cal. Rptr. 2d 778, 782 (Cal. Ct. App. 1991); *People v. Johnson*, 247 Cal. Rptr. 767, 773–74 (Cal. Ct. App. 1988).

60. *Cikora v. Wainwright*, 661 F. Supp. 813, 824 (S.D. Fla. 1987), *aff'd*, 840 F.2d 893 (11th Cir. 1988).

61. *Walters v. McCormick*, 122 F.3d 1172, 1177 (9th Cir. 1997); *Warner v. Workman*, 814 F. Supp. 2d 1188, 1225–28 (W.D. Okla. 2011), *aff'd sub nom. Warner v. Trammel*, 520 F. App'x 675 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 924 (2014) (mem.); *Cikora v. Wainwright*, 661 F. Supp. 813, 824 (S.D. Fla. 1987), *aff'd*, 840 F.2d 893 (11th Cir. 1988); *People v. Brady*, 236 P.3d 312, 323–25 (Cal. 2010), *cert. denied*, 131 S. Ct. 2874 (2011).

62. *DePriest*, 163 P.3d at 927–29 (Cal. 2007); *Yeoman*, 72 P.3d at 1202–05; *People v. Bradford*, 939 P.2d 259, 312–13 (Cal. 1997), *cert. denied*, 523 U.S. 1118 (1998); *People v. Edelbacher*, 766 P.2d 1, 21–22 (Cal. 1989); *People v. Samaniego*, 91 Cal. Rptr. 3d 874, 895–97 (Cal. Ct. App. 2009), *modified* (Apr. 16, 2009).

63. *United States v. Bollin*, 264 F.3d 391, 413 (4th Cir. 2001), *cert. denied sub nom. Tietjen v. United States*, 534 U.S. 935 (2001); *United States v. Gomez*, 165 F.3d 650, 653 (8th Cir. 1999); *see also McCord*, *supra* note 4.

64. DAVID P. LEONARD, THE NEW WIGMORE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 3.2.1 (2009); Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 NEB. L. REV. 272, 299 (1997); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 342–45, 355–65; David A. Garcia, *Third Party Culpability Evidence: A Criticism of the California Mendez-Arline Exclusionary Rule—Towards a Constitutional Standard of Relevance and Admissibility*, 17 U.S.F.L. REV. 441 (1982); Joy & McMunigal, *supra* note 5, at 34; McCord, *supra* note 4; Powell, *supra* note 4, at 1031–34; Reynolds, *supra* note 54, at 191; El-Sawaf, *supra* note 40, at 1051–52.

The basic thrust of the criticism is that because the standard of proof beyond a reasonable doubt is so high, and it is consequently relatively easy to create reasonable doubt, it is unsound to have fixed rules as to which types or sets of defense evidence should trigger the right to inform the jury of facts pointing to a third party's guilt.⁶⁵ On occasion, courts have approvingly cited these criticisms and at least purported to relax the standard for admitting defense evidence of third-party culpability.⁶⁶ On one such occasion, the California Supreme Court wrote that "[t]o be admissible, the third party evidence . . . need only be capable of raising a reasonable doubt of defendant's guilt."⁶⁷ The court emphasized that the defense certainly does not need to present sufficient evidence to establish "a probability" of the third party's guilt.⁶⁸ However, the court cautioned that "we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability."⁶⁹ Then, after seemingly relaxing the standard for evidence of third-party culpability, the court added 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."⁷⁰ On its face, the court's language was strikingly similar to the traditional test employed in "direct link" jurisdictions.⁷¹

2. Evidence of the Third Party's Commission of Crimes Similar to the Charged Crime

In addition to proffering evidence connecting the third party to the charged crime, defense counsel sometimes attempt to introduce

1055–60; Robert Hayes, Note, *Enough Is Enough: The Law Court's Decision to Functionally Raise the "Reasonable Connection" Relevancy Connection in State v. Mitchell*, 63 ME. L. REV. 531, 532–34, 548–49 (2010); Colleen Rutherford Maas, Note, *And Justice for Hall: The Overruling of the Mendez-Arline Standard of Admissibility for Third Party Culpability Evidence in People v. Hall*, 14 W. ST. U. L. REV. 261 (1986).

65. As Judge Garcia noted in his article on the subject, the meaningful constitutional question is whether the accused had presented sufficient evidence to generate a reasonable doubt about his or her guilt. Garcia, *supra* note 64, at 444. There are so many conceivable states of the record that, as a matter of logic, could give rise to reasonable doubt that it is illiberal to prescribe hard-and-fast rules as to when the accused's evidence is adequate to create a reasonable doubt.

66. See, e.g., *People v. Hall*, 718 P.2d 99 (Cal. 1986) (citing Garcia, *supra* note 64).

67. *Id.* at 104.

68. *Id.*

69. *Id.*

70. *Id.*

71. Compare *id.*, with *People v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941), and *Holmes v. South Carolina*, 547 U.S. 319 (2006).

evidence that the third party has committed other crimes similar to the charged crime. When the defense endeavors to do so, the defense is often met by a character evidence objection by the prosecution.

Federal Rules of Evidence 404 and 405 set out the character evidence doctrine.⁷² In pertinent part, the restyled Federal Rule of Evidence 404(b) states:

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.⁷³

Rule 404(b)(1) states the character evidence prohibition.⁷⁴ By virtue of the prohibition, the proponent may not introduce evidence of a person's other misconduct to infer the person's disposition or propensity to misconduct and then utilize that inference to support the conclusion that on the occasion in question the person acted "in character," that is, consistently with the disposition or propensity. The rationale for the prohibition rests on the concurrence of two probative dangers.⁷⁵ One is the danger of misdecision, namely, the risk that at least at a subconscious level, the introduction of the evidence will tempt the jury to decide the case on an improper basis.⁷⁶ The first inferential step in character reasoning (the step from the act to an inference of disposition or propensity) forces the trier to focus on the person's subjective character. Especially when the person in question is the accused, the jury's exposure to testimony about his or her other misdeeds might prompt the jury to convict to protect society from the accused, not because they are convinced beyond a reasonable doubt that the accused is guilty of the charged crime. The second danger is the risk of overvaluation.⁷⁷ Psychological studies generally support the conclusion that laypersons overestimate the probative value of a person's character in predicting the person's conduct.⁷⁸

However, Rule 404(b)(2) indicates that the proponent may defeat a character evidence objection by identifying a non-character theory of

72. FED. R. EVID. 404, 405.

73. *Id.*

74. FED. R. EVID. 404(b)(1).

75. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:19 (rev. 2013).

76. *Id.* § 2:19, at 2-141-43.

77. FED. R. EVID. 404.

78. FED. R. EVID. 404 advisory committee's note.

logical relevance.⁷⁹ As the text of the rule states, it is permissible for the proponent to introduce the evidence for such alternative purposes as proving “motive, opportunity, intent,” and the like.⁸⁰ When one of these theories is tenable on the facts of the case, reliance on the theory tends to moot one or both of the probative dangers inspiring the prohibition.⁸¹ Suppose, for example, that the accused is charged with violating the Extortionate Credit Transaction Act.⁸² To convict an accused under the Act, the prosecution must prove that the alleged victim acted out of fear.⁸³ The prosecutor might offer evidence that prior to the transaction, the accused made several threats to the alleged victim. The threats are relevant to show the alleged victim’s fear. Since the prosecutor is not employing the evidence to predict the accused’s conduct, the second probative danger is absent. Consequently, the judge may legitimately admit the evidence with a limiting instruction under Federal Rule of Evidence 105.⁸⁴

By its terms, Rule 404(b)(1) is not limited to conduct of a criminal accused. The rule refers generally to any “person.”⁸⁵ Thus, the prohibition comes into play even when the defense proffers evidence of the misdeeds of a third party that the defense claims committed the charged offense. In many cases, the defense tries to introduce evidence that the third party perpetrated an offense or offenses similar to the charged crime—so-called “reverse 404(b)” evidence.⁸⁶ The rub is that most courts apply the character evidence prohibition as rigorously to such testimony as they do when the prosecution offers evidence of an accused’s uncharged misconduct.⁸⁷ They see no basis in the text of the

79. IMWINKELRIED, *supra* note 75, §§ 2:20 to 2:22.

80. *Id.*

81. *Id.*

82. *Id.* § 2:22.

83. *Id.*

84. FED. R. EVID. 105. The instruction should have two prongs. One prong specifies the permissible use of the evidence. The second forbids the jury from using the evidence as a basis for simplistic character reasoning, “he did it once before, therefore he did it again.” 2 IMWINKELRIED, *supra* note 75, §§ 9:72 to 9:74.

85. *Mason v. Mitchell*, 95 F. Supp. 2d 744, 779 (N.D. Ohio 2000) (“all persons”), *aff’d in part, remanded in part*, 320 F.3d 604 (6th Cir. 2003); *see also* *Commonwealth v. Thompson*, 779 A.2d 1195, 1204 (Pa. Super. Ct. 2001), *appeal denied*, 790 A.2d 1016 (Pa. 2001) (noting that in dissent, Judge Michael Joyce pointed out that the statute generally refers to “a person”).

86. IMWINKELRIED, *supra* note 75, §§ 2:20 to 2:22.

87. *United States v. Sanders*, 708 F.3d 976, 991–92 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 803 (2013); *United States v. Lukashov*, 694 F.3d 1107, 1118 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1744 (2013); *United States v. Ushery*, 400 F. App’x 674, 676–77 (3d Cir. 2010); *Mason v. Mitchell*, 320 F.3d 604, 634 (6th Cir. 2003); *People v. Homick*, 289 P.3d 791 (Cal. 2012), *cert. denied*, 134 S. Ct. 114 (2013); *see also* *State v. Savino*, 567 So. 2d 892 (Fla. 1990) (holding that the trial judge should not apply a more relaxed standard of similarity merely because the evidence

rule for treating the misconduct of the accused and that of a third party differently. By way of example, suppose that the defense presents evidence that the third party's other offenses and the charged crime display the same, one-of-a-kind *modus operandi*⁸⁸ or that the third party concocted a plan including the charged crime as well as the third party's other offenses.⁸⁹ In either event, the defense may introduce the evidence because it is logically relevant on a tenable non-character theory. However, when the defense cannot do so, Rule 404(b)(1) represents an insuperable obstacle to introducing the testimony about the third party's other offenses.

Predictably, defense counsel have challenged the constitutionality of these restrictive rules. However, in the vast majority of cases, courts have rebuffed these challenges.⁹⁰ Again, as previously stated, in *Holmes v. South Carolina*,⁹¹ the Supreme Court forewent an opportunity to rule on the constitutionality of the "direct link" standard.⁹² The upshot is that the majority view is still firmly entrenched in most jurisdictions.⁹³

B. The Minority View

Although most jurisdictions adhere to some variation of the "direct link" test, as we shall soon see there are dissenters. The courts subscribing to the minority view set the threshold lower when the defense offers evidence of the third party's involvement in the charged crime and relax the standards when the defense attempts to introduce

is offered by the defense rather than the prosecution).

88. *Bohanan v. United States*, 821 F. Supp. 902, 904 (S.D.N.Y. 1993), *aff'd*, 19 F.3d 8 (2d Cir. 1994); *People v. Abilez*, 61 Cal. Rptr. 3d 526 (2007), *cert. denied sub nom. Abilez v. California*, 552 U.S. 1067 (2007); *McCord*, *supra* note 4.

89. *United States v. Kollie*, 501 F.App'x 206 (3d Cir. 2012); *Abilez*, 61 Cal. Rptr. 3d 526.

90. *See, e.g., Wynne v. Renico*, 606 F.3d 867, 870–71 (6th Cir. 2010) (reversing two lower court decisions sustaining the constitutional challenge), *cert. denied*, 131 S. Ct. 2873 (2011); *Miller v. Brunzman*, 599 F.3d 517 (6th Cir. 2010); *Narrod v. Napoli*, 763 F. Supp. 2d 359, 377–78 (W.D.N.Y. 2011); *Kowalak v. Scott*, 712 F. Supp. 2d 657, 689 (E.D. Mich. 2010); *Rogers v. Wong*, 637 F. Supp. 2d 807, 824–26 (E.D. Cal. 2009); *Mastin v. Senkowski*, 297 F. Supp. 2d 558 (W.D.N.Y. 2003); *People v. Mincey*, 6 Cal. Rptr. 2d 822 (1992), *cert. denied*, 506 U.S. 1014 (1992). *But see United States v. Montelongo*, 420 F.3d 1169, 1173 (10th Cir. 2005); *United States v. Blum*, 62 F.3d 63 (2d Cir. 1995); *Virgin Islands v. Mills*, 956 F.2d 443 (3d Cir. 1992); *United States v. Rodriguez*, 917 F.2d 1286, 1289 (11th Cir. 1990), *vacated in part on reh'g*, 935 F.2d 194 (11th Cir. 1991), *cert. denied sub nom. Leon v. United States*, 502 U.S. 1047 (1992); *United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989).

91. *Holmes v. South Carolina*, 547 U.S. 319 (2006).

92. *Id.*

93. *See, e.g., Case v. Hatch*, 708 F.3d 1152, 1177 (10th Cir. 2013) (discussing New Mexico law); *Armstrong v. Hobbs*, 698 F.2d 1063 1067–68 (8th Cir. 2012); *Krider v. Conover*, 497 F. App'x 818 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 1469 (2013).

evidence of the third party's commission of uncharged offenses similar to the charged crime.

To begin with, these courts believe that rather than adopting a "specialized" relevance standard for evidence of a third party's perpetration of the charged offense, the courts ought to simply apply the normal relevance tests.⁹⁴ As previously stated, under the "direct link" standard, most courts have barred evidence of the flight of a third party after the perpetration of the charged crime.⁹⁵ In contrast, applying its normal relevance standard, a Pennsylvania court ruled that the accused had a right to submit such evidence to the jury.⁹⁶

Moreover, these courts ease the application of Rule 404(b) when the defense tenders evidence that a third party has committed other offenses similar to the charged crime. In Arizona⁹⁷ and Pennsylvania,⁹⁸ courts have formally held that the character evidence prohibition is inapplicable when the defense offers third-party culpability evidence. In a Maine case,⁹⁹ as Judge Skolnik astutely observed in dissent, the majority of the state supreme court justices in effect disregarded the prohibition.¹⁰⁰ The accused father was charged with child abuse.¹⁰¹ To show that the mother was the real abuser, the accused proffered evidence that the mother had been abused as a child, as well as expert testimony that persons abused as children tend to become adult abusers.¹⁰² The dissent correctly noted that there was no obvious non-character theory justifying the admission of the evidence.¹⁰³

Of course, even when an item of evidence is otherwise admissible under Rule 404(b), the evidence is still subject to discretionary

94. *Jordan v. United States*, 722 A.2d 1257 (D.C. 1998) (applying the normal standard of relevance); *State v. Meister*, 220 P.3d 1055 (Idaho 2009); *People v. Primo*, 753 N.E.2d 164 (N.Y. 2001); *Reynolds*, *supra* note 54, 217.

95. *See supra* note 63 and accompanying text.

96. *Commonwealth v. Milligan*, 693 A.2d 1313 (Pa. Super. Ct. 1997).

97. *State v. Machado*, 246 P.3d 632 (Ariz. 2011).

98. *Commonwealth v. Thompson*, 779 A.2d 1195 (Pa. Super. Ct. 2001), *appeal denied*, 790 A.2d 1016 (Pa. 2001); *see also* *Allen v. State*, 103 A.3d 700, 712 (Md. 2014) ("In *Sessoms v. State*, 357 Md. 274, 744 A.2d 9 (2000), this Court held that the exclusion under Md. Rule 5-404(b) applies only to other crimes or prior bad acts of the defendant. In other words, the exclusion of other crimes evidence does not apply when the accused, in his or her defense, offers other crimes evidence of another individual." (emphasis omitted)).

99. *State v. Conlogue*, 474 A.2d 167 (Me. 1984) (Scolnik, J., dissenting); 2 IMWINKELRIED, *supra* note 75, §§ 10:44, 10:120.

100. *Conlogue*, 474 A.2d at 173–76 (Scolnik, J., dissenting).

101. *Id.* at 169 (majority opinion).

102. *Id.* at 171–73.

103. *Id.* at 173–76 (Scolnik, J., dissenting).

exclusion under Rule 403.¹⁰⁴ That rule authorizes a trial judge to balance the probative value against the probative danger and to exclude logically relevant evidence when the attendant probative dangers substantially outweigh the probative worth of the evidence.¹⁰⁵ The courts championing the minority view take the position that trial judges should apply Rule 403 more sparingly to defense evidence of third-party culpability.¹⁰⁶ The courts reason that such evidence presents less risk of a verdict on an improper basis than evidence of the accused's own uncharged misconduct.¹⁰⁷ Unlike the third party, the accused is on trial. The accused not only has a greater stake in an accurate verdict than the third party, evidence of the accused's bad character also presents a risk that the jury will commit an inferential error leading more directly to an inaccurate verdict.

In short, there are marked differences between the majority and minority jurisdictions with respect to the treatment of both evidence of a third party's involvement in the charged crime and testimony about a third party's commission of other offenses similar to the charged crime. However, as we shall see in Part II, although the courts disagree in those respects, they concur in other respects—respects that reflect the fundamental differences between the traditional SODDI defense and the SODDI defense 2.0 focused on the failure of the police to diligently investigate leads pointing to the guilt of a third party.

II. A DESCRIPTION OF THE SODDI DEFENSE 2.0

When an accused urges a conventional SODDI defense, he or she presents evidence to show that a third party committed the crime with

104. Compare FED. R. EVID. 404(b), with FED. R. EVID. 403.

105. FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence.”).

106. See *United States v. Wright*, 625 F.3d 583, 608 (9th Cir. 2010); *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005), cert. denied, 546 U.S. 1047 (2005); *United States v. Stevens*, 935 F.2d 1380, 1402 (3d Cir. 1991); *United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989); *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984); *United States v. Ivins*, No. 09-320, 2010 U.S. Dist. LEXIS 63894, at *2, (E.D. Pa. June 28, 2010); *People v. Cruz*, 643 N.E.2d 636 (Ill. 1994); *State v. Garfole*, 388 A.2d 587 (N.J. 1978), appeal after remand, 403 A.2d 888 (N.J. 1979); *State v. Schneidell*, 584 N.W.2d 897 (Wis. Ct. App. 1998), rev'd, 595 N.W.2d 661 (Wis. 1999); Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651 (1993) (applying a relaxed standard).

107. *Cohen*, 888 F.2d at 777 (“When the defendant offers similar acts evidence of a witness to prove a fact pertinent to the defense, the normal risk of prejudice is absent.”); *Ivins*, 2010 U.S. Dist. LEXIS 63894, at *2.

which the accused is charged.¹⁰⁸ The SODDI defense 2.0 is a variation on that theme; here the accused presents evidence to show that the police failed to diligently investigate the guilt of a third party who plausibly committed the charged crime.¹⁰⁹ Although in the past, defense counsel, such as the late Johnny Cochran, have undeniably resorted to the 2.0 version of the defense, several questions remain. Have the courts formally recognized the defense? And, if so, what are the consequences—in particular, the evidentiary consequences—of the differences between the two versions of the defense?

A. *The Judicial Recognition of the SODDI Defense 2.0*

The year 2014 witnessed two significant decisions, one federal and one state, formally recognizing the defense. Indeed, the cases not only recognized the defense; they also gave the defense constitutional status and found constitutional error when a trial judge significantly curtailed the defense's efforts to develop the defense at trial.

1. *Alvarez v. Ercole*

Julio Alvarez faced New York state criminal charges for shooting and killing Daniel Colon.¹¹⁰ After his state court conviction, he filed a federal habeas corpus petition.¹¹¹ At the very beginning of the Second Circuit's opinion granting Alvarez relief, Judge Guido Calabresi briefly summed up the case:

Alvarez' defense strategy was to show that the New York City Police Department investigation had been incomplete in ways that created reasonable doubt that the government had proved its case against him. In support of this argument, Alvarez sought to cross-examine the lead detective to show that the police had not investigated leads provided by a witness, Edwin Vasquez, whose tips were memorialized in a detective's notes and an investigative DD5 report. The trial court prohibited Alvarez from pursuing this line of questioning¹¹²

The victim, Daniel Colon, was a local drug dealer.¹¹³ Colon had been meeting with two crack dealers, Manny Colon and Aramis Fournier, when a car pulled up near the three men.¹¹⁴ According to

108. *See supra* Part I (describing the traditional SODDI defense).

109. *Compare supra* Part I (describing the traditional SODDI defense), *with supra* Part II (addressing the SODDI defense 2.0).

110. *Alvarez v. Ercole*, 763 F.3d 223, 225 (2d Cir. 2014).

111. *Id.* at 229.

112. *Id.* at 225.

113. *Id.* at 226.

114. *Id.*

Manny and Fournier, the car was gold or silver.¹¹⁵ An occupant jumped out of the car and shot Daniel Colon.¹¹⁶ From her apartment, Margie Rodriguez heard the gunshots.¹¹⁷ When she looked down, she saw two men drive off in a gray car.¹¹⁸ On the day of the shooting neither Rodriguez nor Colon nor Fournier could identify the shooter or driver.¹¹⁹

The next day Manny told the police that he remembered that the shooter's name was Julio.¹²⁰ On the same day a Detective Monaco questioned Edwin Vasquez, who claimed to know about the murder.¹²¹ The detective recorded the information in informal notes and later transferred the information to a DD5 investigative report, the form that the New York Police Department ("NYPD") uses to document follow-up investigation after a complaint.¹²² According to the report, Vasquez told Monaco that on either the night of the shooting or the next morning, Vasquez's acquaintance, Julio, told Vasquez that he "took care of" his problem with a man who had argued with Julio's wife.¹²³ Julio told Vasquez that the man had insulted both Julio and his wife—a slight "that Julio would not 'let . . . lie.'"¹²⁴ The DD5 reflected that Vasquez gave the detective a phone number for Julio and directions to find Julio's home.¹²⁵

The police never called the phone number provided by Vasquez.¹²⁶ Nor did police attempt to locate the home Vasquez had mentioned. However, using this information, the defense was able to identify a Julio Guerrero who lived near the shooting side, was married, and drove a silver car.¹²⁷

Before trial, Detective Monaco retired.¹²⁸ At trial the prosecutor called Detective Alfred.¹²⁹ When the defense counsel began to question Alfred about the investigative leads in Monaco's DD5 report, the

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 226–27.

124. *Id.*

125. *Id.* at 227.

126. *Id.*

127. *Id.*

128. *Id.* at 228.

129. *Id.*

prosecution objected on hearsay grounds.¹³⁰ The trial judge sustained the objection.¹³¹ The judge forbade the defense counsel from questioning Alfred about the DD5.¹³² In addition, the trial judge ruled that the proposed line of inquiry “was barred by a state evidentiary rule requiring a ‘clear link’ between evidence implicating a culpable third party and the defendant’s charged crime.”¹³³ The jury convicted Alvarez of manslaughter and assault.¹³⁴ Both the New York Appellate Division and the New York Court of Appeals affirmed.¹³⁵

Alvarez then sought federal habeas corpus relief.¹³⁶ The district court granted relief, but the government appealed.¹³⁷ Writing for the Second Circuit, Judge Calabresi stated that “[w]e agree with the District Court that the [state] trial court’s decision to prohibit Alvarez from questioning Detective Alfred about the Vasquez DD5 was” not “a ‘reasonable limit[] on . . . cross-examination’”¹³⁸

Judge Calabresi reasoned that the state trial judge’s hearsay ruling was incorrect and that that ruling had led to the violation of Alvarez’s right to cross-examination under the Sixth Amendment.¹³⁹ The judge acknowledged that the references to Vasquez’s assertions would have constituted hearsay if the defense had relied on a traditional SODDI defense.¹⁴⁰ The judge stated that the hearsay ruling would have been sound if “Alvarez [had] offered the report as a means of establishing the truth of its content (i.e., that the ‘problem’ that Vasquez’s friend ‘Julio’ ‘had t[aken] care of’ was the murdered Dan Colon)”¹⁴¹ However, in Judge Calabresi’s view, the defense had made it clear to the trial judge that that was not the object of Alvarez’s cross-examination.¹⁴² Alvarez sought to demonstrate that the NYPD had failed to take even obvious, preliminary steps to investigate the leads that were generated by Vasquez’s interview—summarized in the Vasquez DD5.¹⁴³ Alvarez’s strategy, which defense counsel heralded during opening and

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 228–29.

136. *Id.* at 229.

137. *Id.*

138. *Id.*

139. *Id.* at 230–31.

140. *Id.*

141. *Id.* at 230.

142. *Id.* at 231.

143. *Id.*

emphasized in closing, was to show that the NYPD's incomplete investigation indicated that the NYPD had prematurely concluded that Alvarez was the guilty party, and that that raised a reasonable doubt that Alvarez was in fact responsible.¹⁴⁴

Judge Calabresi's hearsay analysis was sound. Even an assertive statement constitutes hearsay only if, at trial, it is offered to prove the truth of the matter asserted in the statement.¹⁴⁵ There are numerous legitimate non-hearsay theories. One is the so-called "mental input" theory: The statement is offered not for its truth but rather to show its effect on the state of mind of the hearer or reader.¹⁴⁶ Thus, a statement is admissible as non-hearsay if it is logically relevant to show that the hearer or reader received notice or learned of a particular fact.¹⁴⁷ The prosecution routinely invokes this theory when it asks the investigating officer to explain why he or she responded to the crime scene; the answer, of course, is a report that they received from the police dispatcher that a crime is in progress or has recently been committed.¹⁴⁸ By the same token, in *Alvarez* the defense counsel was attempting to show that Vasquez had provided investigative leads to the police—tips that they neglected to pursue.¹⁴⁹ The trial judge should have permitted the defense counsel to question Detective Alfred about the contents of the DD5 but, on request by the government, read the jury a limiting instruction about the evidentiary status of Vasquez's statements to Monaco.¹⁵⁰

However, Judge Calabresi's conclusion about the judge's erroneous hearsay ruling could not end the court's analysis.¹⁵¹ In the procedural setting of the case, a federal habeas corpus proceeding, the Second Circuit had to reach the further question of whether the trial judge's mistake amounted to a constitutional error; otherwise, a federal court cannot grant relief to a state prisoner.¹⁵² The court easily concluded that the error was of a constitutional dimension.¹⁵³ The judge's erroneous hearsay ruling "precluded Alvarez from fleshing out his main defense theory: that the police investigation into the murder was flawed and had

144. *Id.*

145. FED. R. EVID. 801(c).

146. 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 1004, at 10-17-24 (5th ed. 2011), LEXIS.

147. *Id.*

148. *Id.* § 1004, at 10-19-24.

149. *Id.*

150. FED. R. EVID. 105.

151. *Alvarez v. Ercole*, 763 F.3d 223, 232 (2d Cir. 2014).

152. *Id.* at 230-31.

153. *Id.* at 231.

improperly disregarded a promising alternate suspect.”¹⁵⁴ The essential thrust of the defense was “a serious lack of thoroughness in the police investigation.”¹⁵⁵ The trial judge’s error not only ran afoul of Supreme Court decisions such as *Delaware v. Van Arsdall*,¹⁵⁶ which protects the right to cross-examine under the Sixth Amendment’s confrontation clause.¹⁵⁷ The judge’s ruling was also at odds with the Court’s landmark 1973 decision, *Chambers v. Mississippi*,¹⁵⁸ safeguarding the accused’s implied Sixth Amendment right to present critical exculpatory evidence.¹⁵⁹

2. *State v. McCullar*

While the Second Circuit handed down its decision in *Alvarez* in August of 2014, the Utah Court of Appeals rendered its decision in *McCullar* in September.¹⁶⁰ As Part I of this Article noted, an accused can develop a SODDI defense in one of two ways: either proffering evidence of the third party’s direct involvement in the charged offense or attempting to introduce evidence of the third party’s commission of uncharged offenses similar to the charged crime.¹⁶¹ In *Alvarez*, the accused relied primarily on the first method.¹⁶² The defense pointed to the location of Julio Guerrero’s home, his marital status, his ownership of a silver car, and his alleged statements to Vasquez—facts that made him “a promising alternate suspect” and should have prompted the police to investigate his possible guilt more thoroughly.¹⁶³ In contrast, *McCullar* also utilized the second method, that is, marshaling evidence of the third party’s guilt of offenses that paralleled the charged crime.¹⁶⁴

Like *Alvarez*, *McCullar* was charged with murder.¹⁶⁵ The prosecution alleged that *McCullar* had slashed the throat of Filiberto Bedolla.¹⁶⁶ Like *Alvarez*, *McCullar* attempted to establish reasonable doubt by “demonstrat[ing] shortcomings in [the] police

154. *Id.* at 232.

155. *Id.*

156. 475 U.S. 673, 679–80 (1986).

157. *See generally id.*

158. *Chambers v. Mississippi*, 410 U.S. 284, 299–302 (1973).

159. *Alvarez*, 763 F.3d at 232. *See generally* EDWARD J. INWINKELRIED & NORMAN M. GARLAND, EXCULPATORY EVIDENCE: THE ACCUSED’S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE chs. 1–2 (3d ed. 2004).

160. *See State v. McCullar*, 335 P.3d 900 (Utah Ct. App. 2014).

161. *See supra* Part I.

162. *See supra* text accompanying note 110.

163. *Alvarez*, 763 F.3d at 232.

164. *McCullar*, 335 P.3d at 903-04.

165. *Id.* at 904.

166. *Id.* at 903.

investigation.”¹⁶⁷ More specifically, McCullar claimed that the police had not properly pursued leads pointing to the guilt of Dawna Finch, Bedolla’s girlfriend.¹⁶⁸

To substantiate his claim, McCullar employed both methods of the SODDI defense, suggesting Finch’s guilt. Initially, like Alvarez, McCullar submitted evidence of Finch’s involvement in the charged crime.¹⁶⁹ Bedolla had been found dead in his bed, and prior to the killing, there had been a picture of Finch on the headboard of the bed.¹⁷⁰ The picture was gone when Bedolla’s body was discovered.¹⁷¹ There was also evidence that Finch had threatened Bedolla “just before he was killed.”¹⁷² When the body was discovered, \$3000 of Bedolla’s money was missing,¹⁷³ and Finch suddenly had “a wad” of money the day after the killing.¹⁷⁴

But McCullar also wanted to present evidence of Finch’s character trait for violence. Two witnesses

told police that they had witnessed a violent outburst by Dawna Finch six to eight months before Bedolla was killed. In that attack, they reported, Finch pinned a man to a bed and held a pair of scissors to his throat in a dispute over drug money. Dawna was on a tangent and wanted money for drugs. The men told Dawna that they didn’t have any money and she got mad. Dawna tackled [one man] onto a bed and was choking him with one hand. In the other hand Dawna was holding a pair of scissors. Dawna threatened to kill [the man] unless they gave her money.¹⁷⁵

The appellate court characterized this incident as “an attack remarkably similar to the attack on Bedolla.”¹⁷⁶

The McCullar trial played out in much the same way as the Alvarez trial. From the outset, McCullar made it clear that his primary argument was that the “police failed to adequately investigate” Finch.¹⁷⁷ Their investigation of Finch had been inadequate.¹⁷⁸ McCullar contended that

167. *Id.* at 907.

168. *Id.* at 903–04.

169. *Id.*

170. *Id.* at 902.

171. *Id.*

172. *Id.* at 904.

173. *Id.* at 903.

174. *Id.* at 904.

175. *Id.* at 909.

176. *Id.*

177. *Id.* at 906.

178. *Id.* at 908.

the information provided the police constituted “credible tips.”¹⁷⁹ Those tips made Finch’s guilt sufficiently “plausible” that the police should have followed up on the tips more diligently.¹⁸⁰ The court concluded that rather than relying on a conventional SODDI defense, “McCullar’s efforts to raise a reasonable doubt of his guilt hinged on his failure-to-investigate theory.”¹⁸¹

At trial, McCullar’s defense counsel endeavored to develop the theory in much the same way as Alvarez’s had done. McCullar’s counsel attempted to elicit testimony about the contents of the oral reports, pointing to Finch, that the police had received.¹⁸² Like the government in *Alvarez*, the prosecutor in *McCullar* objected on hearsay grounds, and as in *Alvarez*, the trial judge sustained the objection.¹⁸³ The prosecution objected to any evidence of Finch’s other violent acts under the state version of Federal Rule 403 on the ground that the evidence was unduly prejudicial.¹⁸⁴ The trial judge accepted the prosecution argument and barred the evidence on that ground as well.¹⁸⁵

The appellate court found fault with both evidentiary rulings.¹⁸⁶ The court’s extended analysis of the hearsay rulings mirrored the Second Circuit’s analysis in *Alvarez*. The court ruled that testimony about the reports was admissible as non-hearsay.¹⁸⁷ McCullar’s attorney had made it quite clear on the record that the defense was not offering the reports for their truth, that is, “to prove that Dawna did it.”¹⁸⁸ In other words, the defense attorney articulated the 2.0 version of the SODDI defense. The court observed that given McCullar’s failure-to-investigate theory, the reports were relevant “‘because of [their] impact on the hearer,’” specifically, the police investigators.¹⁸⁹ The reports put the police on notice of “credible tips” which were then the investigators’ duty to pursue.¹⁹⁰

The court’s analysis of the admissibility of the testimony about Finch’s violent acts was relatively brief. On the facts, there was a strong argument that the testimony about Finch’s violent conduct

179. *Id.* at 907.

180. *Id.* at 912.

181. *Id.* at 908; *see also id.* at 906 (describing “McCullar’s failure-to-investigate theory”).

182. *Id.* at 905–08.

183. *Id.*

184. *Id.* at 908–09.

185. *Id.*

186. *Id.* at 912.

187. *Id.* at 905–06.

188. *Id.* at 906.

189. *Id.* at 905–06 n.4.

190. *Id.* at 906–07.

amounted to nothing more than propensity evidence inadmissible under Rule 404(b). On the facts, it is difficult to discern a non-character theory of logical relevance for the evidence of her attack on the other man. It is true that in both incidents, Bedolla's killing and the attack on the other man, the victim was on a bed and some cutting implement had been used.¹⁹¹ However, it is a stretch to contend that those facts make out a distinctive *modus operandi*¹⁹² or establish the existence of a common scheme or plan including Bedolla's killing as well as the other incident.¹⁹³

Yet, given the lack of a character objection premised on Rule 404, the appellate court discussed only the Rule 403 issue.¹⁹⁴ Under Rule 403, the trial judge balances the probative value of the item of evidence against any incidental dangers. On the plus side of the weighing process, the court characterized the probative value of the testimony as substantial because the other attack was "remarkably similar to the attack on Bedolla."¹⁹⁵ On the negative side of the calculus, the court attempted to distinguish the testimony from evidence of "gruesome photographs of a homicide victim's corpse" and "evidence of a rape victim's sexual promiscuity" that the court deemed more prejudicial.¹⁹⁶ The court added that like Federal Rule 403, the state version of the rule is biased in favor of admitting relevant evidence.¹⁹⁷ When striking the balance is a close call in the judge's mind, the rule mandates that the judge admit the evidence.

In *Alvarez*, after critiquing the trial judge's hearsay and cross-examination rulings, the procedural setting forced the Second Circuit to reach the constitutional issue.¹⁹⁸ *Alvarez* was a federal habeas corpus proceeding, and the court could not grant relief unless it found a constitutional error.¹⁹⁹ In contrast, *McCullar* was a direct appeal in state court.²⁰⁰ Nevertheless, the Utah court proceeded to address the question of whether the trial judge's hearsay and character rulings rose to the level of constitutional error.²⁰¹ The court explained that the resolution of that question affected the standard determining whether

191. *Id.* at 906.

192. IMWINKELRIED, *supra* note 75, §§ 3:12 to 3:13.

193. *Id.* §§ 3:21 to 3:23.

194. *See McCullar*, 335 P.3d at 909.

195. *Id.* at 908–10.

196. *Id.* at 909 n.8.

197. *Id.* at 909.

198. *Alvarez v. Ercole*, 763 F.3d 223, 232–34 (2d Cir. 2014).

199. *Id.* at 229.

200. *See McCullar*, 335 P.3d at 901.

201. *Id.*

the court would reverse.²⁰²

When the court turned to the constitutional question, as in *Alvarez* the court concluded that the trial judge had violated the accused's right to present a defense.²⁰³ The court noted some of the same Supreme Court precedents that *Alvarez* had relied on.²⁰⁴ The Utah court specifically cited *Washington v. Texas*²⁰⁵ and *Chambers*,²⁰⁶ the seminal Supreme Court decisions enunciating the existence of the accused's Sixth Amendment right to present vital exculpatory testimony.²⁰⁷ Due to the trial judge's erroneous rulings, by closing argument the defense was relegated to "vague references to a third party's possible guilt or an incomplete police investigation."²⁰⁸ McCullar had been denied a "meaningful opportunity to present" his defense based on the failure-to-investigate theory.²⁰⁹

B. The Evidentiary Differences Between the Original SODDI Defense and the SODDI Defense 2.0

At this point, it should be evident that there are important differences between the evidentiary implications of the two theories.

1. Hearsay

Both *Alvarez* and *McCullar* highlighted the differing hearsay analyses under the two theories. When a defense counsel relies on the traditional SODDI theory, he or she is contending that the third party actually committed the charged offense. When the defense proffers the testimony about the third party's acts, the relevance of the testimony is conditioned on a showing of the third party's identity as the actor. Federal Rules of Evidence 104(a)–(b) govern the proof of such foundational or preliminary facts. In pertinent part, they read:

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

202. *Id.* at 910–12.

203. *Id.* at 912.

204. *Id.* at 911.

205. *Id.* (citing *Washington v. Texas*, 388 U.S. 14 (1967)).

206. *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

207. See IMWINKELRIED & GARLAND, *supra* note 159, at chs. 1–2.

208. *McCullar*, 335 P.3d at 912.

209. *Id.*

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.²¹⁰

When the relevance of an act depends on the identity of the actor, as it does here, Rule 104(b) governs.²¹¹ While under 104(a) the technical exclusionary rules such as hearsay do not apply to foundational testimony, the rules apply with full force when 104(b) controls. The Advisory Committee Note to Rule 104 explicates the rationale for the difference between the two provisions.²¹² The conventional wisdom is that the common-law courts evolved exclusionary rules such as hearsay because they doubted the competence of lay jurors to critically assess the weight of such testimony. However, under Rule 104(a) the decision maker is a judge.²¹³ If the exclusionary doctrines are “jury-protecting” rules but there is no jury in sight, it makes no sense to apply the rules. However, ultimately the jury makes the decision under Rule 104(b). If, for example, the judge finds that there is sufficient evidence to support a finding that a lay witness has personal knowledge of a fact,²¹⁴ the judge admits the testimony, and the jury makes the final decision whether to believe that the person actually witnessed the fact or event. If the jury must do so, it is justifiable to apply the jury-protecting rules such as hearsay to the foundational testimony.

When the defense counsel is presenting a traditional SODDI defense, he or she is contending that the third party actually committed the charged offense. On that assumption, any statements tending to show the third party’s guilt are being offered for their truth. The statements are not only assertive under Federal Rule of Evidence 801(a),²¹⁵ they

210. FED. R. EVID. 104.

211. See *Huddleston v. United States*, 485 U.S. 681 (1988); Edward J. Imwinkelried, *Determining Preliminary Facts Under Federal Rule 104*, in 45 AM. JUR. TRIALS § 24 (1992); see also CAL. EVID. CODE § 403(a)(4) (“The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to support a finding of the existence of the preliminary fact, when . . . [t]he proffered evidence is of . . . conduct of a particular person and the preliminary fact is whether the person . . . so conducted himself.”). The Advisory Committee’s Note to Federal Rule 104(b) states that the federal drafters used § 403 as their model.

212. FED. R. EVID. 104 advisory committee’s note.

213. FED. R. EVID. 702 advisory committee’s note.

214. Federal Rule of Evidence 602 governs the sufficiency of the proof of a lay witness’s personal or firsthand knowledge. Rule 602 incorporates the 104(b) standard: “A witness may testify to a matter if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony.” FED. R. EVID. 602. The 104(b) standard also controls the sufficiency of authentication evidence. Like Rule 602, Rule 901(a) incorporates the 104(b) standard.

215. FED. R. EVID. 801.

are also being put to a hearsay use under Rule 801(c).²¹⁶ If so, the statements constitute hearsay, and they cannot be admitted as substantive evidence to support a traditional SODDI defense unless the proponent demonstrates that they fall within a hearsay exemption in Rule 801 or an exception stated in Rules 803, 804, or 807.²¹⁷

However, the hearsay analysis is radically different when the defense counsel presents a SODDI defense 2.0. The defense is no longer offering the statements to the police in order to prove the truth of the assertions in the statements. Rather, the defense is merely trying to prove that the statements were made to the police. The statements constitute the investigative tips that the police received. It is the failure of the police to pursue the tips that creates the reasonable doubt under the SODDI defense 2.0. As both *Alvarez* and *McCullar* correctly concluded, under a SODDI defense 2.0 the statements are “mental input” that are relevant to show their effect on the state of mind of the hearer.²¹⁸ The statements qualify as non-hearsay under Rule 801(c).²¹⁹ The judge should admit the statement over a hearsay objection but, on the prosecutor’s request, administer a limiting instruction to the jury under Rule 105.²²⁰

2. Character

Just as the hearsay analysis under the traditional SODDI theory differs profoundly from the analysis under the SODDI defense 2.0, the character evidence analysis under the traditional theory is fundamentally distinct from the analysis under the SODDI defense 2.0.

Assume that the defense has elected to rely on a traditional defense. In addition, suppose that as in *McCullar*,²²¹ the defense has decided to attempt to substantiate the defense by showing that the third party has committed other offenses similar to the charged crime. Unless there are additional facts triggering a legitimate non-character theory of logical relevance such as proof that the charged and uncharged crimes share a distinctive, one-of-a-kind modus operandi,²²² the testimony amounts to character evidence pure and simple. The defense is arguing, at least implicitly, that the testimony shows that the third party has a disposition

216. *Id.*

217. FED. R. EVID. 801, 803, 804, 807.

218. *See generally* *Alvarez v. Ercole*, 763 F.3d 223 (2d Cir. 2014); *State v. McCullar*, 335 P.3d 900 (Utah Ct. App. 2014).

219. FED. R. EVID. 801(c).

220. FED. R. EVID. 105.

221. *See generally* *McCullar*, 335 P.3d 900.

222. *IMWINKELRIED*, *supra* note 75, §§ 3:12 to 3:14.

or propensity for similar conduct and, in turn, that inference increases the probability that on the charged occasion the third party acted “in character”—and committed the crime that the accused is charged with. Federal Rule of Evidence 404(b)(1) prohibits the proponent from relying on that theory.²²³ Thus, Rule 404(b)(1) prevents the defense from introducing the testimony about the third party’s uncharged misconduct on that theory to support a traditional SODDI defense. The defense is trying to do precisely what the rule forbids: the defense is offering the evidence “to prove [the third party’s] character in order to show that on a particular occasion the [third party] acted in accordance with the character.”²²⁴

Alternatively, assume that the defense has selected a SODDI defense 2.0. When the defense relies on this version of the defense and offers testimony about the investigators’ receipt of reports about similar, uncharged crimes by the third party, there is no violation of Rule 404(b)(1). By its terms, Rule 404(b)(1) applies only when the proponent offers testimony about a person’s uncharged misconduct to support the ultimate inference “that on a particular occasion, the person acted in accordance with the character.”²²⁵ The prohibition codified in Rule 404(b)(1) does not come into play when the proponent offers the testimony to support a different ultimate inference.²²⁶

Two hypotheticals in which the accused claims self-defense illustrate the point. In both cases, the accused claims self-defense. In the first variation, although the alleged victim had committed prior violent acts, the accused did not learn of the acts until after the fatal encounter. In that situation, if the accused attempted to offer the evidence, the accused would have to rely on a chain of character reasoning: the alleged victim acted violently before, that conduct shows his or her disposition toward violent conduct, and ultimately that disposition increases the probability that the alleged victim was the aggressor at the time of the encounter with the accused.²²⁷ While some jurisdictions have carved out an exception to the character evidence prohibition for such evidence in self-defense cases, many jurisdictions apply the prohibition and bar the evidence.²²⁸

Contrast the second hypothetical. With one exception, the facts are identical to those in the first but in the second hypothetical the accused

223. FED. R. EVID. 404(b)(1).

224. FED. R. EVID. 404.

225. *Id.*

226. IMWINKELRIED, *supra* note 75, § 2:22.

227. IMWINKELRIED ET AL., *supra* note 146, § 806.

228. *Id.*

had heard about the victim's violent acts before the encounter. In this situation, courts uniformly allow the accused to introduce testimony about the victim's prior violence, not to prove the alleged victim's conduct but, rather, to show the accused's state of mind.²²⁹ This rule is sometimes referred to as the "communicated character" doctrine.²³⁰ The accused's earlier receipt of information about the alleged victim's violent behavior tends to support the accused's claim that he or she had a subjectively honest,²³¹ and objectively reasonable²³² belief that they were in danger and needed to resort to self-defensive force.

The second hypothetical is analogous to a situation in which, to support a SODDI 2.0 defense, the accused offers testimony that the police received reports about the third party's misconduct similar to the charged offense. In Fourth Amendment cases where the question is whether the police possessed probable cause, the cases permit the officers to testify that before the arrest or search, they had received reports about the suspect's prior, similar misconduct.²³³ The officer's receipt of the report helps enable the officer to form a belief (probable cause) that justifies a certain investigatory step, that is, an arrest or search. By the same token, after the officer receives a report about the third party's similar misconduct, the officer's knowledge should prompt the officer to diligently investigate the third party's possible guilt of the charged crime. Both here and in the second hypothetical, the ultimate inference is state of mind rather than the conduct of the person who is the subject of the report. In both situations, the trial judge may admit testimony about the reports without violating the character evidence

229. See, e.g., *United States v. Gregg*, 451 F.3d 930, 935–36 (8th Cir. 2006) ("Evidence of specific instances of a victim's prior violent conduct for purposes of proving a defendant's state of mind . . . is only admissible to the extent a defendant establishes knowledge of such prior violent conduct at the time of the conduct underlying the offense charged."), *cert. denied*, 133 S. Ct. 2338 (2013); see also *Smith v. Dretke*, 417 F.3d 438, 441–42 (5th Cir. 2005) (explaining that the evidence is relevant to the reasonableness of the defendant's belief in a self-defense case if the defendant had some knowledge of the alleged victim's past violent behavior at the time of the homicide); *Socha v. Wilson*, 477 F. Supp. 2d 809, 820 (N.D. Ohio 2007) ("It has been well established that specific instances of a deceased's prior conduct, as well as the perpetrator's knowledge of the deceased's reputation for violence, were admissible to establish subjective state of mind."); FED. R. EVID. 404 advisory committee's note (stating that the normal character evidence restrictions are inapplicable when the incidents demonstrating the alleged victim's violent character were "known by the accused" before the encounter); Stephen Saltzburg, *Self-Defense and the Rules of Evidence*, 14 CRIM. JUST. 46, 48 (2000).

230. *Ex parte Miller*, 330 S.W.3d 610, 618 (Tex. Crim. App. 2009).

231. *Socha v. Wilson*, 477 F. Supp. 2d 809, 820 (N.D. Ohio 2007).

232. See generally *Dretke*, 417 F.3d 438.

233. *IMWINKELRIED ET AL.*, *supra* note 146, § 1911 (citing *United States v. Harris*, 403 U.S. 573 (1971); *El-Amin v. Commonwealth*, 607 S.E.2d 115 (Va. 2005); *State v. Jones*, 846 A.2d 569, 577 (N.J. 2004)); see also *State v. Ruff*, 967 P.2d 742 (Kan. 1998).

prohibition in Rule 404(b)(1). Again, on the prosecutor's request, the judge should give the jury a limiting instruction under Rule 105.

III. A CRITICAL EVALUATION OF THE LEGITIMACY OF THE SODDI DEFENSE 2.0

Part II noted the significant differences between the traditional SODDI defense and the emerging, 2.0 version of the defense.²³⁴ In many respects, the 2.0 version of the defense is understandably more attractive to the accused: the 2.0 version seems to require less evidence of the third party's guilt, and the proffered evidence is less vulnerable to hearsay and character objections by the prosecution.²³⁵ However, precisely because the restrictions on the 2.0 version of the defense are so seemingly lax, prosecutors may object that the defense is illegitimate and that the courts should recognize only the traditional version of the defense.

It is clear that trial judges sometimes permit defense counsel to rely on the 2.0 version of the defense. As the introduction noted, the defense did so in the O.J. Simpson prosecution in Los Angeles in 1995.²³⁶ There, the defense claimed that the police had overlooked evidence pointing to a killer other than O.J. Simpson.²³⁷ Moreover, in cases in which the prosecution relies heavily on scientific evidence to establish the accused's guilt, the defense often makes a parallel argument: "the path not taken."²³⁸ For instance, suppose that the accused is charged with possession of a contraband drug. A government forensic chemist testifies to the identity of the substance found in the accused's possession, but he or she concedes that they relied on a non-specific test prone to false positives. In that circumstance, the defense frequently endeavors to generate reasonable doubt by pointing out that the government expert did not employ gas chromatography/mass spectrometry, the "gold standard of drug testing."²³⁹ "[T]he omitted test

234. See *supra* Part II (addressing the SODDI defense 2.0).

235. *Id.*

236. *Id.*

237. Nelson, *supra* note 1.

238. EDWARD J. IMWINKELRIED, THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE § 10-8, at 361-67 (5th ed. 2014).

239. There is a detailed discussion of gas chromatography/mass spectrometry ("GC" and "MS") in 2 PAUL C. GIANNELLI, EDWARD J. IMWINKELRIED, ANDREA ROTH & JANE CAMPBELL, MORIARTY, SCIENTIFIC EVIDENCE §23.03[c] (5th ed. 2012), LEXIS. GC is a separation technique. Once the gas chromatograph separates the components of the unknown, the mass spectrometer fragments the components and specifically identifies each component. The United States Supreme Court has stated that the identification of an unknown, based on GC/MS analysis, is "highly accurate." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 673 n.2 (1989).

could be the source of the doubt the defense needs to create in order to win an acquittal.”²⁴⁰ The defense argues that there is reasonable doubt because, if the omitted test had been conducted, the result might have shown that the substance was perfectly lawful.

Decisions such as *Alvarez* and *McCullar* will obviously pressure trial judges to rely on the SODDI defense 2.0. The question is whether judges should do so. In order to answer that question, we must address the potential prosecution objections to the legitimacy of the defense.

A. *Objection #1: As a Matter of Law, the Inferences Supported by the Defense Are Too Speculative to Create Reasonable Doubt*

At first blush, this objection seems plausible. A prosecutor might urge that the objection that the inferences arising from the SODDI defense 2.0 are simply too conjectural to generate reasonable doubt. The 2.0 version of the defense requires the trier of fact to engage in more speculation than the traditional version of the doctrine.²⁴¹ The 2.0 version of the doctrine invites the jurors to conjecture as to what an investigation into the third party’s possible guilt might have yielded. Moreover, in a given case, in applying the beyond a reasonable doubt standard, a jury certainly might refuse to find reasonable doubt. However, the question is not whether the judge should require the jury to accept the SODDI defense 2.0 and direct an acquittal. Rather, the question is whether the defense is relevant enough to the jury’s inquiry that the judge ought to permit the defense to submit the argument to the jury.

It is submitted that the answer to the latter question is “Yes.” Cognitive psychology and jury decision-making studies indicate that during deliberations, juries arrive at a verdict by assessing the relative plausibility of competing accounts of the litigated events.²⁴² The trier compares the competing propositions tendered by the opposing litigants.²⁴³ In evaluating the persuasiveness of each proposition, the

240. GIANNELLI ET AL., *supra* note 239, §§ 10-8[c][ii], 10-26-27.

241. *Id.*

242. Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 87 NW. U. L. REV. 604–05 (1994); *see also* Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 224–25 (2008); Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 596–99 (2013) (discussing alternative explanations); William Twining, *Narrative and Generalizations in Argumentation About Questions of Fact*, FESTSKRIFT TILL STIG STROMHOLM 821, 824–25 (1997) (stating that there is “compelling evidence that in practice jurors and other triers of fact reach judgments about particular past events by assessing the plausibility of stories. Jurors, in it said, proceed ‘holistically’ by comparing competing stories . . .”).

243. 1 COLIN AITKEN, PAUL ROBERTS & GRAHAM JACKSON, FUNDAMENTALS OF

trier considers the gaps in the body of evidence supporting the proposition.²⁴⁴ As Judge Posner has observed, in deciding whether there is a gap and, if so, how much significance to ascribe to the existence of the gap, the trier must speculate as to what a reasonable investigation might have produced.²⁴⁵

Perhaps the best analogy is to the courts' treatment of testimony about differential diagnosis and etiology. When an expert testifies to a differential diagnosis, he or she uses process-of-elimination reasoning to determine the patient's illness.²⁴⁶ When the expert opines based on a differential etiology, the expert employs the same mode of reasoning to identify the most likely cause of the patient's condition.²⁴⁷ What conditions do the courts impose before admitting such testimony? On the one hand, the courts do not demand that the expert thoroughly explore every possible illness or cause.²⁴⁸ On the other hand, the courts insist that the expert undertake a serious²⁴⁹ investigation of at least the obvious,²⁵⁰ plausible,²⁵¹ alternative²⁵² explanations.

PROBABILITY AND STATISTICAL EVIDENCE IN CRIMINAL PROCEEDINGS 38 (Royal Stat. Soc'y 2010).

244. D.H. Kaye, *Do We Need a Calculus of Weight to Understand Proof Beyond a Reasonable Doubt?*, 66 B.U. L. REV. 657, 658, 664, 666 (1986).

245. *United States v. Veysey*, 334 F.3d 600, 605 (7th Cir. 2003) (Posner, J.) (stating that the trier may conclude that evidence that should naturally be available is missing because the litigant "has simply not bothered to conduct an investigation"), *cert. denied*, 540 U.S. 1129 (2004).

246. Edward J. Imwinkelried, *The Admissibility and Legal Sufficiency of Testimony About Differential Diagnosis (Etiology): Of Under- and Over-Estimations*, 56 BAYLOR L. REV. 392, 401-02 (2004); *see Stanley v. Novartis Pharm. Corp.*, 11 F. Supp. 3d 987, 996-1002 (C.D. Cal. 2014).

247. Imwinkelried, *supra* note 246, at 402-05; *see also Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765, 765-70 (7th Cir. 2014); GIANNELLI ET AL., *supra* note 239, § 20.06[gb], at 358-62.

248. *Bee v. Novartis Pharm. Corp.*, 18 F. Supp. 3d 268, 306 (E.D.N.Y. 2014) ("[W]hile an expert need not rule out every potential cause in order to satisfy *Daubert*, the expert's testimony must at least address obvious alternative causes and provide a reasonable explanation for dismissing specific alternate factors identified by the defendant."); *In re Digitek Prod. Liab. Litig.*, 821 F. Supp. 2d 822, 838 (S.D.W. Va. 2011) ("[F]ailure to account for all possible causes does not render expert opinion based on differential diagnosis inadmissible; only if [the] expert utterly fails to consider alternative causes or fails to explain why the opinion remains sound in light of alternative causes suggested by the opposing party is [the] expert's opinion unreliable for failure to account for all potential causes." (quoting *Westberry v. Gislated Gummi AB*, 178 F.3d 257, 265-66 (4th Cir. 1999))), *reconsideration denied*, No. 2:08-md-01968, 2010 WL 5396377 (S.D.W. Va. Oct. 20, 2010).

249. Gary Sloboda, *Differential Diagnosis or Distortion?*, 35 U.S.F. L. REV. 301, 310 (2001).

250. There is a new Advisory Committee Note accompanying the 2000 amendment to Federal Rule of Evidence 702. The Note states: "Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include . . . [w]hether the expert has adequately accounted for obvious alternative explanations." FED. R. EVID. 702 advisory committee's note (citing *Clair v. Burlington N.R.R.*, 29 F.3d 499, 501-02 (9th Cir. 1994), and *Ambrosini v. Labarraque*, 101 F.3d

In the case of testimony about a differential diagnosis or etiology, the expert's failure to seriously investigate plausible alternative explanations renders the expert's testimony inadmissible. In the present context, the accused is arguing that the police failed to undertake a serious investigation of a third party who was a plausible suspect. If the parallel to differential diagnosis and etiology continued, the accused would argue that the police failure renders the prosecution case legally insufficient and requires a judgment of acquittal. However, the accused is seeking much less drastic relief than a peremptory ruling. Instead of moving for a judgment of acquittal,²⁵³ the accused is merely seeking permission to (1) present evidence supporting the defense to the jury and (2) argue to the jury that the police failure creates a lingering, reasonable doubt about the accused's guilt. If a failure to adequately investigate plausible alternative explanations can render a differential diagnosis altogether inadmissible, the relief the accused seeks appears modest and reasonable.

However, further analysis indicates that there are some situations in which the accused should not be entitled to even that relief or in which the prosecution ought to have the right to present rebuttal evidence.

1. There Were Multiple Perpetrators

Assume that the other evidence in the case establishes that there was only one perpetrator: the victim testifies that there was only one assailant, an automated surveillance video shows a solitary burglar, or there was only one set of footprints approaching and then leaving the victim's residence. In those situations, proof of a third party's guilt establishes the accused's innocence.²⁵⁴ In procedural parlance, in this fact pattern the accused's hypothesis of a third party's guilt is "an element-negating traverse."²⁵⁵ If there is only one perpetrator, proof of a third party's guilt necessarily negates an essential element of the

129 (D.C. Cir. 1996)).

251. Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, 64 LAW & CONTEMP. PROBS. 107, 128 (2001).

252. *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1309 (11th Cir. 2014); *Goebel v. Denver & Rio Grande W.R.R. Co.*, 346 F.3d 987, 999-1000 (10th Cir. 2003).

253. *Jackson v. Virginia*, 443 U.S. 307 (1979), governs when the accused makes such a motion. The accused has the difficult task of persuading the judge or court that given the state of the record, any rational juror would necessarily have a reasonable, lingering doubt about the accused's guilt. It is one thing to convince a juror that there is such a doubt. It is quite a different matter to convince a judge or court that there is necessarily such a doubt.

254. *E.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 297 (1973).

255. *People v. Pickering*, 276 P.3d 553, 556 (Colo. 2011), *cert. denied*, 132 S. Ct. 2429 (2012).

prosecution's case against the accused. The hypotheses of the accused's guilt and that of the third party are mutually exclusive; simply stated, if one is true, the other must be false.

Several cases discussing the SODDI defense have made the point that in multiple perpetrator cases, the police failure to investigate a third party's guilt does not undermine the prosecution's case to the same extent that it does when there is a single perpetrator. The guilt of the third party might be completely consistent with the accused's guilt. In one multiple perpetrator case, the court asserted that proof of a similar rape by a third party did not suffice to raise a reasonable doubt about the accused's guilt.²⁵⁶ In a second multiple perpetrator situation, the court declared that proof of the third party's guilt would "in no way negate[] or diminish[] the defendant's culpability as the actual shooter."²⁵⁷ In a third case, the court excluded evidence of a third party's flight for the stated reason that it had little probative value "where, as here, there can be more than one guilty party."²⁵⁸

It would be an overstatement in these cases to dismiss the evidence of the third party's guilt as absolutely irrelevant. There is always the possibility that when the police tracked down the third party, he or she would not only confess their guilt but also establish the accused's innocence. However, the third-party culpability evidence has considerably less probative value in multiple perpetrator cases. When the other evidence in the case clearly demonstrates that there were multiple perpetrators, the trial judge should at least have a measure of discretion under Rule 403 in determining the admissibility of testimony to support a SODDI defense 2.0.

2. The Third Party Was Not a Plausible Suspect

Now assume that there was only one perpetrator. Even in this situation, there ought to be limits on the availability of the SODDI defense 2.0. If the police conduct anything approaching a thorough investigation of a serious felony, the investigation is likely to turn up tens or hundreds of names—the victim's relatives, neighbors, coworkers, and acquaintances. The police have limited time and resources, and it would be unreasonable to expect them to thoroughly

256. *People v. Avila*, 133 P.3d 1076, 1136 (Cal. 2006), *modified* (Aug. 2, 2006), *cert. denied*, 549 U.S. 1306 (2007).

257. *People v. Vines*, 251 P.3d 943 (Cal. 2011), *modified* (Aug. 10, 2011), *cert. denied*, 132 S. Ct. 1539 (2012).

258. *United States v. Bollin*, 264 F.3d 391, 413 (4th Cir.), *cert. denied sub nom. Tietjen v. United States*, 534 U.S. 935 (2001); *see also Allen v. State*, 103 A.3d 700, 711 (Md. 2014) ("the incident involved multiple persons").

investigate the possible guilt of every person whose name surfaced. The SODDI defense 2.0 pressures the police to spend precious time and resources investigating third parties; and in deciding when the defense is apropos, courts should distinguish among the possible, the probable, and the plausible.²⁵⁹

At one extreme, it should not suffice that there is a bare possibility of the third party's guilt of the crime charged. Again, it would be objectively unreasonable to expect the police to investigate every person whose name is mentioned in passing during the investigation. That standard would be undesirable as a matter of criminal justice policy, since it would pressure the police to waste time and resources.

At the other extreme, the accused should not be required to demonstrate that the police had sufficient information to establish the probability of the third party's guilt.²⁶⁰ Ultimately, the government has the burden of proving the accused's identity as the perpetrator beyond a reasonable doubt.²⁶¹ In Judge Weinstein's famous survey of his colleagues' understanding of "proof beyond a reasonable doubt," most of the federal district court judges responded that the standard required the establishment of a probability of guilt at least exceeding 75%.²⁶² In a single perpetrator situation in which proof of the third party's guilt exonerates the accused, in principle, the allocation of the ultimate burden of proof to the government should preclude requiring the accused to establish a 50% probability of the third party's guilt.²⁶³

In contrast to either possibility or probability, plausibility is an appropriate standard. In *McCullar*, the court held that the accused has a right to present an exculpatory story when it is "plausible."²⁶⁴ The facts of *McCullar* and *Alvarez* exemplify the sort of facts that the defense

259. The Supreme Court drew the same distinction in another context. In its landmark pleading decisions, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court distinguished among pleaded facts that possibly establish liability, those that would probably establish fault, and those sufficient to plausibly point to liability. The Court ruled that to be legally sufficient to withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must state "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678; see *Abuhamdan v. Blyth, Inc.*, 9 F. Supp. 3d 175, 187 (D. Conn. 2014); *Quinn v. Walgreen*, 958 F. Supp. 2d 533, 541 (S.D.N.Y. 2013).

260. See generally *People v. Hall*, 718 P.2d 99 (Cal. 1986), *reh'g denied*, (June 26, 1986).

261. See *id.*

262. *United States v. Fatico*, 458 F. Supp. 388, 403–04, 411 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

263. See Edward J. Imwinkelried, *The Reach of Winship: Invalidating Evidentiary Admissibility Standards That Undermine the Prosecution's Obligation to Prove the Defendant's Guilt Beyond a Reasonable Doubt*, 70 UMKC L. Rev. 865, 871–72, 880–81 (2002).

264. *State v. McCullar*, 335 P.3d 900, 912 (Utah Ct. App. 2014).

must present in order to demonstrate that a third party was a plausible suspect.²⁶⁵ In *Alvarez*, the defense evidence took the form of both motive and opportunity to commit the charged crime: Julio Guerrero evidently thought that Colon had argued with Guerrero's wife,²⁶⁶ and Guerrero lived near the site of the shooting.²⁶⁷ In Judge Calabresi's words, when the police received reports containing those facts, that information should have made Guerrero "a person of interest" in their minds.²⁶⁸ In *McCullar*, the defense's evidence included testimony relating to both motive and Finch's commission of an uncharged crime "remarkably similar"²⁶⁹ to the charged crime: she wanted money for drugs,²⁷⁰ and she had previously assaulted another man by shoving him onto a bed and threatening to slash him with a pair of scissors.²⁷¹ When the police gained that information, they had a "credible tip[]" that they should have pursued more diligently.²⁷²

The *McCullar* court used apt language when it stated that the accused had succeeded in "rais[ing] an evidence-based doubt" about Finch's guilt.²⁷³ In a single perpetrator case, when the accused shows that the police had reports indicating that the third party had a strong motive to commit the charged crime, an opportunity to do so shared by only a few persons, or a unique means to perpetrate the crime, the third party is not merely one of "the usual suspects" in the grand tradition of *Casablanca*.²⁷⁴ Without more those facts might not suffice to support a traditional SODDI defense,²⁷⁵ but they give the police good reason to spend time and resources investigating the third party's potential guilt of the charged crime.

3. In Retrospect, It Is Clear that the Third Party Did Not Commit the Charged Crime

Assume *arguendo* that before trial the police received a report containing sufficient facts about a third party to make it reasonable for them to investigate the third party's guilt. On that assumption, the

265. See generally *People v. Pickering*, 276 P.3d 553 (Colo. 2011), *cert. denied*, 132 S. Ct. 2429 (2012).

266. *Alvarez v. Ercole*, 763 F.3d 223, 226–27 (2d Cir. 2014).

267. *Id.* at 227.

268. *Id.* at 231.

269. *McCullar*, 335 P.3d at 909.

270. *Id.* at 903–05, 909.

271. *Id.* at 909–10 (referencing "a similar altercation only months before Bedolla's murder").

272. *Id.* at 907.

273. *Id.* at 908.

274. *Id.* at 907.

275. See *supra* text accompanying notes 55–62.

accused is entitled to rely on a SODDI defense 2.0 at trial. However, even on that assumption, an error by the police would be harmless if a thorough investigation would have yielded the conclusion that the third party was innocent. If the police sense that the accused intends to mount a SODDI defense 2.0, it would be permissible for them to conduct that investigation after the fact. It should be immaterial whether the police conducted that investigation before or after the filing of charges. Whatever the timing of the investigation, the results of the investigation would effectively rebut the SODDI defense 2.0 if the investigation demonstrated the third party's innocence.

In a given case, though, there may have been such a lengthy delay between the commission of the charged crime and the subsequent police investigation that the prosecution evidence of the investigation does not fully rebut the SODDI defense. If there was a substantial time lapse, evidence of the third party's guilt may have been lost. In that situation, the accused should still be permitted to raise the SODDI defense 2.0. In any event, the initial, unreasonable police failure to investigate could still be logically relevant and admissible to show the bias of any investigator who testified at trial.²⁷⁶

B. Objection #2: It Is Wrong-Minded to Recognize a SODDI Defense 2.0 with Such Minimal Requirements

As an alternative objection, a prosecutor might urge that the requirements for the SODDI defense 2.0 are unduly minimal compared to the requirements for the traditional SODDI defense. Part I described the traditional SODDI defense in which the accused proffers evidence that a third party committed the crime that the accused is charged with. As we saw in Part I, the case law on the traditional defense generally requires the accused to present a certain quantum of proof of the third party's involvement in the charged crime. In particular, Part I noted that courts routinely hold that without more, proof of neither the third party's motive nor his or her opportunity suffices to support the traditional defense; the trial judge can exclude the defense evidence.²⁷⁷ The cases also limit the types of evidence that the accused may rely on.²⁷⁸ To begin with, courts apply the hearsay rule to reports about the

276. *United States v. Abel*, 469 U.S. 45, 50–51 (1984) (showing that although Article VI of the Federal Rules of Evidence makes no mention of bias impeachment, it is still permissible to use that impeachment technique in federal practice; the credibility of witnesses is a fact of consequence under Federal Rule 401, and Rule 402 is therefore adequate authorization for the continued use of the impeachment technique).

277. *See supra* Part I.

278. *Id.*

third party because the accused is offering the reports for their truth, that is, to prove that in fact the third party perpetrated the charged offense.²⁷⁹ Moreover, when the accused tries to introduce evidence that the third party committed other offenses similar to the charged crime, courts enforce the character evidence prohibition.²⁸⁰ The accused may not use the evidence as a basis for inferring the third party's propensity to commit offenses similar to the charged crime; instead, the accused must identify a non-character theory of logical relevance to satisfy Federal Rule of Evidence 404(b)(2).

Part II compared and contrasted the SODDI defense 2.0. In this version of the defense, the accused makes a more limited contention; the accused asserts that reasonable doubt exists because the police neglected to adequately investigate reports pointing to the third party's guilt.²⁸¹ Part II pointed out that proof of either the third party's motive or opportunity could arguably suffice to make the third party a person of interest whom the police should investigate.²⁸² Furthermore, Part II explained that the defense evidence proffered to support the SODDI defense 2.0 does not face the same hearsay and character hurdles that handicap the traditional defense.²⁸³ The defense testimony about the reports submitted to the police is non-hearsay under Rule 801(c). The defense offers the testimony for the limited purpose of showing the effect of the reports on the state of mind of the police investigators; having received the reports, the police should have been motivated to probe the third party's possible guilt of the charged crime. In addition, the testimony is not subject to the character evidence prohibition that restricts the traditional SODDI defense. Under the 2.0 version of the defense, the ultimate inference is not the third party's conduct; the accused is not proffering the reports to show that the third party acted in conformity with a disposition toward criminal conduct. Rather, as in "communicated character" self-defense cases in which the accused has received reports about the alleged victim's violent character, the ultimate inference is state of mind: the officer's receipt of the report ought to put the officer on notice that the third party is a person of interest who should be investigated.²⁸⁴

This state of the law might strike a prosecutor as paradoxical—or even nonsensical. A traditional SODDI defense has more probative

279. *Id.*

280. *Id.*

281. *See supra* Part II.

282. *Id.*

283. *Id.*

284. *See supra* notes 229–32 and accompanying text.

value in establishing the accused's innocence. When the accused can make out that defense, the accused has admissible evidence tending to show the third party's guilt. In contrast, when an accused relies on the SODDI defense 2.0, the accused may not have a shred of admissible evidence of the third party's guilt. The accused may have only out-of-court reports that the third party was involved in the charged crime or perpetrated a similar, uncharged offense. A prosecutor might protest that it is absurd to shackle the more probative theory with relatively strict requirements while permitting the accused to invoke a weaker defense that is largely free of such restrictions.

On reflection, however, this state of the law—in particular, the differential treatment of the traditional SODDI defense and the 2.0 version—is rational and defensible.

It is true that a traditional defense lends stronger support to the hypothesis that the accused is innocent. A SODDI defense 2.0 is inherently more speculative, since the jury must conjecture as to what an investigation of the third party's guilt would have revealed. However, there is nothing fallacious about concluding that like a traditional defense, the 2.0 version of the defense can generate reasonable doubt. Although it is impermissible for the judge or attorneys to quantify the beyond a reasonable doubt standard for the jury,²⁸⁵ there is a general understanding among experienced trial judges that jurors treat the standard as requiring at least a 75% probability of guilt.²⁸⁶ Indeed, in Judge Weinstein's survey, most of the responding federal district court judges stated that they believed that the jurors roughly equate proof beyond a reasonable doubt with a 90% probability of guilt.²⁸⁷ If a traditional SODDI defense prompted the jurors to conclude that there was a 30% probability of the third party's guilt and the SODDI defense 2.0 led the jurors to believe that there was only a 15% probability, both defenses would pass the threshold and produce acquittals.

Common sense suggests that the accused has a much better chance of gaining an acquittal under a traditional SODDI defense than under the

285. *IMWINKELRIED ET AL.*, *supra* note 146, § 2916 (explaining courts are reluctant to permit any amplification of the general instruction on proof beyond a reasonable doubt). Many appellate courts even forbid the judge from telling the jury that it is the standard that a layperson would use in making the most important decisions in his or her life. In these jurisdictions, any attempt to tell the jury that proof beyond a reasonable doubt equated with a certain probability of guilt would be anathema. *Id.*

286. *See supra* text accompanying note 262–63.

287. *United States v. Fatico*, 458 F. Supp. 2d 388, 411 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

2.0 version of the defense. Again, the latter version of the defense entails much more speculation. In *Alvarez*, in the closing argument the prosecutor accurately characterized the defense theory as “speculation.”²⁸⁸ That characterization may well ring true with a lay jury. Admittedly, it is easier for the defense to mount a SODDI defense 2.0 than to marshal the admissible evidence to present the traditional version of the defense. However, when the accused is forced to resort to the 2.0 version of the defense, as a practical matter the defense has a much lower chance of securing an acquittal. In that light, there is nothing illogical or unfair about the courts’ differential treatment of the two versions of the defense.

CONCLUSION

The recognition of the emerging, 2.0 version of the SODDI defense is an important development for several reasons. The defense bar will certainly welcome the advent of the defense. As Part I noted, there are significant quantitative and qualitative limitations on the evidence usable to substantiate the traditional SODDI defense.²⁸⁹ The 2.0 version of the defense is largely free of those limitations.²⁹⁰ Hence, the defense can invoke the defense even in situations in which it would be impossible to mount the traditional defense.

Much more importantly, though, the emergence of the defense is a salutary development for the criminal justice system. In the past three decades, there has been a growing realization that wrongful convictions are far more common than we once comfortably assumed. To date, there have been over 300 DNA exonerations.²⁹¹ There have been numerous reform proposals to reduce the incidence of such miscarriages of justice. More and more jurisdictions guarantee the accused pre- and post-conviction DNA testing.²⁹² A number of states have revised lineup procedures to lower the risk of mistaken eyewitness identifications.²⁹³ Likewise, there have been initiatives to improve the state of forensic science to curb the danger that flawed expert testimony may lead to a

288. *Alvarez v. Ercole*, 763 F.3d 223, 232 (2d Cir. 2014).

289. See *supra* Part I.

290. See generally *People v. Pickering*, 276 P.3d 553 (Colo. 2011), *cert. denied*, 132 S. Ct. 2429 (2012).

291. Myron Beldock, Leon Friedman & Lewis M. Steel, *The Death of the “Hurricane” and the Criminal Justice System’s Failures*, NAT’L L.J., Apr. 28, 2014, at 47; *DNA Exonerations Nationwide*, INNOCENCE PROJECT (June 15, 2015, 3:17 PM), http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.

292. GIANNELLI ET AL., *supra* note 239, § 18.01, at 6–13.

293. 1 GIANNELLI ET AL., *supra* note 239, § 9.02[b]; Thomas P. Sullivan, *Illinois Enacts Eyewitness Identification Reforms*, CHAMPION, Sept. 2014, at 58.

wrongful conviction.²⁹⁴

However, in the final analysis, the best protection against miscarriages of justice is a well-trained police force that is determined to resist the temptation to “rush to judgment.” The best mechanism to maximize the number of guilty persons convicted as well as the number of innocent persons acquitted is a law enforcement community highly motivated to investigate every suspect who is a plausible person of interest. The judicial recognition of the SODDI defense 2.0 can supply such motivation. For that matter, the constitutionalization of the defense, as in *Alvarez* and *McCullar*, can significantly strengthen that motivation.

294. NAT’L RESEARCH COUNCIL, NAT’L ACAD. OF SCIS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 210, 266 (2009).