WHEN POLICE MESS UP: THE LACK OF A DEFENSE TO INADEQUATE POLICE INVESTIGATIONS

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SYNOPSIS

Inadequate police investigations, where police fail to take reasonable investigatory steps, are one of the leading causes of wrongful convictions. Frequently, due to the difficulties criminal defendants and their attorneys face in conducting their own investigations, a defendant's best course of action when faced with a faulty investigation is to point out the deficiencies of the investigation during trial. As a result, this defense has been recognized by the Supreme Court as a "common trial tactic of [] lawyers[.]"[1] However, despite the Supreme Court's acknowledgment of the defense, many federal jurisdictions bar the defense on grounds of relevance.

This Note is unique in being the first to examine the caselaw in each federal jurisdiction that limits the inadequate-investigation defense. Conflicting caselaw and scholarship reveal a lack of clarity on the relevance of an inadequate-investigation defense. This Note analyzes the conflicts in the caselaw and argues that an inadequate-investigation defense is always relevant.

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1. Kyles v. Whitley, 514 U.S. 419, 446 (1995) (quoting Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986)) ("'A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant[.]'").

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INTRODUCTION

Inadequate police investigations, where police fail to take reasonable investigatory steps, are one of the leading causes of wrongful convictions.[2] The reason for this is that the evidence available to the prosecution and defense as they prepare for a case, and the evidence jurors will hear at trial, largely flows from the evidence collected by police.[3] This evidence then plays a significant role in the jurors' deliberations.[4] Any inaccuracies can tell an incomplete and misleading story.[5] Inadequate police investigations thus often mislead jurors and attorneys (and other decision-makers, such as judges and police), and leave them oblivious to evidence that would completely alter reasonable beliefs about who committed a crime.[6] This Note argues that when a defendant's case suffers from an inadequate police investigation, evidence and defenses about the inadequacies should always be considered relevant, as they can point out that jurors may have an incomplete story. In making this

2. *See infra* Sections I.A, I.B.

3. *See infra* Section I.A.

4. In addition to playing a role in how jurors perceive a case, evidence plays a role in plea bargaining decisions. *See* Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement,* 92 NOTRE DAME L. REV. 691, 702 (2016) ("For purposes of plea bargaining, it is prosecutors' and defense attorneys' *perception* of enforcement-finding's influence that matters most."); Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 18 (1993) ("With the exception of very serious or unusual cases, many defendants enter negotiated guilty pleas on the basis of inadequately developed accounts of the relevant facts."). Further, seventeen percent of defendants who were later exonerated had taken plea deals, showing not only that most people who have been exonerated were found guilty by a jury, but that many innocent people do not trust the justice system to allow them to adequately portray their innocence. *See* Jeffrey Bellin, *The Evidence Rules that Convict the Innocent*, 106 CORNELL L. REV. 305, 321–22 (2021).

5. *See* Ouziel, *supra* note 4, at 693 ("[Evaluations of law enforcement are] a phenomenon that permeates criminal adjudication—affecting not just trials, but plea bargaining, discovery, and even charging decisions."); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 17 (2012) ("The criminal process is as good as the evidence on which it feeds.").

6. *See infra* Section I.A.

argument, this Note addresses the caselaw of the many federal courts that find the adequacy of a police investigation to be irrelevant.[7]

An apt illustration of the impact of an inadequate police investigation is the case of Clemente Aguirre-Jarquin.[8] In 2004, Cheryl Williams and Carol Bareis were found stabbed to death in their Central Florida home.[9] As police investigated, they continued to find evidence confirming their suspicion: Cheryl and Carol's neighbor, Clemente Aguirre-Jarquin, committed the murders.[10] One of the first indicators that Clemente committed the murders came from Cheryl's daughter, Samantha.[11] After arriving at the crime scene, Samantha informed police that she had a "gut feeling" that Clemente committed the murders.[12] Next, police discovered a bloody ten-inch kitchen knife between Cheryl and Carol's home and Clemente's dwelling.[13] The knife was examined for fingerprints, and Clemente's fingerprints were found on the knife.[14] Additionally, the police found sixty-seven bloody shoe impressions at Cheryl's and Carol's home, sixty-four of which were consistent with Clemente's shoes.[15] Finally, the police searched Clemente's home and found a plastic bag filled with Clemente's bloody clothes.[16] The blood was confirmed to be from both Cheryl and Carol.[17]

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7. Though the adequacy of a police investigation should be relevant at both the state and federal level, this Note focuses on federal law.

8. *See generally* Maurice Possley, *Clemente Aguirre-Jarquin*, NAT'L REGISTRY EXONERATIONS. https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5406 [https://perma.cc/UKX2-K4W3] (describing Jarquin's exoneration and the events leading up to it).

9. *Id.*

10. *See id.*

11. *Id.* The Note uses the first names of those involved for this example because both Cheryl and Samantha have the same last name. This illustration aside, the Note refers to people by their last name.

12. *Id.* Notably, Clemente used to be a welcomed guest at Cheryl's home (where Samantha usually lived), but Samantha explained that he was banned from the house when she was sleeping there one night and awoke to find Clemente hovering over her bed. *Id.*

13. *Id.* After some further investigation, the police discovered that this knife resembled a 10-inch knife that was missing from the restaurant where Clemente worked. *Id.*

14. *Id.* It was also confirmed that the blood on the knife was from Cheryl and Carol. *See id.*

15. *Id.*

16. *Id.*

17. *Id.*

Despite this evidence, Clemente did not commit the murders.[18] Though these findings from the police investigation painted a compelling picture of Clemente's guilt, the findings would have revealed Clemente's innocence if police adequately investigated Samantha as a suspect.[19] For instance, in addition to DNA findings throughout the house incriminating Samantha and exonerating Clemente, testimony from four different third-parties revealed that Samantha confessed to the murders on several occasions.[20] Further, the blood found on Clemente's clothing was determined to be inconsistent with the spattering of blood from a stabbing, and consistent with him picking up the victims.[21] This supported Clemente's version of events, where he explained that while he did go to Cheryl's and Carol's house the nights of the murders, he only went to get beer.[22] When he found Cheryl's body when he arrived, her blood got on his clothes when he lifted her onto his lap to try and revive her.[23] As for the knife, Clemente picked it up when he saw it because he was worried the attacker was still in house.[24]

Clemente's case demonstrates the impact of an inadequate police investigation. Though innocent, Clemente was convicted and sentenced to death because the evidence exonerating Clemente was only discovered years after Clemente's trial.[25] Police failed to adequately investigate Samantha as a suspect, missing crucial pieces of evidence.[26] As a result, jurors heard the convincing story of Clemente's guilt, and not the true story of his innocence.[27]

Though Clemente was eventually exonerated and released, he is not alone in his wrongful conviction. Since 1989, nearly 3,300 people have been convicted for a crime that they were later

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18. *Id.*

19. *See id.*

20. *Id.* Among other findings, Samantha's DNA was found in locations throughout the house where Clemente's was not, and these locations were consistent with Samantha being the attacker. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* Eventually, Clemente ran back to his place, and tossed the knife into the grass. *Id.* Fearing deportation due to his status as an illegal immigrant, he did not call the police. *Id.*

25. *Id.*

26. *See id.*

27. *Id.*; *see* State v. Aguirre-Jarquin, No. M04-2491-CFA, 2006 WL 6625225 (Fla. Cir. Ct. June 30, 2006), *vacated*, 202 So. 3d 785 (Fla. 2016).

exonerated from following a post-conviction re-examination of the evidence in their case.[28] However, since exoneration efforts are time-consuming, the resources dedicated to exonerations are usually reserved for the small percentage of people convicted of felonies with prison sentences of many years.[29] While the number of exonerations have been increasing over time,[30] in an ideal world, innocent people would never be found guilty in the first place.

In addition to arguing for the relevance of inadequate police investigation defenses, this Note posits that allowing such defenses will contribute to limiting wrongful convictions.[31] Since a defense arguing an inadequate police investigation can fall under many different names,[32] this Note refers to the defense as an "inadequate-

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28. Glossary, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx [https://perma.cc/WG69-2XBG].

> "A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action."

Id.

On average, those exonerated have spent close to nine years in prison for crimes they did not commit. *25,000 Years Lost to Wrongful Convictions*, NAT'L REGISTRY EXONERATIONS (June 14, 2021), https://www.law.umich.edu/special/exoneration/Documents/25000%20Years.pdf [https://perma.cc/84ZL-WNTU].

29. *Misdemeanors*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Misdemeanors.aspx [https://perma.cc/84ZL-WNTU]. Even though misdemeanors make up about 80% of criminal convictions in the United States, they only make up about 4% of exonerations. Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 BOS. UNIV. L. REV. 999 (2018).

30. *Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx [https://perma.cc/L9Z7-2ZUG]. Thanks to the rise of DNA evidence and the work of people dedicated to stopping the tragic injustice of a wrongful conviction, discovery of wrongful convictions has been rising, from under 60 per year from 1989–99 to over 100 per year since 2012. *See id*.

31. Additionally, finding inadequate-investigation defenses relevant is an important part of holding the government to its burden of proof of proving defendants guilty beyond a reasonable doubt.

32. *See, e.g.*, United States v. Veal, 23 F.3d 985, 989 (6th Cir. 1994) ("sloppy" police investigations); United States v. Patrick, 248 F.3d 11, 22–23 (1st Cir. 2001) ("sloppy investigation" evidence); Morris v. Burnett, 319 F.3d 1254, 1272 (10th Cir. 2003) ("inadequate-investigation evidence"); United States v. Lassend, 545 F. App'x 3, 4–5 (1st Cir. 2013) ("faulty police investigation"); James

investigation defense." Similarly, in referring to evidence that supports the defense, the note uses the phrase "inadequate-investigation evidence."

Part I of this Note examines the role inadequate police investigations play in wrongful convictions, defines an inadequate-investigation defense, and explains how relevance of evidence is determined. Part II explores the different treatment of inadequate-investigation defenses across jurisdictions and the different problems this creates. Part III argues that inadequate-investigation evidence should always be considered relevant and proposes adopting the framework used in Massachusetts to create a standardized approach.

I. Inadequate-Investigations and the Test for Relevance

A. The Role of Inadequate Police Investigations in Wrongful Convictions

The adequacy of a police investigation determines not just whether police will discover the true culprit of a crime, but whether police will mistakenly believe they have discovered the true culprit of a crime.[33] The most common factors contributing to wrongful convictions include mistaken witness identification, perjury or false accusations, official misconduct, false or misleading forensic evidence, and false confessions.[34] Underlying all of these factors, and underlying the vast majority of wrongful convictions, are inadequate police investigations.[35] Instances of misconduct aside, these

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S. Liebman et al., *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 IOWA L. REV. 577, 662 (2013) ("inadequate-investigation defense"); Lisa J. Steele, *Investigating and Presenting an Investigative Omission Defense*, 57 NO. 2 CRIM. L. BULL. ART 1 (2021) [hereinafter Steele, *Investigative Omission Defense*] ("investigative omission evidence").

33. *See* sources cited *infra* note 35.

34. *See % Exonerations by Contributing Factor*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/4YRH-HDG4]. *But see* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1135 (2013) ("[T]he primary causes of wrongful convictions are almost certainly crime-specific.").

35. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006) (finding that tunnel vision, which leads investigators to "focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion," touches almost every wrongful conviction and each of its causes because evidence

inadequate investigations occur despite good faith efforts by officers.[36] They are often the result of different cognitive biases, collectively known as 'tunnel vision,' that lead investigators to overlook evidence that is inconsistent with their chosen theory of guilt for a particular crime.[37]

Investigators, prosecutors, judges, and defense lawyers are all impacted by tunnel vision in the way they analyze evidence related to a case.[38] However, since all stages of a criminal case typically flow from the information gathered in the police investigation, the impact of tunnel vision on police investigations is arguably the most

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inconsistent with the investigators particular conclusion is "overlooked or dismissed as irrelevant, incredible, or unreliable"); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002); Robert J. Ramsey & James Frank, *How to Reduce the Incidence of Wrongful Conviction: Current Perspectives of Criminal Justice Practitioners*, 2007 J. INST. JUST. & INT'L STUD. 231, 234 (2007) ("Ninety of the 479 respondents (19%) said they believed that more thorough investigations would reduce the incidence of wrongful conviction.").

36. *See* Findley & Scott, *supra* note 35, at 292 ("Properly understood, tunnel vision is more often the product of the human condition as well as institutional and cultural pressures, than of maliciousness or indifference.").

37. *See id.*; Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1604 (2006) ("If the investigation is still ongoing, confirmation bias might cause law enforcement officers to conduct searches and to ask questions that will yield either further inculpatory evidence or nothing at all."). Though not discussed in the above the line text, racial bias is also a significant cause of wrongful convictions. *See* Emily Haney-Caron & Erika Fountain, *Young, Black, and Wrongfully Charged: A Cumulative Disadvantage Framework*, 125 DICK. L. REV. 653, 672 (2021) (finding that racial bias leads to investigative errors such as police officers and the public overestimating the age of Black youth suspects by an average of four years while white youth are often seen as younger than their actual age); Sarah Anne Mourer, *Believe It or Not: Mitigating the Negative Effects Personal Belief and Bias Have on the Criminal Justice System*, 43 HOFSTRA L. REV. 1087, 1116 (2015) (finding that racial bias pervades the criminal justice system). For an example of how far racial bias can go in leading to wrongful convictions, see G. Flint Taylor, *The Chicago Police Torture Scandal: A Legal and Political History*, 17 CUNY L. REV. 329, 330 (2014).

38. *See* Findley & Scott, *supra* note 35, at 295; SIMON, *supra* note 5, at 7 ("Virtually every exoneration follows a conviction by a jury or judge who believed that the faulty evidence was true beyond a reasonable doubt."); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 491 (2006) ("Prosecutors may begin with an assumption that the suspect would not have been arrested unless he was guilty, and that assumption will affect the way they filter and assess all subsequent information.").

detrimental in leading to wrongful convictions.[39] For example, as illustrated by the case of Clemente Aguirre-Jarquin, police were so convinced that Clemente committed the murders that they ignored evidence indicating that Samantha Williams committed the crimes.[40] This led to the evidence that prosecutors used in their decision to prosecute Clemente, and the evidence that defense lawyers, judges, and jurors used as they worked to make decisions.

Another example of tunnel vision leading to an inadequate investigation is the case of Marvin Anderson.[41] Amongst other charges, Anderson was convicted of rape of a twenty-four-year-old woman.[42] Once police became convinced of Anderson's guilt, they did not pursue additional leads, even though the true offender's name had been circulating in the community as a likely suspect.[43] Further, the officers' belief that Anderson was guilty led to an identification of Anderson by the victim through processes that are widely considered suggestive today.[44] Eventually, DNA evidence proved that Anderson was not the attacker, and Anderson was exonerated after serving

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39. *See* Findley & Scott, *supra* note 35, at 295; Martin, *supra* note 35, at 849–50; SIMON, *supra* note 5, at 17 ("[T]he single most important determinant of evidence accuracy is the police investigation.").

40. *See* Possley, *supra* note 8.

41. *Marvin Anderson*, NAT'L REGISTRY EXONERATIONS (Mar. 8, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2995 [https://perma.cc/L8PS-UYBN]; *see* Findley & Scott, *supra* note 35, at 296–99.

42. *See* Findley & Scott, *supra* note 35, at 296.

43. *Id.* at 298.

44. *Id.* at 297 n.32.

> "The flawed procedures used in this case included using a photograph of the suspect that stood out as distinctive; showing the photographs and individuals simultaneously rather than sequentially; leading the victim to believe that the suspect was included among the photographs and individuals presented and that her task was 'to see if she could pick out the suspect'; using officers who knew that Anderson was the suspect to conduct the identification procedure; and showing the suspect to the victim in multiple proceedings, especially when he was the only one included in each of those proceedings."

Id.

Tunnel vision was shown on the part of the judge as well, as the judge refused to credit the true offender's confession when he came forward six years later. *Id.* at 298–99. The judge found the confession by the actual offender to be untruthful. *Id.*

twenty years in prison for a crime he did not commit.[45] In hindsight, it is easy to look at exonerations and wonder how the wrongful conviction even happened in the first place. However, when police focus on their theory of guilt and fail to investigate other theories, they can collect evidence in good faith that paints a truly convincing picture of an innocent person's guilt.[46] For instance, the original prosecutor in the case commented that until the exoneration, Anderson's case was "the clearest case he had ever had."[47]

Marvin Anderson's case is just one example of the devastating impact that tunnel vision has on police investigations. Inadequate police investigations caused by tunnel vision are unfortunately widespread, leading to many wrongful convictions.[48] Further, in a study on the causes of wrongful convictions by two Texas State University professors, it was determined that fundamentally, a wrongful conviction is a failure of evidence,[49] which is often the result of tunnel vision and confirmation bias.[50]

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45. *Id.* at 298; *Marvin Anderson*, NAT'L REGISTRY EXONERATIONS (Mar. 8, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2995 [https://perma.cc/L8PS-UYBN].

46. *See* Findley & Scott, *supra* note 35, at 299 (describing the example of Marvin Anderson).

47. *See id.*

48. *See* Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327 (2003) ("[T]he tunnel vision problem has been widely noted in wrongful conviction cases."). For instance, in a report on wrongful convictions in Virginia, the Innocence Commission for Virginia found that tunnel vision, where "the police may minimize or even sometimes ignore evidence that suggests the suspect is innocent," is a factor contributing to wrongful convictions. *See* INNOCENCE COMM'N FOR VA., A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA 69 (2005), https://www.prisonlegalnews.org/media/publications/innocence%20commission%20of%20va,%20wrongful%20convictions%20report,%202005.pdf [https://perma.cc/UY42-VTPH]. For another example, see Mary Kelly Tate, *Commissioning Innocence and Restoring Confidence: The North Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 ME. L. REV. 531, 546 (2012) ("The Inquiry Commission investigated the cases jointly because they arose out of the same crime and discovered inadequate police investigation in the case.").

49. *See* D. Kim Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 NE. U. L. REV. 790, 806 (2019) ("A wrongful conviction is fundamentally a failure of evidence. A criminal investigation requires proper evidence collection, evaluation, and analysis. Errors in any of these tasks can lead to flawed decision-

In addition to causing investigators to ignore relevant evidence, tunnel vision can lead investigators to create inaccurate evidence.[51] In a study of DNA exonerations from 1989–2014, researchers found that tunnel vision is particularly notable in exonerations involving false confessions.[52] This is because once investigators are convinced a suspect is guilty, they may seek a confession from that suspect.[53] Even though the suspects are innocent, they may still confess.[54] Studies show that these false confessions result from the suspects' desire to escape the unpleasant situation and their belief that their innocence will come to light despite their confessions.[55]

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making by detectives . . . . [and] were often the product of a rush to judgment, tunnel vision, confirmation bias, and/or groupthink.").

50. *See id.*; *see also* Fisher, *supra* note 4, at 20–21 (finding that public pressure to "clear" crimes encourages police to respond to incidents promptly, which often leads to quick and inadequate investigations and the loss of crucial evidence).

51. *See* Burke, *supra* note 37, at 1604 ("If the investigation is still ongoing, confirmation bias might cause law enforcement officers to conduct searches and to ask questions that will yield either further inculpatory evidence or nothing at all.").

52. Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 761 (2016) ("While not unique to exonerations involving false confession, tunnel vision is particularly salient in these cases.").

53. *See* Findley & Scott, *supra* note 35, at 293 ("Convinced of guilt, investigators might then set out to obtain a confession from that suspect, producing apparently inculpatory reactions or statements from the suspect, or leading investigators to interpret the suspect's innocent responses as inculpatory. The process of interrogating an innocent suspect might even produce a false confession."); SIMON, *supra* note 5, at 139 ("[T]he interrogative procedure is designed foremost to extract confessions from the suspect at hand, who is believed to be guilty. There is no indication that it is prone to induce confessions only from guilty suspects."); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCH. 215, 220 (2005) ("It is clear that police interrogation is a generally guilt-presumptive process that can set into motion a range of cognitive and behavioral confirmation biases.").

54. *See* West & Meterko, *supra* note 52, at 760; *see also* Kassin, *supra* note 53, at 215 ("[T]here are a disturbing number of known cases in which defendants confess and retract the confessions but are convicted at trial and sometimes sentenced to death—only later to be exonerated.").

55. *See* West & Meterko, *supra* note 52, at 760 (explaining that "when innocent people have falsely confessed in laboratory studies, they have explained that they wished to escape the unpleasant situation in that moment and believed that their innocence would come to light later"); *See also* SIMON, *supra* note 5, at 140. For example, in one of the wrongful convictions studied, an innocent suspect

Wrongful convictions are thus frequently caused in part by inadequate police investigations. Tunnel vision leads good faith investigators to ignore exonerating evidence, create inaccurate incriminating evidence, and form a misleading but convincing story of guilt.

B. Defining an Inadequate-Investigation Defense

Despite the prevalence of inadequate police investigations in causing wrongful convictions, criminal defendants do not have a constitutional right to an adequate police investigation.[56] Further, it is often not possible or feasible for the defense to conduct their own investigation into matters the police should have investigated, leaving defendants reliant on the prosecution's evidence.[57] Therefore, in response to the problem of inadequate police investigations, defense attorneys will sometimes point to evidence showing inadequacies in the investigation against their client.[58] While many courts and attorneys recognize an inadequate-investigation defense as a valid defense, there is not a formally established name for the defense.[59] This section will thus define an inadequate-investigation

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confessed after a lengthy interrogation. *See* West & Meterko, *supra* note 52, at 761 (describing when Frank Sterling confessed to killing an elderly neighbor after a lengthy interrogation and spent 18 years in prison before DNA testing proved his innocence and implicated a previously ignored suspect).

56. *See* WAYNE R. LAFAVE ET AL., 1 CRIM. PROC. § 1.5(b) (4th ed. 2021) ("The legal regulation of investigation has been criticized because it does not mandate use of the investigative procedures most likely to produce reliable evidence, and even as to whatever procedures the police or prosecutor choose to use, does not mandate use of 'best practices' for ensuring reliability."); Robinson v. Winn, No. 2:17-CV-13892, 2019 WL 2387127, at *9 (E.D. Mich. June 6, 2019) (recognizing that "there is no clearly established Supreme Court precedent which holds that criminal defendants have a constitutional right to an adequate police investigation").

57. Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 682 (2014) ("There is no substitute for a well-funded and motivated public defender organization . . . within a county or district, able to collect information about police practices and bring it to bear across cases. . . . [B]ut reliable institutional structures for such inspectors are rarely in place.").

58. *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 460 (2010) ("[D]efense attorneys commonly seek to show that the police officers handling the investigation failed to perform critical investigative tasks that could have yielded exculpatory physical evidence or that might have affirmatively identified another person as the perpetrator of the crime.").

59. *See* sources cited *supra* note 32.

defense and inadequate-investigation evidence to provide clarity and context for the subject of this note.

Broadly speaking, an inadequate-investigation defense relies upon "deficiencies or lapses in the police investigation to raise the specter of reasonable doubt."[60] Recognizing that it can be unreasonable for police to investigate every potential lead, the defense focuses on deviations from reasonable investigation practices.[61] The defense can be thought of as an investigative omission defense because it argues that omissions in the investigation make the investigation inadequate.[62] For example, the defense can point out that "investigators had the opportunity to gather information about other suspects, had information suggesting that the defendant was not the culprit, or had evidence that logically could have, and should have, been tested," and did not act on these opportunities.[63] A reasonable doubt is then raised not just because certain evidence is missing, but because that evidence is missing due

60. State v. Collins, 10 A.3d 1005, 1025 (Conn. 2011).

61. *See* Lisa J. Steele, *When Investigators Stumble: Reasonable Doubt and the Lack of Evidence*, 45-JUN CHAMPION 28, 29 (2021) [hereinafter Steele, *Reasonable Doubt*]. These deviations from a reasonable investigation occur when investigators fail to follow standard procedure, such as not following up on leads that a reasonable person would follow up on or when investigators fail to use well-known and superior techniques to link the suspect to the activity in question. *See* Sample v. State, 550 A.2d 661, 663 (Md. 1988) (defining the defense to include when investigators fail "to utilize a well-known, readily available, and superior method of proof"); Commonwealth v. Bowden, 399 N.E.2d 482, 491 (Mass. 1980) (defining the defense to include when "certain police procedures" are not followed); *Omissions in Police Investigations*, MASS. JURY INSTRUCTION 3.740 (2009), https://www.mass.gov/doc/3740-omissions-in-police-investigations/download [https://perma.cc/8DAL-FH93] (defining the defense to include where investigators did not "follow standard procedure").

62. *See* Steele, *Reasonable Doubt*, *supra* note 61, at 29 ("An investigative omission defense is a subset of a reasonable doubt argument. It is about what the police did, and did not do, grounded in a careful review of the investigation and built on direct and cross-examination."); Steele, *Investigative Omission Defense*, *supra* note 32 ("So what is an investigative omission defense? It is about mistakes—why an investigator made a decision that is flawed in hindsight, and why the fact-finder should find reasonable doubt in the lack of evidence caused by the decision."). For instance, even if a test for fingerprints is conducted, if it is conducted improperly, the omission is a failure to properly conduct a test for fingerprints. *Id.*

63. Steele, *Investigative Omission Defense*, *supra* note 32.

to investigatory failures.[64] By showing gaps in the investigation, the defense suggests that the evidence from the investigation may not be reliable enough to prove guilt beyond a reasonable doubt because the investigation may have missed significant evidence of the defendant's guilt or innocence.[65] One expert aptly explains that the defense "is about mistakes—why an investigator made a decision that is flawed in hindsight, and why the fact-finder should find reasonable doubt in the lack of evidence caused by the decision."[66]

To many well-acquainted with criminal law, this is a well-recognized, familiar, and commonly accepted defense.[67] However, others with similar experience have a contrary view, and feel the defense is seldom accepted.[68] While Section II.A helps to explain why

64. *See Omissions in Police Investigations*, *supra* note 61, at 1 ("If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality, reliability or credibility of the evidence presented by the Commonwealth."); Commonwealth v. Moore, 109 N.E.3d 484, 497 (Mass. 2018) ("[T]hat the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated.").

65. *See Moore*, 109 N.E.3d at 497 (arguing that investigative failure resulted in the police missing "significant evidence of the defendant's guilt or innocence"); *Omissions in Police Investigations*, *supra* note 61, at 1 (emphasizing consideration of "[w]hether the omitted tests or actions could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence").

66. Steele, *Investigative Omission Defense*, *supra* note 32.

67. *See* Michael D. Cicchini, *An Alternative to the Wrong-Person Defense*, 24 GEO. MASON U. C.R. L.J. 1, 3 (2013) (finding that "the United States Supreme Court has already declared" the defense "an integral part of the constitutional right to present a defense"); Morris v. Burnett, 319 F.3d 1254, 1273 (10th Cir. 2003) (noting the "frequency with which investigative techniques are at issue"); Jones, *supra* note 58, at 460 ("It is not uncommon in criminal litigation for the defense to elicit facts to illustrate that the government did not perform a thorough investigation of the crime."); Ouziel, *supra* note 4, at 700 (noting that "the question of guilt will often hinge on the jury's assessment of law enforcement's adequacy"); Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The* CSI *Infection Within Modern Criminal Jury Trials*, 41 LOY. U. CHI. L.J. 119, 159–60 (2009) ("Additionally, for many defendants, their primary defense strategy is challenging the government's evidence via rigorous cross-examination of the government's witnesses. This is a legitimate and proper strategy.").

68. *See* Liebman et al., *supra* note 32, at 660–61 (finding that jurors "do not have a right to know about defects in the state's investigation" and that "[w]ith the sole exception of Massachusetts, no jurisdiction recognizes an inadequate-investigation defense or requires judges to instruct jurors that they may treat

there may be this discrepancy in opinions,[69] there is no dispute that the defense is formally and most prominently recognized in Massachusetts, where it is known as a "*Bowden* defense."[70] In *Commonwealth v. Bowden*, the Supreme Judicial Court of Massachusetts reversed the trial court's instruction to the jury that "the nonexistence of certain scientific tests and other evidence was not to be considered in reaching a judgment."[71] The Supreme Judicial Court found that the "failure of the authorities to conduct certain tests or produce certain evidence was a permissible ground on which to build a defense" and the "fact that certain tests were not conducted or certain police procedures not followed could raise a reasonable doubt as to the defendant's guilt."[72] The *Bowden* defense has since been recognized by hundreds of Massachusetts cases that discuss and explain the defense.[73]

At the federal level, an inadequate-investigation defense has been recognized by the Supreme Court as a "common trial tactic of lawyers."[74] In *Kyles v. Whitley*, a case about a *Brady* violation,[75] the Supreme Court pointed out in dicta that because the police failed to

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inadequacies in the state's investigation as sufficient in themselves to establish reasonable doubt"); Richman, *supra* note 57, at 691 ("[J]udges who had a clearer sense of how and when prosecutors could explain away an alleged deficiency would surely be more receptive to defense challenges in the first place."); United States v. Elysee, 993 F.3d 1309, 1341 (11th Cir. 2021) ("[N]othing in our caselaw indicates the existence of an affirmative defense based on the failure of police to conduct an investigation as reasonably diligent officers . . . ."); *infra* Section II.A (assessing the relevancy of the inadequate-investigation defense by circuit).

69. *See infra* Section II.A (portraying the conflicting caselaw within several jurisdictions where the defense may be ruled relevant or irrelevant).

70. *See* Steele, *Investigative Omission Defense*, *supra* note 32, at 2 (explaining that in Massachusetts an inadequate-investigation defense is known as a "*Bowden* defense").

71. Commonwealth v. Bowden, 399 N.E.2d 482, 491 (Mass. 1980).

72. *Id.*

73. *See* Steele, *Investigative Omission Defense*, *supra* note 32, at 2 ("There are hundreds of Massachusetts cases citing, discussing, and explaining what is sometimes called a '*Bowden* defense,' but this cases law is not widely known outside of Massachusetts.").

74. Kyles v. Whitley, 514 U.S. 419, 446 (1995) (quoting Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986)) ("'A common trial tactic of defense lawyers is to discredit the caliber or the decision to charge the defendant . . . .'").

75. *See* Brady v. Maryland, 373 U.S. 83 (1963); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007) (explaining that under *Brady*, there is a "constitutional duty on prosecutors to disclose exculpatory evidence to defendants").

treat someone as a suspect when their behavior indicated guilt, the defense could have examined the police investigation to make "a vigorous argument" and "throw the reliability of the investigation in doubt."[76] However, this is the extent of the Court's analysis of the inadequate-investigation defense.[77] The Court does not indicate the extent to which this defense can be used, nor does the Court advise on when a defense that throws "the reliability of the investigation into doubt" is relevant.[78] To help aid in the analysis of the relevancy of an inadequate-investigation defense, the next section examines when evidence is considered relevant.

C. General Background on Relevant Evidence via the Federal Rules of Evidence

Under the Federal Rules of Evidence, evidence must be relevant to be admissible, so it is important to prove the relevance of evidentiary facts.[79] Further, once relevance is established, the degree to which evidence is relevant, or its probative value, plays a significant role inadmissibility. Relevant evidence may be excluded under Federal Rule of Evidence 403 if its probative value is substantially outweighed by various non-probative risks.[80]

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."[81] To understand

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76. *See Whitley*, 514 U.S. at 447.

77. *See id.*

78. *See id.*

79. FED. R. EVID. 402 ("Irrelevant Evidence is not admissible."). However, relevant evidence is not necessarily admissible. *Id.* If the United States Constitution, a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court provide that certain evidence is not admissible, then even if the evidence is relevant, it will not be admissible. *Id.* These extensive exceptions aside, all relevant evidence is admissible. *See* FED. R. EVID. 402 advisory committee's notes to 1972 proposed rules (finding "that all relevant evidence is admissible" aside from certain exceptions).

80. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

81. FED. R. EVID. 401. Though the Federal Rules of Evidence supply this test for determining whether evidence is relevant, judges make the actual determinations of relevance. *See* United States v. Abel, 469 U.S. 45, 54 (1984) ("A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules . . . . weighing any factors counseling against

how courts apply this test, it is helpful to examine the common law's application of the test.[82] Overall, courts take a broad approach in their interpretation of the test for relevance.[83] Courts recognize that "any tendency" to make a fact of consequence more or less probable means that the weight or sufficiency of the evidence does not matter in determining relevance.[84] As long as evidence has the slightest probative value, it is relevant.[85] As the Third Circuit puts it, "evidence is irrelevant only when it has no tendency to prove" a fact of consequence.[86] Further, evidence does not need to be directed towards

admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact."). Trial courts in particular have broad discretion in determining whether evidence is relevant. *Id.*

82. *See Abel*, 469 U.S. at 51–52 (quoting Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978)) (acknowledging that while in principle, the Federal Rules make it so that no common law of evidence remains, in reality, "'[a] body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers'").

83. United States v. Curtis, 568 F.2d 643, 645–46 (9th Cir. 1978) (finding that courts interpret the Federal Rules of Evidence to supply "a very expansive definition of relevant evidence"); *see also* United States v. Snyder, 789 F. App'x 501, 511–12 (6th Cir. 2019) (quoting Douglass v. Eaton Corp., 956 F.2d 1339, 1344 (6th Cir. 1992)) (finding that the standard of relevance "is extremely liberal"); United States v. Simon, 12 F.4th 1, 40 (1st Cir. 2021) (finding that the "standard for relevancy is not exacting"); Forrest v. Parry, 930 F.3d 93, 114 (3d Cir. 2019) (finding that "the bar for what constitutes relevant evidence is low").

84. *See* Douglass v. Eaton Corp., 956 F.2d 1339, 1344 (6th Cir. 1992), *abrogated by* Weisgram v. Marley Co., 528 U.S. 440 (2000) ("[I]n determining whether evidence is relevant, the district court must not consider the weight or sufficiency of the evidence."); United States v. Sumlin, 956 F.3d 879, 888 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 605 (2020) (finding that the sufficiency of evidence does not matter in determining relevance if the evidence has probative worth); Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1104 (8th Cir. 1988) (finding that it does not matter for establishing relevancy that evidence of prior acts of discrimination to show an employer's motive in discharging a plaintiff does not show a sufficient number of prior instances of discrimination to prove that the defendant's usual practice was to discriminate because it still has some bearing on the question of the employer's motive).

85. *See Sumlin*, 956 F.3d at 888 (quoting DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 475 (6th Cir. 1996)) (finding that evidence that "'has the slightest probative worth'" is relevant). This means that even if a court believes that evidence has such low probative value that it is insufficient to prove the points for which it is offered, the evidence may not be excluded as irrelevant because it still has probative value. *Id.*

86. Failla v. City of Passaic, 146 F.3d 149, 159 (3d Cir. 1998).

matters in dispute for it to be considered relevant.[87] This means that it does not matter in terms of relevancy if there are alternative pieces of evidence that prove the same point as the evidence in question.[88]

Despite this low bar for relevance, evidence cannot be *per se* relevant or irrelevant in itself.[89] For evidence to be relevant, there must be some connection between the evidence and a fact of consequence in the case.[90] However, since there are some facts that are broad enough to always be of consequence, certain types of evidence can be deemed as always relevant as long as the evidence tends to make those facts more or less probable.[91] In the context of

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87. Old Chief v. United States, 519 U.S. 172, 179 (1997) (finding that the "fact to which the evidence is directed need not be in dispute" for it to be considered relevant); *see also* FED. R. EVID. 401 advisory committee's notes on 1972 proposed rules.

> "[W]hile situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such consideration as a waste of time and under prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute."

Id.

88. *See Old Chief,* 519 U.S. at 179.

89. FED. R. EVID. 401 advisory committee's notes on 1972 proposed rules ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."); *see also* Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387–88 (2008) ("We note that, had the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion.").

90. *See* FED. R. EVID. 401; *supra* note 89.

91. *See* United States v. Repak, 852 F.3d 230, 249–250 (3d Cir. 2017) (quoting United States v. Green, 617 F.3d 233, 251 (3d Cir. 2010)) ("As we have unequivocally held, 'evidence concerning a witness's credibility is always relevant, because credibility is always at issue.'"). To clarify, the evidence is not *per se* relevant in itself, but *if* it tends to prove a certain fact, then it *is* relevant, because the court has determined that the "fact of consequence" part of the test has already been met. *See id.*; *see also* United States v. Green, 617 F.3d 233, 251 (3d Cir. 2010) ("[E]vidence concerning a witness's credibility is always relevant, because credibility is always at issue."); United States v. Abel, 469 U.S. 45, 51 (1984) ("A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony."); Schledwitz v. United States, 169 F.3d 1003, 1015 (6th Cir. 1999) ("Bias is always relevant in assessing a witness's credibility."); United States v. Lynn, 856 F.2d 430, 432 n.3 (1st Cir. 1988) (finding that cross-examination as to bias is always relevant); Villaroman v. United States, 184 F.2d 261, 262 (D.C. Cir. 1950) ("Bias of a witness is always relevant.").

criminal defense, the test for relevance can be framed in terms of whether the evidence tends to negate the defendant's guilt of the crime.[92] Therefore, if a fact is of any consequence in negating a defendant's guilt, and evidence tends to prove that fact, the evidence is relevant. With this background of relevance in mind, the note now turns to an analysis of different jurisdictions' approach to the relevancy of the inadequate-investigation defense and its accompanying evidence.

II. Different Views on the Inadequate-Investigation Defense

Having reviewed the value of an inadequate-investigation defense in Part I, Part II details the approaches that different jurisdictions take towards an inadequate-investigation defense. In examining this jurisprudence, Part II highlights two main problems. The first issue is that the value of an inadequate-investigation defense — allowing jurors to consider whether inadequacies in an investigation raise a reasonable doubt — is often suppressed by court rulings. The second is that the doctrine is unclear and can create unpredictability for practitioners and criminal defendants.

Section II.A examines this doctrine through an analysis of six different regional circuits at the federal level.[93] Though federal caselaw on inadequate-investigation defenses is scarce, it is important because it sets the precedent that can be used by practitioners and defendants who are challenged when using the defense. This section shows that circuits are not only split with each other on the relevance of the defense, but are sometimes split within

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However, even though evidence concerning a witness's credibility is always considered relevant, a court must still determine whether evidence actually concerns a witness's credibility before concluding there is relevance. *See* FED. R. EVID. 401; *supra* note 89.

92. *See* United States v. Lewis, 92 F. App'x 354, 356 (7th Cir. 2004) ("Evidence of Vaughn's 'other crimes' would have been relevant for defensive purposes if alone or with other evidence it tended to negate Lewis's guilt for either the gun- or drug-possession charges."); United States v. Reed, 259 F.3d 631, 634 (7th Cir. 2001) (quoting Agushi v. Duerr, 196 F.3d 754, 760 (7th Cir.1999)) (finding that evidence that tends "'to negate the defendant's guilt of the crime charged against him'" is relevant).

93. The order of circuits examined starts with the Eleventh Circuit because of the recency and depth of the case law discussing inadequate-investigation defenses. From there, the order of the circuits is roughly based on depth of case law. The order of the circuits is as follows: Eleventh, First, Sixth, Fourth, Second, and Tenth.

themselves on the relevance of the defense. Further, the internal splits are not always acknowledged as disagreements and are often the result of a lack of structure and attention regarding the defense.

Virtually all jurisdictions agree that lack of evidence, such as a lack of fingerprint evidence, can be considered in raising reasonable doubt.[94] The division amongst and within jurisdictions thus comes down to whether it matters if the lack of evidence comes from inadequacies in the investigation, and whether the reliability of a police investigation is something that should be considered in determining guilt beyond a reasonable doubt. Though some circuits, such as the Ninth Circuit, have a generally favorable and consistent approach to inadequate-investigation defenses in this context,[95] most circuits do not.[96] To better highlight the problems of the doctrine on inadequate-investigation defenses, Section II.A focuses on this latter set of circuits.

Section II.B examines the problems highlighted by the doctrine presented in Section II.A. While the inconsistencies between and within circuits create problems for planning and efficiency, the tendency of some circuits to view the defense as irrelevant is a problem in itself.

A. The Inadequate-Investigation Defense by Circuit

1. Eleventh Circuit forecloses defense

In the Eleventh Circuit, *United States v. Elysee* sets the strongest precedent in the circuit regarding an inadequate-

94. *See infra* Section II.A.

95. *See, e.g.*, United States v. Howell, 231 F.3d 615, 625 (9th Cir. 2000) ("In this case, the fact that not one, but two separate police reports contained an identical error as to a critical piece of evidence certainly raises the opportunity to attack the thoroughness, and even good faith, of the investigation."); United States v. Sager, 227 F.3d 1138, 1145–46 (9th Cir. 2000) ("[T]he court muddled the issue by informing the jury . . . it could not consider possible defects in Morris's investigation. To tell the jury . . . it may assess the product of an investigation, but . . . not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information."); United States v. Hanna, 55 F.3d 1456, 1460 (9th Cir. 1995). For general approval in the D.C. Circuit, see Jackson v. United States, 768 A.2d 580, 590 (D.C. Cir. 2001) (finding that whether police could have collected fingerprints is a relevant matter for an expert witness to testify on, especially since the defense theorized that the defendant's wrongful arrest stemmed from the police's neglect).

96. *See infra* Section II.A.

investigation defense and holds that it is not relevant for a defendant to argue that a police investigation fell "below the reasonable officer standard of performance."[97] However, district courts had allowed the defense prior to *Elysee's* holding of irrelevancy,[98] so it is unclear how *Elysee* will affect district court rulings going forward.

In *Elysee*, the defendant, Elysee, was charged with being a convicted felon in possession of a firearm.[99] The inadequate-investigation defense responded to police failing to investigate a confession from a suspect that would have exonerated Elysee if true.[100] The theory the defense presented to jurors in their opening statement was based on the officer's failure to investigate and argued "that the police failed to investigate because they were committed to the position that the defendant was the person with the gun no matter what."[101] To support their theory of defense, the defense sought to call as a witness the officer who failed to investigate the confession in order to question him about his response to the confession.[102] However, the district court did not allow the defense to question the officer about the confession,[103] and on appeal, the

97. United States v. Elysee, 993 F.3d 1309, 1338 (11th Cir. 2021).

> "First, Deen's confession was inadmissible because what it tended to show—the 'affirmative defense' that Cabrera's conduct in responding to the confession fell below the reasonable officer standard of performance—was not relevant. Whether Cabrera's performance satisfied that standard was not an issue the Court would instruct the jury to resolve in deciding whether Elysee was guilty of violating 18 U.S.C. § 922(g)(1)."

Id.

98. *See* cases cited *infra* notes 123, 127.

99. *Elysee*, 993 F.3d at 1312.

100. *See id.* at 1317.

101. *Id.* at 1315–16, 1323.

102. *Id.* at 1317 ("Defense counsel's plan was to recall Cabrera . . . to testify that he did virtually nothing to determine whether what Deen told him was true—that he was the Optima's passenger and . . . the gun found at the scene . . . was his. The adequacy of the police response . . . would be on trial."). While the Government attempted to exclude any mention of the confession as hearsay (the person that confessed did not testify at trial), the defense explained that they did not want to have the officer testify about the confession for its truth, but to show that the police investigation was inadequate because a reasonable officer would have investigated the confession. *Id.* at 1317–18.

103. *See id.* at 1331–32 (citing a transcript detailing a conversation between the district court and the defense where the district court explains that "whether the officer who spoke to Darius Deen is called in the Government's case or in the defense case, [the court would not] allow questioning as to what Darius

inadequate-investigation defense was found to be irrelevant.[104] The promise the defense made to jurors in their opening statement that they were "going to hear exactly what the officers did with" the confession never came to fruition, and the jury found Elysee guilty.[105]

In finding the inadequate-investigation defense irrelevant, the Eleventh Circuit explained that they found no precedent deeming the adequacy of an officer's conduct as an issue for a jury to resolve.[106] The court concluded that because there was no caselaw indicating the existence of a defense "based on the failure of police to conduct an investigation as reasonably diligent officers," such a defense must not exist and was thus irrelevant.[107]

In addition to creating precedent for the Eleventh Circuit on the non-relevance of an inadequate-investigation defense, *Elysee* provides insight into how practitioners may understand the relevance of an inadequate-investigation defense. Even though the court found the inadequate-investigation defense to be irrelevant, the court recognized that both the defenders and prosecutors, two Assistant Federal Public Defenders and two Assistant U.S. attorneys

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Deen said about what he was doing that night"). The district court reasoned that allowing the confession would be hearsay. *Id.*

104. *See id.* at 1338 (noting that if "the District Court excluded the statements on hearsay grounds, it abused its discretion" because the statements were intended to show that the officer's "conduct in responding to the confession fell below the reasonable officer standard of performance" but finding that the confession "was not relevant" and upholding the district court's decision to prevent the defense from questioning the officer about the confession).

105. *Id.* at 1316, 1336.

106. *See id.* at 1338 ("Whether Cabrera's performance satisfied that standard was not an issue the Court would instruct the jury to resolve in deciding whether Elysee was guilty of violating 18 U.S.C. § 922(g)(1). And we find nothing in our precedent that would have deemed it an issue.").

107. *Id.* at 1341 ("Because nothing in our caselaw indicates the existence of an affirmative defense based on the failure of police to conduct an investigation as reasonably diligent officers, . . . no such defense exists. Elysee's theory of relevance for Deen's confession hinges on such a defense . . . . Deen's confession was . . . irrelevant."). While not relating to the relevance of the defense, the court also seemed to believe the defense would hold an incredible amount of weight if it were allowed, implying that if the officer's conduct was determined to be unreasonable, Elysee could be acquitted on that determination alone. *See id.* at 1320–21 (explaining that the "litigation of Cabrera's performance under the reasonable officer standard would, in effect, constitute a subsidiary trial—a trial within a trial" which may have prejudiced the jury).

respectively,[108] assumed that the defense was relevant.[109] The court elaborated that the defense and prosecution were so set in this assumption of relevance that neither side bothered researching whether the defense was relevant.[110] While this is just an example of the beliefs of four federal attorneys, the disparity between the attorneys' understanding of the relevancy of the defense and the Eleventh Circuit's ruling on the relevancy of the defense is indicative of the lack of clarity on the issue.

Analysis on the relevance of an inadequate-investigation defense is also provided by the United States District Court for the Middle District of Alabama in *United States v. Carmichael*.[111] Decided over fifteen years before *Elysee*, *Carmichael* provides a slightly different take on the inadequate-investigation defense, but generally agrees with the conclusion that an inadequate-investigation defense is not relevant.[112]

In *Carmichael*, the district court explains that in most cases, evidence used to question the adequacy of the government's investigation is not relevant, or of very little probative value.[113] The court reasoned that "it improperly shifts the jury's focus from the accusations against the defendant to accusations against the police."[114] However, the court notes that inadequate-investigation evidence may be relevant in some cases, such as when there is evidence "of the government's failure to adequately investigate a third-party suspect" and the "defendant's theory of the case is that

108. *See id.* at 1315 n.8 (detailing the various attorneys who represented Elysee and the Government at the trial and appellate stages of the case).

109. *See id.* at 1337 ("Neither side had any idea whether defense counsel's theory that Cabrera failed to act as a reasonable officer was relevant. Neither had researched the point. They simply assumed that Cabrera's conduct was relevant. . . . So, the prosecutor, at least initially, assumed the task of upholding Cabrera's allegedly do-nothing response to Deen's confession.").

110. *See id.* Instead of attempting to rebut the inadequate-investigation defense by arguing it was not relevant, the prosecution stuck with their assumption of relevance and planned on introducing evidence that would show that the officer's failure to respond to the confession was reasonable. *See id.* at 1328–29.

111. United States v. Carmichael, 373 F. Supp. 2d 1293, 1296–97 (M.D. Ala. 2005).

112. *Id.*

113. *Id.* at 1297.

114. *Id.*

someone else committed the crime."[115] While this may seem to contradict the ruling in *Elysee*, where the government's failure to adequately investigate the confession of a third-party suspect was considered irrelevant, the situations are actually distinct.[116] In *Carmichael*, failing to investigate a third-party suspect is only considered relevant if the evidence of the failed investigation is used to show that the third-party committed the crime.[117] In *Elysee*, the failure to investigate was considered irrelevant as it was not being used to show that a third-party committed the crime, but for the purpose of showing that the investigation was inadequate and thus may have missed evidence relating to Elysee's innocence.[118] Therefore, it seems the court in *Carmichael* would agree with the court in *Elysee* that it is not relevant to use evidence for the purpose of showing that an investigation is inadequate in itself, even if that evidence relates to a third-party suspect.[119] However, it is unclear whether the Eleventh Circuit after *Elysee* would agree with the exceptions laid out in *Carmichael*.[120]

Despite the Eleventh Circuit's precedent on the irrelevancy of an inadequate-investigation defense, caselaw within the circuit

115. *Id.* at 1296. Other examples given where inadequate-investigate evidence may be relevant include "where the voluntariness of a confession or the integrity of the government's physical evidence, such as fingerprints or DNA samples, is at issue," and "to the adequacy of the evidence gathered as a result of that investigation" as opposed to "evidence questioning the adequacy of various aspects of the government's investigation itself." *Id.*

116. *See* supra note 57, at 1338.

117. *See Carmichael,* 373 F. Supp. 2d at 1296-97 (citing United States v. Crosby, 75 F.3d 1343, 1347 (9th Cir.1996)). While the cited portion of *Crosby* actually would contradict *Elysee* and supports an inadequate-investigation defense, *Carmichael* explains its view on *Crosby* in a parenthetical, finding that the "trial court's exclusion of evidence about adequacy of police investigation was error where it constituted strong, direct evidence that the victim's husband, not the defendant, had committed the crime." *Id. Carmichael* thus finds the evidence of the investigation to be relevant for its value in providing direct evidence that a third-party committed a crime, and not for its value in showing that the investigation was inadequate and potentially missed evidence relating to the defendant's guilt or innocence. *Id.*

118. *See Elysee*, 993 F.3d at 1327 (finding that the defense intended to introduce the offer to confess "not to establish the truth of what Deen said but, instead, as conduct to show that Cabrera failed to do what a reasonable officer would have done in response").

119. *See supra* notes 117–118.

120. *See Elysee*, 993 F.3d 1309 (never commenting on *Carmichael* or listing exceptions to their ruling on the inadequate-investigation defense).

suggests that the defense is often used without question.[121] For example, in *Reed v. Secretary, Dept. of Corrections*, a petition for writ of habeas corpus was filed by Reed after he was convicted of attempted robbery with a firearm and of opposing an officer without violence.[122] In the case where Reed was convicted, the defense argued that the police investigation was inadequate because the police failed to test for blood and vomit found inside a getaway car allegedly linked to the defendant, Reed. [123] The defense explained that because of this investigative omission, there should be a reasonable doubt as to Reed's guilt because the evidence may have helped prove his innocence if tested.[124] In responding to the petition by Reed, the United States District Court for the Middle District of Florida found that the defense's inadequate-investigation defense was not only reasonable, but "an approach which would be taken by many attorneys facing the same situation."[125] While the court does not comment on the relevancy of the defense, its view that the defense is reasonable and would likely be used by other attorneys suggests that the court believes the defense is relevant, and may be surprised to learn otherwise.[126]

In addition to *Reed*, several other cases refer to the usage of an inadequate-investigation defense without ever questioning its relevance.[127] These examples suggest that an inadequate-

121. *See Elysee,* 993 F.3d 1309 at 1338; *Carmichael*, 373 F. Supp. 2d at 1296; cases cited *infra* notes 122, 127.

122. Reed v. Sec'y, Dep't of Corr., No. 8:08-CV-514-T-30TGW, 2009 WL 2407747, at *1 (M.D. Fla. Aug. 3, 2009).

123. *See Reed*, 2009 WL 2407747, at *4 (finding that the defense argued that because the government did not conduct DNA tests on blood and vomit found in a getaway car, there should be a reasonable doubt because the DNA could have provided evidence of the defendant, Reed's, guilt or innocence if tested) Reed filed a complaint for ineffective assistance of counsel because the defense did not test the DNA evidence, and the court found that the decision to not test the DNA and instead argue the inadequate-investigation defense was a reasonable strategy because the DNA could have been incriminating if it were a match for Reed. *Id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See* Gonzalez v. Sec'y, Dep't of Corr., No. 8:12-CV-634-T-23TBM, 2015 WL 5772283, at *8 (M.D. Fla. Sept. 30, 2015) (finding that defense's reasoning for "questioning the officers at trial was to point out their 'sloppy police work'" and that it was a strategic decision); Reeder v. Thomas, No. 2:13-CV-359-WHA, 2015 WL 5853220, at *6 (M.D. Ala. Oct. 7, 2015) (finding that the defense cross-examining the lead investigator in the case in order "to convey to the jury that law

investigation defense is often used and allowed in the Eleventh Circuit.[128] However, the recent precedent set by the Eleventh Circuit in *Elysee* would seem to prohibit this defense if challenged by the prosecution.[129]

2. First Circuit does not typically allow the defense when its purpose is to show that the investigation may have missed exonerating evidence

In the First Circuit, simply showing that an investigation is inadequate and thus may have missed evidence of a defendant's innocence does not establish relevance.[130] However, the First Circuit has conflicting caselaw that suggests that such a defense is relevant.[131]

United States v. Patrick provides the most in-depth analysis on an inadequate-investigation defense in the circuit and finds that inadequate-investigation evidence "covers a variety of different problems and cuts across the full spectrum of relevant and irrelevant evidence."[132] In *Patrick*, the inadequate-investigation evidence the defense attempted to introduce was deemed irrelevant.[133] After being charged with murder, one of the defendants, Arthur, attempted to argue "that the police had not adequately investigated the murder."[134] This inadequate-investigation defense arose out of notes found in

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enforcement had conducted a sloppy and incomplete investigation of the crime" was not ineffective assistance of counsel, without any mention of relevance or unreasonableness); Harris v. Sec'y, Dep't of Corr., No. 8:18-CV-2067-KKM-TGW, 2021 WL 4442708, at *16 n.10 (M.D. Fla. Sept. 28, 2021).

128. *See* cases cited *supra* notes 122, 127. This common usage of the defense helps explain the assumptions of the attorneys in *Elysee* (that an inadequate-investigation defense would be relevant). *See* United States v. Elysee, 993 F.3d 1309, 1337.

129. *See Elysee*, 993 F.3d at 1338.

130. *See infra* text accompanying notes 148–149.

131. *See infra* text accompanying notes 154–156.

132. United States v. Patrick, 248 F.3d 11, 22 (1st Cir. 2001) ("The phrase 'inadequacy of the police investigation' covers a variety of different problems and cuts across the full spectrum of relevant and irrelevant evidence.").

133. *Id.* at 22–23 (finding that the evidence Arthur wished to introduce "were of questionable materiality under Fed.R.Evid. 401" and even if the evidence "had some probative value, the district court did not abuse its discretion in excluding them under Fed.R.Evid. 403") The "even if" analysis under Rule 403 suggests that the court found the evidence to have little probative value.

134. *Id.* at 21.

police files that documented tips about other possible suspects.[135] Arthur wished to introduce evidence of these notes not for their truth, but to show that the police failed to investigate adequately the other possible suspects before deciding on Arthur.[136] Arthur's theory was that if police adequately investigated these other suspects, they may have found exculpatory evidence, such as evidence that someone else committed the crime.[137]

Despite the value of the evidence suggested by Arthur's theory of defense, the court found that the evidence was irrelevant.[138] The court reasoned that "there was little to show that the notes of the tipsters' calls in fact furthered Arthur's theory, or that there was an inadequate investigation."[139] The court furthered that "even if the notes had some probative value," their exclusion by the district court was not an abuse of discretion because the evidence "would have shifted the jury's focus from the accusations against Arthur to accusations against the police, thus creating a real danger of unfair prejudice and jury confusion."[140]

Ultimately, *Patrick* held that merely showing that an investigation is inadequate does not establish relevance.[141] The

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135. *See id.*

> "[T]he notes recorded tips the police had received about who committed the Thomas murder. The defense theory was that the police had not adequately investigated the murder, as evidenced by these notes. Arthur argues that the notes therefore were not hearsay because they were not offered for their truth but rather for the inadequacy of the police investigation of other possible suspects."

Id.

136. *See id.* at 22.

> "Here, the defense theory is that someone else committed the murder, that this is shown by the fact that other names were given to the police by the tipsters, and that the police failed to take steps to adequately eliminate other possible suspects before settling on Arthur, thereby creating doubt as to Arthur's guilt."

Id.

137. *Id.*

138. *See id.* at 22–23.

139. *See id.* at 22.

140. *See id.* at 23.

141. *Id.* at 22 ("The point is that the phrase 'inadequacy of the police investigation' is too broad and itself says nothing about the relevance of the proffered evidence. Merely showing that an investigation is sloppy does not establish relevance."); *see also* United States v. Carmona-Bernacet, No. 16-547

reasoning, which is slightly circular, is that an inadequate-investigation defense does not establish relevance because showing that an investigation in inadequate "says nothing about the relevance of the proffered evidence."[142] However, like *Carmichael* does in the Eleventh Circuit,[143] *Patrick* provides examples of when evidence of inadequacies in an investigation can be relevant.[144] For example, *Patrick* finds that inadequacies relating to the preservation of evidence may be relevant in challenging physical evidence against a defendant.[145] *Patrick* also references a Ninth Circuit case relied on by Arthur, *United States v. Crosby*, where inadequate-investigation evidence was allowed to show that a more thorough investigation may have produced exculpatory evidence.[146] Yet, the First Circuit, in *Patrick*, explains that *Crosby* only found the evidence of sloppy police work to be relevant because it provided "strong direct evidence that someone else" committed the crime.[147] On the contrary, mere speculation that a more thorough investigation would provide exculpatory evidence is not relevant according to *Patrick* and the First Circuit.[148] Therefore, although *Patrick* does provide examples of where inadequacies in an investigation can be relevant, evidence that an officer failed to take reasonable steps that *may* have uncovered evidence of a defendant's innocence or guilt—the premise of an inadequate-investigation defense—is not necessarily considered relevant.[149]

(FAB), 2022 WL 17588812, at *16 (D.P.R. Dec. 13, 2022) (relying on *Patrick* to find that showing that an investigation is "sloppy" does not establish relevance).

142. *See id.*

143. *See* United States v. Carmichael, 373 F. Supp. 2d 1293, 1296–97 (M.D. Ala. 2005).

144. *See* cases cited *infra* notes 145–148.

145. *See Patrick*, 248 F.3d at 22 ("Certain inadequacies—for example, those that go to the chain of custody or the preservation of evidence—may undercut the reliability of physical evidence against the accused."). The other example *Patrick* provides is inadequacies leading "to the destruction of exculpatory evidence." *Id.*

146. *Id.* at 21, 23 (citing United States v. Crosby, 75 F.3d 1343, 1347–48 (9th Cir.1996)). *Crosby* is also cited by *Carmichael* and interpreted to not broadly allow inadequate-investigation evidence. *See Carmichael*, 373 F. Supp. 2d at 1296 (citing United States v. Crosby, 75 F.3d 1343, 1347 (9th Cir.1996)).

147. United States v. Patrick, 248 F.3d 11, 23 (1st Cir. 2001).

148. *See id.* at 21 (referring to *Crosby* and finding that for the evidence to be relevant there must "be evidence that there is a connection between the other perpetrator and the crime, and not mere speculation").

149. *See id.*

In contrast to the First Circuit in *Patrick*, the First Circuit in *United States v. Lassend* suggests the relevance of an inadequate-investigation defense.[150] In *Lassend*, the defendant was charged with being a convicted felon in possession of a firearm and ammunition.[151] Since a firearm was never found on Lassend, but Lassend was accused of discharging a firearm into the air, the inadequate-investigation defense arose out of the police's failure to test items such as the firearm and Lassend's clothing for DNA and firearm residue.[152] The First Circuit reviewed Lassend's claim that the district court's jury instructions erroneously "foreclosed [the jury] from considering the adequacy of the police investigation when deciding whether the government had proven its case beyond a reasonable doubt."[153]

The First Circuit held that the district court did not err in its jury instructions, as the court "informed the jury that it could draw reasonable inferences from the fact that certain tests were inconclusive or not conducted, or that certain techniques were not used."[154] Accordingly, the instructions did not communicate to the jury that it could not consider the adequacy of the police investigation.[155] While the relevance of the inadequate-investigation defense is not explicitly addressed, this language (implying that the district court may have erred if it communicated that the jury could not consider the adequacy of a police investigation) suggests that the First Circuit in *Lassend* finds the defense to be broadly relevant,

150. *See* United States v. Lassend, 545 F. App'x 3, 4–5 (1st Cir. 2013) (recognizing the potential for "reversible error where instructions removed from jury's consideration the failure of the authorities to conduct certain tests or produce certain evidence") (citation omitted); *see also* United States v. Cruz-Diaz, 550 F.3d 169, 175 (1st Cir. 2008) (where the prosecution was allowed to introduce hearsay evidence indicating admission of guilt by the defendant "to explain why the FBI and police did not pursue other investigatory options after apprehending the defendants"). *Id.*

151. *Lassend,* 545 F. App'x at 3.

152. *Id.* at 4 ("[The] police located the gun in a common area of an apartment building."). Lassend was accused of firing the gun into the air, which is why it would be relevant to test his clothing for firearm residue. In response, Lassend's "trial defense was premised at least in part on a purported faulty police investigation. For example, the defense targeted law enforcement's decision not to have particular items, such as Lassend's clothing and swabs taken from the gun, tested for gun residue and for DNA." *Id.*

153. *See id.* at 4–5.

154. *Id.* at 5.

155. *Id.* at 4.

unlike the First Circuit in *Patrick*.[156] This contrast between *Lassend* and *Patrick* creates uncertainty for defendants in the First Circuit hoping to successfully present an inadequate-investigation defense.

3. Sixth Circuit finds no abuse of discretion in district courts finding the defense irrelevant

The Sixth Circuit is also a "mixed bag" when it comes to finding inadequate-investigation defenses relevant.[157] District courts have conflicting views on the relevance of the defense, and the Sixth Circuit tends to defer to district courts on the matter.[158]

In *United States v. Veal*, the Sixth Circuit found no abuse of discretion in the district court's ruling that inadequate-investigation evidence was irrelevant and "that the jury would not be called upon to determine whether the government's investigation had been good or bad."[159] In contrast, in *Owens v. Foltz*, the Sixth Circuit recognizes that because an alleged lack of investigation was at issue during trial, the jury was free to consider the adequacy of the investigation in determining whether the government had proved its case beyond a reasonable doubt.[160]

More specifically, there is a recognized contrast by some courts in the Sixth Circuit when it comes to allowing expert testimony on the adequacy of an investigation.[161] For example, in

156. *See id.*; United States v. Patrick, 248 F.3d 11, 22 (1st Cir. 2001).

157. *See infra* note 161 and accompanying text.

158. *See infra* note 161 and accompanying text.

159. United States v. Veal, 23 F.3d 985, 989 (6th Cir. 1994) (finding "no abuse of discretion" without providing an explanation).

160. *See* Owens v. Foltz, 797 F.2d 294, 296 (6th Cir. 1986) (finding that because the "facts surrounding the investigation, and alleged lack of investigation, were at issue during the trial[,]" the jury "was free to consider this in determining whether the state had proved its case beyond a reasonable doubt"). While *Owens* is discussing a trial that occurred in state court, the court is still recognizing the freedom of the jury to consider the adequacy of the investigation, and does not provide any indications that this would only apply in state court. *See id.*; *see also* Carrier v. Burton, No. 1:19-CV-723, 2021 WL 4239707, at *7 (W.D. Mich. July 27, 2021), *report and recommendation adopted*, No. 1:19-CV-723, 2021 WL 3782120 (W.D. Mich. Aug. 26, 2021); Steele v. Warren, No. 211CV12064, 2014 WL 4829556, at *3 (E.D. Mich. Sept. 29, 2014); Davis v. Sherry, No. 07-CV-15482, 2012 WL 2130909, at *4 (E.D. Mich. June 12, 2012).

161. *See* United States v. Poulsen, 543 F. Supp. 2d 809, 812 (S.D. Ohio 2008) (allowing expert testimony critical of the government's investigation even though there is "Sixth Circuit authority, including United States v. Olender, 338 F.3d 629 (6th Cir. 2003), and United States v. Veal, 23 F.3d 985 (6th Cir. 1994),

United States v. Marquina, the Sixth Circuit found that the district court did not abuse their discretion in declining to allow expert testimony that was intended to show "that the FBI botched its original investigation and failed to secure evidence sufficient to justify indicting the real targets of the investigation."[162] Citing *Veal* for support in their reasoning, the Sixth Circuit explained that the expert's testimony "would have been of dubious relevance in any event."[163] Further, in *United States v. Olender*, the Sixth Circuit found no abuse of discretion when the district court denied the defense's attempt to introduce testimony of a criminologist who would discuss problems with the police investigation.[164]

However, in *United States v. Poulsen*, the United States District Court for the Southern District of Ohio held that the defense may introduce expert testimony on the adequacy of the Government's investigation.[165] Disagreeing with the Government's argument that the testimony "will not assist the jury in resolving any fact in issue and therefore should be excluded as irrelevant," the court found that evidence "tending to show" inadequacies in the investigation would "be probative of whether the Government has made its case against Defendants," as would an experts' testimony on such matters.[166] The court specifically recognized that Sixth Circuit opinions such as *Olender* and *Veal* may seem to contradict its holding, but pointed out that the Sixth Circuit applied an abuse-of-discretion standard of review in those cases and thus does not mandate exclusion of inadequate-investigation testimony.[167] In *United States v. Stinson*, the United States District Court for the Western District of Kentucky, citing *Poulsen*, came to a similar conclusion on the relevance of the

upholding district court rulings excluding expert testimony critical of the Government investigation that led to the criminal charges at issue").

162. United States v. Marquina, No. 97-5448, 1999 WL 55281, at *1 (6th Cir. Jan. 12, 1999).

163. *Id.*

164. United States v. Olender, 338 F.3d 629, 638 (6th Cir. 2003) ("The district court considered the issue in the absence of the jury and denied Olender's attempt. The potential witness was prepared to comment adversely on the conduct of the investigation.").

165. *Poulsen*, 543 F. Supp. 2d at 812.

166. *Id.* at 811–812.

167. *Id.* at 812.

defense in allowing expert testimony on the adequacy of the investigation against the defendant.[168]

Though the Sixth Circuit's deference allows district courts to admit testimony relating to inadequate-investigation evidence, the deference also allows courts to deny such evidence.[169] This lack of a clear standard may create uncertainty for practitioners and defendants hoping to support their defense with expert testimony.

4. Fourth Circuit constrains the defense with limiting jury instructions

In the Fourth Circuit, inadequate-investigation defenses are generally allowed and seen as relevant.[170] However, the circuit also

168. *See* United States v. Stinson, No. 1:12CR-00012-JHM, 2013 WL 4500089, at *4 (W.D. Ky. Aug. 21, 2013) (finding that the expert's "opinions based on evidence relating to the competence of the investigation, such as that identified by the court in *United States v. Poulsen*, are relevant and permissible").

169. *See* cases cited *supra* notes 161–168 (providing examples of when courts have exercised discretion to admit such testimony); United States v. Bell, No. CR 17-20183, 2022 WL 1214157, at *1–4 (E.D. Mich. Apr. 25, 2022) (denying a motion seeking "permission to ask questions to attack the quality of the Government's investigation" that led to charges against Defendants and finding that "a flawed investigation says nothing about the evidence that the Government may be able to amass against the Defendants").

170. *See, e.g.*, Monroe v. Angelone, 323 F.3d 286, 312 (4th Cir. 2003) (finding that defense "emphasized the poor investigative work of the police," such as their failure to conduct certain tests); Penson v. United States, No. 115CR00007MRWCM1, 2019 WL 498852, at *4 (W.D.N.C. Feb. 8, 2019) ("Counsel argued at trial that there was a reasonable doubt about Petitioner's identity due to sloppy police work, including failure to submit evidence including the cap and muffler for testing, and that the evidence connecting Petitioner to the robbery was purely circumstantial."); Beauchamp v. Stouffer, No. CV PWG-14-603, 2016 WL 6822483, at *8 (D. Md. Nov. 18, 2016) ("[Counsel] explained his trial strategy with regard to the evidence collection and the failure to test it was that [Detective] Massey performed a sloppy investigation."); United States v. Lecco, No. 2:05-00107-01, 2010 WL 1507891, at *3 (S.D.W. Va. Apr. 14, 2010) ("When . . . the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." (emphasis omitted) (quoting Kyles v. Whitley, 514 U.S. 419, 446)); Leaphart v. Eagleton, No. 2:15-CV-04910-JMC, 2017 WL 1160418, at *11 (D.S.C. Mar. 29, 2017) ("As the court explained above, trial counsel's strategy was to attack the police investigation as shoddy or underhanded . . . ."); Brown v. Warden, Lee Corr. Inst., No. 2:18-CV-1276-DCC-MGB, 2019 WL 6091000, at *14 (D.S.C. July 31, 2019), report and recommendation adopted, No. 2:18-CV-01276-DCC, 2019 WL 4509190 (D.S.C. Sept. 19, 2019) ("Second, the State's failure to conduct DNA

has a strong history of supporting controversial jury instructions that suggest jurors should not give weight to inadequacies or omissions in a police investigation.[171]

In *United States v. Mason*, one of the more illustrative cases, the Fourth Circuit held that when a defendant presents an inadequate-investigation defense, jury instructions can explain that "law enforcement techniques are not your concern."[172] Since *Mason*, similar jury instructions have been used in response to the defense, and the Fourth Circuit has continued to uphold the instructions and *Mason*.[173] In *Mason,* the defendant, Thomas Mason, was charged with

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testing played into counsel's plan of painting the investigation as sloppy; rather than create evidence the State should have obtained itself, counsel wanted to emphasize to the evidentiary holes the State left open.").

171. *Infra* notes 172–173; *see also* Wyatt Feeler, *Can Fiction Impede Conviction? Addressing Claims of a "CSI Effect" in the Criminal Courtroom*, 83 MISS. L.J. 1, 37 (2014) (removing from the instructions "consideration of the government's investigation from jurors' consideration" and emphasizing that "the lack of any requirement for the government to conduct specific tests could lead jurors to believe that they should not consider whether the lack of such tests raises a reasonable doubt"); Richman, *supra* note 57, at 687–88 (emphasizing the risk "recognized by some courts in recent years—that some variant of the anti-CSI instruction," a type of instruction that tells jurors that the government is not obligated to conduct any specific type of testing or investigation, "will relieve the prosecution of its burden of proof" and describing the relevant question as "whether, in the context of the case, the jury will take a judge's authoritative denial of any such legal obligation as a conclusive excusal of investigative inadequacies").

172. United States v. Mason, 954 F.2d 219, 222 (4th Cir. 1992) (noting that after "pointing out that the police had failed to fingerprint the gun," defendant argued that the jury instructions "misled the jury into believing that it could not consider the fact that the government had failed to fingerprint the gun"). The court found that although the jury instruction that "law enforcement techniques are not your concern" was not altogether clear, the instructions "viewed in their entirety . . . adequately advised the jury on the putative relevance of the officers' failure to test the gun for fingerprints." *Id.*

173. *See, e.g.*, United States v. Temple, No. 97-4128, 1997 WL 563128, at *1 (4th Cir. Sept. 11, 1997) (concluding that the instruction was proper, and that the instructions as a whole "adequately advised the jury on the relevance of the investigative techniques utilized in the case"); United States v. Walker, Nos. 94-5661, 94-5745, 94-5746, 94-5765, 1995 WL 551361, at *5–6 (4th Cir. Sept. 18, 1995) (upholding jury instructions "very similar to that approved in *United States v. Mason*"); United States v. Brown, No. 11-4722, 2012 WL 1130594, at **2 (4th Cir. 2012) ("[T]he instruction properly emphasized the Government's burden of proof, but also noted that the Government was not required to prove its case in any particular manner."); United States v. Holloway, 774 F. App'x 147, 148 (4th Cir. 2019) ("[T]he challenged instruction is very similar to the instruction that we

possession of a firearm by a convicted felon.[174] Even though a firearm was never found on Mason, and the only firearm allegedly linked to Mason was found outside a day after Mason was apprehended, police never tested the gun for fingerprints.[175] Mason presented an inadequate-investigation defense arguing that police never tested the gun, and in response, the district court read the jury instructions explaining that "law enforcement techniques are not your concern."[176] As pointed out by attorneys and experts studying these instructions, this sentence is dangerous because it may suggest that while jurors can consider that fingerprint evidence does not exist, they cannot consider that this evidence does not exist because of unreasonable investigation practices.[177] Even the court in *Mason* recognizes that this sentence "is not altogether clear."[178]

Thus, although the Fourth Circuit allows inadequate-investigation defenses, the Circuit also uses confusing jury instructions that can limit the effectiveness of the defense.[179]

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upheld in *United States v. Mason* . . . ."); United States v. Dennis, 19 F.4th 656, 671 (4th Cir. 2021) (stating same).

174. *Mason*, 954 F.2d at 221.

175. *Id.* at 221–22 (finding that the day after officers released Mason, the police found a gun on top of a house; in response, the "defense was structured to establish doubt in the jurors' minds by pointing out that the police had failed to fingerprint the gun").

176. *Id.* at 222. The reason these instructions have been upheld is because the instructions also inform jurors that they can consider the failure to take fingerprints (or other investigative failures, depending on the case) "in deciding whether the government has met its burden of proof, because . . . [they] should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty." *Id.* However, the reason defendants take issue with the instructions is that they are misleading. *See id.* at 222 (defendant arguing that instructions "misled the jury into believing that it could not consider the fact that the government had failed to fingerprint the gun"); *see also* Feeler, *supra* note 171, at 35–37. Even though the instructions inform jurors that they can consider the failure to use investigative techniques, they continue with a much lengthier explanation that there is no requirement for the government to use any techniques, including the statement that "law enforcement techniques are not [their] concern." *Mason*, 954 F.2d 219 at 222.

177. *See* sources cited *supra* note 171.

178. *Mason*, 954 F.2d 219 at 222.

179. *See* sources cited *supra* note 171.

5. Second Circuit frequently limits the defense

In the Second Circuit, courts often constrain inadequate-investigation defenses.[180] The Second Circuit tends to find it irrelevant whether lack of evidence, such as a lack of fingerprint testing, is a result of an inadequate investigation and could have been collected.[181] However, the Second Circuit also has caselaw suggesting that the defense is relevant.[182]

United States v. Saldarriaga is one of the most relied on cases in the circuit relating to an inadequate-investigation defense.[183] In *Saldarriaga*, the defendant attacked the adequacy of the investigation against him, arguing that police could have and should have tested evidence for fingerprints and taken photographs or video of the alleged crimes.[184] In response, in front of the jurors, the district court told defense counsel that these attacks on the investigation were irrelevant.[185] The court then reiterated the attacks' irrelevance when instructing the jury prior to deliberation,[186] which it illustrated with an example.[187] Using the argument made about lack of photos of

180. *See, e.g.*, Bell v. Ercole, No. 05 CV 4532 ERK, 2011 WL 5040436, at *27 (E.D.N.Y. Oct. 21, 2011) ("'Merely showing that an investigation is sloppy does not establish relevance'. . . . Rather, the 'sloppy investigation' evidence must be related to a specific issue in the case. . . . The evidence relating to the investigation of 'Jason' [a potential alternate suspect] was not relevant to any issue in Bell's trial.") (citations omitted) (quoting United States v. Patrick, 248 F.3d 11, 22 (1st Cir. 2001), cert. denied, 535 U.S. 910, 122 S.Ct. 1215, 152 L.Ed.2d 152 (2002), *aff'd*, 471 F. App'x 17 (2d Cir. 2012).

181. *See* cases cited *infra* note 183.

182. *See* cases cited *infra* note 198.

183. United States v. Saldarriaga, 204 F.3d 50 (2d Cir. 2000); *see also* United States v. Preldakaj, 456 F. App'x 56, 60 (2d Cir. 2012); United States v. Carton, No. 17 CR 680 (CM), 2018 WL 5818107, at *3 (S.D.N.Y. Oct. 19, 2018); United States v. Duncan, No. 18-CR-289 (SHS), 2019 WL 2210663, at *3 (S.D.N.Y. May 22, 2019); United States v. Barcelo, No. 13-CR-38 RJS, 2014 WL 4058066, at *13 (S.D.N.Y. Aug. 15, 2014), *aff'd*, 628 F. App'x 36 (2d Cir. 2015); United States v. Ngono, 801 F. App'x 19, 24 (2d Cir. 2020); United States v. Carter, No. 21-1005, 2022 WL 16909404, at *4 (2d Cir. Nov. 14, 2022).

184. *See Saldarriaga*, 204 F.3d at 51–52 (finding that defense counsel "attacked the task force for failing to utilize certain investigative techniques" and spent a lot of time "showing how simple it would be with all the resources the government had to produce" such evidence).

185. *See id.* (finding that the defense's inadequate-investigation arguments "occasionally attracted the judge's disapproval" and that the district court "kept telling defense counsel that" the investigative-techniques were irrelevant).

186. *See id.* at 52.

187. *Id.*

the defendant, the district court explained that if jurors would have a reasonable doubt as to the defendant's guilt if they did not have any photos of him committing the crime, then they have a reasonable doubt in this case.[188] However, the court further explained that this means whether or not the police could have obtained such photos is irrelevant and thus should not be considered.[189] Even though at trial, both the defense and government spent considerable time on the issue of whether it would have been reasonable for the investigation to include photos of the defendant, the Second Circuit affirmed the district court's jury instructions.[190] In affirming, the Second Circuit concluded "that the failure to utilize some particular technique or techniques does not tend to show that a defendant is not guilty of the crime with which he has been charged."[191] Therefore, *Saldarriaga* limits the inadequate-investigation defense by preventing jurors from considering the implications of an inadequate investigation.[192]

Though several opinions in the Second Circuit have relied on *Saldarriaga* to affirm similar jury instructions,[193] *United States v. Londono* not only relied on *Saldarriaga*, but also appeared to expand its scope.[194] In *Londono*, the Second Circuit affirmed the district court's decision to sustain an objection to the defendant presenting an inadequate-investigation defense in summation.[195] Citing *Saldarriaga*, the Second Circuit found that the district court acted within its discretion because the defense went beyond commenting on

188. *Id.*

189. *See id.* (finding that the jury was told that "if evidence is such that without the picture you would have a reasonable doubt as to whether the government established the defendant[']s identity as the person who did these things, then you have a reasonable doubt and it doesn't make any difference whether the government could have or could not have," and explaining that clarification was provided to jurors that it "is wholly immaterial whether the government could have done it or couldn't have done it or how many people the government had available that would do it").

190. *See id.* at 52–53 (referring to jury instructions that explained that the defense "spent a lot of argument" on the issue and the government "was very indignant" in their response).

191. *Id.* at 53.

192. *See id.*

193. *See* cases cited *supra* note 183.

194. United States v. Londono, 175 F. App'x 370, 375 (2d Cir. 2006).

195. *See id.* (affirming district court's decision because "a defendant may comment on the failure of proof in the record, such as the absence of forensic evidence in the form of voice, handwriting, or fingerprint analyses, but" may not "argue[] that the government had failed to undertake to procure such evidence").

the lack of evidence in the record by "argu[ing] that the government had failed to undertake to procure such evidence."[196] This holding goes even further than *Saldarriaga* in limiting an inadequate-investigation defense, because it prevents defendants from even presenting the defense.[197]

Conflicting with its view that investigatory failures are not relevant, the Second Circuit has suggested that they are relevant to challenge the adequacy of an investigation.[198] For example, in *Mendez v. Artuz*, the Second Circuit found that evidence of an inadequate investigation could have allowed the defense "to present a strong challenge to the thoroughness and reliability of the police work."[199] Further, in *United States v. Zapata*, the Second Circuit approved the district court's jury instructions because the instructions "fully permitted defendants to attack the government's investigative techniques" and "permitted defendants to argue that by failing to use certain methods of investigation, the government had failed to establish" the defendants' guilt.[200]

Therefore, much like other jurisdictions, the Second Circuit's lack of a formal standard regarding inadequate-investigation defenses has led to inconsistencies in the admissibility of the defense.

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196. *Id.*

197. *See id.* (holding in relevant part that "[t]he district court acted within its discretion by limiting the scope of defense counsel's summation in response to the government's objections" and citing United States v. Schafrick, 871 F.2d 300, 305 (2d Cir. 1989), which "not[es] that statement in closing argument regarding facts not in evidence was improper").

198. *See* Mendez v. Artuz, 303 F.3d 411, 416 (2d Cir. 2002); United States v. Zapata, Nos. 96-1457, 97-1013, 96-1536, 96-1573, 1998 WL 681311, at *7 (2d Cir. Jan. 30, 1998); Alvarez v. Ercole, 763 F.3d 223 (2d Cir. 2014); United States v. Solla, No. 19 CR. 740 (CM), 2021 WL 5756394, at *6 (S.D.N.Y. Dec. 2, 2021).

199. *Mendez*, 303 F.3d at 416 (finding that the police investigation was "to say the least, inadequate" in failing to respond to witnesses, and that the "absence of any credible investigation could have allowed Mendez to present a strong challenge to the thoroughness and reliability of the police work").

200. *Zapata*, 1998 WL 681311, at *7 (finding that district court's jury instructions "granted the defendants to challenge the government's investigative techniques in summation, permitted defendants to argue that by failing to use certain methods of investigation, the government had failed to establish the existence of a conspiracy and each defendants participation in it").

6. Tenth Circuit limits the defense to showing how specific pieces of evidence presented by the government are flawed

In the Tenth Circuit, much of the inadequate-investigation defense precedent comes from two cases, *United States v. Cota-Meza* and *United States v. McVeigh*.[201] Both cases express support for the defense, though *Cota-Meza* has a clearer and more supportive position on the defense than *McVeigh*.[202] As a result, even though inadequate-investigation evidence is not always considered relevant in the Tenth Circuit, it is commonly admissible.[203]

In *Cota-Meza*, the Tenth Circuit broadly recognized the relevance of inadequate investigations, as shown by their reasoning in finding no abuse of discretion in the district court's jury instructions.[204] The district court's jury instructions were in response to an inadequate-investigation defense that argued, among other

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201. United States v. Cota-Meza, 367 F.3d 1218 (10th Cir. 2004); United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998).

202. *See* cases cited *supra* note 201.

203. *See* Morris v. Burnett, 319 F.3d 1254, 1273 (10th Cir. 2003) (noting the "frequency with which investigative techniques are at issue" but finding that "the common admissibility of inadequate-investigation evidence does not relieve the courts of making case-specific determinations of relevance").

204. *See Cota-Meza*, 367 F.3d at 1223 ("This instruction does not constitute an abuse of discretion."); *see also* Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant . . . ."). In *Bowen*, the defendant, Bowen, was convicted for a triple murder. *Id.* at 595. However, information concerning the police investigation of another suspect, Lee Crowe, was withheld from Bowen's attorneys. *Id.* at 599–600. On appeal, the Tenth Circuit found that if the material of the investigation of Crowe had been disclosed, the defense could have pointed out inadequacies in the police's investigation of Crowe. *Id.* at 613. For instance, the police eliminated Crowe as a suspect based on a statement from a woman who knew Crowe that she believed Crowe was in a different town on the night of the murders. *Id.* However, the police never substantiated or corroborated this statement of belief. *Id.* The Tenth Circuit found that if the defense had knowledge of these inadequacies, the defense could have used them to argue that the police only charged Bowen because it was easier to make a case against him than against Crowe. *See id.* Though Bowen was initially sentenced to death, based in part on the information of this inadequate police investigation, Bowen was exonerated. *See* Meghan Barrett Cousino, *Clifford Henry Bowen*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=27 [https://perma.cc/W9Z8-VSGP].

things, that the government failed to fingerprint.[205] The Tenth Circuit acknowledged the value of such a defense, and affirmed the instructions because they "specifically note[d] that the jury can consider the manner in which the investigation was conducted for the purposes of evaluating the weight of the evidence produced by the government and the credibility of the testimony of the law enforcement personnel involved in the investigation."[206] Several other opinions have since cited *Cota-Meza* when recognizing that inadequate-investigation evidence is relevant because it may undermine the reliability of the evidence produced by the government's investigation.[207]

In slight contrast, in *McVeigh*, the Tenth Circuit found that while inadequate-investigation evidence may be relevant, the defense must show how the inadequacy relates to the reliability of particular evidence presented at trial.[208] In *McVeigh*, the inadequate-investigation defense arose out of the government's investigation of other suspects.[209] The defense wished to introduce government reports relating to these suspects to "show that the government failed to investigate other potential suspects once it focused on McVeigh." However, the Tenth Circuit "commended" the district court's exclusion of this evidence, because the defense "failed to establish the requisite connection between the allegedly 'shoddy' and 'slanted'

205. *See Cota-Meza*, 367 F.3d at 1223.

206. *Id.*

207. *See, e.g.*, United States v. Lemon, 714 F. App'x 851, 861 (10th Cir. 2017) (citing *Cota-Meza* and finding that "defendant still presented ample evidence about the inadequacy of the Government's investigation, and the jury was still free to use that evidence to question the Government's credibility"); United States v. Johnson, 479 F. App'x 811, 818 (10th Cir. 2012) (citing *Cota-Meza* and finding that the district court's instructions "did not prevent the jury from considering the extent of the government's investigation").

208. *See* United States v. McVeigh, 153 F.3d 1166, 1192 (10th Cir. 1998) ("Admittedly, the quality or bias of a criminal investigation occasionally may affect the reliability of particular evidence in a trial . . . . However, in McVeigh's case, he failed to establish the requisite connection between the allegedly 'shoddy' and 'slanted' investigation and any evidence introduced at trial"). It is worth noting that in *McVeigh*, the defendant was the Timothy McVeigh convicted for bombing the Murrah Federal Building in Oklahoma City, which killed 168 people. *Id.* at 1176. There may have been some pressure on the court from the publicity McVeigh's proceedings were receiving. For instance, the court of appeals commended the district court for their rulings against McVeigh. *See id.* at 1192.

209. *See id.* at 1188–92.

investigation and any evidence introduced at trial."[210] The Tenth Circuit explained that for inadequate-investigation evidence to be relevant, it must "affect the reliability of particular evidence in a trial."[211] *McVeigh* provides an example of this, finding that it could be relevant to argue that sloppy police work tainted the chain of custody for firearms seized by police.[212]

Unlike the Tenth Circuit in *Cota-Meza*, the Tenth Circuit in *McVeigh* does not seem to find inadequate-investigation evidence relevant for its potential to broadly cast doubt on the reliability of evidence produced by an investigation.[213] Instead, *McVeigh* only seems to find inadequate-investigation evidence relevant if it shows how a specific piece of evidence presented by the government is flawed.[214] The word "seems" is used here because district courts in the Tenth Circuit have interpreted *McVeigh* differently.[215] For example, in *United States v. Mirabal*, the United States District Court for the District of New Mexico cited *McVeigh* to support the proposition that in determining if there is guilt beyond a reasonable doubt, jurors should not consider if "there is more evidence that could have been introduced, or whether investigators could have employed other investigative techniques."[216] However, other district courts, like the court in *United States v. Perrault*, interpret *McVeigh* more in line

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210. *Id.* at 1192.

211. *Id.*; *see also id.*

> "The legal premise of McVeigh's claim—that the quality of the government's investigation was material to his defense—also founders. Admittedly, the quality or bias of a criminal investigation occasionally may affect the reliability of particular evidence in a trial, and hence, the facts surrounding the government's investigation may become relevant."

Id.

212. *Id.* (citing Lowenfield v. Phelps, 817 F.2d 285, 291–92 (5th Cir.1987)).

213. *Compare* United States v. Cota-Meza, 367 F.3d 1218, 1223 (10th Cir. 2004), *with McVeigh*, 153 F.3d at 1192.

214. *See McVeigh*, 153 F.3d at 1192.

215. Though *McVeigh* uses language suggesting narrow support of inadequate-investigation evidence, *McVeigh* does not make clear whether this is part of their FED. R. EVID. 403 analysis that weighs the probative value against the prejudicial value, or part of their relevance analysis. *See id.*

216. United States v. Mirabal, No. CR 13-01152 WJ, 2015 WL 13650551, at *1 (D.N.M. Nov. 24, 2015) ("The question the jury must decide is whether the Government has met its burden of proving Defendant's guilt, regardless of whether there is more evidence that could have been introduced, or whether investigators could have employed other investigative techniques.").

with the way this Note interprets *McVeigh*.[217] In *Perrault*, the district court cites to *McVeigh* to explain that inadequate-investigation evidence "must be relevant in that it brings into question the reliability of a specific piece of evidence procured through the government's investigation."[218] Despite this interpretation, *Perrault* also takes an approach similar to *Cota-Meza*, explaining that inadequate-investigation evidence "has been allowed in cases to generally cast doubt on the government's case."[219]

This contrast between the general applicability of inadequate-investigation evidence to "the government's case" and the narrow applicability of the evidence to a "specific piece of evidence" from the government's case is never clearly reconciled in *Perrault*.[220] This contrast is also never clearly reconciled in the Tenth Circuit, leaving a sense of unpredictability for defendants presenting an inadequate-investigation defense.

7. Summary of the First Circuit's, Second Circuit's, Fourth Circuit's, Sixth Circuit's, Tenth Circuit's, and Eleventh Circuit's caselaw on inadequate-investigation defenses

Among courts rejecting the inadequate-investigation defense, the Eleventh Circuit's decision in *Elysee* is the clearest in ruling that the defense is irrelevant.[221] However, the First Circuit, Second Circuit, Sixth Circuit, Tenth Circuit, and Eleventh Circuit all have valid caselaw that both supports and rejects the relevance of an inadequate-investigation defense.[222] Further, though the Fourth Circuit generally allows an inadequate-investigation defense to be argued, the jury instructions are problematic because they suggest

217. *See* United States v. Perrault, No. CR 17-02558-MV-1, 2019 WL 1375666, at *2 (D.N.M. Mar. 26, 2019); *see also, e.g.*, United States v. Burciaga, No. 08 CR 1541 MV, 2013 WL 12164685, at *6 (D.N.M. Mar. 29, 2013); United States v. Edwards, No. 16-20070-01-CM, 2019 WL 5196614, at *16 (D. Kan. Oct. 15, 2019); United States v. Charley, No. 1:19-CR-00940-JCH, 2020 WL 1324398, at *11 (D.N.M. Mar. 20, 2020); United States v. Aysheh, No. 1:17-CR-00370-JCH, 2021 WL 779159, at *5 (D.N.M. Mar. 1, 2021); United States v. Tao, No. 19-20052-JAR, 2022 WL 262019, at *15 (D. Kan. Jan. 27, 2022).

218. *Perrault*, 2019 WL 1375666, at *2.

219. *See id.*

220. *See id.* at *1–2.

221. United States v. Elysee, 993 F.3d 1309, 1338 (11th Cir. 2021).

222. *See supra* Section II.A.

that jurors should not consider inadequacies in a police investigation.[223] As Section II.B will explain, while the findings of irrelevance are damaging, the inconsistencies in the caselaw can be even more damaging.

B. Problems with the Federal Jurisprudence on the Inadequate-Investigation Defense

Section II.B examines two takeaways from the caselaw on inadequate-investigation defenses, and explains why these takeaways are problems.

First, the caselaw on inadequate-investigation defenses reveals the ways in which the defense can be and is limited by courts.[224] In addition to the support of jury instructions admonishing the consideration of an inadequate-investigation defense, the defense has been limited through the exclusion of evidence and testimony intended to show that an investigation is inadequate.[225] The problem with these limits on the defense is that the limits are often justified on grounds of relevance.[226]

The other main takeaway from the caselaw is that within circuits, there are inconsistencies on the constraints that an inadequate-investigation defense will face.[227] Many circuits have seemingly contradictory caselaw without explanations reconciling the inconsistencies in the caselaw.[228] This lack of clarity arises from the absence of a clear standard regarding the defense and creates a problem of unpredictability for practitioners and defendants.[229]

1. Limiting the defense on grounds of relevance

Exclusion of inadequate-investigation evidence is primarily an issue because courts tend to exclude the evidence through findings of irrelevance.[230] As an initial distinction, it is not necessarily a problem that inadequate-investigation evidence is sometimes

223. *See supra* Section II.A.4.
224. *See supra* Section II.A.
225. *See supra* Section II.A.
226. *See infra* Section II.B.1.
227. *See supra* Section II.A.
228. *See supra* Section II.A.
229. *See infra* Section II.B.2.
230. *See, e.g.*, United States v. Elysee, 993 F.3d 1309 (11th Cir. 2021); United States v. Saldarriaga, 204 F.3d 50 (2d Cir. 2000).

excluded. As many of the courts that limit inadequate-investigation evidence point out, the evidence's probative value can be substantially outweighed by its danger of unfair prejudice, rendering it eligible for discretionary exclusion under Federal Rule of Evidence 403.[231] For example, in *United States v. Veal*, the defendant was a pharmacist charged with failing to maintain proper controlled substance records.[232] As part of his defense, Veal wished to introduce inadequate-investigation evidence to show that investigators initially miscounted the number of fraudulent prescriptions that he wrote.[233] While the evidence did speak to the adequacy of the investigation, the court reasonably found that it likely had minimal probative value that was substantially outweighed by its danger of confusing the jury or wasting time.[234]

The problem with *Veal* and other cases that exclude inadequate-investigation evidence thus is not the exclusion of the evidence, but the findings that the evidence is irrelevant. By finding the evidence irrelevant, courts create precedent that other courts can and have relied on in excluding evidence with heftier probative value on the basis of irrelevance.[235] Further, these views of irrelevance have led to the approval of jury instructions instructing jurors not to consider the defense.[236] These findings of irrelevance are problematic because an inadequate-investigation defense always is and always

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231. *See, e.g.*, United States v. Patrick, 248 F.3d 11, 23 (1st Cir. 2001) ("[E]ven if the notes had some probative value, the district court did not abuse its discretion in excluding them under FED. R. EVID. 403.").

232. *See* United States v. Veal, 23 F.3d 985, 987 (6th Cir. 1994).

233. *See id.* at 989 ("Mr. Veal contends that the trial court erred in not allowing him to submit evidence that the government originally miscalculated the number of bogus prescriptions.").

234. Though the proffered evidence is technically inadequate-investigation evidence, the fact that the officers miscounted prescriptions has a weak link to the reliability of other evidence and does not provide much reason to think that investigators may have missed evidence of the defendant's guilt or innocence.

235. *See, e.g.*, United States v. Marquina, No. 97-5448, 1999 WL 55281, at *1 (6th Cir. Jan. 12, 1999) (relying on *Veal* to exclude expert testimony that would help show that the FBI's investigation was inadequate); United States v. Olender, 338 F.3d 629, 638 (6th Cir. 2003). Remember, evidence must be relevant for it to be admissible. FED. R. EVID. 402.

236. *See, e.g.*, United States v. Mason, 954 F.2d 219, 222 (4th Cir. 1992); United States v. Brown, 474 F. App'x 945, 946 (4th Cir. 2012); United States v. Holloway, 774 F. App'x 147, 148 (4th Cir. 2019); United States v. Dennis, 19 F.4th 656, 671 (4th Cir. 2021).

should be considered relevant.[237] Even though the adequacy of an investigation is not an element of any crime, the adequacy of an investigation relates to the reliability of the evidence attempting to show that a defendant is guilty of a crime. As explained in Section I.A, inadequate police investigations are one of the most common causes of wrongful convictions because they paint a false but convincing picture of a defendant's guilt.[238] By focusing on the defendant or failing to investigate reasonably, the investigations miss exonerating evidence that would help tell an accurate story of the crime.[239] Further, the lack of exonerating evidence against the defendant can lead investigators to be even more confident in their suspicions of the defendant's guilt, which may affect the accuracy of the evidence collected by the investigators.[240] The adequacy of a police investigation is thus always relevant in determining a defendant's guilt, because if police failed to take reasonable measures in their investigation, there may be reasons to doubt the reliability of the evidence they collected against the defendant.

It is thus significant when courts find an inadequate-investigation defense or evidence to be irrelevant, because they are excluding a relevant argument without properly weighing its probative value. The impact of improperly limiting this defense can be devastating due to its potential to contribute to wrongful convictions.[241]

One argument against the importance of relevance is that courts that find the defense irrelevant sometimes engage in a hypothetical Federal Rule of Evidence 403 analysis, showing that the

237. As a reminder, evidence is relevant if it has any tendency to make a fact of consequence more or less probable. FED. R. EVID. 401. The question thus comes down to whether inadequacies in a police investigation are a fact of consequence in determining whether the government has proved the defendant's guilt beyond a reasonable doubt. If inadequacies are a fact of consequence, then any evidence tending to make it more or less likely that an investigation is inadequate should be considered relevant. *See, e.g.*, United States v. Repak, 852 F.3d 230, 249–250 (3d Cir. 2017) ("As we have unequivocally held, 'evidence concerning a witness's credibility is always relevant, because credibility is always at issue.'") (quoting United States v. Green, 617 F.3d 233, 251 (3d Cir. 2010)).

238. *See* Findley & Scott, *supra* note 35, at 292.

239. *See id.*

240. *See* Burke, *supra* note 37, at 1604.

241. *See* Rossmo & Pollock, *supra* note 49, at 806.

evidence would be excluded even if it were considered relevant.[242] This hypothetical analysis is problematic because if courts do not value the evidence as relevant, it is hard to see how they accurately provide the evidence with the appropriate probative value under Federal Rule of Evidence 403.[243] Additionally, though some courts do engage in a 403 analysis after finding the evidence irrelevant, other courts simply find the evidence irrelevant and move on without explanation.[244]

Since many courts do not provide an explanation for finding an inadequate-investigation defense or evidence irrelevant, it can be difficult to understand their reasoning.[245] However, some courts do provide reasons for their view of irrelevance. One common argument against relevance is that the jury should be focused on accusations against the defendant, not against the police.[246] Though this may be a reason to exclude evidence under Federal Rule of Evidence 403, it misses the mark when it comes to the relevance of the evidence and the defense it supports. While in a sense the defense attacks the police by attacking their investigation, the purpose of the defense still focuses on the accusations against the defendant.[247] By attacking the quality of the police investigation, the inadequate-investigation

242. *See, e.g.*, United States v. Elysee, 993 F.3d 1309, 1338–39 (11th Cir. 2021) (finding that even though the inadequate-investigation evidence is not relevant, if it were relevant, "a straightforward application of Federal Rule of Evidence 403 would bar its introduction").

243. FED. R. EVID. 403 (requiring the weighing of evidence's probative value as part of the test to determine whether relevant evidence will be excluded).

244. *See, e.g.*, United States v. McVeigh, 153 F.3d 1166, 1192 (10th Cir. 1998) (finding the evidence irrelevant and not conducting a hypothetical Rule 403 analysis).

245. *See, e.g.*, United States v. Veal, 23 F.3d 985, 989 (6th Cir. 1994).

246. *See, e.g.*, United States v. Carmichael, 373 F. Supp. 2d 1293, 1297 (M.D. Ala. 2005) (finding the defense "improperly shifts the jury's focus from the accusations against the defendant to accusations against the police"); United States v. McVeigh, 153 F.3d 1166, 1192 (10th Cir. 1998) ("To have allowed McVeigh to put the government on trial because there might have been something more the government perhaps could have done with respect to the activities of the Elohim City group would inevitably divert the jury's attention from the issues of the trial."); United States v. Patrick, 248 F.3d 11, 22 (1st Cir. 2001).

247. *See* Steele, *Investigative Omission Defense*, *supra* note 32 (finding that while the defense focuses on mistakes by the police, the purpose of this focus is to show "why the fact-finder should find reasonable doubt in the lack of evidence caused by the decision").

defense raises questions about the reliability of the evidence coming from the investigation in order to raise reasonable doubt.

Another argument courts make in finding an inadequate-investigation defense irrelevant is that since there are no requirements for investigators to use specific investigatory techniques, jurors should not consider whether investigators could have employed different investigatory techniques.[248] However, the defense recognizes that officers are not expected to use every investigatory technique available.[249] The defense is only relevant when an investigation is inadequate, meaning that investigators failed to take reasonable investigatory measures.[250] Further, the defense does not argue that officers neglected their duties in failing to employ reasonable investigatory techniques, but that the failure to use such techniques may have implications about the reliability of the case against the defendant.[251]

Finally, courts argue that inadequate-investigation evidence is irrelevant because it does not show why specific evidence presented

248. *See, e.g.*, United States v. Mason, 954 F.2d 219, 222 (4th Cir. 1992) (approving of jury instructions that explain there is no requirement for police to use specific investigation techniques).

249. *See, e.g.*, Sample v. State, 550 A.2d 661, 663 (Md. 1988) (defining the defense to include when investigators fail "to utilize a well-known, readily available, and superior method of proof").

250. *See* Steele, *Reasonable Doubt*, *supra* note 61, at 29.

251. *See id.* For instance, in *Saldarriaga*, the court explained that if jurors needed photos of the defendant committing a crime to find guilt beyond a reasonable doubt, then they would have reasonable doubt because there were no photos of the defendant. *See* United States v. Saldarriaga, 204 F.3d 50, 51–53 (2d Cir. 2000). The court furthered that whether the investigation could have obtained photos of the defendant is thus irrelevant because police do not have a requirement to use specific investigatory techniques, and that jurors should only focus on the evidence or lack of evidence presented. *Id.* The problem with this reasoning is that it does matter whether the investigation could have obtained photos of the defendant. If jurors did not have a reasonable doubt based on the lack of photos, they may have a reasonable doubt if they found out that it was standard practice for investigators to take photos and that in this case investigators could have easily taken photos. This investigatory failure could raise questions about the adequacy of the investigation as a whole, which could cause jurors to doubt the reliability of the investigation against the defendant. On the other hand, if investigators were able to show that it would have been impossible or unreasonable to obtain photos of the defendant, that may assuage jurors concerns about the investigation.

at trial should be deemed unreliable.[252] These courts acknowledge that inadequate-investigation evidence could be relevant if it has a connection to particular evidence, such as showing that evidence is tainted due to chain of custody issues.[253] Like the other courts finding inadequate-investigation evidence or defenses irrelevant, the courts making this argument do not seem to appreciate the value of an inadequate-investigation defense. While inadequacies in an investigation can be relevant for their connection to a particular piece of evidence,[254] there are some types of investigatory failures that will not specifically relate to a particular piece of evidence. For instance, if police fail to investigate a suspect, there will likely be no evidence of this at trial unless the defense is able to present an inadequate-investigation defense.[255] Even though the failure to investigate does not directly relate to a specific piece of evidence at trial, the investigatory inadequacy is still relevant because it may mean investigators missed exonerating evidence that would drastically reduce the value of the evidence they collected. Therefore, inadequate-investigation evidence is relevant regardless of its connection to a specific piece of evidence presented at trial, because the inadequacies may broadly affect the reliability of all the evidence presented at trial.[256]

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252. *See, e.g.*, United States v. McVeigh, 153 F.3d 1166, 1192 (10th Cir. 1998) (finding the inadequate-investigation evidence irrelevant because the defendant "failed to establish the requisite connection between the allegedly 'shoddy' and 'slanted' investigation and any evidence introduced at trial").

253. *See, e.g.*, United States v. Patrick, 248 F.3d 11, 22 (1st Cir. 2001) ("Certain inadequacies—for example, those that go to the chain of custody or the preservation of evidence—may undercut the reliability of physical evidence against the accused.").

254. Examples of these kind of inadequacies include chain of custody issues, or issues with inaccurate evidence. *Cf.* Burke, *supra* note 37, at 1604 (noting how confirmation bias reduces the likelihood of an investigation producing exculpatory evidence generally).

255. *See, e.g.*, Findley & Scott, *supra* note 35, at 296–99 (explaining the wrongful conviction of Marvin Anderson, where officers failed to investigate a known and likely suspect who turned out to be the actual perpetrator); United States v. Elysee, 993 F.3d 1309, 1312, 1314, 1338 (11th Cir. 2021) (involving a situation where a known suspect confessed, and jurors never heard evidence of this confession or about the known suspect because the police failed to investigate the suspect).

256. Further, the broad effect on evidence is in line with how jurors perceive evidence at trial as one coherent block. *See* SIMON, *supra* note 5, at 175 (finding that jurors tend "strongly to interpret all of the evidence items as a coherent block, pointing toward either inculpation or exculpation"); Dan Simon,

The caselaw on inadequate-investigation defenses is thus problematic because it incorrectly assesses the relevance and probative value of the defense. This can lead to courts incorrectly limiting the defense, increasing the chance of wrongful convictions.[257]

2. Inconsistent rulings result in a lack of a clear framework

The other problem with the caselaw on inadequate-investigation defenses is that it creates an unclear and unpredictable framework on the relevance of the defense.[258] Even though circuits have caselaw referencing inadequate-investigation defenses, most circuits lack a clear defining opinion on the defense that sets a framework for practitioners.[259] Due to the common usage of the defense,[260] defendants may rely on assumptions or their interpretation of caselaw in their decision to present the defense, only

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Chadwick J. Snow, & Stephen J. Read, *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERSONALITY & SOC. PSYCH. 814, 829–30 (2004); David A. Lagnado & Nigel Harvey, *The Impact of Discredited Evidence*, 15 PSYCHONOMIC BULL. & REV. 1166, 1171 (2008) ("Items of evidence with a shared direction will mutually cohere, irrespective of their causal relatedness, and mutually coherent groupings will fall together in the face of information that discredits one item of that grouping."). While this could be argued as a reason to exclude the inadequate-investigation evidence due to its potential for undue prejudice in affecting jurors views of accurate evidence, it is a stronger argument for the probative value of the evidence because it provides jurors with transparency that will rightfully assist them as they work to unify the varied pieces of evidence into a single verdict. *See* SIMON, *supra* note 5, at 16 (explaining that increased transparency and transparent evidence has "tremendous potential to improve the performance and enhance the integrity" of the decision-making process). Further, this risk of prejudice is not a reason to always exclude the evidence as irrelevant, and should be handled through Federal Rule of Evidence 403. *See* FED. R. EVID. 403.

257. *See supra* Section I.A (explaining how inadequate police investigations lead to wrongful convictions).

258. *See supra* Section II.A.

259. *See supra* Section II.A.

260. *See, e.g.*, Morris v. Burnett, 319 F.3d 1254, 1273 (10th Cir. 2003) (noting the "frequency with which investigative techniques are at issue"); Jones, *supra* note 58, at 460 ("[D]efense attorneys commonly seek to show that the police officers handling the investigation failed to perform critical investigative tasks that could have yielded exculpatory physical evidence or that might have affirmatively identified another person as the perpetrator of the crime.").

to be blindsided by a ruling that the defense is irrelevant.[261] This was seen in *Elysee*, where both the defense and prosecution assumed that the inadequate-investigation defense would be considered relevant.[262]

Though it is important for judges to have the flexibility to decide each case based on the specific facts, the caselaw within these circuits is not unpredictable because of various fact patterns, but because of conflicting rule of law.[263] For example, the Second Circuit has caselaw suggesting that it would be irrelevant to attack a police investigation and their failure to use certain investigatory techniques,[264] and caselaw suggesting that it could have been useful for the defense to "challenge the thoroughness and reliability of the police work."[265]

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261. Though not explicitly acknowledged as occurring in any case besides *Elysee*, it is fair to assume that there was some confusion about the law in most cases where defendants challenged rulings on the relevance of inadequate-investigation evidence. *See* United States v. Elysee, 993 F.3d 1309, 1337 (11th Cir. 2021) (involving a situation where the prosecution and defense both assumed the defense was relevant).

262. *See id.*

> "Neither side had any idea whether defense counsel's theory that Cabrera failed to act as a reasonable officer was relevant. Neither had researched the point. They simply assumed that Cabrera's conduct was relevant. So, the prosecutor, at least initially, assumed the task of upholding Cabrera's allegedly do-nothing response to Deen's confession."

Id.

263. *See* Ruth A. Moyer, *Disagreement About Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 831, 865 (2014) (explaining that some circuit splits may be illusory because every case presents different facts and thus can lead to courts reaching different results without disagreeing on the law, and further explaining that a true circuit split thus exists when different courts would reach different results under the same set of facts).

264. *See* United States v. Saldarriaga, 204 F.3d 50, 53 (2d Cir. 2000) (finding "that the failure to utilize some particular technique or techniques does not tend to show that a defendant is not guilty of the crime with which he has been charged").

265. *See* Mendez v. Artuz, 303 F.3d 411, 416 (2d Cir. 2002). As a counterpoint, it could be argued that these cases are consistent with each other, because *Saldarriaga* only discusses the failure of police to use a technique, which does not necessarily mean the investigation was inadequate. However, when looking at the context of *Saldarriaga*, the defendant was not arguing that police must take every possible investigatory measure, but was attacking the quality of the police investigation. *See Saldarriaga*, 204 F.3d at 51–52. It was this attack on

The proof of this lack of clarity is in the cases that rely on the caselaw on inadequate-investigation defenses. Continuing with the Second Circuit as an example, the caselaw finding that jurors should not consider the adequacy of an investigation[266] has been interpreted to prevent defendants from even arguing that there is a lack of evidence because of investigatory failures.[267] While this is a problem because it constrains an important defense, the bigger problem is that defendants may have trouble accurately determining whether their inadequate-investigation defense will be allowed in court. In contrast to the Second Circuit's caselaw barring the defense from even being argued, the Second Circuit also has caselaw that approves of jury instructions specifically because they allow defendants to point out that investigators failed to use certain methods of investigation.[268]

These inconsistencies are thus problematic because it makes it harder to plan on utilizing the defense, even if it may be considered relevant. Worse, it may lead to a defense strategy backfiring by being ruled irrelevant because a reasonable interpretation of caselaw turned out to be different than the presiding judge's also reasonable interpretation of caselaw.[269]

III. Proposing a Framework of Relevance

In response to the problems presented by the caselaw on inadequate-investigation defenses, Part III proposes that courts adopt a framework that directly addresses inadequate-investigation defenses and their relevance. Specifically, courts should rule that inadequate-investigation defenses are always relevant, meaning that evidence of inadequate-investigations can only be excluded under Federal Rule of Evidence 403.[270] A framework that clearly establishes that inadequate-investigation defenses are relevant will address both

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the quality of the investigation that led the district court to instruct the jury that it did not matter whether the police could have taken photos of the defendant. *Id.*

266. *See Saldarriaga*, 204 F.3d at 51–53.

267. *See* United States v. Londono, 175 F. App'x 370, 375 (2d Cir. 2006).

268. *See* United States v. Zapata, Nos. 96-1457, 97-1013, 96-1536, 96-1573, 1998 WL 681311, at *7 (2d Cir. 1998).

269. *Compare* United States v. Mirabal, No. CR 13-01152 WJ, 2015 WL 13650551, at *1 (D.N.M. Nov. 24, 2015), *with* United States v. Perrault, No. CR 17-02558-MV-1, 2019 WL 1375666, at *2 (D.N.M. Mar. 26, 2019) (noting their differing interpretations of United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998)).

270. FED. R. EVID. 403.

problems presented by current caselaw: (1) the over-limitation of the defense; and (2) the lack of clarity regarding the admissibility of the defense.

As a model for what this framework could look like, Section III.A reviews the inadequate-investigation defense framework in Massachusetts, where the defense is known as a *Bowden* defense.[271] Section III.B then assesses how adoption of a *Bowden*-like framework would solve the problems discussed in Part II.

A. The *Bowden* Defense

As mentioned in Section I.B, a *Bowden* defense stems from a Massachusetts case, *Commonwealth v. Bowden*, that recognized the right to build a defense on investigatory omissions.[272] Since *Bowden*, hundreds of Massachusetts cases have refined Massachusetts law on inadequate-investigation defenses.[273] Under a *Bowden* defense, "a defendant may rely on deficiencies or lapses in police investigations to raise the specter of reasonable doubt."[274]

Section III.A.1 discusses a *Bowden* defense as it applies to the admissibility of evidence, and Section III.A.2 discusses a *Bowden* defense as it applies to jury instructions.

1. Inadequate-investigation evidence is always relevant

In addition to being well-developed, Massachusetts' framework on inadequate-investigation defenses may be useful for federal courts to consider because its rules of relevance are based on the Federal Rules of Evidence.[275] Just like Federal Rule of Evidence 401, Massachusetts Guide to Evidence Section 401 rules that "evidence is relevant if (a) it has any tendency to make a fact more or

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271. *See* Steele, *Investigative Omission Defense*, *supra* note 32 (explaining that in Massachusetts an inadequate-investigation defense is known as a '*Bowden* defense').

272. Commonwealth v. Bowden, 399 N.E.2d 482, 491 (Mass. 1980).

273. *See* Steele, *Investigative Omission Defense*, *supra* note 32 ("There are hundreds of Massachusetts cases citing, discussing, and explaining what is sometimes called a '*Bowden* defense . . . .'").

274. Commonwealth v. Moore, 109 N.E.3d 484, 497 (Mass. 2018) (citing Commonwealth v. Bowden, 399 N.E.2d 482, 491 (Mass. 1980)).

275. *See* MASS. G. EVID. § 401.

less probable than it would be without the evidence and (b) the fact is of consequence in determining the action."[276]

In Massachusetts, inadequate-investigation evidence is relevant if it has any tendency to show that a police investigation was inadequate.[277] Therefore, any evidence that police failed to investigate in a way that would be reasonably expected is admissible.[278] For example, evidence that police failed to follow certain police procedures, failed to conduct certain tests, or failed to investigate other suspects would be admissible if it is reasonable to expect that the police would take such investigatory measures.[279] Rulings excluding inadequate-investigation evidence as hearsay are errors, because the evidence is not offered for its truth, but to show that the police did not take reasonable steps in their investigation.[280] Further, if the defense presents a *Bowden* defense and introduces *Bowden* evidence, the prosecution can respond with evidence showing the adequacy of the investigation. Thus, the *Bowden* defense has been called a "two-edged sword"[281] because "the more wide-ranging the defendant's attack on the police investigation, the broader the Commonwealth's response may be."[282]

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276. *Id.*

277. *See Moore*, 109 N.E.3d at 497 (finding that *Bowden* evidence is relevant if it is relevant to the adequacy of the police investigation).

278. SUPREME JUD. CT. ADVISORY COMM. ON MASS. EVIDENCE L., MASSACHUSETTS GUIDE TO EVIDENCE § 1107 (2022).

279. WILLIAM G. YOUNG ET AL., INADEQUATE POLICE INVESTIGATION EVIDENCE § 1107 (Mass. Prac. Annotated Guide to Mass. Evid., 2021).

> "Evidence that certain tests were not conducted, that certain police procedures were not followed, or that certain information known to the police about another suspect was not investigated, in circumstances in which it was reasonable to expect that the police should have conducted such tests, followed such procedures, or investigated such information, is admissible."

Id.

280. *See* Commonwealth v. Bizanowicz, 945 N.E.2d 356, 367 (Mass. 2011) (citing Commonwealth v. Ridge, 916 N.E.2d 348, 358 (Mass. 2009)). However, even if evidence is relevant to the adequacy of a police investigation, it may be excluded if a judge determines that the probative value of the evidence is outweighed by its danger of unfair prejudice. *See Moore*, 109 N.E.3d at 497 ("If evidence is relevant to the adequacy of the police investigation, the judge must then determine whether the probative value of the *Bowden* evidence is substantially outweighed by the danger of unfair prejudice.").

281. Commonwealth v. Avila, 912 N.E.2d 1014, 1024 (Mass. 2009).

282. *Id.*

2. Jury instructions inform jurors that they may consider inadequacies in the police investigation

In Massachusetts, the jury instructions regarding a *Bowden* defense inform jurors that they may consider whether investigation inadequacies raise a reasonable doubt.[283] While reading these jury instructions is permitted, it is not required.[284] However, a judge may not remove the issue of an inadequate investigation from the jury's consideration.[285] Further, courts have suggested that reading these

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283. ADMIN. OFF. OF THE DIST. CT. OF MASS., CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT § 3.740 (2009), https://www.mass.gov/doc/3740-omissions-in-police-investigations/download [https://perma.cc/PN9Z-H7TZ]. The jury instructions are as follows:

> You have heard some evidence suggesting that the Commonwealth did not conduct certain scientific tests or otherwise follow standard procedure during the police investigation. This is a factor you may consider in evaluating the evidence presented in this case. With respect to this factor, you should consider three questions: First: Whether the omitted tests or other actions were standard procedure or steps that would otherwise normally be taken under the circumstances; Second: Whether the omitted tests or actions could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and Third: Whether the evidence provides a reasonable and adequate explanation for the omission of the tests or other actions. If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality, reliability or credibility of the evidence presented by the Commonwealth. All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the circumstances.

Id.

284. *Id.* at n.1 ("Instruction is optional but preferable."); Commonwealth v. Williams, 790 N.E.2d 662, 670 (Mass. 2003); Commonwealth v. Lapage, 759 N.E.2d 300, 307 (Mass. 2001); Commonwealth v. Richardson, 682 N.E.2d 1354, 1357 (Mass. 1997); Commonwealth v. Cowels, 680 N.E.2d 924, 932 (Mass. 1997).

285. *Williams*, 790 N.E.2d at 670 (quoting Commonwealth v. Boateng, 781 N.E.2d 1207, 1215 (Mass. 2003)) ("[A] judge is not required to instruct on the claimed inadequacy of a police investigation. 'Bowden simply holds that a judge may not remove the issue from the jury's consideration.'"). In terms of federal court adopting a *Bowden*-like framework, approval of appellate courts would be needed to establish clarity and authority. *See* Richman, *supra* note 57, at 698 (finding that appellate courts can promote a framework supporting inadequate-investigation defenses). However, due to the lack of clarity in caselaw in many

jury instructions is preferred to not reading the instructions because of the importance of informing jurors that inadequate-investigation evidence can raise a reasonable doubt.[286]

B. Adopting a *Bowden*-like Framework

Adopting a *Bowden*-like framework would solve both of the problems presented by federal caselaw on inadequate-investigation defenses. First, by finding evidence relevant if it shows inadequacies in an investigation, the framework would solve the issue of over-limiting the defense on grounds of relevance.[287] Instead of automatically rejecting inadequate-investigation evidence on grounds of relevance, a *Bowden*-like framework would assume that the evidence is admissible unless its probative value is substantially outweighed by a danger of unfair prejudice.[288] One valid concern with the framework is that even if a *Bowden*-like framework were adopted at the federal level, the judge's finding inadequate-investigation evidence irrelevant today would just exclude it under Federal Rule of Evidence 403. However, authority properly framing the value of an inadequate-investigation defense should cause even the most skeptical judges to reconsider the value of the evidence.[289] Further, the prosecution's ability to respond to allegations of investigatory

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jurisdictions, district courts could likely start promoting the framework as well. Another possible way to adopt such a framework would be the Supreme Court granting certiorari on a case like *Elysee* to clarify the relevance of an inadequate-investigation defense. In fact, a petition for a writ of certiorari for *Elysee* was pending, but recently denied, to answer "[w]hether a criminal defendant may mount a defense at trial based on an inadequate police investigation into another suspect." *See* Petition for Writ of Certioari, *United States v. Elysee*, 993 F.3d 1309 (2021) (No. 21-6770).

286. *See* Commonwealth v. Reid, 562 N.E.2d 1362, 1365 (Mass. App. Ct. 1990) (finding that "it might have been preferable for the judge to inform the jurors that the evidence of police omissions could create a reasonable doubt").

287. *See supra* Section II.B.1.

288. Commonwealth v. Moore, 109 N.E.3d 484, 497 (Mass. 2018) ("If evidence is relevant to the adequacy of the police investigation, the judge must then determine whether the probative value of the Bowden evidence is substantially outweighed by the danger of unfair prejudice.").

289. Richman, *supra* note 57, at 698 ("Would evidence rulings be different were judges to consider the reframing proposed here? I suspect they would."). Also, even if there are some judges that remain skeptical of the probative value of the evidence, it will be harder to exclude the evidence if caselaw establishes that the evidence is relevant because judges will not be able to automatically bar the evidence and will at least have to conduct a Rule 403 analysis.

inadequacy substantially lowers the risk of unfair prejudice,[290] especially since evidence suggests that jurors can give proper weight to such evidence.[291]

Second, a *Bowden*-like framework would solve the current problem of unpredictability.[292] Though judges would still have discretion in excluding inadequate-investigation evidence,[293] practitioners would at least have consistent caselaw to rely on in deciding to present an inadequate-investigation defense. Further, judges concerned that the framework will misguide jurors into thinking that they must acquit if the police investigation was inadequate[294] can read jury instructions that provide clarity on the issue.[295] Plus, there should be a benefit that comes from these concerns about misguiding jurors. If police know their investigations will be critiqued in court, they may have more incentive, or may be pressured by prosecutors, to responsibly pursue additional

290. *See* Commonwealth v. Bright, 974 N.E.2d 1092, 1109 (Mass. 2012) ("[B]ecause the Commonwealth may generally, on redirect examination, explain why particular leads were not followed, the risk of prejudice posed by Bowden evidence is often lower than that associated with third-party culprit evidence."); *see also* Richman, *supra* note 57, at 691 ("[J]udges who had a clearer sense of how and when prosecutors could explain away an alleged deficiency would surely be more receptive to defense challenges in the first place.").

291. *See* Michael S. Pardo, *Evidence Theory and the NAS Report on Forensic Science*, 2010 UTAH L. REV. 367, 377–78 ("[A]lthough far from conclusive, empirical evidence appears to support the competence of jurors in evaluating complex evidence. Thus, there are reasons to think . . . . that jurors, once apprised of the many known and unknown limitations of the techniques, can give it proper weight in the context of individual cases."); *see also* Richman, *supra* note 57, at 698 (arguing that "[e]ven if one does not think jurors (or judges) are particularly good at discerning whether an investigation was up to snuff," "they are better at that than at conducting a retrospective historical inquiry on the basis of 'primary sources' that have been raked through and even modified by adversarial parties").

292. *See supra* Section II.B.2.

293. *See Moore*, 109 N.E.3d at 497 (finding that judges can exclude the evidence if, for instance, its probative value is substantially outweighed by the risk of unfair prejudice).

294. *See, e.g.*, United States v. Elysee, 993 F.3d 1309, 1320 (11th Cir. 2021) (speculating that if the inadequate-investigation defense were allowed, the defendant may be "acquitted on account of" the officer's mistakes, and that "the public would suffer for the breach").

295. *See* ADMIN. OFF. OF THE DIST. CT. OF MASS., CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT § 3.740 (2009), https://www.mass.gov/doc/3740-omissions-in-police-investigations/download [https://perma.cc/PN9Z-H7TZ].

investigatory measures that may reveal evidence of a defendant's innocence or guilt.[296]

Another concern with the *Bowden*-like framework may be that large chunks of time will be spent debating the adequacy of police investigations, distracting from other aspects of the charges against a defendant.[297] However, judges can always limit evidence if they feel that its probative value is substantially outweighed by its danger of wasting time.[298] A defense should not be limited just because there is a possibility that it may be abused, especially when there are tools to curb any potential abuse.

Adopting a *Bowden*-like framework would thus solve the problems of over-limitation and unpredictability posed by the current federal jurisprudence on inadequate-investigation defenses.

CONCLUSION

Though this note proposes adopting a *Bowden*-like framework, there may be other proposals out there on how to adopt a framework for inadequate-investigation defenses.[299] Additionally, there are likely many other ways to positively change the current federal jurisprudence on inadequate-investigation defenses.[300] Adopting a *Bowden*-like framework is not proposed as the best

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296. Richman, *supra* note 57, at 696, 698 ("And should police and prosecutors respond to the possibility of more extensive audits by investing more responsibly in their investigations and clarifying the bases for those investment decisions, we will have achieved much.").

297. *See* Richman, *supra* note 57, at 685.

> "And defense efforts to explore investigative short-cuts, leads not pursued, and forensic tests not ordered should be welcomed. Judicial hostility to such efforts arises not simply from the desire to move a trial along but from the same habituation to routine and internalization of resource limitations that cause the investigative inadequacies in the first place."

Id.

298. *See* FED. R. EVID. 403; Commonwealth v. Moore, 109 N.E.3d 484, 497 (Mass. 2018).

299. *See, e.g.*, Richman, *supra* note 57. There are also other solutions to the problem, such as simply focusing on improving the reliability of the evidence jurors receive. *See* SIMON, *supra* note 5, at 222 ("[T]he combination of best-practice investigative procedures and transparent investigations promises to enable the criminal justice process to achieve a higher degree of accuracy.").

300. Another option could be the Advisory Committee on Evidence Rules clarifying the relevance of the defense with amended notes to Federal Rule of Evidence 401.

possible way to make a beneficial change, but just one possible way that is already being implemented with success. The emphasis on the *Bowden* defense is thus not to show the required solution, but rather to show that a solution is possible.

Though a future note focusing more on such solutions would be useful, the main point of this note is to establish the need for a solution. Regardless of where one stands on the relevance of an inadequate-investigation defense, it is clear that there is not enough clarity in federal courts on the relevance of the defense and its supporting evidence.[301] Further, this note shows how many of these differing views on the relevance of the defense can be reconciled.[302] Many of the concerns federal courts list when barring inadequate-investigation defenses don't go to the relevance of the defense, but to potential risks of unfair prejudice and wasting time.[303] These risks deserve proper consideration, but should be fairly evaluated against the understanding that the defense is relevant in pointing out potential flaws in the evidence against the defendant.

As illustrated by the anecdotes provided in the introduction and Section I.A, investigatory inadequacies, such as a failure to investigate an alternate suspect, have led police, then prosecutors, and then jurors to come to the wrong conclusion about a person's guilt. Jurors should be allowed to consider such inadequacies when evaluating whether a defendant's guilt has been shown beyond a reasonable doubt. For a criminal justice system to be truly just, one of the system's goals must be to ensure that no innocent people are convicted. Allowing jurors to consider evidence of inadequate police investigations would be a move in the right direction.

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301. *See supra* Section II.B.2.
302. *See supra* Section II.B.1.
303. *See supra* Section II.B.1.