TEAM NUMBER: 9 P

No. 12 - 13

IN THE
SUPREME COURT OF THE UNITED STATES

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 THE PETITIONER

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the Federal Rule Evidence 404(b) exclusion of criminal propensity evidence applies to all "persons", as is written in the text, or if the rule applies only to criminal defendants.

II. Whether the Full Defense Rule of *Chambers v. Mississippi* guarantees the right for a defendant to enter criminal propensity evidence of a third party where no other evidence relates the third party to the case at hand.

III. Whether this Court should modify the narrow doctrine of *Williamson v. United States* to reinterpret what may be considered a "statement" under Federal Rule of Evidence 804(b)(3) to include both inculpatory and collateral statements based on the totality of the circumstances.

IV. Whether *Crawford v. Washington* should be considered a refinement to the *Bruton* Doctrine, and therefore allows for the admission of nontestimonial statements made against the penal interest of the non-testifying codefendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Other Federal Cases

Constitutional Provisions

Statutes

Other Sources

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is *United States v. Zelasko*, Cr. No. 13-452 (14th Cir. Feb. 14, 2013). The opinion of the United States District Court for the Southern District of Boerum is *United States v. Zelasko*, Cr. No. 12-98 (S.D. Brm. Jul. 18, 2012).

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Federal Rules of Evidence Rule 401 provides that: "Evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." FED. R. EVID. 401.

II. The Federal Rules of Evidence Rule 403 provides that: "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." FED. R. EVID. 403.

III. The Federal Rules of Evidence Rule 404(b) provides in the relevant parts that: "1) Evidence 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; 2) This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial…." FED. R. EVID. 404(b).

IV. The Federal Rules of Evidence Rule 804(b)(3) states, in the relevant part, an exception to the Rule Against Hearsay when the declarant is unavailable and the statement: "…tends to expose the declarant to criminal liability." FED. R. EVID. 804(b)(3).

V. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides, in the relevant part, that: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

On February 3, 2012 Defendant Zelasko shot and killed a Drug Enforcement Agent ("DEA") informant named Hunter Riley. R. 8. Ms. Zelasko was arrested that day and her Codefendant, Jessica Lane, was arrested the next day. R. 3. Mr. Riley was a member of the men's U.S. Snowman Team and, before his death, investigated the United States women's Snowman Team under the direction of the DEA. R. 9. Mr. Riley sought evidence of distribution of an illegal performance-enhancing anabolic steroid commonly known as "ThunderSnow". During this time, both Ms. Lane and Ms. Zelasko were on the women's U.S. Snowman Team. *Id*.

On October 1, November 3 and December 9, 2011, Mr. Riley attempted to buy steroids from Ms. Lane and she declined each time. *Id*. On December 10, U.S. women's Snowman team coach Peter Billings observed the two defendants arguing, and heard Ms. Lane admonish Ms. Zelasko stating, "Stop bragging to everyone about all the money you're making!" *Id*. On December 19, Mr. Billing's confronted Ms. Lane, with whom he had a romantic relationship, about his suspicions that she was selling steroids to team members, which she denied. *Id*.

On January 16, 2011, Defendant Lane sent an e-mail to Mr. Billings acknowledging his suspicions and stating that member of the male team had found out about her "business" that she and her partner had been running. R. 29. Ms. Lane further stated that her partner was trying to figure out how to "keep him quiet." *Id*. On February 3, 2012, less than three weeks later, Hunter Riley was shot and killed at the Snowteam training facility by Ms. Zelasko. R. 8.

In the days following Mr. Riley's death, the DEA executed search warrants at the Snowteam training facility as well as homes of Ms. Zelasko, Ms. Lane, and Ms. Casey Short, another women's Snowteam member. *Id*. The DEA found one hundred milligrams of

ThunderSnow and $5,000 cash at the home of Ms. Zelasko; 1000 milligrams of ThunderSnow and $10,000 at Ms. Lane's; 12,500 milligrams of ThunderSnow at the U.S. Snowteam training facility (accessible by all team members). *Id*. No evidence was found at Ms. Short's home. *Id*.

On April 10, 2012, a Grand Jury indicted Defendants Lane and Zelasko on 5 charges including conspiracy to distribute anabolic steroids, and murder in the first degree. R. 5. Ms. Zelasko intends to argue that the shooting of Mr. Riley was accidental and that she was not involved in any drug distribution conspiracy. R. 11. To that end, Ms. Zelasko sought to introduce the testimony of Melinda Morris, a former member of the Canadian Snowman team, who will testify that Casey Short had sold Ms. Morris "White Lightning", an anabolic steroid very similar to ThunderSnow, while Ms. Short was her teammate in Canada. R. 24–25. Ms. Zelasko intends to argue that Ms. Short's previous crimes demonstrate a propensity for illegal steroid distribution and that Ms. Short is Ms. Lane's coconspirator. R. 10. In the alternative, Ms. Zelasko seeks to admit Ms. Morris's affidavit, because its omission would violate Ms. Zelasko's Due Process right to present a full defense. R. 14. Furthermore, Ms. Zelasko seeks to suppress the e-mail that Ms. Lane sent to Mr. Billings, arguing that the e-mail is impermissible hearsay and that the e-mail's admission would also violate the Confrontation Clause of the Sixth Amendment because Ms. Zelasko will be unable to cross-examine her Codefendant, who will be asserting her right not to testify at the joint trial. R. 16–19.

Ms. Zelasko made a pretrial motion seeking to admit Ms. Morris' testimony, and the government made a pretrial motion to admit Ms. Lane's e-mail. R. 7. The United States District Court for the Southern District of Boerum granted both motions in favor of the defense. R. 20–23. The United States filed an interlocutory appeal to the United States Court of Appeals for the

Fourteenth Circuit, who affirmed the District Court's decision. R. 30–54. The United States filed a timely petition for certiorari, which was granted by this Court on October 1, 2013. R. 55.

SUMMARY OF THE ARGUMENT

I: This Court should reverse the lower court's ruling and bar the admission of evidence of Ms. Short's past drug sales as propensity evidence under Federal Rule of Evidence 404(b). The lower court erred in its understanding of the majority Circuit opinion on "reverse 404(b)" evidence, erred in its finding that Short's propensity evidence is not barred by standard or modified 404(b) scrutiny, and erred in its application of the 401/403 balancing test. "Other crime" propensity evidence is clearly inadmissible both under the popular modified 404(b) scrutiny as well as under the standard 404(b) scrutiny application supported by the plain text of the rule and 404(b)'s policy objectives. Evidence of previous crimes by Short is also inadmissible under the 401/403 balancing test, because it lacks probative value, would be highly prejudicial, would likely mislead a jury, and would certainly result in an inefficient distraction. This Court should bar the admission of Ms. Morris' testimony under both 404(b) and the 401/403.

II: This Court should reverse the lower court's radical application of the *Chambers v. Mississippi* Full Defense Rule. The Full Defense Rule is only to be used in narrow circumstances when otherwise inadmissible evidence would exculpate a Defendant and its admission is thereby necessary to ensure their right to present a Full Defense. Evidence of Short's past crime is remote and unrelated to the charges here, and its admission would do little to exculpate Defendant Zelasko. Further, the evidence fails the 401/403 balancing test, which is an independent evaluation from the Full Defense Rule. This Court should hold that Full Defense Rule is inapplicable in this case.

III: The court should reconsider its ruling in *Williamson v. United States*. By only evaluating individual sentences, the court is defeating the primary underlying reason behind the admission of statements against penal interest: that such statements are likely to be truthful. By not evaluating the effect of collateral statements, courts are too often denied reliable information. This Court should allow for finders of fact to consider a wider range of statements in order to better discern the meaning behind inculpatory statements. This Court should rule that certain collateral statements should be considered under the totality of the circumstances, and consider the cumulative effect of collateral statements.

IV: This court should hold that Ms. Lane's e-mail to Mr. Billings is a nontestimonial statement under the *Crawford* and *Bruton* doctrines. The trial court held that the *Crawford* nontestimonial statement exception to the Confrontation Clause did not modify the *Bruton* doctrine despite the fact that the *Crawford* majority cited *Bruton* in its opinion. This court should clarify that *Crawford* was as a refinement of the *Bruton* doctrine. Furthermore, this Court should recognize that Ms. Lane's statements were clearly non-testimonial. This Court should therefore instruct the Court of Appeals to remand with instructions to admit Ms. Lane's e-mail.

ARGUMENT

I. The lower court erred when it failed to apply 404(b) scrutiny to evidence of Ms. Short's past crime and erred in its analysis of the Federal Rules of Evidence 401 and 403 balancing test.

The Court of Appeals erred by failing to apply 404(b) scrutiny to the propensity evidence introduced by the Defendant regarding a past criminal act of Ms. Short, a third party to this case. Furthermore, the Court erred when it held that Short's past crimes were admissible under a Federal Rule of Evidence 401/403 balancing test.

Rule 404(b) establishes a foundational tenet of federal law: one must be tried only for the charged offense, not for past crimes, wrongs, acts, or who he is as a person. McCormick on Evidence § 190 (Edward W. Clearly, 3d ed. 1984). Rule 404(b) contains two prongs. The first prong of Rule 404(b) provides that evidence of "other crimes…is not admissible to prove the character of *a person* in order to show action in conformity therewith." Fed. R. Evid. 404(b)(1) (emphasis added). The second prong allows admission of one's "other crimes" evidence for only limited purposes, including proving an individual's intent, identity, and plan. Fed. R. Evid. 404(b)(2). Rule 404(b) is typically used to limit admission of a defendant's "other crimes" meant to incriminate him or her. When defendants, however, seek to introduce evidence of a third party's "other crimes" to demonstrate that this third party committed the crime for which the defendant is charged, such usage is known as "reverse 404(b)." See 2 Wigmore on Evidence § 304 (describing how reverse 404(b) is used to "negative the accused's guilt").

This issue is one of first impression for this Court, and federal circuits disagree about 404(b)'s role in "reverse 404(b)" evidence. Some circuits apply 404(b) uniformly irrespective of whose "other crimes" are at issue. Other circuits apply a modified 404(b) when a defendant seeks

to use "other crimes" evidence. Under both the standard and modified 404(b) application, propensity evidence (evidence that an individual committed a bad act offered only to prove that this individual acted in conformity therewith) is inadmissible. Even courts that do not apply any 404(b) scrutiny to third party criminal propensity evidence always subject the evidence to the 401/403 balancing test.

The lower court erred in three respects in its 404(b) analysis: (1) it purported to apply 404(b) in the manner endorsed by the majority of circuits but instead applied an atypical approach, (2) it did not apply 404(b) to the evidence when the rules of statutory construction and policy support such an application, and (3) it failed to accurately analyze the admissibility of the Morris testimony even if 404(b) were omitted from the analysis. Therefore, this Court should reject evidence of Short's past crime to demonstrate her propensity to commit the crimes at issue.

A. The lower court erred in stating the majority of Circuits hold 404(b) does not bar criminal propensity evidence of a third party.

The lower court erred when it stated that the "majority of Circuits that have considered the issue hold that 404(b) does not bar propensity evidence when it is offered by a criminal defendant." R. 35. On the contrary, despite clear congressional intent for consistent application of 404(b) to all "persons" (*see* discussion *infra* Part I.B), the majority of Circuits have applied a modified version of 404(b), namely the *Stevens* rule. *United States v. Stevens*, 935 F.2d 1380, 1404–05 (3rd Cir. 1991); *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005) (adopting *Stevens* rule). The *Stevens* rule does not eliminate 404(b) scrutiny from the analysis of reverse 404(b) evidence but does provide "more leeway in introducing 'bad acts' evidence under one of the Rule 404(b) exceptions." *See United States v. Williams*, 458 F.3d 312, 314 (3rd Cir. 2006) (clarifying the *Stevens* rule). In other words, evidence introduced strictly to show propensity of a third party is excluded under the modified 404(b) application outlined in *Stevens*.

Under the popular *Stevens* rule, Short's past crime evidence is clearly inadmissible. Defendant seeks to include Short's past crime as evidence to "demonstrate Ms. Short's propensity to sell…drugs" and never attempts to admit it under a 404(b) exception. R. 10. Accordingly, evidence of Short's past crime is admitted purely for propensity purposes and is inadmissible under the modified 404(b) standard created in *Stevens*.

B. The lower court should have applied 404(b) to Short's past crime evidence, because the rules of statutory construction and 404(b)'s policy objectives demonstrate congressional intent for such a construction.

The Fourteenth Circuit should have held that 404(b) applies to all individuals uniformly. Several Circuits have applied 404(b) to bar third party "other crime" evidence. Also, the well-settled rules of statutory construction and 404(b)'s policy objectives demonstrate Congress intended 404(b) to limit admission of third parties' "other crimes" in the same way it limits those of defendants.

1. The lower court erred when it stated only *Lucas* has applied 404(b) to third party propensity evidence.

The lower court erred in stating that only *United States v. Lucas* has applied 404(b) to bar third party criminal propensity evidence when, in fact, various Circuits have held "reverse 404(b)" evidence admitted only to demonstrate a third party's propensity to commit a crime inadmissible. 357 F.3d 599 (6th Cir. 2004). *See United States v. Sturm*, 671 F.2d 749, 751 (3d Cir. 1982) (affirming third party evidence "was properly excludable"); *United States v. Lynch*, 437 F.3d 902, 915 (9th Cir. 2006) (affirming district court's exclusion of reverse 404(b) evidence because it "was strictly propensity evidence"); *United States v. Reed*, 715 F.2d 870, 876 (5th Cir. 1983) (articulating that exclusion of evidence of third party's crime was "precisely what is forbidden under [Rule 404(b)]."). Here, because the Defendant admittedly offers Short's past acts as propensity evidence only, the evidence is inadmissible under 404(b).

2. Rules of statutory construction support uniform application of 404(b).

This Court has long held that if a statute's language was "plain", then "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470, 485 192 (1917) (internal citation omitted). Also, Congress's use of different words in different portions of a statute evidences intent for different meaning from those words. *See Mohamad v. Palestinian Authority et al*., 132 S. Ct. 1702, 1708 (2012). Further, when the text of a statute is unambiguous, the judicial inquiry need not consider sources outside the text of the statute for clues of intent. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). These statutory construction rules are instructive in a court's determination that 404(b) protects defendants and third parties alike.

The plain text of 404(b) applies itself to all "persons." Under the plain meaning rule, when 404(b) plainly proscribes "other crimes" evidence of a "person," it cannot reasonably be construed as extending only to "defendants." *See United States v. McCourt*, 925 F.2d 1229, 1233 (9th Cir. 1991). For even further clarification of congressional intent, the second half of the Rule states that it applies to only "defendants." Fed. R. Evid. 404(b). Congress's use of both "person" and "defendant" in different portions of the same statute is evidence that Congress knew how to delineate subsets of persons when it wanted to and it intended "a person" and "defendant" to have different meanings. *McCourt*, 925 F.2d at 1232. Federal Rules of Evidence treatises agree.[1] The lower court looked to F.R.E. Advisory Committee Notes and common law to support its contention that 404(b) was meant to apply to defendant propensity evidence only, however these

[1] See 2 D. Louisell & C. Mueller, Federal Evidence § 140, at 175 (rev. ed. 1985) (footnote omitted) ("the language is not expressly limited…to acts by the accused. Thus the principle applies…to third-party misconduct too"); see also 22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5239, at 457-58 ("Whose "crimes, wrongs or acts" are barred by Rule 404(b)? Although most of the cases involve proof of other acts of a party, Rule 404(b) is not so limited. Therefore, proof of the conduct of… third persons is prohibited where the evidence is offered to prove their character as a basis for an inference as to their conduct").

sources are irrelevant because the statute's text clearly and unambiguously identifies who is subject to 404(b) scrutiny: all "persons." Congress intended for Rule 404(b) to exclude propensity evidence like Short's past crime evidence, and the rules of statutory construction the plainly illustrate that fact.

3. Policy objectives of 404(b) also support uniform application of the rule.

404(b)'s common law and modern policy objectives also support application of 404(b) to third party "other crimes" evidence. The lower court endorses limiting 404(b)'s purview to defendants only to avoid the common law concern of "prejudicial inferences against criminal defendants." R. 12. While protection of the defendant is certainly a 404(b) policy objective, it is by no means the only one. Rule 404(b) has roots in many concerns including a jury punishing or rewarding an individual for past conduct rather than weighing evidence directly relevant to the specific occurrence, a jury misestimating the probative value of the extrinsic act, the unpredictability of human behavior, and assuring that a person should be free from his past misdeeds.[2]

The policy goals of 404(b) contemplate the dangers of "other crime" evidence for all individuals, not just defendants. For example, policy concerns such as a jury that misestimates the value of extrinsic evidence and ensuring a person is free from his past deeds are no less relevant when considering third party "other crime" evidence. Though the prejudicial impact of defendants' prior crime evidence could result in a conviction and loss of liberty, injustice is equally rife when a guilty defendant is exonerated by way of misplaced blame on an innocent

[2] Weissenberger, Federal Evidence § 404.12, at 87–88 (1987); *see also McCourt*, 925 F.23d at 1235–36 (discussing 404(b) policy objectives in that "it reflects a deep seated notion that our system of justice should not permit the trier of fact to infer that because someone was a bad guy once, he is likely to be a bad guy again and it recognizes that the prejudicial impact of prior criminal conduct offered only to show conforming conduct outweighs its probative value").

third party. Such is the danger in the use of criminal propensity evidence by a defendant. When the Court applies 404(b) to all "other crimes" evidence, all of Rule's 404(b)'s policy goals are upheld, not just the one that protects the defendant. The policy rationale discussed is highly relevant to this case, and further support the inadmissibility of Short's past crime evidence.

The plain text and policy goals of Rule 404(b) demonstrate Congress's intent for third party "other crime" evidence to fall under standard 404(b) purview.

C. Evidence of Short's past crime is also inadmissible under the F.R.E. 401/403 balancing test.

In addition to failure under 404(b) as propensity evidence, Short's past crime evidence is also inadmissible under the 401/403 balancing test.

Even if evidence survives 404(b) scrutiny, it must also survive an independent analysis under Federal Rules 401 and 403, where the relevance of evidence is balanced against 403 considerations. *See United States v. Wilson*, 307 F.3d 596, (7th Cir. 2002) (explaining that "a trial court is entitled to excluded [Rule 404(b)] evidence if, upon a balancing of the evidence's probative value against considerations such as prejudice, undue waste of time, and confusion of the issues under Rules 401 and 403…"). Rule 401 reaffirms the relevance requirement for all evidence and Rule 403 calls for the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury." Fed. R. Evid. 401; Fed. R. Evid. 403. In addition to being inadmissible as propensity evidence under 404(b), the Morris affidavit is also inadmissible for failing the Rule 401/Rule 403 balancing test.

When reverse 404(b) evidence includes generic and common offenses, the court will find such reverse 404(b) evidence fails the 401/403 balancing test. For example, in *United States v. Lucas*, authorities pulled over Lucas, discovered 2.2 kilograms of cocaine under the driver's seat of her vehicle, and charged her with possession with intent to distribute. 357 F.3d at 603. Lucas

defended the charges with evidence that, earlier that day, an acquaintance borrowed the vehicle and this acquaintance has a prior conviction for possession of cocaine with intent to distribute. *Id*. at 603–04. The Sixth Circuit held that under the 401/403 balancing test any probative value of the prior bad act was outweighed by its prejudicial effect on the jury, and "it would have made it easier for the jury to lay the blame on [the acquaintance] despite evidence" of the defendant's guilt. *Id*. at 606; *see United States v. Seals*, 419 F.3d 600 (7th Cir. 2005) (affirming exclusion of evidence of third party's commission of bank robberies that were similar to the bank robbery at issue in the case because "the similarities between the two robberies were generic. Many robbers disguise their identities, carry firearms and use a stolen vehicle in their getaway.").

Just as the court in *Lucas* found the acquaintance's past crime of cocaine possession was not probative enough to balance its 403 considerations, this Court should hold the same for evidence of Short's single instance of selling drugs to a teammate. Lucas's attempt to use a past conviction of cocaine possession as evidence that the acquaintance was guilty for Lucas's charge is just as prejudicial and likely to mislead the jury as evidence of Short's past drug deal to demonstrate evidence that Short was Defendant Lane's coconspirator. The Short evidence, however, produces trial inefficiency, a 403 consideration not present in *Lucas*. In *Lucas*, the defendant sought to use a criminal conviction as evidence of "past crime,"; in the present case, Defendant seeks to admit an affidavit by an alleged witness to Short's drug deal. Because Short has no indictment nor conviction to support Defendant's theory that she has a drug dealing propensity, the Court's focus would be distracted in an attempt to determine whether Short actually did sell Morris drugs. This "trial within a trial" would result in the sort of inefficiency 403 attempts to limit.

Short's past drug deal further fails the balancing test because it provides less probative value under 403 than the third party crime in *Lucas*. Like the crime of cocaine possession in Lucas is common and indistinct, world-class athletes' involvement with steroids is quite common. Tim Rohan, *Antidoping Agency Delays Publication of Research*, N.Y. Times, Aug. 23, 2013, at A1. In fact, Defendant presents less probative evidence than that in *Lucas*, because Lucas provided evidence that the acquaintance was at the scene of the crime, whereas here, outside of the fact that Short was on her Pentathlon team, Defendant presents no connection between Short and the sale of drugs or the murder at issue in this case. Like the third party past crime in *Lucas*, Short's past crime evidence fails the 401/403 balancing test.

II. The lower court also erred in its radical application of the Full Defense Rule because the rule only applies to cases in which inadmissible evidence would exculpate the defendant and does not include evidence that fails the 401/403 balancing test.

The lower court erred when it held that admission of Short's past crime evidence was necessary to ensure Defendant's right to present a full defense, because evidence of Short's past drug deal is not sufficiently probative of Defendant's innocence. Furthermore, Short's past crime evidence fails the 401/403 balancing test, an evidentiary test designed to exclude evidence independent of the Full Defense Rule.

The Due Process clause of the Fourteenth Amendment of the Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." U.S. Const. amend. XIV; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). In *Chambers*, the Court relied on this principle to hold that the Due Process clause would admit evidence otherwise restricted by evidentiary rules if the exclusion of evidence is "critical to [a defendant's] defense" and would deny him/her "a trial in accord with traditional and fundamental standards of due process." *Chambers v. Mississippi,* 410 U.S. 284,

302 (1973). The Court has since clarified the contours of the *Chambers* Full Defense Rule and cautioned that the Rule is to be applied sparingly, as *Chambers* was no more than "an exercise in highly case-specific error correction." *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996); *see also Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (reiterating that "[o]nly rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence"). Furthermore, in *Holmes v. South Carolina*, the Court articulated, while contemplating the reach of the Full Defense Rule, that reverse 404(b) shall be excluded when the evidence does not sufficiently connect the third person to the crime or when evidence fails a 401/403 balancing test. 547 U.S. 319, 326 (2006). The lower court erred in admitting Short's past crime evidence under the Full Defense Rule, because the evidence (A) would not exculpate Zelasko from her charged offenses; and (B) fails the 401/403 balancing test.

A. The Full Defense Rule does not apply because the evidence of Short's past crimes does not exculpate Defendant Zelasko.

This Court has articulated, while contemplating the reach of the Full Defense Rule, that reverse 404(b) "evidence may be excluded where it does not sufficiently connect the other person to the crime [including] where the evidence is speculative or remote." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). This Court has therefore only used the Full Defense Rule to admit evidence when the evidentiary rules deprive a defendant of presenting evidence that, if true, would exculpate the defendant. Application of the Full Defense Rule to Short's past crime evidence would be a radical departure from this Court's precedent, and this Court should reject it here.

For example, in *Chambers*, a defendant was charged for shooting a police officer. *Chambers,* 410 U.S. at 285. The defendant's friend was present the night of the shooting, gave a sworn confession to the very murder at issue, and told others he was responsible. *Id*. at 287-88.

The Mississippi evidentiary rules of hearsay and impeaching one's own witness, however, completely proscribed the defendant's ability to present the confession or witness testimony of the confession. *Id*. at 294. This Court reversed Chambers' conviction and held that the trial court's application of Mississippi's voucher and hearsay rules, resulting in an exclusion of third party guilt evidence, deprived Chambers of due process of law because it significantly undermined fundamental elements of his defense.[3] *Id*. at 302–03. On the other hand, in *United States v. Ushery*, the defendant was found with drugs in his car and was convicted of possession with intent to distribute crack cocaine. 400 Fed. Appx. 674, 675 (3d Cir. 2010). Defendant intended to introduce evidence of a traffic stop that occurred approximately one year prior in which crack cocaine was found in a car owned by his passenger. *Id*. The court acknowledged "that under exceptional circumstances…it could plausibly be argued that a defendant has a constitutional right to present propensity evidence otherwise barred by Rule 404(b)[,]" but exclusion of the other crime evidence here was not a violation of defendant's right to a full defense. *Id*. at 677. The court reasoned that the necessary "exceptional circumstances" to apply the Full Defense Rule were absent, particularly because "evidence that crack cocaine was found on the person of a driver of [defendant's] car one and a half years earlier is minimally probative of whether she possessed the crack cocaine in [defendant's] car." *Id*.

The Full Defense Rule is inappropriate to admit Short's past crime, because evidence of Short's guilt would not exonerate Defendant Zelasko. If the confessions and testimony in *Chambers* were true, such evidence would exculpate the defendant of the murder charges,

[3] *See Holmes,* 547 U.S. 319 (2006). In *Holmes*, this Court held that the exclusion of third party guilt evidence under South Carolina evidentiary law that prohibited third party implication evidence and hearsay rules was a violation of the full defense rule because defendant who was charged with rape and murder of an elderly woman could not present evidence of another man who had a long police record, a history of violence who fit the victim's physical description (whereas the defendant did not), who was seen near the seen of the crime, had a known penchant for older women, and he gloated to others that he was responsible for the attack.

whereas here, even if it were true that Short sold drugs on one occasion nearly one year ago while on an entirely different team, such evidence would not exculpate Defendant Zelasko of the drug and murder charges of the case. The record provides no evidence that Short has dealt any drugs to the Defendants, the Victim, or any individuals even remotely related to this case. Moreover, unlike in *Chambers* where the excluded testimony accounted for every way the defendant was linked to the charges (third party was present with defendant night of the murder, third party owned the murder weapon), evidence of Short's past crime does not account for the many ways in which Defendant is linked to this drug/murder conspiracy. Defendant Zelasko was seen having a public, heated argument with a known drug-dealer (the Codefendant) about "bragging to everyone about all the money you're making", the DEA seized two 50-milligram doses of ThunderSnow and $5,000 in cash from Defendant's apartment, and Defendant shot and killed a DEA informant who had discovered her involvement. Simply put, the fact that Short may have sold steroids one year prior does little to explain Zelasko's multi-level involvement in the scandal. Morris's testimony is like the "other crime" evidence in *Ushery*: just as evidence that crack cocaine was found on the person of a driver of Brown's car one and a half years earlier was minimally probative of whether she possessed the crack cocaine in Ushery's car, evidence that Short sold drugs to a teammate on a single occasion one year prior is minimally probative of whether she sold a different drug to new teammates on a new team and was involved in a drug-murder conspiracy. This Court should hold that Defendant's Due Process rights were not violated by excluding Short's other crime evidence under 404(b).

B. Full Defense Rule is not meant to apply to evidence that fail the 401/403 balancing test.

This Court did not intend for all evidence excluded under evidentiary rules to become admissible under the Full Defense Rule. More specifically, this Court articulated a guiding

principle in the context of the Full Defense Rule: "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326. This Court reiterated that the 401/403 balancing test is independent of the Full Defense Rule and right to put on a defense does not lend probative value to otherwise non-probative evidence.

Short's past crime evidence, as discussed *supra* Part A.3, fails the 401/403 balancing test. Its failure of the 401/403 balancing test further disqualifies evidence of Short's past crime from admission under the Full Defense Rule.

III. The email is admissible in its entirety as a statement against penal interest under 804(b)(3), and *Williamson* must be overruled as an unworkable standard and replaced by a new standard that would provide for the introduction of both inculpatory and collateral statements.

The lower court erred in denying the admissibility of Lane's email as a statement against penal interest under Federal Rule of Evidence 804(b)(3). The lower court declined to admit the email by adhering to the rule from *Williamson v. United States*, which looks to whether an individual sentence, read out of context from a passage made up of several sentences, is sufficiently inculpatory under 804(b)(3). 542 U.S. 594 (1994). Using the *Williamson* rule, the lower court excluded the email because none of the email's sentences, standing alone, exposed Codefendant Lane to criminal liability. R. 39. *Williamson*'s arbitrary and rigid sentence-by-sentence analysis of statements against penal interest obscures the policy objectives of 804(b)(3). Accordingly, *Williamson* must be replaced by a standard that provides for the introduction of both inculpatory and collateral statements. This new standard should both examine the inculpatory nature of the evidence as a whole, bearing in mind the specific type of evidence (e.g., deposition, email, text message, interrogation, etc.), as well as consider the relationship between the inculptory and collateral statements. Here, Petitioner argues that Lane's email, read in its

entirety, constitutes a statement against penal interest, and that *Williamson* must be overruled and replaced by a new standard that would provide for the introduction of forms of modern communication, including Lane's email.

A. Statements against penal interest, like Lane's email, are admissible hearsay.

Federal Rule of Evidence 802 prohibits the admission of hearsay unless a statutory or constitutional exception exists that renders the evidence admissible. Fed. R. Evid. 802. The relevant exception here is 804(b)(3), the exception for statements against penal interest, which allows statements that have "so great a tendency to expose the declarant to … criminal liability" to be admissible when the declarant is unavailable. Fed. R. Evid. 804. Based on the underlying rationale for the hearsay exception for statements against penal interest, this Court can easily identify Lane's email as a statement against penal interest.

In the notes that accompany Rule 804, the Advisory Committee explains the rationale for the statement against penal interest exception: "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements that are damaging to themselves unless satisfied for good reason that they are true." Fed. R. Evid. 804 advisory committee's note (citing *Hileman v. Nw. Eng'g Co.*, 346 F.2d 668 (6th Cir. 1965)). In *Williamson*, this Court echoed the Advisory Committee's confidence in the truthfulness of statements against penal interest. 512 U.S. at 599 ("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."). Thus, while hearsay generally cannot be admitted, courts trust that in the event of an unavailable declarant, hearsay statements against penal interest should be admitted because of the high likelihood that they are truthful.

Lane's email, as a whole, represents a statement against penal interest. The email is composed of five individual sentences. Read together, the sentences in the email illustrate the fact that Lane and an unnamed partner (1) were engaged in the sale of drugs, and (2) conspired to murder Hunter Riley. R.29. The first three sentences reveal that Lane and her partner were involved in the sale of drugs.[4] Those sentences inform the recipient, Peter Billings, that Lane urgently needed to communicate information to Billings because someone on the male team discovered that Lane and her partner were engaged in the illicit sale of drugs to teammates. Though Lane never explicitly states that she and her partner are engaged in the sale of drugs, her use of "come clean" illustrates that she is engaged in the secret "business" of illicit ThunderSnow sales.

In addition to implicating Lane and her partner for selling drugs, the email's last three sentences implicate Lane and her partner for the murder of Hunter Riley.[5] R. 29. Together, these sentences communicate the fact that a member of the male team, of which Hunter Riley was a member, threatened Lane and her partner with a punishment for their secretive "business" activities. Lane goes on to tell Billings that she and her partner are going to silence the individual from the male team, in a statement that can only be interpreted as a thinly veiled reference to murder. Thus, the email's five separate sentences together create a statement that inculpates Lane and her unnamed partner thought to be Zelasko, and should be admissible as a statement against penal interest.

[4] The first three statements are: "I really need to talk to you. 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." R. 29.

[5] The last three statements of the email are: "One of the members of the male team found out and threatened to report us if we don't come clean. My partner really thinks we need to figure out how to keep him quiet. I don't know what exactly she has in mind yet." R. 29.

B. *Williamson* must be replaced by a standard that allows for the introduction of inculpatory and collateral statements, a standard that would accommodate the admissibility of Lane's email.

Despite the fact that Lane's email inculpates both her and Codefendant Zelasko, the lower court refused to admit the evidence as a statement against penal interest because of its application of the *Williamson* standard. R.42. Petitioner argues that *Williamson* imposes stilted constraints on courts, resulting in arbitrary evidentiary rulings, and it must be replaced by a more flexible standard that accommodates modern communications.

In *Williamson*, this Court decided whether, under 804(b)(3), a series of inculpatory statements made by defendant Reginald Harris to Drug Enforcement Agent Donald Walton during a telephone conversation were admissible. 512 U.S. 594, 596 (1994). The Court began its analysis of the statements' admissibility by determining what 804(b)(3) meant by the term "statement." *Id.* at 599. Though this Court identified the possibility for both a very narrow, as well as a broader interpretation of the word "statement", *Williamson* ultimately chose the narrow reading. *Id.* at 599. Inexplicably, the *Williamson* court supported its narrow reading of "statement" by contending that "one of the most effective ways to lie is to mix falsehood with truth." *Id.* at 599–600. Thus, based on nothing more than the conjecture that declarants intentionally intermingle truthful statements against penal interest with lies, the *Williamson* court held that only *individual* statements that inculpate the declarant can be admitted under 804(b)(3). *Id.* at 600–01. ("[T]he most faithful reading of Rule 804(b)(3) 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"). By rigidly applying this rule, the Fourteenth Circuit concluded that Lane's email, which inculpates the declarant through the combination of five separate

"statements" could not be admitted, because no single statement sufficiently exposed Lane and Zelasko to criminal liability.

As *Williamson* bars the admission of Lane's email, Petitioner urges this Court to create a new standard for the assessment of what is a "statement" under 804(b)(3). Three members of this Court concurred in *Williamson*'s judgment, but they recognized the unsustainability of the *Williamson* decision's highly inflexible approach to 804(b)(3) hearsay, and they advocated a standard that accommodated the admissibility of both inculpatory *and* collateral statements. *Id.* at 612–21 (Kennedy, J., concur.). Petitioner argues in favor of a standard much like the one described by Justice Kennedy. *Id*. As mentioned, that standard would allow for the introduction of both inculpatory statements (sentences), as well as sentences that are not inculpatory independently, but are collateral to the inculpatory ones. Kennedy points to the Advisory Committee notes as a source of authority for this interpretation. *Id.* at 614–15 ("[The Advisory Committee's Note] seems a forthright statement that collateral statements are admissible under Rule 804(b)(3)."); *see Huddleston v. United States*, 485 U.S. 681, 688 (1988); *United States v. Owens*, 484 U.S. 554, 562 (1988) (advocating for the use of Advisory Committee notes when interpreting the Rules of Evidence).

The new standard must contain some limiting principles, a reality recognized by Justice Kennedy in his concurrence. *Williamson,* 512 U.S. at 617. The government proposes that a new standard adopted by this Court engage in limiting in two ways: (1) analyze the *type* of statement or document; and (2) determine whether collateral statements contribute to the inculpatory nature of the explicitly inculpatory parts of the evidence. By following these two limiting principles, a court will be fully capable of introducing small pieces of a very large deposition, or a lengthy interrogation. Here, length is not an issue, and the application of these two limiting principles

would inform a reviewing court that the evidence is a single email message, and that all five sentences in the message contribute to the message's inculpatory nature. It is worth noting that the *Williamson* court decided the case in 1994, before the advent of modern, electronic communication. The court could not have contemplated the way electronic communications would dominate communication in the future. This is significant because a standard that replaces *Williamson* should be created with the express consideration of statements in the form of email messages, like the one at issue here.

Petitioner urges this Court to replace *Williamson* with the aforementioned standard that accommodates modern communication while still accomplishing the compelling policy objectives of 804(b)(3), compelling this Court to admit Lane's email.

IV. The email is nontestimonial and thus admissible because it would not violate Zelasko's Confrontation Clause rights under *Crawford*'s restricted *Bruton* doctrine.

The lower court erred in denying the admission of Lane's email to Billings that made reference to Lane and Zelasko's drug operation and their plans to murder Hunter Riley. Because the email nontestimonial statement that implicates Zelasko, it does not trigger Codefendant Zelasko's Confrontation Clause rights, and is thus admissible.

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Supreme Court interpreted this language in *Bruton v. United States*. 391 U.S. 123, 137 (1968). There, the Court held that the admission of certain codefendant confessions at joint jury trials violates the Confrontation Clause. In the wake of the *Bruton* decision, questions remained over the breadth of the "*Bruton* Doctrine" and the applicability of the Confrontation Clause in cases with two or more defendants. In *Crawford v. Washington*, the Supreme Court answered with

finality some of these outstanding constitutional questions. The Court looked to the history of the Sixth Amendment and held that the Confrontation Clause bars admission of only testimonial statements, and not nontestimonial statements. 541 U.S. 36 (2004). Though the Supreme Court declined to define with specificity what constitutes a testimonial statement, Supreme Court and Courts of Appeals precedent signal that Lane's email falls squarely within the realm of nontestimonial statements, and thus does not implicate the Confrontation Clause, allowing the court to admit the email into evidence.

A. The lower court erred in denying the admission of Lane's email because *Crawford* explicitly builds upon the *Bruton* Doctrine.

There are two reasons why this Court should read *Crawford* as refining *Bruton*: 1) the text of the *Crawford* opinion, which cites to *Bruton*, suggests that the Court intended *Bruton* to fall within the ambit of *Crawford*; 2) a large number of the Courts of Appeals have adopted this interpretation. Accordingly, this Court should find that *Crawford* applies to the *Bruton* Doctrine.

1. The text of the *Crawford* opinion shows that it builds upon the *Bruton* Doctrine.

The lower court rejected the argument that *Crawford* builds upon the holding from *Bruton v. United States*, but examining these two cases sequentially reveals that *Crawford* does in fact clarify the *Bruton* Doctrine. Moreover, *Crawford*'s refinement of the *Bruton* Doctrine renders Lane's email admissible because the email is nontestimonial and does not implicate Codefendant Zelasko's Confrontation Clause rights.

Bruton v. United States explicitly addresses the Confrontation Clause's application to joint trials in which a nontestifying codefendant's statement incriminates the other defendant. 391 U.S. 123, 137 (1968) (holding that the admission of hearsay evidence inculpating a codefendant threatened petitioner's Confrontation Clause right). In that case, the District Court

for the Eastern District of Missouri convicted defendant Evans for armed postal robbery, based in part on a postal inspector's testimony that Evans confessed to the inspector that Evans and his codefendant and petitioner, George Bruton, committed the crime. *Id.* at 124. On appeal, the Eighth Circuit affirmed Bruton's conviction because the instruction to the jury to disregard Evans' confession when deciding Bruton's case met the existing constitutional requirements. *Id.* at 125. At the time the Court decided *Bruton*, Confrontation Clause issues were governed by *Delli Paoli v. United States*, 352 U.S. 232 (1957). The Supreme Court overruled *Paoli*, and declared that the admission of Evans' confession in the joint trial deprived Bruton of his right to confront a witness against him, a holding that became known as the *Bruton* Doctrine. *Id.* at 137.

Crawford v. Washington, decided in 2004, built directly upon the *Bruton* Doctrine. In *Crawford*, petitioner Michael Crawford stabbed Kenneth Lee, who allegedly tried to rape Michael's wife, Sylvia. 541 U.S. 36, 38 (2004). At trial, Sylvia claimed marital privilege and refused to testify. To show that Michael did not stab Kenneth in self-defense, the state introduced a tape recording of her statements under the hearsay exception for statements against penal interest. *Id.* at 40. While Crawford argued that the introduction of his wife's tape-recorded statement violated his Confrontation Clause rights, the trial court admitted the statement, reasoning that the statement bore "adequate indicia of reliability.'" *Id.* at 40 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).[6] In the opinion, the Court recites the most significant cases from its Confrontation Clause jurisprudence, including *Bruton* as a leading case on excluding

[6] *Crawford* makes specific reference to *Roberts* throughout the opinion, and the *Crawford* holding ultimately abrogates the *Roberts* rule. Respondent will argue that *Crawford*'s specific reference to *Roberts* illustrates that *Crawford* does not build upon the *Bruton* Doctrine. However, *Roberts*, like *Crawford*, was a case that examined the Confrontation Clause's application to a single defendant. *Bruton*, like the case at bar, is a case in which the Confrontation Clause's application is analyzed in the context of two defendants. Thus, *Crawford*'s more consistent references to *Roberts* than to *Bruton* should be read as the result of *Crawford* and *Roberts* both having only one defendant. *Crawford*'s reference to *Bruton* as an example of a relevant, albeit more niche, Confrontation Clause case, demonstrates the fact that the *Crawford* holding is meant to apply to the *Bruton* Doctrine.

accomplice confessions when the defendant had no opportunity to cross-examine. *Id.* at 57, (citing *Bruton*, 391 U.S. 123, 126-28 (1968)). Despite the Fourteenth Circuit's contrary finding, this citation of *Bruton* by the *Crawford* court signals that the *Crawford* court intended for its opinion to build on the *Bruton* Doctrine. [cite to 14th cir. opinion, 43-45].

Having established that *Bruton* falls squarely within the type of Confrontation Clause case to which *Crawford* directed its ruling, the *Crawford* court rejected a Confrontation Clause test that looked only to a statement's reliability. *Id.* at 61. ("We do not think the Framers meant to leave the Sixth Amendment's protection to…amorphous notions of 'reliability'"). Instead, the Court interpreted the Sixth Amendment as exempting nontestimonial statements from the Confrontation Clause's protection, i.e. rendering them admissible, and also as prohibiting testimonial statements from being admitted unless the declarant is unavailable and there was a prior opportunity for cross-examination. *Id.* at 68. Though the *Crawford* court declined to define what constitutes a testimonial statement, the Court provided a limited definition: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [] police interrogations." *Id.* Cases that come after *Crawford* have interpreted this language. *See e.g. Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (finding that dead victim's statement to police in an informal setting was nontestimonial and thus admissible); *United States v. Dale*, 614 F. 3d 942 (8th Cir. 2010) (interpreting *Crawford* to stand for the fact that an out of court statement unknowingly made to government agent is nontestimonial). *Crawford* and its progeny show that the *Bruton* Doctrine has been refined by the nontestimonial/testimonial distinction, and that the Fourteenth Circuit erred in finding otherwise.

2. This Court and a majority of circuits have interpreted *Crawford* as restricting *Bruton*'s application only to testimonial hearsay by a nontestifying codefendant.

Though the lower court held that *Crawford* did not further refine the *Bruton* Doctrine, many of the Courts of Appeals have interpreted *Crawford* as pertaining to the *Bruton* Doctrine. This Court should decide likewise, a decision that would render Lane's email admissible.

Unlike the Fourteenth Circuit, the Third Circuit has been both consistent and explicit in its interpretation of *Crawford* as refining the *Bruton* Doctrine. In *United States v. Berrios*, the Third Circuit rejected codefendants' *Bruton* Doctrine arguments and analyzed *Crawford*'s nontestimonial/testimonial limitation on *Bruton*. 676 F.3d 118, 127–28 (3d. Cir. 2012) (rejecting the challenge because the statements at issue were nontestimonial and therefore under *Crawford*, outside of the scope of defendant's Confrontation Clause protection). In so holding, the Third Circuit departs from the opinion of the Fourteenth Circuit and endorses the interpretation forwarded by Petitioner in this case: that *Crawford* limits *Bruton*. The Third Circuit reiterated its interpretation of *Crawford* as the progeny of *Bruton* in *United States v. Shavers*. 693 F.3d 363, 395 (3d. Cir. 2012). *Shavers* also concerned the admission of inculpatory evidence against codefendants. *Id.* In that case, the Third Circuit again discussed *Crawford*'s effect on the *Bruton* Doctrine, reinforcing the gulf between the Third and Fourteenth Circuit. *Id. Id.* (quoting *Berrios* 676 F.3d 118 ("[B]ecause *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements.")).

The Third Circuit is joined by a number of other circuits in their interpretation of the *Bruton* Doctrine as modified by *Crawford*. *United States v. Figueroa-Cartagena*, a case that contemplated *Crawford*'s rule in the context of multiple defendants, expresses the First Circuit's conclusion that a nontestimonial statement was admissible under the *Bruton* Doctrine, a holding that contradicts the Fourteenth Circuit's ruling in this case. 612 F.3d 69, 84–85 (1st Cir. 2010) ("It is [] necessary to view *Bruton* through the lens of *Crawford*…"); *see also United States v.*

Ciresi, 697 F.3d 19 (1st Cir. 2012). Additionally, the Second, Fifth, Seventh, Eighth, and Eleventh Circuits agree with this interpretation. *United States v. Farhane,* 634 F.3d 127, 162–63 (2d Cir. 2011); *United States v. Delgado,* 401 F.3d 290, 299 (5th Cir. 2005); *United States v. Jenkins,* 419 F.3d 614, 618 (7th Cir. 2005); *United States v. Dale*, 614 F.3d 942, 956 (8th Cir. 2010); *United States v. Underwood,* 446 F.3d 1340, 1347–48 (11th Cir. 2006). This overwhelming endorsement from the Courts of Appeals, in addition to the actual text of the *Crawford* opinion, demonstrate that *Crawford* does in fact speak to the *Bruton* Doctrine, rendering Lane's nontestimonial email admissible in this case.

B. The email is admissible because it is nontestimonial.

In addition to recognizing that *Crawford*'s nontestimonial/testimonial distinction applies to the *Bruton* Doctrine, this Court must also determine that the email is nontestimonial in nature to find it admissible. *United States v. Crawford*, 541 U.S. 36, 68–69 (2004). As stated above, *Crawford* declined to define what constitutes a testimonial statement. *Id.* The Court generally described statements made in more formal circumstances, e.g., testimony from a prior trial, testimony before a grand jury, or a statements made during a police interrogation, as testimonial statements. *Id.* Since the 2004 *Crawford* decision, this Court and the Courts of Appeals have tried to determine what makes a statement nontestimonial; the cases engaging in that analysis reveal unequivocally that Lane's email is nontestimonial and thus admissible.

This Court has said that in order to determine whether a statement is testimonial or nontestimonial for the purposes of the Confrontation Clause, courts should look to all of the circumstances surrounding the issuance of the statement. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (citing *Crawford*, 541 U.S. at 53–54). In *Davis*, the court found that a 911 call between a victim and an operator was nontestimonial and thus admissible. *Davis*, 547 U.S. at

822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").[7] Although *Davis* does not speak as to whether an email is testimonial or nontestimonial, there are significant similarities between an emergency interrogation by the police and a private email: in neither circumstance does the declarant presume that the statement will be used in legal proceedings, prompting the declarant to speak candidly. Nothing in the record suggests that Lane wrote her email contemplating future litigation. The absence of any such evidence compels this Court to conclude that the information in the email suggesting that Lane and Zelasko were engaged in drug trafficking and that they planned to murder Hunter Riley to protect their secret, is truthful and, accordingly nontestimonial.

Likewise, in *Michigan v. Bryant*, this Court reiterated the rationale that candidly made statements are nontestimonial because they are more likely to be truthful. 131 S.Ct. 1143, 1157–60 (2011). The *Bryant* court goes on to explicitly make the connection between hearsay exceptions, excepted in large part for their candor and presumed truthfulness, and nontestimonial statements. *Id.* at 1157 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial." (quoting *Crawford*, 541 U.S. at 56)). This reasoning applies to Lane's email, a private communication that bears no indication of untruthfulness, rendering the email nontestimonial and thus admissible.

[7] While the Court in *Davis* is primarily concerned with statements produced by interrogation, the Court notes that the absence of an interrogation, as is the case with Lane's email, does not preclude a court from identifying a statement as nontestimonial. *See id.* at 822 n.1 ("This is not to imply, however, that statements fade in the absence of any interrogation are necessarily nontestimonial.")

Precedent from the Courts of Appeals provides additional support for this argument. In *United States v. Ciresi*, the First Circuit discussed the fact that coconspirator statements, as an exception to the hearsay rule similar to statements against penal interest (i.e. Lane's email) are admissible against codefendants post-*Crawford* because of their candidness. 697 F.3d 19 (1st Cir. 2012) (citations omitted) ("[C]oconspirator statements [are] nontestimonial because they [are] 'made in the course of private conversations or in casual remarks that no one expected would be preserved or used later at trial'….").

The email was clearly nontestimonial, therefore the *Bruton* Doctrine does not apply. This Court should remand to the Court of Appeals with instructions to admit the e-mail as evidence.

CONCLUSION

For the foregoing reasons, the United States respectfully requests: that this Court reverse the judgment of the Fourteenth Circuit; that the Court hold the Morris affidavit inadmissible; that the Court hold Ms. Lane's entire e-mail admissible; and that the case should be remanded to the Court of Appeals with instructions to remand to the district court for trial in accordance with the opinion of this Court.

Respectfully submitted,

Team Number: 9 P

Counsel for Petitioner