

No. 12-13

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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**UNITED STATES OF AMERICA**

*Petitioner,*

*-against-*

**ANASTASIA ZELASKO**

*Respondent.*

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

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**BRIEF FOR PETITIONER**

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## QUESTIONS PRESENTED

- I. Whether the Federal Rule of Evidence 404(b) bar on propensity evidence extends to circumstances where the defendant seeks to admit a third party's propensity to commit an offense with which the defendant is charged.
- II. Whether a defendant's due process right to present a complete defense under *Chambers v. Mississippi* is violated by the exclusion of allegations of a third party's propensity to distribute different illegal substances than the ones at issue.
- III. Whether the standard under *Williamson v. United States* for applying Federal Rule of Evidence 804(b)(3) should be overruled and what standard should replace it.
- IV. Whether the statement of a non-testifying co-defendant at a joint trial would qualify as a non-testimonial statement under *Crawford v. Washington* and thus not violate the Confrontation Clause by its admission into evidence.

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## STATEMENT OF THE CASE

The United States charges Anastasia Zelasko and Jessica Lane, members of the United States women's Snowman Pentathlon Team ("Snowman Team"), with distributing steroids to the men's and women's Snowman Team and committing first degree murder once it was apparent that their scheme would be discovered. (R. at 4-5.)

There is conclusive evidence linking Ms. Zelasko and Ms. Lane to both the distribution of steroids and the murder of Hunter Riley. Ms. Zelasko and Ms. Lane are members of the Snowman Team for the Snowman Pentathlon, an extremely physically demanding game in which participants must dogsled, ice dance, aerial ski, rifle shoot, and curl. (R. at 3.) The effects of performance enhancing drugs would give Pentathlon athletes a significant advantage in this timed event. Ms. Zelasko has been a member of the women's Snowman Team since September 2010. (R. at 1.) In the fall of 2011, shortly after Ms. Lane joined the Snowman Team, the United States' team times markedly improved. (R. at 2.) The United States contends that around this time the Defendants began to sell ThunderSnow, a highly effective untraceable anabolic steroid, to members of the Snowman Team. (R. at 4.)

Noticing the suspicious improvement in times, the Drug Enforcement Administration ("DEA") sent Hunter Riley, a member of the men's Snowman Team and a DEA informant, to investigate. (R. at 1.) On October 1, 2011, Mr. Riley asked Ms. Lane to sell him ThunderSnow, but she declined. Again on November 3, 2011 and December 9, 2011, Ms. Lane declined to sell ThunderSnow to Mr. Riley. (R. at 2-3.) These demands for ThunderSnow, although refused, began to cause tensions between Ms. Zelasko and Ms. Lane.

With the suspicion that the DEA might have discovered their scheme, Ms. Lane began to crack under the pressure. On December 10, the day after Mr. Riley's third request for steroids, Peter Billings observed Ms. Zelasko and Ms. Lane in a heated argument. (R. at 3.) Mr. Billings is the coach of the women's Snowman Team, as well as Ms. Lane's boyfriend. (R. at 1.) He witnessed his girlfriend, Ms. Lane, shouting at Ms. Zelasko, "Stop bragging to everyone about all the money you're making!" (R. at 3.) Presumably, Ms. Zelasko's loose lips were causing word of the scheme to spread, making additional people aware of the doping conspiracy that Ms. Lane wanted to keep under wraps. On December 19, Mr. Billings confronted Ms. Lane with his suspicions that she was distributing steroids to the women's Snowman Team. (R. at 3.) While Ms. Lane denied any involvement, less than a month later, on January 16, 2012, she sent Mr. Billings an email admitting her involvement and pleading for help because a male member of the Snowman Team – likely Mr. Riley – had threatened to report both Ms. Zelasko and Ms. Lane. In this email, Ms. Lane noted that her 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. at 3.) Ms. Lane was clearly worried about being discovered.

Ms. Zelasko also shared this fear. Multiple members of the Snowman Team saw Ms. Zelasko and Mr. Riley, the DEA informant, arguing on January 28, 2012. (R. at 3.) This was little over a week after Ms. Lane confided in her boyfriend that a male team member was going to report them and her partner wanted to keep him quiet.

Six days later, the plan Ms. Lane's partner hinted materialized. On February 3, Ms. Zelasko took advantage of Mr. Riley's schedule and shot and killed him while he was competing on the dogsled course at the World Winter games. (R. at 3, 8.) Ms. Zelasko timed the

murder well. She went alone to a *closed* rifle range, allegedly to practice shooting. (R. at 8.) The closed rifle range was adjacent to the bobsled course where Mr. Riley was competing.

After Mr. Riley's death, the co-defendants' plan quickly began to unravel. That evening of February 3, pursuant to a search warrant, law enforcement officials found two 50-milligrams of ThunderSnow and approximately \$5,000 in cash at Ms. Zelasko's apartment. (R. at 3.) A search of the United States' training facility turned up \$50,000 worth of ThunderSnow, weighing 12,500 milligrams, in an equipment room to which the female competitors and staff all had access. (R. at 3.) Officials searched two other female Snowman Team members' apartments. They discovered twenty doses of ThunderSnow and approximately \$10,000 in cash in Ms. Lane's apartment, but nothing in Casey Short's. (R. at 3, 8.) The amount of ThunderSnow in Ms. Zelasko's apartment is consistent with personal use, but the amount in Ms. Lane's apartment suggests that she kept this amount of ThunderSnow for distribution. (R. at 28.)

The United States charged Ms. Zelasko and Ms. Lane with a five-count indictment, including distribution and possession of anabolic steroids, conspiracy to murder in the first degree, and murder in the first degree. (R. at 5.)

After Ms. Zelasko and Ms. Lane were indicted, Miranda Morris, a former member of the Canadian Snowman winter sport team, came forward alleging that her former teammate, Casey Short, now a member of the American Snowman team, once sold a steroid called White Lightning. (R. at 10.) Ms. Morris alleges that Ms. Short approached her in March 2011 to inquire if she wanted to buy White Lightning from Ms. Short. (R. at 10-11.) Although Ms. Morris was initially unsure, she then bought twenty does of White Lightning from Ms. Short. White Lightning is the chemical precursor to ThunderSnow, and White Lightning has been discovered "in the possession of members of several eastern European teams that compete in the

international World Winter Games Competition.” (R. at 11-12, 28.) There is no other evidence besides Ms. Morris’ statement to link Ms. Short to any steroid distribution, which Ms. Zelasko admits. (R. at 21.) There were no steroids discovered at Ms. Short’s apartment. (R. at 8.)

The District Court for the Southern District of Boerum ruled in favor of Ms. Zelasko on all four questions. The Fourteenth Circuit affirmed. The United States now appeals.

### **SUMMARY OF THE ARGUMENT**

The United States respectfully asks that this court reverse the evidentiary rulings of the Fourteenth Circuit with respect to Questions I through IV. This would allow Miranda Morris’ testimony to be excluded from trial because it violates Rule 404, and Ms. Lane’s email admitted under Rule 804(b)(3).

Ms. Zelasko, the co-defendant, should not be allowed to introduce third party propensity evidence under Federal Rule of Evidence 404(b). The Federal Rules of Evidence exist to provide order and consistency in federal trials, replacing the inconsistent common law. One clear ban under the Federal Rules is that regarding propensity evidence. Parties use propensity evidence prejudicially to suggest that because a person once behaved this way in the past, they behaved in a similar fashion in the future. Federal Rule of Evidence 404 does recognize the probative value of past behavior, allowing it for non-propensity purposes to clarify a matter in dispute in the case, such as motive for the action. FED. R. EVID. 404(b). Although the standards for admissibility under 404(b) may be relaxed for defendants, no circuit has allowed defendants to introduce a third party’s past behavior to show the third party’s propensity under Rule 404(b) because it would violate a central tenant of the Rule. Accordingly, Ms. Zelasko should not be allowed to introduce testimony that suggests a third party’s propensity to sell steroids.

Under the Constitution, defendants are entitled to present a defense. This right, however, does not mean that defendants can entirely circumvent the Federal Rules of Evidence. Only when the strength of the excluded evidence is so high and the defendant's ability to present a defense is completely obliterated with the exclusion of such evidence, are the defendant's due process rights under *Chambers* violated. *Chambers v. Mississippi*, 410 U.S. 284 (1973) was a highly fact-specific case that has rarely been extended. The exclusion of propensity evidence does not rise to the level of a *Chambers* violation.

Co-defendant Lane's email is an admissible statement against penal interest, an exception to the rule against hearsay. The *Williamson* standard, in which each sentence in a declaration needs to be examined separately to determine if it is a self-inculpatory statement on its own should not be the standard used to determine admissibility under Rule 804(b)(3). *Williamson v. United States*, 512 U.S. 594 (1994). It is a rigid, unworkable, and unnatural standard that would exclude almost all statements against penal interest. The standard the Court should use is Justice Kennedy's concurrence in *Williamson*, in which self-inculpatory statements and neutral collateral statements within a declaration are admitted unless the statement is self-serving or is made under untrustworthy circumstances. *Id.* at 620.

This email's admission, which has Ms. Lane's confession, does not present a *Bruton* problem at Ms. Lane's and Ms. Zelasko's joint trial. The email is nontestimonial; only testimonial statements activate the Confrontation Clause and the *Bruton* doctrine if there is a joint trial. Accordingly, Ms. Lane's email should be admitted.

The evidentiary rulings of the Fourteenth Circuit should be reversed: excluding Miranda Morris' testimony and allowing Jessica Lane's email.

## ARGUMENT

### **I. THERE IS A STRICT PROHIBITION AGAINST PROPENSITY EVIDENCE IN THE FEDERAL RULES OF EVIDENCE.**

The Federal Rule of Evidence 404(b) (“Rule 404”) bars evidence of a third party’s propensity to commit an offense with which the defendants are charged. The underpinning of Rule 404(a) and 404(b) is to keep out evidence that would prejudice the person on the stand by trying them for their past behavior. FED. R. EVID. 404 advisory committee’s note (“[Character evidence] tends to distract the trier of fact from the main question of what actually happened on the particular occasion.”)

The following analysis will presume that Miranda Morris’s allegations about Casey Short are true. This is by no means an admission that Ms. Short sold White Lightning. Subpart D will discuss the *Huddleston* sufficiency standards with regards to *uncharged* prior misconduct and the judicial efficiency issues third party propensity evidence would cause.

#### **A. Rule 404 on its face prohibits the rule of propensity evidence.**

The first part of Rule 404, 404(a)(1), succinctly lays out the prohibited use of character evidence—propensity: “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted the accordance with the character or trait.” FED. R. EVID. 404. While propensity evidence may be relevant and have a probative value, there is a large risk that jurors will be improperly prejudiced towards the person against whom the propensity evidence is being introduced, such as punishing the bad person or rewarding the good. FED. R. EVID. 404 advisory committee’s note (“It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.”). What the Framers of the rule valued was the evidence in the case, not evidence regarding the character of the person testifying.

There are three exceptions to the admission of character evidence, none of which are at play in *United States v. Zelasko*. The first exception is when character is a central issue in the case because it is an element of a crime, claim, or defense. FED. R. EVID. 404(a)(2)(A). An example is the competency of a driver in a negligent driving case. The second is for the defendant or victim in a criminal case. FED. R. EVID. 404(a)(2)(B). Criminal defendants or victims can bring in evidence of their own pertinent trait or the victim's pertinent trait. The prosecutor can also offer evidence of the victim's character for peacefulness in homicide cases where the defendant alleges the victim was the first aggressor. The third exception is evidence of a witness's character, such as character for truthfulness. FED. R. EVID. 404(a)(2)(C). All three exceptions are clearly laid out in the rule.

The only reason Ms. Zelasko wants to admit Miranda Morris's testimony is to insinuate that Ms. Short has a proclivity for selling drugs, making Ms. Short Ms. Lane's co-conspirator. (R. at 11-12.) Ms. Zelasko's reasoning is that because Ms. Short supposedly once sold steroids in the past, she is likely to do so again. This goes clearly against the purpose of the rule and conflicts with the wording of Rule 404(a). Ms. Zelasko argues that Rule 404(b), which allows certain prior crimes, wrongs, or other acts, applies to Ms. Short's prior misconduct. (R. at 12-13.)

**B. Defendants are only allowed to introduce "reverse 404(b)" evidence if it complies with the permitted uses of specific conduct in Rule 404(b)(2)—to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.**

Defendant Ms. Zelasko cites the defendant's ability to introduce "reverse 404(b)" evidence for exculpatory purposes. Defendants use the prior bad act of another, a third party, to show that it was the third party who committed the crime. Ms. Zelasko's motion must fail

because she seeks to introduce the evidence for propensity, which is not a recognized use of “reverse 404(b)” evidence.

Subpart b of Rule 404 relates to crimes, wrongs, or others acts; for instance, evidence that the defendant once robbed a bank wearing a distinctive disguise of a blond wig, a blue shirt, and rose-colored wire glasses is admissible to show that it was probably the same person who wore that exact disguise in another robbery. *United States v. Dossey*, 558 F.2d 1336, 1339 (8th Cir. 1977). Like in subpart a, this evidence is not allowed “to show that on a particular occasion the person acted in accordance with the character,” which is a prohibition against propensity evidence. FED. R. EVID. 404(b)(1). This type of evidence is allowed to show “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” FED. R. EVID. 404(b)(2). The *Dossey* case is an example of using specific conduct to prove identity. *Dossey*, 558 F.2d at 1339. Another example is introducing evidence of an earlier burglary during which tools were stolen that were used in the burglary at issue to show plan and intent. *Lewis v. United States*, 771 F.2d 454, 456 (10th Cir. 1985). The acronym MIMICK is often used to describe the Rule 404(b) exceptions.

The purpose of the MIMICK exceptions is to allow clarification if, and only if, the MIMICK categories are at issue. The two-step test laid out in *United States v. Beechum* asks first if it is extrinsic to an issue other than the defendant’s character, namely that it cannot be to show propensity. Then, the evidence must possess probative value that substantially outweighs undue prejudice and must meet other requirements of Rule 403. 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert denied*, 440 U.S. 920 (1979) (holding that the prosecution could introduce evidence of stolen credit cards in defendant’s wallet to negate defendant’s claim that he intended

to turn in a stolen silver dollar). The MIMICK exceptions are to prove a specific issue at trial, not to prove propensity.

Rule 404(b) is an important part of the prosecutor's toolkit, but that is not the only use of the rule. Among others, the Second, Third, Fifth, Seventh, Ninth and Tenth Circuit allow defendants to introduce "reverse 404(b)" evidence for exculpatory purposes. *See, e.g., United States v. McClure*, 546 F.2d 670, 672-73 (5th Cir. 1977) (holding that defendant could introduce a third party's prior misconduct to show lack of criminal intent); *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1983) (holding that defendant could introduce a third party's prior misconduct to show defendant's lack of knowledge of the criminal plan); *United States v. McCourt*, 925 F.2d 1229, 1230 (9th Cir. 1991); *United States v. Stevens*, 935 F.2d 1380, 1405 (3d Cir. 1991); *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005); *United States v. Montelongo*, 420 F.3d 1169, 1172-74 (10th Cir. 2005). These circuits are in agreement that "the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword." *See, e.g., Aboumoussallem*, 726 F.2d at 911; *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999).

The lower standard for admission of "reverse 404(b)," however, must still comply with Rule 404(b)(1) that the evidence cannot be used for propensity. The circuits cited above that have allowed "reverse 404(b)" evidence have all used it to clarify one of the MIMICK categories at trial, such as intent. *E.g., McClure*, 546 F.2d at 672-73 (using the "reverse 404(b)" evidence to show defendant's lack of intent). When a defendant seeks to use the prior misconduct of a third party to show the third party's propensity, that use has been denied.

C. Although “reverse 404(b)” that complies with Rule 404(b)(2) is admissible, “reverse 404(b)” evidence for propensity is inadmissible due to the bar against propensity evidence.

The circuits that have dealt with reverse 404(b) evidence and allowed it have also explicitly disallowed “reverse 404(b)” evidence when the defendant seeks to introduce it to show propensity. For instance, the Third Circuit, which allowed “reverse 404(b)” evidence in *Stevens*, declined to extend the rule in *United States v. Williams*. In *Williams* the defendant, on trial for possession of a firearm by a felon, sought to introduce evidence that another person with whom he was arrested had a previous firearm possession conviction. 458 F.3d 312, 313-14 (3d Cir. 2006). The unanimous panel held that “[b]ecause the purpose for which [the defendant] sought to introduce [the third party’s] prior conviction was to show that he has a *propensity to carry firearms, the District Court correctly excluded the evidence.*” *Id.* at 314 (emphasis added). The Third Circuit distinguished *Williams* from *Stevens*, writing that the evidence in *Stevens* was used to show identity, one of the earmarked exceptions in Rule 404(b)(2). *Id.* at 318. (“[Crimes, wrongs, or other acts] may be admissible for another purpose, such as . . . identity . . .”). Additionally, the judges noted that while *Stevens* gave defendants “more leeway in introducing *non-propensity evidence* under Rule 404(b), he or she is not allowed more leeway in admitting propensity evidence in violation of Rule 404(b). *Id.* at 317 (emphasis in original). This holding is consistent with the clear proscription against propensity evidence in both Rule 404(a) and 404(b).

Similarly the Sixth Circuit, which also recognizes the use of reverse 404(b) evidence, declined to extend the rule to propensity evidence. *E.g., United States v. Lucas*, 357 F.3d 599, 605-06 (6th Cir. 2004) (holding that the defendant could not introduce a third party’s previous conviction for cocaine trafficking to show that the drugs found at the scene could have those of

the third party). The defendant, Lucas, wanted to show that the drugs was not hers but that of another person, because, among other reasons, he had a propensity for selling cocaine. *Id.* at 606. The Sixth Circuit rejected this use, which clearly fell outside the exceptions in 404(b). *Id.* The rule the Sixth Circuit laid out was that “the standard analysis of Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party, not charged with any crime.” *Id.* This principle, that “[e]vidence of “other crimes, wrongs, or acts,” no matter by whom offered, is *not admissible for the purpose of proving propensity or conforming conduct*, although it may be admissible if offered for some other relevant purpose” is repeated in other circuits. *E.g., McCourt*, 925 F.2d at 1235 (emphasis added).

Ms. Zelasko’s desired use of “reverse 404(b)” has been clearly rejected by the Circuits that have dealt with the issue. She argues that because she is the defendant she has more leeway in introducing exculpatory evidence, which would allow her to introduce propensity evidence. Both the Third and the Sixth Circuit, which allow “reverse 404(b)” evidence, have rejected this precise argument for “reverse 404(b)” propensity evidence. *See Williams*, 458 F.3d at 313-14; *Lucas*, 357 F.3d at 606.

Had Ms. Zelasko argued that Ms. Short’s past wrong gave her motive to distribute ThunderSnow and murder Mr. Riley, the evidence could be let in under Rule 404(b). Motive or another one of the exceptions laid out the Rule 404(b) does allow evidence of past crimes, wrongs, or other acts. It not an issue that Ms. Short had a motive to sell steroids or to kill Mr. Riley. Defendant’s counsel also does not argue any of these exceptions, but wants to introduce the propensity evidence under 404(b), a prohibited use. *See Lucas*, 357 F.3d at 606 (holding that defendant could not introduce the 404(b) propensity evidence to prove knowledge and intent because those issues were not issues in the case.). Not only is the evidence prohibited

under the rule, but also it would still not negate Ms. Zelasko's plan to silence Mr. Riley by killing him.

The probative value of this evidence also does not outweigh any prejudicial effect. *Id.*, 357 F.3d at 606 (balancing the probative value of the evidence against the prejudicial effect). The steroid Miranda Morris alleges she saw Ms. Short sell was not ThunderSnow, the steroid in this case. The alleged steroid was White Lightning. Although ThunderSnow and White Lightning are esters, chemical derivatives of each other, they are not the same steroid. In fact, steroids by definition are esters of testosterone and thus each other. Stephen Kishner, MD, *Anabolic Steroid Use and Abuse*, Medscape (Mar. 8, 2013), <http://emedicine.medscape.com/article/128655-overview>. Similarities between the crime at issue and the past crime are not dispositive for the admission of the evidence, but are factors in determining admission. *See Stevens*, 935 F.2d at 1405. Here, any connection with Ms. Short's one past alleged sale of an ester of ThunderSnow is simply too tenuous. Any potential misdeed by Ms. Short is "simply too generic" to prove anything other than Ms. Short's propensity. *See Williams*, 458 F.3d at 318. Any probative value the evidence may have is "outweighed by the risk of unfair prejudice and confusion of the issues." *See id.* at 319. The prejudice is not only prejudice to the defendant, but "an undue tendency to suggest decision on an improper basis." *Lucas*, 458 F.3d at 606 & n.2 (citing FED. R. EVID. 403 advisory committee notes). The unfair prejudice is that the jury will make an improper inference that because Ms. Short once sold steroids before, she must have sold them in this case, even though there is no evidence linking her to the conspiracy either to distribute steroids or murder Mr. Riley. (R. at 12-13.)

The Fourteenth Circuit Court of Appeals and the District Court of the Southern District of Boerum overlooked one crucial area of "reverse 404(b)" jurisprudence—that it does not extent to

propensity. The District Court cited the Third Circuit in *United States v. Stevens*, which allowed “reverse 404(b)” evidence to prove identity, a non-propensity purpose. (R. at 21.). The District Court neglected the later ruling of the Third Circuit in *United States v. Williams* that clarified that “reverse 404(b)” evidence still complies with Rule 404(b)’s ban on evidence used for propensity. *Williams*, 458 F.3d at 313-14. The Court of Appeals overlooked the same limiting factor. (R. at 34.) The Court of Appeals also mistakenly cited *United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005) to stand for Rule 404(b) allowing propensity evidence. (R. at 35.) The defendants in *Montelongo* argued no such thing. They wanted to use the “reverse 404(b)” evidence to prove that they had no knowledge, a MIMICK category in Rule 404(b), of the narcotics in their truck. *Montelongo*, 420 F.3d at 1174 (“[T]he evidence the Defendants sought to elicit on cross-examination was relevant to their defense that they *had no knowledge* of the marijuana packed in the trunk they were driving.”) (emphasis added.) In fact, when faced with the issue of whether or not Rule 404(b) allows defendants to introduce a third party’s specific acts for propensity, the answer from circuits has been “no.” *E.g.*, *McCourt*, 925 F.2d at 1235; *Williams*, 458 F.3d at 313-14; *Lucas*, 357 F.3d at 605-06.

**D. Because the standard of admissibility is sufficiency under *Huddleston*, allowing propensity evidence based on mere allegations would reduce judicial efficiency.**

The above analysis has been predicated on the notion that Ms. Short actually sold White Lightning. There is, however, no proof other than Ms. Morris’s testimony. Evidentiary issues aside, allowing defendants to introduce prior uncharged misconduct for propensity purposes would undercut the purposes of the Federal Rules of Evidence. Under *Huddleston*, the party seeking to admit prior *uncharged* misconduct under Rule 404(b) need not prove that the uncharged misconduct actually happened. Defendants could take advantage of this rule to

deluge the judicial process with the prior uncharged misconduct of third parties in the hope that the jury could find a scapegoat.

The Supreme Court established in *Huddleston* that if the district court judge can find that there is sufficient evidence so that the jury could find by a preponderance of the evidence that the prior *uncharged* misconduct occurred, then the evidence is admissible. *Huddleston v. United States*, 485 U.S. 681, 689 (1988). For instance in *Huddleston*, the government wanted to introduce the testimony of a record store owner and an FBI agent, who could both testify that the defendant, Guy Huddleston, previously tried to sell them stolen goods. This testimony was used to prove an element of the Huddleston's crime – that Huddleston knew the tapes he was selling were stolen. *Id.* at 683-684.

Providing defendants this ability, only hindered by the district court's evidentiary rulings, counters the intended effect of the rules regarding character evidence: ensuring a streamlined judicial system and preventing mini-trials on unrelated charges within the main trial. The only evidence that Ms. Short may have dealt steroids is the affidavit of another.<sup>1</sup> If this meets the sufficiency standard, judges would have to rule constantly on motions from defendants seeking to introduce propensity evidence for scapegoating purposes. This would cause undue delay in the judicial process and decrease predictability for litigants—both defendants and prosecutors. It is a real risk that if Ms. Morris lied about Ms. Short and Ms. Zelasko was allowed to introduce false propensity evidence that justice could not be achieved.

**II. THE DEFENDANT'S DUE PROCESS RIGHTS ARE NOT VIOLATED UNDER *CHAMBERS* AS DEFENDANTS ARE NOT ENTITLED TO INTRODUCE ALL RELEVANT AND POSSIBLY EXCULPATORY EVIDENCE UNDER *CHAMBERS*, WHICH THE SUPREME COURT HAS LIMITED TO ITS FACTS.**

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<sup>1</sup> The district court's ruling on the admissibility of Ms. Morris's affidavit is not challenged on appeal.

Defendant Anastasia Zelasko is able to present a complete defense with the exclusion of the propensity evidence. Her due process rights are not violated under *Chambers v. Mississippi*, 410 U.S. 284 (1973). While *Chambers* can require the admission of some evidence offered by a criminal defendant even if other evidence rules, such as hearsay or character evidence would prohibit the admission of such evidence, the threshold set by *Chambers* is high.

The holding of *Chambers* is narrow and limited to its facts. Leon Chambers, charged with killing a police officer, wanted to call Gable McDonald as a witness, so McDonald could be cross-examined about his retracted confession of killing the police officer. *Id.* at 289. Mississippi's strict voucher rules, in which one could not cross his own witness, prevented Chambers from calling McDonald. McDonald's confession bore many marks of reliability: it was spontaneous, made to close acquaintances, and made right after the crime. *Id.* at 300-02 ("The testimony rejected by the trial court here bore persuasive assurances of trustworthiness . . ."). The trustworthiness of the evidence is an important consideration in a *Chambers*-style weighing. See *Kubsch v. Superintendent, Ind. State Prison*, No. 3:11CV42-PPS, 2013 WL 6229136 at \*16 (N.D. Ind. Dec. 2, 2013). From the facts of the case, Chambers' ability to present a defense was obliterated from the voucher rule. Chambers, however, was specific instance of error correction and is not applicable to most cases. *Chambers*, 410 U.S. at 303 ("Rather, [the Supreme Court] hold[s] quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of fair trial.").

The Supreme Court has itself rejected the ability of a defendant to present all relevant and possibly exculpatory evidence. In *Montana v. Egelhoff*, the Court rejected the defendant's argument that he should have been able to present evidence that he was intoxicated in a case for deliberate homicide. 518 U.S. 37, 56 (1996). The Supreme Court reversed the Montana Supreme

Court which found that the defendant, Egelhoff, “had a due process right to present and have considered by the jury all relevant evidence to rebut the State’s evidence on all elements of the offense charged.” *State v. Egelhoff*, 272 Mont. 114, 125 (Mont. 1995). The Supreme Court noted that relevant evidence could be excluded for any number of reasons such as evidentiary rules, but also failure to abide by procedural requirements. *Egelhoff*, 518 U.S. at 42. *See also Michigan v Lucas*, 500 U.S. 145, 151 (1991) (“[P]robative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule.”). Egelhoff relied on a statement from *Chambers* that “[t]he right of an accused in criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Egelhoff*, 518 U.S. at 52. The Supreme Court soundly rejected the principle, writing “*Chambers* was an exercise in highly case-specific error correction.” *Id.* The Court also cited the *Chambers* itself: “we hold quite simply that *under facts and circumstances of this case* the ruling of the trial court deprived Chambers of a fair trial.” *Id.* (quoting *Chambers*, 410 U.S. at 302-03) (emphasis added). Distilling *Chambers*, Justice Scalia wrote, “[t]he holding of *Chambers*—if one can be discerned from such a fact-intensive case—is certainly not that a defendant is denied ‘a fair opportunity to defend against the State’s accusations’ whenever ‘critical evidence’ favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.” *Id.* at 53.

The Supreme Court has clearly articulated that while evidence may be probative for the defendant, legitimate policy reasons for the evidentiary rules can keep out the probative evidence. In *Michigan v. Lucas*, the Supreme Court considered Michigan’s evidentiary rule that allowed a defendant in a rape case to introduce evidence of his relationship with the victim only if he introduced it within ten days after arraignment. 500 U.S. 145, 147 (1991). In *Lucas*, the

defendant failed to comply with the rule and thus was not able to offer potentially exculpatory information. Citing the policy reasons of the state to keep out the information, such as “a valid determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy” and minimizing trial delay, Justice O’Connor, writing for the majority, upheld the Michigan rule and prevented Lucas from introducing evidence about his prior relationship with the defendant. *Id.* at 150. The Supreme Court has repeatedly rejected the contention that defendants can introduce any and all exculpatory evidence.

Ms. Zelasko’s defense is that she played no role distributing ThunderSnow with Ms. Lane and that the death of Mr. Riley was a sad accident. The exculpatory evidence she seeks to admit is the affidavit of a former Canadian Snowman Team member, Ms. Morris, who claims that Ms. Short sold Thunder Lightning, a drug different from ThunderSnow. The only evidence against Ms. Short is Ms. Morris’s word. The strength of this evidence is far below the strength of the evidence in *Chambers*. It is also unclear if Ms. Morris will receive any future benefit for confessing. *See Chambers*, 410 U.S. at 300-02. Ignoring the evidentiary issues, including the *Huddleston* issue, Ms. Morris’s testimony is not material to Ms. Zelasko’s defense. The exclusion of Ms. Morris’s testimony does not deny Ms. Zelasko a fair trial. This is unlike *Chambers* where the strength of the excluded evidence was without a doubt crucial to Chambers’ defense.

There are also legitimate policy reasons for excluding propensity evidence. The Federal Rules of Evidence exist because of concerns of bias, efficiency, and consistency. FED. R. EVID. 102. Introducing a third party’s uncharged prior misconduct for the purpose of propensity distracts the jury from the matter at issue and may propel juries to scapegoat especially since the third party does not have an opportunity to defend herself. Additionally, since the admissibility

of such evidence is determined by the trial judge, there is little predictability for litigants especially if the prior misconduct is uncharged, like in this case. Allowing Ms. Zelasko's to admit a third party's uncharged prior misconduct would undercut the goals of the Federal Rules of Evidence.

**III. THE WILLIAMSON STANDARD IS UNWORKABLE AND ITS RESULTS UNPREDICTABLE, THEREFORE, THE COURT SHOULD ADOPT A MORE RELAXED STANDARD THAT MEETS THE COURT'S CONCERNS, AND ALLOWS FOR CLARITY, PREDICTABILITY AND UNIFORMITY IN THE LOWER COURTS.**

Hearsay is inadmissible as evidence because of the unreliability of out-of-court statements – the declarant may be lying, misremembering or misunderstanding a past event – ills that do not have the safeguards of oath, demeanor, and cross-examination at trial. *Williamson v. United States*, 512 U.S. 594, 598 (1994). However, there are various exceptions to the general inadmissibility of hearsay evidence. One such exception is Federal Rule of Evidence 804(b)(3), which allows 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.”

The statement against penal interest exception is founded on the notion that the declarant will not make a self-inculpatory statement unless she believes the statement is true. FED. R. EVID. 804(b)(3) Advisory Committee Note. In *Williamson*, the Court redefined “statement” as “sentence” and excluded collateral statements that are not themselves self-inculpatory from admissibility even if they are made in a broader context of self-incrimination. *Williamson*, 512 U.S. at 599-600. This is an artificial, difficult standard to apply, because it mandates a sentence-

by-sentence analysis that results in unpredictability. Accordingly, the *Williamson* standard should be abandoned in favor of a less restrictive approach. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“[W]hen governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’ ”).

**A. The *Williamson* standard is overly narrow and does not provide adequate guidance to lower courts. Rather, it produces an unworkable formula with unpredictable results.**

The *Williamson* standard reads Federal Rule of Evidence 804(b)(3) very narrowly; in particular, it tasks lower courts with examining a declaration sentence-by-sentence and excluding any that is not specifically self-incriminating, even if it is a neutral accompanying statement (“collateral statement”). It forbids the assumption that a statement is self-incriminating just because it forms part of a self-incriminating narrative. *Williamson*, 512 U.S. at 600-01. The Supreme Court’s reasoning was that the declarant would have a strong motivate to shift guilt onto another person and exonerate herself, therefore, every sentence in a declaration should be viewed suspiciously. *Id.* at 607; *Lee v. Illinois*, 476 U.S. 530, 541 (1986).

The Court was fractured in its *Williamson* decision, and although it produced the ruling in effect today, three separate concurrences differing on the appropriate approach towards evaluating statements against penal interest. Justice Scalia, in his concurrence, pointed out the fallacy in the majority’s reasoning. “[A] declarant’s statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible codefendant.” *Williamson*, 512 U.S. at 606-07. The *Williamson* standard’s rigidity directs the lower courts to do precisely that – discard collateral statements that may be neutral or self-inculpatory merely because they may involve another person or do not directly speak to the declarant’s guilt. This rule does not operate on

natural language patterns, written or spoken. Rather, it is a very mechanical segmentation of one declaration into separate statements. In effect, it operates to divide declarations in order to rule inadmissible mentions of other individuals involved in the criminal activity alongside the declarant. Further adding to this confusing standard is the Court's direction that determining whether a statement is against the declarant's penal interest is a question that ultimately "can only be answered in light of all the surrounding circumstances." *Id.* at 604.

Many circuit courts have interpreted *Williamson* more broadly. For example, the First Circuit declared "we do not accept ... that *Williamson* creates a *per se* bar to any and all statements against interest that also implicate another, nor do we find that any of the hearsay challenged here shift blame from the declarant." *United States v. Barone*, 114 F.3d 1284, 1295 (1st Cir. 1997). The First Circuit understood the Court's instruction in *Williamson* as one looking to the totality of the circumstances to determine whether each particular statement comports with the reasoning behind Rule 804(b)(3). The Second Circuit also adopted a looser interpretation of *Williamson*, assessing the indicia of trustworthiness of the context in which the statements are made. "[W]e rested our decision on the 'particularized guarantees of trustworthiness' surrounding the statements, including the fact that the statements inculcated both the declarant and the defendant equally, rather than relying on mere proximity to states inculpatory of the declarant . . . the statements were made . . . in private; there was no police or other official interrogation." *United States v. Sasso*, 59 F.3d 341, 349-50 (2d Cir. 1995). Another circuit that adopted a broader approach is the Seventh Circuit. It considers various factors including "1) the relationship between the confessing party and the exculpated party; 2) whether the confessor made a voluntary statement . . . and; 3) whether the statement was made

in order to curry favor with the authorities.” *United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995).

The current standard has caused unpredictability, because of its restrictiveness “the exclusion of collateral statements would cause the exclusion of almost all inculpatory statement.” Michael D. Bergeisen, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements against Penal Interest*, 66 CALIF. L. REV. 1189, 1207 (1978).

**B. A broader approach to Federal Rule of Evidence 804(b)(3), as articulated in Justice Kennedy’s concurrence in *Williamson*, should apply as it admits collateral statements of a neutral and self-inculpatory character.**

The Court should adopt a broader approach, which is what Justice Kennedy urged in his *Williamson* concurrence. He proposed admitting statements that are part of declarations that contain facts against penal interest unless the statement is self-serving or is made under circumstances where it is likely the declarant had significant motivation to inculcate in exchange for favorable treatment. *Williamson*, 512 U.S. at 620. This proposition is essentially an adaptation of Dean McCormick’s approach, which would permit the admissibility of only neutral collateral statements, with well-articulated limiting principles. *Id.* at 612. Such an approach would fall in line with the text of the rule, provide clarity and predictability to lower courts, and address the concern at the heart of the *Williamson* ruling.

Nothing in the text of Rule 804(b)(3) precludes the admissibility of neutral collateral statements. In fact, the rule is silent with regards to collateral statements altogether. Justice Kennedy’s proposition is based on three foundations: the Advisory Committee’s Note, the common law of the hearsay exception, and the presumption that Congress intended its statute to have some meaningful effect. *Id.* at 614. These sources provide further support for the adoption of a less restrictive rule.

The advisory committee's note is silent regarding collateral statements, but indicates that the central preoccupation of this rule is ensuring that a statement is adequately reliable in order to be admissible. Statements tending to subject the declarant to liability are considered to be sufficiently reliable. FED. R. EVID. 804(b)(3) Advisory Committee's Note ("The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay."). With regard to common law, a declaration against interest has been held admissible "not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement." Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 57 (Nov. 1944). Finally, the strict *Williamson* rule would result in the exclusion of nearly all inculpatory statements. Bergeisen, *supra* at 1207. Indeed, such a narrow rule would rarely result in a defendant being inculpated by a declarant's statement. Such a result would render Rule 804(b)(3) a useless, redundant exception to the hearsay rule. *Williamson*, 512 U.S. at 617.

Justice Kennedy's proposition provides a meaningful articulation of the exception, while establishing limits that address the Court's concern with unreliable, potentially self-exculpating statements by co-defendants. Simultaneously, this less artificial approach would allow for courts to produce more uniform holdings.

**C. Co-defendant Lane's statement is admissible as a statement against penal interest.**

Co-Defendant Lane's email falls within the Rule 804(b)(3) exception of statements against penal interest. The statement is against her interest because she is admitting to engaging in a business that could subject her to criminal liability. Additionally, she voluntarily sent the email in question to Peter Billings and confessed to selling a controlled substance. The recipient was not only the declarant's boyfriend, but also her coach, someone in a position to report her

and subject her to criminal liability. Under the Kennedy approach, the entire email would be admissible, as it only contains self-inculpatory statements and neutral collateral statements. There is no indication that Ms. Lane attempted to shift responsibility onto her partner and the circumstances surrounding the correspondence clarify that law enforcement was not only uninvolved, but also unaware of the declaration.

Alternatively, even under the restricted *Williamson* approach, most of the sentences in the email exchange are self-inculpatory. Even the statement “[m]y partner really thinks we need to figure out how to keep him quiet” clearly communicates the declarant’s involvement in the act of “keeping him quiet” and would therefore be admissible against Ms. Zelasko. (R. at 29.)

#### **IV. ADMITTING CO-DEFENDANT’S EMAIL, AS EVIDENCE WOULD NOT VIOLATE MS. ZELASKO’S CONSTITUTIONAL RIGHTS UNDER THE CONFRONTATION CLAUSE.**

Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” This Confrontation Clause provides criminal defendants the constitutional right to cross-examine witnesses. The right is founded on the notion that certain kinds of evidence can be particularly damning and their reliability especially suspect; thus the cross-examination requirement is designed as a curative measure to prevent the admission of untrustworthy evidence. *United States v. Bruton*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring); *United States v. Barone*, 114 F.3d 1284, 1299 (1st Cir. 1997).

In *United States v. Bruton*, the Supreme Court redefined the Confrontation Clause to only exclude testimonial evidence. *Bruton*, 391 U.S. at 127. This distinction recognized that testimonial statements, rather than nontestimonial declarations, are suspicious because of a declarant’s motivation to self-exculpate by incriminating the defendant. In those cases, in-court

cross-examination would allow the defendant to call into question the declarant's claims in a formal setting and before the jury.

**A. Crawford modifies the Bruton doctrine – so only testimonial statements fall under Bruton and non-testimonial statements are admissible – regardless of whether the declarations were made by a co-defendant or not.**

In *Crawford v. Washington*, the Supreme Court modified the *Bruton* doctrine, clarifying that nontestimonial statements do not implicate the Confrontation Clause and are thus admissible as evidence. *Crawford v. Washington*, 541 U.S. 36, 56 (2004). It goes to the heart of the Sixth Amendment's Confrontation Clause, the worry that untested *ex parte* declarations had the propensity to be self-exculpating by shifting the declarant's blame onto the defendant, hence the need for a formalized confrontation. *Id.* at 44. The Court further grounds itself in the reasoning that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy." *Id.* at 56.

A clear and precise rule is provided for determining whether a given statement is testimonial. "They are testimonial when the circumstances objectively indicate that ... the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). Nontestimonial statements include declarations given with the purpose of soliciting aid in the face of an ongoing emergency, even if these declarations are made to law enforcement officers. *Id.* at 822. The declarant's motivation to lie is greatly reduced because of their need for effective help in ending the ongoing situation. *Michigan v. Bryant*, 131 S.Ct. 1143, 1157 (2011). The emergency circumstances, much like dying declarations, for example, greatly reduce the likelihood that the proffered statement is false.

*Michigan v. Bryant* further elaborated on the circumstances that indicate a statement is nontestimonial. The Court cites the level of formality, the identity of the interrogator, and the content and tenor of the exchange during which the statement is made as factors that must be examined to make an accurate determination on the nature of the statement. *Id.* at 1160, 1162.

Taken together, the *Davis* line of cases articulates a clear rule that produces predictable results and protects defendants' Sixth Amendment rights. Simply, if the statement is nontestimonial, it has the same indicia of reliability independent of the declarant's participation in the crime at issue. Although, Justice White's dissent in *Bruton* stated the opinion that a co-defendant's statement is more suspect than ordinary hearsay evidence because of the motivation to self-exonerate by implicating the defendant, the Supreme Court has not made this distinction in any subsequent cases. *Bruton*, 391 U.S. at 141. All *ex parte* communications are subject to the same pitfalls regardless of the declarant's status as non-party or co-defendant. Nontestimonial statements are admissible without cross-examination precisely because they are uttered under circumstances where suspects' motives, particularly those of self-exoneration, are either not present or greatly diminished to a point where unreliability is no longer a clear concern. Therefore, *Crawford* and its progeny apply with equal force to a non-testifying co-defendant's declarations.

*United States v. Cruz*, 481 U.S. 186 (1987), examined a non-testifying co-defendant's statement. The Court determined the declarant's statement was testimonial and applied the *Bruton* doctrine, rendering the statement inadmissible. *Cruz*, 481 U.S. at 190. The Court's use of the framework distinguishing between testimonial and nontestimonial statements clearly indicates that the co-defendant's statement does not receive a different analysis from non-party

declarations. The *Crawford* distinction applies to co-defendants' testimonies because it is a robust enough framework to protect against the danger of unreliability. *Id.* at 192.

**B. Ms. Lane's email is a nontestimonial statement that falls squarely within the Crawford line of cases, and is thus admissible as evidence.**

Where a declarant's statement is deemed nontestimonial, there is no established procedure it must receive. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68. Under the *Roberts* test, a statement is admissible only if it falls within a hearsay exception or if the statement bears particularized guarantees of trustworthiness. *Id.* at 42.

One practice is to simply admit the declaration once it is deemed nontestimonial, as the Confrontation Clause does not apply. *United States v. Dale*, 614 F.3d 942, 955 (8th Cir. 2010); *United States v. Udeozor*, 515 F.3d 260, 270 (4th Cir. 2008); *United States v. Johnson*, 581 F.3d 320, 325 (6th Cir. 2009); *United States v. Watson*, 525 F.3d 583, 588 (7th Cir. 2008). Another practice is to submit the nontestimonial statement to the *Roberts* test in order to admit it into evidence. *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004); *United States v. Hendricks*, 395 F.3d 173, 184 (3d Cir. 2005); *United States v. Underwood*, 446 F.3d 1340, 1346 (11th Cir. 2006). The latter approach takes the view that *Crawford* re-defines the scope of the Confrontation Clause, removing the *per se* bar on untested *ex parte* declarations. *Saget*, 377 F.3d at 226. It determines that "*Crawford* leaves the *Roberts* approach untouched with respect to nontestimonial statements." *Id.* at 227. Regardless of the procedure adopted, the non-testifying

co-defendant's declaration in this case is nontestimonial and admissible as evidence, even if examined under the *Roberts* test.

In the present case, co-defendant Lane sent an email to her boyfriend Mr. Billings in which she implicated both herself and the Defendant in illegal activity. She states that she and her partner are being threatened with the exposure of their criminal activities, and that her partner wishes to "keep [the person] quiet." (R. at 29.) The email is a clear "call for help" per *Davis*. *Davis*, 547 U.S. at 827.

Looking to the factors outlined in *Bryant*, the declarant made her statement informally in an email to her boyfriend, who is not involved in law enforcement activities and with whom she is intimate. Her statements were unsolicited. Ms. Lane was seeking help in the face of an ongoing personal emergency. She was not seeking to establish past facts, but rather to share her current circumstances and seek advice in dealing with her pressing present circumstances. Ms. Lane did not intend that the primary use of her email would be part of a law enforcement investigation. This firmly defines her statement as nontestimonial, therefore not triggering the Confrontation Clause.

If her nontestimonial statement were subject to a further *Roberts* test requirement, the overall circumstances under which the statement was made reveal that she could not have expected these statements would be used prosecutorially. *Dale*, 614 F.3d at 956. Her motivation to shift blame onto the Defendant would be considerably diminished, and thus provide the Court with sufficient guarantees of trustworthiness to admit it as evidence.

**CONCLUSION**

For the above reasons, the United States respectfully requests this Court **REVERSE** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: 1) Rule 404(b) prohibits propensity evidence introduced by the defendant; 2) Ms. Zelasko's due process rights are not violated by the exclusion of propensity evidence based on uncharged allegations; 3) Ms. Lane's email is admissible as a hearsay exception under Rule 804(b)(4), statement against penal interest, and 4) there is no *Bruton* violation because Ms. Lane's email is nontestimonial.

Respectfully Submitted,

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Counsel for Petitioner

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