

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF LYON

FIFTH JUDICIAL DISTRICT

CRIMINAL COURT DIVISION
Court File No. 42-CR-08-220

State of Minnesota,

Plaintiff,

vs.

DEFENDANT'S MEMORANDUM OF LAW
REGARDING ALTERNATIVE
PERPETRATOR EVIDENCE

Olga Marina Franco del Cid
aka
Alianiss Nunez Morales,

Defendant.

To: Lyon County District Court, Criminal Division, Lyon County Government Center, 607
West Main Street, Marshall, MN 56258;

and: Lyon County Attorney's Office, Attention: Rick Maes, Lyon County Attorney, 607 West
Main Street, MN 56258.

SUMMARY

Evidence that a third party committed the crimes Defendant is charged with in the
above-entitled case must be admitted upon a minimal showing of relevant evidence. This
is called evidence of an Alternative Perpetrator. Only evidence that a third party
committed some other crime in order to show that he committed the crimes charged
against Defendant are subject to the so-called "reverse *Spreigl*" requirements.

FILED IN THIS OFFICE

6-27-08

Karen J. Bierman
COURT ADMINISTRATOR
Marshall, Lyon County, Minnesota

EVIDENCE REGARDING THE CRIMES ALLEGED IN THIS CASE

Evidence regarding the crimes alleged in this case must be admitted subject only to the evidentiary rules regarding relevancy. Judge Alito wrote for a unanimous Supreme Court stated that an evidentiary rule barring the admission of evidence that a third party committed the crime cannot rest on the strength of the prosecution's case. *Holmes v. South Carolina*, 547 U.S. ____, 126 S.Ct. 1727 (2006). Rather, the Fourteenth Amendment requires that states allow a defendant the Sixth Amendment guarantee to a meaningful opportunity to present a complete defense. But a defendant may introduce evidence that a third party committed the crime where such evidence raises a reasonable inference or presumption as to the defendant's own innocence, but is not admissible if it merely casts a bare suspicion upon another or raises a conjectural inference as to the commission of the crime by another. *State v. Gregory*, 198 S.Ct. 98, 104 (1941). The unanimous Court in *Holmes* quoted with approval that "the accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged... (Such evidence) may be excluded where it does not sufficiently connect the other person to the crime...." *Holmes v. South Carolina*, 547 U.S. at ____, citing 40A Am. Jur. 2d, Homicide §286, pp. 136-138 (1999).

It should also be noted that the defendant in *State v. Profit* sought to introduce both evidence that a third party committed the murder Profit was charged with, and also other crimes to show that the third party committed the crime Profit was charged with. *See, State v. Profit*, 591 N.W.2d 451 (Minn. 1999). The defense ended up not calling the third

party as a witness, and appealed. The Minnesota Supreme Court noted the trial court's ruling that if the third party, "Mr. Kelly has information relevant to the specific cases before us... Mr. Kelly will obviously be allowed to testify." *State v. Profit*, 591 N.W.2d at 463. The Court went on to distinguish other crimes that a third party may have committed, and when offered to prove these other crimes to show the third party also committed the charged offenses, then the "reverse *Spreigl*" analysis is used, pursuant to Rule 404(b) of the Minnesota Rules of Evidence.

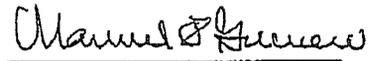
The Minnesota State Supreme Court clarified the difference between offering an Alternative Perpetrator defense and "reverse *Spreigl*" evidence in *State v. Jones*. See, *State v. Jones*, 678 N.W.2d 1, Minn. 2004) (partial copy attached). As the Jones court made clear, evidence of an Alternative Perpetrator may be offered and argued upon a minimal showing of relevant evidence tending to show that a third person, and not the accused, committed the crime in question.

CONCLUSION

Evidence that a third party committed the crimes charged against Defendant is admissible upon a showing of relevancy, that is, if it tends to show that another person committed the crimes. A "reverse *Spreigl*" analysis is not appropriate or constitutional in this situation.

Dated: 23 June, 2008

RESPECTFULLY SUBMITTED,



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guaranteed by constitutional due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Exclusion of evidence supporting a defendant's theory that an alternative perpetrator committed the crime with which the defendant is charged "will almost invariably be declared unconstitutional when it significantly undermin[e]s fundamental elements of the defendant's defense." *Beatty v. Commonwealth*, 125 S.W.3d 196, 2003 WL 22415370 at *7 (Ky.2003) (quoting *United States v. Scheffer*, 523 U.S. 303, 315, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). Nonetheless, when a defendant seeks to introduce exculpatory evidence based on an alternative perpetrator theory, the court must still evaluate this evidence under the ordinary evidentiary rules as it would any other exculpatory evidence. See *State v. Gutierrez*, 667 N.W.2d 426, 435 (Minn.2003).

[20, 21] Alternative perpetrator evidence is admissible if it has an inherent tendency to connect the alternative party with the commission of the crime. See *id.* at 436 n. 8; see also *Beatty*, 125 S.W.3d 196, 2003 WL 22415370 at *7 (stating that alternative perpetrator evidence may be excluded if it could confuse or mislead the jury). Our requirement that such evidence have an inherent tendency to connect the other party with the crime "avoids the use of bare suspicion and safeguards the third person from indiscriminate use of past differences with the deceased." *State v. Richardson*, 670 N.W.2d 267, 280 (Minn. 2003) (quoting *State v. Hawkins*, 260 N.W.2d 150, 159 (Minn.1977)). Once a foundation is laid with evidence having an inherent tendency to connect the alleged alternative perpetrator to the commission of the crime, "it is permissible to introduce evidence of a motive of the third person to commit the crime, threats by the third person, or other miscellaneous facts which

would tend to prove the third person committed the act." in order to cast a reasonable doubt on the state's case. *Hawkins*, 260 N.W.2d at 159 (internal citations omitted); see *State v. Bock*, 229 Minn. 449, 458-59, 39 N.W.2d 887, 892-93 (1949).

[22-26] It is also permissible for a defendant to present evidence of other crimes, wrongs, or bad acts committed by the alleged alternative perpetrator in order to cast reasonable doubt upon the identification of the defendant as the person who committed the charged crime. *Gutierrez*, 667 N.W.2d at 436-37. We have sometimes labeled this type of proffered alternative perpetrator evidence as "reverse-Spreigl" evidence. *Woodruff v. State*, 608 N.W.2d 881, 885 (Minn.2000). Here, *Spreigl* refers to the standard used to determine the admissibility under Minn. R. Evid. 404(b) of evidence of "another crime, wrong, or act," separate from the charged crime. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). In order for a defendant to successfully argue for the admission of "reverse-Spreigl" alternative perpetrator evidence, he must first meet the threshold requirement of connecting the alternative perpetrator to the commission of the crime with which the defendant is charged. *Woodruff*, 608 N.W.2d at 885. If the defendant fails to meet the threshold requirement of connecting the alternative perpetrator to the charged crime, the reverse-Spreigl alternative perpetrator evidence is not admissible. *Hawkins*, 260 N.W.2d at 159. Once the defendant meets that threshold requirement, the district court should then evaluate the admissibility of the reverse-Spreigl evidence according to the standard we articulated in *Woodruff*. Under this standard, the defendant must show (1) clear and convincing evidence that the alleged alternative perpetrator participated in the reverse-

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Spreigl incident;⁶ (2) that the reverse-*Spreigl* incident is relevant and material to defendant's case; and (3) that the probative value of the evidence outweighs its potential for unfair prejudice. 608 N.W.2d at 885.

While a proffer of proof concerning an alternative perpetrator may include reverse-*Spreigl*-type evidence, not all evidence concerning an alternative perpetrator is necessarily this type of evidence. Unfortunately, some of the discussion in our decisions has tended to classify all such alternative perpetrator evidence as reverse-*Spreigl* evidence. This classification has perhaps led to the erroneous implication that the heightened clear and convincing standard that is applicable to reverse-*Spreigl* evidence is likewise applicable to all alternative perpetrator evidence. It is not.

Here, Jones sought to introduce evidence about two alternative perpetrators: Robert Beard and Richard Christy. When addressing the admissibility of this evidence, both the parties and the district court failed to distinguish between the proffered alternative perpetrator evidence that was reverse-*Spreigl* evidence and any other proffered alternative perpetrator evidence. Instead, the parties focused their discussion about alternative perpetrator evidence on whether Jones had passed the "clear and convincing" threshold requirement of connecting the alleged alternative

perpetrators to the charged crime. The court then ruled on the issue as the parties presented it and determined that Jones had failed to present "clear and convincing" evidence connecting either Beard or Christy to Linda Jensen's murder. Using this standard, the court deemed that all of Jones' proffered alternative perpetrator evidence was inadmissible.

Plain Error Analysis

We conclude that the district court erred when it used the clear and convincing standard to assess the admissibility of all of Jones' proffered alternative perpetrator evidence. More particularly, the court erred when it failed to examine the evidence to determine whether Jones had proffered evidence that was not reverse-*Spreigl* evidence, which evidence should have been evaluated under the ordinary evidentiary rules. Because this error was based on the parties' failure to correctly frame the issue⁷ and because neither party objected to this analysis at the district court level or in their briefs to our court, we must analyze the error under the plain error standard. See *State v. Litzau*, 650 N.W.2d 177, 182 (Minn.2002).

[27, 28]. Under the plain error review, a defendant may obtain relief if he was denied a fair trial. *Id.* Three factors must be met: (1) there must have been error; (2) that error must be plain; and (3) it must have affected substantial rights.

reverse-*Spreigl* test, are appropriately used "to evaluate any evidence brought by the defendant to show that a third person committed the crime." As discussed above, this is a misstatement of the law. In discussing whether the evidence about Christy was admissible, defense counsel stated, "We don't have to prove Mr. Christy committed this crime, we just have to show there's clear and convincing evidence to believe that he was involved." This, too, is a misstatement of the law.

6. But see *Richardson*, 670 N.W.2d at 280 (stating that Sixth Amendment concerns may enter into the picture when it is the defendant who is seeking to present other crimes evidence and that there may well be situations when the clear and convincing rule may have the potential to operate unconstitutionally).

7. The state argued in its memorandum opposing the use of "Reverse-*Spreigl*" evidence that the threshold inquiry of a connection between the alternative perpetrator and the charged crime, as well as the three-pronged

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Minn. 885

Cite as 608 N.W.2d 881 (Minn. 2000)

[2, 3] Pursuant to Rule 404(b) of the Minnesota Rules of Evidence, a defendant may seek to introduce evidence that a third person, not the defendant, committed the crime of which defendant is accused. See *State v. Johnson*, 568 N.W.2d 426, 433 (Minn.1997). Such evidence is often referred to as "reverse-Spreigl" evidence. See *id.* This evidence may consist of a third person's motive to commit the crime, threats made by the third person, or other facts tending to prove the third person committed the crime. See *State v. Hawkins*, 260 N.W.2d 150, 159 (Minn.1977).

[4] However, before the defendant can introduce such evidence he must lay a foundation consisting of additional evidence which has "an inherent tendency to connect such other person with the actual commission of the crime." * * * This requirement avoids the use of bare suspicion and safeguards the third person from indiscriminate use of past differences with the deceased." *Id.* (citations omitted). In other words, in addition to evidence connecting a third party to the victim, the threshold also requires a foundation consisting of evidence connecting that third party to the crime of which the defendant is accused.

[5] Before a court can admit reverse-Spreigl evidence, the defendant must show: (1) by clear and convincing evidence that the third party participated in the reverse-Spreigl incident; (2) that the reverse-Spreigl incident is relevant and material to defendant's case; and (3) that the probative value of the reverse-Spreigl evidence outweighs its potential for unfair prejudice. See *Johnson*, 568 N.W.2d at 433-34.

[6] Appellant argues that he satisfied the reverse-Spreigl threshold by connecting Webber, Harris, and Marberry to Woodruff's murder. In fact, as the trial court noted in its order excluding evidence of Woodruff's extra-marital relationships, appellant did not make the requisite offer of proof connecting these third parties to

Woodruff's murder. There was no evidence of threats against Woodruff by these persons or evidence that any of them were seen at the Kenwood Cleaners on the day of the murder. Contrary to appellant's assertions, the record strongly supports the exclusion of appellant's proffered evidence: Webber and Harris both were at work at the time of the shooting, and therefore had alibis which precluded their presence at the scene of the murder. Further, police determined that Marberry, who lived in Montana, had never traveled to Minneapolis, and therefore was also absent from the murder scene. In short, appellant did not provide a foundation connecting Webber, Harris, or Marberry to Woodruff's murder, thus making any evidence of Woodruff's relationships with them not material to appellant's case. Accordingly, appellant's proffered evidence did not meet the test for admission set forth in *State v. Johnson*. We therefore conclude that the postconviction court did not abuse its discretion in denying appellant relief on this claim.

II.

Next, we consider appellant's argument that the postconviction court abused its discretion by refusing to grant a new trial on the basis of the state's alleged failure to disclose key evidence to the defense. Prosecutors must disclose to the defense all relevant written or recorded statements that relate to the case. See Minn. R.Crim. P. 9.01, subd. 1(2). This obligation extends to materials in possession or control of the prosecutor's staff and any others who have participated in the investigation or evaluation of the case. See *id.* at subd. 1(7).

[7-9] In addition, the United States Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the prosecution's failure to disclose material evidence that is favorable to the accused violates the Due Process Clause. Evidence is material if there is a reasonable probability that, had it been disclosed, the result of the trial

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