

“This Other Dude Did It!”:

A Test of the Alternative Explanation Defense

by Elizabeth R. Tenney, Hayley M.D. Cleary and Barbara A. Spellman

How does a criminal defense attorney argue for a Not Guilty verdict? One strategy is simply to argue that the state’s case is incomplete and has not been proven beyond a reasonable doubt; no more is required. Another strategy is to provide alternative explanations of each piece of evidence: for example, how the defendant’s blood got in the victim’s car or that other people had keys to the home. A more specific version of this strategy would be to provide a complete alternative story—implicating unnamed or named others—that explains all of the evidence. Thus, the defense may choose to enumerate some of the possible explanations for individual pieces of evidence or for the crime as a whole. TODDI (“This Other Dude Did It”) is a slang term for the defense strategy in which attorneys point to a specific other possible perpetrator who could have committed the crime. Our laboratory study suggests that a defense strategy that argues not only that the defendant is innocent, but also that some other individual(s) could have committed the crime, is more likely to result in acquittal.

Does It Really Help to Point the Finger Somewhere Else?

Our study participants (253 college undergraduates) read a fictional transcript of the trial of Richard Wilson for the second-degree murder of his wife, Laura Wilson. Several pieces of evidence (e.g., fingerprints on the murder weapon, no evidence of forced entry, history of domestic violence) incriminated the defendant, but there were no eyewitnesses. In the basic version of the transcript, the defense rebutted each piece of evidence and argued that the defendant was not guilty beyond a reasonable doubt. In the alternative version of the transcript, the defense not only rebutted the evidence but also turned against one, two, or three witnesses and argued that the witness(es) could have committed the crime.

The transcript was conceived so that virtually all direct evidence incriminated the defendant. To introduce an alternative suspect, new circumstantial and probative evidence was revealed to unpack the possibility that another specific individual could have committed the crime. For example, in one story it was revealed that the victim’s stepbrother, a frequent gambler, did not get along well with his stepsister, and he was now the primary beneficiary of his mother’s will because his stepsister was no longer alive. Thus, the alternative suspects were individuals against whom an accusation of guilt was not too farfetched. Many criminal trials have the potential to contain such suspects. There may be a will, or an angry ex-lover, or an unknown, unnamed drug dealer. Like the defendant, a TODDI suspect might have a plausible motive, an unsubstantiated alibi, or some other suspicious indicator around which the defense could weave a story that is not refuted by the evidence.



After reading a transcript, the participants rendered a verdict and then rated the likelihood that the defendant was guilty on an eight point scale. Results showed that the minimal TODDI strategy worked—that is,

providing testimony from at least one alternative suspect successfully reduced estimates of the defendant's guilt. However, accusing more than one alternative suspect was not clearly better than accusing only one.

Participants in all TODDI versions, in which there was an alternative suspect, still believed that the defendant seemed guiltier than any one of the alternative suspects. That is, the TODDI story was never better than the prosecution's story. Yet, adding one TODDI story decreased the number of participants who rendered guilty verdicts from 73% to 35%, and ratings of the likelihood that the defendant committed the crime decreased as well. Adding the second and third TODDI stories was not statistically significantly better than employing a single TODDI story (although all measures of guilt did decline slightly). See Figure 1.

The results of the current experiment suggest that in court, the addition of one or more alternative suspects would decrease jurors' belief in the defendant's guilt, even when the alternative suspect is not actually believed to be the culprit. (See Tenney, Cleary, & Spellman (2009) for more study details.)

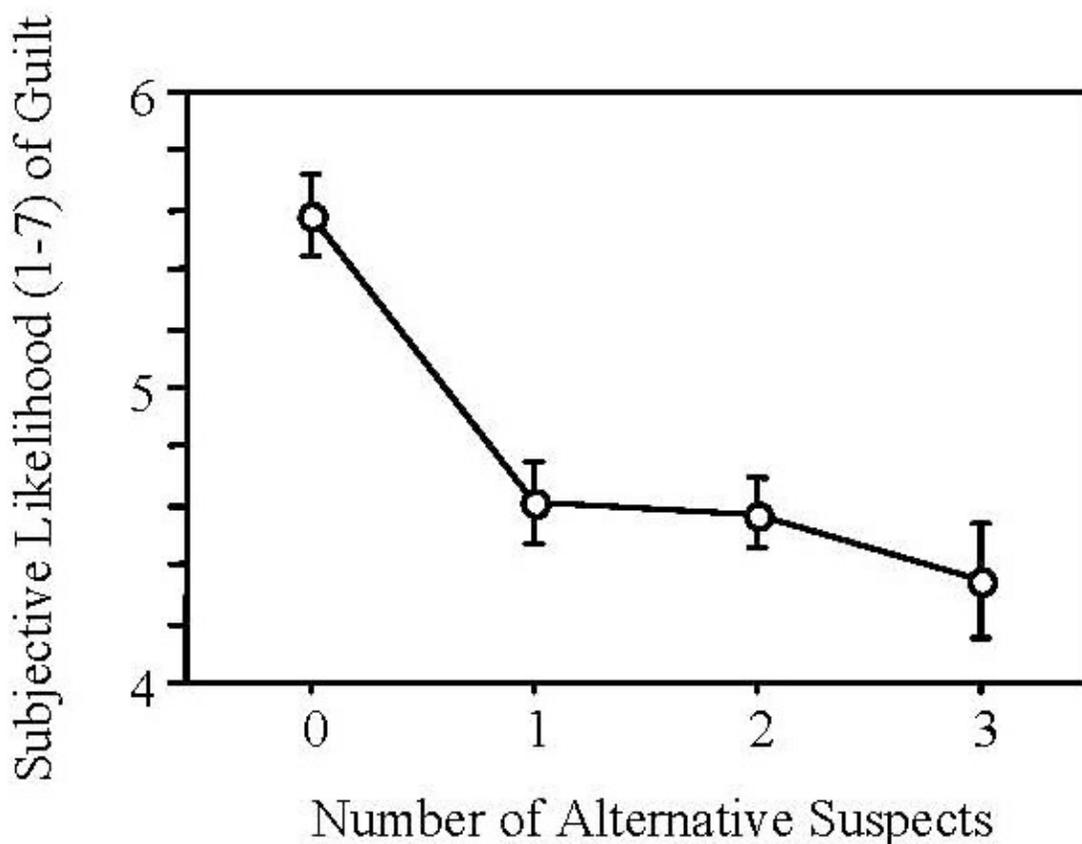


Figure 1. Mean subjective likelihood that the defendant is guilty as a function of the number of alternative suspects (with standard error bars).

Why Doesn't Adding More Alternative Suspects Help?

We know that jurors construct a story of how they believe a crime occurred and then match that story to a verdict category. For example, if jurors believe a defendant planned a murder and carried it through, they select the verdict category of first degree murder. If there are two plausible stories of how the crime occurred—one advocated by the defense and one by the prosecution—jurors tend to reduce belief in both stories. This process is called the story model of juror decision making (Pennington & Hastie, 1986). Using the story model as a basis, what happens when multiple stories fit the *same* verdict category (e.g., multiple stories describe how the defendant is not guilty)? Perhaps jurors first compare stories within a verdict category to each other before comparing across verdict categories. More specifically, they might consider all the TODDI stories together, then determine which TODDI story best fits a Not Guilty verdict, and then compare only that best story to the prosecution's story (making the rest of the alternatives irrelevant).

Another possibility is that once the notion that someone else might have done it is introduced via the first TODDI story, adding more TODDI suspects does only a little to further unpack the idea that some other individual instead of the defendant is guilty; for the most part, the idea that someone else is guilty has already been raised by the first alternative suspect. Thus, bringing up a particular *type* of defense (e.g., the TODDI defense that someone else did it) is more powerful than giving multiple examples of the same type of defense.

Future studies should determine whether explicating different types of not guilty arguments would further reduce guilty verdicts. For example, in addition to pointing at a TODDI suspect, a defense attorney could explain how a homicide could have happened by accident, or that it could have been suicide. Unpacking the hypothesis that the defendant is not guilty into such diverse components could be more effective than unpacking it the same way multiple times.



Warnings About Using a TODDI Defense

Research has suggested that providing a weak defense can actually raise confidence in the prosecution's case because jurors might think, "If this is the best the defense can do, the defendant must be guilty" (McKenzie, Lee, & Chen, 2002). More generally, this argument follows from the "dud alternative" effect, in which the addition of implausible alternative outcomes may increase judgments that the focal outcome will occur (Windshitl & Chambers, 2004). If employing the TODDI defense, one should be careful to construct *plausible* alternative stories; however, in our experiment, none of the TODDI suspects were ever thought to be guilty. Exactly what constitutes "enough" plausibility remains to be seen, and is likely to depend on the case-specific circumstances.

Also, it is possible that some jurors become suspicious when a defense attorney tries to incriminate too many other people. If a defense seems desperate (here by presenting multiple alternative scenarios rather than just one weak one), some jurors might surmise that the defense is weak, and the defendant is, in fact, guilty. We saw some slight hints of that from our participants who read about three alternative suspects. Litigators employing a TODDI strategy may want to avoid accusing too many alternative suspects, lest it appear they are grasping at straws.

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We asked two experienced trial consultants to respond to the article by Tenney, Cleary and Spellman. Julie Blackman and Stan Brodsky offer their perspectives on the following pages.

A Response To:

“This Other Dude Did It! A Test of the Alternative Explanation Defense”

by Julie Blackman

Julie Blackman, Ph.D. (jblackman@julieblackman.com) is the principal of Julie Blackman & Associates in NYC. She offers trial strategy consulting in criminal and civil cases in the NYC area and beyond.

Tenney, Cleary and Spellman report that their research shows that “a defense strategy that argues not only that the defendant is innocent, but also that some other individual(s) could have committed the crime, is more likely to result in acquittal.” In “whodunnit” type cases this finding makes perfect sense. Jurors in such cases seek narratives to explain “whodunnit.” A narrative including an alternate vision of whodunnit is richer and more compelling than the simple negating reflected in the idea that the prosecution failed to meet its burden of proof beyond a reasonable doubt.



Few cases, however, are “whodunnit” type cases. What’s more, some defendants are charged with crimes for events over which they had special responsibility. Consider the case of corporate executives indicted in white collar crime cases. Then, the potential benefits to the defense of blaming alleged criminal acts on the “other dude” are reduced or eliminated. Efforts by high level executives to blame the “other dude” may be roundly resented by jurors who think that top level executives, who earned many millions of dollars, should take responsibility for whatever happened on their watch. They may be judged harshly for efforts to pass the buck. In such scenarios, blaming the other dude is a risky defense strategy.

So, while the advice that follows from Tenney et al.’s study (i.e., blame it on the other dude) seems likely to be useful in simple “whodunnit” type cases, its utility may end there. The “blame the other dude” strategy seems

likely to work only when no expectation of special responsibility attaches to the defendant.

When There Aren’t Any Other Dudes: Beyond the Alternative Dude Defense

by Stanley Brodsky

Stanley L. Brodsky, Ph.D. (sbrodsky@bama.ua.edu) is Professor in the Department of Psychology, The University of Alabama, Tuscaloosa, where he directs the Witness Research Laboratory. He is author of the 2009 book *Principles and Practice of Trial Consultation*.

The TODDI is an appealing and potential useful approach. It puts together two important foundations: empirical research along with common sense. It is reasonable for attorneys to seek out and develop a plausible case for at least one alternate defendant, even if the evidence is circumstantial and somewhat weak.

However, there is a problem. In a majority of cases, other possible defendants are not only difficult to identify, but essentially impossible to find. For example, there may have been only one person who was accused of embezzlement and who had access to records. Consider the additional example of a case in which the evidence is unequivocal that the neighbor-defendant was the one person who spent time alone with the children who were allegedly molested. In another example, many witnesses might have observed the assault at issue.

The more broadly usable approach is the concept of the alternative explanation in general. Juror processing of case information may be examined according to how many constructs or perspectives jurors have to organize their perceptions and understandings. In a capital case on which I consulted, the one eyewitness identified the defendant from a single photo shown to her by the investigator. She was asked (as part of discovery) to name the identifying characteristics of the defendant that made her so certain that he was the perpetrator. This Caucasian witness said of the African-American defendant that it was his broad nose, very dark skin, and whites of his eyes -- traits common to many African-Americans. The alternative explanation that was developed, in opposition to that of accurate eyewitness identification, was racist stereotyping; this explanation was supported in part by the simplistic and race-related traits of identification.

When claiming, “The Other Dude Did It,” the defense attorney has to move beyond the starting position of arguing that the state has to prove its position and that the defendant is innocent unless proven guilty. In one rural county, I included in the jury questionnaire a query asking, “No matter what the law says, do you agree that a defendant in a murder trial should have to prove his innocence?” Over 40% indicated agreement. Even though the judge later rehabilitated these people in response to defense challenges for cause, the statement probably accurately reflected the actual positions of the venire. Jurors need to have something to believe in as a substitute for the prosecution’s case.



Finding that alternative is not a simple task. Early on in the development of any case, experienced attorneys and consultants often delve in depth into many choices for case conceptualization. If dozens of alternative explanations, even ones that are not obvious on the surface, can be put forth, the subsequent process of vetting usually leaves the trial team with two or three alternate perspectives. I find that this first task, the job of considerable time invested in mobilizing multiple theories of the case, is always a demanding, essential, and complex task. It calls for lateral thinking, for deferring judgments about the worth of theories, and for proposing a great many alternatives so that good ones will emerge.

Such gathering of large pools of possible case conceptualizations is much like the principle of personnel selection. If you get one hundred applicants for a position, any method of selection will work well. If there are only two or three applicants for a position, the selection methods have to be extraordinary to make a difference. Remember, inexperienced attorneys often do what may be thought of as a line-by-line rebuttal of charges. The alternative explanations discussed here are part of a broader way of approaching and understanding case conceptualization that allows jurors to get past the reflexive attribution of guilt to the only person who is sitting in the room and being accused.

A response to the Trial Consultants from Tenney, Cleary & Spellman...

The responses to our article make some excellent points. Both Blackman and Brodsky note that we only discuss how the TODDI defense can be used in "whodunit" type cases -- but that whodunit cases are few in number.

We agree; we limited our discussion to those types of cases because those are what we used in our study. But Brodsky notes the more important general point: TODDI is an example of a strategy in which the defense does not merely try to refute the prosecution's case but instead (or in addition) creates plausible alternative explanations of the events. Those plausible explanations need not center around alternative suspects but could center around alternative motives, alternative interpretations of ambiguous behaviors, alternative explanations for the most damning piece of evidence, etc. The most important lesson here from psychology is that humans are explanation seekers: people are not content to know THAT something happened, we want to know HOW and WHY.

Providing plausible alternative stories -- whether or not they are about other possible perpetrators -- satisfies the jury's need for an explanation of the events in question. (See Pennington & Hastie, 1991, for further discussion.)

Pennington, N., & Hastie, R. (1991). A cognitive theory of juror decision making: The story model. *Cardozo Law Review*, 13, 519-557.

13,450+

13,450. That's the number of reads our May issue of *The Jury Expert* had as of Monday, July 20 (the day before we published this issue). Our online debut issue (in May 2008) had a few more than 500 reads. Over the past year we have grown a lot and we are grateful to the thousands of you who read our pages every issue. And even more grateful (dizzily so!) when you pass us on to your friends and colleagues.

We are also grateful to the academics and researchers who write for us and turn theory into practice and especially grateful to the members of the American Society of Trial Consultants (ASTC) without whom we would not exist. ASTC member trial consultants continue to inform, educate and surprise us with creative and practical articles focused on improving litigation advocacy. So thanks to all of you and to paraphrase a young Sally Fields--"you like us, really like us".

This issue is filled with lessons for uncertain times. We have articles on terror management theory and how to use it at trial, two articles on damages in times of recession (does it make a difference in awards and if so, how?), getting the most out of videos at trial, exploring the TODDI defense (this other dude did it!), how to prepare your witness for the environment change from office to actual courtroom, and negotiating in the new millennium. Plus our July favorite thing and a book review. It's hot outside! Stay inside, enjoy the air conditioning and read *The Jury Expert*!

--- *Rita R. Handrich, Ph.D.*



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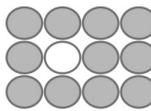
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