Team No. 04R

Docket No. 12-13

IN THE

Supreme Court of the United States

SPRING TERM 2014

UNITED STATES OF AMERICA,
Petitioner,

v.

ANASTASIA ZELASKO,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team No. 04
Counsel for Respondent

ISSUES PRESENTED

I. Whether, as a matter of law, Federal Rule of Evidence 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged.

II. Whether, under *Chambers v. Mississippi*, Defendant Anastasia Zelasko's constitutional right to present a complete defense would be violated by exclusion of evidence of a third party's propensity to distribute illegal drugs.

III. Whether *Williamson v. United States* should be overruled insofar as it provides a standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest, and if so, what standard should replace it.

IV. Whether, at a joint trial, the statement of a non-testifying co-defendant implicating the defendant is barred violative of the Confrontation Clause under *Bruton v. United States*, even though the statement was made to a friend and thus would qualify as a non-testimonial statement within the meaning of the Court's subsequent decision in *Crawford v. Washington*.

TABLE OF CONTENTS

Page

ISSUES PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

Statement of the Facts 1

Procedural History 2

STANDARD OF REVIEW 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. RULE 404(B) DOES NOT BAR A DEFENDANT'S INTRODUCTION OF THIRD PARTY PROPENSITY EVIDENCE BECAUSE SUCH EVIDENCE DOES NOT RISK PREJUDICING THE DEFENDANT AND THE LEGISLATIVE HISTORY DOES NOT SUPPORT AN INTERPRETATION OF THE RULE THAT DEVIATES FROM ITS COMMON LAW ROOTS. 5

A. Ms. Morris's Testimony Regarding Ms. Short's Past Drug Sales Is Admissible Because the Common Law Policy Justifications Underlying Rule 404(b) Are Intended to Protect the Defendant, and Not Third Parties. 7

B. The Legislative History Underlying Rule 404(b) is Insufficient to Support a Plain Language Interpretation of the Rule that Runs Counter to Its Common Law Roots. 10

II. EVIDENCE OF MS. SHORT'S PROPENSITY TO DISTRIBUTE ANABOLIC STEROIDS IS ADMISSIBLE UNDER THE *CHAMBERS* DOCTRINE BECAUSE EXCLUDING THE EVIDENCE WOULD SERVE NO LEGITIMATE PURPOSE. 11

A. This Court Has Identified No Legitimate Concerns Relating to Third Party Propensity Evidence Outside of Those Addressed by Rule 403. 12

TABLE OF CONTENTS (CONT.)

Page

B. A Rule Barring Admission of Propensity Evidence Relating to Ms. Short is Disproportionate to Any Legitimate Purpose that Has Been Proposed..... 16

III. THE *WILLIAMSON* STANDARD IS FAITHFUL TO THE UNDERLYING RATIONAL OF RULE 804(B)(3) AND WAS CORRECTLY APPLIED TO THE FACTS OF THE PRESENT CASE BY THE COURTS BELOW. 19

A. This Court's Approach in *Williamson* is Necessary for the Proper Application of Rule 804(b)(3) Because Collateral Neutral Statements Should Not Be Admissible by Virtue of Their "Mere Proximity" to Self-Inculpatory Statements..... 20

B. The Fourteenth Circuit Did Not Abuse Its Discretion Because the Statements Within Ms. Lane's Email Were Non-Inculpatory and Therefore Inadmissible Under Rule 804(b)(3). 22

IV. MS. LANE'S EMAIL WAS PROPERLY EXCLUDED BECAUSE ITS ADMISSION WOULD VIOLATE THE CONFRONTATION CLAUSE... 25

A. Ms. Lane's Email is Properly Excluded Under *Crawford* Because It Would Have Been Excluded Under *Bruton*, and *Crawford* Provides Broader Protection than *Bruton*. 26

B. Ms. Lane's Email Is also Properly Excluded Under *Crawford* Because a Comparable Letter Would Have Been Deemed Inadmissible at the Time of this Nation's Founding..... 30

C. Even if Ms. Lane's Email is Non-Testimonial Under *Crawford*, It Should Be Excluded as Testimonial Under Post-*Crawford* Jurisprudence. 31

CONCLUSION 33

TABLE OF AUTHORITIES

Pages(s)

Cases

UNITED STATES SUPREME COURT

Bruton v. United States,
391 U.S. 123 (1968) 3, 26, 27, 28

Bullcoming v New Mexico,
131 S. Ct. 2705 (2011) 25

Chambers v. Mississippi,
410 U.S. 284 (1973) 11

Crane v. Kentucky,
476 U.S. 683 (1986) 12

Crawford v. Washington,
541 U.S. 36 (2004) ..... *passim*

Davis v. Washington,
547 U.S. 813 (2006) ..... *passim*

Donnelly v. United States,
228 U.S. 243 (1913) 19

Gen. Elec. Co. v. Joiner,
522 U.S. 136 (1997) 4

Giles v. California,
554 U.S. 353 (2008) 25, 30

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

Kiobel v. Royal Dutch Petroleum Co.,
133 S. Ct. 1659 (2013) 17

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009) 25

Michigan v. Bryant,
131 S. Ct. 1143 (2011) 26, 28

TABLE OF AUTHORITIES (CONT.)

Pages(s)

Michigan v. Lucas,
500 U.S. 145 (1991) 14

Morrison v. Nat'l Austl Bank Ltd.,
130 S. Ct. 2869 (2010) 17

Nevada v. Jackson,
133 S. Ct. 1990 (2013) 16

Pennsylvania v. Ritchie,
480 U.S. 39 (1987) 12

Pierce v. Underwood,
487 U.S. 552 (1988) 3, 4

United States v. Abel,
469 U.S. 45 (1984) 7

Washington v. Texas,
388 U.S. 14 (1967) 12

Whorton v. Bockting,
549 U.S. 406 (2007) 26

Williams v. Illinois,
132 S. Ct. 2221 (2012) 26

Williamson v. United States,
512 U.S. 594 (1994) ..... *passim*

UNITED STATES COURTS OF APPEALS

AMF Inc. v. Sleekcraft Boats,
599 F.2d 341 (9th Cir. 1979) 16

Cudjo v. Ayers,
698 F.3d 752 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (U.S. 2013) 4

DiBenedetto v. Hall,
272 F.3d 1 (1st Cir. 2001) 14, 15

Eley v. Erickson,
712 F.3d 837 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 254 (U.S. 2013) 29

TABLE OF AUTHORITIES (CONT.)

Pages(s)

Dodd v. Trammell,
730 F.3d 1177 (10th Cir. 2013) 13

Lyle v. Koehler,
720 F.2d 426 (6th Cir. 1983) 27, 29

Mattel, Inc. v. Walking Mountain Prods.,
353 F.3d 792 (9th Cir. 2003) 16

Peak v. Webb,
673 F.3d 465 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 931 (2013)..... 26

United States v. Aboumoussallem,
726 F.3d 906 (2d Cir. 1984)..... 8

United States v. Armstrong,
621 F.2d 951 (9th Cir. 1980) 18

United States v. Alvarez,
584 F.2d 694 (5th Cir. 1978) 22

United States v. Zelasko,
Cr. No. 13-452 (14th Cir. Feb. 14, 2013) 1

United States v. Barone,
114 F.3d 1284 (1st Cir. 1997)..... 23

United States v. Barrett,
539 F.2d 244 (1976)..... 21

United States v. Clark,
717 F.3d 790 (10th Cir. 2013) 26, 27, 28

United States v. Cromer,
389 F.3d 662 (6th Cir. 2004) 33

United States v. Crosby,
75 F.3d 1343 (9th Cir. 1996) 14, 15

United States v. Dargan,
738 F.3d 643 (4th Cir. 2013) 23, 24, 27

United States v. Dudek,
560 F.2d 1288 (6th Cir. 1977) 8

TABLE OF AUTHORITIES (CONT.)

Pages(s)

United States v. Ebron,
683 F.3d 105 (5th Cir. 2012) 21, 22, 23

United States v. Frazier,
387 F.3d 1244 (11th Cir. 2004) 4

United States v. Garcia,
897 F.2d 1413 (7th Cir. 1990) 22

United States v. Gonzalez-Sanchez,
825 F.2d 572 (1st Cir. 1987) 8

United States v. Krezdorn,
639 F.2d 1327 (5th Cir. 1981) 9

United States v. Lucas,
357 F.3d 599 (6th Cir. 2004) 8

United States v. Maher,
454 F.3d 13 (1st Cir. 2006) 32

United States v. McCourt,
925 F.2d 1229 (9th Cir. 1991) 6, 16, 18

United States v. Mike,
655 F.3d 167 (3d Cir. 2011) 4, 17

United States v. Morano,
697 F.2d 923 (11th Cir. 1983) 7, 8, 9

United States v. Powers,
500 F.3d 500 (6th Cir. 2007) 32

United States v. Puckett,
692 F.2d 663 (10th Cir. 1982) 16, 17

United States v. Reed,
259 F.3d 631 (7th Cir. 2001) 9

United States v. Reynolds,
715 F.2d 99 (3d Cir. 1983) 29

United States v. Seals,
419 F.3d 600 (7th Cir. 2005) 13

TABLE OF AUTHORITIES (CONT.)

Pages(s)

United States v. Silva,
380 F.3d 1018 (7th Cir. 2004) 32

United States v. Stevens,
935 F.2d 1380 (3d Cir. 1991)..... 6, 9

United States v. Turner,
474 F.3d 1265 (11th Cir. 2007) 4

United States v. Turning Bear,
357 F.3d 730 (8th Cir. 2004) 13

United States v. Udeozor,
515 F.3d 260 (4th Cir. 2008) 23

United States v. Waters,
627 F.3d 345 (9th Cir. 2010) 13

United States v. Yousef,
327 F.3d 56 (2d Cir. 2003)..... 13

UNITED STATES DISTRICT COURTS

Kahane v. Shultz,
653 F. Supp. 1486 (E.D.N.Y. 1987) 18

United States v. Zelasko,
Cr. No. 12-98 (S.D.B. July 18, 2012) 1

STATE COURTS

Framingham Mfg. Co. v. Barnard,
19 Mass. 532 (1824) 30, 31

Morris' Lessee v. Vanderen,
1782 WL 44 (Pa. Apr. 1782) 30

State v. Campbell,
1844 WL 2558 (Ct. App. S.C. 1844) 30

OTHER COURTS

King v. Woodcock,
168 Eng. Rep. 352 (1789) 31

TABLE OF AUTHORITIES (CONT.)

Pages(s)

United States Constitutional Amendments

U.S. Const. amend. V 12

U.S. Const. amend. VI 12, 25

U.S. Const. amend. XIV 12

Statutory Provisions

18 U.S.C. § 371 2

18 U.S.C. § 1111(a) 2

18 U.S.C. § 3731 3

21 U.S.C. § 841(a)(1) 2

21 U.S.C. § 841(b)(1)(E) 2

21 U.S.C. § 844 2

21 U.S.C. § 846 2

Federal Rules of Evidence

Fed. Rule Evid. 403 ..... *passim*

Fed. Rule Evid. 404(b) ..... *passim*

Fed. Rule Evid. 804(b)(3) ..... *passim*

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Wigmore, Code of Evidence, (3d ed. 1942) 6, 8

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Pages(s)

40A Am.Jur.2d,
Homicide § 286 (1999) 13

22 C. Wright & K. Graham, Federal Practice & Procedure,
(1978)..... 17

OPINIONS BELOW

The ruling of the United States District Court of the Southern District of Boerum is reported at *United States v. Zelasko*, Cr. No. 12-98 (S.D.B. July 18, 2012), and appears on pages 20-23 of the record. The opinion of the United States Court of the Appeals for the Fourteenth Circuit is reported at *United States v. Zelasko*, Cr. No. 13-452 (14th Cir. Feb. 14, 2013), and appears on pages 30-54 of the record.

STATEMENT OF THE CASE

Statement of Facts

Anastasia Zelasko, Casey Short, and Jessica Lane are members of the U.S. Women's Snowman team. (R. 8.) Hunter Riley was a member of the U.S. Men's Snowman team. (R. 8.) The Snowman is a competitive winter sport involving five events, including dogsledding and rifle shooting. (R. 8.) Before his death, Mr. Riley was also an informant for the DEA. (R. 9.) Prior to joining the U.S. team, Ms. Short was a member of the Canadian Snowman team, during which time she was known to deal in an anabolic steroid named "White Lightning." (R. 25.)

In February of 2012, the U.S. Snowman teams participated in trials for the international competition known as the World Winter Games in Remsen National Park. (R. 8.) On February 3, Ms. Zelasko practiced alone on a rifle range that had been closed during the trials. (R. 8.) The range was adjacent to a portion of a dogsled course on which male members of the U.S. Snowman team were competing. (R. 8.) At approximately 10:15 a.m., Hunter Riley was killed by a bullet from Ms. Zelasko's rifle. (R. 8.) After the death of Mr. Riley, Peter Billings—the coach of the U.S. Women's Snowman team—gave the government an email that Ms. Lane had previously sent to him. (R. 9.) Mr. Billings also described an argument that he heard between Ms. Zelasko and Ms. Lane. (R. 9.) A search warrant was executed that night on Ms. Zelasko's

house, where two 50-milligram doses of a steroid known as "ThunderSnow" were allegedly found along with approximately $5,000 in cash. (R. 8.) A quantity of two 50-milligram doses is consistent with personal use and not sale. (R. 28.)

The next day, a search was conducted of the U.S. team's training facility, where 12,500 milligrams of "ThunderSnow," worth approximately $50,000, were discovered hidden in an equipment room to which all female team members and staff had access. (R. 8.) The same day, a warrant was executed on the apartments of Ms. Short, where no evidence was found, and Ms. Lane, where twenty doses of "ThunderSnow" and approximately $10,000 in cash were found. (R. 8.) Ms. Zelasko and Ms. Lane were then indicted for murder, conspiracy to commit murder, conspiracy to distribute and possess with intent to distribute steroids, possession of steroids, and distribution of and possession with intent to distribute steroids. (R. 8.)

Procedural History

On April 10, 2012, the Grand Jury indicted Ms. Zelasko on charges of Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E) and 846, Distribution of and Possession with Intent to Distribute Anabolic Steroids in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(E), Simple Possession of Anabolic Steroids in violation of 21 U.S.C. § 844, Conspiracy to Murder in the First Degree in violation of 18 U.S.C. §§ 371 and 1111(a), and Murder in the First Degree in violation of 18 U.S.C. § 1111(a). (R. 1-5.) Before trial, Ms. Zelasko moved in limine to introduce the testimony of Miranda Morris regarding Ms. Short's propensity to sell steroids similar to those at issue in this case. (R. 7.) Ms. Zelasko argued that Federal Rule of Evidence 404(b) does not apply to a non-defendant third party; and in the alternative, that regardless of 404(b)'s application, her constitutional right to present a complete defense renders Ms. Morris's testimony admissible.

(R. 12, 14.) Similarly, Petitioner moved to introduce an email sent by Ms. Lane to Mr. Billings, arguing that Ms. Lane's statements constitute a declaration against penal interest under Federal Rule of Evidence 804(b)(3). (R. 3, 16.)

On July 16, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on the motions. (R. 6.) On July 18, 2012, that court ruled to grant Ms. Zelasko's motion and deny Petitioner's motion. (R. 21, 22.) The court held 404(b) inapplicable to non-defendant third parties; and alternatively, held Ms. Morris's testimony admissible pursuant to Ms. Zelasko's constitutional right to present a complete defense. (R. 21-22.) The court applied the *Williamson* standard and held that Ms. Lane's email did not constitute a declaration against penal interest; and further, found the email barred by the Confrontation Clause under *Bruton v. United States*, 391 U.S. 123 (1968). (R. 22-23.)

Following the district court's rulings, Petitioner filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit pursuant to 18 U.S.C. §§ 3731. (R. 30.) On February 14, 2013, the Fourteenth Circuit affirmed the rulings of the district court, agreeing with the district court's reasoning in all respects. (R. 31.) Petitioner subsequently filed a petition for a writ of certiorari, which this Court granted on October 1, 2013. (R. 55.)

STANDARD OF REVIEW

This Court has granted certiorari to four separate questions, each subject to differing standards of review. (R. 55.) The first question asks for a construction of Federal Rule of Evidence 404(b) "as a matter of law." (R. 55.) Questions of law are subject to *de novo* review. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

The second question asks if the exclusion of a particular piece of evidence would violate the *Chambers* doctrine. (R. 55.) When revisiting the *Chambers* doctrine in *Holmes v. South*

Carolina, this Court stated that "the Constitution permits judges to exclude evidence," so long as their determinations are not arbitrary. 547 U.S. 319, 326-27 (2006). Thus decisions to admit or exclude evidence under *Chambers* are reviewed for abuse of discretion.[1]

The third question asks for two separate determinations. First, it asks if this Court should overturn existing precedent (R. 55.), a question of law to be reviewed *de novo*. *Pierce*, 487 U.S. at 558. Second, this Court is reviewing a district court determination under Federal Rule of Evidence 804(b)(3). When analyzing determinations under 804(b)(3), "[d]istrict judges . . . must be given wide discretion." *Williamson v. United States*, 512 U.S. 594, 621 (1994). Thus, the district court's evidence specific determination is reviewed for abuse of discretion.

The fourth question also has two parts. (R. 55.) The application of *Bruton* to the email is an evidentiary finding reviewed for abuse of discretion. *United States v. Turner*, 474 F.3d 1265, 1275 (11th Cir. 2007); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-42 (1997). However, the Fourteenth Circuit's additional rulings relating to the *Crawford* decision "as a matter of law" are reviewed *de novo*. *Pierce*, 487 U.S. at 558; (R. 45.).

SUMMARY OF ARGUMENT

The Fourteenth Circuit correctly held Rule 404(b) to be inapplicable to third-party propensity evidence. The primary concern underlying 404(b)'s common law origin—prejudice to the *defendant*—is not implicated when such evidence is offered by the defendant regarding a third party. Further, there is insufficient evidence of Congressional intent in 404(b)'s legislative history to support deviation from settled common law.

[1] *See United States v. Mike*, 655 F.3d 167, 170-71 (3d Cir. 2011) ("The District Court did not abuse its discretion . . . [because it] did not deprive Mike of his constitutional due process right to present clearly exculpatory evidence necessary to obtain a fair trial."); *accord Cudjo v. Ayers*, 698 F.3d 752, 766 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013); *United States v. Frazier*, 387 F.3d 1244, 1273 (11th Cir. 2004).

The affidavit from Ms. Morris was properly admitted and any failure to admit the affidavit would violate Ms. Zelasko's right to present a "complete defense" at trial. Any previously identified legitimate state interest in keeping the affidavit out is already served by Rule 403; and the affidavit's exclusion would be disproportionate to any proposed state interests.

The *Williamson* standard is necessary for accurate application of Rule 804(b)(3) governing statements against interest, because requiring that each statement be individually tested is most faithful to the underlying rationale of the rule. Applying that standard, the Fourteenth Circuit did not abuse its discretion in holding that Ms. Lane's email was inadmissible under 804(b)(3).

Ms. Lane's email is also inadmissible against Ms. Zelasko because Ms. Lane will be unavailable for cross-examination in violation of Ms. Zelasko's right to confront her accuser. This violation was recognized by this Court's decision in *Bruton*, and no applicable exception to the Sixth Amendment can be found in common law. This Court's decision in *Crawford*, as well as post-*Crawford* jurisprudence, forecloses any argument that Ms. Lane's email can be admitted without cross-examination.

ARGUMENT

I. RULE 404(B) DOES NOT BAR A DEFENDANT'S INTRODUCTION OF THIRD PARTY PROPENSITY EVIDENCE BECAUSE SUCH EVIDENCE DOES NOT RISK PREJUDICING THE DEFENDANT AND THE LEGISLATIVE HISTORY DOES NOT SUPPORT AN INTERPRETATION OF THE RULE THAT DEVIATES FROM ITS COMMON LAW ROOTS.

Federal Rule of Evidence 404(b)(1)[2] provides that, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." The rule is founded in the common law prohibition against the admission of a defendant's past crimes as evidence of his propensity

[2] All further statutory references are to the Federal Rules of Evidence.

to commit the charged offense. *See* Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence, § 5239 (2d ed. 2013). Courts and commentators have long cited two primary concerns justifying the rule: first, a tendency to punish for a previous wrong; and second, a potential for juries to focus on defendants' past misdeeds instead of present evidence. *See United States v. McCourt*, 925 F.2d 1229, 1235 n.9 (9th Cir. 1991) (citing Glenn Weissenberger & James J. Duane, Weissenberger's Federal Evidence § 404.12 at 87-88 (3d ed. 1998)). As Professor Wigmore noted, the evidence "is objectionable not because it has no appreciable probative value but because it has too much." 1A Wigmore, Evidence § 58.2 at 1212.

Although the common law rule was traditionally applied to limit "other crimes" evidence against a party to the litigation—specifically against a criminal defendant—Rule 404(b) has created confusion when defendants seek to introduce propensity evidence of a third party. Third-party propensity evidence is used in a defensive manner to support a theory that a third party, and not the criminal defendant, committed the charged offense. *See, e.g.*, *United States v. Stevens*, 935 F.2d 1380, 1401-02 (3d Cir. 1991). This evidence regarding a third party is commonly referred to as "reverse 404(b)" evidence. *See, e.g.*, *id.* ("In contrast to ordinary 'other crimes' evidence, which is used to incriminate criminal defendants, 'reverse 404(b)' evidence is utilized to exonerate defendants."). Unlike 404(b) evidence introduced against a defendant, "reverse 404(b)" evidence does not implicate the common law concerns regarding prejudice to the accused, and can prove essential to mounting an effective defense. Nevertheless, circuit courts have disagreed as to whether 404(b)'s use of the term "person" should be read as an expansion of the common law rule to bar *all* "other crimes" evidence, regardless of whom it is being introduced against.

Here, the Fourteenth Circuit was correct in holding that 404(b) does not apply to "reverse 404(b)" evidence introduced by the defendant. Applying the rule broadly to prohibit the introduction of such evidence is an unnecessary expansion of the rule that abandons its underlying common law rationale. Additionally, the legislative history surrounding the rule's adoption is void of guidance with regard to its third party application and is therefore insufficient to justify a deviation from the common law standard. Accordingly, this Court should affirm the Fourteenth Circuit's holding, and in doing so, ensure that defendants like Ms. Zelasko retain the opportunity to present a complete defense.

A. Ms. Morris's Testimony Regarding Ms. Short's Past Drug Sales Is Admissible Because the Common Law Policy Justifications Underlying Rule 404(b) Are Intended to Protect the Defendant, and Not Third Parties.

It is generally accepted that the common law of evidence was not abrogated by codification of the Federal Rules of Evidence in 1972, but instead remains to guide the court in its interpretation of the codified rules. *See United States v. Abel*, 469 U.S. 45, 51-52 (1984) ("In reality, of course, the body of common law knowledge continues to exist, though in a somewhat altered form of a source of guidance in the exercise of delegated powers."). An important way in which the common law guides courts' interpretation of the Federal Rules of Evidence is to illuminate the policy justifications underlying a given rule. *See, e.g.*, *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983) ("The evidence was not introduced 'to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith,' so the policies underlying Rule 404(b) are inapplicable.").

In considering the application of 404(b) to "reverse 404(b)" evidence, circuit courts have frequently relied on common law policy in their analysis. *Id.* Rule 404(b) finds its roots in the common law prohibition against the admission of a defendant's past crimes as evidence of

current guilt. *See* Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence, § 5239 (2d ed. 2013) ("Rule 404(b) continues the policy of the common law."); *United States v. Dudek*, 560 F.2d 1288, 1295-96 (6th Cir. 1977) (noting that 404(b) restates the common law). Wigmore set forth the common law rule as follows: "the doing of a criminal act, not part of the issue, is not admissible as evidence of the doing of the *criminal act charged*." Wigmore, Code of Evidence 81 (3d ed. 1942) (emphasis added). Wigmore's focus on the criminal act charged demonstrates a primary concern that "other crimes" evidence will place the *defendant* at an unfair advantage. As noted above, courts and commentators have identified two fundamental concerns regarding the admission of "other crimes" evidence against the defendant: first, that a jury will view the defendant as a "bad man" and punish him for *past action*; and second, that "other crimes" evidence will be used as proof of the crime charged. *See* Glenn Weissenberger & James J. Duane, Weissenberger's Federal Evidence § 404.12 (3d ed. 1998); *United States v. Lucas*, 357 F.3d 599, 611-12 (6th Cir. 2004) (Rosen, J., concurring).

The majority of circuit courts considering "reverse 404(b)" evidence have relied on the common law in their analysis. Almost uniformly, these courts have reasoned that because "reverse 404(b)" evidence does not reference the defendant, the primary concerns underlying the rule are not implicated. *See United States v. Aboumoussallem*, 726 F.3d 906, 911-12 (2d Cir. 1984) ("[R]isks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense. In such cases the only issue arising under Rule 404(b) is whether the evidence is relevant . . . ."); *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 583 (1st Cir. 1987) ("Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant. . . . [B]ecause the evidence did not directly implicate [the defendant] . . . the danger of unfair prejudice was relatively small."); *United States v. Morano*,

697 F.2d 923, 926 (11th Cir. 1983) ("The evidence was not introduced to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith, so the policies underlying Rule 404(b) are inapplicable.") (quotations omitted); *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."); *United States v. Stevens*, 935 F.2d 1380, 1404-05 (3d Cir. 1991) ("[W]e therefore conclude that a defendant may introduce 'reverse 404(b)' evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations."); *United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001) ("[P]ursuant to Rule 404(b), evidence regarding other crimes is admissible for defensive purposes if it tends . . . to negate the defendant's guilt of the crime charged against him."). In contrast, a strict, plain language interpretation of 404(b) limiting a defendant's opportunity to introduce "reverse 404(b)" evidence serves no common law evidentiary purpose, and is not grounded in policy.

Here, the Fourteenth Circuit correctly held that 404(b) does not apply to a defendant's effort to introduce "reverse 404(b)" evidence. (R. 35.) Similar to the circuit majority approach set forth above, the court noted that 404(b) is "rooted in common law and the policy at common law was to protect the criminal defendant from a conviction based on evidence of prior acts." (R. 35.) The court further stated that "[t]he third party is not at risk of conviction in this case," and therefore, "the policy reasons behind FRE 404 apply here with much weaker force, if any force at all." (R. 35.) Ms. Short is not standing trial in this case, faces no risk of unjust conviction at this time, and will be entitled to the evidentiary protections of 404(b) should she face a future indictment. With the common law policy considerations underlying 404(b) in

mind, this Court should affirm the Fourteenth Circuit and ensure that Ms. Zelasko has the right to present her defense.[3]

B. The Legislative History Underlying Rule 404(b) is Insufficient to Support a Plain Language Interpretation of the Rule that Runs Counter to its Common Law Roots.

In addition to considering the common law origins of the Federal Rules of Evidence, this Court has turned to legislative history for guidance in determining the intended application of a given rule. *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 515-22 (reviewing preliminary drafts of the federal rules of evidence, advisory committee notes, and congressional hearings in an effort to interpret FRE 609). In *Green*, this Court resolved a circuit split surrounding the application of 609(a)(1) in civil trials. *Id.* at 508-11. The plain language of the rule endowed defendants with protection against impeachment in civil trials, but denied plaintiffs the same benefit. *Id.* at 509. This Court initiated its analysis by noting, "[n]o matter how plain the text of the Rule may be," in the civil context, "Rule 609(a)(1) can't mean what it says." *Id.* at 510-11. Because the literal reading would "compel an odd result," this Court turned to examine the history and development of the rule leading to its enactment as law. *Id.* at 509, 511.

This Court found that the legislative history was insufficient to justify an interpretation of 609(a) that deviated from settled common law at the time the Federal Rules of Evidence were enacted. In order to successfully contend that legislative action changed settled law, a party "has the burden of showing that the legislature intended such a change." *Id.* at 521. Framing its analysis through examination of the rule's common law history, this Court considered the development of the draft rules and any subsequent amendments implemented by Congress. *Id.*

[3] This interpretation of 404(b) may raise concerns that Ms. Zelasko has the opportunity to present evidence that the government may not, however this Court has long recognized that "[t]he Sixth Amendment to the Constitution guarantees a criminal defendant certain fair trial rights not enjoyed by the prosecution." *Green*, 490 U.S. at 510. Furthermore, if the government had wished to bring in evidence concerning Ms. Short, they could have sought an indictment against her.

515-22. The three preliminary drafts were examined, as well as hearings in the House and Senate regarding modifications to the draft rules. *Green*, 490 U.S. at 515-22. Despite evidence that an amendment to the rule was proposed and rejected, this Court still concluded that criminal defendants are entitled to special protection under the Sixth Amendment, and Congress could not have intended to afford civil defendants a similar advantage. *Id.*

Here, unlike in *Green*, the legislative record offers no guidance as to Congress's intent regarding the application of 404(b). The rule remained unchanged throughout three drafts. *See* 46 F.R.D. 161; 51 F.R.D. 315; 56 F.R.D. 183. Additionally, hearings in both the Senate and House, as well as subcommittee judiciary hearings, fail to address 404(b) in any way, *see generally* S. Rep. 93-1277 (1974); H.R. Rep. 93-650 (1973); H.R. Rep. 63-1597 (1973), and the advisory committee notes on both the proposed and enacted rules do not discuss the application of 404(b) to non-defendant third parties. *See generally* Fed. R. Evid. 404 advisory committee's note. Here, Petitioner faces the same heavy burden identified in *Green* when advocating for an interpretation of 404(b) that deviates from the settled common law existing at the time of the rule's enactment. Unlike in *Green*, Petitioner has an empty legislative record to draw on in attempting to carry their burden—if the facts of *Green* are insufficient to demonstrate legislative intent, then they are certainly insufficient in this case. Accordingly, the lack of a legislative record coupled with inapplicable common law policy justifications dictates that 404(b) should not protect non-party witnesses.

II. EVIDENCE OF MS. SHORT'S PROPENSITY TO DISTRIBUTE ANABOLIC STEROIDS IS ADMISSIBLE UNDER THE *CHAMBERS* DOCTRINE BECAUSE EXCLUDING THE EVIDENCE WOULD SERVE NO LEGITIMATE PURPOSE.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284,

294 (1973). This right was later expanded upon to include "a meaningful opportunity to present a complete defense," and is rooted in both the Due Process Clauses and the Sixth Amendment. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *see also* U.S. Const. amend. V; U.S. Const. amend. VI; U.S. Const. amend XIV.[4] However, this right is not without limitations. Where the right to present a complete defense is concerned, "the Constitution permits judges to exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues." *Holmes v. South Carolina*, 547 U.S. 319, 326-27 (2006) (citations and quotations omitted).

When the admission of evidence is governed by a rule of evidence, this Court has provided guidance for balancing these concerns. "[T]he Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *Id.* at 320. In this instance, 404(b) cannot be used to exclude evidence of Ms. Short's propensity to distribute anabolic steroids because doing so would serve no legitimate state purpose. In the alternative, assuming a legitimate state purpose can be discovered, excluding the propensity evidence would be a grossly disproportionate application of that purpose.

A. <u>This Court Has Identified No Legitimate Concerns Relating to Third Party Propensity Evidence Outside of Those Addressed by Rule 403.</u>

In the broadest terms, "the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose." *Holmes*, 547 U.S. at 320. This Court has recognized that excluding evidence of third-party guilt over relevance concerns serves a

[4] Here, the Compulsory Process Clause of the Sixth Amendment applies. This Court has previously held that merely denying admission of available evidence is sufficient to create a Compulsory Process Clause violation, and that this is subsumed in the right to present a "complete defense." *See Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); *see also Washington v. Texas*, 388 U.S. 14, 23 (1967) ("We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.").

legitimate purpose. *Holmes*, 547 U.S. at 327 ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused . . . but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded.") (quoting 40A Am. Jur. 2d *Homicide* § 286 (1999)). Additional legitimate purposes relating to "unfair prejudice, confusion of the issues, or [the] potential to mislead the jury," may also be present. *Id.* at 326-27. This Court has stated that Congress may establish rules guarding these express purposes. *Id.* at 324. Rule 403 exists in order to serve these identified legitimate purposes.[5] Thus, if the propensity evidence relating to Ms. Short would ordinarily be admissible under 403, there are no legitimate reasons to exclude under 404(b) as those reasons have already been addressed.

Multiple circuit courts have recognized that the protections of 403 and legitimate concerns relating to the right to present a complete defense are co-extensive. *See Dodd v. Trammell*, 730 F.3d 1177, 1192 (10th Cir. 2013); *United States v. Waters*, 627 F.3d 345, 353 (9th Cir. 2010); *United States v. Turning Bear*, 357 F.3d 730, 735 (8th Cir. 2004); *United States v. Yousef*, 327 F.3d 56, 128 (2d Cir. 2003). Thus, when the defendant seeks to put propensity evidence before the jury, its admissibility should be governed by 403. *United States v. Seals*, 419 F.3d 600, 610-11 (7th Cir. 2005) (Posner, J., concurring) ("The district judge was wrong to think that the applicable standard was given not by Rule 403 but by Rule 404(b), which forbids placing the defendant's prior crimes (or his other bad acts) in evidence in order to demonstrate

[5] The concerns addressed by 403 encompass the entirety of all legitimate concerns relating to evidence of third party guilt that have been identified by this Court. *Compare Holmes*, 547 U.S. at 326-27 ("[T]he Constitution permits judges 'to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'"), *with* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

that he has a propensity to commit crimes.”).[6] Under the 403 standard, “[e]vidence that tends to prove a person other than the defendant committed a crime is relevant, but there must be evidence that there is a connection between the other perpetrators and the crime, not mere speculation.” *DiBenedetto v. Hall*, 272 F.3d 1, 8 (1st Cir. 2001); *see also United States v. Crosby*, 75 F.3d 1343, 1348-49 (9th Cir. 1996). In this instance, there is evidence of Ms. Short’s connection to the crime, and so evidence that Ms. Short committed the crime instead of Ms. Zelasko, is both relevant and admissible.

When making a relevancy determination, courts will ask whether the introduction of the evidence will (1) add any new issues to the case, (2) prejudice a defendant, (3) cause a concern about cumulative evidence, or (4) waste the court’s time. *Crosby*, 75 F.3d at 1348 n. 5. In *Crosby*, a defendant was convicted of assault after being denied the opportunity to present evidence of third-party guilt. *Id.* at 1346-47. Specifically, the defendant wanted to present evidence that the victim had previously been attacked by her husband, which was offered so that the jury might draw an inference of third-party guilt. *Id.* The Ninth Circuit determined that because the identity of the attacker was a central issue in the case, the introduction of evidence that the husband might have been the attacker did not add any new issues or waste the court’s time. *Id.* at 1348. Additionally, because no other evidence about the victim’s husband was being offered, there was no concern about cumulative evidence, and as the husband was not a defendant, there was no concern over prejudice. *Id*. at 1348 n. 5.

[6] The petitioner errs in relying upon *Michigan v. Lucas* for the proposition that “the constitutional right to offer a complete defense does not imply a right to offer evidence that is . . . inadmissible under the Rules of Evidence.” (R. 15.) This Court’s decision in *Lucas* explicitly states that “[r]estrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve” 500 U.S. 145, 151 (1991). If no legitimate purpose is served by excluding exculpatory evidence, then a rule mandating its exclusion is arbitrary and fails under *Lucas* as well as *Chambers*. *See Holmes*, 547 U.S. at 320.

Similar to the determination in *Crosby*, the evidence of Ms. Short's propensity to sell steroids is relevant for 403 purposes, and thus cannot be excluded under 404(b) because doing so would serve no legitimate purpose. Ms. Zelasko is charged with conspiracy to distribute and possess with intent to distribute anabolic steroids. (R. 4.) It is axiomatic that a conspiracy involves more than one person, and so a central issue in this case is the determination of who was involved in that conspiracy. Indeed, Petitioner intends to argue that Ms. Zelasko conspired with Ms. Lane based upon a public argument between the two. (R. 3.) Evidence that Ms. Lane actually conspired with a third person bears directly on this issue, and therefore does not add any new issues to the case nor does it waste the court's time. Furthermore, because Ms. Morris is not a defendant, nor is there any showing that other evidence relating to Ms. Morris will be introduced, there is no issue of prejudice or accumulation of evidence. *Crosby*, 75 F.3d at 1348 n.5 ("[The] evidence was also neither cumulative nor would its introduction have been a waste of time: No other evidence about [the issue] was introduced and the Hoskie evidence was highly probative.").

Even under the broader standard applied by the First Circuit in *DiBenedetto*, the propensity evidence would still be admissible because "there is a connection between the other perpetrator[] and the crime." 272 F.3d at 8. Here, evidence of Ms. Short's guilt is not being offered arbitrarily, because Ms. Short and Ms. Lane were teammates and Lane specifically stated that her co-conspirator was a teammate. (R. 3, 10.) Additionally, the steroids Ms. Short previously distributed were a chemical precursor to those Ms. Zelasko is alleged to have distributed, and Ms. Short stated that she was in contact with a laboratory capable of chemical modification. (R. 25, 28.) Ms. Short also marketed her previous product under the name "White

Lightning," which is similar to the trade name Ms. Zelasko is alleged to have used.[7] (R. 25.) All of these facts demonstrate the connection between Ms. Short and the alleged crime as required by *Dibenedetto*.

Under any recognized construction, evidence of Ms. Short's propensity to distribute steroids is admissible under 403; and Rule 403 is co-extensive with all legitimate concerns identified by this Court under the "complete defense" doctrine.[8] Thus, there can be no legitimate concerns supporting a rule that would bar the admission of this evidence. Where no legitimate concerns exist, the Constitution demands that the relevant evidence be admitted under both the Due Process and Compulsory Process clauses. *Holmes*, 547 U.S. at 320.

B. A Rule Barring Admission of Propensity Evidence Relating to Ms. Short is Disproportionate to Any Legitimate Purpose that Has Been Proposed.

In addition to the concerns identified by this Court in *Holmes*, the Ninth and Tenth Circuits have proposed additional legitimate purposes for the exclusion of propensity evidence tending to demonstrate third-party guilt.[9] *See United States v. Puckett*, 692 F.2d 663, 671 (10th Cir. 1982); *United States v. McCourt*, 925 F.2d 1229, 1235 n.9 (9th Cir. 1991). However, "the Constitution . . . prohibits the exclusion of defense evidence under rules that . . . are disproportionate to the ends that they are asserted to promote." *Holmes*, 547 U.S. at 320. Even if it is assumed, *arguendo*, that the concerns raised by these circuits are legitimate, the evidence may not be excluded if doing so would have a disproportionate effect on Ms. Zelasko's right to a fair trial. Moreover, *Chambers* doctrine determinations are at the discretion of the district court.

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[7] Similarity of trade names has long been recognized as evidence that two products come from the same point of origin, as "reputation is often conveyed word-of-mouth." *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 351 (9th Cir. 1979), *abrogated on other grounds by* Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

[8] *See supra,* note 2.

[9] This Court has also suggested two additional legitimate concerns in sexual assault cases, but neither applies as this is not a sexual assault case. *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013). The concerns were (1) embarrassment to the victim, and (2) surprise to the prosecution where the evidentiary rule required advanced notice. *Id*. 404(b)(1) has no advanced notice requirement, and affidavit from Ms. Morris does not even address the victim, Mr. Riley, much less cause embarrassment.

See United States v. Mike, 655 F.3d 167, 170-71 (3d Cir. 2011); *see supra* Standard of Review. Thus, in order to prevail, Petitioner needs to demonstrate that the concerns raised by the Ninth and Tenth Circuits bear such force on this case that admitting the affidavit was an abuse of discretion on the part of the Southern District of Boerum.

The concern raised by the Tenth Circuit relates to how "unrelated and dissimilar [crimes] to the charges alleged in the indictment" may affect future prosecutions. *Puckett*, 692 F.2d at 671. A narrow reading of *Puckett* suggests that concern is not present here. In *Puckett*, a defendant sought to introduce propensity evidence relating to his co-defendant, at a joint trial, in order to "try to place blame on the other" as a defense. *Id.* The Tenth Circuit determined that even though such evidence tended to exculpate the defendant, it might bias the jury against his co-defendant, and thus create prejudice. *Id*. However, as Ms. Short is not a co-defendant in this case, there is no concern over similar prejudice here.

Even if *Puckett* is read to broadly apply to any hypothetical future prosecution, that concern is still not present in this case. *See Puckett* 692 F.2d at 671 (citing 22 C. Wright & K. Graham, Federal Practice & Procedure §§ 5236 & 5239 (1978) (containing a comprehensive discussion of uncharged crimes)). Here, any future prosecution would be outside the jurisdiction of American courts. The evidence relating to Ms. Short only describes activity that took place in Canada. (R. 24, 25.) The only crime discussed by the evidence is the sale of steroids covered by 21 U.S.C. § 841, a statute that does not include any claim of extraterritorial jurisdiction. (R. 24, 25.) "When a statute gives no clear indication of an extraterritorial application, it has none . . . ." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)). Therefore, there can be no subsequent prosecution of Ms. Short arising from the introduction of evidence relating to her sale of steroids

in Canada. Without a concern relating to subsequent prosecution, the district court did not abuse its discretion by admitting the affidavit.

Furthermore, excluding the affidavit because of the concerns identified by the Ninth Circuit would be "disproportionate to the ends that they are asserted to promote," and thus unconstitutional under the *Chambers* doctrine. *Holmes*, 547 U.S. at 320. The issues raised by the Ninth Circuit are: "the jury may misestimate the probative value of the extrinsic act evidence in evaluating its significance; [the] unpredictability of human behavior; and assuring that a person should be free from his past misdeeds." *McCourt*, 925 F.2d at 1235 n.9. On these facts, the district court did not abuse its discretion by admitting the evidence despite these concerns. Any government interest in ensuring the jury does not find the evidence unduly probative is undercut by facts showing that the affidavit is in fact, highly probative.[10] Ms. Short previously sold an analogous drug, under a similar name, to a teammate, and then became a teammate of Ms. Lane's at the same time that Ms. Lane was alleged to have formed a business partnership selling steroids. (R. 3, 10, 24-25.) Likewise, concerns over the "unpredictability of human behavior" are no different than similar concerns over evidence of intent that is regularly admitted by trial courts. *See Kahane v. Shultz*, 653 F. Supp. 1486, 1493 (E.D.N.Y. 1987).[11] Finally, concerns that Ms. Short should be "free from her past misdeeds" do not apply as Ms. Short is neither a defendant nor taking the stand. Therefore, the district court did not abuse its discretion in admitting Ms. Morris's affidavit, and its exclusion would create a *Chambers* violation.

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[10] Even other opinions of the Ninth Circuit support this inference. *See United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980) ("Fundamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.")

[11] In *Kahane* the court noted that the "unpredictability of human behavior" suggested that a single instance of conduct most likely had no bearing on intent, and yet the court was unwilling to bar intent evidence consisting of a single incident. 653 F. Supp. at 1493 ("This court would be reluctant to hold that any act, standing alone, conclusively bespeaks its intent. Recognizing the unpredictability of human behavior and its limitless vagaries, the possibility that such a case may arise may be conceded.")

III. THE *WILLIAMSON* STANDARD IS FAITHFUL TO THE UNDERLYING RATIONALE OF RULE 804(B)(3) AND WAS CORRECTLY APPLIED TO THE FACTS OF THE PRESENT CASE BY THE COURTS BELOW.

Federal Rule of Evidence 804(b)(3) sets out an exception to the prohibition against hearsay for statements against interest when the declarant is unavailable as a witness. Hearsay exceptions are created because the statements in question have distinct indicia of reliability that reduce the hearsay dangers of insincerity, ambiguity, faulty memory, and misperception. *See* Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 188 (1948). Rule 804(b)(3) is "founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States*, 512 U.S. 594, 599 (1994). This rule recognizes both statements against pecuniary or proprietary interest and penal interest—the latter was codified by the rule after its indefensible exclusion from the common law. *See Donnelly v. United States*, 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting). In the criminal context, the rule is a two-prong inquiry, further requiring "corroborating circumstances that clearly indicate [the statement's] trustworthiness." Fed. R. Evid. 804(b)(3)(B). As stated in the Advisory Committee Notes for 804(b)(3), "[t]he requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication." Fed. R. Evid. 804 advisory committee's note.

In this Court's most recent decision interpreting the first prong of Rule 804(b)(3), it stated that "the most faithful reading of [the rule] is that it does not allow admission of non-self inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Williamson*, 512 U.S. at 600-01. The Fourteenth Circuit accurately applied the *Williamson* standard and did not abuse its discretion in finding that Ms. Lane's statements in her

email to Mr. Billings were non-inculpatory and therefore inadmissible. (R. 38, 42.) This Court should affirm the Fourteenth Circuit's judgment that Ms. Lane's email is inadmissible under Rule 804(b)(3).

A. This Court's Approach in *Williamson* is Necessary for the Proper Application of Rule 804(b)(3) Because Collateral Neutral Statements Should Not Be Admissible by Virtue of Their "Mere Proximity" to Self-Inculpatory Statements.

In *Williamson*, this Court interpreted "statement" as "a single declaration or remark," reading Rule 804(b)(3) as covering only "declarations or remarks within the confession that are individually self-inculpatory." 512 U.S. at 599. This Court explained its interpretation, stating that "[t]he fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability." *Id.* at 600. Ultimately, "[t]he question under Rule 804(b)(3) is always whether [each] statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.'" *Id.* at 603-04.

Collateral neutral statements cannot pass under Rule 804(b)(3) by virtue of their "mere proximity" to self-inculpatory statements. *Id.* at 600. As this Court recognized, there is no reason why "collateral statements, even ones that are neutral as to interest . . . should be treated any differently from other hearsay statements that are generally excluded." *Id.* Doing so would subvert the established prohibition against hearsay by allowing untested statements into evidence.

Collateral statements, however, are not per se inadmissible—they simply need to meet the requirements of Rule 804(b)(3). Whether a statement is self-inculpatory can "only be determined by viewing it in context." *Id.* at 603. As this Court noted, even facially neutral

statements may in reality be against the declarant's interest; "'I hid the gun in Joe's apartment' may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory." *Williamson*, 512 U.S. at 603.

Prior to *Williamson*, courts recognized that allowing statements surrounding those against interest into evidence did not serve the purposes of 804(b)(3). In *United States v. Barrett*, a declarant's out-of-court statement exonerating a defendant and implicating another was sufficiently against interest because it "strengthened the impression that he had an insider's knowledge of the crimes." 539 F.2d 244, 252 (1st Cir. 1976). In that case, Tilley, the declarant, over a game of cards, stated that "Tilley, and Buzzy (Adams) were going to have some trouble with the people from California" with regards to the "stamp theft or matter" and that "Buzzy, not Bucky, was involved." *Id.* at 249, 250. The First Circuit declined to "read the federal rule as incorporating the rather broad formulation . . . that the against-interest exception permit[s] reception not only of the 'specific fact against interest . . . but also every fact contained in the same statement.'" *Id.* at 252. Instead, that court focused on whether each portion of the narrative was sufficiently disserving as to qualify under Rule 804(b)(3). *See id.* at 252-53. In doing so, it found that Tilley's knowledge of the persons involved "advertis[ed] his likely complicity," and therefore was against interest. *Id.* at 249-50.

After *Williamson*, some courts refused to apply this Court's standard because they misunderstood the way in which it functions. In *United States v. Ebron*, the Fifth Circuit considered several statements for qualification under 804(b)(3). 683 F.3d 105, 132-33 (5th Cir. 2012). In one such statement, the declarant, Mosley, stated that he and "Akh went in [Barnes' cell] and put in the work," and that Mosley "stabbed [Barnes] so many times that they had to take breaks." *Id.* In analyzing whether Mosley's reference to Akh was admissible under

804(b)(3), that court incorrectly focused on reliability in general, *see Ebron*, 683 F.3d at 133—an inquiry reserved for the second prong of 804(b)(3). This Court in *Williamson* stated that the focus of 804(b)(3)'s first prong is whether a statement is "genuinely self-inculpatory"—an inquiry distinct from whether that self-inculpatory statement is reliable. 512 U.S. at 605.

The *Williamson* standard is faithful to the rationale behind the creation of Rule 804(b)(3), allowing only statements that are individually against interest to pass under this exception. Furthermore, this Court's contextual approach to determining whether a statement is self-inculpatory ensures that statements that are truly against interest—even if facially non-inculpatory—will be admissible under this hearsay exception.

B. The Fourteenth Circuit Did Not Abuse Its Discretion Because the Statements Within Ms. Lane's Email Were Non-Inculpatory and Therefore Inadmissible Under Rule 804(b)(3).

In order for a statement to fall within the Rule 804(b)(3) hearsay exception, three criteria must be met. As a preliminary matter, the declarant must be unavailable as a witness as defined in 804(a). The first prong under 804(b)(3), in relevant part, requires that the statement in question is such that "a reasonable person in the declarant's position" would have made it "only if the person believed it to be true because, when made . . . [it] had so great a tendency . . . to expose the declarant to . . . criminal liability." Fed. R. Evid. 804(b)(3)(A). The second prong requires that, if the statement is offered in a criminal case as against penal interest, that it be "supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3)(B); *see also United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978); *United States v. Garcia*, 897 F.2d 1413 (7th Cir. 1990). As the Fourteenth Circuit noted, Ms. Lane is unavailable within the meaning of 804(a)(1) because she is "exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies." (R.

39.) In this case, the privilege is Ms. Lane's exercise of her Fifth Amendment privilege not to testify. (R. 39.)

However, under the first prong 804(b)(3), none of the statements contained within the email have "so great a tendency" to expose Ms. Lane to criminal liability as to render them "against interest." As noted by the Fourteenth Circuit, Ms. Lane's email consists of five distinct statements.[12] Even the most disserving statement in the email—the second—"does not reveal the nature of the business" nor confess to an element of a crime. (R. 42.) As Scalia noted in his *Williamson* concurrence, "[a] statement obviously can be self-inculpatory . . . without consisting of the confession 'I committed X element of crime Y,'" but he demonstrates this principle by using statements closely linked with confessions to crimes.[13] Here, there is no such mention of a crime, nor any element of a crime.

In fact, cases allowing evidence under 804(b)(3) after *Williamson* have only dealt with statements that mention crimes or elements of crimes. *See United States v. Dargan*, 738 F.3d 643 (4th Cir. 2013) (declarant's statements to cellmate regarding his robbing a jewelry store); *United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997) (declarant's statements to witness described significant details of the crimes he committed with the Mafia); *Ebron*, 683 F.3d 105 (declarant's statements to cellmate about him stabbing the victim); *United States v. Smalls*, 605 F.3d 765 (10th Cir. 2010) (declarant's statements to witness about him and others killing the victim); *United States v. Udeozor*, 515 F.3d 260 (4th Cir. 2008) (declarant's statements

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[12] (1) "I really need your help"; (2) "I know you've suspected us before about the business my partner and I have been running with the female team"; (3) "One of the members of the male team found out and threatened to report us if we don't come clean"; (4) "My partner really thinks we need to figure out how to keep him quiet"; and (5) "I don't know exactly what she has in mind." (R. 29.)

[13] "Consider, for example, a declarant who stated: 'On Friday morning, I went to a gunshop and (lawfully) bought a particular type of handgun and particular type of ammunition. I then drove in my 1958 blue Edsel and parked in front of the First City Bank with the keys in the ignition and the driver's door ajar. I then went inside, robbed the bank, and shot the security guard.' Although the declarant has not confessed to any element of a crime in the first two sentences, those statements in context are obviously against his penal interest, and I have no doubt that a trial judge could properly admit them." *Williamson*, 512 U.S. at 606 (Scalia, J., concurring).

overheard through legal wiretapping regarding his smuggling, battery, and forcible intercourse). Ms. Lane's email simply does not contain the sort of statements that have "so great a tendency . . . to expose the declarant . . . to criminal liability," and thus, is not "against interest" for the purposes of 804(b)(3). Fed. R. Evid. 804(b)(3)(A).

Petitioner errs in asserting that, because the statements were not made to a law enforcement officer, the *Williamson* standard should be relaxed. First, the *Williamson* standard was simply not premised on the distinction between statements made to law enforcement officers and those made to others. This difference is informative in the proper application of 804(b)(3), but should by no means transform the *Williamson* standard. Second, by contending that the statements here are "more reliable" than those in *Williamson*, Petitioner misunderstands the focal question of 804(b)(3)'s first prong[14]—a misunderstanding analogous to the one at work in the Fifth Circuit's *Ebron* opinion. General reliability is the rationale for the existence of hearsay exceptions—further addressed in 804(b)(3)'s second prong—whereas the question under 804(b)(3)'s first prong is whether a given statement is inculpatory. *Williamson*, 512 U.S. at 605.

Even rejecting the proper application of 804(b)(3) set forth in *Williamson*, and instead, applying Petitioner's "reliability" framework, Petitioner inaccurately analyzes the statements contained in Ms. Lane's email. Not only are the fourth and fifth statements non-inculpatory against Ms. Lane, they shift blame and agency away from herself and onto her partner; the statements read, "My partner really thinks we need to figure out how to keep him quiet" and "I don't know exactly what she has in mind." (R. 29.) The statement may not be to a law

[14] The second prong of 804(b)(3) addresses general concerns of reliability regarding statements against penal interest offered in a criminal case: "[the statement must be] supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3)(B). The Fourth Circuit in *Dargan* enumerated several factors relevant to this second prong, including but not limited to "the declarant's motive in making the statement and whether there was a reason for the declarant to lie" and "the party or parties to whom the statement was made." 738 F.3d at 649-50.

enforcement official, but it was to a person in an analogous position of authority: Mr. Billings, the coach of the United States Women's Snowman Team. (R. 1.) By distancing herself from the planning and potential future actions of her partner, Ms. Lane implied that she was the relative "smaller fish," perhaps seeking to receive a lesser punishment—from the management of the Women's Snowman Team, as opposed to the government—for her involvement. *See Williamson*, 512 U.S. at 604 ("Small fish in a big conspiracy often get shorter sentences than people who are running the whole show.") The statements in Ms. Lane's email are not "against interest," nor do the surrounding circumstances clearly indicate their trustworthiness even if they were. Thus, this Court should affirm the Fourteenth Circuit's judgment that Ms. Lane's email is inadmissible under the 804(b)(3) hearsay exception.

IV. MS. LANE'S EMAIL WAS PROPERLY EXCLUDED BECAUSE ITS ADMISSION WOULD VIOLATE THE CONFRONTATION CLAUSE.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI. This Court has stated that, where possible, the protections of the Confrontation Clause should be applied broadly. *Crawford v. Washington*, 541 U.S. 36, 54 (2004). Under the reasoning in *Crawford*, this Court has repeatedly held that testimony cannot be admitted against a defendant if there has been no meaningful opportunity for cross-examination. *See, e.g. Giles v. California*, 554 U.S. 353, 377 (2008) (forfeiture statute cannot escape cross-examination requirement); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (affidavits of drug-analysis technicians not admissible without cross-examination); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717-18 (2011) (ability to re-test the defendant's blood not accepted as a substitution for cross-examination). However, this Court has identified two exceptions to *Crawford*. First, the Confrontation Clause does not apply to scientific data

produced without regard to a specific suspect. *Williams v. Illinois*, 132 S. Ct. 2221, 2243-44 (2012). Second, the Confrontation Clause does not apply to "non-testimonial" statements gathered "to enable police assistance to meet an ongoing emergency." *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011); *Davis v. Washington*, 547 U.S. 813, 827-28 (2006).

Prior to *Crawford*, this Court stated that there is a Sixth Amendment violation when "incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial" because "[i]t was against such threats to a fair trial that the Confrontation Clause was directed." *Bruton v. United States*, 391 U.S. 123, 135-36 (1968). While *Bruton* was decided before *Crawford*, as noted above, protections provided by the Confrontation Clause were broadened by *Crawford*. This has led lower courts to acknowledge that "*Crawford* indicates that the class of testimonial statements that fall within the protective ambit of the Confrontation Clause *includes*, but is not limited to, statements covered also by *Bruton*." *United States v. Clark*, 717 F.3d 790, 815 (10th Cir. 2013) (emphasis in original); *see also Peak v. Webb*, 673 F.3d 465, 483 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 931 (2013). Therefore, in the matter at hand, Ms. Lane's email was properly excluded because (1) the email falls under the general *Bruton* rule and is not saved by the recognized *Crawford* exceptions; (2) the email is expressly prohibited by the *Crawford* line of cases, specifically *Giles*; and (3) even if the email were admissible as non-testimonial under *Crawford*, it is properly classified as testimonial based upon post-*Crawford* jurisprudence.

A. Ms. Lane's Email is Properly Excluded Under *Crawford* Because It Would Have Been Excluded Under *Bruton*, and *Crawford* Provides Broader Protections than *Bruton*.

Confrontation Clause analysis begins with *Crawford* "[b]ecause *Crawford* announced a new rule." *Whorton v. Bockting*, 549 U.S. 406, 417 (2007) (quotations omitted). Under

Crawford, the cross-examination requirement of the Confrontation Clause "applies to witnesses against the accused—in other words, those who bear testimony." 541 U.S. at 51.[15] When determining who is a witness against the accused, this Court explicitly included "accomplice confessions implicating the accused." *See id.* at 64. This is the same category of statements that was considered in *Bruton*. 391 U.S. at 135-36. Moreover, the protections provided after *Crawford* reflect a "broader category" of statements than was protected pre-*Crawford*. 541 U.S. at 71 (Rehnquist, C.J., concurring in judgment). It follows that statements protected under *Bruton* would still be protected under *Crawford*.[16] As Ms. Lane's email would be excluded under *Bruton*, it is likewise excluded under *Crawford*.

This Court, in *Lyle v. Koehler*, applied *Bruton* to a set facts roughly analogous to those in the present case. 720 F.2d 426, 436 (6th Cir. 1983). In *Lyle*, a Michigan state court admitted letters written by a non-testifying co-defendant, and the contents of the letters alluded to a cover-up but did not directly inculpate the defendant. *Id*. at 434-35. On those facts, this Court reversed the conviction, determining that "[t]he close association between [the co-defendants] . . . necessarily invited the jury to extend the inference of [one defendant's] guilty mind to the substantive guilt of both defendants." *Lyle*, 720 F.2d at 434.[17] This was exactly the kind of

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[15] This language was simplified into the "testimonial statement" analysis employed in *Davis*. 547 U.S. at 821. For the purposes of a *Bruton* analysis, however, this Court does not need to reach the question of the testimonial or non-testimonial nature of a non-testifying co-defendant's confession because *Crawford* makes it clear that *Bruton* protections still apply. *See Crawford*, 541 U.S. at 63-64 ("The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit . . . statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in *Lilly*, that it was 'highly unlikely' that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them.") (citations omitted).

[16] Several circuit court decisions claim that the "testimonial statement" analysis in *Davis* serves to limit *Bruton*. *See, e.g.*, *Dargan*, 738 F.3d at 651 ("*Bruton* is simply irrelevant . . . ."). However, a close reading of *Crawford* makes it clear that statements protected under *Bruton* are still protected post-*Crawford*, and thus, a more correct conclusion was reached by the Sixth Circuit in *Clark*, noting, "*Crawford* indicates that the class of testimonial statements that fall within the protective ambit of the Confrontation Clause *includes*, but is not limited to, statements covered also by *Bruton*." 717 F.3d at 815 (emphasis in original).

[17] The dissent in *Lyle* states that the letters at issue there do not violate *Bruton* because they do not inculpate the defendant by name. 720 F.2d at 440-41 (Porter, J., dissenting). This is correctly addressed by the *Lyle* majority,

concern identified in *Bruton*: the Sixth Amendment is violated by "extrajudicial statements that 'added substantial, perhaps even critical weight to the Government's case in a form not subject to cross-examination.'" *Id.* (quoting *Bruton*, 391 U.S. at 135-36). Thus, the introduction of the letters in *Lyle* violated the "defendant's constitutional rights to have an involuntary confession entirely disregarded," through cross-examination. *Bruton*, 391 U.S. at 137.

All of the same considerations that existed in *Lyle* exist here. Ms. Lane sent an email to a third party. (R. 29.) The email evinces a guilty mind on the part of Ms. Lane, and discusses the possibility of a cover-up. (R. 29.) Ms. Lane is unavailable for cross-examination. (R. 18.) These facts are analogous to those in *Lyle*, and the concern that the jury will improperly extend the inference of one defendant's guilty mind to the other is present here. Therefore, admitting Ms. Lane's email would be a *Bruton* violation, and as discussed above, violations of *Bruton* are included in violations of *Crawford*. *Clark*, 717 F.3d at 815.

Furthermore, Petitioner's argument cannot be saved by the exception to *Crawford* that this Court identified in *Davis v. Washington*.[18] Reliance on the exception would imply that Ms. Lane's email is inadmissible under *Davis* because it is arguably "non-testimonial." (R. 18.) Such a reading implies that *Davis* is a retreat from the Confrontation Clause principals espoused in *Crawford*. Yet, this Court's own jurisprudence precludes such a reading of *Davis*. In *Michigan v. Bryant*, this Court stated that *Davis* was to be read as a narrow inquiry into police interrogations: "the Court in *Davis v. Washington* . . . took a further step to determine more precisely which police interrogations . . . implicate a Confrontation Clause bar." 131 S. Ct.

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which points out that this concern is only appropriate where the "statement made no mention of any individual other than the declarant." 720 F.2d at 434 n.14. There is no similar concern here, as Ms. Lane's email clearly references a "business partner" and thus mentions an individual other than the declarant. (R. 29.)

[18] As noted above, this Court has identified two exceptions to *Crawford*: the ongoing emergency and the development of scientific evidence not aimed at a suspect. *See Davis*, 547 U.S. at 822 (ongoing emergency); *Williams*, 132 S. Ct. at 2243 (scientific evidence). Only the *Davis* exception is dealt with here as there is no question relating to scientific testing.

1143, 1153 (2011). The purpose of *Davis* was not to categorically limit *Crawford*, but to "discuss[] the concept of an ongoing emergency." *Bryant*, 131 S. Ct. at 1154. As there is no contention that Ms. Lane's email fits into the framework of the ongoing emergency exception, its categorization as potentially non-testimonial does not implicate *Davis*.[19]

Even assuming that *Davis* is somehow implicated, the specific facts of this case make it clear that Ms. Lane's email is inadmissible under a *Davis* analysis. This Court has acknowledged that "[Sir Walter] Raleigh's trial has long been thought a paradigmatic confrontation violation." *Crawford*, 541 U.S. at 52. Thus, in *Davis*, this Court admitted statements only because they were distinguishable from the evidence introduced against Raleigh. *Davis*, 547 U.S. at 828 ("What she said was *not* 'a weaker substitute for live testimony' at trial, like Lord Cobham's statements in Raleigh's Case . . . .") (citations omitted, emphasis added). Yet here, no such distinction exists. Indeed, the testimony against Raleigh was problematic specifically because "Lord Cobham, Raleigh's alleged accomplice, had implicated him in . . . a letter . . . read to the jury." *Crawford*, 541 U.S. at 44; *see also Davis*, 547 U.S. at 822 n.1 ("[T]he evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning."). This is exactly the kind of evidence Petitioner seeks to admit against Ms. Zelasko: a letter written by an alleged accomplice which was not produced as a result of police interrogation. (R. 9, 16.) As the Confrontation Clause was designed to protect against the kind of evidence offered against Raleigh, it must now protect against the evidence offered by Petitioner against Ms. Zelasko.

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[19] It is worth noting that this argument is not without precedent. Circuit court decisions have admitted "non-testimonial" evidence which fell afoul of *Bruton* both before and after *Davis*. *See*, *e.g. Eley v. Erickson*, 712 F.3d 837, 855, 862 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 254 (2013) (*Bruton* error where court allowed the cellmate of an accomplice to testify about an accomplice admission); *Lyle*, 720 F.2d at 434 (*Bruton* error where letter from an accomplice was read to the jury); *United States v. Reynolds*, 715 F.2d 99, 105 (3d Cir. 1983) (*Bruton* error where postal inspector testified about an overheard conversation between the accomplices which occurred on a public street).

B. Ms. Lane's Email Is also Properly Excluded Under *Crawford* Because a Comparable Letter Would Have Been Deemed Inadmissible at the Time of this Nation's Founding.

When interpreting the Confrontation Clause, this Court has stated it "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. This premise was strengthened four years after *Crawford* when this Court stated that the Constitution "requires that a defendant have the opportunity to confront the witnesses . . . except in cases where an exception to the confrontation right was recognized at the time of the founding." *Giles*, 554 U.S. at 357. Under this articulation of the Confrontation Clause, *Crawford* provides a basis for excluding Ms. Lane's email that is independent of *Bruton*; the email should be excluded because it would not have been covered by any exception recognized by the Framers of the Constitution.

In *Crawford*, this Court noted that "[Sir Walter] Raleigh's trial has long been thought a paradigmatic confrontation violation." 541 U.S. at 52. As discussed above, the violation stemmed in part from the reading of a letter by Lord Cobham, Raleigh's alleged accomplice, to the jury. *Id.* at 44. This Court cited a 19th century decision describing why Cobham's letter was not properly confronted, including the concern that "Cobham's examination was unsworn." *Id.* at 52 (citing *State v. Campbell*, 1844 WL 2558 (Ct. App. S.C. 1844)).[20] This demand that unsworn letters not be admitted because of a lack of confrontation, was commonplace in early American jurisprudence. *See Morris' Lessee v. Vanderen*, 1782 WL 44 (Pa. Apr. 1782) ("[The party] offered to read a letter . . . [b]ut this was objected to, and disallowed by the court, it being a particular fact, which ought to be proved by witnesses on oath."); *Framingham Mfg. Co. v.*

[20] The court in *Campell* set forth the requirements of confrontation as: "All common law writers on evidence lay down the three following prerequisits, as tests of all oral or viva voce testimony, in order to render it legal evidence. First. That the witness put on the stand, upon his oath, must believe in its obligation upon him, here and hereafter, to tell the truth. Secondly. He must have taken the judicial oath prescribed by law-none other can be substituted. And, thirdly, He must be subjected, personally, to the examination of the man he accuses." *Campbell*, 1844 WL 2558.

Barnard, 19 Mass. 532, 566 (1824) ("[L]etters are but declarations not under oath, and the fact of [the witness's] death does not give them an efficiency which they had not in his lifetime."). The introduction of an unsworn letter from an alleged accomplice, who could not be cross-examined, would not have been allowed under common law cross-examination at the time of the founding.[21]

In the absence of a common law exception to confrontation, Ms. Lane's email would not have been admitted in early American courts. Even if the email is properly classified as "non-testimonial," this simply implies that it was an unsworn letter of the sort presented against Raleigh, and rejected by the Supreme Courts of Pennsylvania and Massachusetts in *Morris' Lessee* and *Framingham Mfg. Co.*, respectively. Indeed, "out-of-court statements made by someone other than the accused and not taken under oath . . . were generally not considered substantive evidence upon which a conviction could be based." *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring) (citing *King v. Woodcock*, 168 Eng. Rep. 352, 353 (1789)). Put differently, concerns over "strain[ing] the constitutional text" are not present here, because letters nearly identical to the one sent by Ms. Lane would have been prohibited as "tantamount to the abuses that gave rise to the recognition of the confrontation right," by the drafters of the Sixth Amendment. *Williams*, 132 S. Ct. at 2242.

C. Even if Ms. Lane's Email is Non-Testimonial Under *Crawford*, It Should Be Excluded as Testimonial Under Post-*Crawford* Jurisprudence.

Even assuming that Ms. Lane's email is non-testimonial under *Crawford*, it has been rendered testimonial by the jurisprudence that has developed since *Crawford*. In particular, this Court noted in *Davis* that "[t]he Framers were no more willing to exempt from cross-

[21] This observation was also made by this Court in *Crawford* when it was stated that "[w]e find it implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK." 541 U.S. at 52 n.3. Hence, if a statement taken under oath should be subjected to cross-examination, then a substantially similar statement should not escape cross examination merely because it is unsworn.

examination volunteered testimony . . . than they were to exempt answers to detailed interrogation." *Davis*, 547 U.S. at 822 n.1. After *Crawford* was decided, the circuit courts noted that police departments began to use confidential informants in an unscrupulous manner, as statements made to a confidential informant were arguably non-testimonial under *Crawford*. *See United States v. Powers*, 500 F.3d 500, 508 (6th Cir. 2007); *United States v. Maher*, 454 F.3d 13, 22 (1st Cir. 2006); *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004). The experience in *Silva* is particularly illustrative. There, a DEA agent took the stand and testified about the contents of statements between the defendant and a non-testifying party, as they had been relayed to a non-testifying confidential informant. *Silva*, 380 F.3d at 1019. The Seventh Circuit noted that if such accusations were exempted from cross-examination, "every time a person says to the police 'X committed the crime,' the statement (including all corroborating details) would be admissible . . . [and] would eviscerate the constitutional right to confront and cross-examine one's accusers." *Id*. at 1020 (parenthetical in original). For that reason, the circuit courts—post-*Crawford*—held that volunteered information was testimonial for Confrontation Clause purposes. *See, e.g.*, *Powers*, 500 F.3d 508.

In this instance, the information Mr. Billings shared with police, including Ms. Lane's email, is entirely testimonial, and therefore inadmissible under *Davis*. On this record, it is clear that Mr. Billings believes Ms. Zelasko to be an accomplice of Ms. Lane's. He volunteered information to the police about an argument he overheard between the two. (R. 3.) He also approached the police on his own with evidence relating to anabolic steroid dealing in response to the shooting of Hunter Riley. (R. 9.) The decision to approach the police was an affirmative act, suggesting Mr. Billings believed the shooting and the steroids were related. As a result, any information shared with the government by Mr. Billings is testimonial because it was

"knowingly and purposely made to authorities, accuse[s] someone of a crime, and [will be] used against the accused at trial." *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004). These sorts of officious acts are the kinds warned against in the confidential informant cases. In effect, Ms. Lane is acting as a confidential informant, providing Mr. Billings with information allegedly implicating Ms. Zelasko.[22] The email to Mr. Billings should be classified as "volunteered testimony" under *Davis*, and thus testimonial as a matter of law.

CONCLUSION

For the aforementioned reasons, this Court should affirm the decision of the Fourteenth Circuit Court of Appeals.

Dated: February 11, 2014

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[22] In additional to the issues identified in *Silva*, the Sixth Circuit identified a more visceral policy issue in *Cromer*: "One can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation." 389 F.3d at 675. In this instance, if Mr. Billings were to hold a grudge, and the only method to impeach the email would be the testimony of Ms. Lane, then the exact scenario hypothesized in *Cromer* is presented here.