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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).

I. INTRODUCTION

If the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense,[1] why have Arkansas courts interpreted *Zinger v. State*[2] in a manner that deprives a criminal defendant of this right? Arkansas courts have done so by their constitutionally questionable approach to the admissibility of third-party exculpatory evidence. Exculpatory evidence is evidence tending to prove a criminal defendant's innocence,[3] i.e., the criminal defendant uses exculpatory evidence to establish that some third party, unrelated to the criminal defendant, committed the crime. The Arkansas Supreme Court initially attempted to establish the rule with respect to exculpatory evidence in *Zinger*.[4] The opinion, however, does not make clear precisely which approach Arkansas courts are required to follow. In dicta the court initially discussed a relatively high standard, the direct connection test, which requires a *direct* connection between the crime and a third party.[5] Next, however, the court discussed a far more lax standard for the admissibility of the evidence, the connection combination test, permitting either a direct *or* circumstantial evidentiary connection between the crime and the third party.[6] Finally, the court concluded that because there was neither circumstantial *nor* direct evidence of a third-party perpetrator in the case at bar, the exculpatory evidence was inadmissible.[7]

An examination of *Zinger* leads to confusion as to which precise approach the court has adopted.[8] This note begins by examining the various approaches of other states in order to provide a backdrop for how Arkansas's approach fits into the national framework of the admissibility of exculpatory evidence.[9] It then examines *Zinger* and the Arkansas cases that have followed.[10] Finally, it suggests that in light of the implications the current Arkansas approaches have on the constitutionally guaranteed rights of criminal defendants, the court should adopt a new standard based on a strict application of Arkansas Rules of Evidence 401 and 403.[11]

II. BACKGROUND

There are various tests for the admissibility of exculpatory evidence, and each raises different constitutional concerns. It is pertinent to first briefly describe the different approaches that courts have developed to determine the admissibility of this evidence.[12] Although certain federal circuit courts or

state courts will be referenced in relation to each test, it is important to note that the tests are applied inconsistently among various jurisdictions. The courts will often look beyond a particular test and use other standards, tests, or factors to determine whether to admit the exculpatory evidence. Therefore, analysis of a particular court's approach to this type of evidence will merely act as an illustration to explain how each particular test operates.

Next, with this general framework, Arkansas's approach will be examined more thoroughly beginning with the *Zinger* case itself.[13] Finally, the section will conclude with an explanation of the test that has seemingly been adopted by the Arkansas Supreme Court.[14]

A. Road to *Zinger*: Differing Approaches to Exculpatory Evidence

1. *The Relevancy Test*

The relevancy test is based on Federal Rules of Evidence 401 and 402.[15] Rule 401 states that "'[r]elevant evidence [is] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[16] Rule 402 states that "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible."[17]

The relevancy test is a fairly lax standard.[18] It gives the judge broad discretion in determining whether to admit the exculpatory evidence.[19] A North Carolina court employing the relevancy test noted that the standard is easily satisfied and "'[a]ny evidence calculated to throw light upon the crime charged' should be admitted by the trial court."[20]

In *U.S. v. Johnson*,[21] the defendant was accused of burning down an Alabama high school in 1994.[22] The government appealed from a magistrate judge's order allowing exculpatory evidence, which implicated five other possible arson suspects, to be admitted.[23] To determine whether the exculpatory evidence should have been admitted, the court analyzed the evidence presented for each of the five third-party suspects.[24] For example, Hulond Humphries, the high school's principal, was implicated as a possible third-party perpetrator.[25] The court noted a substantial amount of relevant motive evidence stemming from months of racial tension at the high school, Humphries' outrage over interracial dating, and the possibility that he may lose his job.[26] Moreover, the evidence against Humphries suggested a great deal of relevant opportunity evidence. For instance, Humphries had purchased five gallons of gasoline one week before the fire, and he was present at the school a mere three hours before the fire destroyed the building.[27]

The court began by applying the relevancy test to determine whether to admit evidence that another person, like Humphries, could have committed the arson.[28] In discussing the Federal Rules of Evidence, the court noted that relevance alone does not require the evidence to be admitted.[29] Relying on

Rule 403, the court indicated that there must be a balancing of interests between the "defendant's 'strong interest in presenting exculpatory evidence,'" and the "state's interest 'in promoting reliable trials, particularly in preventing the injection of collateral issues into the trial through unsupported speculation about the guilt of another party.'"[30] Analyzing the admissibility of the exculpatory evidence presented, which implicated Humphries as a third-party perpetrator, the court weighed all of the relevant evidence connecting him to the crime: his motive; his placement at the scene of the crime mere hours before it occurred; his purchase of gasoline one week prior to the incident; removal of personal effects from the school one week preceding the fire; evidence that he told friends of his depression problems the night of the crime; and two prior confessions of guilt.[31]

Because of this strong motive and opportunity evidence, the court determined that the evidence was certainly admissible under Federal Rules of Evidence standards.[32] Moreover, the court stated that even if the exculpatory evidence was not admissible under the federal rules, the evidence was absolutely required to be admitted because of the constitutional guarantees to criminal defendants found in the Fifth and Sixth Amendments.[33] Although courts using the relevancy test use the language of the relevancy rules, they tend to effectively look at the weight and sufficiency of the evidence in connecting the third party to the crime.[34] Courts do so by analyzing "the strength of the nexus between the proffered evidence and the guilt of the third party."[35] In *Johnson*, the court required the nexus between the exculpatory evidence and the crime to be substantial and probative.[36]

2. *The Direct Connection Test*

The next test is the direct connection test. A connection test of some sort is the most popular approach to exculpatory evidence among the various jurisdictions.[37] Courts applying the direct connection test determine the admissibility of exculpatory evidence by examining whether the proffered evidence *directly* connects the third party to the charged crime.[38] Courts tend to admit the evidence *only* when a direct connection links the crime with a third party.[39] Courts applying this test hold that evidence that does no more than create an inference or conjecture as to another's guilt is inadmissible.[40]

For example, in *State v. Smith*,[41] the court used the direct connection test. There, the defendant appealed from a death judgment for the brutal slayings of a mother and son by hatchet.[42] The defendant argued exculpatory evidence implicating a man named J. W. Yates, who had been in the neighborhood at the time of the crime, had been improperly excluded at trial.[43] The court held that this evidence was properly excluded because it would merely raise an inference as to Yates's opportunity to commit the crime.[44]

3. *The 403 Test*

The 403 test is derived from Federal Rule of Evidence 403, which states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[45]

In *People v. Hall*,[46] the defendant appealed his conviction of first-degree murder, second-degree robbery, and burglary.[47] Initially, no foul play was suspected when victim Israel Deasonhouse was discovered dead covered in cottage cheese and excrement.[48] Afterwards, however, an individual named Rhae Foust was arrested for drunk driving. In an effort to mitigate his charges, Foust told police that the defendant, Hall, had explained to him in specific and accurately descriptive details how another man, David Rodriguez, had killed the elderly Deasonhouse.[49] After Hall was arrested, he continued to insist that Rodriguez had committed the crime and denied having such accurate and descriptive knowledge of the crime.[50] At trial, the judge declined to admit testimony suggesting that Foust, rather than Rodriguez or Hall, actually killed Deasonhouse.[51] The trial judge reasoned that although this testimony was relevant, it lacked more than a possible suspicion that Foust committed the murder, and it did not meet the requisite probative value standard for admission.[52]

On appeal, however, the Supreme Court of California overruled the trial court judge and clarified the correct 403 test to be used.[53] In clarifying the applicable law, the court articulated the 403 test as "simply treat[ing] third-party culpability evidence of this kind like any other evidence: if relevant it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion."[54] The court further declared that the trial court should avoid "a hasty conclusion" that the defendant's exculpatory evidence is "incredible" because this is a question for the jury, not for a judge.[55] Lastly, the court held that courts applying this standard "must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion."[56] Although the trial judge misapplied the law, the court concluded that the error was harmless and affirmed the defendant's conviction.[57]

4. *The Balancing Test*

Courts using the balancing test "weigh[] the interests of the accused in proving his innocence against the state's interest in convicting the guilty, [while] the ultimate admissibility decision is based on the strength of the evidence implicating the third party in the crime."[58] "The balancing test weighs and evaluates the following two interests: (1) the legitimate interests of the defendant to present a defense, and (2) the interests of the state to

administer fair and reliable trials."[59] One commentator asserts, however, that while these courts claim to use a strict balancing test, they also couple it with a "'critical and reliable' twist."[60] The "critical and reliable twist" within the balancing test demands that "[e]ven after evaluating, balancing, and weighing the diverse interests, '[w]here the state interest is strong, only the exclusion of critical, reliable, and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected.'"[61]

In *Perry v. Rushen*,[62] the Ninth Circuit discussed the balancing test in relation to the admissibility of exculpatory evidence.[63] There, the defendant appealed a conviction of aggravated assault for allegedly attacking a woman along a jogging path.[64] On the day of the attack, the woman had asked a man with a dog for directions, but, against her wishes, the man began to walk with her.[65] He then grabbed her by the neck and pulled her off the path; as she began to scream, he began to bang her head against the trees.[66] Her screams attracted other joggers and the assailant fled.[67] Later, the victim identified the defendant as the assailant based on his general appearance and a distinctive scar on his forehead.[68]

At trial, the defendant attempted to introduce evidence that a man by the name of Wolfe had committed the assault.[69] This evidence consisted of testimony by two witnesses who were robbed and raped by Wolfe in the same area of the park only three days earlier.[70] The defendant also asserted these similarities to Wolfe: both were African-American; they were of similar height and weight; both had braided hair on the day of the attack; and on the afternoon of the assault, Wolfe had been wearing a brown leather jacket and blue jeans while the defendant had been wearing a light brown jacket and blue warm-up pants.[71]

In discussing the admissibility of this evidence, the court specified that a "court must balance the importance of the evidence against the state['s] interest in exclusion."[72] Furthermore, a court must consider the evidence under the totality of the circumstances, including "its probative value on the central issue, its reliability, whether it is capable of evaluation by the finder of fact, whether it is the sole evidence on the issue or merely cumulative, and whether it constitutes a major part of the attempted defense."[73] In discussing the opposing interests between the state and the criminal defendant, the court noted that in the Supreme Court of the United States cases addressing exculpatory evidence, the rule has been that there must be "unusually compelling circumstances" in order to outweigh the "strong state interest in administration of its trials."[74]

Ultimately, the court found that the evidence of Wolfe as a third-party perpetrator was too tenuous and carried with it too great a risk for confusion of the issues to a jury.[75] Therefore, the court concluded that because the exculpatory evidence was "not so closely connected to the issue of his guilt or innocence that its exclusion, based on its lack of probity and its tendency to

confuse the jury, [would not violate] due process or the right of compulsory process."[76]

5. *The Reasonable Doubt Test*

Under the reasonable doubt test, evidence tending to implicate a third party "must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability."[77] Particularly "where the state's case is based on circumstantial evidence, the court should allow the defendant 'wide latitude' to present all the evidence relevant to his defense, unhampered by the piecemeal rulings on admissibility."[78] Exculpatory evidence under the reasonable doubt test still permits the trial court "discretion to exclude such evidence if it is too speculative or conjectural or too disconnected from the facts of the case against the defendant."[79]

In *State v. Conlogue*,[80] the defendant appealed from a conviction of recklessly causing serious bodily injury to a one and a half year-old child.[81] During the summer of 1981, the defendant, Conlogue, and a woman named Patricia Easler lived at a campground with Easler's three young children.[82] A friend visiting the couple reported the defendant to authorities for physically abusing one of the children.[83] Afterwards, a Health and Human Services representative and a detective visited the camp and took photographs of the child.[84] The child was then taken to a doctor where multiple bruises and injuries around the child's face were discovered.[85] Three days later, the child was returned to the hospital with an acute fracture of the right arm.[86] While there, Easler told the doctor she did not intend to hurt the child.[87] After both the defendant and Easler were indicted, Easler retracted her previous statement and claimed that she only admitted to hurting the child in order to protect the defendant.[88]

At the defendant's trial, the judge declined to admit the testimony of three defense witnesses who, as former neighbors of Easler, testified that they had seen her physically abuse her two older children.[89] The appellate court subsequently reversed, holding that the evidence had been improperly excluded because the testimony tended to implicate Easler and was of sufficient probative value to raise a reasonable doubt as to the defendant's guilt.[90]

6. *Combination of Tests*

Many of the courts use a combination of tests, even if they claim to be using one of the categories mentioned above. [91] Most often, courts using one of the tests also "rely on the strength of the connection between the evidence of a third party's guilt and the commission of the crime charged."[92]

B. Arkansas Decides: *Zinger v. State*

The Arkansas Supreme Court established Arkansas's approach to exculpatory evidence in the *Zinger* case.[93] The discussion of *Zinger* will begin with a brief factual description of the case[94] and then discuss the authorities that the court relied upon to reach its decision.[95] Next, it will address the holding of the case,[96] and, finally, it will examine the court's analysis.[97]

1. *Facts*

"Nikki Sue Zinger and Daniel Wayne Risher[ ]were convicted of the first degree murder of Zinger's mother, Linda Holley. . . ."[98] On March 10, 1991, officers were called to Holley's home in Magnolia, Arkansas, where they discovered her ransacked trailer and her body, which had been stabbed a number of times and had suffered several blows to the skull.[99] There was glass from the broken rear door on top of the items strewn about the floor, and there was evidence that someone had tried to clean up some of the blood after the murder.[100] Investigating officers concluded that a robbery had been staged after the victim was killed.[101]

Risher and Zinger were romantically involved; they lived part of the time at Risher's parents' home and part of the time with Holley.[102] At trial, the state presented evidence that Risher and Zinger had murdered Holley in order to collect $90,000 in insurance proceeds for which Zinger was the beneficiary.[103] Evidence indicated Zinger knew about Holley's insurance policy before the murder occurred because on March 14th, four days after Holley's body was discovered, the police found a box containing the insurance papers at Risher's parents' home.[104] All of the investigating officers testified that this box was not in the Rishers' trailer on March 11th when they had conducted a "very thorough search" of the Risher home.[105]

Moreover, an expert witness presented incriminating evidence collected from a piece of polymer glass taken from Holley's eyeglass lens.[106] He discovered a fragment of glass similar to the polymer glass from Holley's eyeglass lens on Risher's jacket pocket, the same jacket Risher had been seen wearing on the day of the murder.[107] The expert witness also concluded that a fiber removed from Risher's jacket had come from the nurse's uniform Holley was wearing at the time of the murder.[108] Lastly, the expert found blood on a robe inside Zinger's closet, on a pair of boots found in the Risher home, and on the jacket Risher had been seen wearing on the day of the attack.[109]

At the trial, Risher and Zinger attempted to introduce evidence that a third party had murdered Holley.[110] The trial court refused to admit testimony from a police officer regarding a similar murder that had occurred approximately thirty miles from Magnolia in Cullen, Louisiana.[111] The appellants sought to admit this evidence to convince the jury that the person who

committed the crime in Louisiana also murdered Holley.[112] The testimony suggested the following similarities to Holley's murder: the Louisiana victim had been beaten and stabbed several times; the victim was left in a position similar to that of Holley; and there was evidence of an attempted clean-up at the Louisiana murder scene.[113] The Louisiana crime would have also suggested a motive for the Holley murder because the Louisiana attack was a drug-related offense.[114] Finally, the murder weapons, a hammer and pair of scissors, were found at the scene of the crime in Louisiana.[115] The discovery of the weapons in Louisiana was proffered to suggest that the Louisiana suspect had used these weapons against Holley because her death was the result of blunt force trauma to the skull and stab wounds to the body. Moreover, the defense argued it could explain why no murder weapons had been discovered in connection with the Holley crime.[116]

2. *Discussion of Authorities*

The Arkansas Supreme Court articulated the issue as follows: "under what circumstances [is] evidence incriminating others . . . relevant to prove a defendant did not commit the crime charged"?[117] In arriving at its decision, the court began by examining the approaches adopted by the supreme courts of North Carolina and California.

a. North Carolina's approach: Direct connection test

The North Carolina Supreme Court articulated its admissibility standard by stating that

> [a] defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points *directly* to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible.[118]

This approach to the admissibility of exculpatory evidence, as previously discussed, is the direct connection test, and it is the most difficult of admissibility standards to meet.[119]

b. California's approach: Combination test

The court then discussed an approach that the Supreme Court of California has used in determining whether to admit exculpatory evidence.[120] The California court acknowledged that defendants have a right to present exculpatory evidence,[121] but also explained that

> [t]he rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . [E]vidence 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.[122]

Here, California's approach to the admissibility of exculpatory evidence falls under the combination test: [123] a reasonable doubt test combined with a connection test.[124] This test requires the evidence to raise a reasonable doubt as to the defendant's guilt, and, to do so, the court permits admission of either *direct or circumstantial* evidence that a third party committed the crime charged.[125] The latter component of California's approach infuses a more relaxed connection test, as opposed to a strict direct connection test, into the judge's determination of the admissibility of the evidence by permitting direct or circumstantial evidence to pass admissibility muster.[126]

3. *Zinger's Holding*

Ultimately, the Arkansas Supreme Court held that although there were some similarities between the two crimes, "there was no evidence presented connecting the Louisiana suspect to the Holley murder."[127] The court noted that the trial court was not even given the name of a third party or information indicating whether he or she had any connection to Holley. Therefore, the court held "there was neither *direct nor circumstantial* evidence connecting the Louisiana perpetrator to the Arkansas crime, other than a few similarities found in the two crime scenes."[128] As a result, the court declined to conclude that the trial court judge abused his discretion in refusing to admit the exculpatory evidence.[129]

4. *Analysis*

The manner in which the *Zinger* case is written leads to ambiguity as to which test the Arkansas Supreme Court has adopted. This is partially a problem of poor organization within the text of the opinion. The court begins its discussion with North Carolina's approach: a strict direct connection test for the admissibility of exculpatory evidence.[130] Next, the court discusses California's approach, a combination test, which incorporates a reasonable doubt test and a more relaxed connection test.[131] The court fails to properly distinguish these two approaches, ignoring how each of these tests sets a very different standard for the admissibility of exculpatory evidence.[132] The holding makes clear, however, that the court declined to adopt the strict direct connection test as adopted by the North Carolina court.[133] As it concluded the opinion, the court noted that the evidence of the Louisiana murder was inadmissible because there was *neither direct nor circumstantial evidence*

that a third party committed Holley's murder.[134] Use of this language, indicative of a combination test, which incorporates the reasonable doubt test and a more relaxed combination test, established the standard to be used in Arkansas when evaluating the admissibility of exculpatory evidence. Thus, *Zinger*'s holding permits Arkansas trial courts to make inferences about the possibility of a third-party perpetrator by permitting the use of circumstantial evidence.[135]

III. ARGUMENT

This section will begin by discussing how Arkansas courts have interpreted *Zinger*.[136] Next, it will synthesize these varying interpretations in an attempt to understand exactly which standard the Arkansas courts are using in relation to the admissibility of exculpatory evidence.[137] It will then evaluate the constitutional implications of these Arkansas approaches.[138] Finally, it will conclude with a proposal for the adoption of an entirely new approach.[139]

A. So . . . Which Standard is It? Arkansas Courts Play the Guessing Game

1. *Standard Confusion*

Possibly as a result of ambiguity in the *Zinger* case, Arkansas courts interpreting the standard for admissibility of exculpatory evidence have utilized the strict direct connection test, a combination test, and have even used a seemingly new approach based on Arkansas Rules of Evidence 401, 402, and 403.[140]

In *Larimore v. State*,[141] the Arkansas Supreme Court, citing the Arkansas Rules of Evidence, declined to admit exculpatory evidence based on a seemingly new approach.[142] Appellant Larimore had been convicted of the first-degree murder of his wife, June.[143] June's body was discovered with 134 stab wounds to her face, torso, arms, hands, and legs.[144] Investigators determined that the crime was likely motivated by anger, as opposed to a sexual attack or a robbery.[145] They concluded this because there was no physical evidence of a sexual assault and June's jewelry and purse remained untouched.[146] When her body was discovered, the sliding glass door was unlocked, the stereo was still playing, and the only household items that had been disturbed were the telephones, which appeared to have had their cords either unplugged or severed.[147]

At trial, the appellant attempted to introduce evidence that an individual named Lockman had the motive and opportunity to commit the murder.[148] The appellant's evidence indicated Lockman had been seen near June's home on the morning of the murder, had previously done yard work for her, had been caught breaking and entering into June's home to steal her proper-

ty, and had attempted to break into her home on one other occasion.[149] Each of these incidents occurred several months before the murder.[150] The state moved to exclude the testimony based on relevancy, and the motion was granted.[151]

On appeal, the court categorized the excluded evidence as "reverse 404(b)"[152] evidence.[153] It stated that evidence of this type must first be independently relevant, i.e., it must "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."[154] The court then stated that although relevant, the evidence still may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, a confusion of the issues, or the possibility that it will mislead the jury.[155]

Next, the court added an additional admissibility threshold, apart from the admissibility hurdles based on the Arkansas Rules of Evidence. It did so by evaluating the level of *connection* between the exculpatory evidence and the crime charged.[156] The court cited with favorability the Court of Appeals for the Fifth Circuit's approach to the admissibility of this evidence, which "requires that the evidence have 'a tendency to negate [the defendant's guilt], and that it [pass] the Rule 403 balancing test.'"[157] The court stated that for this determination:

> [s]imilarity and time connections are factors in determining the probativeness of the evidence, which must be weighed against the possibility of confusing the issues and wasting time. Some courts have said that there should be a sufficient nexus between the evidence and the possibility of another person's guilt and that this evidence should do more than create a mere suspicion.[158]

Based upon the relatively innocuous incidents that had occurred between Lockman and June, as well as the dissimilarities between those incidents and the facts of the case at bar, the court determined that the trial court had not abused its discretion by excluding the evidence as irrelevant.[159]

In *Echols v. State*,[160] the Arkansas Supreme Court added to the confusion by holding that the defendant could not present any exculpatory evidence unless it pointed *directly* to third-party guilt.[161] As a result, the defendant was barred from presenting any circumstantial evidence, which could have raised the possibility of third-party involvement in the crime charged.[162] Therefore, the court, citing and interpreting its own law, further muddied the waters of admissibility by improperly articulating the standard it had previously set forth in *Zinger* and by declining to even reference the standard it had used in *Larimore*.[163] The *Echols* court then went a step further by articulating a new rule with respect to exculpatory evidence by stating there should be a *sufficient* connection between the evidence and the possibility of another person's guilt before it is admissible.[164] By denying admission of the exculpatory evidence, unless the evidence points *directly* to

third-party guilt, it could be inferred that a "sufficient connection" simply requires a direct connection between a third-party perpetrator and the crime charged.[165] However, whether "sufficient connection" was meant to wholly exclude circumstantial evidence from the Arkansas admissibility standard is unclear.

In *Burmingham v. State*,[166] the Arkansas Supreme Court once again discussed the conflicting approaches presented in *Zinger*.[167] Ultimately, however, the court relied solely on the direct connection test adopted by the North Carolina Supreme Court and cited in *Zinger*.[168] The court stated that evidence that does no more than create an inference or conjecture as to another's guilt is inadmissible.[169] In concluding whether evidence about similar rapes would be admissible, the court stated:

> Presenting evidence that other "blue light rapes" occurred while appellant was in jail without additional evidence does nothing more than create an inference or conjecture as to another unnamed individual's guilt in an unrelated crime. Because appellant failed to provide evidence as to a particular third party's guilt in the rape of [the plaintiff, the evidence was properly excluded].[170]

Because the court failed to articulate the requisite amount of connection between evidence of a third-party perpetrator and a crime, it can be inferred that they relied solely on North Carolina's direct connection test.[171] Nevertheless, this ambiguity continues the confusion about which test is the appropriate measure for the admissibility of exculpatory evidence in Arkansas.

Finally, in *Armstrong v. State*,[172] the Arkansas Supreme Court stated that, ultimately, the Arkansas test merely requires "that the evidence a defendant wishes to admit to prove third-party guilt *sufficiently connects* the other person to the crime."[173] Although the court clearly stated its reliance on a connection test of some sort, the court failed to articulate whether or not circumstantial evidence was sufficient to meet the admissibility threshold.[174]

2. *Making Sense Out of the Senseless*

The hodgepodge of admissibility standards following *Zinger* attests to its ambiguity and illustrates the need for a clearer articulation of the Arkansas standard.[175] Most often, Arkansas courts demand direct evidence connecting the third party to the crime, but, as previously discussed, in some cases the Arkansas courts are also permitting the admission of circumstantial exculpatory evidence.[176] Perhaps it is easiest to conceptualize these seemingly conflicting standards as each essentially articulating the same thing: All are shorthand for weighing probative value against the risk of undue prejudice, delay, and the risk of confusion of the issues.[177] Where a rose by

any other name smells as sweet,[178] it no longer becomes relevant exactly how a court articulates its particular admissibility standard, i.e., where regardless of specific semantics, the same conventional balancing test is employed for *all* evidence, it becomes immaterial which precise phrase a court uses to articulate its admissibility standard.[179] Where, however, "sufficient connection," "direct connection," or other similar language is *misread* to suggest that exculpatory evidence "occupies a special or exotic category of proof," a problem arises.[180] This problem has arisen in Arkansas courts.

B. What Does the Constitution Say About a Criminal Defendant's Rights?

To fully appreciate the consequences of treating exculpatory evidence as "a special or exotic category of proof," it is first pertinent to discuss a criminal defendant's constitutionally guaranteed rights.[181] Then, with these guarantees in mind, this section will analyze the current Arkansas approaches and explore what this problem means for Arkansas courts and criminal defendants.[182]

1. *Supreme Court of the United States Defines the Rights*

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[183]

The Supreme Court of the United States has rarely dealt with the constitutionality of the various exculpatory evidence standards. The first time the Court addressed exculpatory evidence was in *Alexander v. United States*,[184] an Arkansas case.[185] There, the defendant was charged with the murder of friend and business partner, Steadman.[186] On the day of the murder, the defendant and Steadman were seen horseback riding together.[187] In addition to their firearms, the defendant carried a pistol.[188] After meeting with the defendant and Steadman, a witness testified that he saw the horses standing without their riders along a road.[189] A few moments later, the witness testified that he heard several gun shots and saw the defendant mount his horse and begin to lead Steadman's horse along the road.[190] Steadman's body was discovered twelve days later with a crushed skull and a bullet hole in the back of his ear.[191]

At trial, the defendant attempted to introduce evidence suggesting Steadman had been murdered by a woman's cuckolded husband, House.[192] The evidence consisted of testimony stating that on the day of Steadman's murder, House had been "riding around the neighborhood armed with . . . guns" looking for Steadman and his adulterous wife "who were then believed to have eloped together."[193] The trial judge excluded the testimony.[194]

In its first discussion regarding the admissibility of exculpatory evidence, the Court noted that it was within the trial court judge's sound discretion to exclude the testimony if the statements were "so remote or insignificant as to have no *legitimate tendency* to show that House could have committed the murder."[195] Although the Court reversed on other grounds, dicta suggests the Court believed the testimony did have a legitimate tendency to suggest that House could have committed the murder.[196]

The Court next addressed exculpatory evidence in *Washington v. Texas.*[197] There, the Court held a state statute, which made an accomplice's testimony inadmissible in court, unconstitutional because it violated the Sixth Amendment Compulsory Process Clause and the Due Process Clause of the Fourteenth Amendment.[198] The defendant had been convicted of murder with malice and sentenced to fifty years in prison.[199] At trial, the defendant attempted to introduce an accomplice's testimony, which corroborated the defendant's testimony that the accomplice, and not the defendant, had been the one to fatally shoot the victim.[200] Because of the state statute, however, the defendant was prevented from introducing the testimony of an accomplice to the crime charged.[201]

The *Washington* Court reemphasized that "the most basic ingredients of due process" are "'a person's right to reasonable notice of [the] charge[s] against him[ ] and an opportunity to be heard in his defense.'"[202] Furthermore, these rights include, at a minimum, the right to examine the witnesses against the defendant, "to offer testimony, and to be represented by counsel."[203] The Court also recognized that:

> [t]he right to offer the testimony of witnesses, and to compel their attendance . . . is in plain terms the right to present a defense [by] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.[204]

The Court concluded that a defendant's right to present witnesses is a fundamental element of the due process of law.[205] Therefore, the Court held that the defendant's right had been unconstitutionally violated and reversed the conviction.[206]

> The Court next addressed the admissibility of exculpatory evidence in *Chambers v. Mississippi.*[207] There, the Court considered the constitutionality of a state law that prevented a criminal defendant from calling witnesses in his favor.[208] The Court found the state's statute unconstitutional because "the right to a fair opportunity to defend against the [s]tate's accusations" constituted a criminal defendant's right to due process.[209]

More recently, the Supreme Court overturned a South Carolina court's decision in *Holmes v. South Carolina*.[210] The defendant had been convicted of the brutal rape, robbery, and murder of an eighty-six year old woman.[211]

At trial, the prosecution mounted a large amount of forensic evidence against the defendant.[212] In response, the defendant offered evidence suggesting the investigation against him was motivated by a conspiracy among law enforcement officers to frame him, as well as "attempted to undermine the . . . forensic evidence by suggesting it had been contaminated" using poor evidence collection techniques.[213] The defendant also offered the testimony of several witnesses concerning a third-party perpetrator, seen in the victim's neighborhood on the morning of the assault, who confessed to multiple people about his involvement in the crime.[214] One witness claimed that upon questioning the third-party perpetrator about whether he had raped and killed the elderly woman, the man stated, "Well, you know I like older women."[215] The trial court subsequently excluded all of the exculpatory evidence, and the defendant was convicted of "murder, first-degree criminal sexual conduct, first-degree burglary, and robbery;" he was sentenced to death.[216]

The South Carolina Supreme Court affirmed the conviction, holding that where there is "strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence."[217] After reviewing the forensic evidence against the defendant, the court determined that because of the strong evidence of his guilt, he could not overcome the forensic evidence against him.[218]

The Supreme Court of the United States granted certiorari. The Court began by noting that "[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."[219] After discussing the defendant's right to be given a meaningful opportunity to present a complete defense, the Court noted that this right is abridged by evidence rules that "'infringe [o]n a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'"[220] In overturning South Carolina's decision, the Court noted that excluding evidence where there is strong forensic evidence of the defendant's guilt permits the trial judge not to focus "on the probative value or the potential adverse effects of admitting" the exculpatory evidence, but instead focuses on the strength of the prosecution's case.[221] Therefore, if the prosecution's case is strong enough, the exculpatory evidence will always be excluded, even if the evidence, when "viewed independently, would have great probative value" and would not pose any undue risk of prejudice, confusion of the issues, or harassment.[222] Interpreted this way, the South Carolina standard did not serve the rational means that it was designed to promote, i.e., excluding issues that have a very weak logical connection to the issues.[223] The Court stated that just "because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case."[224] In vacating the conviction, the Court con-

cluded that South Carolina's approach to exculpatory evidence as applied in the case was unconstitutional because the rule was arbitrary and did not rationally serve the legitimate end it purported to serve.[225]

2. *How Do the Arkansas Approaches Fare Under Constitutional Scrutiny?*

While Arkansas cases are unclear as to the requisite amount of connection required to admit exculpatory evidence, the clear trend among Arkansas courts is to require a *direct* connection before admitting the evidence, despite whatever phrasing the judge chooses in his written opinions.[226] This direct connection requirement raises serious constitutional concerns. If the Constitution requires that a criminal defendant be provided "a meaningful opportunity to present a complete defense,"[227] then requiring a direct connection between the third party and the crime sets the admissibility standard too high.

First, if the defendant cannot secure direct evidence, *all* of the exculpatory evidence is inadmissible.[228] It is extremely important to note the implication of requiring the production of direct evidence. "Direct evidence means eyewitness testimony."[229] As one commentator notes, even if obtained, "eyewitness testimony is notoriously unreliable," and it is always prey to police manipulation.[230] Further, even an innocent defendant will be unlikely to secure any eyewitness testimony because of police investigation techniques, which tend to disregard any forthcoming witness or evidence that is adverse to the police officers' theory of the case.[231] As a result of the pressure to solve cases, "it is easy to believe that [an] investigation tends to focus on building a case against a suspect rather than on exploring leads and preserving evidence that might suggest [a] suspect's innocence."[232] In addition, many factors, such as a witness's fear of retaliation from the true guilty party and the police officers' advanced investigative capabilities versus a lone defendant's minimal resources for investigation, contribute to the nearly impossible task of securing eyewitness testimony.[233]

A direct connection requirement also puts the burden of production on the defendant to produce evidence linking the third party to the crime.[234] Although the Supreme Court of the United States has not addressed the constitutionality of placing the burden of proof on the criminal defendant, the law clearly requires the state to bear the burden of proving every element of the crime beyond a reasonable doubt, and the burden cannot constitutionally be shifted to the accused.[235] The right to present a defense, while not absolute, "encompasses the ability to advance any legitimate theory of defense and to present evidence necessary to support that theory without undue interference."[236] A direct connection requirement is contrary to this notion because, unless the criminal defendant can meet his burden of production, all relevant defense evidence is excluded from the jury's consideration.[237]

Moreover, in every crime, "the identity of the perpetrator is an element of the crime."[238] Therefore, shifting the burden of production to the defendant to prove the identity or other evidence about the third party is unconstitutional.[239]

The direct connection requirement also runs contrary to core values in the Constitution by replacing a right to trial by jury with a judge's opinion of whether a third party could have committed the crime.[240] For the framers of the Constitution, the jury trial was a fundamental barrier against a tyrannical government.[241] As ultimate arbitrators on the issue of facts, juries also serve as a vital protection against erroneous convictions.[242] The Supreme Court of the United States has stated that the jury provides an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[243] Finally, replacing the jury's factual findings on a material issue as critical as the identity of the perpetrator with a judge's concept of what constitutes a "sufficient connection" in the case violates the notion that juries function to enable common "citizens to participate in the administration of justice."[244]

C. Time for a Re-Do

1. *The Status Quo Cannot Stand*

The ambiguity in *Zinger* has promoted a toxic and contradictory pattern to the admissibility of exculpatory evidence in Arkansas courts. The Arkansas approaches, requiring either a strict direct connection test, a combination test with a more relaxed connection requirement, or mere admissibility under Arkansas Rules of Evidence 401, 402, and 403, at their very core all suffer from the same problem: Each is treating exculpatory evidence differently than all other evidence.[245] By doing so, the criminal defendant must overcome a nearly impossible,[246] and demonstrably higher, evidentiary burden that violates the criminal defendant's constitutional rights.[247]

State evidence rules are also being violated. These standards permit an Arkansas judge to ignore his very own evidence rules, which simply require him to admit all relevant evidence[248] unless it is outweighed by the danger of undue prejudice, delay, or confusion of the issues.[249] Under each of the Arkansas approaches, the judge is effectively evaluating the type of the evidence, either direct or circumstantial, and the weight of the proffered evidence, thereby ignoring the "required examination of the evidence's probative value."[250] A judge improperly evaluating the exculpatory evidence in this manner is focusing on the *third-party's* guilt or innocence, forcing the criminal defendant to prove to the judge's satisfaction that the third party actually "committed the crime or was 'largely' connected to it."[251] The proper admissibility standard analyzes the effect the proffered "evidence has upon the *defendant's* culpability."[252]

Moreover, Rule 401's relatively lax relevancy standard and Rule 403's exclusion based on lack of probative value are designed to reinforce the notion "that the weight of the evidence is for the *jury* to determine."[253] By impermissibly raising the evidentiary bar and evaluating the evidence, the judge oversteps his role and robs the jury of its position as the ultimate trier of fact.[254]

The oft-cited justification for the judge overstepping his role in this manner, particularly in reference to the admissibility of exculpatory evidence, relates to the judicial system's inherent mistrust of juries to base convictions and acquittals on admissible evidence rather than emotions or other improper reasons.[255] Courts arguing in favor of the judge preventing jurors from hearing exculpatory evidence note that such evidence would "open the door to the most fraudulent contrivances to procure the acquittal of parties accused of crime."[256] This fear, however, is unfounded and over emphasized.[257] First, it ignores the high value our society has placed on permitting even two guilty men to go free in order for one innocent man to retain his freedom.[258] It also ignores the prosecution's ability to cross-examine, impeach untrustworthy witnesses, and prosecute perjurers.[259] Finally, it assumes that when presented with exculpatory evidence, jurors would be unable to discern truth from falsity.[260] Social science contrarily suggests that jurors are not easily duped and distracted by speculative and implausible claims.[261] Studies of jury behavior provide evidence that jurors are active and curious during the trial process, and they are unlikely to go "scurrying" after an unsupported and speculative third-party perpetrator claim.[262]

2. *Proposal for a New Standard: Back to the Basics*

As a result of the ambiguity found in *Zinger*,[263] Arkansas courts faced with the admissibility of exculpatory evidence have been left to design new standards, rephrase old standards, and always remain consistently inconsistent with regard to what type and amount of evidence will pass a judge's particular evidentiary threshold.[264] To remedy this, the Arkansas Supreme Court should entirely disregard a connection requirement and, instead, focus solely on Arkansas Rules of Evidence 401 and 403.[265]

Under the suggested approach, *all* evidence will be treated the same, eliminating the current misconception in Arkansas courts that admission of exculpatory evidence requires an "exotic or specialized category of proof," i.e., a direct connection, to be admissible.[266] The judge will begin with a Rule 401 relevancy determination, namely: "[t]o be relevant, the evidence need only *tend* to create a reasonable doubt as to the defendant's guilt."[267] Next, the judge will evaluate the exculpatory evidence under a *strict* application of Rule 403.[268] This analysis will require the judge to weigh the evidence's probative value versus the danger of unfair prejudice, a confusion of the issues, or the possibility that it will mislead the jury.[269]

Simply put, this approach removes the requirement for a direct connection between the third party and the crime charged. By evaluating exculpatory evidence just like every other piece of evidence, the criminal defendant will no longer be forced to pass an unbearably high evidentiary hurdle in order to exercise his constitutional rights in presenting a complete defense.[270] Moreover, the state's interest in expediency will also be accommodated through Rule 403 by permitting the trial judge to maintain his discretion to exclude evidence when its probative value is substantially outweighed by dangers of delay, prejudice, and confusion of the issues.[271]

Finally, simply requiring that the evidence meet the Rule 401 and 403 standards will permit jurors to truly hear and evaluate the facts of the case.[272] Under this new approach, unfounded fears about juries are lessened, and the judge will assume the proper role as the gate-keeper while the jury remains the ultimate trier of fact.[273]

IV. CONCLUSION

The Arkansas Supreme Court spawned a series of inconsistent and oftentimes contradictory cases amongst subsidiary Arkansas courts after its holding in *Zinger*. The rule in *Zinger*, and its subsequent interpretations, has raised serious concerns with respect to the constitutionally guaranteed rights of criminal defendants. By adopting a test that treats the admissibility of all evidence the same, Arkansas courts will successfully ease the negative constitutional implications for the criminal defendant while simultaneously clarifying the evidentiary standard for admissibility and fostering consistency among Arkansas courts' approach to exculpatory evidence.

*Bourgon B. Reynolds**

1. Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.").
2. 313 Ark. 70, 852 S.W.2d 320 (1993).
3. BLACK'S LAW DICTIONARY 257 (9th ed. 2009).
4. 313 Ark. at 70, 852 S.W.2d at 320.
5. *Id.* at 75, 852 S.W.2d at 323.
6. *Id.* at 75–76, 852 S.W.2d at 323.
7. *Id.* at 76, 852 S.W.2d at 323.
8. *See id.* at 70, 852 S.W.2d at 320; *see also* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1647–51 (2008) (analyzing the different approaches to a defendant's claim to innocence).
9. *See infra* Part II.A.
10. *See infra* Part II.B.
11. *See infra* Part III.C.2.

12. *See infra* Part II.A.1.
13. *See infra* Part II.B.1.
14. *See infra* Part II.B.4.
15. *See* Brett C. Powell, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023, 1024 (2001) (discussing how jurisdictions use the Federal Rules to determine admissibility of exculpatory evidence).
16. Fed. R. Evid. 401.
17. FED. R. EVID. 402.
18. State v. McElrath, 366 S.E.2d 442, 449 (N.C. 1988).
19. State v. Williams, 650 P.2d 1202, 1213 (Ariz. 1982) (citing State v. Renteria, 520 P.2d 316, 317 (Ariz. Ct. App. 1974)).
20. *McElrath*, 366 S.E.2d at 449 (quoting State v. Huffstetler, 322 S.E.2d 110, 118 (N.C. 1984)).
21. 904 F. Supp. 1303 (M.D. Ala. 1995).
22. *Id.* at 1305.
23. *Id.*
24. *Id.*
25. *Id.* at 1306.
26. *Id.*
27. *Johnson*, 904 F. Supp. at 1306.
28. *Id.* at 1307.
29. *Id.*
30. *Id.* at 1311 (quoting Cikora v. Duggar, 840 F.2d 893, 898 (11th Cir. 1988)).
31. *Id.*
32. *Id.* at 1306.
33. *Johnson*, 904 F. Supp. at 1310 (relying on the Fifth and Sixth Amendments the court unequivocally announced that a defendant "has a right to present to the jury substantial and reliable exculpatory evidence that another person committed the crime").
34. Stephen Michael Everhart, *Putting A Burden of Production on the Defendant Before Admitting Evidence That Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 NEB. L. REV. 272, 278 (1997).
35. *Id.* (suggesting that courts applying the relevancy test in this manner place the burden of proof on the defendant); *see infra* Part III.B.2.
36. 904 F. Supp. 1303, 1311 (M.D. Ala. 1995).
37. 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, 936–38 (1996). Professor McCord notes that of the fifty states, federal courts, and District of Columbia, only thirty-six jurisdictions have enough case law on exculpatory evidence to support a thorough analysis. *Id.* at 936. He contends that of these thirty-six jurisdictions, "twenty-five adhere at least in part to the direct connection doctrine." *Id.* Of the remaining eleven jurisdictions, McCord asserts eight appear to rely solely on a balancing test, which weighs the probative value of the evidence against any potential unfair prejudice. *Id.* at 937. Finally, according to McCord, three courts "supplement the balance test with a capable-of-raising-a-reasonable-doubt approach." *Id.* at 937–38. McCord also notes that Maine is the most distinct jurisdiction because it has "explicitly reject[ed] the direct connection doctrine as setting too high a standard." *Id.* at 938 (emphasis omitted).
38. *Id.* at 975. Professor McCord finds the direct connection test to be the predominate approach despite how the deciding court tends to term their admissibility standard. *Id.* at 936–38.
39. *E.g.*, White v. State, 285 P. 503, 510 (Nev. 1930) (declining to admit evidence of a

third party's guilt where there was no evidence directly connecting the third party to the killing); State v. Smith, 189 S.E. 175, 176 (N.C. 1937) ("[I]t is well settled that such evidence is not admissible unless it points directly to the guilt of the third party[;] evidence which does no more than create an inference or conjecture as to such guilt is inadmissible.").

40. State v. Wilson, 367 S.E.2d 589, 600 (N.C. 1988).
41. 189 S.E. 175 (N.C. 1937).
42. *Id.* at 175–76. The defendant also appealed his first-degree burglary conviction.
43. *Id.* at 176–77.
44. *Id.*
45. FED. R. EVID. 403.
46. 718 P.2d 99 (Cal. 1986).
47. *Id.* at 100–01.
48. *Id.* at 101.
49. *Id.*
50. *Id.*
51. *Id.* at 102.
52. *Hall*, 718 P.2d at 102.
53. *Id.* at 104.
54. *Id.* (citations omitted).
55. *Id.*
56. *Id.* "[I]f the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." *Id.* (quoting 1A JOHN HENRY WIGMORE, EVIDENCE § 139 (Peter Tillers rev. ed. 1980)).
57. *Id.* at 105–06.
58. Everhart, *supra* note 33, at 282.
59. *Id.*
60. *Id.* at 277 (citing Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983)).
61. *Id.* at 282 (quoting Perry v. Rushen, 713 F.2d 1447, 1452 (9th Cir. 1983)).
62. 713 F.2d 1447 (9th Cir. 1983).
63. *Id.* at 1452.
64. *Id.* at 1448.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Rushen*, 713 F.2d at 1448–49.
69. *Id.* at 1449.
70. *Id.*
71. *Id.*
72. *Id.* at 1452.
73. *Id.* at 1452–53; *see also* Everhart, *supra* note 33, at 282 (discussing the operation of the balancing test).
74. *Rushen*, 713 F.2d at 1452 (discussing Chambers v. Mississippi, 410 U.S. 284 (1973) and Washington v. Texas, 388 U.S. 14 (1967)); *see infra* Part III.B.1.. for a discussion of the significance of these Supreme Court cases.
75. *Id.* at 1454.
76. *Id.* at 1455.
77. State v. Conlogue, 474 A.2d 167, 172 (Me. 1984).
78. State v. LeClair, 425 A.2d 182, 186 (Me. 1981).
79. *Id.* at 187.
80. 474 A.2d 167 (Me. 1984).

81. *Id.* at 169–70.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Conlogue*, 474 A.2d at 169.
87. *Id.* at 170.
88. *Id.*
89. *Id.* at 172.
90. *Id.* at 172–73.
91. Everhart, *supra* note 33, at 283 (citing the following cases to illustrate a court's use of a combination of the tests: Cikora v. Duggar, 840 F.2d 893 (11th Cir. 1988) (using the balancing test and the connection test); Perry v. Rushman, 713 F.2d 1447, 1454 (9th Cir. 1983) (the court began with the balancing test but ultimately excluded the exculpatory evidence based solely on relevancy grounds); State v. Caulk, 542 A.2d 167 (Me. 1984) (combining the reasonable doubt test and the direct connection test)).
92. Everhart, *supra* note 33, at 283.
93. Zinger v. State, 313 Ark. 70, 852 S.W.2d 320 (1993).
94. *See infra* Part II.B.1.
95. *See infra* Part II.B.2.
96. *See infra* Part II.B.3.
97. *See infra* Part II.B.4.
98. *Zinger*, 313 Ark. at 71, 852 S.W.2d at 321.
99. *Id.* at 72, 852 S.W.2d at 321.
100. *Id.*, 852 S.W.2d at 321.
101. *Id.*, 852 S.W.2d at 321.
102. *Id.*, 852 S.W.2d at 321.
103. *Id.*, 852 S.W.2d at 321.
104. *Zinger*, 313 Ark. at 72, 852 S.W.2d at 321.
105. *Id.,* 852 S.W.2d at 321.
106. *Id.,* 852 S.W.2d at 321.
107. *Id.,* 852 S.W.2d at 321.
108. *Id.* at 72–73, 852 S.W.2d at 321–22.
109. *Id.* at 73, 852 S.W.2d at 322.
110. *Zinger,* 313 Ark. at 75, 852 S.W.2d at 323.
111. *Id.,* 852 S.W.2d at 323.
112. *Id.,* 852 S.W.2d at 323.
113. *Id.,* 852 S.W.2d at 323.
114. *Id.,* 852 S.W.2d at 323.
115. *Id.* at 75, 852 S.W.2d at 322.
116. *Zinger*, 313 Ark. at 75, 852 S.W.2d at 323.
117. *Id.,* 852 S.W.2d at 323.
118. *Id.,* 852 S.W.2d at 323. (quoting State v. Wilson, 367 S.E.2d 589, 600 (N.C. 1988)) (emphasis added).
119. *See* discussion *supra* Part II.A.2.
120. *Zinger,* 313 Ark. at 76, 852 S.W.2d at 323.
121. *Id.* at 75–76, 852 S.W.2d at 323.
122. *Id.* at 76, 852 S.W.2d at 323 (quoting People v. Kaurish, 802 P.2d 278, 295 (Cal. 1990)) (emphasis added).
123. *See* discussion *supra* Part II.A.6.
124. *See supra* note 91 and accompanying text.
125. People v. Kaurish, 802 P.2d 278, 295 (Cal. 1990).

126. *See supra* Part II.A.2.
127. *Zinger*, 313 Ark. at 76, 852 S.W.2d at 323.
128. *Id.,* 852 S.W.2d at 323 (emphasis added).
129. *Id.,* 852 S.W.2d at 323.
130. *Id.* at 75, 852 S.W.2d at 323 (citing State v. Wilson, 367 S.E.2d 589, 600 (N.C. 1988)).
131. *Id.* at 75–76, 852 S.W.2d at 323.
132. Comparing the consequences that a direct connection test has on a criminal defendant with that of a more relaxed combination test, which incorporates a reasonable doubt test and a connection test, reveals the inherent differences in the two standards. A criminal defendant who may only present exculpatory evidence which *directly* connects a third-party to the crime is a world away from a criminal defendant who may present *direct or circumstantial* evidence in his own defense. The court's failure to clearly distinguish between the approaches undermines the important differences between them and, particularly, serves to undercut the devastating implications each test has on a criminal defendant attempting to prove his innocence. *See* discussion *infra* Part III.B.1.
133. *Zinger*, 313 Ark. at 76, 852 S.W.2d at 323.
134. *Id.,* 852 S.W.2d at 323.
135. *Id.,* 852 S.W.2d at 323.
136. *See infra* Part III.A.1.
137. *See infra* Part III.A.2.
138. *See infra* Part III.B.
139. *See infra* Part III.C.
140. It is worth noting that the Arkansas Rules of Evidence 401, 402 and 403 correspond directly with Federal Rules of Evidence 401, 402 and 403. *In re* Adoption of Unif. R. Evid., 290 Ark. 616, 717 S.W.2d 491 (1986).
141. 317 Ark. 111, 877 S.W.2d 570 (1994).
142. *Id.* at 125, 877 S.W.2d at 576–77.
143. *Id.* at 115, 877 S.W.2d at 571.
144. *Id.* at 115–16, 877 S.W.2d at 571.
145. *Id.,* 877 S.W.2d at 571.
146. *Id.* at 116, 877 S.W.2d at 571.
147. *Larimore*, 317 Ark. at 116, 877 S.W.2d at 571.
148. *Id.* at 123, 877 S.W.2d at 576.
149. *Id.,* 877 S.W.2d at 576.
150. *Id.,* 877 S.W.2d at 576.
151. *Id.,* 877 S.W.2d at 576.
152. ARK. R. EVID. 404(b) states that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

153. *Larimore,* 317 Ark. at 123, 877 S.W.2d at 575.
154. *Id.* at 123–24, 877 S.W.2d at 576 (citing ARK. R. EVID. 401).
155. *Id.* at 124, 877 S.W.2d at 576 (citing ARK. R. EVID. 403).
156. *Id.,* 877 S.W.2d at 576.
157. *Id.,* 877 S.W.2d at 576. (quoting State v. Stevens, 935 F.2d 1380, 1405 (3d Cir. 1991)).
158. *Id.,* 877 S.W.2d at 576.
159. *Larimore,* 317 Ark. at 125, 877 S.W.2d at 576.
160. 326 Ark. 917, 936 S.W.2d 509 (1996).

161. *Id.* at 962, 936 S.W.2d at 532 (citing Zinger v. State, 313 Ark. 70, 852 S.W.2d 320 (1993)).

162. *Id.*, 936 S.W.2d at 532.

163. *Id.,* 936 S.W.2d at 532.

164. *Id.,* 936 S.W.2d at 532.

165. *Id.,* 936 S.W.2d at 532.

166. 342 Ark. 95, 27 S.W.3d 351 (2000).

167. *Id.* at 109, 27 S.W.3d at 359–60.

168. *Id.,* 27 S.W.3d at 359–60. (citing State v. Wilson, 367 S.E.2d 589, 600 (N.C. 1988)).

169. *Id.,* 27 S.W.3d at 359–60.

170. *Id.* at 110, 27 S.W.3d at 360.

171. *Id.,* 27 S.W.3d at 360.

172. 373 Ark. 347, 284 S.W.3d 1 (2008).

173. *Id.* at 353, 284 S.W.3d at 5 (emphasis added).

174. *Id.,* 284 S.W.3d at 5.

175. *See* discussion *supra* Part III.A.1.

176. *See* discussion *supra* Part III.A.1.

177. McCord, *supra* note 36, at 936; *see also* People v. Primo, 753 N.E.2d 164, 168 (N.Y. 2001) ("These catch phrases merely reinforce the notion that remote evidence of a third party's culpability-though relevant-will not be sufficiently probative to outweigh the risk of trial delay, undue prejudice or jury confusion.").

178. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, SC. 2.

179. People v. Primo, 753 N.E.2d 164, 168 (N.Y. 2001).

180. *Id.*; *see infra* Part III.C.1 (explanation of why it is problematic to treat exculpatory evidence differently than all other types of evidence).

181. *Primo*, 753 N.E.2d at 168; *see infra* Part III.B.1.

182. *See* discussion *infra* Part III.C.1.

183. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)); *see also* Martin A. Hewett, *A More Reliable Right to Present A Defense: The Compulsory Process Clause After* Crawford v. Washington, 96 GEO. L.J. 273, 275 (2007) (discussing the affirmative evidentiary right granted to the criminal defendant by the Compulsory Process Clause of the Sixth Amendment—the right to have compulsory process for obtaining witnesses in his favor); Jayna M. Mathieu, *Reverse Spreigl Evidence: Challenging Defendants' Obligation to Exceed Prosecutorial Standards to Admit Evidence of Third Party Guilt*, 86 MINN. L. REV. 1033, 1035–36 (2002) (evaluating a state law and its implications on the criminal defendant's Sixth Amendment right to introduce potentially exculpatory evidence); Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1064 (1999) (discussing how a criminal defendant's constitutional right to present witnesses will invariably override any state statute or common law decision to the contrary); Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 569 (1978) (thorough discussion of the Confrontation and Compulsory Process Clauses and their effect on criminal defendants).

184. 138 U.S. 353 (1891).

185. *Id.* at 355–56.

186. *Id.* at 355.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Alexander*, 138 U.S. at 355.

191. *Id.*

192. *Id.* at 356.

193. *Id.* at 357.

194. *Id.* at 356.
195. *Id.* (emphasis added).
196. *Alexander*, 138 U.S. at 357 ("[W]e think that, if it were shown that House was in search of Steadman, his declarations as to his purpose in so doing stand upon the same basis, with regard to admissibility, as his conduct, and were a part of the *res gestae*.").
197. 388 U.S. 14 (1967).
198. *Id.* at 18–19.
199. *Id.* at 15.
200. *Id.* at 16–17.
201. *Id.*
202. *Id.* at 18 (citing *In Re* Oliver, 333 U.S. 257, 273 (1948)).
203. *Washington*, 388 U.S. at 18.
204. *Id.* at 19.
205. *Id.*
206. *Id.* at 23.
207. 410 U.S. 284 (1973).
208. *Id.* at 294.
209. *Id.*
210. 547 U.S. 319 (2006); *see also* John H. Blume et al., *Every Juror Wants A Story: Narrative Relevance, Third Party Guilt and the Right to Present A Defense*, 44 AM. CRIM. L. REV. 1069, 1079 (2007) (a fascinating in-depth discussion of the disturbing facts of *Holmes* and what effect the Supreme Court's holding has on the criminal defendant attempting to present a meaningful defense).
211. *Holmes*, 547 U.S. at 321–22.
212. *Id.* at 322.
213. *Id.* at 322–23.
214. *Id.* at 323.
215. *Id.*
216. *Id.* at 321–22.
217. *Holmes*, 547 U.S. at 324.
218. *Id.*
219. *Id.* at 324 (internal citations omitted).
220. *Id.* (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 56, 58 (1987))).
221. *Id.* at 329.
222. *Id.*
223. *Holmes*, 547 U.S. at 330.
224. *Id.*
225. *Id.* at 331; *see generally* Lissa Griffin, *Avoiding Wrongful Convictions: Re-Examining the "Wrong-Person" Defense*, 39 SETON HALL L. REV. 129 (2009) (discussing the Holmes decision and its relation to exculpatory evidence).
226. *See supra* Part III.A.1–2.
227. Crane v. Kentucky, 476 U.S. 683, 690 (1986).
228. Everhart, *supra* note 33, at 280.
229. Donald A. Dripps, *Relevant But Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put on a Defense*, 69 S. CAL. L. REV. 1389, 1422 (1996).
230. *Id.*
231. *Id.* (excluding exculpatory evidence ignores the self-fulfilling quality of police investigations).
232. *Id.* at 1416–17.
233. *Id.* at 1422.
234. Everhart, *supra* note 33, at 280.

235. *Id.* at 285.
236. Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643, 1682 (2000).
237. *See id.*
238. Everhart, *supra* note 33, at 285.
239. *Id.*
240. *See* Dripps, *supra* note 228, at 1394, for a discussion of the jury's value.
241. *Id.*
242. *Id.* at 1395.
243. *Id.* (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).
244. *Id.*
245. *E.g.*, People v. Primo, 753 N.E.2d 164, 168 (N.Y. 2001) (noting that it is problematic to treat exculpatory evidence as a "special or exotic" type of evidence and require a higher admissibility standard for it).
246. Dripps, *supra* note 228, at 1422.
247. *See* discussion *supra* Part III.B.2.
248. ARK. R. EVID. 401.
249. ARK. R. EVID. 403.
250. Powell, *supra* note 14, at 1038.
251. State v. Gibson, 44 P.3d 1001, 1003–04 (Ariz. 2002) (internal citations omitted) (emphasis added).
252. *Id.* (emphasis added).
253. 22 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5165 (1st ed. 2011) (emphasis added).
254. *See supra* Part III.B.2.
255. *See* Blume et al., *supra* note 209, at 1084.
256. *Id.* at 1085 (quoting Munshower v. State, 55 Md. 11, 23 (1880)).
257. *Id.* at 1085.
258. *Id.*
259. *Id.*
260. *Id.*
261. *See* Blume et al., *supra* note 209, at 1084 (citing Richard Lempert, *The Jury's Role in Administering Justice in the United States: Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15, 18 (2002)).
262. *Id.* at 1086.
263. 313 Ark. 70, 852 S.W.2d 320 (1993).
264. *See* discussion *supra* Part III.A.1–2.
265. *See supra* Part II.A.3 (discussing a California case adopting the same standard as suggested in the proposal).
266. *See supra* Parts II.A.3, III.A.2, III.C.
267. State v. Gibson, 44 P.3d 1001, 1004 (Ariz. 2002).
268. *Id.*
269. Ark. R. Evid. 403.
270. *See* discussion *supra* Part III.B.1.
271. People v. Primo, 753 N.E.2d 164, 168 (N.Y. 2001).
272. *See supra* Part III.B.2.
273. *See supra* Part III.B.2.

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