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No. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

--against--

ANASTASIA ZELASKO,

Respondent.

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

BRIEF FOR PETITIONER

QUESTIONS 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 an unclear standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest, and be replaced by the standard in Justice Kennedy's concurrence.

IV. Whether, at a joint trial, the nontestimonial statement of a non-testifying co-defendant implicating the defendant violates the Confrontation Clause under *Bruton v. United States*, when *Crawford v. Washington* limited the scope of the *Bruton* doctrine to testimonial statements.

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STATEMENT OF FACTS

Anastasia Zelasko and Jessica Lane were both members of the women's United States Snowman team. R. at 8.[1] In or about August 2011, Zelasko and Lane conspired to possess and distribute and began to possess and distribute anabolic steroids to their female teammates. R. at 2. Hunter Riley was a member of the U.S. Men's Snowman team. R. at 8. In 2011, he began cooperating with the DEA as an informant. R. at 9. In this role, he approached Defendant Lane three times in late 2011 in an attempt to buy steroids from her, and each time she declined. *Id.* In December 2011, Peter Billings, the coach of the U.S. Women's Snowman team, overheard the defendants arguing and heard Lane implore Zelasko to stop "bragging to everyone about all the money [she was] making." *Id*. Billings, had been romantically involved with Lane for several yeras, confronted her with his suspicion that she was engaged in the illegal business of selling steroids to team members, which she denied. R. at 1.

On February 3, 2012, Zelasko shot and killed Riley on the U.S. Snowman Team training grounds. R. at 3. She was arrested shortly thereafter, and upon execution of a search warrant the DEA seized approximately $5,000 in cash and two 50-milligram doses of ThunderSnow from her home. *Id.* The DEA also seized $10,000 in cash and twenty doses of ThunderSnow from Lane's home, along with the laptop from which the email was sent. R. at 4. After Riley's death, Billings turned over an email to the government that he had received from Lane a few weeks earlier, on January 16, 2012. *Id*. This email read:

> Peter,
>
> I really need your help. I know you've suspected before about the business my partner and I have been running with the female team. one of the members of the male team found out and threatened to report us if we don't come clean. My

[1] The Snowman is a multi-event winter sport that includes dogsledding and rifle shooting. R. at 8.

> partner really thinks we need to figure out how to keep him quiet. I don't know exactly what she has in mind yet.
>
> Love,
> Jessie

R. at 3. Billings saw this as an acknowledgment that Lane was involved in illicit sales to other members of the female team with one other partner, and that the other partner was concerned about a male team member threatening to report such illicit sales. R. at 9.

In addition to investigating Zelasko and Lane, the government investigated a third member of the women's Snowman team, Casey Short. *Id.* Pursuant to a warrant, the government searched Ms. Short's apartment and found no evidence. *Id.* However, Miranda Morris, a former member of the Canadian Snowman team, is prepared to testify that Ms. Short sold her a performance-enhancing drug called White Lightning in Ontario in April 2011. R. at 25.

PROCEDURAL HISTORY

On April 10, 2012, Zelasko and Lane were indicted and charged with conspiracy to distribute and possess with intent to distribute anabolic steroids under 21 U.S.C. §§ 841(a)(1), b(1)(E), and 846; distribution of and possession with intent to distribute anabolic steroids under 21 U.S.C. § 841(a)(1) and (b)(1)(E); simple possession of anabolic steroids under 21 U.S.C. § 844; conspiracy to murder in the first degree under 18 U.S.C. §§ 371 and 1111(e); and murder in the first degree under 18 U.S.C. § 1111(a). R. at 4-5. Lane decided not to testify at trial, rendering her unavailable. R. at 18.

Before trial, Respondant Zelasko moved *in limine* to introduce the testimony of Ms. Morris, to show that Ms. Short has a propensity to sell performance-enhancing drugs. R. at 7. Respondent argued in support of the motion that Federal Rule of Evidence 404(b)(1) does not

apply when the defendant offers evidence to exculpate herself, and, alternatively, that she has a due process right to present the evidence. R. at 12, 14. The government responded that the evidence was precluded by the plain language of the Rule, and that the probative value of the evidence is insufficient to trigger a constitutional right. R. at 12, 14. The government also moved to introduce Lane's email to Billings as a statement against penal interest under Federal Rule of Evidence 804(b)(3). R. at 16. Zelasko responded that *Williamson v. United States* precluded admission of the statement under Rule 804(b)(3) and that admission would violate Zelasko's rights under the Confrontation Clause. R. at 17-18

On July 18, 2012, the District Court ruled in favor of Respondent on all of the motions. R. at 21-22. On February 14, 2013, the Fourteenth Circuit affirmed the District Court on all the issues, holding that: (1) Ms. Morris's testimony was not barred under Rule 404(b)(1) because the Rule does not bar defendant's from offering evidence of a third party's propensity to commit the charged offense, (2) admitting Ms. Morris's testimony was within Zelasko's constitutional right to present a complete defense because the government has no legitimate interest in excluding the evidence and the evidence is sufficiently probative to cast doubt on Zelasko's guilt; 3) the email was not admissible as a statement against penal interest pursuant to 804(b)(3) because each individual statement within the email was not individually self-inculpatory, citing *Williamson*; and (4) the email would violate Zelasko's Confrontation Clause rights under *Bruton v. United States* because Lane was a non-testifying co-defendant, notwithstanding the Court's decision in *Crawford* which limited the Confrontation Clause to testimonial statements. R. at 39-45. On October 1, 2013, the United States Supreme Court granted the government's petition for a writ of certiorari. R. at 55.

SUMMARY OF THE ARGUMENT

As a matter of law, Rule 404(b)(1) bars evidence of a third party's propensity to commit an offense with which the defendant is charged. The Fourteenth Circuit held the Rule only prohibits the introduction of a *defendant's* propensity to commit the charged offense. But this is negated by the plain language of the rule, which bars evidence of *any person's* crimes, wrongs, or other acts to demonstrate the person's propensity to commit the act. Additionally, the full text of the Rule and its legislative history demonstrate the rulemakers chose to use the word "person" instead of "defendant" in Rule 404(b)(1) so the Rule would encompass evidence of a third party's propensities. Finally, the Rule must bar evidence of third parties' propensities, or the policies underlying the Rule would be undermined. The Rule is not only meant to protect the defendant from prejudice, but also to protect the fairness and efficacy of the trial by preventing prejudice to the government's case, jury confusion, and judicial inefficiency. Therefore, because Rule 404(b)(1) clearly bars evidence of a third party's propensity to commit the charged offense, Respondent should be barred from admitting Ms. Morris's testimony to prove that Ms. Short has a propensity to sell steroids.

Excluding Ms. Morris's testimony under Rule 404(b)(1) will not violate Respondent's rights under the Due Process Clause of the Fourteenth Amendment because the Rule does not arbitrarily limit the defendant's right to a complete defense, and because applying it in this case would not deprive the defendant of critical evidence.

Additionally, Lane's email to Billings should be admitted under Rule 804(b)(3). *Williamson* should be overruled insofar as it requires courts to admit only statements that are individually self-inculpatory while excising collateral statements that give context to the general self-inculpatory narrative. This standard is too strict as it requires exclusion of

inherently reliable statements, which Rule 804(b)(3) clearly contemplated admitting. It has proven very difficult to apply consistently in the lower courts, making it ripe for review. The Court should instead adopt the standard offered in Justice Kennedy's concurrence, as it more effectively encapsulates the intent of the rule and offers a clearer totality of the circumstances approach. Under this standard, Lane's email is admissible because it contains a statement against penal interest and the circumstances surrounding the making of the statement indicate that it is sufficiently reliable.

Admission of Lane's email would not violate Zelasko's rights under the Confrontation Clause of the Sixth Amendment, because it is nontestimonial and *Crawford v. Washington* limited the scope of the *Bruton* doctrine to only testimonial statements. Because the Confrontation Clause only applies to testimonial statements, Zelasko does not have a cognizable Confrontation Clause claim.

ARGUMENT

I. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT IMPROPERLY CONCLUDED FRE 404(B)(1) DOES NOT APPLY WHEN THE DEFENDANT OFFERS EVIDENCE OF A THIRD PARTY'S PROPENSITIES.

The Fourteenth Circuit misinterpreted Rule 404(b) as permitting the admission of evidence of a third party's alleged propensity to sell steroids. This interpretation is incorrect because it ignores the Rule's plain language, its legislative history, and the interests it was designed to serve.

Rule 404(b) defines the purposes for which evidence of a person's crimes, wrongs, or other acts may be admissible. Under Rule 404(b)(1), such evidence "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." Fed. R. Evid. 404(b)(1). But the evidence may be admitted under Rule

404(b)(2) for non-propensity purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Rule 404(b) is usually used by prosecutors to introduce evidence of a defendant's prior bad acts in order to prove the defendant's state of mind at the time of the charged offense. *United States v. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005).

In the rare cases in which a criminal defendant offers the crimes, wrongs, or other acts of a third party, it is called "reverse 404(b)" evidence. *See, e.g., United States v. Seals,* 419 F.3d 600, 606 (7th Cir. 2005). Some circuits have held that the standard of admissibility for reverse 404(b) evidence is lower than it is for traditional 404(b) evidence. *See, e.g., United States v. Stevens,* 935 F.2d 1380, 1401-06 (3d Cir.1991) (holding that the standard of similarity a defendant must meet when offering 404(b) evidence to prove identity is lower than for a prosecutor). However, because the plain language of the Rule is clear, even those courts have not permitted defendants to introduce 404(b) evidence to prove propensity. *See United States v. Williams*, 458 F.3d 312, 317 (3d Cir. 2006) ("Although, under *Stevens,* a defendant is allowed more leeway in introducing *non-propensity evidence* under Rule 404(b), he or she is not allowed more leeway in admitting *propensity evidence* in violation of Rule 404(b)."). *See also United States. v. Edwards*, 901 F. Supp. 2d 12, 17 (D.D.C. 2012) ("Even if a lower standard of similarity is warranted, the Defendant still must articulate some non-propensity purpose for the evidence that would tend to negate his guilt.").

This Court has previously held "the Federal Rules of Evidence are a legislative enactment" to be interpreted by the "traditional tools of statutory construction." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). Accordingly, for the reasons discussed below, the Fourteenth Circuit erred when it held that Rule 404(b)(1) does not apply to Respondent's

evidence of Ms. Short's alleged propensity to sell steroids. This Court should hold that Rule 404(b)(1) bars defendants from entering evidence of a person's prior bad acts to prove the person has a propensity to commit the charged offense.

A. THE PLAIN LANGUAGE OF RULE 404(B)(1) BARS RESPONDENT'S EVIDENCE BECAUSE THE RULE PROHIBITS PROPENSITY EVIDENCE OF ANY "PERSON."

The plain language of the Rule is clear. Rule 404(b)(1) mandates 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." Fed. R. Evid. 404(b)(1) (emphasis added). The Rule does not bar only propensity evidence offered to prove "the defendant's character;" rather, the Rule takes a broader approach by using the more general term "person." *United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004). Thus, the Rule by its plain language prohibits a defendant from entering a person's crimes or other act's to prove the person's propensities. *Id.*; *see also United States v. Reed*, 715 F.2d 870, 876 (5th Cir. 1983). The Fourteenth Circuit, therefore, erred because the court's holding is inconsistent with the plain language of the Rule. *See Huddleston v. United States*, 485 U.S. 681, 687 (1988) (rejecting defendant's argument because it was inconsistent with the plain language of Rule 404(b)).

B. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE ENTIRE RULE INDICATE THE RULEMAKERS INTENDED TO BAR PROPENSITY EVIDENCE OFFERED BY A CRIMINAL DEFENDANT UNDER 404(B)(1).

1. <u>The text of Rule 404 illustrates the rulemakers intentionally used the word "person" in 404(b)(1) so as to include evidence offered by criminal defendants.</u>

The plain language of Rule 404 indicates the legislators' intent to exclude extrinsic evidence of third-party propensities under Rule 404(b)(1). Rule 404(a) prohibits the use of "a person's" character, Fed. R. Evid. 404(a)(1), but makes exceptions for "a defendant," Fed. R. Evid. 404(a)(2)(A),"a victim," Fed. R. Evid. 404(a)(2)(B), and "a witness," Fed. R. Evid.

404(a)(3). Additionally, Rule 404(b)(2) creates a notice requirement that pertains only to "a defendant in a criminal case" and "the prosecutor." Fed. R. Evid. 404(b)(2). Congress, therefore, knew how to differentiate between parties and also intended that "a person" would mean something different from "a defendant." *See United States v. McCourt*, 925 F.2d 1229, 1231-32 (9th Cir. 1991). Consequently, Rule 404(b)(1)'s prohibition against admitting "a person's" character cannot reasonably be read to apply only to a criminal defendant's character. *Id*. The Fourteenth Circuit erred in holding that the Rule could be so narrowly construed so as not apply to Respondent's evidence.

2. <u>The legislative history of Rule 404 illustrates the rulemakers knew about "reverse 404(b)" evidence, yet chose not to amend Rule 404(b)(1) to create an exception for propensity evidence offered by criminal defendants.</u>

The rulemakers responsible for amending Rule 404(b) knew about "reverse 404(b) evidence." In 1991, the rule makers added a notice requirement to Rule 404(b)(2), which allows "a defendant in a criminal case," to request notice of the general nature of 404(b) evidence "the prosecutor" may be offering for non-propensity purposes at trial. Fed. R. Evid. 404 advisory committee's note. The Advisory Committee Note accompanying the amendment states, "Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2d 670 (5th Cir. 1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution." *Id.* This comment reveals the Advisory Committee knew that defendants occasionally offer 404(b) evidence of third parties. Yet, the committee did not amend Rule 404(b)(1) to make an exception for such evidence. The Advisory Committee must have intended to bar defendant's from entering a third party's prior bad acts to prove the third party's

propensities. *See Lucas*, 357 F.3d at 605 n.1. Therefore, the Fourteenth Circuit's interpretation of the Rule should be rejected because it is inconsistent with the legislative history of Rule 404(b). *See Huddleston*, 485 U.S. at 688 (rejecting defendant's argument, in part, because it was inconsistent with the Advisory Committee Notes accompanying Rule 404(b)).

C. THIS COURT HAS PREVIOUSLY STATED THAT RULE 404(B)'S PROHIBITION IS NOT LIMITED TO OTHER ACTS EVIDENCE USED TO PROVE THE DEFENDANT'S CHARACTER.

This Court's precedent favors the government's position. In *Huddleston*, this Court implied Rule 404(b)(1) should be applied to prohibit evidence of anyone's character, by not only using the general term "actor" when defining the scope of the Rule, but by also noting that the Court's analysis would remain the same whether the defendant's or someone else's character was at issue. *Id.* at 685. It explained,

> Federal Rule of Evidence 404(b)—which applies in both civil and criminal cases—generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the *actor's* character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge … The actor in the instant case was a criminal defendant, and the act in question was "similar" to the one with which he was charged. *Our use of these terms is not meant to suggest that our analysis is limited to such circumstances*.

Id. (emphasis added). *See also Agushi v. Duerr* 196 F.3d 754, 760 (7th Cir. 1999) ("Even though *Huddleston* involved a situation in which the defendant was the actor, the Court strongly suggested that Rule 404(b) should be applied to any *actor*.").

D. THE POLICIES UNDERLYING RULE 404(B)(1) APPLY WHENEVER EXTRINSIC EVIDENCE IS USED TO PROVE PROPENSITY, REGARDLESS OF THE PARTY OFFERING THE EVIDENCE.

Extrinsic evidence of propensity is generally bad evidence. Rule 404(b)(1) codified the common law principle that "the doing of one act is in itself no evidence that the same or a like act was again done by the same person." Charles Wigmore, *Wigmore's Code of the Rules of*

Evidence in Trials at Law § 192, p. 642 (3d ed.1940). Though propensity inferences from prior bad acts may have some probative value, the value is slight enough to be outweighed as a matter of law by other considerations, including unfair prejudice, confusion, and delay. *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). These same policy considerations, discussed below, are present when the defendant is the party offering the extrinsic evidence. *See Williams*, 458 F.3d at 317.

1. Propensity evidence is substantially likely to cause unfair prejudice, whether offered by the defendant or government, because of the likelihood that the jury will misunderstand the weight of the evidence.

In *Michelson*, this Court stated that the danger with propensity evidence is the substantial likelihood that the jury will assign the evidence more weight than it deserves, creating unfair prejudice. 335 U.S. at 475. Criminal defendants are not the only parties who can be unfairly prejudiced; the government's efforts to prosecute crimes can also be unfairly prejudiced by the evidence introduced at trial. *See* Fed. R. Evid. 403 advisory committee note ("'Unfair prejudice' within this context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."). In fact, in *Old Chief v. United States*, this Court noted the potential for the government's case to be unfairly prejudiced by jurors' perceptions of prior bad act evidence. 519 U.S. 172, 185 n.8 (1997).

There is a substantial risk of unfair prejudice based on jurors' perceptions if the defendant offers evidence of a third party's prior bad acts to suggest the third party committed the charged offense. *See Lucas*, 357 F.3d at 606. For example, because jurors may not be allowed to hear evidence of the defendant's prior bad acts, jurors may unfairly conclude that the third party is more likely than the defendant to have committed the charged offense because the third party has a propensity to commit the offense, whereas the defendant, according to the evidence in the

record, does not. *See id.* Additionally, jurors may misunderstand the government's burden and unfairly conclude that the prosecutor must prove the third party's innocence beyond a reasonable doubt before the jury can find the defendant guilty. 1 Federal Evidence § 4:37 (4th ed.). Thus, the government can be unfairly prejudiced by prior bad acts evidence offered by defendants, and defendants should not be allowed to circumvent Rule 404(b)(1)'s proscription.

2. The probative value of prior bad acts evidence introduced to prove propensity is insufficient to overcome the substantial risk of confusion and delay caused by creating a "trial within a trial."

In *Nevada v. Jackson*, this Court held "'good reasons' for limiting the use of extrinsic evidence" include "to focus the fact-finder on the most important facts" and to "conserve 'judicial resources by avoiding mini-trials on collateral issues.'" 133 S. Ct. 1990, 1993 (2013) (quoting *Clark v. Arizona,* 548 U.S. 735, 770 (2006); *Abbott v. State*, 138 P.3d 462, 476 (2006)).

Rule 404(b)(1) is predicated on these "good reasons." Prior bad acts evidence is extrinsic evidence that is substantially likely to create the risk of mini-trials on collateral issues because it is often as contested as the issues at trial. *See, e.g., United States v. Hill*, 322 F.3d 301, 310 (4th Cir. 2003) (Traxler, J., concurring) (noting the heightened risk of a trial within a trial when the parties contest the reliability of the defendant's third party evidence). Even when the defendant is introducing prior bad acts for some higher value purpose than propensity, courts have found the risk of a trial within a trial sufficient to bar the evidence. *See, e.g., United States v. Aboumoussallem,* 726 F.2d 906, 912–13 (2d Cir.1984) (affirming exclusion of reverse 404(b) evidence offered to prove common plan because of the risks presented by a trial within a trial). The Fourteenth Circuit erred when it concluded that the policy considerations underlying Rule 404(b)(1) do not apply to evidence offered by criminal defendants because the likelihood of

confusion of the issues and undue delay remains the same no matter which party is offering the evidence.

3. Granting defendants immunity from 404(b)(1)'s prohibition would create judicial inefficiency by requiring judges to determine in every case what has been predetermined as a matter of law.

The standard proposed by Respondent would waste judicial resources. If defendants were allowed to circumvent Rule 404(b)(1)'s proscription, courts would still need to perform case-by-case balancing to determine whether the probative value of the defendants' evidence under Rule 401 is not substantially outweighed by the dangers in Rule 403 of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence," Fed. R. Evid. 403. *See United States v. Myers*, 589 F.3d 117, 124 (4th Cir. 2009) (affirming the exclusion of reverse 404(b) evidence because its probative value was substantially outweighed by Rule 403 considerations). Case-by-case balancing "involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation." *Tome v. United States*, 513 U.S. 150, 165 (1995). Where Congress, this Court, and the Advisory Committee have already decided the balance as matter of law, returning discretion to trial judges to reweigh the issues in every case where the defendant offers a third party's prior bad acts to prove propensity serves no meaningful purpose. *See McCourt*, 925 F.2d at 1236. Accordingly, this Court should reject the Fourteenth Circuit's holding that Rule 404(b)(1) does not apply to evidence offered by criminal defendants.

II. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT IMPROPERLY CONCLUDED RESPONDENT HAS A CONSTITUTIONAL RIGHT TO THE ADMISSION OF MS. MORRIS'S TESTIMONY.

Though there are circumstances in which a criminal defendant is constitutionally entitled to present testimony otherwise inadmissible under a rule of evidence, this case is not one of

them. Respondent's right to present a defense is not impaired by Rule 404(b)(1), and the evidence she is seeking to introduce is not critical to her defense.

"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.'" *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)). Defendants do not, however, have free reign of the courtroom; "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). A defendant has a right to present evidence properly excluded under an accepted rule only "where constitutional rights directly affecting the ascertainment of guilt are implicated." *Id.*

This Court has only found that exclusion of defense testimony under a rule of evidence was unconstitutional when two elements were true: (1) the rule was "arbitrary or disproportionate" to the purposes it was designed to serve, and (2) the exclusion of the evidence "infringed upon a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (citing *Rock v. Arkansas*, 483 U.S. 44, 58 (1987); *Chambers*, 410 U.S. at 302; *Washington v. Texas,* 388 U.S. 14, 22-23 (1967)).

A. EXCLUSION OF RESPONDENT'S EVIEDNCE IS NOT UNCONSTITUTIONAL BECAUSE RULE 404(B)(1) IS NEITHERT ARBITRARY NOR DISPORPORTIONATE TO THE PURPOSES IT IS DESIGNED TO SERVE.

1. <u>Rule 404(b)(1) is not arbitrary or disproportionate to the legitimate purposes it is designed to serve.</u>

A rule that excludes defense evidence in consideration of legitimate policy concerns, like unfair prejudice and potential to mislead the jury, is "unquestionably constitutional." *Holmes v.*

S. Carolina, 547 U.S. 319, 326-7 (2006) (quoting *Montana v. Egelhoff,* 518 U.S. 37, 42 (1996)). In contrast, a rule is arbitrary or disproportionate if it "exclude[s] important defense evidence but [does] not serve any legitimate interests." *Id.* at 324. *See also Washington v. Texas*, 388 U.S. 14, 22 (1967) (rule arbitrary because it could not be rationally defended); *Crane*, 476 U.S. at 691 (rule arbitrary because state did not "advance any rational justification" for the rule).

As discussed in the previous section, Rule 404(b) represents the conclusion of this Court, the Advisory Committee, and Congress that the low probative value of crimes, wrongs, or other acts, when used to prove a person's propensities, is outweighed by the substantial danger of unfair prejudice, confusion of the issues, and potential to mislead the jury. The Rule, then, is "unquestionably constitutional" because it only excludes unimportant evidence while serving legitimate interests. *See Holmes*, 547 U.S. at 326-327.

2. <u>The Fourteenth Circuit erred in its analysis by ignoring this Court's precedent; thus, its conclusion that the government has no legitimate interests in excluding Respondent's evidence is incorrect.</u>

The Fourteenth Circuit improperly analyzed the due process issue. The court did not examine this Court's precedent to determine whether the Rule was constitutionally enforceable. *See Holmes*, 547 U.S. at 325-326; *Jackson*, 133 S.Ct. at 1992-1994. Rather, the court conducted what basically amounted to Rule 403 balancing, examining whether policy considerations would be furthered as a factual matter in this case. As a result, the court's holding contradicts this Court's precedent.

The court's analysis proceeded under the assumption that *Michigan v. Lucas*, 500 U.S. 145 (1991), "requires weighing the government's stated interest in restricting given evidence against the Defendant's strong interest in presenting a complete defense." R. 37. This Court has already stated that the Fourteenth Circuit's reading of *Lucas* is incorrect. *See Jackson*, 133 S. Ct.

at 1993. In *Lucas*, this "Court did not even suggest, much less hold, that it is unconstitutional to enforce [a rule of evidence] unless a case-by-case balancing of interests weighs in favor of enforcement." *Id.*

As a result of this error, the Fourteenth Circuit contradicted this Court's precedent by holding that the government's interests under Rule 404(b)(1) are legitimate generally, but not legitimate as a factual matter in this case. R. 37-38. In *Holmes*, this Court stated that rules limiting the admissibility of defense evidence of third party guilt are "widely accepted" because they are premised on legitimate policy concerns. 547 U.S. at 326-327. 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.' A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." *Id.* (quoting *Crane,* 476 U.S. at 689–690).

Thus, where legitimate policy concerns have been weighed as a matter of law within a given rule of evidence, courts should not engage in factual analysis of whether exclusion under the rule serves legitimate government interests in the instant case. The Fourteenth Circuit erred in its reasoning by engaging in exactly this form of case-by-case analysis, and so reached the incorrect conclusion that the government has no interests in excluding Respondent's evidence.

B. RESPONDENT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO PRESENT MS. MORRIS'S TESTIMONY BECAUSE THE EVIDENCE IS SPECULATIVE AND TOO REMOTE TO CONNECT TO A WEIGHTY CONSTITUTIONAL INTEREST.

Even if properly excluded under a rule of evidence, testimony about a third party's guilt must be admitted if it "implicate[s] a sufficiently weighty interest of the defendant to raise a constitutional concern under [this Court's] precedent." *Scheffer*, 523 U.S. at 309. Evidence of a

third party's guilt implicates a weighty interest of the defendant when, under the "facts and circumstances" of the individual case, its exclusion would deprive the defendant of a fair trial. *Chambers*, 410 U.S. at 302. Such cases are rare. *Jackson*, 133 S. Ct. at 1992. The Constitution permits the exclusion of evidence of a third party's guilt "where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." *Holmes*, 547 U.S. at 327 (quoting 40A Am.Jur.2d, Homicide § 286, pp. 136–138 (1999)).

Accordingly, exclusion of Respondent's evidence does not implicate her constitutional rights because the evidence is (1) not "critical" under this Court's precedent, (2) speculative and too remote from the charged crime, and (3) unconnected to any of the fundamental rights this Court has recognized.

1. <u>Respondent's proffered testimony is not like the evidence this Court has previously found "critical" evidence of third-party guilt.</u>

In *Chambers*, 410 U.S. 284, and *Green v. Georgia*, 442 U.S. 95 (1979), the defendants were deprived of a fair trial because state rules of evidence were applied to exclude exculpatory confessions by third parties. The third party in *Chambers* had confessed to three people that he had committed the charged murder and had made a sworn statement confessing to the murder. 410 U.S. at 289. At trial, the defendant called the third party, but was not allowed to cross-examine him when he repudiated his confession because a state rule prevented him from impeaching his own witness. *Id.* at 303. The defendant was also barred from admitting the testimony of the people to whom the defendant had confessed because the state had no exception to the hearsay rule for statements against penal interest. *Id.* Similarly, in *Green*, a witness was barred from testifying about a third party's confession under a hearsay rule. 442 U.S. at 95. The third party, who had been tried and convicted of the charged murder, had confessed to a witness

that he had committed the murder alone and that the defendant had not even been present. *Id.* at 96-97. In both cases, the proffered defense evidence was highly probative testimony that directly tied the third party to the charged crime.

Respondent's evidence it is not the type of third party evidence that this Court has ever held must be admitted. *See United States v. Young*, 248 F.3d 260, 271 (4th Cir. 2001) (holding that where a third-party's statements did not rise to the level of a confession, defendant did not have a due process right to the evidence). Unlike *Chambers* and *Green*, this case does not involve a third-party confession to the charged crime. The evidence here is uncorroborated third party propensity evidence.

2. Respondent's proffered testimony is the type of evidence that can be constitutionally excluded as speculative and too remote.

Respondent's evidence of Ms. Short's alleged propensity to sell steroids can be properly excluded as speculative and too remote from the charged offense. Defendants offering evidence of a third party's guilt generally must demonstrate a "nexus" between the third party and the charged crime before such evidence can be admitted. *See, e.g., Wade v. Mantello*, 333 F.3d 51, 61-62 (2d Cir. 2003) ("a defendant still must show that his proffered evidence … is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the asserted 'alternative perpetrator.'"). Even when the defendant is able to proffer motive and opportunity evidence, courts may exclude it as speculative. *See, e.g., United States v. Jordan*, 485 F.3d 1214, 1221 (10th Cir. 2007) (excluding evidence that a third party, who had a motive to hurt the victim, was near the scene of the stabbing ten minutes before it occurred).

Respondent's evidence does not demonstrate a "nexus" between third-party Ms. Short and the charged offense. Respondent is charged with possessing and selling a steroid known as ThunderSnow in the United States to members of the United States Snowman Team from August

2011 to February 2012. R. at 18. She proffers uncorroborated testimony that while in Canada, Ms. Short sold a steroid known as White Lightning in April 2011 to members of the Canadian Snowman Team. R. at 25. In other words, the proffered evidence is that Ms. Short sold a different drug in a different country to different people roughly a year before the charged crime. Respondent concedes the *only* value of the evidence is its propensity inference. R. at 12. She is not offering the evidence to suggest that Ms. Short has knowledge of the type of steroids in the indictment, or that this crime was so similar to the alleged prior incident that Ms. Short has a common plan to sell steroids to Snowmen teams. Respondent concedes she has no evidence tying Ms. Short directly to the charged offense. The government's search of Ms. Short's apartment yielded no evidence related to this case. R. at 9. Respondent is, therefore, proffering the evidence to invite the jury to leap from the alleged past drug sale to this offense based purely on the inference that Ms. Short is the kind of person who sells steroids. In other words, Respondent is inviting the jury to speculate without any factual support linking the two events, without any demonstrated nexus. Thus, the evidence is speculative and too remote to be "critical" to Respondent's defense.

3. <u>Exclusion of Respondent's evidence does not infringe on any of her constitutional rights.</u>

Respondent's evidence is not connected to any of her constitutional rights. Respondent's right to call witnesses is not burdened by limiting those witnesses' testimony under rules of evidence. *See Taylor v. Illinois*, 484 U.S. 400, 409 (1988). Respondent's right to rebut the government's case is not burdened by prohibiting her from introducing evidence of a third party's extrinsic acts. *See Jackson*, 133 S. Ct. at 1994. Additionally, exclusion of Respondent's evidence does not restrict her right to cross-examine witnesses, s*ee Delaware v. Van Arsdall,* 475 U.S. 673, 678–679 (1986), or her right to testify, *see Rock*, 483 U.S. at 57-58 (1987).

Thus, exclusion of Respondent's evidence does not violate the Constitution because the evidence is not "critical" under the Court's precedent, is speculative and too remote from the charged crime, and is not connected to any of her constitutional rights.

III. THE *WILLIAMSON* STANDARD GOVERNING THE APPLICATION OF FRE 804(B)(3) SHOULD BE OVERRULED AND REPLACED BY THE STANDARD SET FORTH IN JUSTICE KENNEDY'S CONCURRENCE.

FRE 804(b)(3) provides an exception to the general bar against hearsay evidence. Fed. R. Evid. 804(b)(3). It allows for admission of an out of court statement that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.

Id. In *Williamson v. United States*, the Supreme Court held that the term "statement" means only a "single declaration or remark," meaning that the rule only applies to those declarations within a general confession or narrative that are self-inculpatory standing alone; collateral, non-self-inculpatory statements are not admissible, "even if they are made within a broad narrative that is generally self-inculpatory." 512 U.S. 594, 599-601 (1994). The Court based its holding on the premise that 804(b)(3) is concerned primarily with reliability. *Id.* at 599-600. It concluded that only those statements that are directly contrary to the declarant's interest are sufficiently reliable, and collateral statements that are not self-inculpatory lack the necessary indicia of reliability. *Id*. The *Williamson* rule, however, necessarily excludes many statements that are inherently reliable.

A. THE *WILLIAMSON* STANDARD FOR THE APPLICATION OF FRE 804(B)(3) SHOULD BE OVERRULED BECAUSE IT IS POORLY REASONED AND DEFIES CONSISTENT APPLICATION BY THE LOWER COURTS.

While *stare decisis* is the preferred course because it promotes the "evenhanded, predictable, and consistent" development of the laws, it is not an "inexorable command." *Payne*

v. Tennessee, 501 U.S. 808, 827-28 (1991). A previous decision can and should be overruled when it is "unworkable" or "badly reasoned." *See id.* at 827. *Williamson* is one such decision where the principle of *stare decisis* should not be applied.

1. Justice O'Connor's decision should be overruled because the reasoning is confused and gives unclear guidance to the lower courts regarding its application.

Much of the confusion stemming from the *Williamson* decision is apparent by looking at the text of the decision itself. The majority in *Williamson* purports to impose a per se exclusionary rule on all neutral or self-exculpatory collateral statements contained in an inculpatory narrative, because those statements do not bear the same degree of reliability as those statements that are individually self-inculpatory. *Williamson*, 512 U.S. at 600. Concerned primarily with attempts to curry favor with law enforcement and attempts at blame-shifting, the Court is wary of the strategy of lying effectively by "mix[ing] falsehood with truth." *Id.* at 599-600. However, Justice O'Connor admits that whether a statement is self-inculpatory depends on the context in which the statement was made, and the determination requires a totality of the circumstances approach. *Id.* at 603. She concedes that "even statements that are on their face neutral may actually be against the declarant's interest." *Id.* The Court seems to direct the lower courts to consider the context and general narrative to determine which statements are self-inculpatory while at the same time examining each statement alone. It directs courts to look at the surrounding circumstances but then forces them to excise all of the same necessary context once the evidence comes before the jury.

Moreover, the major concerns about reliability that caused the Court to adopt the narrow reading of the Rule are not present in many situations in which self-inculpatory narratives are made, including the instant case. According to the Advisory Committee Note to 804(b)(3), the "circumstantial guaranty of reliability for declarations against interest is the assumption that

persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Fed. R. Evid. 804 advisory committee's note. The Advisory Notes make clear that whether a statement is against interest is to be determined by looking at the context and circumstances of each case. *Id.* Those that are made while in custody, the Notes state, may be motivated by a desire to curry favor with the authorities, but the same words spoken to an acquaintance would easily be admitted. *Id*.

While Justice O'Connor recognizes these points in *Williamson*, the per se ban on all collateral statements that form the general self-inculpatory narratives will necessarily exclude many statements that are inherently reliable and, taken as a whole, against the declarant's penal interest. *See Williamson*, 512 U.S. at 616 (Kennedy, J., concurring). Defendant Lane's email contains exactly the type of statements that are sufficiently damaging to herself that she would not have made them unless they were true. *See* Fed. R. Evid. 804 advisory committee's notes. Because Justice O'Connor's decision is poorly reasoned and results in the exclusion of many statements that the Advisory Committee likely would have found admissible, *Williamson* should be overruled.

2. *Williamson* has been inconsistently applied by the lower courts.

While *Williamson* on its face may seem like a straightforward rule, application in practice has proven to be exceedingly difficult, resulting in inconsistent treatment by many of the Circuits. *Compare United States v. Patayan Soriano*, 361 F.3d 494, 506 (9th Cir. 2003) (admitting a narrative of generally self-inculpatory statements including those that shifted blame to someone else as the mastermind) *with United States v. Wexler*, 522 F.3d 194, 203 (2d Cir. 2008) (finding that *Williamson* precludes non-self-inculpatory statements within a "broader narrative" that is only "generally self-inculpatory). *See generally* Richard T. Sahuc, *The*

Exception that Swallows the Rule: The Disparate Treatment of Federal Rule of Evidence 804(b)(3) as Interpreted in United States v. Williamson, 55 U. MIAMI L. REV. 867, 868 (2001) (examining the inconsistent federal treatment of *Williamson*). While some courts have applied the narrow test by looking at each portion of the proffered statement individually to determine whether it is truly self-inculpatory, others have chosen to look at the circumstances and context surrounding the statement, admitting those statements that are deemed to be self-inculpatory based on collateral statements and circumstances regardless of whether each individual portion would subject the declarant to criminal liability. *Compare United States v. Nagib*, 56 F.3d 798, 804 (7th Cir. 1995) (examining each portion of the proffered statement to determine whether it was against declarant's penal interest) *with United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997) (looking at the context and circumstances to determine whether the entire statement was against declarant's penal interest).

Even some of the circuits that have tried to remain faithful to *Williamson*'s narrow interpretation of "statement" have addressed the issue with certain degrees of trepidation, failing to definitively excise those collateral remarks that are not individually self-inculpatory. *See United States v. Smalls*, 605 F.3d 765, 786 (10th Cir. 2010) (explaining that collateral remarks that were part of a larger self-inculpatory narrative "*may* need to be extracted" from the self-inculpatory portions of the narrative) (emphasis in original).

The Fourteenth Circuit held that Lane's statement is not admissible using the *Williamson* analysis because none of the five individual statements in Lane's email exposes her to criminal liability. R. at 42. It held that the email does not expose the nature of the business and the rest of the statements are too "cryptic" for liability to attach. R. at 42. However, had this email been proffered in other circuits, many would have ruled it admissible. In *United States v. Barone*, the

declarant's statements regarding his "problem" and "big mistake" were found to be self-inculpatory and sufficiently reliable because he was not shifting blame or attempting to curry favor with law enforcement, and none of the statements were exculpatory of either the declarant or defendant. *Barone*, 114 F.3d at 1296. Therefore, the court found, the declarant's cryptic statements were admissible as sufficiently against his penal interest because none of the reliability concerns were present, and in light of the circumstances of the statements a reasonable person would not have made them unless true. *Id*. at 1299.

Similarly, the circumstances surrounding Defendant Lane's email raise none of these reliability concerns present in *Williamson*, and a reasonable person in Lane's situation would not have made the statements unless they were true. *See id*; *see also United States v. Sasso*, 59 F.3d 341, 349 (2d Cir. 1995) (finding statements to be sufficiently reliable when declarant inculpates himself and defendant equally and when there was no motivation to lie or curry favor with law enforcement). Additionally, the references in the email to "coming clean" and "keeping him quiet" are just as indicative of criminal activity as Limoli's reference to the "problem" and "big mistake" in *Barone*. *See Barone*, 114 F.3d at 1299. Therefore, it is highly likely that the First Circuit, when confronted with a very similar situation, would have come out differently than the Fourteenth Circuit, demonstrating the difficulty in applying the *Williamson* standard.

The Third Circuit has taken a similar approach to the First Circuit in applying *Williamson*. *See United States v. Moses*, 148 F.3d 277 (3d Cir. 1998). The Third Circuit found that given the context, the declarant's vague statement that he was "tak[ing] care" of Moses "moneywise" was sufficiently against his penal interest as to fall under the hearsay exception of Rule 804(b)(3). *See id.* at 280. Rather than looking at each individual portion of the declarant's statement, the court found that the "proper approach" under *Williamson* was simply to "examine

the circumstances in which the statements are made in order to determine whether they are self-inculpatory or self-serving." *Id.* Because the statements were made to a friend rather than law enforcement and because the declarant was providing information that might have aided authorities in any investigation of his wrongdoing, the statements were sufficiently reliable and against the declarant's penal interest to be admissible. *Id.* at 281.

The Third Circuit also identified usefulness in aiding criminal investigations as a factor indicating reliability of a statement. *Id.* Like in *Moses* in which the declarant's statements were against penal interest because they provided information about the defendant and location at which they sometimes met, Lane's email would have been admissible because it provides information that would aid law enforcement in investigating any wrongdoing – namely, that she was running an illicit business with the female team and that at least one member of the male team knew about it, someone whom they wanted to silence. *See id.* While Lane's email does not name Zelasko nor the male team member specifically, making it slightly less helpful than when the declarant named the defendant in *Moses*, the possible partners are so limited that the statement would have provided enough aid to any law enforcement investigation that it would be sufficiently against Lane's penal interest. *See id*.

Lastly, the Fifth Circuit has gone so far as to read *Williamson* as applying only to situations in which the declarant's statement is made to law enforcement after the declarant's arrest, focusing on the concern that the statement would not be reliable if the declarant had a motive to curry favor with law enforcement. *See United States v. Ebron*, 683 F.3d 105, 133 (5th Cir. 2012). In *Ebron*, the Fifth Circuit allowed the admission of a collateral statement that was inculpatory of defendant because the statement was made to the declarant's cellmate rather than law enforcement, a distinction the court found to be dispositive. *Id.* at 133-34.

This kind of fractured response and disparate treatment in the lower courts is precisely the type of situation that counsels against adherence to *stare decisis. See Payne*, 501 U.S. at 829-30. It is those decisions that "have defied consistent application by the lower courts" that are ripe for reconsideration. *See id.* at 830. Because *Williamson* has been applied far from consistently in the lower courts, its standard governing the application of Rule 804(b)(3) should be overruled.

B. THE NARROW STANDARD OF *WILLIAMSON* SHOULD BE REPLACED BY THE APPROACH PUT FORTH BY JUSTICE KENNEDY'S CONCURRENCE BECAUSE IT WOULD ALLOW FOR ADMISSION OF RELIABLE STATEMENTS AGAINST INTEREST THAT THE RULE WAS DESIGNED TO PERMIT.

In his concurrence in *Williamson*, Justice Kennedy gives a brief account of the three different approaches to collateral statements that have been cited most frequently, ultimately favoring the middle ground offered by the McCormick approach. *Williamson*, 512 U.S. at 612. This is the approach that should be adopted as the standard governing collateral statements. *See id.* at 620. Under the Kennedy/McCormick approach, a court should determine whether the declarant made a statement that contained a fact against penal interest, and if so, all statements related to the statement against interest should be admitted. *Id.* at 620.

Kennedy is careful to impose two limitations: a collateral statement should be excluded if it is so self-serving as to render it unreliable, or if the statement was made "under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment." *Id.* at 620. This approach effectively addresses the reliability concerns that motivated Justice O'Connor and the rest of the majority to adopt such a narrow approach with regard to collateral statements. It also effectively encapsulates Justice O'Connor's directive to consider the totality of the circumstances when determining whether or not a statement is, in fact, contrary to penal interest. *See* Jennifer

L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1550-51 (2013) (explaining that only allowing individually self-inculpatory statements means the court must rid the narrative of all context, ending up with a different story than originally told).

Using this standard, Lane's email is admissible as a statement against penal interest under 804(b)(3). The portion of the email that refers to her "partner" figuring out how to "keep him quiet" is certainly as against penal interest as Limoli's statement in *Barone* about his "big mistake" and resultant "problem," as discussed above. *See Barone*, 114 F.3d at 1299. The reference to her partner is indicative of participation in a conspiracy and the attempt to "keep [someone] quiet" is indicative of further criminal activity. *See id*. Therefore, Lane's email would pass the first step of Kennedy's test, and the rest of the email would be admitted as collateral statements bolstering the narrative of criminal activity. *See Williamson*, 514 U.S. at 620.

The inquiry does not stop there, however, as the test makes sure that any collateral statements are sufficiently reliable to pass muster under the rule. *Id.* The statements here clearly pass muster. Lane is not attempting to shift any blame off of herself, as she refers to the business she is running *with* her partner as opposed to the business that her partner is running alone. *See* R. at 3. She is simply asking for help in a clearly precarious situation rather than attempting to absolve herself of any liability. *Id.* Neither is she attempting to curry favor with law enforcement, because this was a statement made to a close confidante rather than a post-arrest statement made to police to obtain favorable treatment. *See Ebron*, 683 F.3d at 130; *Barone*, 114 F.3d at 1295-96.

In sum, Justice Kennedy's approach allows the courts to truly employ the totality of the circumstances inquiry that O'Connor envisioned in *Williamson* but then stripped of its meaning by mandating that courts look at each statement individually. *See Williamson*, 512 U.S. at 603. Under this contextual inquiry, it is clear that the circumstances in which Lane's email was written provide no indication that she had any motivation to lie in any of the collateral statements. Because the circumstances surrounding the email indicate that she would not have made the statements unless "satisfied for good reason that they are true," Lane's email is both sufficiently against penal interest and sufficiently reliable to be admissible under 804(b)(3).

IV. ADMISSION OF LANE'S EMAIL DOES NOT VIOLATE THE CONFRONTATION CLAUSE UNDER *BRUTON V. UNITED STATES* BECAUSE *CRAWFORD V. WASHINGTON* MADE CLEAR THAT THE CONFRONTATION CLAUSE ONLY APPLIES TO TESTIMONIAL STATEMENTS.

The Sixth Amendment guarantees the right of the accused to be "confronted with the witnesses against him." U.S. Const. amend. VI. In *Bruton v. United States*, the Supreme Court held that admission of an unavailable codefendant's confession in a joint trial, as used against the defendant, violated the defendant's right to cross-examination under the Confrontation Clause of the Sixth Amendment. 391 U.S. 123, 126 (1968). As the Court's Confrontation Clause jurisprudence continued to evolve, it held in *Ohio v. Roberts* that when a hearsay declarant is unavailable for cross-examination, his statement is admissible only if it shows "adequate indicia of reliability;" in other words, it had to "fall within a firmly rooted hearsay exception" or show "particularized guarantees of trustworthiness." 448 U.S. 56, 66 (1980).

In 2004, the Supreme Court revisited this standard used for the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36 (2004). Finding the *Roberts* rationale to be

unworkable and not in line with the historical principles of the Confrontation Clause, it expressly overruled its decision in *Roberts* and announced a new standard. *Id.* at 60. In *Crawford*, the Court issued a rule that applies to all statements facing a challenge under the Confrontation Clause: if the statement is *testimonial* in nature, the Sixth Amendment requires exclusion unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. *Id.* at 61. Where a statement is nontestimonial in nature, it is governed by the individual states' hearsay laws—not the Confrontation Clause. *Id.* at 68. Because *Crawford* draws the distinct line between testimonial statements and non-testimonial statements, overruling the *Roberts* emphasis on reliability, and because it holds that this distinction is the relevant one for the Confrontation Clause, the *Bruton* doctrine is limited to testimonial statements only. *See id*. Therefore, admission of co-defendant Lane's nontestimonial email[2] at the joint trial would not violate Respondent Zelasko's rights under the Confrontation Clause of the Sixth Amendment.

A. IN OVERRULING *OHIO V. ROBERTS*, THE SUPREME COURT ANNOUNCED A NEW RULE IN *CRAWFORD* THAT APPLIES TO *ALL* STATEMENTS SUBJECT TO CONFRONTATION CLAUSE SCRUTINY.

The court below asserts that *Crawford* does not apply to the *Bruton* doctrine, because *Bruton* was concerned with prejudice to the defendant and *Crawford* is concerned with the reliability of the statements. R. at 45. It therefore held that admission of a co-defendant's inculpatory statement, whether it is testimonial or nontestimonial, unconstitutionally prejudices the defendant unless the co-defendant is available for cross-examination. *Id.*; *see generally* Colin Miller, *Avoiding a Confrontation? How Courts Have Erred in Finding That Nontestimonial Hearsay Is Beyond the Scope of the* Bruton

[2] The parties do not dispute that Lane's email is nontestimonial. R. at 18-19.

Doctrine, 77 BROOK. L. REV. 625, 627 (2012) (arguing that the cases present legally distinct issues). This holding is entirely inconsistent with the *Crawford* decision, and misunderstands its rationale.

It is true that the *Roberts* decision did not affect the *Bruton* doctrine, because *Roberts* dealt with reliability and *Bruton* deals with prejudice to defendants. *See* Miller at 663. However, as the Court later made clear, *Crawford* announced an entirely new rule, completely overruling the rationale of *Roberts*. *Whorton v. Bockton*, 549 U.S. 406, 416 (2007). The Court explained that "the *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled." *Id.*; *see Davis v. Washington*, 547 U.S. 813, 825, n.4 (2007).

Looking to the text of the decision similarly makes clear that the *Roberts* emphasis on reliability departed from the historical principles of the Confrontation Clause, which was meant to address witness testimony. *See Crawford*, 541 U.S. at 59. The Court explains that the general reliability framework of *Roberts* is "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Id.* at 63. It makes absolutely clear that the original understanding of the Clause was that it applies *only* to testimonial statements and that any nontestimonial hearsay statements are subject only to the state or federal evidence rules. *Id.* at 68. Rather than setting forth a test for constitutional reliability, therefore, *Crawford* simply sets forth a test to determine which statements fall within the reach of the Confrontation Clause.

Indeed, Justice Rehnquist, concurring only in the judgment, dissents from the Court's decision to overrule *Roberts*, explaining that there is no reason to draw the distinction between testimonial and nontestimonial statements instead of evaluating the

reliability of each statement. *Id.* at 69-74 (Rhenquist, J., concurring). The *Crawford* rule, therefore, does not turn on the reliability of hearsay statements made by unavailable declarants. The Court created a clear and sharp distinction between testimonial and nontestimonial statements, rejecting the amorphous and unpredictable emphasis on reliability as put forth by the *Roberts* Court. *See id.* at 62-63. The Court plainly "limited the Confrontation Clause's reach to testimonial statements." *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011). Because Lane's email was nontestimonial and because *Crawford* limited *Bruton* to testimonial statements only, admission of the Lane email would not violate Respondent's constitutional rights.

B. CIRCUITS HAVE OVERWHELMINGLY INTERPRETED *CRAWFORD* AS LIMITING THE *BRUTON* DOCTRINE TO TESTIMONIAL STATEMENTS.

The lower court's decision runs contrary to many of the circuits that have addressed this issue. It contends that *Bruton* and *Crawford* deal with legally distinct issues, but as discussed in the previous section, the lower court is misguided in this analysis. *See* R. at 45. Other circuits that have addressed this issue have overwhelmingly concluded that *Crawford* clearly limited the *Bruton* doctrine to testimonial statements, and that nontestimonial statements are not covered by the Confrontation Clause but instead are to be governed by the state's hearsay laws. Examination of these decisions as well as the Supreme Court's decisions in *Crawford* and *Davis* make clear that prejudice to the defendant and reliability of the statements are no longer the cornerstones of admissibility; rather, the dispositive determination is whether the statements are nontestimonial or testimonial in nature.

The Eighth Circuit has recently addressed an issue very similar to the one presented by Lane's statement. In *United States v. Dale*, the court addressed the

admissibility of a recorded incriminating statement by an unavailable codefendant as offered against the other defendant at a joint trial. 614 F.3d 942, 954 (8th Cir. 2010). The court found that the recorded statement was clearly nontestimonial because the declarant did not know that the listener was wearing a wire, so he could not have reasonably believed that the statements would be used at a later trial. *Id.* at 956. In holding that *Bruton* did not apply to nontestimonial statement, it stated that it is now "clear that that Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant." *Id*. at 955. This unequivocal exclusion of nontestimonial statements from Confrontation Clause analysis makes clear that *Crawford* limited *Bruton* to testimonial statements only. *See id.* at 956. Similarly, like in *Dale* in which the admission of the non-testifying codefendant's statement at the joint trial did not violate the Confrontation Clause because the statement was nontestimonial, admission of Lane's nontestimonial email would not violate Respondent's rights under the Confrontation Clause regardless of the prejudicial impact on Respondent. *See id.* at 955.

Similarly, the Tenth Circuit expressly addressed the applicability of the Confrontation Clause to the *Bruton* doctrine. The Tenth Circuit notes that the decision in *Bruton* is consistent with current Confrontation Clause jurisprudence because the statement in *Bruton* was in fact testimonial, as it dealt with a codefendant's post-arrest confession to law enforcement. *United States v. Smalls*, 605 F.3d 765, 768 n. 2 (10th Cir. 2010). It explicitly notes that the *Bruton* rule, "like the Confrontation Clause on which it is premised, does not apply to nontestimonial hearsay statements." *Id.*

Taking the same approach, the First Circuit examined the admissibility of statements made by a non-testifying co-defendant at a joint trial, explaining that the

Bruton rule about such statements at a joint trial only applies if the defendant has the right to confront the declarant in the first place. *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010). The court made clear that courts must view *Bruton* "through the lens of *Crawford* and *Davis*," and that the threshold inquiry is whether the statement is testimonial. *Id*. If the statement is not testimonial, the court makes clear, the Confrontation Clause does not apply. *Id.* As other circuits have noted as well, "once it is determined that a statement is nontestimonial, only the rules of evidence may bar its admission." *United States v. Sutton*, 387 Fed. Appx. 595, 601 (6th Cir. 2010); *see also United States v. Pike*, 292 Fed. Appx. 108, 112 (2d Cir. 2008) (holding that a declarant's statement did not violate either *Crawford* or *Bruton* because it was nontestimonial); *United States v. Johnson*, 581 F.3d 320, 325 (6th Cir. 2009) (Confrontation Clause only applies to testimonial statements and admissibility of nontestimonial statements governed only by Federal Rules of Evidence); *United States v. Duron-Caldera*, 737 F.3d 988, 993 (5th Cir. 2013) (admission of affidavit violated Confrontation Clause only because affidavit was testimonial, noting specifically that *Bruton* does not apply to nontestimonial statements because *Bruton* is premised on Confrontation Clause).

The court below cites no circuit decisions in support of its contention that *Bruton* and *Crawford* present legally distinct issues, and Respondent only vaguely referenced a Third Circuit decision indicating that *Crawford* not restrict *Bruton* to testimonial statements. R. at 18-19. Respondent may be referring to *United States v. Jones*, in which the government sought admission of a non-testifying co-conspirator's statement. 381 Fed. Appx. 148, 151 (3d Cir. 2010). The Third Circuit explains that it interprets *Bruton*'s rule broadly, applying it to custodial confessions as well as informal statements. *Id*. Reliance

on this case, however, is misplaced, as the observation that *Bruton* applies broadly to informal statements was dicta. *Id*. Indeed, the statement in *Jones* was ruled admissible as non-hearsay under Rule 801's exception for co-conspirator statements made in furtherance of a conspiracy. *Id.*; Fed. R. Evid. 801(d)(2)(E). The court, therefore, did not need to affirmatively decide the *Bruton* issue because it found that the statement was non-hearsay. *Jones*, 381 Fed. Appx. at 151.

The Supreme Court has made clear in multiple decisions that *Crawford* limited the Confrontation Clause to only testimonial statements, and that admission of nontestimonial statements will not violate the Confrontation Clause. Indeed, almost every circuit to address the issue has interpreted *Crawford* this way, and has found that *Crawford* limits the *Bruton* doctrine to testimonial statements only. Therefore, admission of co-defendant Lane's nontestimonial email would not violate Respondent's rights under the Sixth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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Counsel for Petitioner

Dated: February 12, 2014