# RELEVANT EVIDENCE MADE IRRELEVANT: *STATE V. ABBITT* AND NORTH CAROLINA'S UNCONSTITUTIONAL TEST FOR ADMISSIBILITY OF THIRD-PARTY CULPABILITY EVIDENCE*

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> *"I thought it was a way to exclude me even further from the case, reduce me to nothing, and, in a sense, substitute himself for me."*[1]

## INTRODUCTION

The issue of identity is always paramount in any criminal trial,[2] but prosecutors and jurors can get it wrong. Since 1989, as of this paper's publication, there have been 3,586 exonerations of wrongfully convicted individuals in the United States.[3] The number of wrongful


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1. ALBERT CAMUS, L'ÉTRANGER, 103 (Matthew Ward trans., Vintage International, 1989) (1942).

2. *See* State v. Abbitt, 385 N.C. 28, 40, 891 S.E.2d 249, 257 (2023) (quoting State v. Jeter, 326 N.C. 457, 458, 389 S.E.2d 805, 806 (1990)) ("Plainly, 'the identity of the perpetrator of the crime charged is always a material fact.'").

3. *The National Registry of Exonerations: Exonerations by State*,

convictions is almost certainly even higher because many petty or less serious charges don't get the attention or resources that would allow those wrongfully accused to fight against or overturn their wrongful convictions.[4] These wrongful incarcerations create a cascading set of direct and collateral consequences for victims, including years—if not decades—lost to wrongful incarceration, social stigma, marginalization, and various economic costs.[5]

There are many reasons that individuals suffer from wrongful convictions.[6] And although there are many ways to mitigate and reduce wrongful convictions, one possible avenue is the trial narrative.[7] The narrative plays a crucial role as juries deliberate the evidence before them and try to make sense of it.[8] Prosecutors have near total free reign to "tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault."[9] They are, of course, subject to the limitations of the rules of evidence.[10] But in the absence of the ability to freely present a case, the prosecutorial interest in preserving security is harmed.[11] Thus, it makes sense for the limitations on the prosecution's ability to present a case to be the exception, not the rule.[12]

The right to make one's case is not limited to the State either. Defendants have a constitutional right to a meaningful opportunity to make their case and present their story to the jury.[13] It is essential to the

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THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Apr. 15, 2025).

4. Keith A. Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L.R. 1265, 1292 (2018).

5. *Id.* at 1293.

6. See generally Clanitra Stewart Nejdl & Karl Pettitt, *Wrongful Convictions and Their Causes: An Annotated Bibliography*, 37 N. ILL. U. L. REV. 401 (2017) for an overview of scholarly work discussing such factors.

7. *See* John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L.R. 599, 612–13 (2005); John H. Blume, Sheri L. Johnson, & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1091 (2007).

8. *See* Blume, Johnson, & Paavola, *supra* note 7, at 1088.

9. Old Chief v. United States, 519 U.S. 172, 188 (1997).

10. *See, e.g.*, FED. R. EVID. 403; FED. R. EVID. 404; FED. R. EVID. 410(a).

11. *See* Sell v. United States, 539 U.S. 166, 180 (2003).

12. *Old Chief,* 519 U.S. at 189.

13. *See* Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Anderson, 350 N.C. 152, 176, 513 S.E.2d 296, 310 (1999).

adversarial system of justice that criminal defendants be given this equal right. If defendants could not freely defend themselves before a criminal tribunal, their life and liberty would be trampled by the power of the State.[14] This is precisely why defendants have, *inter alia*, the constitutional right to counsel,[15] right to cross-examine witnesses against them,[16] and right to be heard.[17] But this crucial right is weakened by rules surrounding third-party culpability evidence that systematically disfavor criminal defendants.[18]

Although the third-party culpability defense has been referred to by many names,[19] the idea surrounding this defense is the same. It is a trial theory whereby the defense attempts to identify another person as the perpetrator of an offense as a means to vindicate the defendant's innocence.[20] Professor David McCord of Drake University Law School traces the American origins of the third-party culpability defense back to *State v. May*,[21] a North Carolina case from 1833.[22] Since the decision of the *May* court, evidence supporting third-party culpability defenses

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14. *See* Paul T. Wangerin, *The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution",* 9 OHIO ST. J. ON DISP. RESOL. 203, 218 (1994) (writing that "powerful states inevitably curtail individual rights").

15. *See* Gideon v. Wainwright, 373 U.S. 335, 344–45 (1963); *see also* State v. Simpkins, 373 N.C. 530, 535–36, 838 S.E.2d 439, 446 (2020) (quoting Moran v. Burbine, 475 U.S. 412, 430 (1986)) ("The purpose of the right to counsel 'is to assure that in any criminal prosecution, the accused shall not be left to his own devices in facing the prosecutorial forces of organized society.'").

16. *See* Davis v. Alaska, 415 U.S. 308, 316 (1974); *see also* State v. Gregory, ___ N.C. ___, 912 S.E.2d 357, 359 (2025) (Riggs, J., dissenting) (quoting State v. Legette, 292 N.C. 44, 53, 231 S.E.2d 896, 901 (1977)) ("The right to confront and cross-examine one's accusers is central to an effective defense and a fair trial.").

17. *See Crane*, 376 U.S. at 690.

18. *See* David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WISC. L. REV. 337, 338–39 (2016).

19. *See, e.g.,* David McCord, *"But Perry Mason Made it Look so Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 TENN. L. REV. 917, 920 (1996) ("alleged alternative perpetrator" or "aaltperp"); Schwartz & Metcalf, *supra* note 18, at 338 ("third-party guilt evidence"); Edward J. Imwinkelried, *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*, 47 LOY. U. CHI. L.J. 91, 92 (2015) ("Some Other Dude Did It" or "SODDI"); Michael D. Cicchini, *An Alternative to the Wrong-Person Defense*, 24 GEO. MASON U. CIV. RTGS. L.J. 1, 8 (2013) ("wrong-person defense" and "other-suspect defense").

20. *See* Hemphill v. New York, 595 U.S. 140, 144–45 (2022) (where defendant attempted to enter evidence suggesting that the victim's best friend committed the crime); *see also* Holmes v. South Carolina, 547 U.S. 319, 323 (2006) (where defendant's theory sought to enter evidence suggesting another man killed the victim).

21. McCord, *supra* note 19, at 921.

22. State v. May, 15 N.C. (1 Dev.) 328 (1833).

has been subjected to evidentiary rules that are skeptical of the evidence's admissibility. This has resulted in the proliferation of evidentiary rules that "impose a higher barrier to admission of [ ] third-party guilty evidence than is placed on other relevant evidence."[23] These rules have been criticized for their questionable constitutionality and their detrimental effect on criminal defendants seeking to preserve their life and liberty.[24] As one scholar put it:

> [When] the judge prevents defense counsel from presenting evidence of innocence at trial, no legitimate, competing interest is served. If the defendant is convicted without presenting a defense, everyone loses. When the jury hears only the government's evidence and theory of the case, there is no assurance that the proper result was reached. And again, the risk remains that an innocent individual was wrongly convicted, and the true perpetrator remains at large.[25]

The questions surrounding such impactful evidentiary burdens facing criminal defendants are renewed in North Carolina following the North Carolina Supreme Court's recent third-party culpability evidence decision in *State v. Abbitt*.[26] This recent development will consider *Abbitt* and how North Carolina courts review the admissibility of third-party culpability evidence. It will proceed by analyzing North Carolina's rule in the context of a defendant's constitutional right to present a defense. I contend that North Carolina's unique demand for third-party culpability evidence to functionally exonerate the defendant is arbitrary and disproportionate to the underlying purposes of the relevancy standard, and therefore unconstitutional under U.S. Supreme Court precedent. This recent development will conclude by identifying

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23. Schwartz & Metcalf, *supra* note 18, at 347.

24. *See* Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Somone Else Committed the Crime Charged: Is it Constitutional?*, 76 NEB. L. REV. 272, 299 (1997); Robert Hayes, *Enough is Enough: The Law Court's Decision to Functionally Raise the "Reasonable Connection" Relevancy Standard in* State v. Mitchell, 63 ME. L. REV. 531, 533 (2011); Lissa Griffin, *Avoiding Wrongful Convictions: Re-Examining the "Wrong-Person" Defense*, 39 SETON HALL L. REV. 129, 161–62 (2009); Imwinkelried, *supra* note 19, at 98–99; Cicchini, *supra* note 19, at 7.

25. Cicchini, *supra* note 19, at 5.

26. State v. Abbitt, 385 N.C. 28, 891 S.E.2d 249 (2023).

solutions to analyzing the relevancy of third-party culpability evidence in North Carolina.

## I. *STATE V. ABBITT*

As law students typically learn during their first week in Evidence classes, evidence probative towards a fact at issue is relevant and admissible while irrelevant evidence is inadmissible.[27] Although identity is a crucial fact in every trial and third-party culpability evidence would be probative and relevant in determining the identity of the culprit, courts across the United States examine the relevance of third-party culpability evidence under rules stricter than what is required under Rule 401.[28] The dominant approach to analyzing whether third-party culpability evidence is admissible is known as the "direct connection test."[29] Although the specifics of this rule vary from jurisdiction to jurisdiction, the direct connection test generally requires more than just mere conjecture of a possible third-party culprit.[30] Under this test, third-party culpability evidence must specifically link a particular third party to the commission of the offense at issue in a trial.[31] North Carolina follows a similar test, first defined in its present form in the 1987 case of *State v. Cotton*.[32] But unique to North Carolina's rule is the requirement that the third-party culpability evidence functionally exonerate the defendant.[33] How exactly this rule operates, namely the latter requirement, was at the center of the North Carolina Supreme Court case *State v. Abbitt*.[34]

### A. *Factual Background*

On May 24, 2016, Lacynda Feimster was murdered during an attempted robbery.[35] Two perpetrators, a Black woman and Hispanic

27. FED. R. EVID. 401; FED. R. EVID. 402.

28. *See* Schwartz & Metcalf, *supra* note 18, app. at 403–09 (categorizing and listing different jurisdictions' approaches to third-party culpability evidence).

29. *Id.*

30. *See* Imwinkelried, *supra* note 19, at 97.

31. *Id.* at 98; *see* Schwartz & Metcalf, *supra* note 18, at 347 (quoting Rogers v. State, 280 P.3d 582, 586 (Alaska Ct. App. 2012)).

32. *See* State v. Cotton, 318 N.C. 663, 667, 351 S.E.2d 277, 279–80 (1987).

33. *Id.*, 351 S.E.2d at 279–80.

34. State v. Abbitt, 385 N.C. 28, 891 S.E.2d 249 (2023).

35. *Id.* at 30, 891 S.E.2d at 251–52.

man, followed Feimster into her apartment where the victim's mother, Mary Gregory, and three-year-old son also lived.[36] While in the apartment, the two perpetrators were searching for something, presumably money based on witness testimony.[37] After failing to find what she and her coconspirator were looking for, the female perpetrator fatally shot Feimster.[38] Gregory, who survived the attack, got a good enough look at the perpetrators to provide descriptions.[39] She recalled that the male perpetrator was "tall, with wavy black hair that was combed or slicked back."[40] Gregory did not make note of any facial hair or tattoos, and the man was wearing dirty latex gloves.[41] The female perpetrator was described as "short, stocky, and dark-skinned, having shoulder-length hair and wearing red tennis shoes."[42]

Three days after the offenses took place, Gregory identified Sindy Lina Abbitt and Daniel Albarran as the perpetrators through the use of a photographic lineup.[43] Subsequently, Abbitt and Albarran were indicted for the murder of Feimster.[44] Gregory affirmed her identification during the investigation and at trial.[45] During the cross-examination of Gregory at trial, defense counsel asked Gregory if she had ever been presented with a picture of a woman named Ashley Phillips.[46] Gregory answered that she had.[47] As a result of defense counsel's line of inquiry, the State filed a motion in limine to exclude discussion of the possible guilt of another person.[48]

In response to this motion, the defense presented a theory that identified two other individuals, Ashley Phillips and Tim McCain, as the perpetrators.[49] As the defense explained, the police identified Phillips as a possible suspect during their investigation.[50] Phillips is a Black woman that Feimster's family identified as a possible

36. *Id.* at 29, 891 S.E.2d at 251.
37. *Id.* at 30, 891 S.E.2d at 251.
38. *Id.*, 891 S.E.2d at 252.
39. *Id.*, 891 S.E.2d at 251–52.
40. State v. Abbitt, 385 N.C. 28, 29, 891 S.E.2d 249, 251 (2023).
41. *Id.*, 891 S.E.2d at 251.
42. *Id.* at 30, 891 S.E.2d at 251.
43. *Id.* at 31, 891 S.E.2d at 252.
44. *Id.* at 29, 891 S.E.2d at 251.
45. *Id.* at 31, 891 S.E.2d at 252.
46. State v. Abbitt, 385 N.C. 28, 31, 891 S.E.2d 249, 252 (2023).
47. *Id.*, 891 S.E.2d at 252.
48. *Id.*, 891 S.E.2d at 252.
49. *Id.* at 31–32, 891 S.E.2d at 252–53.
50. *Id.* at 31, 891 S.E.2d at 252.

perpetrator.[51] Phillips arrived at the police station for questioning in a vehicle which matched the description of a vehicle seen at the scene of the murder on the day of the murder.[52] Inside this car, investigators found a .25 caliber gun.[53] This gun matched the caliber of the bullet shell casing from the murder.[54] Police also found latex gloves similar to the ones worn by the male perpetrator.[55] DNA swabs were taken from both the gloves and shell casing, but the police failed to have these swabs analyzed.[56] Although Gregory was not shown a picture of Phillips in any photographic lineup, when later shown a picture of Phillips she said "[w]ell, she does look like [the female perpetrator]."[57]

The defense team also presented evidence suggesting that the second perpetrator of the murder was Tim McCain.[58] McCain and Phillips were allegedly associated with one another.[59] McCain was observed near the crime scene around the time the offense was committed.[60] McCain was allegedly "carrying a pistol and trying to conceal his face."[61] At this same time, McCain was with a woman who resembled Phillips.[62] Thus, the defense's argument identified Phillips and McCain, not Abbitt and Albarran, as the actual perpetrators.[63]

The trial court ruled that third-party culpability evidence must be relevant under N.C. Rule of Evidence 401 *and* satisfy the direct connection test.[64] In taking the evidence in the light most favorable to the State,[65] the trial court ruled in favor of the State.[66] The trial court reasoned that the proffered evidence failed to meet the second prong of the direct connection test, which requires the third-party culpability

51. *Id.*, 891 S.E.2d at 252.
52. State v. Abbitt, 385 N.C. 28, 31–32, 891 S.E.2d 249, 252 (2023).
53. *Id.* at 32, 891 S.E.2d at 252.
54. *Id.*, 891 S.E.2d at 252.
55. *Id.*, 891 S.E.2d at 252.
56. *Id.* at 46, 891 S.E.2d at 262 (Earls, J., dissenting).
57. *Id.* at 32, 891 S.E.2d at 252–53 (majority opinion).
58. State v. Abbitt, 385 N.C. 28, 32, 891 S.E.2d 249, 253 (2023).
59. *Id.*, 891 S.E.2d at 253.
60. *Id.*, 891 S.E.2d at 253.
61. *Id.* at 47, 891 S.E.2d at 262 (Earls, J., dissenting).
62. *Id.*, 891 S.E.2d at 262.
63. *Id.*, 891 S.E.2d at 262.
64. State v. Abbitt, 385 N.C. 28, 32–33, 891 S.E.2d 249, 253 (2023) (majority opinion).
65. Although this issue is not clearly discussed in the *Abbitt* majority, see *infra* note 82, Justice Earls points out that the trial court applied the wrong standard in this analysis, *Abbitt*, 385 N.C. at 47, 891 S.E.2d at 262 (Earls, J., dissenting).
66. *Id.* at 33, 891 S.E.2d at 253 (majority opinion).

evidence be "inconsistent" with the defendants' guilt.[67] Ultimately, the jury returned guilty verdicts against Abbitt and Albarran on first-degree murder and felony murder, respectively.[68]

### B. *North Carolina's Direct Connection Approach*

The North Carolina Supreme Court heard the question of whether the trial court erred in refusing to admit the defendants' third-party culpability evidence.[69] In their briefing and oral arguments, the defendants specifically challenged the constitutionality of North Carolina's direct connection test for third-party culpability evidence.[70] The North Carolina Supreme Court began by recognizing that the United States Constitution "prohibits the exclusion of defense evidence under [evidentiary] rules that serve no legitimate purpose" or are "disproportionate to the ends that they . . . promote."[71] The evidentiary rules at issue in this case were Rule 401 and Rule 402.[72] These rules pertain to the *relevance* of evidence—Rule 402 limits admissible evidence to relevant evidence and Rule 401 defines relevant evidence as evidence which makes a fact of consequence to the issues more or less probable.[73]

Proceeding under this understanding, the North Carolina Supreme Court defined the limitations placed upon defendants under the direct connection test.[74] Third-party culpability evidence "must do more than create mere conjecture of another's guilt in order to be relevant."[75]

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67. *Id.*, 891 S.E.2d at 253.

68. *Id.* at 36, 891 S.E.2d at 255.

69. *Id.* at 36, 891 S.E.2d at 255.

70. State v. Abbitt, 385 N.C. 28, 39, 891 S.E.2d 249, 257 (2023) ("In their arguments before this Court, defendants assert error by the trial court, under both the Rules of Evidence with regard to the admissibility of relevant evidence in criminal trials and under the United State and North Carolina Constitutions in the context of a criminal defendant's right to present a defense under each instrument's Due Process Clause.").

71. *Id.* at 40, 891 S.E.2d at 257 (quoting Holmes v. South Carolina, 547 U.S. 319, 326 (2006)).

72. *Id.*, 891 S.E.2d at 257.

73. *See* N.C.G.S. § 8C-1, Rule 401 (2025) ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."); *id.*, Rule 402 ("All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible.").

74. *Abbitt*, 385 N.C. at 40–41, 891 S.E.2d at 258.

75. *Id.* at 40, 891 S.E.2d at 258 (quoting State v. McNeil, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990)).

The evidence must both implicate a third-party as the true culprit of an offense *and "*be inconsistent with the defendant's guilt."[76] The court reasoned that, without more than mere conjecture, third-party culpability evidence is "too remote to be relevant and should be excluded."[77]

*Without any analysis of the constitutionality of the direct connection test*, the North Carolina Supreme Court proceeded by applying the direct connection test to the facts of Abbitt and Albarran's case.[78] The court concluded there was no dispute on the first prong of the direct connection test and held in favor of the defendants on this front.[79] Thus, the real issue was whether the evidence was inconsistent with the defendants' guilt.[80] On this point, the North Carolina Supreme Court held that "while defendants' proffered evidence implicates other suspects which were suggested by defendants, such evidence does not exculpate defendants."[81] Even when the court took the evidence in a light most favorable to the defendants and assumed, *arguendo*, that the evidence does prove that Phillips and McCain were present at the scene,[82] the court nonetheless reasoned that it didn't prove the defendants' innocence—if anything, it would merely indict co-conspirators.[83] For this reason, the third-party culpability evidence presented by the defendants was not "inconsistent" with the defendants' guilt and, accordingly, was not relevant evidence.[84]

Justice Earls was the sole dissenter in *Abbitt*.[85] She opened her dissent with a focus on the constitutional guarantees for a criminal

76. State v. Abbitt, 385 N.C. 28, 40, 891 S.E.2d 249, 258 (2023).

77. *Id.* at 41, 891 S.E.2d at 258 (quoting State v. Brewer, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989)).

78. *Id.* at 41–43, 891 S.E.2d at 258–259.

79. *Id.* at 41, 891 S.E.2d at 258.

80. *Id.*, 891 S.E.2d at 258.

81. *Id.* at 43, 891 S.E.2d at 259.

82. Despite the trial court's erroneous weighing of evidence in granting the State's motion in limine, see *supra* n. 65, this is this majority's only discussion of the how a court should consider evidence when weighing the State's motion in limine, State v. Abbitt, 385 N.C. 28, 43, 891 S.E.2d 249, 259 (2023). The majority fails to consider the trial court's erroneous weighing of evidence in favor of the State.

83. *See Abbitt*, 385 N.C. at 43, 891 S.E.2d at 259 ("[W]hile defendants' proffered evidence implicates other suspects which were suggested by defendants, such evidence does not exculpate defendants.").

84. *Id.*, 891 S.E.2d at 259–60.

85. *Id.* at 44, 891 S.E.2d at 260 (Earls, J., dissenting).

defendant.[86] Justice Earls's dissent placed a great emphasis on these constitutional protections and highlighted that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[87] Like the majority, the dissent gave credence to the constitutional rule that evidentiary rules should not be arbitrary or disproportionate to their purposes.[88] Justice Earls concluded that the direct connection test upheld and applied by the majority infringed upon a criminal defendant's right to have a meaningful opportunity to present a complete defense and, in turn, the right to a fair trial.[89]

The dissent focused on the nature of "relevance" regarding the admissibility of evidence. Justice Earls highlighted precedent explicitly holding that the standard for relevance is a "relatively lax" standard.[90] To support this assertion, Justice Earls pointed to precedent which held that any evidence speaking to the crime charged should be admitted by the trial court.[91] Regardless, as Justice Earls continued, the direct connection test applied by the majority is a misapplication of the relevancy standard.[92] The plain text of N.C. Rule of Evidence 401 merely requires evidence to make a fact at issue more or less likely in order to be relevant.[93] Justice Earls concluded that the majority improperly interpreted how to apply the direct connection test in light of the minimal standards required by Rule 401.[94] Although she agreed with the idea that third-party culpability evidence needs to be more than mere conjecture, Justice Earls argued that the direct connection test is not a two-part conjunctive test.[95] Instead, as she reasons, the relevancy test for third-party culpability evidence must tend to show that the defendant

86. *Id.*, 891 S.E.2d at 260.

87. *Id.*, 891 S.E.2d at 260 (quoting Holmes v. South Carolina, 547 U.S. 319, 324 (2006)).

88. State v. Abbitt, 385 N.C. 28, 44–45, 891 S.E.2d 249, 260 (2023) (Earls, J., dissenting).

89. *Id.* at 44, 891 S.E.2d at 260.

90. *Id.* at 45, 891 S.E.2d at 260 (first quoting State v. McElrath, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988); and then quoting State v. Israel, 353 N.C. 211, 219, 539 S.E.2d 633, 638 (2000))).

91. *Id.* at 45, 891 S.E.2d at 260 (quoting *Israel*, 353 N.C. at 219, 539 S.E.2d at 648).

92. *Id.*, 891 S.E.2d at 261.

93. *Id.*, 891 S.E.2d at 260.

94. *See* State v. Abbitt, 385 N.C. 28, 45, 891 S.E.2d 249, 261 (2023) (Earls, J., dissenting) (explaining an analysis distinct from the majority's analysis).

95. *Id.*, 891 S.E.2d at 261.

did not commit the crime *because* someone else was the likely perpetrator.[96]

Justice Earls concluded that the "rule of relevancy related to the admission of evidence of third-party guilt must be in line with" the constitutional right to present a meaningful defense.[97] Under her reading of Rule 401, Abbitt and Albarran were denied this right by having their third-party culpability evidence excluded.[98] She explained that evidentiary rules serve to protect against wrongful convictions, but when misapplied it can detract from this goal.[99] And the misapplication here and denial of the right to a fair trial have run the risk of incarcerating two possibly innocent people, and for these reasons she dissented.[100]

## II. NORTH CAROLINA'S DIRECT CONNECTION APPROACH IS NOT DUE PROCESS

A central theme that reappeared in both the majority and dissent of *Abbitt* were the constitutional guarantees criminal defendants enjoy and how these rights interact with evidentiary rules.[101] The key case that both opinions relied on for this assertion is *Holmes v. South Carolina.*[102]

### A. Holmes v. South Carolina *and The Right to Present a Defense*

*Holmes v. South Carolina* centers around a murder trial.[103] During the trial, Holmes, the defendant, sought to introduce evidence that another man, White, was the true perpetrator.[104] Holmes produced witnesses who spotted White in the neighborhood where the murder

96. *Id.*, 891 S.E.2d at 261.
97. *Id.* at 51, 891 S.E.2d at 264.
98. *Id.*, 891 S.E.2d at 264.
99. *Id.* at 50–51, 891 S.E.2d at 264.
100. State v. Abbitt, 385 N.C. 28, 50–51, 891 S.E.2d 249, 264–65 (2023) (Earls, J., dissenting).

101. *Id.* at 28, 891 S.E.2d at 257 (majority opinion) (quoting Holmes v. South Carolina, 547 U.S. 319, 326 (2006)); *id.* at 44, 891 S.E.2d at 260 (Earls, J., dissenting) (quoting *Holmes*, 547 U.S. at 324).
102. *Id.* at 28, 891 S.E.2d at 257 (majority opinion) (quoting *Holmes*, 547 U.S. at 326); *id.* at 44, 891 S.E.2d at 260 (Earls, J., dissenting) (quoting *Holmes*, 547 U.S. at 324).
103. *Holmes*, 547 U.S. at 319.
104. *Id.* at 323.

took place earlier that day.[105] Additionally, four witnesses provided testimony suggesting that White had confessed to the crime and admitted that Holmes was innocent.[106] Despite the relevancy of this evidence, the trial court excluded Holmes's third-party culpability evidence.[107] The South Carolina Supreme Court affirmed this exclusion, reasoning that third-party culpability evidence requires more than mere conjecture and, in the face of the State's forensic evidence, the claims of White's culpability could not raise a reasonable inference about Holmes's own innocence.[108]

The U.S. Supreme Court, however, vacated the decisions of the South Carolina courts and remanded the matter for a new trial.[109] The Court stated, in no uncertain terms, that States have the power to define evidentiary rules, but this authority has limits.[110] "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[111] This constitutional right to present a meaningful defense is violated when evidentiary rules are arbitrary or disproportionate to the purposes they serve.[112] For example, "arbitrary" rules include prohibitions on codefendants from testifying in support of their codefendants unless they are already acquitted,[113] bars on parties from impeaching their own witnesses,[114] and wholesale exclusions of testimony related to the unreliability of confessions.[115] However, the U.S. Supreme Court explicitly upheld evidentiary rules that exclude third-party culpability evidence that is "speculative or remote, or does

105. *Id.*
106. *Id.*
107. Holmes v. South Carolina, 547 U.S. 319, 323 (2006).
108. *Id.* at 324.
109. *Id.* at 331.
110. *Id.* at 324.
111. *Id.* (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)); *see also* State v. Anderson, 350 N.C. 152, 176, 513 S.E.2d 296, 310 (1999) (quoting State v. Miller, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996)) ("The right of a defendant . . . to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the Sixth and Fourteenth Amendments to the federal Constitution . . . .").
112. *Holmes*, 547 U.S. at 324–25 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)).
113. Holmes v. South Carolina, 547 U.S. 319, 325 (2006) (citing Washington v. Texas, 388 U.S. 14, 22–23 (1967)).
114. *Id.* at 325–26 (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).
115. *Id.* at 326 (citing *Crane*, 476 U.S. at 691).

not tend to prove or disprove a material fact in issue at the defendant's trial."[116] The Court did not explicitly endorse anything further than this.

In considering the South Carolina rule, the Supreme Court found it to be "arbitrary" and impermissible.[117] The Court reasoned that the South Carolina rule did not focus on the probative value of the proposed third-party culpability evidence or the evidence's potentially adverse effects; the application of the rule centered entirely on if the State's case was strong enough to independently debunk the third-party guilt argument.[118] This hostility towards third-party culpability evidence divorced the rule from its purpose of avoiding baseless and distracting accusations towards third parties.[119] Accordingly, the South Carolina rule violated the defendant's due process right to have a meaningful opportunity to present a complete defense.[120]

### B. Abbitt *Cannot Survive* Holmes

Although *Holmes* was present in *Abbitt*, the majority ignored the lasting premise of *Holmes*. The *Holmes* decision is about under what circumstances a state's evidentiary rules which exclude third-party evidence violate the constitution.[121] The *Abbitt* court did not meaningfully engage in a *Holmes* analysis.[122] *Abbitt* did not thoroughly elaborate on nor persuasively justify the policy objectives of the direct connection test.[123] *Abbitt* did not even address the defendants' claim regarding the constitutionality of the direct connection test in North Carolina.[124] The *Abbitt* majority's failure to engage in the *Holmes* analysis for North Carolina's direct connection rule is particularly

116. *Id.* at 327.
117. *Id.* at 331.
118. *Id.* at 329.
119. Holmes v. South Carolina, 547 U.S. 319, 330 (2006).
120. *Id.* at 331 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).
121. *See id.* at 321 ("This case presents the question whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the *defendant may not introduce proof of third-party guilt* . . . ." (emphasis added)).
122. *See* State v. Abbitt, 385 N.C. 28, 40–42, 891 S.E.2d 249, 257–58 (2023) (discussing North Carolina's third-party culpability evidence admissibility standard, including a quote from and citation to *Holmes*, but failing to consider disproportionality of the standard).
123. *See id.* at 41, 891 S.E.2d at 258.
124. *See id.* at 39, 891 S.E.2d at 257.

salient given how the authorities the court relies on all predate *Holmes*.[125]

The only occasion where North Carolina courts considered North Carolina's direct connection test in relation to *Holmes* came in *State v. Loftis*,[126] a Court of Appeals decision. The *Loftis* court ultimately upheld North Carolina's direct connection test by distinguishing North Carolina's rule from the rule in *Holmes*.[127] The *Loftis* court explained that the rule in *Holmes* was premised on the strength of prosecution's evidence.[128] Comparatively, North Carolina's direct connection test does not hinge on anything external to the inherent qualities of the evidence presented.[129] In fact, the *Loftis* court cited the U.S. Supreme Court's explicit endorsement of third-party culpability relevance rules which limit speculative or remote evidence.[130] Thus, the *Loftis* court concluded that the more stringent demands of the direct connection test fall within constitutional limits because it is a reasonable limitation to preserve the governmental interest in reliable and relevant evidence.[131]

However, the *Loftis* court used this snippet of *Holmes* to fully distinguish *both prongs* of North Carolina's direct connection test and uphold its constitutionality.[132] The *Loftis* court failed to diligently consider the second prong of North Carolina's direct connection test.[133] *Abbitt* also suffered from the same unjustifiable oversight.[134] As stated in *Abbitt*, the proffered third-party culpability evidence must serve to exculpate the defendant.[135] This requirement functionally demands the accused to prove that they are not guilty.[136] *Abbitt*'s demand for more

125. *See id.* at 41, 891 S.E.2d at 258 (citing only cases from before 2006 in supporting rule for admissibility of third-party culpability evidence.).

126. State v. Loftis, 185 N.C. App. 190, 649 S.E.2d 1 (2007).

127. *Id.* at 201–02, 649 S.E.2d at 9–10.

128. *Id.*, 649 S.E.2d at 9–10.

129. *Id.*, 649 S.E.2d at 9–10.

130. *Id.* at 202, 649 S.E.2d at 10 (quoting Holmes v. South Carolina, 547 U.S. 319, 327 (2023)).

131. *See id.*, 649 S.E.2d at 10; *Holmes*, 547 U.S. at 326–27; Griffin, *supra* note 24, at 156.

132. *See* State v. Loftis, 185 N.C. App. 190, 202, 649 S.E.2d 1, 9–10 (2007).

133. *See id.*, 649 S.E.2d at 9.

134. *See* State v. Abbitt, 385 N.C. 28, 40–41, 891 S.E.2d 249, 257–58 (2023).

135. *Id.* at 41, 891 S.E.2d at 258 (quoting State v. Miles, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012)).

136. *See id.*, 891 S.E.2d at 258; *see also Exculpate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

than just colorable evidence of third-party culpability divorces the analysis from the plain text of the evidentiary rule to something that is more searching.[137]

In practice, the second prong of the *Abbitt* test operates more like a sufficiency test.[138] In the criminal context, the evidence must be strong enough for a reasonable jury to convict the defendant beyond a reasonable doubt.[139] The prosecution bears the burden of producing sufficient evidence as to all elements of a crime.[140] Identity is one such element the prosecution has the burden of proving.[141] Criminal defendants may also carry a burden of production if they are presenting affirmative defenses.[142]

But presenting evidence countering an essential element that the prosecution must prove, such as identity, is not an affirmative defense.[143] A criminal defendant cannot be required to meet a burden of production with evidence challenging the essential elements of the crime charged.[144] This remains true even when they proffer evidence of a third-party culprit.[145] As Professor David Schwartz and Chelsey Metcalf note, the alleged goal of placing a burden of production on the defendant for third-party culpability evidence is to prevent "speculative acquittals."[146] The two are critical of this interest because it favors giving the jury no evidence over some evidence; "exclud[ing] all evidence of third-party guilt" to avoid "speculative acquittals" but "allowing a jury to make a finding of not guilty—which necessarily implies that some unknown third person committed the crime—means that a jury can make a decision based on a possibility of third-party guilt with no evidence of third-party guilt."[147] Further, the direct connection test is irreconcilable with the principle that it is the prosecution's duty to

137. *See Abbitt*, 385 N.C. at 45, 891 S.E.2d at 261 (Earls, J., dissenting).

138. *See* Schwartz & Metcalf, *supra* note 18, at 382.

139. Jackson v. Virginia, 443 U.S. 307, 318 (1979); *see also* Michael S. Pardo, *What Makes Evidence Sufficient?*, 65 ARIZ. L. REV. 431, 462 (2023).

140. Everhart, *supra* note 24, at 287.

141. *Id.* at 292–93.

142. *Id.* at 288.

143. *Id.* at 290.

144. Schwartz & Metcalf, *supra* note 18, at 397.

145. *Id.*

146. *See id.* at 398–99.

147. *See id.* at 399.

prove guilt beyond a reasonable doubt because the direct connection test prevents the injection of reasonable doubt.[148]

Higher burdens for third-party culpability evidence serve general governmental interest in ensuring that evidence is reliable.[149] On that note, the *Holmes* court explained that relevancy rules exist "to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues."[150] These interests can all be fairly satisfied by a requirement for third-party culpability evidence to go beyond mere conjecture and hypothesizing.[151] And once the governmental interest of credibility has been satisfied, the interest for a greater showing is even lower.[152]

The "exculpatory" prong of North Carolina's direct connection test does not serve to further these interests in any meaningful way beyond what is already established. The "exculpatory" element is redundant; the demand for more than mere conjecture is already satisfied by the first prong of the direct connection test. By excluding "testimony which was relevant to the central question presented to the jury" with relevancy rules that exceed their purpose, the *Abbitt* court unconstitutionally and "impermissibly constrain[s] defendants' ability to mount their defense."[153]

## III. RETURNING THE RIGHT TO A DEFENSE TO DEFENDANTS

If *Abbitt*'s approach to relevancy for third-party culpability evidence cannot be squared with *Holmes* and Due Process, how can it be? That question can be answered in several ways. One such approach would be to abandon the direct connection test entirely.[154] The direct connection test—not just in North Carolina, but across the nation—is inconsistent with the plain text of the evidentiary rules for relevance.[155] The federal rule (which is mirrored across the nation) plainly states that evidence is relevant if it has a tendency to make a fact of consequence

148. *Id.* at 401.
149. Griffin, *supra* note 24, at 156.
150. Holmes v. South Carolina, 547 U.S. 319, 330 (2006).
151. *See* State v. Abbitt, 385 N.C. 28, 41, 891 S.E.2d 249, 258 (2023).
152. Griffin, *supra* note 24, at 156.
153. State v. Corbett, 376 N.C. 799, 832, 855 S.E.2d 228, 252 (2021); *see Holmes*, 547 U.S. at 324.
154. Schwartz & Metcalf, *supra* note 18, at 402.
155. *Id.*

more or less probable.[156] And the issue of identity is always a fact of consequence, no matter what the trial is about.[157]

Another possibility is reframing the purpose of third-party culpability evidence. Instead of understanding the evidence as the accusation of a third party as the culprit, it should be understood as illustrating the investigatory shortcomings of the police.[158] This approach avoids some of the problems that may arise with less-than-stellar third-party culpability evidence, such as hearsay, character evidence, and "direct connection" issues.[159] As one author described this approach, "using the same evidence to focus on the government's incompetence, including its failure to consider the guilt of third parties, renders the evidence admissible" despite some direct evidence of third-party guilt.[160] However, this particular approach may still permit some portions of the defense to be inhibited, as evidenced by trial court's approach in *Abbitt*.[161]

Despite these ideas, the most practical approach would be the one proposed in Justice Earls's dissent. Unlike the *Abbitt* majority, Justice Earls is cognizant of the principles set forth in *Holmes*.[162] And her approach to the constitutional problem is as simple as reinterpreting the basic text of North Carolina's direct connection approach. The rule "simply means that the proffered evidence must tend to show the defendant did not commit the crime because someone other than the defendant was the perpetrator."[163] This tracks with the historical precedent on third-party culpability evidence prior to *State v. Cotton*, where the requirement that the evidence be inconsistent with the defendant's guilt first appeared without any support for the "inconsistent" prong.[164] Justice Earls's understanding of third-party culpability evidence would place North Carolina in line with almost

156. FED. R. EVID. 401.

157. State v. Abbitt, 385 N.C. 28, 40, 891 S.E.2d 249, 257 (2023) (quoting State v. Jeter, 326 N.C. 457, 458, 389 S.E.2d 805 (1990).

158. Imwinkelried*, supra* note 19, at 105; Cicchini, *supra* note 19, at 26.

159. Imwinkelried, *supra* note 19, at 113–18; *see* Cicchini, *supra* note 19, at 31–33.

160. Cicchini, *supra* note 19, at 31.

161. *See Abbitt*, 385 N.C. at 33–35, 891 S.E.2d at 253–54.

162. *Id.* at 44–45, 891 S.E.2d at 260–61 (Earls, J., dissenting).

163. State v. Abbitt, 385 N.C. 28, 45, 891 S.E.2d 249, 261 (2023) (Earls, J., dissenting) (internal citation omitted).

164. *See* State v. Cotton, 318 N.C. 663, 667, 351 S.E.2d 277, 279–80 (1987); *cf.* State v. Hamlet, 302 N.C. 490, 501, 276 S.E.2d 338, 346 (1981); State v. Allen, 80 N.C. App. 549, 550, 342 S.E.2d 571, 572 (1986).

every other jurisdiction that follows some form of the direct connection test.[165]

## CONCLUSION

The *Holmes* precedent prohibits the application of evidentiary rules that are arbitrary or disproportionate to the purposes they serve. North Carolina's direct connection test, as stated and deployed in *Abbitt*, demands the defendant to produce exculpatory evidence. This is an incredibly stringent bar that is arbitrary to the purposes of relevancy requirement that underlies the direct connection test. The *Abbitt* rule runs the risk of preventing defendants from presenting a true and persuasive narrative that can prevent a wrongful conviction. However, there are constitutional ways to analyze third-party culpability evidence. The simplest and most practical way to achieve this is by removing the disproportionate requirement for evidence to be exculpatory and only require some colorable link between the crime alleged and a third-party culprit. This change would not only go towards bringing the evidentiary rule into constitutional compliance, but it also realigns the direct connection test with the meaning of relevant evidence. Without a change to North Carolina's direct connection test, criminal defendants will lose an invaluable tool to protect their innocence. Otherwise, we risk reducing a defendant's innocence to an arbitrary technicality.

165. *See* Schwartz & Metcalf, *supra* note 18, app. at 403–08.