

7-1-2001

## Perry Mason meets the "Legitimate Tendency" Standard of Admissibility (and doesn't like what he sees)

Brett C. Powell

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Evidence Commons](#)

---

### Recommended Citation

Brett C. Powell, *Perry Mason meets the "Legitimate Tendency" Standard of Admissibility (and doesn't like what he sees)*, 55 U. Miami L. Rev. 1023 (2001)

Available at: <https://repository.law.miami.edu/umlr/vol55/iss4/28>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# **Perry Mason meets the “Legitimate Tendency” Standard of Admissibility (and doesn’t like what he sees)**

## **INTRODUCTION**

A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.<sup>1</sup>

Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.<sup>2</sup>

The above quotes are merely examples of the often-articulated principle of American jurisprudence that an accused has the right to constitutional due process in the courts of the United States. This right requires the courts to afford the defendant the opportunity to present a defense to the charges leveled against him, and to present witnesses in his own behalf in order to do so. Yet, this right is qualified. For instance, the courts may limit the amount of testimony or other evidence admitted on a single point in order to prevent the courts from being overburdened as a result of unduly long trials caused by the presentation of cumulative evidence.

Additionally, the courts must regulate the type of evidence presented to a jury in order to maintain the integrity of the system. Scientific evidence, for example, is closely scrutinized for reliability before it may be admitted. Likewise, evidence that would tend to implicate a third party rather than the defendant must be reviewed for its probative value in order to prevent misleading evidence from being presented to the jury.

The Federal Rules of Evidence set the standard of admissibility for third party evidence, in part, under Rules 404(b) and 403. Rule 404(b) reads in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as

---

1. *In re Oliver*, 333 U.S. 257, 273 (1948).

2. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .<sup>3</sup>

Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>4</sup> In implementing these rules, courts attempt to balance the right of a defendant to present a defense against the need to prevent the parties from introducing marginally relevant or overvalued evidence,<sup>5</sup> which may improperly confuse the jury. These rules are subject to interpretation by the courts, and their application has led to disparate implementation.

When dealing with evidence offered by the prosecution, the courts implement Federal Rule of Evidence 401.<sup>6</sup> Of course, implementation of this rule is tempered by Rule 404(b), which prevents the admission of character evidence intended to prove the bad character of the defendant so as to show conformity therewith (also known as the "bad man" inference). This "bad man" evidence could cause the jury to consider, at least in part, the character of the accused beyond the alleged crime at trial as they attempt to judge the merits of the case against him. Thus, the Rule 404(b) provision is necessary since "bad man" evidence, though prejudicial (because it could cause the jury to make the prohibited inference that the defendant committed the crime simply because he has the propensity to do so) could qualify for admission under the "any tendency" standard of relevancy.

Rule 404(b) frequently comes into play within the criminal context on the issue of identity and knowledge. Under Rule 404(b), the prosecution may introduce evidence of other crimes, so long as this evidence relates to the identity of the perpetrator of the crime for which the defendant is on trial. For example, a prosecutor may introduce evidence of the defendant's involvement in a previous, similar crime in order to show a similarity in the modus operandi of the crime, and thus establish the likelihood that the same person committed both crimes. This "similar methodology" evidence could also be admitted to leave the jury with the inference that the defendant had the ability to commit the crime. Thus, the prosecution's primary limitation merely precludes him from

---

3. FED. R. EVID. 404(b).

4. FED. R. EVID. 403.

5. Evidence having a disproportionate impact on the jury's opinion of the case, despite having little probative value, i.e., misleading the jury.

6. FED. R. EVID. 401 defines relevant evidence. "Relevant Evidence" means evidence "having any tendency to make the existence of any fact that is of consequences to the determination of the action more or less probable than it would be without the evidence." *Id.*

entering this evidence for the inference that the defendant has a predisposition to commit such crimes.

Given the prosecution's wide latitude in presenting evidence pointing to the defendant's guilt, a defendant must be able to present alternative theory evidence that would tend to implicate a third party in the crime, and thereby cast doubt upon his own guilt. This type of defense, often referred to as "the Perry Mason defense," is frequently the only strategy available to the defendant.<sup>7</sup> The Supreme Court has repeatedly upheld this right, finding that the constitution guarantees defendants the right to present third party culpability evidence as part of their defense.<sup>8</sup>

Despite this mandate, courts have attempted to maintain the integrity and efficient operation of the court system by implementation of the so-called "legitimate tendency" standard of admissibility. Under this standard defendants are required to show a third party and the crime are in some way "connected" before the court will allow such evidence to be presented to the jury. As will be explained, the "connection" in this context is a vague and nebulous concept.

This standard is intended to allow the defendant to show that another person could have committed the crime while preventing her from improperly drawing a "bad man" inference to a known (or unknown) third party. In other words, a defendant may cast doubt on his guilt by presenting the jury with evidence that a third party may have committed the crime, so long as he does not do so by merely showing that the third party has the *propensity* to do so.

Such limitations are intended to protect the prosecution from possible abuse of the third party or alternative theory evidence. Arguably, the state needs this protection because it has an institutional disadvantage in attempting to obtain a conviction in a criminal case. Beginning with the arraignment and proceeding through the penalty phase of the trial, the state has the burden of obtaining evidence and presenting a case in a system that presumes the innocence of the accused. Bearing in mind the high standard of proof required to obtain a conviction, the courts have developed processes to prevent improper defense evidence from being presented to the jury. Among these is the "legitimate tendency" standard, which has developed in the common law beginning with the Supreme Court's decision in *Alexander v. United States*.<sup>9</sup>

As the courts attempt to implement this standard, trial judges are

---

7. This term, often used derisively, refers to the fictitious criminal defense lawyer of literary and television fame, who routinely obtained acquittals for his innocent clients by forcing witness stand confessions from a third party.

8. *See, e.g.*, *Washington v. Texas*, 338 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

9. 138 U.S. 353, 356 (1891).

forced to make judgments based as much on opinion as legal precedent. With no clear cut, "bright line" standard to inform these decisions, courts throughout the country have reached very different opinions as to what types of evidence meets the "legitimate tendency" standard. This disparity violates the United States Constitution in that defendants do not receive equal protection from the courts in the country's various jurisdictions. This situation requires the abolition of the "legitimate tendency" standard of admissibility.

Some may argue that to eliminate the "legitimate tendency" standard would allow guilty defendants to escape conviction. With the reasonable doubt standard already in place as the burden the prosecution must satisfy in order to obtain conviction, proponents of the "legitimate tendency" standard argue that the removal of the standard would open the door for the defense to cast doubt on the defendant's guilt by questionable means. Defense attorneys would be free, they argue, to introduce evidence that may affect the jury on a purely *emotional* level and dissuade them from finding the defendant guilty. Such evidence may include evidence that other people who could not possibly have committed the crime might have had motive to do so. In the alternative, the defense would be able to draw comparisons to a multitude of vaguely similar crimes for which the defendant has an ironclad alibi, with the inference that the same person committed all of these crimes. Finally, of course, is the possibility that the defendant will offer fabricated exculpatory evidence. According to this view, even the jury's most unfounded doubt may result in the acquittal of a guilty party simply because of the severity of the reasonable doubt standard.

What these critics fail to consider is that Rule 403 already exists to prevent both the prosecution and the defendant from admitting such improper evidence.<sup>10</sup> Under Rule 403, all evidence admitted in a criminal trial must be sufficiently probative of the issues of the case before such evidence may be submitted to the jury. Supporters of the courts' application of the more harsh "legitimate tendency" test also fail to acknowledge the disagreement in philosophy between the reasonable doubt and "legitimate tendency" standards. The foundation of American criminal jurisprudence is the idea that a defendant must be *proven* guilty before he may be deprived of his freedom. The criminal justice system is designed to protect the rights of society against the overreaching of the government. In recognition of the serious consequences of a criminal conviction, the reasonable doubt standard exists to protect those accused of a crime from being unfairly convicted. Thus, the "legitimate tendency" barrier is inconsistent with American criminal jurisprudence's

---

10. See FED. R. EVID. 403.

ideal of full disclosure of fact so eloquently articulated in the following quote from *In re Winship*:

Use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual . . . have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.<sup>11</sup>

This Comment begins with an examination of a criminal defendant's right to present evidence on her own behalf and a brief description of Rule 401's "any tendency" standard of admissibility. The Comment will then discuss the emergence and difficulties of implementation of the "legitimate tendency" standard of admissibility of third party defense evidence. Finally, the Comment will examine the constitutional conflicts inherent in the states' disparate treatment of criminal defendants under the "legitimate tendency" standard, and call for the abolition of the rule in favor of consistent application of Federal Rules of Evidence 401 and 403.

#### THE DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE ON HIS OWN BEHALF

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.<sup>12</sup>

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>13</sup>

The Supreme Court of the United States has found that the suppression of evidence through the exercise of court procedural rules, which

---

11. 397 U.S. 358, 364 (1970).

12. U.S. CONST. amend. VI.

13. U.S. CONST. amend. XIV, § 1.

prevents the defendant from presenting his theory of the case to the jury, violates the defendant's fundamental Sixth Amendment right to call witness on his own behalf. Therefore, such rules violate the due process clause of the Fourteenth Amendment of the United States Constitution.

Case in point is *Chambers v. Mississippi*, where a hostile crowd formed around police officers as they attempted to effectuate an arrest.<sup>14</sup> Someone in the crowd shot and killed one of these officers, Aaron Liberty. Before falling, Liberty turned and fired his riot gun, presumably at the shooter. Leon Chambers was wounded by the officer's blast.<sup>15</sup> Officials at the scene assumed that Chambers was dead. They did not attempt to get medical attention for him nor did they search for the murder weapon.<sup>16</sup> Ultimately, three men, including Gable McDonald, took Chambers to the hospital where Chambers recovered from his wounds.<sup>17</sup>

Chambers was subsequently tried for the murder of officer Liberty. At trial, witnesses offered conflicting versions of who shot Officer Liberty. Prosecution witnesses stated that they had seen Chambers commit the crime, while defense witnesses testified that McDonald fired the shots. As part of its contention that McDonald, not Chambers, shot Liberty, the defense attempted to introduce evidence that McDonald had repeatedly confessed to the murder.<sup>18</sup> After the prosecution concluded its case in chief without calling McDonald, the defense called McDonald to the stand in an attempt to expose McDonald's prior confessions. The defense introduced McDonald's confession to police and read its contents into the record. On cross-examination, McDonald acknowledged and repudiated his earlier confession, stating that he had only confessed because he was promised by another man, Reverend Stokes, that if he did so, he would share in the proceeds from a civil suit that Chambers would file against the town after his acquittal.<sup>19</sup> On redirect, the defense was precluded from questioning McDonald about his three separate inculpatory statements made prior to his meeting with Reverend Stokes, on the grounds that, under Mississippi law, a witness may not impeach his own witness's credibility.<sup>20</sup> The court found that since McDonald's testimony was not "adverse" to Chambers in that it did not directly implicate him in the murder, Chambers would be bound by this common

---

14. 410 U.S. 284, 285 (1973).

15. *Id.* at 286.

16. *Id.* at 289.

17. *Id.* at 287.

18. *Id.* at 289.

19. *Id.* at 291.

20. Federal Rule of Evidence 607, which was amended in 1987, now allows any party to impeach the credibility of any witness.

law rule.<sup>21</sup> Subsequent attempts by the defense to introduce testimony by others that McDonald had confessed to the crime were excluded by the court as hearsay.<sup>22</sup> As a result, the defense was unable to fully present its theory of the case: that McDonald, not Chambers, had committed the crime.

In its examination of the case, the Supreme Court noted that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,"<sup>23</sup> and that:

[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.<sup>24</sup>

Finding that the Mississippi rules violated Chamber's right to due process, in that they effectively barred Chambers from presenting a defense, the Supreme Court reversed his conviction. With the *Chambers* decision, the Supreme Court affirmed the principle that common law rules of evidence were subject to constitutional limitations.<sup>25</sup>

In *Washington v. Texas*,<sup>26</sup> the Supreme Court dealt with the issue of statutory exclusion of a co-indicted witness for the defendant, declaring that as a constitutional matter a defendant must be allowed to present witnesses on his behalf. The defendant was an eighteen-year-old boy who had had a romance with a young woman until the girl's mother forbade the relationship. The girl had begun to see another young man and this new boyfriend was visiting the girl's family when he was shot to death.<sup>27</sup>

The defendant, apparently in a fit of jealousy, drove to the girl's house with several other boys, including Charles Fuller, who brought along a shotgun at the defendant's request.<sup>28</sup> Upon arriving at the girl's home, several of the boys threw bricks at the house. As the girl's mother and new boyfriend came out on the porch to investigate, the other boys ran back to their car, leaving the defendant and Fuller alone in front of the porch.<sup>29</sup> At this point, either the defendant or Fuller shot and killed the girl's new boyfriend. Fuller and the defendant were then

21. *Chambers*, 410 U.S. at 292.

22. *Id.*

23. *Id.* at 302.

24. *Id.* at 294.

25. *See id.* The reader should especially note then Justice Rehnquist's first contention in his dissent. *See id.* at 308.

26. 388 U.S. 14 (1967).

27. *Id.* at 15.

28. *Id.*

29. *Id.*



seen running back to the car, with Fuller carrying the shotgun.<sup>30</sup>

At trial, the defendant testified that after the other boys ran, Fuller grabbed the gun away from the defendant and fired, despite the defendant's attempts to persuade Fuller not to shoot. For his part, Fuller was fully prepared to corroborate the defendant's story.<sup>31</sup> At the time of this incident, a Texas statute prevented persons charged or convicted as co-participants in the same crime from testifying on each other's behalf. In striking down the Texas statute, the Supreme Court declared, "[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."<sup>32</sup> The Court further noted that, "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court."<sup>33</sup> Finally, the Court held that "the State arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."<sup>34</sup> Thus, the Court concluded that the Texas statute violated the Sixth Amendment in that it prevented the defendant from calling witnesses on his behalf.<sup>35</sup>

This principle has been upheld elsewhere as well. In *State v. Nelson*,<sup>36</sup> the defendant was accused, inter alia, of possession of cocaine with intent to deliver. The cocaine in question was found in the ceiling of the defendant's home, in an old lunchbox covered in cobwebs, along with a rusted razorblade, old and deteriorated plastic bags, and an old Tupperware container.<sup>37</sup> While the trial court admitted this evidence, it refused to allow the defendant's proffered evidence that the previous owner of the defendant's home had died of a drug overdose. With this information, coupled with the obvious age of the evidence, the defendant intended to present to the jury the theory that the previous owner, rather than the defendant, was the source of the drugs.<sup>38</sup>

---

30. *Id.* at 16.

31. *Id.*

32. *Id.* at 19.

33. *Id.* at 22 (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918)).

34. *Id.* at 23.

35. See *State v. Maupin*, 913 P.2d 808, 811 (Wash. 1996) ("The right guaranteed by the Sixth Amendment was recognized and applied to the states in *Washington v. Texas*.").

36. 480 N.W.2d 900, 906 (Iowa Ct. App. 1991).

37. *Id.* at 906.

38. *Id.*

The Iowa Court of Appeals held that the trial court's decision to exclude this evidence was error:

The evidence the defendant sought to introduce is probative on the issue of the source of the . . . cocaine. . . . The State's theory depended on the jury assuming Nelson was the source of that box and its contents. If Nelson could cast significant doubt on that assumption, it would materially help his case. The defendant is entitled to present evidence relevant to his theory of defense. Equally important, the jury is entitled to know the pertinent facts when reaching a verdict on the case.<sup>39</sup>

Thus, the court of appeals reversed and remanded Nelson's conviction, concluding that the trial court abused its discretion in excluding the proffered evidence.

Each of these cases speaks to a common theme, namely that a criminal defendant has a constitutional right to present evidence to a jury supporting the defendant's contention that someone else committed the offense. Additionally, failing to allow the finder of fact to view all the facts of a case violates this fundamental principle of American jurisprudence. As explained by Wigmore:

it is difficult to see the object of [restricting a defendant's right to present exculpatory evidence], because if the evidence is really of no appreciable value, no harm is done in admitting it; while if it 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.<sup>40</sup>

#### THE SUPREME COURT'S ILL-FATED ATTEMPT TO CLARIFY THE STANDARD OF ADMISSIBILITY: *ALEXANDER V.* *UNITED STATES*

Notwithstanding Wigmore's observations, the courts have imposed varying standards of admissibility to limit the ability of a defendant to bring in evidence deemed to be speculative or unreliable. Chief among these is the "legitimate tendency" standard, which has developed in the common law beginning with the Supreme Court's decision in *Alexander v. United States*. As will be seen, however, this standard has been repeatedly misunderstood and misapplied and the resulting confusion causes criminal defendants in different jurisdictions within the United States to have disparate opportunity to enter evidence in support of their respective cases.

---

39. *Id.* (citations omitted).

40. 1A WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 139, at 200 (Tillers rev. 1983).

In *Alexander*, the Supreme Court addressed the issue of evidence admissibility in a murder case set against the backdrop of the American Old West.<sup>41</sup> There, the accused and the deceased had been partners in the livestock business. A witness observed the two men on horseback returning to their camp together. The same witness heard several gunshots. He then saw the defendant riding alone, leading a horse with no rider.

At trial, the defendant attempted to show that a third party may have been responsible for the crime by offering evidence that the deceased had been having an affair with a married woman, and that the woman's husband had set out in search of the decedent in order to get revenge.<sup>42</sup> The Court addressed the question of whether this evidence should have been presented to the jury in order to cast doubt on the defendant's guilt.<sup>43</sup> The Court explained that in order for exculpatory evidence of this type to be properly admitted, the defendant must be able to show that there existed a "legitimate tendency" to connect the proffered evidence to the crime itself.<sup>44</sup> The Court reasoned that if the woman's husband had made his statements, acted before the murder, and that the husband's whereabouts were unaccounted for when the deceased was killed, then there would be a sufficient "connection" shown between the proffered evidence and the murder.<sup>45</sup> To establish this connection, the defendant would have to demonstrate both motive and opportunity on the part of the third party.

Although it was clear that the defendant had shown that this third party had a motive to kill the deceased, the Court questioned whether the evidence was sufficient to provide the essential link between the alleged threatened violence and the murder itself.<sup>46</sup> It would be insufficient, reasoned the Court, to establish simply that a third party bore animus toward the deceased, or even that this third party had actually set out in an attempt to do him harm, unless it could be reasonably shown that these acts occurred at a time in which the third party could have made good on his threats.<sup>47</sup> For example, if the murder occurred before the jealous husband learned of the affair, the fact that the husband set off in an attempt to find and kill the deceased would be irrelevant, since it

---

41. 138 U.S. 353 (1891).

42. *Id.* at 354.

43. "[W]e recognize a certain discretion on the part of the trial judge to rule out this entire testimony. . . if, in his opinion, they were so remote or insignificant as to have no *legitimate tendency* to show that (the party in question) could have committed the murder." *Id.* at 356 (emphasis added).

44. *Id.*

45. *Id.* at 357.

46. *Id.* at 356.

47. *Id.*

could not possibly constitute an alternate theory of the crime.<sup>48</sup> Subsequent courts have interpreted *Alexander* as having placed a higher burden on the defendant, concluding that a mere tendency to cast doubt on the defendant's guilt was insufficient to rise to the level of admissibility. This heightened relevancy standard required by the courts has come to be known as the "legitimate tendency" test.

In order to understand the problem with the "legitimate tendency" test, it is important to note that the standard grows out of a misinterpretation of *Alexander*. By focusing on the nature of the evidence rather than on its persuasiveness, subsequent courts have unnecessarily complicated the issue of admissibility. Hence, these courts have attempted to determine how "direct" the proffered evidence must be, rather than examining how probative the evidence is. In fact, *Alexander* does not attempt to describe the type of evidence that may be admitted by a defendant. Instead, it states simply that a judge may, in his discretion, exclude evidence if he finds it to have insufficient probative value.

The situation presented in *Alexander* is that of a jealous husband seeking revenge on a murder victim. The *Alexander* court merely observes that, unless the defendant were to show that the victim was, in fact, alive at the time the jealous husband sought his vengeance, the fact of the husband's action would not be capable of persuading a reasonable juror to believe that the husband could have committed the murder. On the contrary, if it could be shown that the husband set out looking for the victim after the victim's death, this would tend to indicate that the husband was unaware of the victim's death and would, therefore, indicate the husband's innocence.

To further clarify the point, imagine a twenty-year-old college student in the year 2001 studying the history of the Cold War. Upon reading about the Bay of Pigs invasion, he exclaims his desire to kill President John F. Kennedy. The knowledge of this exclamation, made in 2001, by an individual who was not yet born at the time of President Kennedy's tragic death, could not, persuade a reasonable juror that this student might be responsible for Kennedy's assassination. Thus, *Alexander* stands for nothing more than the proposition that this sort of non-probative evidence should not be submitted to a jury.

Taking another example, consider the hypothetical murder of Victor's who, twenty years before, had swindled Steve, his then business partner, out of \$10,000 dollars. At the time of the swindle, Steve swore that he would "fix" Victor. Since that time, Steve had no contact with Victor, moved to another state across the country, and amassed a large

---

48. *Id.*

personal fortune. At trial, it is established that the defendant, Danny, had threatened Victor's life on the day before the murder, upon discovering that Victor had embezzled Danny's entire life savings. Further, Danny purchased a weapon identical to the one used in the crime and was seen lurking around Victor's house just before the murder.

Under these circumstances it would be perfectly consistent with *Alexander* to exclude evidence pertaining to Steve because, taken in light of the damning quantity and nature of the prosecution's evidence, Danny's proffer would have insufficient probative value as to the identity of the killer. Notice that if Steve had been swindled out of \$10,000,000, dollars and sworn more specific and violent retribution on Victor, and had done so just days prior to Victor's death, this evidence *would* be admitted under *Alexander*. Notice also that the *nature* of the evidence has not changed under this second scenario. There is still no "direct evidence" linking Steve to the murder. The changes in the specifics of the evidence, however, make the evidence more persuasive in indicating that Steve, Victor's former partner, may have killed the victim. Thus, the evidence would be probative of the possible innocence of Danny.

The rationale behind the "legitimate tendency" standard is logical; it protects against the introduction of marginally relevant evidence likely to be overvalued by the jury and prevents the defense from creating a "smoke screen" to confuse the jury as to the central issues of the case. The problem with the standard is not in its rationale but, rather, its implementation. By expressing the "legitimate tendency" limitation in terms of relevance rather than probative value, the courts have needlessly complicated the issue. As a result, *Alexander* has been misunderstood and repeatedly misapplied in the state courts. Case in point is California, where the threshold requirement for admission has vacillated from an overburdening fixation on the nature of the evidence proffered by the defendant, to a proper examination of the evidence's probative value.

#### DISPARATE IMPLEMENTATION OF THE "LEGITIMATE TENDENCY" TEST

The chief difficulty with the "legitimate tendency" standard has been the inconsistency of its definition and, accordingly, its application. For example, California's so-called "*Mendez-Arline* Rule" placed an almost insurmountable burden on the defendant, as it was a "principle of exclusion requiring a preliminary showing of a 'substantial probability' of third-party guilt before such evidence [could] be admitted."<sup>49</sup> This

---

49. *People v. Hall*, 718 P.2d 99, 101 (Cal. 1986).

standard is based on the principles espoused by two seminal cases.

In *People v. Mendez*,<sup>50</sup> the trial court refused to admit testimony offered by the defense in a murder case that tended to implicate four men whom the victim had previously employed. These four workers had a heated argument with the victim just prior to the murder, and quit their employment, leaving the area on the morning after the murder was discovered. The court ruled that such testimony was not linked to any other evidence establishing a legitimate tendency to connect the workers to the crime, and was therefore inadmissible.<sup>51</sup> The California Supreme Court reasoned that evidence pointing to a third person as the truly guilty party "should not be admitted if it 'simply affords a possible ground of possible suspicion . . . mere evidence of motive of another person, or of motive coupled with threats . . . , is inadmissible unless coupled with other evidence tending to *directly connect* such other person with the actual commission of the crime charged.'" <sup>52</sup>

Thus, the *Mendez* court misapplied the standard set forth in *Alexander* by adding a "direct connection" requirement to the test. *Alexander* stated only that a trial judge would have the discretion to rule out evidence if it was "so remote or insignificant as to have no legitimate tendency to show [third party guilt]."<sup>53</sup> In short, *Mendez* required direct evidence of the actus reus itself; motive and opportunity became insufficient for admissibility.

*Mendez* required a defendant to "directly connect" a third party to a crime before ever allowing a jury—the finder of fact—to even consider the possibility that this third party may be responsible for the crime. Under this standard, the defendant would presumably have to present an eyewitness or other equally direct source of evidence (such as fingerprints at the scene, the victim's belongings in the third party's possession, etc.) in addition to evidence establishing motive and opportunity before the court would even admit the evidence. By imposing this standard, the *Mendez* court placed a powerful obstacle (and a far greater barrier for the defendant than that in *Alexander*) between the jury and the facts of the case.

In *People v. Arline*,<sup>54</sup> a California District Court of Appeal upheld a trial court's refusal to admit evidence implicating a third party. In *Arline*, the defendant was on trial for the commission of a gas station robbery. Consistent with Rule 404(b), the defendant sought to introduce

---

50. *People v. Mendez*, 223 P. 65 (Cal. 1924).

51. *Id.*

52. *Hall*, 718 P.2d at 103 (quoting *Mendez*, 223 P. 65, 70 (Cal. 1924)) (emphasis added).

53. *Alexander v. United States*, 138 U.S. 353, 356 (1891).

54. 91 Cal. Rptr. 520 (Cal. 5th Dist. Ct. App. 1970).

evidence that another individual had committed a similar crime two months after the crime for which the defendant was charged and that this other individual was in the area at or around the time of the robbery in question. The trial judge found that there was not the "slightest resemblance" between the defendant and the third party, and noted several discrepancies in the modus operandi of the crimes, and subsequently refused to admit this third party evidence.<sup>55</sup>

In affirming the trial court's decision, the California Fifth District Court of Appeal employed an even stricter standard than that in *Mendez*, stating that evidence implicating a third party must amount to "substantial proof of a probability that this happened" in order to be admitted.<sup>56</sup> In practical application, *Arline* requires a trial judge to determine that proffered evidence is inadmissible, unless it is nearly dispositive of the issue of third party guilt. Thus, the *Arline* standard moves the threshold of admissibility from a showing of motive and opportunity plus direct or circumstantial evidence, a high standard in itself, to a virtual showing of proof that a third party committed the act.

Based on the facts of *Arline*, the decision of the trial court to exclude the evidence, and the district court of appeal's affirmation of that decision were most likely correct. The rule as established in the court's opinion is likely the result of sloppy writing, as the standard articulated in the opinion is noticeably stronger than that warranted by the facts of the case.<sup>57</sup> Nevertheless, the burden articulated in *Arline* creates a highly disparate standard of admissibility, depriving future defendants of the opportunity to present a competent defense.

This standard formed the basis of the California Supreme Court's decision in *People v. Green*, in which the court upheld the trial court's exclusion of alternate theory evidence in the murder of the defendant's wife.<sup>58</sup> There, the primary witness against the defendant had been an acquaintance of the defendant and the victim. The witness testified that he drove the defendant and the victim to a secluded area and waited while the defendant took the victim away from the car to shoot her in the back of the head with a shotgun.

While the state introduced evidence from other sources describing the defendant's violent temper and his rocky marriage to the victim, there were no eyewitnesses to the crime itself. The state, therefore, was required to rely on the testimony of this witness/accomplice who had an equal opportunity to commit the crime, and arguably had sufficient

---

55. *Id.* at 522.

56. *Hall*, 718 P.2d at 103 (quoting *Arline*, 91 Cal. Rptr. at 522) (emphasis added).

57. See *Arline*, 91 Cal. Rptr. at 520.

58. 609 P.2d 468, 480 (Cal. 1980).

motive as well. The evidence tended to show that the defendant and victim had been involved in selling drugs, the victim may have been in possession of drugs at the time, and the witness had been told that the victim had over \$800 dollars in cash in her possession. In addition, the witness was a known drug user with a violent disposition.<sup>59</sup>

The defense was precluded from exploring this weakness in the prosecution's case because, in the court's view, even with these facts, the defense could not establish a "direct connection" between the third party/witness and the crime.<sup>60</sup> As the court explained:

[E]vidence that a third person had a motive to commit the crime with which the defendant is charged is inadmissible if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense. . . . The record before us does not contain substantial evidence connecting [the witness and the] murder, within the meaning of this rule.<sup>61</sup>

The court held this, despite the fact that *the witness's own testimony* placed him at the scene and established at least some degree of culpability in the crime.

*Green* clearly allowed a mutation of away from the "so remote or insignificant as to have no "legitimate tendency" standard of *Alexander*,<sup>62</sup> and in its place required that the defendant directly link the third party to the commission of the crime through "substantial evidence."<sup>63</sup> In other words, the defendant would have to show, through direct evidence, that the third party *actually did* commit the crime, rather than showing that the third party *could have* committed the crime. The disparity in treatment between prosecutor and defendant caused by this requirement is self-evident.

Also on display was the disparity between the state and federal standards when California's permutation of the "legitimate tendency" standard was challenged in the federal courts in *Perry v. Watts*.<sup>64</sup> Perry filed a petition of habeas corpus in which he challenged the state trial court's decision to exclude evidence in a rape case. The defendant had sought to introduce evidence that a third party may have committed this crime. This third party looked quite similar to the defendant and had committed an almost identical rape in the same location three years earlier. He was not only on the scene of the charged crime, but was also

---

59. *Id.*

60. *Id.*

61. *Id.*

62. *Alexander v. United States*, 138 U.S. 353, 356 (1891).

63. *Green*, 609 P.2d at 480.

64. *Perry v. Watts*, 520 F. Supp. 550 (S.D. Cal. 1981).



wearing similar clothing as the defendant and had unsuccessfully attempted another similar rape *in the same location only hours earlier*.

At trial,<sup>65</sup> the court had rejected Perry's attempts to introduce this evidence on the ground that there was no direct evidence that the third party had committed the crime. From an evidentiary standpoint, the trial court should have admitted the evidence under the California Evidence Code section 352, the state's adaptation of Federal Rule of Evidence 403. It reads, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."<sup>66</sup> Although "[a] reasonable jury might well have found the proffered evidence, along with the other evidence presented, sufficient to raise a reasonable doubt as to the defendant's guilt."<sup>67</sup> Using the *Mendez-Arline* standard, the California Court of Appeals nevertheless upheld the trial court's decision to exclude the evidence for its lack of direct connection to the third party. In short, the trial court used a standard that focused on the type of evidence presented (i.e., direct or circumstantial) and ignored the state's own required examination of the evidence's probative value.

Upon examination of the habeas petition, the District Court for the Northern District of California acknowledged that under the Federal Rules of Evidence this third party evidence would have been allowed in the federal courts, but held that the state trial court properly "applied the California case-developed rules in refusing to admit petitioner's proffered evidence."<sup>68</sup> The court further stated:

Rule 403 is virtually identical to California's Evidence Code section 352. However, the federal cases interpreting the proper exercise of this discretion [to exclude evidence] do not set forth any formal standards for admissibility of this evidence, as has been done by the California courts. The [sic] federal cases indicate that the discretion of the trial judge may not be exercised as broadly as in the California courts in excluding evidence that a third party committed the crime charged, and there appears to be a definite preference for the admission of such evidence [in the federal courts].<sup>69</sup>

The court went on to describe the standard as established in *Alexan-*

---

65. *People v. Perry*, 163 Cal. Rptr. 522 (Cal. 1st Dist. Ct. App. 1980).

66. CAL. EVID. CODE § 352. This is a codification not of relevance, but of persuasion. Under Federal Rule of Evidence 403 and California Evidence Code 352, evidence proffers are examined for their probative value.

67. David A. Garcia, *Third Party Culpability Evidence: A Criticism of the California Mendez-Arline Exclusionary Rule—Towards a Constitutional Standard of Relevance and Admissibility*, 17 U.S.F. L. REV. 441, 468 (1983).

68. *Perry v. Watts*, 520 F. Supp. 550, 555 (N.D. Cal. 1981).

69. *Id.*

der as suggesting "quite a limited amount of discretion available to the trial judge, and certainly sets forth a stricter standard for exclusion of such evidence than is set forth by the California courts."<sup>70</sup> The court also quoted the opinion of the Court of Appeals for the Ninth Circuit in *United States v. Armstrong*,<sup>71</sup> "[f]undamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged."<sup>72</sup>

After this discussion of the importance of the accused's right to present a defense, the court acknowledged with approval the Supreme Court's opinion in *Chambers v. Mississippi*, that "few rights are more fundamental than that of an accused to present witnesses in his own defense,"<sup>73</sup> but then concluded that, in order to receive the relief he sought, the defendant would have to prove that his fundamental, constitutional rights had been violated.<sup>74</sup> The court reasoned that it must examine whether the proffered evidence was exculpatory and crucial to the defendant's case and, if so, that it must then balance the accused's right to present this evidence against the state's competing interests in regulating the introduction of evidence.<sup>75</sup> Amazingly, the court found that in this case, where the only issue in question was the identity of the perpetrator of the crime and the evidence would tend to show that another individual actually committed that crime, the defense's proffered evidence was neither crucial nor exculpatory. The court, therefore, ruled that the trial court's refusal to admit the evidence did not violate the defendant's constitutional right to present a defense.<sup>76</sup> While there is no question that the proffered evidence in this case was sufficiently probative to be admitted, the court's reliance on the *Mendez-Arline* standard negated the defendant's right to present this evidence because of the circumstantial nature of the evidence.

Furthermore, in its focus of inquiry, the court missed a crucial point of analysis. The Due Process Clause of the Fourteenth Amendment requires each state to fully enforce the rights granted in the rest of the United States Constitution. The states may provide additional rights over and above those guaranteed by the United States Constitution, but they may not curtail their citizens' rights to a level below this constitu-

---

70. *Id.* at 556.

71. 621 F.2d 951 (9th Cir. 1980).

72. *Perry*, 520 F. Supp. at 556 (emphasis added).

73. *Id.* at 558 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

74. *Id.* at 557.

75. *Id.* at 558-59.

76. *Id.* at 559.

tional guarantee. Here, a federal court recognized that the state court had employed a standard that curtailed a criminal defendant's rights to a level below that of the federal courts, yet failed to acknowledge the constitutional problem such action caused. As with the Texas evidence code examined *supra* in *Washington v. Texas*, California's standard fell below the guaranteed protection of the Fifth and Fourteenth Amendment. The California rule, as alluded to in the *Perry* opinion, established a prohibitively high standard of admissibility for the introduction of a defendant's evidence of third party guilt. This standard had the equivalent effect of precluding third party evidence in all but the most obvious of circumstances—circumstances that would likely have derailed a prosecution before the case ever went to trial. Effectively, the California standard prevented the full access to the court system guaranteed to criminal defendants throughout the United States, just as Texas's statute preventing the testimony of an indicted co-perpetrator had done.<sup>77</sup> Nevertheless, the federal courts failed to remedy the situation, and the *Mendez-Arline* rule would remain the standard in California for five more years.

By 1986, it was up to the California Supreme Court to recognize the overly harsh nature of the *Mendez-Arline* exclusionary theory. In *People v. Hall*,<sup>78</sup> the trial court decided to exclude evidence linking a testifying witness to the commission of a murder despite evidence placing the witness at the scene. The defendant submitted offers of proof linking the witness to the actual murder; prints from the witness's rather unique shoe tread were found in the victim's bedroom<sup>79</sup> and forensic evidence showed that, like the witness, and unlike the defendant, the killer was probably left-handed.<sup>80</sup> Finally, the witness had knowledge of unique particulars of the murder, unlikely to be known by anyone other than the killer.<sup>81</sup> Despite all of this, the trial court ruled that this evidence failed to show a "substantial probability" of the third party's guilt.<sup>82</sup>

This case was finally sufficient for the Supreme Court of California to re-examine its admissibility standard. The court, framing the question in terms of relevance and probability, ruled that the trial court had applied an improperly restrictive standard of admissibility to the proffered evidence. The California Supreme Court stated that "proper inquiry was limited to whether this evidence could raise a reasonable

---

77. See *Washington v. Texas*, 388 U.S. 14 (1967).

78. 718 P.2d 99 (Cal. 1986).

79. *Id.* at 104.

80. *Id.*

81. *Id.*

82. *Id.*

doubt as to [the] defendant's guilt."<sup>83</sup> With this decision, the court removed the extremely restrictive direct evidence requirement presupposing exclusion and replaced it with the more appropriate probative/prejudice balancing test.

In Wisconsin, the standard of admissibility is essentially in line with the modern California approach. In *State v. Denny*,<sup>84</sup> the defendant in a murder case attempted to show that others had a motive to kill the victim. If this evidence were presented to the jury, the defendant reasoned, he would have been able to establish a "hypothesis of innocence" and undermine the state's case as to motive.<sup>85</sup>

The *Denny* court generally approved of the standard put forth by California in *Green*. It lowered the threshold as to what constitutes a "legitimate tendency," however, by rejecting *Green's* requirement that to show a "legitimate tendency," the evidence must be "substantial."<sup>86</sup> *Denny* interpreted *Alexander* to mean "a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted."<sup>87</sup> In the court's view the "legitimate tendency" test should properly ask, "whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime."<sup>88</sup> This version of "direct connection" as alluded to in the *Denny* decision is much more akin to the standard originally laid out in *Alexander*. Thus, the *Denny* standard of "legitimate tendency" is that a direct connection to the crime exists where the defendant can place a third party near the crime scene (temporally and spatially) with a possible motive. However, *Denny* still insists that the defense must proffer direct evidence linking the third party to the crime itself.<sup>89</sup> The difference then between *Green* and *Denny* is that *Denny* does not insist that this direct evidence be "substantial." This standard remains the Wisconsin rule.<sup>90</sup>

In Florida, the Florida Supreme Court dealt with the appropriateness of the "legitimate tendency" and the "any tendency" tests in *Rivera v. State*.<sup>91</sup> The court would make relevancy of evidence assessments

---

83. *Id.*

84. 357 N.W.2d 12 (Wis. Ct. App. 1984).

85. *Id.* at 16.

86. *Id.*

87. *Id.* at 17.

88. *Id.*

89. *Id.* "Thus, as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." *Id.*

90. See *State v. Hoffman*, 514 N.W.2d 724 (Wis. Ct. App. 1993).

91. 561 So. 2d 536 (Fla. 1990).

relating to two different crimes proffered in the trial of a man accused of murdering an eleven-year-old girl, Staci Jazvac.<sup>92</sup>

At approximately 5:30 P.M. on Thursday, January 30, 1986, Staci rode her bicycle away from her home and toward the local drugstore.<sup>93</sup> Her family would never see her alive again. A cashier remembered seeing the girl in the drugstore sometime between 6:30 P.M. and 7:00 P.M.<sup>94</sup> When Staci did not return home before dark, her mother began to look for her. By 7:30 P.M. Staci's mother had encountered a Broward County Deputy Sheriff. The deputy had the girl's bicycle in the trunk of his car; he had found it abandoned in a field near the shopping center where the drugstore was located.<sup>95</sup>

On February 7, 1986, Starr Peck, who would become a prosecution witness in the subsequent murder trial, received one of a series of obscene phone calls from a man who identified himself to her only as "Tony."<sup>96</sup> "Tony" had been calling Peck since September, 1985, and Peck had indulged the caller in an attempt to find out the caller's identity.<sup>97</sup> "Tony" typically described his sexual fantasies and his partiality to wearing women's clothing, including pantyhose.<sup>98</sup> The February 7 call was different, however, because it contained a confession that would link twenty-four-year-old Michael Rivera to Staci Jazvac's disappearance and subsequent murder.<sup>99</sup> Michael Rivera was Ms. Peck's employee, and she identified him as "Tony."<sup>100</sup>

On February 13, Broward County Sheriff's detectives took Rivera into custody on unrelated warrants and brought him to police headquarters. Once there, they informed Rivera that they wanted to speak with him regarding the disappearance of Staci Jazvac. Rivera admitted to making the obscene calls to Peck, but denied any involvement in Staci's disappearance. Rivera would go on to describe two events in which he had acted on his impulses. The first involved an attack on another eleven-year-old Coral Springs girl, Jennifer Goetz (a crime for which he would later be convicted). The other event to which Rivera alluded involved his exposing himself to a young girl pushing a bike. When asked what he had done with this girl, Rivera replied, "I can't tell you

---

92. *Id.* at 536.

93. *Id.* at 537.

94. *Id.*

95. *Id.*

96. *Id.*

97. Starr Peck testified that the caller knew her name and would call her at the office as well as her home, thereby causing Peck to attempt to learn the caller's identity. Christine Evans, *Murder-trial Witness recalls 'Tony's' Confession*, MIAMI HERALD, April 11, 1987, at 1D.

98. *Id.*

99. *Rivera v. State*, 561 So. 2d 536, 537 (Fla. 1990).

100. *Id.*

. . . They'll kill me for what I've done."<sup>101</sup> Staci's body was found completely clothed, though her jeans were unzipped and partially pulled down around her hips, and her panties were torn.<sup>102</sup> At trial, forensic pathologist Dr. Ronald Keith Wright would testify that the cause of death was asphyxiation caused by ether or strangulation.<sup>103</sup>

Starr Peck testified that "Tony" (whom she identified as Rivera) told her that he had put an ether rag over Staci, dragged her into his van, and sexually assaulted her.<sup>104</sup> This testimony also revealed several discrepancies between the actual circumstances of the murder and the events recounted in the phone calls. For example, "Tony" described the girl as wearing red silk shorts. "Tony" said he knocked the girl out with ether and claimed that he had raped the girl twice after her death. In fact, Staci Jazvac had been wearing jeans when abducted, and the medical examiner could not positively conclude that Staci had been sexually assaulted.<sup>105</sup> Further, he found no trace of ether on the girl's body.<sup>106</sup> Despite these discrepancies, the trial court admitted the testimony.

The prosecution entered other damning testimony. Rivera's fellow inmates testified that Rivera had admitted to them that he had choked and tried to kill another young girl in the same fashion as Staci.<sup>107</sup> This crime, however, was not perfectly analogous. The other girl, Jennifer Goetz (to whom Rivera himself made reference in his police interview), had been manually choked and had had a bag placed over her head. No ether was used on her.<sup>108</sup>

Other similarities between the assault on Jennifer Goetz and Staci Jazvac's murder did exist. The most striking of these similarities is that in the Goetz case, a caller identifying himself as "Tony" called a resident of a Coral Springs condominium and confessed that he had tried to rape a girl by the condominium's swimming pool.<sup>109</sup> The defendant would later challenge the admissibility of this evidence under section 90.404(2)(a), *Florida Statutes*.<sup>110</sup>

Through defense counsel, Rivera attempted to introduce evidence

---

101. *Id.*

102. *Id.*

103. Dr. Wright would further testify that the body was partially decomposed and that this could have accounted for the tear in the girl's panties. Dr. Wright could not say for certain that the girl had been sexually assaulted. *Id.* at 537.

104. Evans, *supra*, note 97, at 1D.

105. *Rivera v. State*, 561 So. 2d 536, 537 (Fla. 1990).

106. *Id.*

107. *Id.*

108. Christine Evans, *Phone Calls About Attack Are Described*, MIAMI HERALD, Nov. 5, 1986, at 1BR.

109. *Id.*

110. The Florida rule closely parallels FED. R. EVID. 404(b).

that a similar crime had been committed while Rivera was in custody.<sup>111</sup> Linda Kalitan had been abducted on February 20, 1986, less than one month after the murder of Staci Jazvac. Linda had been last seen riding her bicycle in southern Broward County.<sup>112</sup> Her body was found in a canal in the same general location as the field where Staci Jazvac's body was found. Because the trial court found this evidence to be insufficiently probative, it excluded the evidence. Rivera was convicted and sentenced to death in Florida's electric chair.

On appeal, Rivera contended that the trial court erred in admitting evidence of his previous attack on Jennifer Goetz because, he contended, it violated the rule laid down in *Williams v. State*,<sup>113</sup> and codified by Florida's Rules of Evidence:

Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.<sup>114</sup>

The Supreme Court of Florida dismissed this assertion upon review, ruling that the evidence of Rivera's assault on Jennifer Goetz was admissible under the rule because it tended to establish the identity of the perpetrator.<sup>115</sup> The court looked to several relevant facts in making its determination. First, the age and physical description of the two girls was the same. Both girls were eleven-years-old, petite, and had blonde hair.<sup>116</sup> Second, the manner of attack was similar, as both girls were apparently attacked from behind, during daylight hours, and when the children were alone.<sup>117</sup> After each crime, a caller identifying himself only as "Tony" placed phone calls to discuss his sexual fantasies, his propensity for wearing pantyhose, and confess to the crime. Finally, both crimes occurred within four miles of Rivera's home.<sup>118</sup> The Supreme Court of Florida held that this evidence established "'a sufficiently unique pattern of criminal activity' to justify the admission of collateral crime evidence on the disputed material issue of identity," despite the inconsistencies between the two incidents.<sup>119</sup>

Rivera's second contention on appeal concerned the exclusion of

---

111. *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990).

112. *Id.* at 540.

113. 110 So. 2d 654 (Fla. 1959).

114. FLA. STAT. § 90.404(2)(a) (1999).

115. *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* (quoting *Chandler v State*, 442 So. 2d 171, 173 (Fla. 1983)).

proffered evidence of the abduction and murder of Linda Kalitan. This contention dealt with the reciprocal of the rule on which his first contention had rested, known in Florida as the "reverse *Williams* rule."<sup>120</sup> Rivera contended that the trial court should have admitted evidence of the Linda Kalitan murder because it tended to show that Rivera did not murder Staci Jazvac. The logic of the contention was that if a similar crime had been committed so close to the time that Staci Jazvac had been murdered, then perhaps the same man committed both murders. If so, and the second murder had taken place while Rivera was in custody and could not possibly have committed the crime, then Rivera would be innocent of the Jazvac murder as well. Such an inference would permit a jury to find reasonable doubt as to Rivera's guilt.

The Supreme Court of Florida upheld the trial court's decision by distinguishing the Kalitan case from the Jazvac murder and finding that differences in both the victimology and circumstances surrounding the condition of the bodies were sufficient to conclude that the two crimes were unrelated. Therefore, the existence of one was not relevant to the other.<sup>121</sup> In considering the *Rivera* court's rulings, it is important to remember that the court was dealing with three distinct crimes. The court was assessing the probative value of the Goetz attack and the Kalitan murder as these facts related to the Jazvac case. The chart on the following page compares the similarities and differences in the respective cases. Differences are shown in italics.

---

120. *Id.*

121. *Id.* at 540.



| <i>Attack on<br/>Jennifer Goetz</i>  | <i>Murder of<br/>Staci Jazvac</i>  | <i>Murder of<br/>Linda Kalitan</i>  |
|--|--|---|
| Victim was choked in an apparent attempt to kill   | Victim was asphyxiated, either by ether or by strangulation                                  | Victim was strangled  |
| 11 year-old-victim   | 11 year-old-victim   | <i>29 year-old-victim</i>   |
| Victim was found fully clothed   | Victim was found fully clothed   | <i>Victim was found almost totally nude**</i>   |
| Victim was small & petite; childlike   | Victim was small & petite; childlike   | <i>Victim was a fully developed woman</i>   |
| <i>Victim was attacked while walking to catch a bus</i>  | Victim was riding her bike when abducted   | Victim was riding her bike when abducted  |
| Victim was attacked during daylight hours  | Victim was attacked during daylight hours  | <i>Victim was attacked at night**</i>   |
| Victim was attacked in northern Broward County; within 4 miles of Rivera's home                      | Victim was abducted from northern Broward County; within 4 miles of Rivera's home            | <i>Victim was abducted in southwest Broward County; 12 miles from the Rivera home.</i>              |
| Victim was found at site of attack; in southwestern Broward County (within 4 miles of Rivera's home) | Victim was found in a field in southwestern Broward County (within 4 miles of Rivera's home) | <i>Victim was found in a canal in southwestern Broward County (within 4 miles of Rivera's home)</i> |
| Victim was not sexually abused   | No conclusive evidence of sexual abuse was found   | <i>Evidence of anal penetration prior to victim's death was found</i>                               |
| Call from "Tony" was made confessing to the crime  | Call from "Tony" was made confessing to the crime  | <i>No call was made</i>   |
| Rivera confessed to this crime   | Rivera alluded to his guilt in this crime  | <i>Crime occurred while Rivera was incarcerated</i>   |

*\*\*Linda Kalitan's body was found wearing only a pair of socks; her clothes found in a canal weighted down by rocks. She was last seen riding her bicycle home from work at about 10:30 p.m. She never arrived at the home of a babysitter to pick up her two children.*<sup>122</sup>

122. Paul Shannon, *Police Begin Search for Davie Mother of 2*, MIAMI HERALD, Feb. 23, 1986, at 1D.

While the Florida Supreme Court employed the "legitimate tendency" test to this proffered evidence; its approach was similar to the *Hall* method in that it conducted a balancing test as to the evidence's probative and prejudicial value, rather than requiring some form of "direct connection" to the crime. Similar to the standard imposed by Rule 403, the court looked to whether the evidence Rivera sought to introduce was sufficiently probative so as to outweigh the danger of the jury overvaluation. The court reasoned that the Kalitan murder was not reasonably related to the Jazvac killing and the introduction of this evidence would therefore be unduly prejudicial to the state's case. Because Rivera could not overcome this probative/prejudicial balance, he was unable to satisfy the standard necessary for this evidence to be considered admissible to the issue of guilt in the Jazvac case.<sup>123</sup>

#### FURTHER LACK OF CONTINUITY

It is relevant to note that a sampling of court rulings from around the country reveal similarly disparate methods of determining the outcome of such cases. In South Dakota, for example, as outlined in *State v. Larson*, "[w]here the state interest [in exclusion] is strong, only the exclusion of critical, reliable, and highly probative evidence will violate due process."<sup>124</sup> The South Dakota rule clearly favors the prosecution, maintaining that "the state's legitimate interest in reliable and efficient trials is often compelling."<sup>125</sup> "The general rule requires the court to balance the importance of the proffered evidence against the state's interest in exclusion."<sup>126</sup> Under the *Larson* analysis, it seems that the more compelling the evidence, the more likely the courts of South Dakota will find that the evidence must be excluded to protect the state's prosecutorial interests.

In Washington, "evidence connecting another person with the crime charged is not admissible unless there is a train of facts or circumstances which tend to clearly point to someone other than the defendant as the guilty party."<sup>127</sup> "On the other hand, the Indiana Constitution requires that "[I]n all criminal prosecutions, the accused shall have the

---

123. The author should note that, under the facts the court dealt with in *Rivera*, he believes that the decisions reached in that case were entirely appropriate and the conviction proper. The case discussion is presented only for the purpose of demonstrating the complexity of the decision and the opportunity for improper exclusion of relevant evidence.

124. See *State v. Larson*, 512 N.W.2d 732, 739 (S.D. 1994).

125. *Id.*

126. *Id.*

127. *State v. Maupin*, 913 P.2d 808, 813 (Wash. 1996) (quoting *State v. Mak*, 718 P.2d 407 (Wash. 1986)). *Maupin* held that, where the defendant was accused of the abduction/murder of a child, it was not harmless error to exclude testimony of a witness who claimed to have seen the child in the company of an identified third party.

right . . . to be heard by himself and counsel."<sup>128</sup>

The Indiana Supreme Court held that this provision requires the admission of both the defendant's own alibi testimony and of evidence that implicates an unknown third party in the crime.<sup>129</sup> The differences between the rather liberal standards used in California and Indiana, the highly restrictive standards used in Washington and South Dakota, as well as the probative/prejudicial balancing test used in Florida demonstrates that there is no consistent application of the "legitimate tendency" test being administered across the country.

DISPARITY OF STANDARDS: THE "ANY TENDENCY" RULE AS APPLIED  
TO PROSECUTORIAL EVIDENCE: RULE 404(B) AND  
THE "WILLIAMS RULE"

The *Williams*, standard of admissibility, as applied to the prosecution, dramatizes the disparity between the prosecution's and defendant's right to present evidence. In *Williams*, the defendant had been convicted of raping seventeen-year-old girl. The defendant hid on the floorboard behind the driver's seat of the girl's car while the car was parked in a shopping center parking lot. After the victim entered the car and drove a short distance, the defendant suddenly reached over the front seat and stabbed the victim in the chest with an ice pick. He then forcibly raped the girl twice before fleeing.

At trial, the prosecution elicited testimony from the arresting officer to the effect that the defendant had originally denied any sexual encounter with the victim. He accounted for his presence in the car by claiming that he had believed the car belonged to his brother, and that he had crawled into the back seat of the car to take a nap.<sup>130</sup> The prosecution then entered evidence that approximately six months prior to this crime, the defendant had been found lying on the floor of another teenage girl's car, parked in the same lot. At that time, the defendant had offered the same excuse: that he had thought the car belonged to his brother and that he had crawled into the car to take a nap. (The two cars were of different makes, colors, and years.) On appeal, the Florida Supreme Court upheld the conviction and deemed the evidence to have been properly admitted, since the trial judge gave limiting instructions to the jury that the testimony was "to be taken as bearing on identity, intent, 'the plan or

---

128. *Campbell v. State*, 622 N.E.2d 495, 498 (Ind. 1993).

129. *Id.* at 499. Although the facts of this case distinguish the decision of the court from the decision reached in *Rivera*, the standard of admissibility in Indiana would seem to be more inclusive than in Florida.

130. *Williams v. State*, 110 So. 2d 654, 657 (Fla. 1959).

design only.’”<sup>131</sup> Thus, the court reasoned that “all relevant evidence having probative value in establishing a material issue [is admissible].”<sup>132</sup> This is an articulation of the “any tendency” standard that is the generally accepted criterion for the admission of evidence.<sup>133</sup>

As articulated in *Williams*, the common law rule of admissibility is best described as a rule of inclusion with the exception that such evidence may not be admitted solely to prove bad character or propensities.<sup>134</sup> This rule of admissibility requires the courts to admit all relevant evidence. While the prosecution enjoys the benefit of the any tendency rule, as discussed *supra*, this guarantee is often circumvented as it pertains to the defendant.

#### ANALYSIS: THE “LEGITIMATE TENDENCY” STANDARD IS INCONSISTENT WITH THE GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS UNDER THE LAW

Proponents of the “legitimate tendency” standard point out that the burden of proof beyond a reasonable doubt rests with the prosecution for each and every element of the crime. This burden is extremely high; frequently characterized as being proof so compelling that a juror would not hesitate to rely and act upon it in making the most important decisions of the juror’s own life.<sup>135</sup> A conviction would, therefore, generally not be sustained without compelling evidence of the defendant’s guilt. In this view, the “legitimate tendency” test is, a tool used to prevent the inclusion of speculative evidence, which may make a conviction all but impossible. Without this standard, it is argued, the courts would allow “undue prejudice to the People [caused by] unsupported jury speculation as to the guilt of other suspects.”<sup>136</sup> As stated in *Mendez*, “in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased.”<sup>137</sup> Such evidence may not be probative of the

---

131. *Id.* at 658 (citation omitted). Though a common law articulation, this criterion is consistent with Federal Rule of Evidence 404(b).

132. *Id.*

133. The author should note that he believes the admission of this evidence to be entirely proper, and makes no argument that the testimony should have been excluded. The facts of *Williams* are offered only to illustrate the availability of such evidence to the prosecution, and to dramatize the point that evidence of a similar incident involving a third party and offered by the defendant would likely be excluded.

134. *Williams* 110 So. 2d at 659.

135. See PATTERN JURY INSTRUCTIONS (Criminal Cases). Eleventh Circuit § 3 (1997).

136. *People v. Green*, 609 P.2d 468, 480 (Cal. 1980).

137. *People v. Mendez*, 223 P. 65, 69 (Cal. 1924).

issues at trial, but could easily be used to confuse the jury, dissuading it from focusing on the case against the defendant.

Supporters further argue that without the "legitimate tendency" standard, the defendant would be free to offer false testimony to the jury in order to establish reasonable doubt as to guilt. Without being required to substantiate evidence by clearing a "direct connection" test or other such evidentiary hurdle, the defendant would be free to offer perjured testimony with impunity. This contention does not bear scrutiny because it views the reasonable doubt burden as a tactical disadvantage to the prosecution rather than as a constitutional safeguard of the defendant. The onus is on the prosecutor to make his case, and in doing so must disprove the defendant's claim of innocence, regardless of what form it may take.

Additionally, this line of reasoning ignores the prosecutor's rather extensive arsenal of weapons to expose untruthful testimony. The prosecutor need not rely on the "legitimate tendency" standard to prevent untruthful testimony from being aired in front the jury. In addition to its own investigatory powers and the use of cross-examination, the prosecution may file perjury charges against those who offer untruthful testimony. Were these safeguards not a sufficient protection, increased penalties for perjury, a lowered burden of proof in perjury cases, etc., could achieve the same goal as excluding defense evidence that a third party committed the crime without compromising the integrity of the due process guarantee. As pointed out by David A. Garcia, "[a]ll prof- fers of exculpatory evidence must be tested by a constitutional standard. . . . For the prosecution to be successful in excluding such evidence, there must be a demonstration that the evidence is so inherently unreliable that the trier of fact could have no rational basis for evaluating its truth."<sup>138</sup>

Admittedly, use of the "legitimate tendency" standard does, upon initial consideration, make intuitive sense. A logical application of Rule 403, would dictate that evidence likely to confuse issues rather than shed probative light on the case should be excluded. The problem arises as the courts attempt to implement the "legitimate tendency" standard by requiring direct evidence linking a third party to the act itself before the defendant may submit the possibility to the jury that a third party may be responsible for the crime. In order to meet the criterion of most manifestations of the "legitimate tendency" test, a criminal defendant is required to show motive and opportunity as well as direct evidence placing the third party at the scene. Therefore, the defendant must meet a higher burden for admissibility than is prescribed by the Federal Rules

---

138. Garcia, *supra* note 67, at 457-58.

of Evidence and the original *Alexander* opinion. Of course, where the prosecution may obtain a conviction on nothing more than circumstantial evidence, this means that the defendant and the state are entering the adversarial system on unequal footing.

In addition, current manifestations of the "legitimate tendency" test presuppose a stronger preference for exclusion than is warranted by Rule 403. The balancing test prescribed by Rule 403, when properly applied, would allow the defendant to introduce third party evidence so long as that evidence could persuade a reasonable juror, ascribing the proper weight to the evidence, that a reasonable doubt of the defendant's guilt exists. The fact that an unreasonable juror, ascribing an improper degree of importance to the evidence, could use the evidence to form an unfounded doubt as to guilt should not preclude the defendant from entering the evidence. It is when *only* a juror, attributing undue importance to the evidence, could use that evidence to find an *unreasonable* doubt that that evidence must be excluded. Such application of Rule 403, as alluded to in *People v. Hall*, is consistent with the Federal Rules of Evidence generally and the guarantees of the United States Constitution.

Further, the argument that the prosecution needs the additional protection of the direct connection requirement has little foundation. The argument is that without this protection, the prosecution may be unduly burdened by the admission of unfairly prejudicial or misleading defense evidence with only marginal probative value. This is the theory espoused by the South Dakota Supreme Court, *supra*. As noted, to take that conclusion to its logical end, the more significant the defense's evidence, the more the courts would be compelled to exclude it. The courts would then allow only insignificant defense evidence to be presented, and the better the defendant's case, the less likely he would be to be able to present that case. From an evidentiary standpoint, it makes little sense to impose this standard in order to protect the prosecution, when Rule 403 and its state counterparts are already in place.

To illustrate the point, imagine three different scenarios presented in a murder case. In the first, the defendant proffers evidence that in no way sheds any probative light on the case, but merely points out the general unpopularity of the deceased. In the second scenario, the defendant proffers evidence that has a minimal degree of probative value, but merely presents the possibility of a third party's opportunity to commit the crime. In the third scenario, the defendant proffers testimony that does in fact cast doubt upon his guilt, such as a witness that claims to have seen someone else commit the crime. In the first scenario, the Rule 403 standard erects a sufficient barrier to the introduction of this evi-

dence, because it would exclude evidence that is truly non-probative. In the second case where the defendant's evidence is slightly probative, but does not truly draw the likelihood of guilt away from the defendant, the prosecutor is in a perfect position to draw attention to the weakness of the defendant's assertion. Finally, in the third instance, where the evidence proffered by the defendant is truly probative of his innocence, there is no legitimate ground on which to exclude it. As explained by Wigmore:

It is difficult to see the object of this restriction, because if the evidence is really of no appreciable value, no harm is done in admitting it; while if it 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.<sup>139</sup>

Wigmore envisions a situation in which *B*, a third party, has made threats or has in another manner inculpated himself in the crime. Says Wigmore, "it seems unsound as a general rule to hold that mere threats, or mere evidentiary facts of *any one other sort*, are to be rejected if unaccompanied by additional facts pointing towards *B* as the doer."<sup>140</sup> The "legitimate tendency" standard in its present form does precisely that—exclude probative evidence because of the "sort" of the evidence offered, rather than focusing on the probative value of the evidence.

As stated in *McKoy v. North Carolina*,<sup>141</sup>

[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 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. . . . Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered.<sup>142</sup>

In light of this accepted theory, with its strong preference to submit evidence to the jury and allow the jury to determine its persuasiveness, it is difficult to justify the continuing use of modern manifestations of the legitimate tendency tool to exclude the defendant's evidence in criminal cases because of its circumstantial nature.

---

139. WIGMORE, *supra* note 40, at § 139.

140. *Id.* at 200 (emphasis added).

141. 494 U.S. 433 (1990).

142. *Id.* at 440 (citing MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 401.1 n.12 (2d ed. 1986)) (quotations omitted).

Further, it must be remembered that a single eyewitness may be sufficiently persuasive to obtain a guilty verdict. For example, in *Washington v. Texas*, there were several witnesses who saw the defendant and the third party, Fuller, approach the house where the victim was located. But because the other boys ran from the scene before the victim appeared on the porch, the only people present when the shotgun was fired were the deceased, the mother of the victim's girlfriend, the defendant, and the third party. The deceased, obviously, was unable to testify. The defendant claimed he did not fire the gun. Charles Fuller, the defendant's only corroborating witness, was precluded from testifying. Therefore, only the mother of the victim's girlfriend could testify to the defendant firing the gun. At trial, the defendant was convicted with this testimony.

Where a single witness may convict a defendant, the defendant must have the opportunity to counter this witness's identification of the defendant with an alternate theory or other witnesses. Had Fuller been allowed to testify on Washington's behalf, the jury may have been persuaded that the witness identification was mistaken.

Under the "legitimate tendency" standard, equally compelling exculpatory evidence is frequently excluded from the jury's consideration because of this heightened threshold of admissibility. Remember that in *Green v. People*, the defense was not allowed to probe the veracity of the state's only witness to the crime, a man who clearly had participated in the murder of the victim. With this evidence excluded, the defendant was convicted. This rule, which was intended to prevent the jury from making the wrong decision based on poor evidence, may have forced the jury to do just that.

It defies reason to believe that the disparate treatment between defense and prosecution in these cases is consistent with the idea of due process. Under a constitutional analysis, the problem with the "legitimate tendency standard" is that in practical application there is wide latitude for interpretation of the term "legitimate tendency." This latitude has led to a great deal of disparity in the rule's application. Many courts look only to the nature of the evidence and exclude circumstantial evidence that may be highly probative and crucial to the defendant's case.

More significant than the institutional disparity between defendant and prosecutor, generally, is the lack of consistency of application between the courts in which this situation plays out. This has led to unequal treatment of criminal defendants throughout the country. When it comes to presentation of alternate theory of the crime evidence, a criminal defendant in California may be in a favorable position to a



criminal defendant in Florida, who may, in turn, be in a favorable position compared to a defendant in South Dakota. None of these defendants would be in the same position if they were being tried in federal court.

Where defendants face noticeably different challenges when attempting to present alternate theory evidence, the constitutional guarantee of due process is an illusion. Where a criminal defendant in California, a defendant in Florida, and a defendant in Wisconsin may all anticipate different outcomes than defendants in South Dakota, Iowa, Washington, or in federal court, the administration of justice is as much a result of caprice as of law.

To illustrate the point, consider the hypothetical plight of David Defendant, who stands accused of robbing a convenience store and of the felony murder charge arising from the death of the store's owner, who was shot during the robbery while working at the store's register. David was in serious financial difficulty at the time of the robbery/murder. His only alibi is that at the time of the crime he was home, alone, and sleeping. A single witness has identified David as the person she saw pulling on a ski mask before entering the store just prior to the crime. The perpetrator wore gloves to commit the crime, left no fingerprints or other physical evidence at the scene, and the shotgun pellets recovered at the scene are not traceable. Because the perpetrator wore a ski mask throughout the crime, the store's video cameras are of little use.

At trial, David Defendant attempts to present his alternate theory of the crime—his only possible defense. The defense has learned the victim moonlighted as a bookmaker, taking illegal football bets. Evidence shows that the victim had one particular client, Larry Loser, who was deeply in debt. Further, the evidence shows that Larry is acquainted with an ex-convict named Kelly Killer, who has been suspected of several murders for hire within the past year, and who matches David's basic physical description. Evidence also shows that Larry met with Kelly three days prior to the victim's death and that Kelly's whereabouts cannot be accounted for during the robbery. The defendant attempts to offer the theory that Larry hired Kelly to kill the victim in order to avoid having to pay his gambling debts, and that the robbery was merely staged to cover the true motive of the crime.

What would be the likely outcome of David's case? Under *Alexander* and the federal rules, the defense would be allowed to present this evidence to the jury. Note that under *Alexander*, this evidence qualifies for admission because it places the third party near the scene of the

crime, both spatially and temporally, with a motive to commit the crime, and is therefore sufficiently probative.

An examination of the states already discussed, however, reveals less than consistent results. As seen in *Rivera*, the Florida courts use a probative/prejudice balancing test in determining the admissibility of the evidence. The court would have to look to the nature of the evidence and make a subjective determination as to whether the evidence presented is capable of raising a reasonable doubt. This standard is consistent with *Alexander*.

Under the *Larson* rule, South Dakota would most likely exclude the evidence. *Larson* requires the exclusion of the evidence unless a "train of evidence exists that clearly points to the guilt of another party."<sup>143</sup> Here a train of evidence exists, but such evidence is capable only of raising a reasonable doubt as to the guilt of the accused party. Without any physical evidence, there exists no evidence that directly links the third party to the crime. Here again, probative evidence is excluded because of its circumstantial nature.

Under both the Indiana and Wisconsin standards, the evidence would be permitted because of its capability of raising reasonable doubt, and the states' strong preference for admission of defense evidence. Under the modern California standard, the evidence would be admitted only if the judge believed that, absent physical evidence, a reasonable doubt could be raised. (One must remember that in *People v. Hall*, the fact that the third party left tread marks from his tennis shoes at the scene of the crime was a major consideration in overturning the *Mendez-Arline* standard.) Under the *Mendez-Arline* standard, of course, the evidence would have to be excluded as not "directly connecting" the third party to the crime.

### CONCLUSION

It is, perhaps, inevitable that disparate outcomes would be reached across the country as so many different courts attempt to reach a just result while dealing with complex issues. The lack of uniformity in the "legitimate tendency" standard exacerbates the problem, however, opening the door for further confusion and disparity. The underlying problem causing this disparity in the administration of justice throughout the country is simply that the *Alexander* "legitimate tendency" standard is a standard without an anchor. It allows individual courts to interpret its language without careful consideration of its principles. As a result, courts may raise the bar that a defendant must hurdle in order to have his

---

143. *State v. Larson*, 512 N.W.2d 732, 739 (S.D. 1994).

proffered evidence admitted.<sup>144</sup> As courts continue to interpret *Alexander* and apply their own standards of admissibility based upon their own understanding of the "legitimate tendency" doctrine, our justice system continues to suffer from an inconsistency of thought and process.

The current United States Supreme Court, with its mostly admirable devotion to the principles of federalism, may be willing to accept a certain degree of inconsistency in the way different states address this issue. It seems clear, however, that the prior Court's guidelines handed down in *Alexander* have been met with confusion, and that this confusion has led to disparity in the administration of justice among the states. This inequality of treatment presents a serious constitutional issue in which the Equal Protection Clause of the Constitution is circumvented.

The Due Process Clause of the Fourteenth Amendment requires each state to fully enforce the rights granted in the rest of the Constitution. While states may provide additional rights over and above those guaranteed by the Constitution, they may not curtail its citizens' rights to a level below the constitutional guarantee. Yet, in state after state, trial courts employ a disparate standard of admissibility based loosely on the "legitimate tendency" standard established by *Alexander*. This, despite the fact that the vast majority of these same states have adopted the Federal Rules of Evidence, which contain a much stronger preference for admission.

The "legitimate tendency" standard, with its widely varying methods of implementation, creates an intolerable violation of the Constitution's guarantee of due process. It seems high time for the Court to acknowledge that this disparity has led to constitutional violation. Further, the Federal Rules of Evidence has abrogated the *Alexander* rule. As it did in *Huddleston v. United States*,<sup>145</sup> the Court must recognize that the language of the Federal Rules of Evidence supersedes its preceding common law rules and must be enforced as written.

Finally, where federal and state courts apply grossly different standards of admissibility in essentially the same situations, equal protection under the law cannot exist. It is time to recognize that the "legitimate tendency" standard does more harm than good; that more disparity in the administration of justice is damaging to the principles of American jurisprudence. In short, it is time to acknowledge that the "legitimate tendency" standard as applied by the courts is unworkable. It is time for a renunciation of the "legitimate tendency" standard and for a uniform

---

144. See Garcia, *supra* note 67, at 465.

145. 485 U.S. 681 (1988).

application of Rule 403. To do otherwise is to continue to allow this continuing disparity and resulting constitutional violation.

BRETT C. POWELL\*

---

\* Brett C. Powell is a native of Miami and a graduate of Florida State University. He is a member of the University of Miami Law Review, an officer of the University of Miami Moot Court Board, an Academic Achievement Program Dean's Fellow, and a recipient of the Dean's Merit Scholarship. Brett and his wife Linda have two children; Noel and Nicholas. Brett would like to thank Professor Michael Graham, for making the Symposium for which this piece was written possible. Your guidance and dedication are greatly appreciated. Thanks also to Professor Kenneth Graham for his insight and for his very kind acknowledgement in his upcoming work. And, of course, thank you to my wife, Linda. Your love and support made it possible for me to devote the time and energy necessary to complete this Comment. Lastly, the author wishes to make a final point. At no time should the reader of the Comment infer that the author has anything but the utmost respect for the United States, its judicial system, and the people who work daily to serve the interest of justice. The author submits this Comment in the belief that the right to offer healthy criticism of our institutions is not only a unique privilege of our governmental system, but is the duty of those interested in the continued success of our nation. God Bless America.