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"Reverse" 404(b) Is Not an Evidence Law Issue: A Call to Revive the Compulsory Process Clause as a Vehicle for Evidence Admission

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"REVERSE" 404(B) IS NOT AN EVIDENCE LAW ISSUE: A CALL TO REVIVE THE COMPULSORY PROCESS CLAUSE AS A VEHICLE FOR EVIDENCE ADMISSION

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In criminal cases, Federal Rule of Evidence 404(b) is typically used by prosecutors seeking to introduce non-propensity "crimes, wrongs, or other acts" evidence against defendants. However, sometimes it is the defendant who seeks to use the Rule as a vehicle for evidence admissibility, either to provide such evidence to implicate the guilt of a third party or to help prove the intent or motive of alleged victims in violent crimes involving altercations. This latter defense-proffered use of Rule 404(b) has been termed "reverse" 404(b), and currently there is disagreement among courts (both federal and state) regarding how to assess the admissibility of such evidence. The question at stake in this disagreement—as it is generally framed—is whether the Rule should be applied in a uniform manner to evidence offered by both defendants and prosecutors (the plain language of the Rule does not indicate any reason to treat them differently), or whether the Rule should be relaxed when used by criminal defendants (given the lower/nonexistent danger of "trial by character" and related fairness concerns). In this Comment, I argue that, by framing this problem as a narrow question of evidence law, scholars and practitioners have largely failed to recognize and appreciate the important constitutional dimension of the issue. Based on an analysis of the recent Tenth Circuit decision in United States v. Tony, I discuss the pitfalls of regarding "reverse" 404(b) as solely a concern of evidence law, before arguing for a broader approach to such evidence that gives primacy to—for both practical and conceptual reasons—a consideration of the interplay between constitutional rights and evidence law that these situations evoke. This new approach, based on the Compulsory Process Clause of the Sixth Amendment, offers a vision of "reverse" 404(b)–type

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situations that is clearer as a matter of trial-level application and appellate procedure, and also fairer and more protective of the rights of the parties involved.

INTRODUCTION

Among the most foundational ideas of the American criminal justice process are two discrete notions: 1) the prohibition on "trial by character"; and 2) the right of a criminal defendant to present a complete defense. Can these ideas ever be at odds with one another? As with many conceptual questions regarding criminal justice, the answer is complex though it probably does not need to be. This Comment considers the interplay between Federal Rule of Evidence 404[1]—the substantive evidentiary protection concerning the former notion—and the constitutional right to a complete defense, which is the legal epitome of the latter. As will be shown, in certain evidentiary circumstances overreliance on the unclear and counterintuitive jurisprudence that has grown around Rule 404(b)[2]—which involves a notorious "other purpose" exception to Rule 404's general character evidence protections—has had the perverse effect of hindering the rights of criminal defendants in evidentiary matters related to the full presentation of their own defense. Thus, the discrete foundational notions described above can—and do—chafe with one another in criminal trials. This Comment seeks to describe and assess this problem, before gesturing towards a clearer path that might ensure an end to the unnecessary tension between Rule 404 and a defendant's right to present a complete defense.

To help illustrate the general parameters of the issue, throughout this Comment I will refer to and analyze the recent Tenth Circuit decision in *United States v. Tony*.[3] In January 2020, the Tenth Circuit Court of Appeals handed down its decision in *Tony*, reversing the New Mexico District Court's first-degree murder conviction of defendant Brian Tony and remanding his case for a new trial. The basis for this reversal was evidentiary: at the pretrial stage, the District Court had erroneously excluded evidence that Mr. Tony argued was important for his denial of premeditation and his claim of self-defense. The evidence in question was that the victim was (allegedly) under the influence of methamphetamine at the time of his fatal encounter with Mr. Tony, and thus more likely to act "erratically and violently."[4] Mr. Tony had sought to introduce this evidence under Federal Rule of Evidence 404(b), as non-propensity evidence of the victim's "other acts" that would help to prove his intent to seriously harm Mr. Tony during their altercation. This use of Rule 404(b)—by defendants instead of prosecutors—is often referred to as "reverse" 404(b), and currently there exists disagreement among federal circuits and state courts as to whether such evidence should be held to the same admissibility standards as prosecutor-introduced 404(b) evidence in criminal trials. Without addressing the evidence's "reverse" quality, in excluding the evidence the District Court simply claimed that Mr. Tony had failed to identify a proper purpose for the evidence under 404(b). According to the Tenth Circuit, this ruling was clearly

1. FED. R. EVID. 404.
2. FED. R. EVID. 404(b).
3. 948 F.3d 1259 (10th Cir. 2020).
4. *Id.* at 1261.

erroneous based on the record (evidence to show intent *is* a permissible "other purpose" under 404(b)), and because the conviction could not be upheld on alternative grounds, the court reversed the conviction.

At the risk of stating the seemingly obvious, appellate court reversals of lower court convictions are generally good news for criminal defendants. At the very least, they are good news for the defendant whose conviction was on appeal! In a similar vein, it may seem unexpected that a Comment concerned with the trial rights of criminal defendants begins with a critical discussion of a case in which a criminal defendant had his conviction overturned. However, in the fickle realm of evidence law in criminal trials—where admissibility standards are (mostly) uniform for prosecution and defendants—a "good" ruling in your favor today can become a "bad" ruling against you tomorrow (whatever side you are on). Sometimes, after taking a closer look, "good news" in the form of an evidentiary ruling takes on a more ambiguous character.[5] In what follows, I discuss the specifics of the 404(b) ruling in *Tony*, before diving deeply into the ambiguity of this ruling—and this Rule. After commenting on *Tony* and its possible implications, I discuss and assess an underutilized and often-dismissed (if not completely novel) means by which 404(b)-type evidence[6] can be introduced in criminal trials: via an affirmative constitutional argument for evidence admissibility under the Compulsory Process Clause of the Sixth Amendment. In short, this Comment will proceed in two parts: the first descriptive and critical (discussing *Tony* and the dynamics of Rule 404(b) and "reverse" 404(b) in the Tenth Circuit) and the second prescriptive, aspirational, and doctrinal (on the possible constitutional approach to admissibility of this kind of evidence).

The title of this Comment is slightly facetious. I very much appreciate and recognize that the types of evidence that I describe here are (and should be) dealt with in part by notions that are firmly within the purview of "Evidence Law" as it is traditionally conceived and taught doctrinally. That is, notions of relevance, probative value, and cumulativeness have a central role to play in my analysis of defendant-proffered 404(b)-type evidence. However, my point is that in criminal cases the admission of certain types of defendant-proffered exculpatory evidence should not have to fit squarely into a rule of evidence—Rule 404—that was plainly not designed or theorized with such evidence in mind. To confine this type of evidence to the conceptual narrowness of this Rule, and the whims of its increasingly muddled and controversial application, threatens to trivialize the central role that this

5. As an early clarificatory note, I wish to emphasize that this Comment is in no way critical of any strategy undertaken by the attorneys that advocated on behalf of Mr. Tony at either the trial or appellate level—attorneys for whom I have nothing but the highest respect. Rather, my discussion takes this case as an instructive starting point for a theoretical discussion regarding a specific evidentiary circumstance and uses the case's facts and posture to demonstrate the (potential) viability of an alternative approach in such situations going forward.

6. By "404(b)-type" evidence (and later "reverse" 404(b)–type evidence), I refer generally to evidence that counsel would ordinarily seek to admit under the "another purpose" exception to Rule 404(b)'s general ban on "Crimes, Wrongs, or Other Acts" evidence to show that a person acted in conformity with the character/propensity that this evidence suggests. I am aware that this metonym is technically imprecise: this type of evidence—more specifically—is really "404(b)(2)-type" evidence. However, in the interest of simplicity I have followed the general practice in the scholarship of referring to the type of evidence allowed under 404(b)(2) as "404(b)" evidence.

type of evidence often[7] plays in the ability of criminal defendants to present a complete legal defense to the charges of which they are accused. Simply put, in certain situations (like Mr. Tony's) criminal defendants should not have to rely on 404(b) alone to secure the admission of their evidence—regardless of whether the Rule functions to exclude the evidence or whether the infamous permissiveness of the Rule ultimately secures its admission (as was the case in *Tony*). Rather, the constitutional approach to the admission of such evidence advocated by this Comment allows a more comprehensive and coherent understanding of this type of evidence and its role in criminal trials, and also ameliorates many of the procedural difficulties that have arisen when such evidence is conceived solely as an "evidence law issue" without constitutional implications. In this vein, aside from this Comment's main aim of making a pragmatic litigation-oriented suggestion regarding trial tactics for criminal defendants, it also seeks to add to recent scholarship concerned with theorizing the intersection between evidence law and constitutional law.[8]

This Comment is organized as follows. Part I.A describes in detail the procedural and evidentiary issues on appeal in *Tony*, and the circuit court's rationale for reversing Mr. Tony's conviction. Part I.B discusses the scholarship around Rule 404(b) in general, the Tenth Circuit's approach to Rule 404(b) and "reverse" 404(b) evidence, and also highlights the lack of clarity and uniformity that the current approach to such evidence invariably begets. In addition, I discuss the main reasons why sole reliance on "reverse" 404(b) evidence is inadvisable for criminal defendants in such situations as a matter of trial practice.

Part II.A then moves on to an assessment of a constitutionally-based alternative means to evidence admissibility in "reverse" 404(b)–type situations in criminal trials, and begins by discussing the legal grounds for the Compulsory Process Clause approach anchored in Sixth Amendment principles and Supreme Court case law. Part II.A also outlines potential principles that might clarify and delineate the scope of this constitutional approach, as well as anticipating some basic critiques to this approach. Part II.B gives a basic outline of how this theory might apply given current case law in the Tenth Circuit and the New Mexico state courts. The Comment then briefly concludes by summarizing this approach and reflecting on the possible future implications of reframing "reverse" 404(b) in the manner suggested.

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7. As will be discussed, my claim is not that *all* "404(b)-type" evidence offered by criminal defendants is central to these defendants' ability to present complete defenses, and neither does *all* such evidence rise to the level of possible constitutional implication. The aim of Part II.A of this Comment is to offer some guidance about the source and scope of this right, thus providing more specific guidance regarding parameters of possible application. *See infra* Part II.A.

8. *See* Brandon L. Garrett, *Constitutional Law and The Law of Evidence*, 101 CORNELL L. REV. 57 (2015) (noting that the intersection of the Constitution and the law of evidence has—on the whole—not been the subject of judicial standards or academic commentary and calling for a renewed approach to the conceptualization of this intersection).

I. *United States v. Tony* and a Critical Evaluation of Rule 404(b) and Its Application to Criminal Defendants

A. United States v. Tony

In the early hours of May 9, 2016, during a late-night altercation at a remote area of the Navajo Nation northeast of Gallup, New Mexico, Brian Tony killed Pat Garcia. At trial, the prosecution and Mr. Tony offered widely divergent accounts of the early morning's events—both acknowledged that a fight had taken place that ended in Mr. Garcia's grisly death by blunt force and multiple stab wounds but agreed on little else. The prosecution's theory of events suggested that Mr. Tony had driven Mr. Garcia to the remote area with the premeditated intention of killing him there because the latter had earlier stolen some tools from him.[9] Further, the government argued that Mr. Tony had initiated the deadly encounter by striking Mr. Garcia in the head with a hammer after he had parked his car in the isolated darkness.[10]

At trial, the defense offered a version of events that suggested Mr. Garcia was the initiator of the altercation, and further that Mr. Garcia had "brought a knife to a fistfight"—thus escalating the level of violence far beyond what Mr. Tony believed was simply a "hand-to-hand" encounter to settle a dispute between friends.[11] On the stand at trial, Mr. Tony repeatedly claimed that he had pleaded with Mr. Garcia that they finish their fight without weapons—as a "fair fight."[12] However, according to Mr. Tony, despite these pleas Mr. Garcia persistently and aggressively came at him with the hammer and a large bowie knife,[13] and also continually shouted that he was going to kill Mr. Tony.[14] According to the defense's theory, although Mr. Tony was unarmed at the outset of the fatal encounter,[15] he took Mr. Garcia's bowie knife from him during the scuffle and killed him with it.[16]

Although there were definite inconsistencies in various versions of Mr. Tony's pretrial account of the evening's events, the version offered in his trial testimony was corroborated in part by various pieces of admitted evidence. For one, not only was the knife used in the murder agreed to belong to Mr. Garcia, but during the altercation Mr. Tony himself suffered a severe stab wound to his left forearm—a deep wound "at the level of the bone" that required emergency surgery.[17] Further, a prosecution witness also testified that, following the events of the evening, Mr. Tony had many smaller knife wounds as well as blunt force injuries to his head and torso, indicating a two-sided struggle and defensive injuries.[18] Finally, photos of a large rock—which Mr. Tony claimed he used to defend against Mr. Garcia's lunges

9. Trial transcript, vol. 2 at 20, No. 16-CR-2904-MV, 2018 WL 501561 (D.N.M. 2018) [hereinafter Trial transcript].

10. *Id.* at 19.

11. Trial transcript, vol. 4 at 9. *See also id.* at 93 (Mr. Tony's testimony).

12. *Id.* at 93, 89–116.

13. Trial transcript, vol. 2 at 54.

14. *See* Trial transcript, vol. 4 at 205 (Mr. Tony on cross); vol. 2 at 97–107 (Mr. Tony on direct).

15. Trial transcript, vol. 4 at 205.

16. *Id.* at 115.

17. Trial transcript, vol. 2 at 183–86; vol. 2 at 184 (for bone quote).

18. *Id.* at 136–42.

with the bowie knife—show what appear to be knife marks consistent with this proffered version of events.[19]

However, perhaps most important of all—at least for the purposes of this Comment—is what evidence *did not* come in at trial to support Mr. Tony's version of events. After Mr. Garcia's body was discovered the next morning by a goatherd tending to his trip,[20] the police discovered suspected methamphetamine in a small metal container found on Mr. Garcia's person.[21] Further, the autopsy analysis of Mr. Garcia found that his blood contained both methamphetamine and amphetamine.[22] In an attempt to keep this evidence from coming in at trial, the government filed an omnibus motion *in limine* to exclude any and all methamphetamine-related evidence from the trial because it was inadmissible character evidence.[23] In his response, Mr. Tony argued that this evidence was important not for character purposes, but rather that alongside other "evidence regarding the effects of methamphetamine on human behavior"[24] the meth evidence would be used to bolster the self-defense claim by showing that "meth is one of those drugs that makes people do irrational and sometimes highly violent things."[25] In short, according to Mr. Tony, the meth evidence was relevant not because of what it said about Mr. Garcia's character based on "other acts," but rather because it offered insight into the aggressive and violent intent of Mr. Garcia during their altercation in the early morning hours of May 9.

Nevertheless, the trial court granted the government's motion *in limine* to exclude the methamphetamine evidence on the grounds that Mr. Tony had failed to identify a "permissible purpose for the introduction of specific instances of prior bad acts" under Federal Rule of Evidence 404(b).[26] The court did not discuss on the record that the evidence was potentially prejudicial and thus excluded under Rule 403,[27] rather simply that no proper purpose had been identified by defense counsel

19. Trial transcript, vol. 5 at 77. Interestingly, law enforcement did not collect the rock during their initial sweep of the crime scene—it was only photographed. Regarding this fact, during the closing statement at trial, defense counsel noted: "So it's the one really good piece of evidence for Brian [Tony] was not collected by the Government [sic]. It was left to sit in that ravine, to be covered with snow and rain and wind and dirt and monsoon floods to go through there [sic]. And so Brian has to rely on those pictures, when the very first person who was on the scene, Special Agent Trant, or any of those other police officers could have collected that as evidence." *Id.* at 79.

20. Trial transcript, vol. 2 at 20.

21. Trial transcript, vol. 1 at 17.

22. *Id.* at 19.

23. *See id.* at 26.

24. *Id.* at 49–50.

25. Trial transcript, vol. 4 at 15.

26. Trial transcript, vol. 1 at 258; FED. R. EVID. 404(b). Rule 404 deals with the basic approach to character evidence in the Federal Courts, and subsection (a) of the Rule notes that "[e]vidence of a person's character or character trail is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Rule 404(b), however, notes an important nuance to this general rule: that evidence of more specific "Crimes, Wrongs, or Other Acts" "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." For a full discussion of Rule 404(b) and its use by criminal defendants, *see* discussion *infra* Part I.B.

27. Federal Rule of Evidence 403 reads, "[t]he 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

under 404(b). As the trial transcript shows, during the jury proceedings the judge required defense counsel to phrase certain witness questioning in such a way as to avoid the subject of Mr. Garcia's possession of methamphetamine on the evening of his death.[28]

The jury trial took place over five days during the final week of September 2017. At the conclusion of the trial, the jury deliberated for over four hours on Friday afternoon before sending a note to the judge saying "we cannot reach consensus."[29] After another nearly five hours of deliberation on Saturday morning, the jury sent a note to the judge requesting details on self-defense law, to which the judge instructed the jury to rely on the instructions given.[30] Ultimately, after another three hours, the jury announced its verdict rejecting Mr. Tony's self-defense argument and finding him guilty of murder in the first-degree under 18 U.S.C. Section 1111(b).[31] District Judge Martha Vásquez sentenced Mr. Tony to life imprisonment.[32]

It is important to note the possible implications of the excluded methamphetamine evidence and the centrality of such evidence to Mr. Tony's self-defense theory. The basic narrative of the defense sought to depict Mr. Garcia as aggressively bellicose and unwilling to respond to Mr. Tony's verbal pleas that they fight without weapons. As a result, evidence that Mr. Garcia may have been under the influence of *any* mind-altering substance would surely have been relevant in support of this account. Further—as argued by Mr. Tony on appeal—methamphetamine's particular "tendency to induce violent behavior" is (potentially) a matter of "common knowledge."[33] In any case, the excluded evidence surely would have been important in determining the credibility of Mr. Tony's self-defense account—a point which the jury appears to have considered closely (given the long deliberation and the specific question on self-defense law).

On appeal, a three-judge Tenth Circuit panel reversed Mr. Tony's conviction and remanded the case for a new trial.[34] The basis for this reversal was that the methamphetamine evidence was excluded "for a reason unsupported by the record"—in essence, the district court's 404(b) ruling was based on a clearly erroneous understanding of how this evidence could be accommodated within the language of the Rule.[35] Because the evidence was originally proffered under a proper

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the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

28. *See* Trial transcript, vol. 2 at 63–64, 263–64, 402–05 (transcribing bench conferences in which the judge warns defense counsel to steer away from questioning that might lead witnesses to "blurt out" information about the excluded meth evidence).

29. Trial transcript, vol. 1 at 309.

30. *Id.* at 310.

31. United States v. Tony, No. 16-CR-2904-MV, 2018 WL 501561 (D.N.M. Jan. 19, 2018).

32. Trial transcript, vol. 1 at 347.

33. Brief for appellant at 30, United States v. Tony, 948 F.3d 1259 (10th Cir. 2020) (No. 18-2182).

34. United States v. Tony, 948 F.3d 1259, 1261 (10th Cir. 2020).

35. *Id* at 1261–64.

understanding of 404(b), and the conviction could not be affirmed under any alternative grounds,[36] the panel was forced to reverse and remand.

At this point, it would seem that any miscarriage of justice caused by the lower court's ruling was ameliorated by the circuit court reversal. That is, the lower court excluded important and potentially exculpatory evidence based on a poor reading of the record (and perhaps the applicable Rule of Evidence), and the Circuit Court corrected the error by reversing the conviction and remanding for a new trial. What remains for analysis? As will be discussed in section I.B below, it is not the *result* of the proceedings that this Comment seeks to discuss and critique, but rather the *means* by which this result was achieved.[37] Mr. Tony's case serves as an important illustration of the perils of defense-offered 404(b) evidence, even when (as occurred here) this trial tactic ultimately facilitates the introduction of such evidence. To understand these perils, we must take a closer look at Rule 404(b)—its various modes of application, rationales, surrounding case law—and consider whether this Rule (in its current form) is the most appropriate vehicle for the introduction of exculpatory evidence that is central to criminal defendants' complete defense.

B. The Law Surrounding Rule 404(b), "Reverse" 404(b), and the Problems Therein

During the Tenth Circuit oral argument in Mr. Tony's case, when the court was assessing the possible admissibility of the methamphetamine evidence, Judge Bacharach asked the government counsel whether it mattered that the evidence at issue was "reverse" 404(b) evidence.[38] The judge explained that when 404(b) evidence is introduced by the defendant, this "reverse" situation "typically gives rise to a more forgiving standard."[39] As will be discussed below, the answer to Judge Bacharach's question—whether the "reverse" quality of the evidence *mattered* in Mr. Tony's case—is somewhat unclear. Because "reverse" 404(b) standards (where they exist) are judge-made and find no grounding in the plain language of the Rules of Evidence themselves,[40] it can occasionally be difficult to discern *when* they affect judicial decisions. However, before addressing these concerns in more detail, it is important to discuss more general information about Rule 404(b) itself: what it is, how it operates, and some of the scholarly criticism surrounding its use. By

36. The Tenth Circuit noted that the methamphetamine was not *per se* admissible—that is, the district court could have exercised its discretion to exclude the evidence under Rule 403, or due to the lack of a foundation in expert testimony to support the inference that meth induces violent behavior. So, although "the district court has discretion to decide whether the evidence was relevant or required expert testimony, the court never exercised that discretion. So we can affirm on alternative grounds only if it would have been an abuse of discretion to permit the introduction of the evidence." *Id.* at 1263 (citation omitted).

37. Again, as was stated in note 5, I wish to reiterate that my discussion is not intended to be a condemnation of the trial or appellate strategy of any of Mr. Tony's lawyers. My critical discussion is directed at the Rules themselves (and Evidence Law more generally), not at any attorney that uses current evidentiary practices to effectively advocate for their particular client.

38. Oral Argument at 27:04, United States v. Tony, 948 F.3d 1259 (10th Cir. 2020) (No. 18-2182), https://www.ca10.uscourts.gov/oralarguments/18/18-2182.MP3.

39. *Id.*

40. *See generally* ROGER C. PARK, DAVID P. LEONARD, AVIVA A. ORENSTEIN, DALE A. NANCE & STEVEN H. GOLDBERG, EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 7.12, 286 (4th ed. 2011) (discussing "reverse" 404(b)).

understanding the context of the Rule and its application, we can more coherently speak about some of the complexities and issues regarding its "reverse" operation by criminal defendants.

1. Rule 404(b), A Brief Account

Broadly speaking, the central declaration of Federal Rule of Evidence 404—that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait"[41]—reflects the American legal aversion to "trial by character" and is largely a (liberalized) codification of synthesized common law on the subject.[42] In essence, Rule 404 as a whole prohibits introduction of evidence of a person's disposition or past uncharged crimes or "other acts" to show that this person acted in conformity with this disposition (or the disposition implied by the uncharged/unconvicted crimes or "other acts") during the particular event subject to litigation.[43] The rationale for this rule—especially as it relates to criminal trials—is usefully summed up by Judge Charles Clark's oft-cited remark that "[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not who he is."[44]

Rule 404(b)(2), however, provides that some evidence that might initially appear inadmissible under the general notion underlying Rule 404 may be admissible in certain circumstances: provided it is not being introduced to show character or propensity, but rather for "another purpose."[45] The text of Rule 404(b)(2) expressly allows evidence of crimes, wrongs, and other acts—not to prove character or disposition—but rather to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[46] For example, say a defendant is charged with murder, and the murder weapon was a knife known to have been stolen from a sporting goods store a week earlier. Under 404(b)(2), evidence that the defendant stole the knife from the store would be admissible in his trial for murder, not to show his character (as a thief) or propensity (to commit murder), but rather to show his *preparation* for the murder for which he is presently on trial.

Although parties seeking to use this 404(b) exception as a vehicle for evidence admissibility must formally identify a proper non-propensity purpose for

41. FED. R. EVID. 404(a).

42. *See* Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1467 (1985) (noting the Federal Rules' liberalization of some evidentiary standards—including those regarding character evidence—as well as describing the common law approach to the "uncharged misconduct" doctrine); 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5232 (1978) (describing how the Rules codified the common law rules around character evidence with some noted alterations).

43. PARK ET AL., *supra* note 40, at § 7.01, 231.

44. United States v. Myers, 550 F.2d. 1036, 1044 (5th Cir. 1977).

45. FED. R. EVID. 404(b)(2).

46. *Id.* Compare the specificity of "crimes, wrongs, and other acts" evidence of 404(b) with the more general evidence prohibited by Rule 404(a): "[e]vidence of a person's character or character trait." FED. R. EVID. 404(a).

the evidence,[47] almost immediately after the enactment of the Federal Rules scholars and commentators began voicing concerns that Rule 404(b) was too permissive; i.e., it often effectively allowed character evidence but simply under another name.[48] Indeed, apparently *contra* the common law approach to such evidence,[49] many courts, including the Tenth Circuit, view Rule 404(b) as a rule of "inclusion, rather than exclusion."[50] That is, unlike under the pre-Rules common law uncharged misconduct doctrine (where evidence of uncharged crimes or other bad acts was only allowed in under narrow "previously approved pigeonhole[s]"[51] such as intent, motive, and identity), "the inclusionary approach identifies only one *verboten* theory: attempting to support a general inference of bad character."[52] It is important to emphasize that the distinction between an exclusionary and an inclusionary approach to Rule 404(b) is more than simply semantic: following the inclusionary approach, courts have explicitly held that the "standard for satisfying Rule 404(b) is *permissive*."[53] Under the inclusionary approach, the list of proper purposes under 404(b)(2) (motive, opportunity, intent, preparation, etc.) "is illustrative, not exhaustive."[54] Thus, so long as the "purpose" identified for the evidence can be argued under *any* non-propensity theory, and the evidence passes the admission-friendly weighing of Rule 403,[55] the evidence should be admitted.

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47. *See, e.g.*, United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014) (noting that the first step in determining admissibility under 404(b)(2) is that "the proponent must identify a proper 404(b) purpose for admission (such as knowledge or intent) that is 'at issue' in, or relevant to, the case.").

48. *See generally* Imwinkelried, *supra* note 42 (portending the possible problems with the interpretation of the Rule in the early years of its application); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged misconduct to Prove* Mens Rea*: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J 575 (1990) (reaffirming his earlier prediction with more evidence); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence,* 17 REV. LITIG. 181 (1998) (arguing that—despite its apparent purpose—Rule 404(b) does not have the effect of banning propensity reasoning at all); Daniel J. Capra & Leisa L. Richter, *Character Assassination: Amending Rule 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 772 (2018) (noting that a cavalier approach to admissibility under the Rule has substantially undermined the prohibition against character evidence).

49. *See generally* Thomas J. Reed, *Admission of Other Criminal Act Evidence After the Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113 (1984) (outlining the move from the more restrictive "exclusionary" common law approach to the uncharged misconduct doctrine to the permissive "inclusionary" approach increasingly favored under the Rules).

50. United States v. Smalls, 752 F.3d 1227, 1337 (10th Cir. 2014) (quoting United States v. Segien, 114 F.3d 1014, 1022 (10th Cir. 1997)).

51. Imwinkelried, *supra* note 42, at 1468.

52. *Id.* (emphasis in original).

53. United States v. Parker, 553 F.3d 1309, 1314 (10th Cir. 2009) (emphasis added).

54. United States v. Tan, 254 F.3d 1204, 1208 (10th Cir. 2001).

55. *See* FED. R. EVID. 403 (noting that the possible risks associated with the admission of a given piece of evidence—unfair prejudice, confusing the issues, misleading the jury, etc.—must "*substantially* outweigh" the evidence's probative value) (emphasis added); United States v. Moore, 732 F.2d 983, 989 (D.C. Cir. 1984) ("The language of [Rule 403] tilts, as do the rules as a whole, toward the admission of evidence.").

This means that although character or propensity evidence is not allowed (except under the named exceptions in 404(a)(2)),[56] evidence of particular "Crimes, Wrongs, or Other Acts" is to be *permissively* allowed provided counsel can fashion a plausible non-propensity purpose for its introduction from any number of possible theories indicated by the "not exhaustive" list. And given that determining the line between a propensity and a non-propensity purpose for the introduction of a piece of evidence is a deeply vexed and philosophically debatable enterprise,[57] the inclusionary approach and the ease of evidence admission under Rule 404(b)—along with the controversy it begets—has led to the Rule becoming "the most frequently utilized and cited rule of evidence, and 'has generated more published opinions than any other subsection of the rules.'"[58]

2. "Reverse" 404(b) and Its Problems

Much of the proceeding discussion—and indeed much of the scholarly literature on Rule 404(b)—implicitly or explicitly imagines evidence introduced *against* defendants under the Rule when considering its purposes and the perils of its form and application. That is, these discussions usually describe and critique the practice of prosecutors using the permissiveness of the modern inclusionary approach to 404(b) in order to secure the admission of incriminating evidence that would otherwise be inadmissible due to character or propensity inferences. But, as noted above, the plain language of the Rule does not specify which party may proffer evidence based on its requirements. The text of 404(b) says "[e]vidence of a crime, wrong, or other act is not admissible to prove a *person's* character,"[59] not "a *defendant's* character." Further, unlike 404(a), which provides three explicit exceptions applicable in criminal cases (two of which explicitly give criminal defendants the option to introduce certain types of otherwise inadmissible evidence), 404(b) contains no such exceptions.[60] Due to this incongruity of subsections (a) and (b), many courts understand that the drafters of the Rules intended to have 404(b) apply uniformly to any party in any case, either civil or criminal.[61]

However, as many commentators have noted, defendant-proffered 404(b)-type evidence does not—strictly speaking—present any danger of "trial by

56. Subsection 404(a)(2) provides exceptions to the character rules of 404(a), and these exceptions offer certain criminal trial situations in which defendants and/or prosecutors may offer character evidence in certain proscribed circumstances and given certain parameters. For example, "a defendant may offer evidence the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." FED. R. EVID. 404(a).

57. *See* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 786 (2013) ("[T]he distinction between legitimate 'propensity free' inferences from character evidence and disfavored propensity uses is far from clear and is difficult to apply. Many of Rule 404(b)'s admissible uses of character evidence are more or less dependent on propensity inferences. The state of mind exceptions (motive, intent, plan), for example, often involve propensity inferences to one degree or another and sometimes these inferences are necessarily based on the defendant's character.").

58. Capra & Richter, *supra* note 48, at 771.

59. FED. R. EVID. 404(b) (emphasis added).

60. FED. R. EVID. 404(a). *See also supra* note 56.

61. *E.g.*, United States v. Lucas, 357 F.3d 599, 606 (6th Cir. 2004) (arguing the committee commentary of rule 404 supports that the same admissibility analysis should apply regardless of whether the moving party is the government or the defendant).

character," and thus the chief underlying rationale of 404 evidence in general is "muted" if not extinguished.[62] In essence, this is because the "character" of third parties/victims cannot be "on trial" as they are not in a position to be convicted of anything at all (i.e., they will not be deprived of their liberty regardless of what the fact-finder thinks of them). Put another way, when defendants introduce evidence under the Rule, the evidence is almost always going to be evidence against a party who has not been criminally charged,[63] and thus the type of prejudice this individual might face in the eyes of the fact-finder appears to be different not only in degree but in kind.[64] This is the most basic and obvious problem with "reverse" 404(b) evidence: namely, it does not implicate the fundamental trial interests that the Rule ostensibly was designed to protect.[65] Owing in large part to a recognition of this somewhat intuitive fact, shortly after the enactment of the Federal Rules of Evidence in 1975, circuit courts began explicitly relaxing their rules for defendant-introduced 404(b) evidence, or even questioning whether application of the rule was appropriate in such circumstances.[66]

While the lack of a clear logical foundation for the Rule as it applies to defendants may be the chief conceptual problem with reverse 404(b) evidence, it is not the only problem. As the previous subsection demonstrates, the permissiveness of Rule 404 with respect to otherwise inadmissible evidence has been the subject of a great deal of broadly defense-oriented criminal law scholarship.[67] Given this line of criticism, it should be apparent that the question of admissibility standards for "reverse" 404(b) evidence has the potential to put defense counsel in a somewhat uncomfortable position—a kind of advocate's Orwellian doublethink. Namely: if in the course of your representation of defendants you generally argue that current approaches to Rule 404(b) evidence have effectively swallowed the character rule

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62. PARK ET AL., *supra* note 40, at § 7.12, 286.

63. There may be possible narrow circumstances in which evidence is offered against a codefendant, but then there exists a question about whether the situation is really "reverse" 404(b) at all, given that it begins to look more like conventional 404(b) evidence as the evidence *is* being introduced against a defendant.

64. It should be noted, however, that although the worry about "trial by character" is usually inapplicable, there still may be reasons to be concerned about "tainting" the victim in cases—like Mr. Tony's—where the defendant's 404(b) evidence is offered against a victim in a violent encounter. This Comment discussed these concerns in more detail below. *See* discussion *infra* notes 178–81 and accompanying text.

65. *See, e.g.*, United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979) (noting that "[t]he extrinsic acts rule is based on the fear that the jury will use evidence that the defendant has, at other times, committed bad acts to convict him of the charged offense").

66. *See, e.g.*, United States v. McClure, 546 F.2d 670 (5th Cir. 1977) (noting that strict standards to admissibility for prosecution-proffered 404(b) evidence to not prejudice defendant do not apply and thus should not loosened in defendant-proffered situations); United States v. Krezdorn, 639 F.2d 1327, 1333 (11th Cir. 1981) (stating that "[w]hen the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable"); United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) (noting the important fact that defendant introduced 404(b) evidence is often used defensively, not offensively: "we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword"); United States v. Stevens, 935 F.2d 1380 (3rd Cir. 1991) (same, and apparently the first time such evidence was referred to as "reverse" 404(b) evidence).

67. *See supra* note 48 and accompanying text.

due to a perversion of the Rule's originally exclusionary purpose, how should you approach the question of what standards should govern the analysis for admission when *defense* evidence is introduced under the Rule?

First, although there appears to be a simple solution to this potential defense counsel "doublethink," this problem is more difficult to overcome than it initially appears. The easy response is simply that it is the duty of defense counsel to zealously advocate for their *particular* client—and not "defendants" generally—and so the fact that you might argue for an inclusionary interpretation of 404(b) one day (in a "reverse" 404(b) situation) and an exclusionary the next (when the government is offering evidence *against* your client under the Rule) is not "doublethink" at all—it is simply being a good defense attorney.

On the level of an individual client, this is of course true. However, because of the vast differences in institutional incentivizing that exist in the criminal law context—i.e., the prosecution does not have any individual "client" in the way a defense counsel does and thus the former can/should operate with an eye to the "administrative adjudication" concerns of future litigation and large-scale policy concerns[68]—what we might conceptualize as "criminal defense interests" are often (particularly in the case of evidence law) going to be susceptible to this "particular client" critique. Nevertheless, this does not mean that such interests do not exist. It is perfectly plausible to suggest that more case law affirming the inclusionary approach to 404(b)—whether it concerns defense- or prosecution-proffered evidence—will function to further entrench this inclusionary approach across the board through the process of the standard common law process of confirmation by repetition. Therefore, especially in jurisdictions that treat 404(b) evidence admissibility in a uniform manner no matter who is the moving party, it is entirely possible (or even likely) that defense arguments for the inclusionary approach to 404(b) evidence will function to further expand 404(b)'s "exception" to the character evidence rule and continue the trend that federal courts will play "fast and loose with other act evidence."[69]

Obviously, neither of these conceptual problems with "reverse" 404(b) evidence—the lack of a logical foundation and the incentivizing defense attorneys to advocate for the inclusionary approach—have gone entirely unnoticed by courts. As noted,[70] following the enactment of the Federal Rules of Evidence, several of the early circuit courts that addressed the "reverse" Rule 404(b) question made similar observations. For example, in 1984 the Second Circuit noted that in such circumstances "the risks of prejudice [that underlie Rule 404] are normally absent," and thus "the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense."[71] This kind of reasoning—and variations thereon—have led to a wide variety of what have been elsewhere termed the more "lenient" standards for admission of defendant-proffered

68. Gerard E. Lynch, *Our Administrative System of Criminal* Justice, 66 FORDHAM L. REV. 2117, 2127 (1998). *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (considering various forms of conduct incentivizing in the context of criminal law practice and how these play a role in forming the behavior of various criminal justice actors).

69. Capra & Richter, *supra* note 48, at 831.

70. *See supra* note 66 and accompanying text.

71. *Aboumoussallem*, 726 F.2d at 912.

evidence of prior acts by third parties.[72] These standards range in exact parameters, from the Seventh Circuit approach of holding the Rule fully inapplicable in "reverse" 404(b) situations,[73] to more cautious/nuanced standards like that of the Tenth Circuit (in which the Rule has been held to apply to defense-proffered 404(b) evidence, but with relaxed standards under certain circumstances).[74] Despite their differences, what these various "lenient" Circuit Court standards have in common is their recognition that the application of Rule 404(b) to defendants should not function in *exactly* the same way as it does to the prosecution. Aside from the Second, Seventh,

72. Zachary El-Sawaf, Comment, *Incomplete Justice: Plugging the Hole Left by the Reverse 404(b) Problem*, 80 U. CIN. L. REV. 1049, 1055 (2012).

73. *See, e.g.*, United States v. Reed, 259 F.3d 631, 634 (7th Cir. 2001) ("In deciding to admit ["reverse" 404(b)–type] evidence, a district court should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time and confusion of the issues under Rule 403."). In essence, the sole parameters for evidence according to this approach is the determination of relevance under Rule 401, and the probative-versus-prejudice balancing test of Rule 403. *See id.*

74. *See* United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005). In the Tenth Circuit, while the Rule itself remains applicable to the criminal defendants, the standard for admission of prior *similar* acts is relaxed. *Id.* at 1174–75. That is, when used by prosecutors, the similarity of the prior acts is held to a higher standard of likeness than when prior acts evidence is proffered by defendants: "a lower standard of similarity should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor." *Id.* (quoting United States v. Stevens, 935 F.2d 1380, 1404 (3d Cir. 1991)). *Montelongo* involved defendants who were charged with possession of contraband with intent to distribute when upwards of fifty kilograms of marijuana was found in the sleeping compartment of a semi-truck that they were co-driving. *Id.* at 1171. The owner of the truck sought to testify for the government that he had inspected the truck just before the defendants had picked it up and had found no marijuana inside. *Id.* at 1172. Defendants sought to introduce evidence—under Rule 404(b)—of a prior act of the owner only a few months earlier in which marijuana had been found in the sleeping compartment of a different semi-truck that was owned by the owner/witness. *Id.* at 1176. Given the similarity between the acts, and an apparent endorsement of language regarding "reverse" 404(b) from *Stevens*, the court allowed the evidence and concluded, *inter alia*, that the exclusion on the basis of 404(b) was in error. It is important to recognize, however, that the court's relaxation of "reverse" 404(b) standards appears to be somewhat narrow: because the issues in *Montelongo* were limited to *similar* prior acts—*i.e.*, "identity," "knowledge," or modus operandi 404(b) evidence—it is not entirely clear from the opinion how this "lower standard" would apply to 404(b) cases that do not involve questions of similarity—e.g., "preparation" or "plan" 404(b) evidence. Nevertheless, as Judge Bacharach's comment at oral argument indicates, *see supra* note 39 and accompanying text, it may be that judges and practitioners have read *Montelongo* to mean that the standard for "reverse" 404(b) evidence is lower in *all* 404(b)-type circumstances (not only in similar prior acts). However, while some might hold this view, it should be noted that not all judges and practitioners construe *Montelongo* in this broad manner: in a memorandum opinion from the U.S. District Court for the District of New Mexico, Judge James O. Browning noted that "[t]he Court is not prepared to say that it should adopt a 'relaxed standard [ ] for "reverse" 404(b) evidence' . . . without more explicit direction from the Tenth Circuit. While the Court does, under *United States v. Montelongo*, feel comfortable using a relaxed standard of similarity, the Court believes that the usual standards for rule [sic] 404(b) are necessary." United States v. Moreau, No. CR 07-0388 JB, 2008 WL 2229467, at *13 (D.N.M. Mar. 12, 2008). Thus, although the Tenth Circuit may be broadly categorized in the "lenient" category as it relates to "reverse" 404(b) evidence because it has recognized *some* difference in the Rule's application to criminal defendants, the *Montelongo* approach does not appear to fully endorse the more complete leniency approach advocated by the Seventh Circuit in *Reed*.

and Tenth Circuits, other circuits that apply some version of a lenient "reverse" 404(b) standard include the First,[75] Third,[76] Fifth,[77] and Eleventh[78] circuits.

Opposite these various forms of leniency, the alternative approach is to simply hold that application of Rule 404(b) applies uniformly to any party. As noted, the plain language of the Rule does not indicate any reason to do otherwise. As the Sixth Circuit noted in *United States v. Lucas*, while there may be "some merit" to the lenient approach given the absence of "the primary evil that may result from admitting such evidence against a defendant," ultimately the plain language and stated purpose of Rule 404(b) is that "prior bad acts are generally not considered proof of *any* person's likelihood to commit bad acts in the future."[79] Therefore, the Rule should apply in the same way to whichever party is introducing the evidence against *any* person.[80] In addition to the Sixth Circuit, this approach is explicitly followed by the Ninth Circuit.[81] The remaining circuits have not explicitly addressed the issue, often finding other grounds on which to solve analogous evidentiary issues.[82]

As this brief survey indicates, the circuits clearly lack uniformity in their approaches to the admissibility of "reverse" 404(b) evidence. Like any circuit split, this variability of approach poses some degree of fairness problems: in this case, federal defendants may have vastly different capacities to introduce potentially exculpatory evidence simply by virtue of the court in which they happen to find themselves. As a result of this fairness issue, the currently extant scholarship on "reverse" 404(b) tends to advocate some ideal admissibility standard (usually some version of an approach taken by one of the circuits) and argue for the adoption of this standard across all federal courts.[83] While uniformity would unquestionably be desirable, this solution would not ameliorate all problems associated with "reverse" 404(b).

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75. *See, e.g.*, United States v. Gonzalez-Sanchez, 825 F.2d 572, 582 n.25 (1st Cir. 1987) (holding that the restrictions of Rule 404(b) are "inapplicable" to defendant-proffered evidentiary situations).

76. *See, e.g.*, *Stevens*, 935 F.2d at 1405 ("a defendant mat introduce 'reverse 404(b)' evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations").

77. *See, e.g.*, United States v. Krezdorn, 639 F.2d 1327, 1333 (5th Cir. 1981) ("When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable").

78. *See, e.g.*, United States v. Morano, 687 F.2d 923, 926 (11th Cir. 1993) ("Rule 404(b) does not specifically apply to exclude this [defendant-proffered] evidence because it involves an extraneous offence committed by someone other than the defendant.").

79. United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004).

80. Recall that the text of the Rule says, "not admitted to prove a person's character" not "the defendant's character." FED. R. EVID. 404(b).

81. *See* United States v. McCourt, 925 F.2d 1229, 1232 (9th Cir. 1991) ("Because Rule 404(b) plainly proscribes other crimes evidence of 'a person,' it cannot reasonable be construed as extending only to 'an accused' . . . [t]his reading is consistent with the scheme of the Rules.").

82. *See, e.g.*, United States v. Battle, 774 F.3d 504, 513 (8th Cir. 2014) ("Assuming without deciding that [the defendant's] suggested [lenient] method is correct, we find that the district court did not abuse its discretion in excluding the evidence.").

83. *See, e.g.*, Jessica Broderick, Comment, *Reverse 404(b) Evidence: Exploring Standards when Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U. COLO. L. REV. 587 (2008) (suggesting a standard that would largely conform to the Seventh Circuit approach as described in United States v. Reed, 259 F.3d 631 (7th Cir. 2001)); El-Sawaf, *supra* note 72, at 1066 (arguing for adoption of "the more liberal approach utilized by the Second, Third, and Tenth Circuits").

For one, depending on the approach taken, the more general conceptual concerns associated with 404(b) and its modern inclusionary approach may not be adequately addressed. By way of example, consider the plausible suggestion that all federal courts should simply adopt a more "lenient" standard to the admissibility of "reverse" 404(b) evidence than they do to conventional 404(b) evidence. This approach seems sensible, but recall the underlying problems with Rule 404(b) described above.[84] The current inclusionary approach to permissible 404(b) evidence has had the practical effect in many instances of undermining the general rule against character evidence that is allegedly formalized by Rule 404. Character evidence, so this critique goes, is simply allowed in under the guise of a 404(b) permitted purpose while having the same prejudicial effect on the decision-making tendencies of the fact-finder.[85] So, the suggestion of simply adopting a "lenient" approach to "reverse" 404(b) evidence would run the serious risk of tacitly accepting—for all practical purposes—the inclusionary approach to Rule 404(b) when the Rule is used in its conventional "non-reverse" manner by prosecutors. That is, defendants would still be incentivized to argue for an expansive version of 404(b)'s parameters to get in their evidence. Although in theory a court could adopt an exclusionary posture for conventional 404(b) analysis and an inclusionary one for "reverse" 404(b), in practice this distinction would likely be difficult to cleanly apply and—more importantly—risks making the rule far more complicated than it needs to be.[86]

A second related procedural problem with simply uniformizing a liberal approach with a "lower standard" of some kind is that there may arise confusion about when that lower standard is actually affecting the outcome of a given case. Mr. Tony's case is an instructive example of this kind of danger. Although the evidence that Mr. Tony sought to introduce was unquestionably 404(b) evidence of the "reverse" nature, the Tenth Circuit did not explicitly reach its decision on the grounds of the "lower standard."[87] Despite Judge Bacharach's question at oral argument, the published opinion nowhere indicates that the "reverse" nature of the evidence impacted the court's 404(b) analysis. The silence on this issue begets further 404(b) uncertainty: should the opinion be read to mean that methamphetamine evidence can *always* come in under 404(b) so long as the moving party argues that the drug's tendency to induce violence was part of the user's "intent" to commit some violent act? Or was that evidence (and its concomitant inference) only permitted under the Rule because it was proffered by the defendant? The opinion offers no clues to these questions, and future practitioners will be left without clear guidance on the matter.

It is not the claim of this Comment that either of these problems—incentivizing the inclusionary approach to 404(b) and uncertainty as to when a certain standard is influencing judicial decision-making—are insurmountable obstacles. In theory, if the Supreme Court simply adopted the Seventh Circuit approach, in which Rule 404(b) does not apply at all to defense-proffered evidence applicable to third parties and the evidence is instead assessed solely on the grounds

84. *See* discussion *supra* notes 62–68 and accompanying text.

85. *See supra* note 48 and accompanying text.

86. This Comment aims to offer a less complex and more logical solution to this problem. *See infra* Part II.

87. A standard which, as noted above, is itself potentially contested in terms of scope. *See supra* note 74.

of Rule 401 relevance and Rule 403's probative-versus-prejudice balancing test, both concerns would disappear. If this Comment were restricted to simply making a policy argument about the most advisable alternative to solve the circuit split, this Seventh Circuit model would likely be my recommendation for the approach that the federal courts should adopt and uniformize. Further, I tend to agree with the scholarship that argues that Rule 404(b) should be amended,[88] and an amendment to the Rule could likewise solve many of the current problems that plague its "reverse" application.

Nevertheless, there are two important reasons why this Comment does not simply conclude with these normative policy suggestions. The first is that in an important sense, I believe that even if these hypothetical events—a specific Supreme Court ruling on the circuit split and a clarifying amendment to the Rule—were to come to pass, the simple assessment of (what is now) "reverse" 404(b)–type evidence solely in terms of relevance and 403 balancing still effectively trivializes the central importance that such evidence often plays for criminal defendants. As was true in Mr. Tony's case, "reverse" 404(b)–type evidence might sometimes be so central for the defense's case that its importance to innocence-protection might arguably transcend the kinds of rules and standards used for other kinds of evidence and trigger higher order defense-specific rights of a constitutional order. Following this intuition, the suggestions offered in Part II of this Comment are an attempt to imagine a more complete account of how this evidence might be theorized under a constitutional theory for evidence admission under current law. These suggestions, I submit, would remain pertinent even were the legal landscape around Rule 404 to dramatically change.

Second, and more crucially, because my hope is that this Comment can serve as a guide for criminal litigants in the here and now, I do not wish to simply suggest or endorse possible future changes to the law without offering some kind of plausible litigation strategy that can be put to use under the regime of our current evidence case law. As noted above, part of my aim is to suggest that discussions of "reverse" 404(b) have been unduly restricted to conceptualizing the issue solely within the traditional bounds of evidence law, and that a fuller understanding of the dynamics of many of these evidentiary situations requires an appreciation of the constitutional implications that these situations often evoke. By drawing attention to the notion that "reverse" 404(b) is not (solely) an evidence law issue, I hope to offer a kind of theoretical framework that seeks to reimagine and reformulate a practical legal approach to "reverse" 404(b) evidence.

II. A Call to Revive The Compulsory Process Clause as a Vehicle for "Reverse" 404(b)–Type Evidence Admission

A. A Different Approach: The Compulsory Process Clause of the Sixth Amendment

To avoid the various conceptual and procedural pitfalls associated with Rule 404(b), in many "reverse" 404(b)–type situations the admission of certain forms of exculpatory evidence should be assessed on constitutional terms, as part of a defendant's right to Compulsory Process under the Sixth Amendment of the United

88. *See, e.g.,* Capra & Richter, *supra* note 48, at 771; Imwinkelried, *supra* note 42, at 1467.

States Constitution.[89] Aside from avoiding the possible problems of 404(b), this theory for admission carries additional procedural benefits: a higher standard for error on review,[90] a significant tilting of Rule 403 analysis towards admission due to the weight of constitutional requirements,[91] and a stronger and more workable basis for habeas corpus appeals in the event that the evidence is denied admission and the defendant is convicted.[92] Aside from these practical advantages, constitutional arguments for admission based on the Compulsory Process Clause also have the advantage of conceptual clarity. Unlike the unwieldy efforts to squeeze exculpatory defense evidence past the restrictions of a Rule of Evidence—404(b)—that was not designed or theorized with such evidence in mind, a constitutional theory for admission rooted in a specific Clause in the Bill of Rights takes a high-minded approach to what the Constitution requires of our adversarial criminal justice system: namely, the capacity to defend oneself against accusations of criminal wrongdoing.

Given that the central purpose of this Comment is to help guide approaches to criminal trial practice, the main focus of the following pages will be pragmatically oriented. That is, although some discussion of theoretical or jurisprudential notions is necessary to establish the existence and salience of the right to Compulsory Process and its scope, my aim here is not to cast my lot in with the various academic debates about the meaning of the Sixth Amendment.[93] Rather, I only wish to demonstrate that there currently exists a sufficient foundation—both in the scholarship, but more importantly in the case law—to plausibly argue for the

89. U.S. CONST. amend. VI (guaranteeing that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor").

90. *See, e.g.*, United States v. Beltran-Garcia, 338 F.App'x 765, 773 (10th Cir. 2009) (explaining that in the Tenth Circuit, if a constitutional error is found, the appeals court will reverse unless it determines that the error is harmless beyond a reasonable doubt, while non-constitutional errors are assessed under plain error review); United States v. Riccardi, 405 F.3d 852, 875 (10th Cir. 2005) (explaining that when valid constitutional errors are preserved below, the Government bears the burden to prove that the error was harmless).

91. Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1118 (2013) (arguing that Rule 403 represents an "extra-constitutional system goal," and when "a constitutional provision and an extra-constitutional system goal conflict, then the Supremacy Clause of the Constitution mandates a clear outcome-the extra-constitutional goal must give way.").

92. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 401 (1993) (discussing that independent constitutional violations provide more solid grounding for habeas review than other grounds such as "freestanding claims of actual innocence").

93. In developing my own understanding of the theoretical and historical foundations of the Compulsory Process Clause, I have relied heavily on the seminal work of Professor Akhil Reed Amar in his *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996), as well Edward J. Imwinkelried and Norman M. Garland's treatise EXCULPATORY EVIDENCE (2d ed. 1996), and the earlier foundational articles by Professor Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); *Compulsory Process II*, 74 U. MICH. L. REV. 191 (1975); *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978), and by Professor Robert Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976).

admission of defendant-proffered "reverse" 404(b)–type exculpatory evidence under this constitutional provision.[94]

Despite sometimes being derided as an impractical and analytically meaningless "right"—a sort of "Hail Mary" for defendants who have run out of other ideas[95]—the right to present a complete defense, whether rooted in the Compulsory Process Clause, the Confrontation Clause, or the Due Process Clause(s), has been repeatedly identified and utilized by the United States Supreme Court and many lower courts as a means to allow the admission of defense evidence that has been held otherwise inadmissible for some non-constitutional or extra-constitutional reason.[96] By outlining and offering an analysis of these cases and their rationale, this Comment seeks to offer some general outlines for constitutional arguments for evidence admissibility that can be used by defense counsel in "reverse"404(b)–type situations like Mr. Tony's. Following these general argumentative outlines, I discuss how the framework I suggest may apply to the current Tenth Circuit and the New Mexico case law regarding constitutional arguments for the admissibility of defense evidence. Although my focus is bound to these two jurisdictions, the general approach is likely broadly appropriate in any federal court and may also be applicable in other state courts.

1. The Source of the Right

Historically, courts and commentators have disagreed about both the constitutional source as well as the proper scope of a criminal defendant's right to present defense evidence. Although the Supreme Court has "long interpreted" a constitutional requirement that "criminal defendants be afforded a meaningful opportunity to present a complete defense,"[97] the Court has explicitly expressed uncertainty about where exactly this source is constitutionally rooted.[98] Further,

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94. Of course, this is not to say that I am agnostic about the existence or desirability of this right. As should be clear, I believe the protection of this right—properly and fairly defined—to be desirable on many levels, both as a matter of constitutional requirements but also as a matter of policy/trial fairness.

95. Critics of constitutional theories for evidence admissibility often point towards Justice Scalia's dicta in his plurality opinion in *Montana v. Egelhoff* that "the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." 518 U.S. 37, 42 (1996). In general, this is a misrepresentation of the position of nearly all advocates of evidence admission under any constitutional theory (be it Due Process, or any of the clauses of the Sixth Amendment): in the course of research for this Comment I was unable to find any scholarly commentary or case law proposing an "unfettered right" to offer such evidence. I discuss this common strawman of an "unfettered" right further below. *See infra* notes 159–61 and accompanying text.

96. *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967) (holding that Texas statutes forbidding an accused from calling as a witness any person charged as a principal, accomplice, or accessory in the same crime was unconstitutional); Chambers v. Mississippi, 410 U.S. 284 (1973) (holding that withholding central defense evidence on the basis of a state hearsay rule was unconstitutional); Holmes v. South Carolina, 547 U.S. 319 (2006) (holding that a state court rule that excluded important defense evidence was "arbitrary" and violated defendant's constitutional rights). More discussion of these cases is to follow. *See* discussion *infra* notes 124–47 and accompanying text.

97. California v. Trombetta, 467 U.S. 479, 485 (1984).

98. *See, e.g.*, Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting *Trombetta*, 467 U.S. at 485)).

when recognizing this right, courts are often quick to add a qualification that the right "is not absolute,"[99] though rarely giving any positive or definite indications about its scope. This uncertainty on the part of the Court puts practitioners (and lower courts) in an uncomfortable position: while the existence of right itself is explicitly confirmed and then held applicable or inapplicable in a certain case given a certain set of facts, how are practitioners to argue how this right applies to their facts given the uncertainty around scope and source?[100] While the answer to this question might have different responses depending on the type of evidence offered, for the purpose of this Comment, I focus specifically on a defendant's right to introduce exculpatory "reverse" 404(b)–type evidence to support the defendant's theory, and thus focus our attention on the Compulsory Process Clause contained in the Sixth Amendment.

As noted, in "reverse" 404(b)–type evidentiary situations criminal defendants should rely on the Sixth Amendment's guarantee of Compulsory Process as the constitutional source of their argument for evidence admission. The text of the Clause reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[101] While the ensuing pages elaborate more on the specific meaning of these words and the specificities of the relevant case law, at this point it is worth pointing out some general pragmatic reasons why this constitutional approach is the one advocated by this Comment.

First, it is crucial to stress that although the Amendment explicitly speaks only of compelling "witnesses," the scope of the Amendment is not restricted solely to live human witnesses. Rather, from Chief Justice John Marshall's famous interpretation of the Clause in the 1807 trial of Aaron Burr (discussed below[102]) to the more recent Supreme Court declaration that the Clause establishes "at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial *and* the right to put before the jury evidence that might influence the determination of guilt,"[103] the Clause has been held to apply to certain forms of physical evidence in addition to live human witnesses. In the words of the Tenth Circuit, the Clause's scope as it relates to exculpatory evidence of various forms is "broad."[104] Further, in their historical scholarship on the original understanding of the Clause, Professors Westen[105] and Clinton[106] have argued that this broad interpretation of the Clause accords with the

99. *See, e.g.*, United States v. Serrano, 406 F.3d 1208, 1215 (2005). *See also Egelhoff*, 518 U.S. at 42 (1996) (noting that "the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

100. Indeed, as Mark Mahoney notes in his monograph on the subject, the "primary artifice used to defeat the defendant's right to advance" a theory based on the right to present a complete defense is to argue that the language and holdings of the seminal Supreme Court cases dealing with such right (viz., *Chambers v. Mississippi*, *Washington v. Texas*, or *Holmes v. South Carolina*) should be read narrowly as only applicable to the facts of those cases. Mark J. Mahoney, *The Right to Present a Defense*, ii (2016), https://www.harringtonmahoney.com/content/Publications/Mahoney%20-%20Right%20to%20Present%20a%20Defense%202017.pdf.

101. U.S. CONST. amend. VI.

102. *See* discussion *infra* at note 121 and accompanying text.

103. Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

104. *Serrano*, 406 F.3d at 1215.

105. Westen, *The Compulsory Process Clause*, *supra* note 93, at 95–101.

106. Clinton, *supra* note 93, at 731–39.

original understanding at the time of its adoption. In any case, aside from judicial and historical endorsements, the idea that the Clause applies to more than just human witnesses also is supported by a kind of intuitional logic: as Professor Akhil Reed Amar notes, "[i]f the accused, in order to show his innocence, is generally empowered to drag a human being, against her will, into the courtroom to tell the truth, surely he must also enjoy the lesser-included rights to present other truthful evidence that in no way infringes on another human being's autonomy."[107]

Second, the Compulsory Process Clause is an "affirmative" tool for criminal defendants in a way that few other constitutional trial rights are. The Clause's "affirmativeness" refers to the notion that, unlike the other procedural protections offered by the Sixth Amendment (right to a speedy trial, public trial, counsel, the confrontation clause, etc.) that apply in every case, the Compulsory Process Clause "operates exclusively at the defendant's initiative and provides him with affirmative aid in presenting his defense."[108] The Supreme Court itself has recognized the importance of this distinctive feature of the Clause. The Court's discussion on this point merits being quoted in full:

> Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case. While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present testimony of witnesses provides the defendant with a sword that may be empowered to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct.[109]

In short, the Clause's distinctiveness as an affirmative tool in the defendant's arsenal—a "sword"—singles it out as a natural vehicle for the admission of exculpatory evidence offered by the defendant. Under this theory the defendant need not rely on any particular tactic employed by the government, rather the Clause "comes into play at the close of the prosecution's case."[110]

Third, among the various alternatives for possible constitutionally-based evidentiary approaches, the right to Compulsory Process has the benefit of analytical specificity. Unlike the "less rigid and more fluid" right of Due Process guaranteed by the Fifth and Fourteenth Amendments,[111] the specific requirements of the Sixth Amendment contain the clarity of a text-based requirement and the potential for a more consistent application. That is, while the requirements of "due process" are often conceptually obscure and easily dismissed as highly "subjective" or otherwise vacuous notions,[112] trial notions rooted in specific provisions of the Bill of Rights

107. Amar, *supra* note 93, at 698. Earlier, Professor Westen made a similar point. *See* Westen, *The Compulsory Process Clause*, *supra* note 93, at 149–59.

108. Westen, *The Compulsory Process Clause*, *supra* note 93, at 74.

109. Taylor v. Illinois, 484 U.S. 400, 410 (1988).

110. Westen, *The Compulsory Process Clause*, *supra* note 93, at 74.

111. Betts v. Brady, 316 U.S. 455, 462 (1942).

112. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 860–65 (1998) (Scalia, J., concurring).

are more anchored in historical constitutional tradition and more readily subject to the kinds of meta-interpretive analysis currently in vogue among the courts of the federal judiciary.[113] And while the current Supreme Court case law construing the Clause is somewhat "sparse,"[114] due to the Clause's rootedness in the text of the document—unlike more explicitly judicially-created rights or "subjective" due process notions—a delineation of its scope has the potential to be anchored more "objectively."[115]

These three preliminary features of the Compulsory Process Clause—that it compels both physical evidence as well as live testimony; that it is an "affirmative" tool; and that it is textually grounded in the Bill of Rights—appear to make it a good candidate for advocates looking to address problems regarding the exclusion of potentially exculpatory defense evidence. However, a more complete picture of the Clause requires some discussion of its "sparse" Supreme Court case law, as well as an analysis of what these cases reveal about the capacity of the Clause to fulfill the evidentiary function advocated by the Comment. As will be shown, the Compulsory Process Clause is a kind of logical counterpart to the Sixth Amendment's Confrontation Clause: where the latter provides the criminal defendant's right to confront witnesses *against* her, the Compulsory Process Clause protects the obverse right of the defendant to affirmatively present *her own* witnesses and evidence.[116] While a defendant's constitutionally protected defense "can begin with vigorous questioning of the government witnesses and evidence under the letter and spirit of the Confrontation Clause; . . . it reaches full bloom in the Compulsory Process

113. Whether or not it is true that "we are all originalists [now]"—a phrase commonly attributed to Justice Kagan and repeated by Justice Kavanagh at his confirmation hearing—it seems relatively uncontroversial to assert that text and historical analysis have a particularly central role to play in contemporary constitutional analysis. *See generally* Eric Segall, *We are All Legal Realists Now*, DORF ON LAW (Aug. 26, 2020), http://www.dorfonlaw.org/2020/08/we-are-all-legal-realists-now.html (giving context and commentary to Justice Kagan's famous quip, and discussing originalism as "meta-interpretive theory").

114. Amar, *supra* note 93, at 646.

115. By way of disclaimer, I am personally skeptical (at least as an empirical matter) that the delineation rights that are more plainly rooted in the text of the constitution are any less "subjective" than more conspicuously judge-made rights. However, for the purposes of this Comment, I make this point because I believe that judges—especially lower court judges—are far more likely to be persuaded by arguments based on specific, text-based rights rather than broader notions of a "fair trial" under the Due Process Clause. This intuition may be incorrect but it is not unconsidered or idiosyncratic: this view is also taken by Professor Westen, *The Compulsory Process Clause*, *supra* note 93, at 150 ("A court may be reluctant to reverse a conviction where the defendant complains in general that he was denied a 'fair trial' under the due process clause, and probably will apply a more lenient standard of review in cases in which the defendant complains of a more specific violation."), as well as Mr. Mahoney, *see* Mahoney, *supra* note 100, at 159 ("The use of a specific constitutional provision may genuinely affect the outcome of the case. It has long been clear that the courts will apply less rigorous standards in considering and reviewing 'fair trial' claims of right that in considering a claim of a violation of a specific provision of the Bill of Rights.").

116. *See, e.g.*, Westen, *Compulsory Process II*, *supra* note 93, at 192 (calling the Compulsory Process Clause the "companion and counterpart to the more famous confrontation clause."); Martin A. Hewett, Comment, *A More Reliable Right to Present a Defense: The Compulsory Process Clause After* Crawford v. Washington, 96 GEO L.J. 273, 315 (2007) ("The right to compulsory process is necessarily connected to the right of confrontation.").

Clause."[117] The remainder of this subsection is devoted to a discussion of how the Compulsory Process Clause case law might support such an assertion, and what principles might be derived from an analysis of this case law in helping delineate the scope of the Clause in its modern application.

Despite its conceptual kinship with the Confrontation Clause, the Compulsory Process Clause has not received the same sustained scholarly attention or judicial analysis as its better-known Sixth Amendment companion.[118] During the early years of the Rehnquist Court, the Supreme Court itself has recognized that it had had "little occasion to discuss the contours of the Compulsory Process Clause."[119] While it is difficult or impossible to determine precisely why this is the case,[120] it is important to emphasize that it was not always so. The use of the Compulsory Process Clause as a means for defendants to argue affirmatively for the admission of exculpatory physical evidence played a central role in one of our nation's most-storied trials from the founding generation.

In the 1807 criminal trial of former Vice President Aaron Burr for treason and misdemeanor, Chief Justice John Marshall (presiding as Circuit Justice for Virginia) relied on the broad understanding of the Compulsory Process Clause's power to allow Burr to subpoena—even *before* his grand jury indictment—allegedly incriminating letters sent from General James Wilkinson to President Jefferson outlining Burr's treasonous plot.[121] Deeming the guarantees of Compulsory Process "sacred" to the effective administration of the adversarial criminal justice system, Chief Justice Marshall declared that the Clause "must be so construed as to be something more than a dead letter."[122] Nevertheless, from the Burr trial until the Warren Court, this was essentially the fate of the Clause: it was only cited by the

117. Amar, *supra* note 93, at 698.

118. *E.g.* Westen, *Compulsory Process II*, *supra* note 93, at 193 (describing the Clause as often "overlook[ed]" by courts and law students).

119. Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1987).

120. Professor Westen suggests that the reason may be as simple as that, between the Burr trials (see discussion *infra* note 121 and accompanying text) and the Warren Court (see discussion *infra* note 124 and accompanying text), "because litigants failed to brief the issue, courts reached for other grounds on which to decide cases that warranted compulsory process analysis." Westen, *The Compulsory Process Clause*, *supra* note 93, at 108. Thus, according to this theory, courts simply never had the opportunity to propound standards for the affirmative use of the Clause by defendants. This Comment generally argues that this is still basically the problem for Compulsory Process theories for evidence admission. Because this argument is rarely (if ever) seriously advanced by litigants, courts have not been pressured to give the right the full and thoughtful treatment that is generally thought to be required of Bill of Rights protections.

121. *See* United States v. Burr, 25 F. Cas. 30, 35 (No. 14,692d) (C.C.D. Va. 1807), https://press-pubs.uchicago.edu/founders/documents/a2_1_1s19.html; IMWINKELRIED & GARLAND, *supra* note 93, at 25–27 (providing a concise historical background on evidentiary dynamics of the Burr case). It is also useful to note that in the same opinion, Chief Justice Marshall effectively brushes aside any analytical distinction between human witnesses (spoken about specifically by the Compulsory Process Clause) and "physical witnesses"—evidence like the letters (not spoken about specifically by the Clause): "[t]his court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence [sic]. The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation." United States v. Burr, 25 F. Cas. at 35.

122. *Id.* at 33.

high court five times in this 160-year period—twice in dicta and three times declining to construe it.[123]

After this period in which the Compulsory Process Clause largely vanished from the pages of the federal reports, it reappeared forcefully during the so-called "criminal procedure revolution" of the Warren Court.[124] In the landmark 1967 case *Washington v. Texas*, the Supreme Court held, *inter alia*, that two Texas statutes that prohibited a criminal defendant from calling as a defense witness any charged or convicted coparticipants in the same crime were unconstitutional as applied because they violated the defendant's rights under the Compulsory Process Clause of the Sixth Amendment.[125] In *Washington*, Defendant Jackie Washington had been charged with murder,[126] and his defense theory was that he had not been directly involved in the crime but rather that another man named Charles Fuller had shot the deceased and—further—Washington had in fact tried to talk him out of it.[127] The record of the lower court indicated that Fuller would have corroborated this theory, if not for the state statute that forbade his defense testimony as a codefendant.[128]

Finding it "undisputed that Fuller's testimony would have been relevant and material, and that it was vital to the defense," the Court held that application of the statute in this case would deprive Washington of his right to Compulsory Process as guaranteed by the Sixth Amendment.[129] In language redolent of Chief Justice Marshall a century and a half earlier, Chief Justice Warren stated that a defendant's right to affirmatively present his own defense witnesses was of equal constitutional importance as his right to confront the prosecution's witnesses,[130] and that these two Sixth Amendment rights together established "a fundamental element of due process of the law."[131] Given this constitutional centrality of the Compulsory Process Clause, the opinion continued, the kind of "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief" violated the defendant's constitutionally protected right under the Clause.[132]

For the purposes of this Comment, two important aspects of *Washington* must be emphasized. First is the opinion's notion of "arbitrary rules" preventing the admission of evidence. As will be shown by later cases, "arbitrariness" analysis is an important parameter for the Court in making determinations of constitutional evidence admission in the face of otherwise exclusionary evidence rules. However, it is important to note what the Court means (and does not mean) by "arbitrary" in

123. Westen, *The Compulsory Process Clause*, *supra* note 93, at 108.

124. *See, e.g.*, CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION x–xii (1993) (explaining the use of the term "criminal procedure revolution" to describe "a series of constitutional decisions by the United States Supreme Court during the 1960s that 'revolutionized' the criminal procedure of the states").

125. 388 U.S. 14, 16 (1967).

126. *Id.* at 15–16.

127. *Id.*

128. *Id.* at 16.

129. *Id.*

130. *Id.* at 19.

131. *Id.*

132. *Id.* at 22.

this formulation. As used in *Washington* and subsequent opinions, "arbitrary" does not appear to mean unfounded or wholly irrational. Rather, it is the *application* to the facts that is "arbitrary." While the Court in *Washington* does clearly critique the rule as applied to facts of the case,[133] it does not explicitly find that statute itself to be either facially unconstitutional or entirely bereft of underlying rationale (viz., to prevent perjury resulting from codefendants trying to "swear the other out of the charge"[134]). In other words, the Court takes the view that *in light of* the fact that the evidence was not only "relevant and material" but also constitutionally "vital to the defense," the statute—essentially by contrast—*becomes* "arbitrary."[135] The "arbitrariness" of the exclusionary evidence rule is only arbitrary when compared against the countervailing constitutional argument that seeks to admit the evidence.

The second important aspect is a general theme that undergirds the Court's whole analysis in *Washington* and must serve as a guide for any plausible Compulsory Process Clause analysis: namely, we cannot permit any construction of the Clause that renders it impotent or meaningless. Apparently in response to Texas's argument that the Compulsory Process Clause was not violated because Fuller was technically in the courtroom for Washington's trial (although he could not testify),[136] Chief Justice Warren firmly declared in concluding the opinion that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."[137] Particularly given the highly fact-specific analysis that the Compulsory Process Clause invariably requires (again, courts must consider the proffered evidence *in the context* of the facts and exclusionary rules),[138] the logical force of this common sense argument is crucial to combatting skepticism about the affirmative use of the clause by defendants. These concepts will be further discussed below, but for now I must simply emphasize that central to the result of *Washington* is the notion that the text of the Clause must *mean something*. It cannot be construed so as to be rendered entirely impotent in the face of non-constitutional court rules (whether those of the states or those promulgated by the United States Congress).

The sweeping language of *Washington* led to various other Supreme Court decisions in which exclusionary rules—both statutory and rooted in the common law—were found to violate the constitutional right to present a complete defense.[139] Perhaps the most famous and emphatic of the *Washington* progeny is *Chambers v.*

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133. *Id.* at 19–23.

134. *Id.* at 21 (quoting Benson v. United States, 146 U.S. 325, 335 (1892)).

135. *Washington*, 388 U.S. at 16.

136. *See, e.g.*, Washington v. Texas oral argument, March 15, 1967, at 16:24, https://www.oyez.org/cases/1966/649 (Respondent's counsel expounding this theory during the first day of oral argument).

137. *Washington*, 388 U.S. at 23.

138. *See* discussion *infra* note 171 and accompanying text.

139. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973) (discussed below); Davis v. Alaska, 415 U.S. 308 (1974) (holding that trial court exclusion of certain defense cross-examination which sought to establish a witness's bias violated the constitutional rights of the defendant); Rock v. Arkansas, 483 U.S. 44 (1987) (holding that a court rule that excluded hypnotically refreshed testimony violated the defendant's constitutional right to testify on her own behalf); Olden v. Kentucky, 488 U.S. 227 (1988) (holding that trial court exclusion of certain defense cross-examination which sought to demonstrate the witness's motive to lie violated the constitutional rights of the defendant).

Mississippi, decided seven years later.[140] In *Chambers*, a defendant (Chambers) who was on trial for murder sought, among other evidence, to admit out-of-court statements from a third party (McDonald) in which the latter had confessed to the crime to three acquaintances. Despite their apparent willingness to testify, the state trial court did not allow the jury to hear the testimony of the three men on hearsay grounds. As the Supreme Court explained, at trial Chambers "was thwarted in his attempt to present this portion of his defense by strict application of certain Mississippi rules of evidence."[141]

Although this application of evidentiary rules at trial was indisputably correct in the technical legal sense, the Court nevertheless found that the exclusion of this testimony violated Chambers' constitutional rights to a fair trial.[142] Repeatedly emphasizing the centrality of the excluded "critical evidence," the Court famously held that "[i]n these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[143] Citing *Washington*, the Court further proclaimed that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[144] It is worth pointing out that in *Chambers*, as in *Washington*, in reversing a lower court ruling based on "as applied" constitutional analysis, the hearsay rule is erroneous only because of the circumstances of its "mechanistic[]" use—i.e., it *became* arbitrary when compared to the centrality of the evidence that it excluded.

More recently, the Court has further reaffirmed that "mechanistic" application of evidentiary rules in the light of central defense evidence is "arbitrary" and may deprive defendants of their constitutional right to present a complete defense.[145] In the 2006 case *Holmes v. South Carolina*, newly-minted Justice Alito—in his first opinion as a member of the Court[146]—reaffirmed the notion that the constitutional right to present a complete defense may effectively override otherwise applicable evidentiary rules when these rules are "disproportionate to the ends that they are asserted to promote."[147]

Clearly, despite some rhetorical narrowing of the *Washington* and *Chambers* decisions over the ensuing decades,[148] the central notions of these cases that I have described—that exclusionary rules may *become* "arbitrary" in light of the centrality of the evidence that they exclude, and that the Constitution's guarantee of Compulsory Process must *mean something*—remain legally valid and have never

140. 410 U.S. 284 (1973).

141. *Id.* at 289.

142. *Id.* at 290.

143. *Id.* at 302.

144. *Id.*

145. Holmes v. South Carolina, 547 U.S. 319 (2006).

146. This fact is notable given the reputation of Justice Alito as perhaps the Court's most prosecution-friendly member. *See, e.g.*, Linda Greenhouse, *It's All Right with Sam*, N.Y. TIMES (Jan. 7, 2015), https://www.nytimes.com/2015/01/08/opinion/its-all-right-with-samuel-alito.html (describing Justice Alito as "probably the most pro-prosecution member of a pro-prosecution court," and offering decision-making statistics to support this assertion).

147. *Holmes*, 547 U.S. at 326.

148. *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37, 42 (1996) ("*Chambers* was an exercise in highly case-specific error correction") (Scalia, J., plurality).

been questioned by the Court. However, as noted above, the post-Warren Court Supreme Court case law—including *Holmes*—has been less than clear about the constitutional source of these guarantees.[149] Even *Chambers* itself, although later described by subsequent opinions as a Compulsory Process case,[150] seems to have been more explicitly decided on Due Process grounds.[151] In the opening remarks of this section I suggested that the slippage/conflation of Due Process with Compulsory Process has caused difficulty in articulating parameters for the actual scope of these rights as a matter of practice.[152] Below I offer some parameters for how practitioners may argue the scope of a right to present "reverse" 404(b)–type defense under the Compulsory Process Clause.

In sum, as a matter of practice the most appropriate constitutional source of a defendant's right to introduce exculpatory "reverse" 404(b)–type evidence is the Compulsory Process Clause of the Sixth Amendment. Not only is this theory supported by the history and scholarship regarding the Amendment, but it is also supported by Supreme Court case law—from Chief Justice John Marshall to the Warren Court to Justice Samuel Alito. Further, unlike the "less rigid and more fluid" right of Due Process guaranteed by the Fifth and Fourteenth Amendments, the Compulsory Process Clause offers a more rooted starting point for the identification of a particularized right that is not as susceptible to criticisms of judicial subjectivity around the inherently fuzzy notions of a "fair trial." However, due to the relatively sparse and admittedly imprecise case law on the subject, how are litigants to define the scope of this particularized right? How are Compulsory Process claims to respond to the criticism—à la Justice Scalia in *Montana v. Egelhoff*[153]—that they are simply pleas for "unfettered" defendant evidentiary power to violate the Rules of Evidence and trump any contrary arguments for inadmissibility under the guise of a constitutional imprimatur? The next subsection takes up this question and makes practical litigation-oriented suggestions for the delineation of a defendant's right to introduce exculpatory evidence under the Compulsory Process Clause.

149. *See* discussion *supra* at notes 97–100 and accompanying text. *See also Holmes*, 547 U.S. at 324 (quoting Justice O'Connor's language from Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.").

150. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 56 n.13 (1987) (citing *Chambers* in a footnote in support of the Court's Compulsory Process Clause jurisprudence).

151. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that the trial court's rulings "denied [Chambers] a trial in accord with traditional and fundamental standards of due process.").

152. Others have also noted this problem. *See, e.g.*, Stacey Kime, Comment, *Can a Right be Less Than The Sum of Its Parts? How the Conflation of Compulsory Process and Due Process Guarantees Diminishes Criminal Defendants' Rights*, 48 AM. CRIM. L. REV. 1501 (2011) (describing the various conceptual and practical problems that result from the conflation between Compulsory process and Due Process); Hewett, *supra* note 116, at 294 (describing a post-*Chambers* jurisprudential "slide from Compulsory Process Clause to a due-process" issue in regard to clashes between exclusionary evidentiary rules and the constitutional right to a complete defense).

153. 518 U.S. 37, 42 (1996) (noting that "the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").

2. The Scope of the Right

Needless to say, defining the proper scope of a constitutional right that has been largely (if not entirely) applied on the basis of "as applied" Supreme Court decision-making is a fraught endeavor. Nevertheless, among these decisions—and lower court opinions dealing with similar questions—some general principles become apparent. On this basis, this section seeks to provide some general guidance on how advocates might articulate the scope of a defendant's constitutional right to provide defense evidence under the Compulsory Process Clause—despite the "sparse" case law and its concomitant uncertainties. As discussed previously, part of the aim of this Comment is to encourage advocates to make educated and thoughtful arguments for the admission of certain types of evidence under this constitutional theory, and in this manner encourage and guide *courts* to define the scope of the right. In *Crawford v. Washington*, the Supreme Court offered a set of (somewhat) definitive parameters to the scope of the Sixth Amendment's Confrontation Clause.[154] The Compulsory Process Clause—the undervalued companion of the Confrontation Clause—has no analogous landmark case (yet). Without informed advocacy on the part of the defense bar, and sustained invocations of the right as the basis of theories of evidence admission, the courts alone cannot be expected to provide a "Compulsory Process Clause *Crawford*" on their own. Because the jurisdiction of the law-making capacity of the courts is limited to cases and arguments brought before them, advocates must commit themselves to informed advocacy on important and largely unresolved constitutional questions implicated by evidence law. With these notions in mind, in this section I discuss general principles regarding the scope of the Compulsory Process Clause.

The primary and most important mechanism for delineating the scope of defense-proffered evidence under the Compulsory Process Clause is the concept of relevance. Whether admissibility is argued under a specific Rule of Evidence or the Constitution, relevance analysis is the first step in all such evidence assessments.[155] Particularly in the case of constitutionally-based evidentiary arguments, the notion of relevance has a kind of common-sense logical primacy: a piece of evidence cannot plausibly form the basis of a defendant's "complete defense" if it is not *relevant* to that defense. In order to be relevant, a piece of evidence must tend to make a fact of consequence of the action more or less probable than it would be without the evidence.[156] Although this notion—codified in Rule 401 of the Federal Rules—adopts an expansive definition of the concept of relevance,[157] federal courts have nevertheless explicitly used the concept to demarcate the basic parameters of the admissibility of defense evidence argued under a constitutional theory.[158] Thus,

154. *See* 541 U.S. 36 (2004). Like nearly all landmark decisions, *Crawford* left many questions—particularly at the margins—unanswered. Nevertheless, the decision was also one of the greatest windfalls to criminal defendants since the Warren Court, and despite some lingering questions it did affirmatively answer many questions about the scope of the Confrontation Clause.

155. FED. R. EVID. 401.

156. *Id.*

157. PARK ET AL., *supra* note 40, at § 5.01.

158. *See, e.g.*, United States v. Thompson, 178 F.Supp.3d 86, 91 (W.D.N.Y. 2016) (holding that the Due Process clause of the Fifth Amendment "does not give a criminal defendant the right to introduce

although it may seem at first blush an analytically weak restraint, the concept of relevance in fact plays a central role in moderating the possibility of a completely "unfettered" right to present defense evidence derided by critics of the right.

Beyond the concept of evidentiary relevance, the scope of a constitutional analysis for defense-proffered admission of evidence under the Compulsory Process Clause must necessarily be determined by some degree of balancing of interests. While the specter of an "unfettered" right to present defense evidence under the Compulsory Process Clause necessarily evokes a right that is absolutist in nature, such an approach would be conspicuously at odds with the ordinary analytical approach taken by the Supreme Court towards constitutional guarantees held by citizens. That is, as a matter of constitutional law in practice, an "absolutist" right—one presumably "unfettered" by any form of scrutiny test or weighing of interests—is almost nonexistent in constitutional analysis.[159] Rather, when assessing a citizen's assertion of a right that is alleged to be impeded by some government action, the Court almost invariably applies some test that takes into consideration the importance of the citizen's alleged right and the interests of the government in order to assess the constitutionality of the action.[160] Thus, for a Court to determine the admissibility of evidence under a defendant's Compulsory Process theory, there must necessarily be some analysis of the competing interests involved and how they bear on the concepts protected by the Clause itself: of safeguarding a defendant's right to defend herself against accusations of criminal wrongdoing.[161]

While the Supreme Court has never explicitly enumerated such balancing factors for the Compulsory Process Clause, our analysis is not wholly without direction. Although extracting clear principles for some kind of balancing test from the underdeveloped and almost exclusively "as applied" jurisprudence of the Compulsory Process Clause is a potentially fraught exercise, the case law—as well as more general principles of constitutional law—does provide some clues.

First, for the right to have meaning, any balancing test of interests must necessarily be *unbalanced* in favor of the defendant. As noted, although nearly all forms of constitutional rights analysis involve some form of balancing, the weight of a legitimate constitutional guarantee always functions as a thumb on the scale in

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irrelevant evidence," and ruling against a defendant's constitutional claim to introduce evidence immaterial to his charged wrongdoing).

159. While a full discussion of what a "absolutist" right would practically entail is beyond the scope of this Comment, for my purposes it suffices to say that while certain areas of First Amendment jurisprudence come closest to a kind of categorical right that is not subject to any form of interest-weighing, this approach is essentially *sui generis* and not a plausible account of how courts have ever approached (or should approach) the Sixth Amendment. *See generally* IMWINKELRIED & GARLAND, *supra* note 93, at § 2–3 (discussing the uniqueness of First Amendment approaches to rights analysis).

160. The various scrutiny tests—strict, intermediate, rational basis review—familiar from various areas of constitutional analysis are prime examples of such a consideration: viz., in such cases the Court assesses the important of the citizen's asserted right and assigns the appropriate level of scrutiny, and then on these bases weighs the countervailing government interests to determine constitutionality. The greater the importance of the right, the stronger the government's interests must be for the action to pass constitutional muster.

161. *See generally* Amar, *supra* note 93, at 642 (1996) (explaining the clusters of rights that "illuminate the internal architecture of the Sixth Amendment.").

favor of the protected individual.[162] That is, when applying some form of scrutiny analysis to determine whether a right has been unconstitutionally infringed, the Court is not simply balancing the common-sense pros and cons in either direction, but rather they are trying to *overcome* the already existing presumption in favor of the protection of the right. If this were not true, the right would be powerless, and we would have to construe constitutional text and/or supreme court case law as superfluous—something American lawyers are generally not willing to do.[163]

Second, building on the analysis of the evidence's relevance, litigants should emphasize both the evidence's centrality to the defense's theory, as well as the lack of alternative pieces of evidence to demonstrate the same point. These factors are two sides of the same coin. As to the former, the centrality of a piece of evidence is really just an emphasis of the factors of Rule 401 relevance: its tendency to make a fact more or less probable than without it, and how consequential it is to determine the action.[164] Not surprisingly, in describing evidence that is "critical to [defendant's] defense"[165] the Court sometimes uses the term "highly relevant" to describe truly central pieces of potentially exculpatory evidence[166] (in contradistinction to less-central "marginally relevant" evidence[167]). The other side of the coin of "highly relevant" evidence centrality is the evidence's uniqueness or indispensability to prove the point at issue. The Court itself has noted that when a particular piece of evidence is "all but indispensable to any chance of [the defense] succeeding," the exclusion of that evidence on the basis of otherwise valid exclusionary rules may deprive the defendant of a fair trial.[168] Evidence must be singular in its capacity to demonstrate this central fact, not "merely cumulative."[169]

Third, Compulsory Process arguments must recognize that "as applied" constitutional analysis is a double-edged sword, and litigants must use it to their advantage. As noted, nearly all of the major "landmark" federal case law involving a constitutional right to present defense evidence has involved "as applied" constitutional analysis. For this reason, critics often explain away the right by narrowing it as applicable only to essentially unrepeatable factual situations found in particular cases.[170] However, "as applied" case law can also be used to the advantage of litigants attempting to advance a theory based on the right.[171] For one, assume that an exclusionary evidence Rule (like 404(b)) had survived a constitutional challenge in a previous case in your jurisdiction. Because such challenges are invariably "as

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162. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 111 (1970) ("tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights") (Black, J., concurring in part and dissenting in part).

163. For an example of a case law discussion of this type of "unbalanced" balancing test from the New Mexico state courts, see discussion *infra* note 215 and accompanying text.

164. FED. R. EVID. 401.

165. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

166. *See, e.g.*, Crane v. Kentucky, 476 U.S. 683, 688 (1986).

167. *See, e.g.*, Holmes v. South Carolina, 547 U.S. 319, 326 (2006) (affirming that "the Constitution permits judges to exclude evidence that is . . . only marginally relevant.") (citations omitted).

168. *Crane*, 476 U.S. at 691.

169. *See, e.g.*, United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982).

170. *See e.g.*, Montana v. Egelhoff, 518 U.S. 37, 42 (1996) ("*Chambers* was an exercise in highly case-specific error correction.") (Scalia, J., plurality).

171. *See, e.g.,* IMWINKELRIED & GARLAND, *supra* note 93, at § 2–3(c).

applied" (the Court has never held a Rule of Evidence *facially* unconstitutional),[172] counsel can always highlight legitimate legal distinctions between the cases. And more generally, "as applied" constitutional challenges to "mechanical" applications of the Rules of Evidence have a kind of modesty and subtlety that facial constitutional challenges lack. That is, the request that counsel is making of a court in an "as applied" challenge is significantly tamer than asking to invalidate an entire Rule in all of its possible applications.

Fourth and closely related, despite the necessity of a strong assertion of the existence of a right to present defense evidence under a constitutional theory, defense counsel must not ignore the competing government interests involved in the right's application. Although some—as a matter of strategy—have cautioned against any discussion of "interest balancing" in the enforcement of a defendant's constitutional rights,[173] this approach runs the risk of falling into the same "absolutist" rights fallacy described above.[174] That is, asserting that "[w]e are not free to conduct cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings," is tantamount to stating that such guarantees are "absolutist."[175] If we want to argue—as I do—that the notion of a defendant's "unfettered" right to present *any* evidence she wants is simply an argumentative bogeyman deployed to invalidate the conceptual saliency of a viable constitutional right, then we cannot then turn around and say the right must be absolute in its application.

Rather, consistent with the notion of using "as applied" analysis to the defendant's advantage, defense counsel must acknowledge the existence of the countervailing interests in favor of the government and argue why they do not apply (or do not apply with great force). In the case of third party/victim "other acts" evidence otherwise excluded under 404(b), the purpose of the Rule itself is the best place for defense counsel to start. As noted above,[176] it is uncontroversial to say that the basic policy rationale behind Rule 404(b), and the character rules more generally, is to prevent forbidden inferences about a party's propensity to act in a certain way based on prior instances of conduct that might logically support those inferences. In this way, (ideally) our proceedings do not become "trials by character." However, when the evidence in question does not bear on the question of the *defendant's* character, it is less clear what government/fairness interest the rule is protecting.[177]

What other countervailing interests might exist? Perhaps the most compelling argument is that although the third party/victim's character is not "on trial" in the same way as the defendant's, the ability of juries to accomplish their fact-finding duties may nevertheless be improperly swayed by prejudicial information regarding these parties. For example, in Mr. Tony's case the government

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172. *See generally* Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873 (2019) (explaining that while a Rule of Evidence may be *applied* in an unconstitutional manner, a specific Rule has never been held to be facially unconstitutional).

173. *See, e.g.*, Mahoney, *supra* note 100, at 169.

174. *See supra* notes 159–60 and accompanying text.

175. Maryland v. Craig, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting).

176. *See* discussion *supra* notes 62–66 and accompanying text.

177. *Id.*

argued *in limine* that even if the methamphetamine was found to be admissible under 404(b), the effect would still be highly prejudicial because "it implies the jury *should acquit* due to the victim's bad character."[178] That is, although the jury cannot convict the third party/victim of any crime, they *can* acquit the defendant and might do so *because* they might think that the third party/victim was a bad person and is either guilty of some crime them self or "deserved" whatever happened to them.

The validity of this argument, and thus the strength of this countervailing interest, will obviously be highly contingent on the specific facts of the case. In cases where the defendant is introducing 404(b)-type evidence to implicate a third party (what Professor Imwinkelried memorably terms the SODDI defense: some other dude did it),[179] the whole point of the evidence is that the jury might infer another person's guilt and thus acquit. The Supreme Court has protected the constitutional validity of this inference.[180]

However, in cases where defendants seek to introduce 404(b)-type evidence against victims—as in Mr. Tony's case—the argument is even more cogent. There are many reasons to believe that a defendant's constitutional right to present the defense evidence might outweigh the prejudicial danger of introducing evidence against victims. The primary reason is tautological, but crucial: namely, the right is constitutional, and the government interest is not. As noted above, although the right is not to be rendered "absolute," the defense is entitled to an "unbalanced" balancing test so as to render significant the existence of the right. Second—and as is often argued by the government in the face of accusations of unfair prejudice—trials cannot ever be free from all forms of prejudice. As the First Circuit has so vividly put it, adversarial proceedings involving violence or gruesome acts "are not to be confused with high tea at Buckingham Palace."[181] Insulating the proceeding from all possible forms of potentially prejudicial inferences is a futile and ultimately undesirable endeavor, as all evidence—especially central/"highly relevant" evidence—is *necessarily* prejudicial in some sense. Lastly, inferences like that suggested in Mr. Tony's case are of a questionable empirical or logical quality: is a jury really going to acquit a defendant because they hear that the victim had meth in his possession? This assumption is premised on an extremely cynical view of the jury, and compared with the centrality of this evidence to Mr. Tony's self-defense theory and the constitutional protections of the Compulsory Process Clause, it seems unlikely that this speculative possibility of prejudice outweighs arguments for the evidence's admissibility.

In sum, the scope of a defendant's constitutional right to introduce 404(b)-type evidence under the Compulsory Process clause must be reasonably articulated as both non-absolute and subject to an (unbalanced) balancing test of competing interests. Litigants would do well to tailor theories for admission to emphasize the evidence's relevance, centrality to the defense's theory (or its "highly relevant"

178. Government's Second Motion in Limine, at 70, United States v. Tony, Criminal No. 16-2904-MV (D.N.M. 2018) (emphasis added).

179. Edward J. Imwinkelried, *Evidence of a Third Party's Guilt of the Crime that the Accused is Charged with: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0*, 47 LOY. U. CHI. L.J. 91 (2015).

180. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973).

181. United States v. Mehanna, 735 F.3d 32, 64 (1st Cir. 2013).

nature), and the (lack of) alternative forms of evidence to show the same point-to-be-proved. Further, instead of seeing the "as applied" nature of prior relevant Supreme Court case law as an inopportune blemish to be avoided, litigants should embrace the more modest posture and added rhetorical wiggle room of "as applied" constitutional analysis. Lastly, instead of ignoring countervailing government interests, defendants should name and acknowledge the potential countervailing government interests in keeping the evidence excluded under Rule 404(b) and analyze their salience alongside the various factors weighing in favor of admission.

3. Possible Criticisms: A Brief Survey of the Low-Hanging Fruit

There are many possible criticisms that might be lodged against the Compulsory Process Clause approach to the admission of "reverse" 404(b)–type evidence that this Comment advocates. I have tried over the course of these pages to confront and discuss the major ones. For example, perhaps the most straightforward critique is a basic skeptical one: namely, that there is insufficient legal foundation to support such an argument and therefore reliance on it would be strategically risky. Against this possible criticism, I have tried to demonstrate how such an argument could be based on clearly established case law, and have also pointed out that the alternative—simply seeking admission through Rule 404(b) itself—is no less risky (given the patchwork of approaches to this kind of evidence and the lack of a clear and coherent underlying rationale). Ideally, if enough case law were to develop around the constitutional argument that I have proposed, defendants would no longer have to rely on the uncertainties of Rule 404(b) at all in such circumstances. Perhaps then—again, ideally—Rule 404(b) could either return to its common law exclusionary origins,[182] or be amended in some way so as to better protect the rights of criminal defendants,[183] and such evidence would simply be assessed on constitutional grounds (if sufficiently relevant) or simple Rule 401 and 403 grounds (if "marginally" relevant).[184]

I have also discussed possible criticisms of the cogency of the right to a complete defense itself; namely, the bogeyman of a completely "unfettered" defense right and the parade of horribles that would invariably ensue. As I have repeatedly stressed, no plausible theory of the possible parameters of the Compulsory Process Clause would support the notion that criminal defendants should have an unfettered right to introduce whatever evidence they want. In part II.A.2, I have discussed basic principles that might aid in developing a moderate ("fettered") version of this right such that future criminal defendants may articulate it clearly. The limited nature of a right must not be construed to mean that the right does not exist, and the notion that the right must "mean something" is a theme that guides the analysis of this Comment and should underlie any workable Compulsory Process Clause analysis.

Another possible criticism that I have addressed is the idea that Rule 404(b) in fact should apply to third parties and victims because the risk of prejudice to these parties is also an important factor that could unduly prejudice in some way the fact-finder in their truth-seeking function. As noted above, even in the absence of any

182. *See* discussion *supra* notes 49–53 and accompanying text.

183. *See, e.g.*, Capra & Richter, *supra* note 48, at 772.

184. *See supra* note 167 and accompanying text.

contrary constitutional argument, I am deeply skeptical of the validity of this argument.[185] But especially in the context of the presence of a countervailing constitutional argument, I do not believe that these arguments can be taken seriously as a matter of logic. The real and severe danger of trial by character that justifies the heightened exclusionary aims of the character rules in the Rules of Evidence cannot—in my view—be said to be equally applicable to situations in which the defendant needs such evidence to exercise their constitutional right to present defense evidence.

To conclude, there is one further criticism that I have yet to address: that of judicial efficiency. As the Tenth Circuit has noted, "[w]hile a state may not apply a rule of evidence [sic] mechanistically to defeat the ends of justice, in appropriate circumstances, the defendant's right to present relevant testimony may 'bow to accommodate other legitimate interests in the criminal trial process.'"[186] And "[t]he integrity and efficient administration of judicial proceeding constitute such countervailing interests."[187] However, in the context of most "reverse" 404(b)–type evidence, the additional administrative or financial strain on the resources of the court is likely trivially small as such evidence is generally already known by the parties, and the operation of the Rule simply functions to exclude it from the purview of the fact-finder. That is, as in Mr. Tony's case, the trial court's 404(b) exclusion only ensured that the counsel avoided talking about the subject in front of the jury—it was *obscured* by the operation of the Rule. Therefore, as is theoretically the case in nearly all 404(b) situations, simply allowing that obscured evidence to be heard would not have required the outlay of any additional financial resources nor any large amount of additional court time. Concerns about judicial efficiency, at least conceived in this sense, do not appear to be a plausible criticism of the constitutional solution advocated by this Comment.

B. Preliminary Notes on Possible Application of the Approach

In the spirit of this Comment's stated intention to serve as a practical guide to current criminal practice, before I conclude I will briefly survey—as a sort of main text appendix—the current New Mexico and Tenth Circuit case law with potential relevance to the kind of argument that this Comment advocates. In this way, I hope to point the way to some potentially helpful case law, and pair the argument with current law in these two jurisdictions.

1. The Tenth Circuit

The Tenth Circuit and its subsidiary District Courts have repeatedly held, often citing *Washington v. Texas* or its progeny, that the Constitution protects a defendant's right to present a meaningful defense.[188] Further, the Tenth Circuit has specifically endorsed the Supreme Court's "broad reading" of the Compulsory

185. *See* discussion *supra* notes 178–81 and accompanying text.

186. Richmond v. Embry, 122 F.3d 866, 872 (10th Cir. 1997) (quoting Michigan v. Lucas, 500 U.S. 145, 149 (1991)).

187. Young v. Workman, 383 F.3d 1233, 1237–38 (10th Cir. 2004).

188. *See, e.g.*, United States v. Serrano, 406 F.3d 1208, 1214 (2005) ("A criminal defendant's right to present a defense is essential to a fair trial.").

Process Clause of the Sixth Amendment that "establish[es], at a *minimum*, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial *and the right to put before a jury evidence that might influence the determination of guilt*."[189] As this Comment has shown, this "broad reading" is congruent with the earliest interpretation of the clause from the Justice Marshall's pronouncements from the Founding Generation,[190] and also comports with the core criminal justice values of innocence protection and truth-seeking that the Clause seeks to protect.[191] In short, not only does the Circuit plainly acknowledge the importance of this constitutional right, but also recognizes that the Compulsory Process Clause itself is a logical source of the right not only to compel live human witness, but also to present other relevant and probative defense evidence.

While the clearly established law of the Circuit guarantees this right—and its existence is often repeated (almost mantra-like) whenever questions of the constitutionality of evidence exclusion arise—to date there is no case in which the scope of the right is delineated, nor is there any case in which the Clause clearly functions to override an "arbitrary" evidence exclusion based on an otherwise valid court rule. Further, after affirming the existence of the right, Tenth Circuit courts are usually quick to add the usual disclaimer that the right is "not absolute."[192] Or, as then Circuit Judge Neil Gorsuch once articulately put it, "surely [under the guise of the Compulsory Process Clause] a defendant cannot present testimony willy nilly that has nothing to do with the crime charged."[193] As this Comment has discussed above,[194] questions of relevance and probative value are central to any plausible analysis of evidence admission under the Clause, and no such theory of its operation assumes that its scope is "absolute" or that defendants should have "willy nilly" discretion to admit such evidence. Nevertheless, in the Tenth Circuit as elsewhere, the stated "non-absoluteness" of the Clause's scope and its effective (non)operation has almost come to tacitly cast its validity into doubt.

Despite the uncertainty that accompanies the lack of case law regarding this clearly established right's scope, there are many reasons to believe that the Compulsory Process approach advocated by this Comment for "reverse" 404(b)–type evidence can form the foundation of a successful theory for the admission of such evidence in the federal courts of the Tenth Circuit.

For one, as noted above, the rhetorical approach of the Tenth Circuit courts in articulating the right conforms with the scope of the Compulsory Process Clause elaborated in Part II.A.2 of this Comment. That is, the approaches to the Clause that I propose can function as the kind of analytical framework that the Tenth Circuit has (thus far) failed to furnish. For example, broadly speaking, the main reason why the various courts of the Circuit have so far declined to apply the Clause (or the right to

189. *Id.* at 1215 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987)) (emphasis added).

190. *See* discussion *supra* note 121 and accompanying text.

191. *See generally* Amar, *supra* note 93, at 642 ("The deep principles underlying the Sixth Amendment's . . . many clauses . . . are the protection of innocence and the pursuit of truth.").

192. *See, e.g.*, *Serrano*, 406 F.3d at 1215.

193. United States v. Hernandez-Hernandez, 519 F.3d 1236, 1238 (2008).

194. *See* discussion *supra* notes 155–69 and accompanying text.

present defense evidence more generally) is due to issues of relevance.[195] As I have discussed, the concept of relevance—and distinguishing "highly relevant" evidence from that which is merely "marginally relevant"[196]—should be central to any theory for evidence admission under the Compulsory Process Clause. By clearly articulating the basis for a piece of evidence's relevance and (ideally) its "highly relevant" nature, litigants can effectively distinguish from the Circuit's prior unsuccessful attempts at defense-proffered evidence admission under a constitutional theory.

On that note, the Tenth Circuit case law in this area provides an ideal opportunity to take advantage of the benefits to "as applied" constitutional analysis. Given the clear and repetitious support of the notion of a constitutional right to present defense evidence by the courts, litigants must both hold courts to account for and give practical meaning to this constitutional guarantee (i.e., the Constitution must *mean something*),[197] while also emphasizing distinguishing factors between instant facts and the prior case law.

Lastly, and of particular relevance to this Comment, courts of the Tenth Circuit have already recognized and (partially) discussed the possible constitutional dynamic of certain kinds of "reverse" 404(b)–type evidence. In *United States v. Montelongo*, the Tenth Circuit decision that created the (partially) lenient standard for "reverse" 404(b) evidence in the Circuit,[198] the circuit court found that the district court's erroneous exclusion of "reverse" 404(b) evidence rose to the level of a constitutional error as it "undermined the protections afforded by the Sixth Amendment's Confrontation Clause."[199] Consequently, because the court found the evidence-exclusion error to be constitutional, the government on appeal was subject to the higher standard of proving that the error was harmless beyond a reasonable doubt.[200] In short, because the court found that the district court's evidentiary ruling had "preclude[d] an entire relevant area of cross-examination," and because the excluded testimonial evidence was "directly—as opposed to 'marginally'—relevant," the court's exclusion of the evidence represented an error of constitutional proportions.[201]

As such, *Montelongo* demonstrates the possibility that a Rule-based evidence exclusion might rise to the level of a (Sixth Amendment) constitutional deprivation. Of course, despite their textual proximity and their conceptual

195. *See, e.g.*, Maes v. Thomas, 46 F.3d 979, 987 (10th Cir. 1995) ("It is the materiality of the excluded evidence to the presentation of the defense that determines whether the petitioner has been deprived of a fundamentally fair trial."); *Hernandez-Hernandez*, 519 F.3d at 1242 ("The Fifth and Sixth Amendment right to produce witnesses on one's own behalf, while fundamental, does not extend to irrelevant (or immaterial) matters."); United States v. Gianetta, No. 96-1434, 139 F.3d 913 (Table of Decisions Without Reported Opinions), at *4 (10th Cir. Feb. 18, 1998) ("The Sixth Amendment . . . only protects defendants' rights to offer relevant and material evidence.").

196. *See* discussion *supra* notes 166–67 and accompanying text.

197. *See* discussion *supra* notes 136–38 and accompanying text.

198. 420 F.3d 1169 (10th Cir. 2005). *See supra* note 74 for a discussion on why it is potentially inaccurate to describe *Montelongo* as creating an unequivocally "lenient" standard for "reverse" 404(b) evidence, as well as a brief description of the case's somewhat uncertain reception by courts in the circuit.

199. *Id.* at 1175. *See supra* note 74 for an account of the relevant facts in *Montelongo*.

200. *Id.* at 1176.

201. *Id.* at 1175–76.

relatedness, the Confrontation Clause and the Compulsory Process Clause differ in many respects (*Montelongo* only discusses the Confrontation Clause).[202] Additionally, although it is impossible to say whether the court would have still found constitutional error even *had* they found no Rule 404(b) error, the broad and emphatic language of the court[203] seems to indicate the possibility of constitutional error even in the absence of the evidentiary error. In any event, the recognition that evidence exclusion under a Rule of Evidence might rise to the level of a constitutional issue is a relevant fact that future Compulsory Process Clause arguments should seek to emphasize

An unpublished post-*Montelongo* memorandum opinion from the District Court for the District of New Mexico[204] seems also to (very cautiously) suggest the constitutional right to present a complete defense may, in certain circumstances, trump an otherwise applicable and valid exclusionary rule. In a memorandum opinion by Judge James O. Browning, *United States v. Moreau* involved a ruling on a government motion *in limine* to exclude "reverse" 404(b) evidence offered by the defendant in a drug trafficking case to show that a third-party witness had committed prior crimes/acts involving drug transportation. The witness was set to testify that they[205] had not seen the interior of the truck in which the drugs were being transported, despite owning the warehouse at which the defendant obtained the fabric that was being used to hide the drugs in the back of the truck. The defendant sought to introduce, under 404(b), evidence of prior acts of the witness to demonstrate that the witness had the "knowledge to operate a 'sophisticated' marijuana operation" based on their past experience.[206]

Ultimately, the District Court found that the defendants had in fact identified a proper purpose to have the prior acts admitted under 404(b)—namely, some amalgam of opportunity, plan, preparation, and knowledge.[207] However, in concluding the opinion, the court seemed to indicate—with some apparent distress—that even had the defendant failed to get the prior acts in under Rule 404(b), he may have been successful under a Compulsory Process Clause theory:

> The Court is concerned that it may be *required* to allow [the defendant] to present evidence of the conspirators mentioned in the Indictment so that he can present his defense that the conspiracy was well enough organized and planned that it could achieve its ends without his knowing involvement. Because, however, the Court can fairly base its decision to allow the evidence under rule 404(b), the Court may avoid deciding the constitutional issue.[208]

As this language indicates, arguments for evidence admission under the Compulsory Process clause may function alongside or—possibly—in lieu of the ordinary

202. *See* Westen, *The Compulsory Process Clause*, *supra* note 93, at 73–78.

203. *See supra* note 199 and accompanying quoted language.

204. United States v. Moreau, No. CR 07-0388 JB, 2008 WL 2229467 (D.N.M. Mar. 12, 2008).

205. The memorandum opinion does not specify the name or the gender of the witness. *Id.* at *1 n.1.

206. *Id.* at *4.

207. *Id.* at *13.

208. *Id.* at *17 (emphasis added).

standards for admission under the Rules of Evidence. Again, although the outcome of such an argument is uncertain, the clear affirmation of broadly construed Compulsory Process Clause principles by the Tenth Circuit and the brief clues provided by the case law give reasons to be cautiously optimistic about how a court might respond to the kinds of arguments suggested in this Comment.

2. New Mexico State Courts

Like the Tenth Circuit, the New Mexico Supreme Court has clearly established that criminal defendants have a constitutional right to present a complete defense.[209] Also like the Tenth Circuit, there is no specific case that outlines the scope of this right. However, state courts have dealt generally with situations involving a defendant's Sixth Amendment constitutional rights to present defense evidence in light of a precluding evidence rule. The central case applicable to this issue is *McCarthy v. State*.[210]

In *McCarthy*, the state Supreme Court reviewed a trial court's decision to exclude defense-proffered witness testimony at trial on the grounds that the defendant had not complied with a court rule concerning a notice requirement for alibi witnesses.[211] In support of his defense that he was elsewhere when the burglary at issue occurred, defendant Mark McCarthy sought to compel two witnesses who would testify as to his presence at an arcade around the time of the burglary.[212] However, because the defense had not given notice to the prosecution regarding these witnesses—*contra* the notice-of-alibi rule—the district court judge would not allow the witnesses to testify regarding the time of the defendant's presence at the arcade.[213] The Supreme Court, although agreeing with the lower court that the defendant had not complied strictly with the rule's notice requirement,[214] nevertheless reversed the conviction and remanded the case for a new trial. In so doing, the court held that the exclusion of the defendant's evidence was repugnant to the requirements of the Sixth Amendment of the United States Constitution, despite the existence of a sanction-oriented rule for a specific kind of evidence.[215]

Citing and applying *Washington v. Texas* approvingly, the court's ruling in *McCarthy* was based on the notion that although court rules can preclude defense witness testimony otherwise required by the Sixth Amendment in "limited circumstances," the balancing test between preclusion of evidence and admission of Sixth Amendment evidence must "begin with a presumption *against* exclusion of

209. *See, e.g.*, State v. Lasner, 2000-NMSC-038, ¶ 24, 129 N.M. 806, 814, 14 P.3d 1282, 1290 ("We acknowledge 'the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.'" (quoting Crane v. Kentucky*,* 476 U.S. 683, 690 (1986)).

210. 1988-NMSC-079, 107 N.M. 651, 763 P.2d 360.

211. *Id.* The relevant Rule in effect at the time was SCRA 1986, 5-508, which read: "[U]pon the written demand of the district attorney, specifying as particularly as in known to the district attorney, the place, date and time of the commission of the crime charged, a defendant who intends to offer an alibi in his defense shall, not less than ten (10) days before trial or such other time as the district attorney may direct, serve upon such district attorney a notice in writing of his intention to claim such alibi." This former Rule was substantially similar to the current N.M. R. ANN. 5-508.

212. *McCarthy*, 1988-NMSC-079, ¶ 3, 763 P.2d at 360–61.

213. *Id.*

214. *Id.* ¶¶ 12–13, 763 P.2d at 363.

215. *Id.* ¶ 17, 763 P.2d at 364.

otherwise admissible defense evidence."[216] Citing approvingly a Ninth Circuit decision[217] adopting a balancing test to weigh various factors to determine the admissibility of such evidence when otherwise precluded by an evidence rule—balancing, among other things, the importance of the defense evidence to the defendant's theory—the court in *McCarthy* noted that the presumption in favor of admissibility of such evidence is required because "[n]o other approach adequately protects the right to present a defense."[218] That is, in *McCarthy* the New Mexico Supreme Court acknowledged that for the right to present a complete defense to have any meaning beyond the merely rhetorical, situations in which defendants are deprived of their ability to mount a defense based on evidentiary rules must trigger a heightened form of analysis that is cognizant of the importance of this right and weigh interests accordingly.

Although *McCarthy* dealt with a circumstance in which a rule otherwise mandated preclusion of evidence as a sanction for a rule violation, subsequent state court decisions have expanded this concept to cases involving evidence precluded on more traditional Rules of Evidence grounds (such as Rule 401 relevance and 403 risks of prejudice).[219] Further, although the oft-quoted language from *McCarthy* requires a "presumption against exclusion of *otherwise admissible* defense evidence,"[220] it is important to note what "otherwise admissible" means (and does not mean) in this context. For this language to be rendered meaningful, "otherwise admissible" must mean that in the absence of *the rule currently precluding the evidence*, the evidence would be admissible. That is, like all other admissible evidence, the evidence in question must be relevant—both in the probative and material sense.[221] Clearly it does *not* mean that the evidence needs to be admissible in light of the rule precluding it: that would render the language of *McCarthy* meaningless as purely tautological.

Although *McCarthy* and subsequent cases have set up a preliminary framework for assessing exclusionary evidence rules and their relationship to the requirements of the Sixth Amendment, the precise contours of this dynamic remain underdeveloped. However, *McCarthy*'s explicit adoption of an "unbalanced" balancing test for evidentiary analysis in light of the Sixth Amendment creates a favorable legal foundation on which to elaborate the sort of Compulsory Process Clause theory that this Comment suggested in Part II.A.2. Although the state court treatment of the Compulsory Process Clause is even more sparse than that of the

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216. *Id.* ¶ 9, 763 P.2d at 362 (emphasis added) (quoting Fendler v. Goldsmith, 728 F.2d 1181, 1188 (9th Cir. 1983) (citing Washington v. Texas, 388 U.S. 14, 19 (1967)).

217. *Fendler*, 728 F.2d at 1188.

218. *McCarthy*, 1988-NMSC-079, ¶ 9, 763 P.2d at 362 (quoting *Fendler*, 728 F.2d at 1188).

219. *See, e.g.*, State v. Campbell, 2007-NMCA-051, ¶¶ 1–2, 13, 141 N.M. 543, 545, 547, 157 P.3d 722, 724, 726 (holding that the trial court's exclusion of defendant's expert witness testimony on relevance and undue prejudice grounds was in error based on the evidence's constitutional importance to the defendant's theory).

220. *McCarthy*, 1988-NMSC-079, ¶ 9, 763 P.2d at 362 (emphasis added) (quoting *Fendler*, 728 F.2d at 1188).

221. *See* discussion on relevance *supra* notes 155–58 and accompanying text.

federal courts,[222] the central theme of *McCarthy* is consistent with this Comment's theme that the Clause must mean something. It is the duty of future advocates to further elaborate on the Clause's requirements and push courts to add content and structure to the analysis of such affirmative arguments for evidence admissibility.

CONCLUSION

In seeking to introduce "reverse" 404(b)–type evidence that is central to their defense, defendants should consider a constitutional theory for the admission of this evidence under the Compulsory Process Clause of the Sixth Amendment. In addition to avoiding many of the pitfalls associated with the unusual operation of Rule 404(b) that these situations evoke and providing a more intuitive alternative, this constitutional approach also more adequately highlights the paramount importance that such evidence can often play in an accused's defense. As was the case for Mr. Tony in *United States v. Tony*, "reverse" 404(b)–type evidence can sometimes supply unique and vital support to a specific defense theory. Given the uncertainty around the application of "reverse" 404(b) to criminal defendants, and the muddled jurisprudence around the Rule more generally, this Comment has argued that it is both unwise and undesirable to allow the admissibility of such evidence to hinge on whims of this Rule alone. Or indeed, on "Evidence Law" alone. In illustrating the potential applicability of the Compulsory Process Clause as a vehicle for affirmative defense-proffered arguments for the admissibility of "reverse" 404(b)–type evidence, this Comment has sought to recast and reimagine the intersection of constitutional rights and evidence law that these situations evoke. Of course, in a basic sense, the project of a full theorization of this intersection must be aided by further elaboration on the part of the courts. This Comment's modest aim is to provide concepts and vocabulary to construct some possible scaffolding on which further development in this direction might rely.

222. It appears that a New Mexico state appellate court has only once considered a case in which the defendant attempted to argue on appeal that an evidentiary ruling violated his rights under the Compulsory Process Clause: *State v. Gibbins*. 1990-NMCA-013, 110 N.M. 408, 796 P.2d 1104. In *Gibbins*, the defendant was prevented from further cross-examining a police officer during his case-in-chief—even though he had already had the opportunity to cross-examine the officer earlier (after his initial testimony during the State's case). During trial, the defendant did not attempt to subpoena the officer, despite the court explicitly telling him to do so. *Id.* ¶ 7, 796 P.2d at 1106. The Court of Appeals, unsurprisingly, found no violation of the defendant's rights under the Clause on the basis of this evidentiary exclusion. As the court pointed out, "the trial court did not deny defendant [sic] the opportunity to call Officer McShan as a witness . . . It simply required that the officer be subpoenaed." *Id.* ¶ 10, 796 P.2d at 1106. Because the record did not show that the defendant attempted to compel the witness and was prevented, there was no violation of the Compulsory Process Clause. The opinion did not discuss in any detail the requirements of the Compulsory Process Clause as an affirmative means to argue for evidence admission (as this Comment does), but *Gibbins* might plausibly support such an argument by providing an opportunity to use "as applied" constitutional analysis to counsel's advantage by way of factual distinguishing.