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 UNITED STATES 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 a standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest, and if so, what standard should replace it.
- IV. Whether, at a joint trial, the statement of a non-testifying codefendant implicating the defendant is barred as violative of the Confrontation Clause under *Bruton v. United States*, even though the statement was made to a friend and thus would qualify as a nontestimonial statement within the meaning of the Court's subsequent decision in *Crawford v. Washington*.

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Table of Contents	ii
Table of Authorities	v
Opinions Below	1
Statutory Provisions	1
Standard of Review	1
Statement of the Case	1
Statement of Facts	1
Procedural History	4
Summary of the Argument	7
Argument	9
I. THE PLAIN LANGUAGE OF RULE 404(b) BARS ANY PARTY FROM INTRODUCING EVIDENCE OF THE PROPENSITY OF ANY PERSON	9
A. The plain language of Rule 404(b) prohibits the use of propensity evidence to demonstrate that <i>any</i> person, including third parties, acted in accordance with his or her prior conduct	9
B. Rule 404(b) bars propensity evidence, whether it is introduced by the prosecution or by a defendant as "reverse 404(b)" evidence	11
II. THE EXCLUSION OF RESPONDENT'S PROPENSITY EVIDENCE DOES NOT IMPERMISSIBLY BURDEN HER RIGHT TO PRESENT A COMPLE DEFENSE UNDER <i>CHAMBERS</i>	ETE
A. For an evidentiary rule to yield to the right to present a complete defense under <i>Chambers</i> , the evidence's value must outweigh the interests the rule furthers	14
Unless an evidentiary rule was applied arbitrarily, disproportionately, or unjustly, it need not yield to the right to present a complete defense	15

		2.	In order to justify suspension of an evidentiary rule, the proffered evidence must be reliable and critical to the accused's defense	15
	В.	cannot out	t's asserted "right" to present third-party propensity evidence weigh the bar Rule 404(b) imposes because Morris's s unreliable and far from critical.	1 <i>6</i>
III.	STAN GENE ENFO	IDARD FOR ERALLY SE DRCEMENT	OULD OVERRULE <i>WILLIAMSON</i> 'S NARROW R RULE 804(b)(3) ADMISSIBILITY AND HOLD THAT LF-INCULPATORY NARRATIVES TO NON-LAW ARE ADMISSIBLE "STATEMENTS AGAINST PENAL	18
	A.		should reject <i>Williamson</i> 's overly narrow and unworkable r the application of Rule 804(b)(3).	18
		1.	Courts have struggled to apply Williamson's narrow standard	20
		2.	Stare decisis does not obligate this Court to preserve Williamson	22
	B.	enforcemen	should subject informal statements made to non-law and to a relaxed standard under which narratives that are elf-inculpatory are admissible.	23
		1.	Statements made to law enforcement are inherently unreliable	24
		2.	Many courts have distinguished between the statements to law enforcement in <i>Williamson</i> and informal narratives to <i>non</i> -law enforcement	25
		3.	Under this standard, Lane's January 16 e-mail to her boyfrier is admissible because it lacks the self-serving incentives that make statements to law enforcement unreliable	
IV.	TEST STAT	IMONIAL S EMENT TO	VFORD RESTRICTED BRUTON'S SCOPE TO TATEMENTS, A NON-TESTIFYING CODEFENDANT'S A ROMANTIC PARTNER DOES NOT VIOLATE THE ON CLAUSE	28
	A.		imited the Confrontation Clause's protections, including	28

		This Court has made clear that the Confrontation Clause does not protect nontestimonial statements	9
		2. Courts have overwhelmingly held that <i>Crawford</i> restricts the <i>Bruton</i> doctrine to testimonial statements	0
	В.	Because Lane's e-mail to Billings was nontestimonial, it is outside <i>Bruton</i> 's protection and does not violate respondent's Confrontation Clause rights	2
Conclusion		3	3
Appendix		A-	1

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Barnhart v. Peabody Coal Co.,	
537 U.S. 149 (2003)	23
Bowers v. Hardwick,	
478 U.S. 186 (1986)	23
Bruton v. United States,	
391 U.S. 123 (1968)	24, 28, 30
Chambers v. Mississippi,	
410 U.S. 284 (1973)	14, 15, 16, 17
Crane v. Kentucky,	
476 U.S. 683 (1986)	15, 16
Crawford v. Washington,	
541 U.S. 36 (2004)	28, 29
Cruz v. New York,	
481 U.S. 186 (1987)	30
Davis v. Washington,	
547 U.S. 813 (2006)	29
Green v. Georgia,	
442 U.S. 36 (1979)	25
Helvering v. Hallock,	
309 U.S. 106 (1940)	22
Holmes v. South Carolina,	
547 U.S. 319 (2006)	15
Huddleston v. United States,	
485 U.S. 681 (1988)	9, 11
Lawrence v. Texas,	
539 U.S. 558 (2003)	23
Lee v. Illinois,	
476 U.S. 530 (1986)	24

527 U.S. 116 (1999)	23, 30
McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)	23
Payne v. Tennessee, 501 U.S. 808 (1991)	22, 23, 27, 31
Rock v. Arkansas, 483 U.S. 44 (1987)	15, 16
Slaughter-House Cases, 83 U.S. 36 (1872)	23
United States v. Mezzanatto, 513 U.S. 196 (1995)	23
United States v. Scheffer, 523 U.S. 303 (1998)	15
Washington v. Texas, 388 U.S. 14 (1967)	15
Wharton v. Bockting, 549 U.S. 406 (2007)	30
White v. Illinois, 512 U.S. 594 (1994)	29
Williamson v. United States, 512 U.S. 594 (1994)	passim
UNITED STATES COURTS OF APPEALS CASES:	
Agushi v. Duerr, 196 F.3d 754 (7th Cir. 1999)	11
Crespin v. New Mexico, 144 F.3d 641 (10th Cir. 1998)	25
United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984)	11, 13

United States v. Barone, 114 F.3d 1284 (1st Cir. 1997)	20, 21, 26
United States v. Bartle, 835 F.2d 646 (6th Cir. 1987)	29
United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987)	10
United States v. Berrios, 676 F.3d 118 (5th Cir. 1981)	31
United States v. Butler, 71 F.3d 243 (7th Cir. 1995)	21
United States v. Dale, 641 F.3d 942 (8th Cir. 2010)	31
United States v. Ebron, 683 F.3d 105 (5th Cir. 2012)	20, 22
United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010)	31
United States v. Hadja, 135 F.3d 439 (7th Cir. 1998)	21
United States v. Johnson, 581 F.3d 320 (6th Cir. 2009)	30, 31
United States v. Lucas, 357 F.3d 599 (6th Cir. 2004)	passim
United States v. McCourt, 925 F.2d 1229 (9th Cir. 1991)	10, 12, 17
United States v. Meester, 925 F.2d 867 (11th Cir. 1985)	13
United States v. Moses, 148 F.3d 277 (3d Cir. 1998)	25
United States v. Mothershed, 859 F.2d 585 (8th Cir. 1988)	10

United States v. Nagib, 56 F.3d 798 (7th Cir. 1995)	19
United States v. Patayan Soriano, 361 F.3d 494 (9th Cir. 2004)	26
United States v. Pike, 292 F. App'x 108 (2d Cir. 2008)	31
United States v. Reed, 715 F.2d 870 (7th Cir. 1983)	12
United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1981)	26
United States v. Seals, 419 F.3d 600 (7th Cir. 2005)	11, 12
United States v. Smalls, 605 F.3d 765 (10th Cir. 2010)	passim
United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991)	11
United States v. Sturm, 671 F.2d 749 (3d Cir. 1982)	12
United States v. Taylor, 509 F.3d 839 (7th Cir. 2007)	31
United States v. U.S. Infrastructure, Inc., 576 F.3d 1195 (11th Cir. 2009)	26
United States v. Wexler, 522 F.3d 194 (2d Cir. 2008)	26
United States v. Williams, 458 F.3d 312 (3d Cir. 2005)	12, 16
Vincent v. Seabold, 226 F.3d 681 (6th Cir. 2000)	26

UNITED STATES DISTRICT COURT CASES:

Ciccarelli v. Gichner Sys. Grp., Inc., 862 F. Supp. 1293 (M.D. Pa. 1994)	20
United States v. Thompson, CRIM. 6:09-16-KKC, 2013 WL 5528827 (E.D. Ky. Oct. 4, 2013)	31
United States v. Williams, 1:09CR414JCC, 2010 WL 3909480 (E.D. Va. Sept. 23, 2010)	30, 31
STATE COURT CASES:	
Cantu v. State, 939 S.W.2d 627 (Tex. Crim. App. 1997)	26
Chandler v. Commonwealth, 455 S.E.2d 219 (Va. 1995)	21
People v. Beasley, 609 N.W.2d 581 (Mich. Ct. App. 2000)	21
State v. Hills, 957 P.2d 496 (Kan. 1998)	21
State v. Julian, 719 N.E.2d 96 (Ohio Ct. App. 1998)	21, 26
State v. Selalla, 744 N.W.2d 802 (S.D. 2008)	19
State v. Sonthikoummane, 769 A.2d 330 (N.H. 2000)	21
Walter v. State, 267 S.W.3d 883 (Tex. Crim. App. 2008)	passim
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. VI.	28

FEDERAL STATUTES:

18 U.S.C. § 371	4
18 U.S.C. § 1111(a)	4
18 U.S.C. § 3731-31(a)	6
21 U.S.C. § 802(41)(A)	2
21 U.S.C. § 841(a)(1)	4
21 U.S.C. § 841(b)(1)(E)	4
21 U.S.C. § 844	4
21 U.S.C. § 846	4
Fed. R. Evid. 401	12
Fed. R. Evid. 403	12, 13
Fed. R. Evid. 404(a)	10
Fed. R. Evid. 404(b)	passim
Fed. R. Evid. 804(b)(3)	passim
LEGISLATIVE HISTORY MATERIALS:	
Fed. R. Evid. 404 advisory committee's notes	6
Fed. R. Evid. 804 advisory committee's notes	6
TREATISIES, BOOKS & LAW REVIEW ARTICLES:	
1 Oxford English Dictionary 1-2 (James A. H. Murray et al. eds., 1933)	10
1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 1:40, (4th ed. 2009)	30
4 Jack B. Weinstein & Margaret Berger, Weinstein's Evidence Manual § 804(b)(3)(03), (7th ed. 2005)	24

5 John Henry Wigmore, Evidence in Trials at Common Law § 1362,	
(James H. Chadbourn rev., 1974)	18
Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8.75,	
(3d ed. 2003)	22

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but is reproduced on pages 30-54 of the Record. The rulings of the United States District Court for the Southern District of Boerum are not published but can be found on pages 20-23 of the Record.

STATUTORY PROVISIONS

The following statutory provisions are relevant to the determination of the present case:

Fed. R. Evid. 404(b)

Fed. R. Evid. 804(b)(3)

The full text of each provision appears in the Appendix.

STANDARD OF REVIEW

This case presents four questions of law, which this Court must review de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATEMENT OF THE CASE

I. Statement of Facts

Until recently, respondent was an elite athlete in the winter sport of Snowman Pentathlon. (R. 1.) She traded triumph for disgrace, however, when she and a teammate conspired to distribute performance-enhancing drugs to their teammates. (R. 2, 4.) When respondent discovered that another teammate was acting as a DEA informant, she murdered him in cold blood in her quest to keep her steroid scheme a secret. (R. 2-3, 5.) Facing murder, drug, and conspiracy charges as a result, respondent now attempts to manipulate the Federal Rules of Evidence in order to evade the consequences of her actions.

1

A. The U.S. women's Snowman Team's performance improved markedly after the arrival of respondent and her coconspirator.

Snowman Pentathlon is a "physically demanding" athletic competition made up of five different winter sports: rifle shooting, ice dancing, aerial skiing, curling, and dogsledding. (R. 1-2.) The United States national Snowman Pentathlon program fields men's and women's teams, both of which train in Remsen National Park in the State of Boerum for the World Winter Games, the sport's most important elite international competition. (R. 1-3, 8.) Before August 2011, the women's United States Snowman Pentathlon Team ("Snowman Team") had never placed higher than sixth in any major international competition. (R. 2, 8.)

That began to change in the fall of 2011, when the women's Snowman Team's practice times showed dramatic improvement. (R. 2.) These improvements coincided with the addition of two new members to the team: Jessica Lane ("Lane") in August 2011 and Anastasia Zelasko ("respondent"), respondent in this case, in September 2011. (R. 1-2.)

B. Respondent and Lane conspired to sell steroids to their teammates—a conspiracy that ultimately led to murder.

Beginning in August 2011, Lane and respondent conspired to and began to possess and distribute anabolic steroids¹—specifically, a bolasterone ester the Snowman Team's athletes referred to as "ThunderSnow"—to other members of the women's Snowman Team. (R. 2.) Hunter Riley ("Riley"), a member of the U.S. men's Snowman Team, began working as an informant for the Drug Enforcement Administration ("DEA") in 2011. (R. 2, 8-9.) Riley approached Lane and asked to purchase ThunderSnow on three occasions between October 1 and December 9, 2011 under the pretense of buying it for his personal use, but Lane declined each time. (R. 1-2, 9.)

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¹ Anabolic steroids, as defined in 21 U.S.C. § 802(41)(A), are a Schedule III controlled substance. (R. 2, 4-5.)

On December 10, women's Snowman Team coach Peter Billings ("Billings"), who had been involved in a romantic relationship with Lane for several years, observed Lane and respondent engaging in a heated argument. (R. 3, 9.) Before they parted, Lane shouted at respondent, "Stop bragging to everyone about all the money you're making!" (R. 3, 9.) When Billings confronted Lane approximately a week later with his suspicions that she was distributing steroids to the women's Snowman Team, Lane denied his allegations. (R. 3, 9.) On January 16, 2012, however, Lane sent Billings the following e-mail ("the January 16 e-mail"):

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

 $(R. 3, 29.)^2$

On January 28, several Snowman Team members saw respondent involved in another heated argument, this time with Riley, the DEA informant. (R. 3, 9.) Less than a week later, on February 3, 2012, respondent shot and killed Riley with her rifle on the Snowman Team's training grounds in Remsen National Park. (R. 3, 8-9.) At the time, respondent was practicing alone on a shooting range that was temporarily closed for the U.S. team's trials for the upcoming World Winter Games. (R. 3, 8.) The range was located adjacent to a dogsled course where the members of the men's Snowman Team were competing in the trials. (R. 3, 8.) Respondent was promptly arrested. (R. 3.)

When the DEA executed a search warrant at respondent's home on the day of the shooting, agents discovered and seized two fifty-milligram doses of ThunderSnow and \$5,000 in cash. (R. 3, 8, 27-28.) The following day, the DEA conducted three more lawful searches: one at the Snowman Team's training facilities, one at Lane's apartment, and one at the apartment of Casey Short ("Short"), another member of the U.S. women's Snowman Team. (R. 3, 8.) Agents recovered a total

² Billings turned the January 16 e-mail over to the Government in the course of the investigation. (R. 9.)

of 270 doses of ThunderSnow and \$60,000 from the team's communal equipment storage room and Lane's home, where they found the laptop computer from which the January 16 e-mail originated. (R. 3-4, 8, 27.) Lane was taken into federal custody shortly thereafter. (R. 4, 31.) No evidence was found at Short's apartment. (R. 8.)

II. Procedural History

A. Respondent and her coconspirator were indicted on conspiracy, drug, and murder charges.

On April 10, 2012, a grand jury returned an indictment charging respondent and Lane with five counts:³ (1) conspiracy to possess and distribute anabolic steroids, (2) possession of steroids with intent to distribute, (3) simple possession of steroids, (4) conspiracy to commit murder, and (5) first-degree murder. (R. 4-5, 8, 31.) The parties agree that a two-member conspiracy existed. (R. 11.) The Government contends that the two coconspirators were Lane and respondent, who discovered that Riley was an informant and murdered him in order to prevent him from disclosing their involvement in supplying illegal steroids to the Snowman Team. (R. 11.) Respondent denies involvement in the conspiracy and claims the shooting was accidental. (R. 8, 11.) Lane has asserted her Fifth Amendment right not to testify at her joint trial with respondent. (R. 18, 23, 39, 45.)

B. The District Court admitted respondent's "reverse 404(b)" propensity evidence but barred the Government from introducing the June 16 e-mail.

The United States District Court for the Southern District of Boerum ("District Court") held a pre-trial motion hearing on July 16, 2012 to resolve two motions: respondent's motion to introduce propensity evidence, and the Government's motion to introduce the January 16 e-mail from Lane to Billings. (R. 6-7.) Respondent moved to introduce the testimony of retired Snowman athlete Miranda Morris, who alleged that Short sold her a steroid dubbed "White Lightning" on April 4, 2011, while

4

³ The five counts alleged violations of, respectively: (1) 21 U.S.C. §§ 841(a)(1), (b)(1)(E), 846; (2) 21 U.S.C. §§ 841(a)(1), (b)(1)(E); (3) 21 U.S.C. § 844; (4) 18 U.S.C. §§ 371, 1111(a); and (5) 18 U.S.C. § 1111(a).

they were teammates on Canada's Snowman Team. (R. 7, 10, 24-25, 28.) Short left for the U.S. team two months later, and she became a teammate of respondent and Lane at the time of the events that gave rise to the indictment. (R. 1, 10.)

Even though investigators found no evidence when they searched Short's apartment, and White Lightning has been linked to several Eastern European teams on the international Snowman circuit, respondent theorizes that because ThunderSnow is an ester, or chemical derivative, of White Lightning, Short—and not respondent—was the second member of the conspiracy. (R. 8, 11-12, 28.) Respondent claims that she thus lacked a motive to murder Riley and that the shooting was accidental—despite the fact that respondent had reached the highest echelon of a sport that requires rifle-shooting expertise and was undoubtedly familiar with the location of the dogsled course relative to the range because the competition was being held on the U.S. team's regular training grounds. (R. 1-3, 8, 11.) Respondent acknowledged that her intended use of Morris's testimony is propensity evidence for the purposes of Federal Rule of Evidence 404(b) ("Rule 404(b)"), but argued that a criminal defendant may introduce evidence a third party's "prior bad acts" even though the Rule's plain text states otherwise. (R. 10-13.)

The District Court agreed, holding in a three-sentence analysis that Morris's testimony was admissible because respondent's use of "reverse 404(b) evidence" presented no risk of prejudice to her own case. (R. 21.) Alternatively, the court held that Morris's testimony was admissible because barring the evidence of Short's supposed propensity to sell a similar steroid would impermissibly burden respondent's constitutional right to present a complete defense. (R. 21-22.)

The District Court also heard arguments on the Government's motion to introduce the January 16 e-mail. (R. 7.) In its brief opinion, the District Court denied the motion on the grounds that it was bound to follow this Court's decision in *Williamson v. United States*, which held that each

Federal Rule of Evidence 804(b)(3) ("Rule 804(b)(3)"). (R. 22-23.) The court also rejected the Government's argument that introducing the e-mail statement of non-testifying codefendant Lane would not violate respondent's Confrontation Clause rights, holding that this Court's decision in *Crawford v. Washington* did not restrict the *Bruton* doctrine, which bars the admission of a non-testifying codefendant's confession against another defendant at a joint trial, to testimonial statements. (R. 23.) The Government appealed pursuant to 18 U.S.C. §§ 3731-31(a). (R. 30.)

C. A divided panel of the Court of Appeals affirmed.

On February 14, 2013, a divided panel of the United States Court of Appeals for the Fourteenth Circuit ("Court of Appeals") affirmed on substantially the same grounds as the District Court. (R. 30-31, 34, 38, 45.) In a vigorous dissent, Judge Marino called the majority's conclusions "wrong-headed." (R. 54.) He would have denied respondent's motion to admit Morris's testimony on the grounds that the plain text of Rule 404(b) barred *all* propensity evidence, no matter who introduced it, and that barring the propensity evidence did not unconstitutionally frustrate respondent's right to present a complete defense. (R. 46-48.)

Judge Marino also disagreed with the majority's denial of the Government's motion to admit the January 16 e-mail. (R. 53-54.) He criticized majority's "blind obedience" to *Williamson*'s cumbersome standard and argued that "there are undoubtedly several better approaches" to the determination of admissibility under Rule 804(b)(3). (R. 48, 53.) Judge Marino also would have held that *Crawford* restricted the *Bruton* doctrine to testimonial statements, thus excluding the nontestimonial January 16 e-mail from the Confrontation Clause's protection. (R. 53-54.) In closing, Judge Marino warned that the majority's holdings in this case "gratuitously restrict[ed] the

government's ability to do justice." (R. 54.) The Government appealed, and this Court granted certiorari on October 1, 2013. (R. 55.)

SUMMARY OF THE ARGUMENT

Respondent in this case is former high-level athlete who threw her career away in the name of profiting financially from a conspiracy to sell illegal performance-enhancing drugs. In the end, however, the consequences of her actions were far more severe than merely sullying her sport and damaging the reputations of her team and her country. When respondent discovered that a teammate was acting as an informant, she murdered him in cold blood in order to ensure his silence. Now, she attempts to implicate an innocent person in her stead by manipulating the Federal Rules of Evidence and the United States Constitution by twisting their plain language and underlying logic.

This Court should not permit her to do so. It should reverse the decision of the Court of Appeals because: (1) Morris's testimony is inadmissible propensity evidence under the plain meaning of Rule 404(b) and (2) barring Morris's testimony does not violate respondent's right to present a full defense under *Chambers v. Mississippi*, and (3) Lane's January 16 e-mail is admissible because (3) *Williamson*'s narrow and cumbersome standard for the Rule 804(b)(3) "statement against interest" exception cries out for overruling or limitation, and (4) after *Crawford*, *Bruton*'s Confrontation Clause protections only apply to testimonial statements.

First, the plain text of Rule 404(b) compels the conclusion that Morris's testimony—propensity evidence by respondent's own admission—is inadmissible. Because the Rules explicitly prohibit evidence of the propensity of a "person," not a "defendant," Rule 404(b) applies with equal force to third parties like Short. The fact that respondent, the defendant, is introducing this "reverse 404(b)" evidence to exculpate herself makes no difference. Propensity evidence like Morris's

testimony is barred under *any* circumstances where, as here, it is introduced for an impermissible purpose.

Second, preventing respondent from introducing Morris's testimony in no way violates her right to present a complete defense under *Chambers*. Respondent's evidence is simply not strong enough to outweigh the government's interest in enacting rules of evidence to ensure the exclusion of unreliable evidence. Morris's claims as to Short's supposed propensity to sell steroids have little probative value because they involve events that allegedly took place in a different program in a different country nearly a year before the events that gave rise to this case came to light. Most importantly, they are uncorroborated by any other evidence and thus lack the reliability necessary to be critical to respondent's defense. Morris's testimony is, therefore, inadmissible.

Third, this Court should overrule *Williamson*'s overly narrow definition of a "statement against interest," which has proven unworkable in practice and yielded a muddled body of law. This Court should overrule *Williamson* outside the context of statements to law enforcement, where a declarant has strong incentives to shift blame or curry favor. Instead, this Court should apply a relaxed standard to informal statements to non-law enforcement, which are unlikely to be self-serving. As long as the narrative as a whole is generally self-inculpatory, except in rare cases where the circumstances create a particularly high risk of self-serving motives, it should be admissible. For example, the January 16 e-mail is admissible because Lane sent it to her boyfriend, not law enforcement, thus negating the likelihood that self-serving incentives distorted the truth.

Fourth, respondent cannot escape this conclusion on Confrontation Clause grounds. When this Court in *Crawford* restricted the Confrontation Clause's applicability to testimonial statements, it limited *Bruton*'s applicability to testimonial statements as well. The seven federal courts of appeals that have considered whether *Crawford* restricted *Bruton* to testimonial statements all agree

that it did. Because, as respondent concedes, the January 16 e-mail is nontestimonial, it falls outside the scope of *Bruton* as modified by *Crawford* and offers respondent no Confrontation Clause protection. The e-mail's admissibility is governed exclusively by Rule 804(b)(3), under which it is admissible as a statement against Lane's penal interest. For these reasons, the Government respectfully requests that this Honorable Court reverse the decision of the Court of Appeals.

ARGUMENT

I. THE PLAIN LANGUAGE OF RULE 404(b) BARS ANY PARTY FROM INTRODUCING EVIDENCE OF THE PROPENSITY OF ANY PERSON.

The Court of Appeals disregarded the plain text of Rule 404(b) when it held that the prohibition against admitting propensity evidence does not apply to third-party propensity evidence or propensity evidence introduced by criminal defendants. (R. 34.) Under Rule 404(b), only evidence that falls within one of the permissible uses of character evidence listed in Rule 404(b)(2) is admissible. The plain language of Rule 404(b) bars *all* propensity evidence, including the third-party evidence introduced by respondent, a criminal defendant. The Court of Appeals' ruling should, therefore, be reversed.

A. The plain language of Rule 404(b) prohibits the use of propensity evidence to demonstrate that *any* person, including third parties, acted in accordance with his or her prior conduct.

Rule 404(b) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). This "propensity evidence," or, as it is often called, "prior bad acts" evidence, is intended to demonstrate a person's "propensity" to commit "bad acts" simply because he or she did so in the past. *United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004). Propensity evidence is strictly prohibited. *See Huddleston v. United States*, 485 U.S. 681, 686 (1988). Evidence of prior crimes and acts may only be admitted if the evidence is

offered for a permissible purpose such as those listed in Rule 404(b)(2): "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* "Pattern" is not included among these permissible purposes because evidence of an actor's "pattern" of prior bad acts is simply another way of establishing a propensity. *United States v. Beasley*, 809 F.2d 1273, 1277 (7th Cir. 1987).

Critically, the text of Rule 404(b) prohibits the use of evidence of "a person's character" to prove that the "person" acted in accordance with it. Fed. R. Evid. 404(b)(1). Black's Law Dictionary defines a "person" as "[a] human being." Black's Law Dictionary 1257 (9th ed. 2009). The indefinite article "a" can be defined as "any." 1 Oxford English Dictionary 1-2 (James A. H. Murray et al. eds., 1933). Rule 404(b) thus prohibits to the use of evidence of "any human being's" character to show that the "human being" acted in accordance with it. Because "the rules on character evidence use explicit language in defining to whom they refer," Rule 404(b)'s prohibition of propensity evidence against "a person" applies to any actor, whether defendant, victim, witness, or anyone else. United States v. McCourt, 925 F.2d 1229, 1232 (9th Cir. 1991). In fact, Rule 404's language differentiates these terms by using them differently in different contexts. McCourt, 925 F.2d at 1231-32; compare Fed. R. Evid. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character"), with Fed. R. Evid. 404(a)(2)(C) ("the prosecutor may offer evidence of the alleged victim's trait"), and Fed. R. Evid. 404(a)(1)(B) ("a defendant may offer evidence").

Even though Rule 404 was restyled in 2011 to "make . . . terminology consistent throughout the rules," the drafters retained the term "person" in Rule 404(b)(1) instead of changing it to

⁴ Propensity evidence carries a particularly high risk of prejudice because evidence of *past* wrongful behavior has the potential to lead a jury too quickly and uncritically to the conclusion that an actor committed the *present* wrong based solely on the "once a bad guy, always a bad guy" assumption. *Id.* This is impermissible. Criminal defendants, for example, may only be convicted of crimes on the basis of what they have *actually* done, not what they may or may not have the *propensity* to do. *United States v. Mothershed*, 859 F.2d 585, 589 (8th Cir. 1988).

"defendant," which is used throughout Rule 404. *See* Fed. R. Evid. 404; Fed. R. Evid. 404 advisory committee's note. This demonstrates that (1) Congress intended the terms "person" and "defendant" to have different meanings, (2) the word "person" in Rule 404(b)(1) cannot reasonably be limited only to defendants, and (3) Congress intentionally barred the use of the propensity evidence of *any person* under Rule 404(b)(1).⁵ Fed. R. Evid. 404 advisory committee's note. Consequently, prior bad acts cannot be used to prove *any* person's propensity to commit bad acts in the future. *Lucas*, 357 F.3d at 606. This includes the bad acts of third parties as well. *See*, *e.g.*, *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999) (barring third-party propensity evidence under Rule 404(b)).

The Court of Appeals disregarded the plain language of Rule 404(b), which prohibits the introduction of evidence of *any* person's propensity, including that of third parties. (R. 34.) Respondent does not attempt to argue that Rule 404(b) permits propensity evidence—it does not—nor does respondent attempt to introduce the evidence for a permissible purpose under Rule 404(b)(2). (R. 10-12, 32-33, 46.) Instead, respondent seeks to introduce Morris's testimony to demonstrate that (1) Short has a propensity to sell steroids, and (2) because she did so in the past, a jury should infer that Short was second coconspirator in this case. (R. 33.) This use of Morris's testimony is quintessential propensity evidence, and the plain language of Rule 404(b) forbids it.

B. Rule 404(b) bars propensity evidence whether it is introduced by the prosecution or by a defendant as "reverse 404(b)" evidence.

Propensity evidence can be used as a "sword" or a "shield." *See United States v. Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984). In a typical case, the prosecution introduces Rule 404(b) evidence "of a criminal defendant's prior misconduct as proof of motive or plan to commit the crime at issue." *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005) (internal citation omitted). When a criminal defendant, however, seeks to admit evidence of a *third party*'s

11

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⁵ This Court has recognized that Rule 404(b) prohibits the introduction of the generic term "actor's"—as opposed to *defendant's*—character. *Huddleston*, 485 U.S. at 685.

prior misconduct in order to negate his or her own guilt, it is known as "reverse 404(b) evidence." *Seals*, 419 F.3d at 606.

The admissibility of "reverse 404(b)" evidence ultimately depends upon whether its probative value outweighs the risk of unfair prejudice it poses. See, e.g., United States v. Stevens, 935 F.2d 1380, 1384 (3d Cir. 1991). This weighing will not occur, however, unless the evidence is offered for one of Rule 404(b)'s permissible purposes. United States v. Williams, 458 F.3d 312, 317-18 (3d Cir. 2006) (reading Stevens to apply only to permissible uses). Defendants seeking to introduce "reverse 404(b)" evidence are typically afforded more leeway to do so than the prosecution because there is no danger of prejudice to the defendant—the very party who is introducing the evidence—under these circumstances. Stevens, 935 F.2d at 1384. Importantly, a defendant is only allowed "more leeway in introducing non-propensity evidence under Rule 404(b)." Williams, 458 F.3d at 317. A court will not, however, grant leeway to a defendant attempting to admit propensity evidence that falls outside one of Rule 404(b)(2)'s permissible uses. Id.

The federal courts of appeals overwhelmingly exclude evidence offered by criminal defendants to exculpate themselves if the evidence is only intended to prove a third party's propensity. *McCourt*, 925 F.2d at 1233-34; *see also Lucas* 357 F.3d at 606 (excluding evidence of third party's prior convictions because they merely demonstrated the third party's propensity); *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 583 (1st Cir. 1987) (stating that offering Rule 404(b) evidence solely to establish actor's propensity for crime is impermissible); *United States v. Reed*, 715 F.2d 870, 876 (7th Cir. 1983) (affirming exclusion of evidence of third party's prior arrests for rape because evidence was introduced by defendants only to prove third party's propensity as a means of exculpating themselves); *United States v. Sturm*, 671 F.2d 749, 751 (3d Cir.

⁶ Evidence is "probative" if it "has any tendency to make a fact more or less probable." *See* Fed. R. Evid. 401(a) (specifying criteria for "relevance" for the purposes of the Federal Rules of Evidence). Under Rule 403, "[T]he court may exclude relevant evidence if its probative value is substantially outweighed by," inter alia, "unfair prejudice."

1982) (affirming exclusion of third party's prior involvement in arson-extortion scheme because it was offered only to prove propensity); *cf. United States v. Meester*, 762 F.2d 867, 877 (11th Cir. 1985) (admitting evidence of third party's prior consistent flights to transport marijuana as proof of a common plan); *Aboumoussallem*, 726 F.2d at 912 (admitting evidence of third party's prior drug smuggling crimes because it tended to prove third party's modus operandi or common plan); *Beechum*, 582 F.2d at 911 (conducting Rule 403 weighing of Rule 404(b) evidence only if offered to prove issue other than propensity).

Here, the Court of Appeals erred by setting aside Rule 404(b) prohibitions against propensity evidence simply because respondent, a criminal defendant, intends to introduce character evidence under "reverse 404(b)." (R. 34.) The fact remains that Morris's testimony will be used solely to demonstrate Short's alleged propensity to sell steroids—a blatantly impermissible purpose. (R. 32-33.) Whether offered under Rule 404(b) or "reverse 404(b)," courts of appeals have uniformly held that such propensity evidence is strictly barred. Morris's testimony, which demonstrates *only* propensity, should, therefore, be excluded.

II. THE EXCLUSION OF RESPONDENT'S PROPENSITY EVIDENCE DOES NOT IMPERMISSIBLY BURDEN HER RIGHT TO PRESENT A COMPLETE DEFENSE UNDER CHAMBERS.

While the Court of Appeals correctly acknowledged that a defendant's "constitutional right to present a complete defense may trump evidentiary rules" in some cases, this is not one them. (R. 36.) In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court explained that such an action is appropriate where a defendant's right to offer evidence critical to his defense outweighs the mechanistic application of evidentiary rules in a way that fails to promote a legitimate state interest. Here, however, Morris's uncorroborated testimony, with its tenuous connection to the facts of this

case, does little to further respondent's defense and thus cannot trump the bar Rule 404(b) imposes on highly prejudicial propensity evidence. This Court should, therefore, reverse the decision below.

A. For an evidentiary rule to yield to the right to present a complete defense under *Chambers*, the evidence's value must outweigh the interests the rule furthers.

On the unusual facts of *Chambers*, this Court held that a murder defendant's constitutional right to present a complete defense was denied because he did not have an opportunity to introduce evidence about a third party who confessed to the murder on four separate occasions. *Chambers*, 410 U.S. at 288-89. Emphasizing that the case "establish[ed] no new principles of constitutional law" and that the outcome was predicated upon "the facts and circumstances of this case," the *Chambers* Court concluded that two of the state's evidentiary rules violated the defendant's constitutional rights: (1) the rule prohibiting parties from impeaching their own witnesses denied him the opportunity to cross-examine the third party, and (2) the rule against hearsay prevented him from introducing testimony from three witnesses to whom the third party confessed. *Id.* at 294, 302. This Court explained that the defendant's inability to cross-examine the third party violated the Confrontation Clause because "the availability of the right to confront and to cross-examine those who give damaging testimony . . . has never been held to depend on whether the witness was initially put on the stand by the accused or by the State." *Id.* at 297-98. This Court thus set aside Mississippi's "irrational" voucher rule. *Id.* at 296 n.8, 298.

The *Chambers* Court also held that the three witnesses' testimony should have been admitted notwithstanding the rule against hearsay. *Id.* at 302. This Court closely scrutinized the hearsay's reliability, taking notice of the numerous facts corroborating the witnesses' account: the third party confessed to the witnesses shortly after the murder and provided a sworn confession to the defendant's counsel, eyewitnesses testified that the defendant did not commit the murder, the third party owned the same caliber gun as the murder weapon and was seen with it immediately after the

shooting, and the third party expressed sincere self-incrimination. *Id.* at 300-01. Because these circumstances "provided considerable assurance of [the statements'] reliability," this Court explained, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 300, 302.

1. Unless an evidentiary rule was applied arbitrarily, disproportionately, or unjustly, it need not yield to the right to present a complete defense.

As in *Chambers*, this Court has at times disregarded "arbitrary" evidentiary rules that exclude critical defense evidence without serving any legitimate state interests. Holmes v. South Carolina, 547 U.S. 319, 325 (2006) (disregarding exclusion of third party forensic evidence as not rationally justified). The exclusion of evidence that lacks competence and reliability, however, is neither arbitrary nor disproportionate. See United States v. Scheffer, 523 U.S. 303, 309 (1998). Because "governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact," this Court explained, "the exclusion of unreliable evidence is a principal objective of many evidentiary rules." Id. at 309 (emphasis added). This Court has "never questioned" states' power to exclude evidence through rules that "serve the interests of fairness and reliability." Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citing Chambers, 410 U.S. at 302).

2. In order to justify the suspension of an evidentiary rule, the proffered evidence must be reliable and critical to the accused's defense.

Courts must weigh the government's interest in ensuring the reliability of evidence against defendants' interests. (R. 37.) However, despite a defendants' right to a "meaningful opportunity to present a complete defense," *California v. Trombetta*, 467 U.S. 479, 485 (1984), the evidence at

calling a witness who committed the same crime, but allowing prosecution to call that same witness in its favor).

15

⁷ See, e.g., Rock v. Arkansas, 483 U.S. 44, 55-56 (1987) (holding that rule prohibiting hypnotically induced testimony was unconstitutional because state failed to articulate whether such testimony was available to the prosecution); Crane v. Kentucky, 476 U.S. 683, 690 (1986) (setting aside rule prohibiting admission of evidence demonstrating defendant's previous confession was unreliable because the state did not present rational reason for the exclusion); Washington v. Texas, 388 U.S. 14, 87 (1967) (setting rule aside because no legitimate interest was served by prohibiting defendant from

issue must be strong enough to trigger it in the first place. *See Crane*, 476 U.S. at 690-91. Courts will only consider setting evidentiary rules aside if they "exclude *competent*, *reliable* evidence bearing on the credibility" of an exculpatory fact. *Id.* at 690 (emphasis added). To outweigh an evidentiary rule under *Chambers*, evidence must be "critical" to the accused's defense and "[bear] persuasive assurances of trustworthiness." *Chambers*, 410 U.S. at 302.

B. Respondent's asserted "right" to present third-party propensity evidence cannot outweigh the bar Rule 404(b) imposes because Morris's testimony is unreliable and far from critical.

Given the qualified nature of the right to present a complete defense, it is not surprising that it "does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." *Lucas*, 357 F.3d at 606. As discussed above, Rule 404(b)'s plain text prohibits propensity evidence. *Williams*, 458 F.3d at 317. Here, respondent concedes that Morris's testimony is offered solely to demonstrate Short's supposed propensity to sell steroids. (R. 12.) Because Rule 404(b) bars evidence of *any person's* propensity, respondent must demonstrate that her interest in presenting it outweighs the government's interest in enacting the Rule—a showing she cannot make.

Unlike the evidentiary rules at issue in *Chambers*, Rule 404(b)'s prohibition against propensity evidence is neither arbitrary nor disproportionate. The prohibition of propensity evidence serves a legitimate interest by minimizing the high risk of prejudice that accompanies "prior bad acts." *Lucas*, 357 F.3d at 606. Not only is Rule 404(b) rooted in sound policy, it is far from draconian. For example, it contains a non-exhaustive list of permissible uses for this type of evidence, but respondent failed to argue that Morris's testimony fits into any of them. Fed. R. Evid. 404(b)(2); (R. 12-13.). Unlike the rules the *Rock* and *Washington* Courts disregarded, Rule 404(b) is also applied uniformly: federal courts of appeals routinely exclude Rule 404(b) propensity evidence.

McCourt, 925 F.2d at 1233-34. Rule 404(b) thus does not "mechanistically defeat the ends of justice." *Chambers*, 410 U.S. at 302.

Respondent's interest in introducing Morris's testimony cannot outweigh the government's strong interest in this fair and equitable evidentiary rule. Unlike the hearsay statements in *Chambers*, no "persuasive assurances of trustworthiness" buttress Morris's account of Short's alleged steroid sales. (R. 24-25.) Respondent has failed to provide *any* corroborating evidence of Short's involvement with either White Lightning or ThunderSnow; no evidence was discovered at Short's apartment during the investigation. (R. 8.) In absence of the assurances of trustworthiness that *Chambers* requires, Morris's testimony does not justify setting Rule 404(b) aside.

Nor is the testimony "critical" to respondent's defense. Whereas the third party in *Chambers* possessed the same caliber gun used in the charged murder, White Lightning, the steroid Morris claims Short sold, is chemically distinct from ThunderSnow. (R. 7, 10, 24-25, 28.) The alleged sale occurred nearly one year prior to the crime at issue in this case, in another country, and among a different group of athletes. (R. 7, 10, 24-25, 28.) More importantly, Short was not the only alleged purveyor of White Lightning in Morris's circle; it was common among several Eastern European Snowman teams that competed alongside the North American teams at international competitions such as the World Winter Games. (R. 1, 8, 28.)

Respondent's third-party propensity evidence is thus far too attenuated to be considered reliable or "critical" for *Chambers* purposes. Merely "casting some doubt," as Judge Marino aptly pointed out, will not do. (R. 48.) Respondent's purported need for Morris's unreliable and irrelevant testimony cannot outweigh the legitimate state interest Rule 404(b) furthers by excluding potentially

17

⁸ In any event, defendants like respondent who are able to explore their defense theories through other evidence that is *not* barred by legitimate evidentiary rules—including their own testimony—are not stripped of their constitutional right to a complete defense. *Lucas*, 357 F.3d at 606-07.

prejudicial propensity evidence. This Court should, therefore, hold that the rule need not yield, and Morris's testimony is inadmissible under *Chambers*.

III. THIS COURT SHOULD OVERRULE WILLIAMSON'S NARROW STANDARD FOR RULE 804(b)(3) ADMISSIBILITY AND HOLD THAT GENERALLY SELF-INCULPATORY NARRATIVES TO NON-LAW ENFORCEMENT ARE ADMISSIBLE "STATEMENTS AGAINST PENAL INTEREST."

The Court of Appeals, explaining that it lacked the power to "revisit recent and binding precedent" of this Court, held that the January 16 e-mail was inadmissible under *Williamson v. United States*, 512 U.S. 594 (1994) because Lane's collateral statements did not directly implicate her in any criminal activity. (R. 43.) This Court, however, is not so constrained. Because *Williamson*'s overly narrow definition of a "statement against penal interest" for Rule 804(b)(3) purposes has proven unworkable and confusing among the federal courts, stare decisis does not obligate this Court to preserve it. Instead, this Court should follow a majority of courts of appeals and limit *Williamson*'s applicability to statements to law enforcement, where the risk of self-serving statements is greatest. *Williamson* should be overruled to the extent that it applies to informal statements to non-law enforcement, which should be subject to a relaxed standard that permits the admission of generally self-inculpatory narratives. Because Lane addressed the January 16 e-mail to her boyfriend, not law enforcement, and the statements it contained were thus unlikely to be self-serving, this Court should hold that the e-mail is admissible in its entirety under Rule 804(b)(3).

A. This Court should reject *Williamson*'s overly narrow and unworkable standard for the application of Rule 804(b)(3).

Hearsay, defined in Rule 801 as an out-of-court statement "offered in evidence to prove the truth of the matter asserted," is generally inadmissible under Rule 802 of the Federal Rules of Evidence due to concerns about its unreliability, as it cannot be subjected to the same tests as incourt testimony. Fed. R. Evid. 801, 802; *Williamson*, 512 U.S. at 598; 5 John Henry Wigmore,

Evidence in Trials at Common Law § 1362, at 3 (James H. Chadbourn rev., 1974). The rule against hearsay, however, "has long been subject to exception." *United States v. Smalls*, 605 F.3d 765, 780 (10th Cir. 2010). Rule 804 lists exceptions for situations in which the declarant is unavailable to testify. *United States v. Nagib*, 56 F.3d 798, 803-04 (7th Cir. 1995). One of these, Rule 804(b)(3)'s "statement against interest" exception, allows the admission of a hearsay "statement that . . . a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it . . . had so great a tendency to . . . expose the declarant to . . . criminal liability." Fed. R. Evid. Rule 804(b)(3)(A).

In *Williamson*, this Court defined the scope of a "statement" for Rule 804(b)(3) purposes. 512 U.S. at 599. The hearsay at issue, a drug conspiracy participant's custodial confession to a DEA agent, contained statements implicating the declarant himself, as well as potentially self-exculpatory collateral statements implicating defendant Williamson. *Id.* at 596-98. The Court had to choose between two definitions of a "statement": broadly, as an "extended declaration" that cumulatively inculpated the declarant despite "contain[ing] "both self-inculpatory and non-self-inculpatory parts," or narrowly, as a "single declaration or remark" that is "individually self-inculpatory." *Id.* at 599. The Court chose the latter, explaining that "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." *Id.*

The divided Court ultimately held that Rule 804(b)(3) permitted the admission of individual statements that are self-inculpatory standing alone, but not collateral statements that are part of a broader, generally self-inculpatory narrative, which are not "cloak[ed] . . . in the same truthfulness." *State v. Selalla*, 744 N.W.2d 802, 814-15 (S.D. 2008) (discussing *Williamson*); *accord Williamson*, 512 U.S. at 600-01. Courts evaluating whether an individual statement is "sufficiently against the

declarant's penal interest" must conduct a fact-intensive inquiry into the nature of "all the surrounding circumstances" in order to determine whether "a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Williamson*, 512 U.S. at 603-04 (internal quotation marks omitted); *see also United States v. Barone*, 114 F.3d 1284, 1295 (1st Cir. 1997) (calling *Williamson* a "totality of the circumstances" test). A two-Justice plurality of the Court remanded the case for such a determination. *Williamson*, 512 U.S. at 604; *Walter v. State*, 267 S.W.3d 883, 896 (Tex. Crim. App. 2008) (pointing out the "fractured" nature of the *Williamson* Court).

1. Courts have struggled to apply Williamson's narrow standard.

This Court should overrule *Williamson* because its overly narrow formulation of a "statement against interest" is too cumbersome to apply consistently. In this case, the Court of Appeals described the issue of whether Lane's statements in the January 16 e-mail were sufficiently self-inculpatory as a "close call" and aptly acknowledged the fact that "*Williamson* is often, as here, difficult to apply." (R. 41-43.) A state high court went even further, calling "the surgical precision called for by *Williamson* . . . highly artificial and *nearly impossible to apply*." *People v. Newton*, 966 P.2d 563, 578 (Colo. 1998) (emphasis added) (declining to adopt *Williamson* to govern corresponding state evidentiary rule).

The case law reveals three common ways in which courts have struggled to apply *Williamson*. First, *Williamson*'s definition of "statement" is so narrow as to "apply only to particular words," requiring courts to parse, edit, and redact individual sentences with "surgical precision." *See Ciccarelli v. Gichner Sys. Grp., Inc.*, 862 F. Supp. 1293, 1300 (M.D. Pa. 1994) (citing *Williamson*, 512 A.2d at 616-17 (Kennedy, J., concurring)); *Newton*, 966 P.2d at 578. Second, many federal and state appellate courts have either relaxed *Williamson* or bypassed it entirely where the

statement at issue was a casual narrative to a friend, acquaintance, or family member rather than to a law enforcement official. *See*, *e.g.*, *United States v. Ebron*, 683 F.3d 105, 134-35 (5th Cir. 2012) (fellow inmate); *Barone*, 114 F.3d at 1296 (1st Cir. 1997) (close relatives); *Walter*, 267 S.W.3d at 898 ("street corner" conversation with brother). Third, splits in some courts' own internal case law confirm the difficulty of determining *Williamson*'s breadth as applied to different facts. *Compare United States v. Hadja*, 135 F.3d 439, 444 (7th Cir. 1998) (holding that statement that son collaborated with Nazis was contrary to father's penal interest at Nazi collaboration trial, even though declarant could not been subjected to criminal liability), *with United States v. Butler*, 71 F.3d 243 (7th Cir. 1995) (limiting statements against penal interest to "only those statements that so far tend to subject the declarant to criminal liability" that a reasonable person would not have made them unless they were true (internal quotation marks omitted)). Ollectively, the post-*Williamson* case law seriously undermines the Court of Appeals's assertion that "federal courts have applied [it] effectively for more than twenty years." (R. 43.)

This case illustrates why *Williamson* should be abandoned. Dissenting Judge Marino aptly observed that "the statement at issue is a prime example of how unworkable *Williamson* is." (R. 50.) As Judge Marino pointed out, Lane's request to Billings for help with her problem is not self-inculpatory "in a vacuum." (R. 50.) In the context of her fear that her illegal steroid business is about to be discovered and that a plan is afoot to "keep him quiet," however, it could reasonably be construed as a request for help in executing the murder plot. (R. 50.) Under *Williamson*, a court must

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⁹ Given these problems, it is perhaps not surprising that several state courts, in interpreting state evidentiary rules that mirror the Federal Rules of Evidence, have either rejected the *Williamson* standard outright or declined to adopt it when they had the chance to do so. *See*, *e.g.*, *Newton*, 966 P.2d at 578 (criticizing and rejecting *Williamson*); *State v. Hills*, 957 P.2d 496, 503 (Kan. 1998) (distinguishing *Williamson*); *People v. Beasley*, 609 N.W.2d 581, 585 (Mich. Ct. App. 2000) (declining to adopt *Williamson*); *State v. Sonthikoummane*, 769 A.2d 330, 334 (N.H. 2000) (same); *State v. Julian*, 719 N.E.2d 96, 100 (Ohio Ct. App. 1998) (acknowledging that Supreme Court of Ohio "declined, although given the opportunity, to adopt *Williamson*'s reasoning"); *Walter v. State*, 267 S.W.3d 883, 896 (Tex. Crim. App. 2008) (incorporating Justice Kennedy's concurrence rather than majority opinion into Texas law); *Chandler v. Commonwealth*, 455 S.E.2d 219, 225 (Va. 1995) (distinguishing *Williamson* on state law grounds).

evaluate the context of the surrounding circumstances—but, illogically, may not consider the *direct* context provided by the collateral statements immediately surrounding self-inculpatory statements. Even worse, on these facts, *Williamson*'s requirement that the inculpatory statements be "stripped of the extraneous, non-inculpatory baggage that once gave them context" serves no purpose. (R. 51.) Because Lane addressed her e-mail to Billings, her long-time boyfriend, she stood to gain nothing from the statements it contained; unlike *Williamson*, which involved an arrestee's confession, Lane had no self-serving incentive to lie. (R. 1, 29.) Under the circumstances of the present case—and many more cases like it—much is lost and little is gained by applying *Williamson*'s narrow standard. This Court should, therefore, seize this opportunity to overturn it.

2. Stare decisis does not obligate this Court to preserve Williamson.

Stare decisis should not save *Williamson*. Stare decisis is a matter of preference, "not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). In *Payne*, this Court reiterated the long-standing principle that stare decisis is actually "a principle of policy and not a mechanical formula of adherence to the latest decision." *Id*. (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). The Court rejected the petitioner's stare decisis arguments and overruled two constitutional decisions that were the products of fragmented Courts and "defied consistent application by the lower courts." *Id*. at 828-29.

Williamson suffers from the same maladies as the cases overturned in Payne. It has proven inconsistent and unwieldy, yielding a body of law that is "fraught with uncertainty." Ebron, 683 F.3d at 134; see also Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8.75 (3d ed. 2003) (addressing post-Williamson confusion surrounding Rule 804(b)(3)). Moreover, like the cases Payne overruled, Williamson was also the product of a "fractured set of opinions." Walter, 267 S.W.3d at 892. The judgment of the Court consisted of plurality of only two Justices, and four

Justices produced separate opinions—including a concurrence in which Justice Kennedy vigorously disagreed with the majority's rationale. *Williamson*, 512 U.S. at 595.

The Court of Appeals's concern with the fact that *Williamson* has stood for twenty years does not oblige this Court to adhere to it. ¹⁰ (R. 43.) This Court need not share the reservations of the majority in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), which declined to overrule the holding of the seminal *Slaughter-House Cases*, 83 U.S. 36 (1872), because it formed the foundation of over a century of constitutional jurisprudence. *McDonald*, 130 S. Ct. at 3030. As the cases discussed above demonstrate, *Williamson* has not produced any semblance of a consistent body of precedent. ¹¹ For this Court to continue to adhere to it would frustrate the goals of stare decisis: "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827. *Williamson* should, therefore, be overruled to the extent that it applies to statements made to non-law enforcement.

B. This Court should subject informal statements made to non-law enforcement to a relaxed standard under which narratives that are generally self-inculpatory are admissible.

This Court should limit *Williamson*'s application to statements made to law enforcement, which are significantly more likely to be self-serving and thus unreliable, and subject informal narratives made to non-law enforcement to a relaxed standard under which generally self-inculpatory statements are admissible. One of *Williamson*'s overarching themes was the special threat of

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¹⁰ In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), after just seventeen years. Explaining that "[t]he rationale of Bowers does not withstand careful analysis," the Court held that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Lawrence*, 539 U.S. at 578.

¹¹ Members of this Court have cited *Williamson* only three times, and never in the context of Rule 804(b)(3). *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003) (Scalia, J., dissenting) (retirement benefits statute); *Lilly v. Virginia*, 527 U.S. 116 (1999) (Confrontation Clause); *United States v. Mezzanatto*, 513 U.S. 196 (1995) (Souter, J., dissenting) (relevance of Advisory Committee Notes).

untruthfulness that self-serving statements present, particularly in the law enforcement context. *See* 512 U.S. at 601. In fact, the Advisory Committee Notes warn that "a [custodial] statement admitting guilt . . . may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest." Fed. R. Evid. 804 advisory committee's note.

1. Statements made to law enforcement are inherently unreliable.

Williamson instructs that "whether a statement is self-inculpatory or not can only be determined by viewing it in context" and "in light of all the surrounding circumstances." Williamson, 512 U.S. at 603-04. One of the most important aspects of that context is the identity of the person to whom the declarant addressed the statement, which bears heavily upon whether the declarant had an incentive to lie. See Lee v. Illinois, 476 U.S. 530, 541 (1986) ("[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion." (quoting Bruton v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting) (emphasis added)). When a statement is made to law enforcement, this risk is particularly strong. Williamson, 512 U.S. at 607-08 (1994) (Ginsburg, J., concurring in part and concurring in the judgment); 4 Jack B. Weinstein & Margaret Berger, Weinstein's Evidence Manual § 804(b)(3)(03), at 804-109-11 & n.32 (7th ed. 2005). Casual statements to lovers, friends, and acquaintances, however, "provid[e] a circumstantial guaranty of reliability not found in statements, arrest, custodial or otherwise, knowingly made to law enforcement officials." United States v. Smalls, 605 F.3d 765, 783 (10th Cir. 2010) (internal quotation marks omitted); see also Fed. R. Evid. 804 advisory committee's note ("[T]he same words spoken . . . to an acquaintance[] would have no difficulty in qualifying [as against interest]").

The statements at issue in *Williamson* itself were made to law enforcement; the Government introduced two confessions a drug conspiracy suspect made to a DEA agent while in custody. 512 U.S. at 596. Even though the agent did not explicitly promise the suspect any benefits in return for

his cooperation, he did promise to report the suspect's cooperation to the prosecutor. *Id.* at 597. Because the suspect's custodial statements thus lacked a "circumstantial guaranty of reliability," *Smalls*, 605 F.3d at 783, it is not surprising that the *Williamson* Court was concerned with the threat of untruthfulness. The Court reinforced that, to be admissible, statements must be "truly self-inculpatory, rather than merely attempts to shift blame or curry favor." *See Williamson*, 512 U.S. at 603. The latter is significantly more likely in the law enforcement context, where such statements have the potential to "decrease [the declarant's] practical exposure to criminal liability." *Crespin v. New Mexico*, 144 F.3d 641, 648 (10th Cir. 1998).

2. Many courts have distinguished between the statements to law enforcement in *Williamson* and informal narratives to *non*-law enforcement.

Many courts have recognized the risk of untruthfulness inherent in statements to law enforcement. The list includes this Court, which has, at times, acknowledged that statements made outside of the law enforcement context are more reliable. *See*, *e.g.*, *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (deeming statement against interest reliable because it was spontaneous, made to a close friend, and lacked ulterior motive). A number of other federal courts have gone even further, aptly recognizing that *Williamson*'s fear of self-serving collateral statements makes little sense outside the law enforcement context.

One of these opinions was authored by a current member of this Court. In *United States v*. *Moses*, 148 F.3d 277 (3d Cir. 1998), then-Judge Alito properly distinguished *Williamson*'s self-serving custodial confession from statements made to a friend over lunch on the grounds that "there [was] no reason to believe that [the declarant] was trying to avoid criminal consequences by passing blame" under the latter set of circumstances. *Id.* at 280. An overwhelming majority of the other federal courts of appeals has also distinguished *Williamson*, and most have relaxed the standard

where informal statements to non-law enforcement were at issue.¹² State appellate courts have also recognized the distinction between statements to law enforcement and statements to non-law enforcement.¹³ One even endorsed this distinction as "a better mechanism to exclude [the out-of-court] statements that are most likely to be untrustworthy." *Walter*, 267 S.W.3d at 897.

This Court should do the same. Excluding statements to non-law enforcement from *Williamson*'s reach reconciles the doctrinal confusion that led to the fractured opinions in that case and has plagued the courts' post-*Williamson* jurisprudence ever since. Suspicion of self-serving statements was a common feature of all of the opinions in *Williamson*. *See* 512 U.S. at 603 (noting in majority opinion that statements must be "truly self-inculpatory, rather than merely attempts to shift blame or curry favor" to be admissible under Rule 804(b)(3)); *id.* at 604, 114 S.Ct. at 2437 (O'Connor, J., concurring) (emphasizing that suspect's statement was inadmissible because "[a] reasonable person in [his] position might even think that implicating someone else would decrease his practical exposure to criminal liability" for sentencing purposes); *id.* at 620 (Kennedy, J., concurring in judgment) ("[I]n cases where the statement was made under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment, as when the

¹² See, e.g., Smalls, 605 F.3d at 783 (inmate "most certainly was not seeking to curry favor" with confidential informant, whom he thought was a fellow inmate); United States v. U.S. Infrastructure, Inc., 576 F.3d 1195, 1209 (11th Cir. 2009) (recognizing that statement to confidant alleviated "any concern that [the declarant] was attempting to curry favor with the government by shifting blame to another individual"); United States v. Wexler, 522 F.3d 194, 203 (2d Cir. 2008) (affirming district court's determination that statement was admissible, distinguishing Williamson on the grounds, inter alia, that the statements at issue were made to "trusted friends" rather than law enforcement); United States v. Patayan Soriano, 361 F.3d 494, 506 (9th Cir. 2004) (distinguishing Williamson but ultimately finding that the statements at issue were made under unique circumstances in which the evidence against the arrestees was so overwhelming that they had nothing to gain by lying); Vincent v. Seabold, 226 F.3d 681, 687-88 (6th Cir. 2000) (emphasizing high risk of unreliability in Williamson); United States v. Barone, 114 F.3d 1284, 1296 (1st Cir. 1997) (concluding that it "cannot seriously be argued" that statements to relatives could have been motivated by a desire to shift blame or curry favor); United States v. Sarmiento-Perez, 633 F.2d 1092, 1102 (5th Cir. 1981) ("The unreliability of the confession in this case is predicated upon circumstances that inhere in the making of virtually every custodial confession.").

¹³ Compare State v. Julian, 719 N.E.2d 96, 100 (Ohio Ct. App. 1998) (emphasizing that "an accused's statements to the police incriminating others and exculpating himself are not necessarily against the declarant's interest and therefore might not be reliable" (first emphasis added)), with Cantu v. State, 939 S.W.2d 627, 635 (Tex. Crim. App. 1997) (en banc) (noting that declarants "felt they could confide in [the defendant's brother and sister-in-law] and had no motivation to lie or place the blame for the crime on someone else").

government made an explicit offer of leniency in exchange for declarant's admission of guilt, the entire statement should be inadmissible.").

Adopting this approach allows *Williamson* to maintain some precedential value in the law enforcement context, assuaging stare decisis concerns. It also provides the "consistency" that stare decisis furthers, *see Payne*, 501 U.S. at 827, by reconciling the doctrinal and logical underpinnings of *Williamson* with the realities that courts face. More importantly, it continues to ensure that statements with a particularly high risk of untruth—those meant to shift blame or "curry favor"—will be excluded. At the same time, limiting *Williamson*'s applicability to statements to law enforcement reins in its overbroad reach, ensuring that courts have the evidence they need to do justice. *See Williamson*, 512 U.S. at 617 (Kennedy, J., concurring in judgment); *Walter*, 267 S.W.3d at 896. As the Court of Appeals aptly recognized, the current *Williamson* standard excludes probative and reliable evidence, "gratuitously restricting the government's ability to do justice." (R. 54.) For these reasons, this Court should hold that *Williamson* applies only to statements made to law enforcement, and that informal statements to non-law enforcement are subject to a relaxed standard that permits the admission of generally self-inculpatory narratives.

3. Under this standard, Lane's January 16 e-mail to her boyfriend is admissible because it lacks the self-serving incentives that make statements to law enforcement unreliable.

Under this standard, Lane's January 16 e-mail is admissible because the statements it contains were made under circumstances that indicate its reliability. Critically, the e-mail was addressed to Lane's boyfriend, Billings—not to law enforcement. (R. 1, 29.) As eight federal courts of appeals have recognized, because these statements were made to a close confidant, Lane had no incentive to shift blame or to curry favor. (R. 1, 29.) In fact, the opening sentence of the e-mail suggested its purpose: to confide in a boyfriend in the hope of obtaining some kind of help. (R. 29.) The e-mail

contained no indication whatsoever that Lane hoped to obtain any kind of leniency in the event of a future prosecution. (R. 29.) In fact, rather than containing self-serving lies, the e-mail's tone implied the opposite: Lane was finally ready to tell her boyfriend the truth about her illicit activities. (R. 29.) Because these disclosures related to Lane's involvement in an illegal steroid business and the beginnings of a conspiracy to commit murder, the general thrust of the narrative was sufficiently against her penal interest to fall within Rule 804(b)(3)'s exception to the rule against hearsay—so against her penal interest, in fact, that she was indicted for those crimes. (R. 4-5.) This Court should hold that the January 16 e-mail is admissible in its entirety.

IV. BECAUSE *CRAWFORD* RESTRICTED *BRUTON*'S SCOPE TO TESTIMONIAL STATEMENTS, A NON-TESTIFYING CODEFENDANT'S STATEMENT TO A ROMANTIC PARTNER DOES NOT VIOLATE THE CONFRONTATION CLAUSE.

The Court of Appeals erred in holding that the *Bruton* doctrine rendered the January 16 e-mail inadmissible on Confrontation Clause grounds at respondent's and Lane's joint trial. (R. 45.) *Crawford v. Washington* held that the Confrontation Clause applied only to testimonial statements. Because *Bruton* was a Confrontation Clause case, *Crawford* restricted the *Bruton* doctrine's applicability to testimonial statements as well. The e-mail at issue in this case, however, is nontestimonial and thus beyond the scope of *Bruton*'s protection. Its admissibility is governed by Rule 804(b)(3)—under which, as was demonstrated above, it is admissible. The Court of Appeals's decision to the contrary should, therefore, be reversed.

A. *Crawford* limited the Confrontation Clause's protections, including those offered by *Bruton*, to testimonial statements.

The Confrontation Clause of the Sixth Amendment provides that in criminal cases, "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Bruton v. United States*, 391 U.S. 123 (1968), this Court held that a defendant's Confrontation Clause rights were violated by admitting the confession of a non-testifying

codefendant at their joint trial. *Id.* at 135. Even though the jury was instructed to consider the confession only against the codefendant, the confession was deemed so "powerfully incriminating" that the jury instruction was insufficient to cure the Confrontation Clause violation. *Id.*

1. This Court has made clear that the Confrontation Clause does not protect nontestimonial statements.

Bruton's scope became unclear in the wake of Crawford v. Washington, 541 U.S. 36 (2004), which marked a major departure from this Court's previous Confrontation Clause jurisprudence. In Crawford, this Court abrogated its previous "reliability" test and held that the prosecution's use of a non-testifying witness's statements recorded during a "testimonial" police interrogation violated the Confrontation Clause because confrontation was "the only indicium of reliability sufficient to satisfy constitutional demands." Id. at 38, 68-69. While the Court did not offer a precise definition of the word "testimonial," it made clear that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. at 51. The Court acknowledged that its holding "cast[] doubt" on White v. Illinois, 502 U.S. 346 (1992), which rejected the proposition that the Confrontation Clause applied only to testimonial statements, but declined to examine what, if any, of White's holding remained. Id.

This Court's case law over the past decade confirmed that *White* did not survive *Crawford*. In *Davis v. Washington*, 547 U.S. 813 (2006), this Court emphasized the distinction between testimonial and nontestimonial statements, making clear that the Sixth Amendment term "witnesses" referred *only* to testimonial statements. *Id.* at 821. The *Davis* Court clarified that "[i]t is the testimonial character of the statement that separates it from other [nontestimonial] hearsay that, while subject to traditional limitations upon hearsay evidence, *is not subject to the Confrontation*

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¹⁴ The "*Bruton* doctrine" barring such a use of a non-testifying codefendant's confession was subsequently extended to include codefendants' *statements*. *See*, *e.g.*, *United States v. Bartle*, 835 F.2d 646, 651 (6th Cir. 1987).

Clause." *Id*. (emphasis added). In *Wharton v*. *Bockting*, 549 U.S. 406 (2007), this Court declared that "the Confrontation Clause has no application" to nontestimonial hearsay statements. *Id*. at 420.

Because *Crawford* restricted the Confrontation Clause's application to testimonial statements, the scope of *Bruton*, which was also rooted in the Confrontation Clause, was restricted to testimonial statements as well. 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 1:40 (4th ed. 2009). In fact, *Bruton* itself involved testimonial statements: a series of confessions to a postal inspector. 391 U.S. at 126. Had the statements in *Bruton* been nontestimonial, the case would have been decided differently in today's post-*Crawford* world, where such statements are outside the Confrontation Clause's protections. 1 Mueller & Kirkpatrick, *supra*, § 1:40.

Years before *Crawford*, this Court stated, "Having decided *Bruton*, we must face the honest consequences of what it holds." *Cruz v. New York*, 481 U.S. 186, 193 (1987). The fact remains that *Bruton* was a Confrontation Clause case holding that a defendant's rights were violated by the admission of his codefendant's confession. 391 U.S. at 126. At their cores, *Bruton* and *Crawford* were both rooted in a common theme: this "Court's suspicion of untested custodial confessions." *See Lilly v. Virginia*, 527 U.S. 116 (1999). This Court must, therefore, also "face the honest consequences" of what *Crawford* holds: "Because it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements." *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir. 2009).

2. Courts have overwhelmingly held that *Crawford* restricts the *Bruton* doctrine to testimonial statements.

Courts have almost categorically held that neither *Crawford* nor *Bruton* applies to nontestimonial statements. *See United States v. Williams*, 1:09CR414 JCC, 2010 WL 3909480, at *2 (E. D. Va. Sept. 23, 2010) (unreported) ("Recalling that *Bruton* is a Confrontation Clause case, the Government argues that *Bruton*, like the Confrontation Clause, is limited by *Crawford* to

testimonial statements. The Government is in good company."). Indeed, seven federal courts of appeals and the District of Columbia Court of Appeals have either held outright or recognized that *Bruton* applies exclusively to testimonial statements. ¹⁵ Very recent federal cases continue to adopt the reasoning that because *Crawford* limited the Confrontation Clause to testimonial statements, nontestimonial statements are beyond *Bruton*'s purview. *United States v. Thompson*, CRIM. 6:09-16-KKC, 2013 WL 5528827, at *4 (E. D. Ky. Oct. 4, 2013) ("Neither *Bruton* nor *Crawford* is implicated . . . because the statements of the codefendants on the recordings are not *testimonial*." (emphasis in original)).

This Court should likewise hold that *Crawford* limited the *Bruton* doctrine to testimonial statements. In contrast to the *Williamson* issue discussed above, the principle of stare decisis requires that the integrity of *Crawford* and its progeny be maintained. These decisions are less than a decade old and, unlike the split decisions *Payne* overturned, 501 U.S. at 828-29, *Crawford* commanded a seven-Justice majority. 541 U.S. at 37. More importantly, the fact that the courts of appeals are in accord demonstrates that a uniform body of law already holds that *Crawford* restricted *Bruton* to testimonial statements. This Court is, therefore, ideally suited to adhere to its "preferred course" of stare decisis in order to promote the consistent development of this area of law and encourage continued reliance upon it. *Payne*, 501 U.S. at 827.

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¹⁵ United States v. Berrios, 676 F.3d 118, 128 (3d Cir. 2012), cert. denied, 133 S. Ct. 982 (U.S. 2013) (holding Bruton doctrine not applicable to codefendants' nontestimonial statements); United States v. Dale, 614 F.3d 942, 948 (8th Cir. 2010) (distinguishing testimonial statements in Bruton from statements defendant "made unwittingly, and not in anticipation . . . of future use . . . at trial"); United States v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010) (conversation between defendant and his mother did not pass "threshold question" is whether statement is testimonial, as Bruton must be viewed "through the lens of Crawford and Davis"); United States v. Smalls, 605 F.3d 765, 768 n.2 (10th Cir. 2010) (noting that "the Bruton rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements"); United States v. Johnson, 581 F.3d 320, 326 (6th Cir. 2009) (Bruton rule not applicable to codefendants' nontestimonial statements); United States v. Pike, 292 F. App'x 108, 112 (2d Cir. 2008) (unpublished) ("because the statement was not testimonial, its admission does not violate" Crawford or Bruton); United States v. Taylor, 509 F.3d 839, 850 (7th Cir. 2007) (rejecting Bruton argument because challenged hearsay statement was "not 'testimonial evidence' covered by the Confrontation Clause"); Thomas v. United States, 978 A.2d 1211 (D.C. 2009) (explaining that "if a defendant's extrajudicial statement inculpating a codefendant is not testimonial, Bruton does not apply" (emphasis in original)).

B. Because Lane's e-mail to Billings was nontestimonial, it is outside *Bruton*'s protection and does not violate respondent's Confrontation Clause rights.

As the weight of the authority of this court and others demonstrates, nontestimonial statements fall outside the protections of the *Bruton* doctrine. The Court of Appeals in this case correctly observed—and respondent made no attempt to deny—that "the e-mail at issue is clearly testimonial." (R. 43.) Even though Lane will not testify at her joint trial with respondent, the Confrontation Clause does not bar Lane's nontestimonial e-mail to Billings. (R. 18, 23.) Its admissibility is instead governed by Rule 804(b)(3). *Smalls*, 605 F.3d at 780. As the previous section demonstrated, the e-mail is admissible in its entirety.

Protecting the integrity of this Court's interpretation of the Sixth Amendment by holding *Bruton* inapplicable does not equate to "tak[ing] shortcuts across" respondent's opportunity to examine the e-mail at trial, as the District Court seemed to fear. (R. 23.) For example, respondent will have the opportunity to question Billings, the e-mail's recipient. (R. 29.) As Lane's romantic partner and the team's coach, Billings was intimately familiar with the events that gave rise to this case and the people involved. (R. 1, 9.) He witnessed a heated argument between respondent and Lane and personally participated in another when he confronted Lane with his suspicions. (R. 3, 9.) Significantly, he was so familiar with the circumstances surrounding the conspiracy that he suspected Lane's and respondent's involvement for at least two months before Riley was murdered. (R. 3, 9.) Most importantly, as Lane's boyfriend, he is uniquely positioned to offer a great deal of insight into Lane's actions and thought process. (R. 1, 9.) For these reasons, respondent stands to gain a wealth of information from Billings through "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

Because Billings voluntarily cooperated with the investigation, does not implicate any spousal privilege issues, and displayed no indication in the record of any reluctance to testify, there

is no reason to think respondent will not be able to question him about the e-mail. (R. 9.) Even if she

could not, however, the fact remains that she cannot invoke the Confrontation Clause to bar the

nontestimonial e-mail, which is admissible under Rule 804(b)(3). The Government, therefore,

respectfully requests that this Court reverse the decision of the Court of Appeals.

CONCLUSION

For these reasons, the decision below permits respondent to twist the Federal Rules of

Evidence in a way that, in the words of dissenting Judge Marino, "gratuitously restrict[s] the

government's ability to do justice." (R. 54.) The Government, therefore, respectfully requests that

this Honorable Court **REVERSE** the decision of the United States Court of Appeals for the

Fourteenth Circuit and hold: (1) Rule 404(b) bars Morris's third-party propensity evidence as a

matter of law; (2) excluding Morris's testimony does not violate respondent's right to present a

complete defense; (3) as applied to statements to non-law enforcement, Williamson is overruled and

replaced by a relaxed standard that permits the admission of generally self-inculpatory, non-self-

serving narratives like the January 16 e-mail; and (4) because Crawford restricted Bruton to

testimonial statements, admitting the January 16 e-mail does not violate the Confrontation Clause.

Respectfully Submitted,

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Counsel for Petitioner

Date: February 12, 2014

33

APPENDIX

Federal Rules of Evidence

Fed. R. Evid. 404(b). Crimes, Wrongs, or Other Acts.

- (1) **Prohibited Uses.** 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) **Permitted Uses; Notice in a Criminal Case.** 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:
 - (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
 - **(B)** do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 804(b)(3). Statement Against Interest.

A 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; and
- **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.