No. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

-V.-

ANASTASIA ZELASKO,

Respondent.

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

BRIEF FOR 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 overrule 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 be considered a nontestimonial statement within the meaning of the Court's subsequent decision in *Crawford v. Washington*.

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STATEMENT OF THE CASE

Statement of Facts

Defendant Zelasko shot and killed DEA informant and member of the United States men's Snowman Team, Hunter Riley, on the Snowman Team training grounds on February 3, 2012. (R. 1, 3.) At the direction of the DEA, Riley had approached Defendant Lane, a member of the United States women's Snowman Team, on multiple occasions to buy an anabolic steroid named ThunderSnow. (R. 1-3.) Defendants Lane and Zelasko together were engaged in the sale and distribution of ThunderSnow to the historically under-performing women's Snowman team. (R. 2.) Interestingly, a marked improvement in the teams practice times correlated with the addition of Defendant Lane to the team. (R. 2.)

About two months before Riley was murdered, Peter Billings, coach of the women's Snowman Team and boyfriend of Defendant Lane, observed Defendants Lane and Zelasko in a heated argument. (R. 3.) During the argument, Billings overheard Defendant Lane shout, "Stop bragging to everyone about all the money you're making!" to Defendant Zelasko. About a week later, Billings confronted Defendant Lane and expressed his suspicion that she was selling steroids to members of the women's Snowman Team. (R. 3.)

Although Defendant Lane initially denied the accusation, a few weeks later Billings received an incriminating email from Defendant Lane. (R. 3.) She wrote:

Peter,

I really need your help. I know you've suspected before about the business my partner and I have been running with the female team. One of the members of the male team found out and threatened to report us if we don't come clean. My partner really thinks we need to figure out how to keep him quiet. I don't know exactly what she has in mind yet.

Love,

Jessie

(R. 3.) Shortly thereafter Defendant Zelasko was observed in a heated argument with Riley. (R. 3.) She shot and killed him days later. (R. 3.)

The DEA executed a search warrant on Defendant Zelasko's house that same day. (R. 3.) During the search, they seized two 50-milligram doses of ThunderSnow and approximately \$5,000 in cash. (R. 3.) The next day, the DEA executed a search warrants at Defendant Lane's house and at the Snowman Team's training facilities. (R. 3.) From the Team's equipment storage room, they recovered 12,500 milligrams of ThunderSnow, valued at approximately \$50,000. (R. 3.) The DEA also seized twenty 50-milligram doses of ThunderSnow, \$10,000 in cash, and the laptop from which Defendant Lane sent the email to Billings, from Lane's house. (R. 4.) The DEA executed another warrant at the apartments of Casey Short, but no evidence was found. (R. 8.)

A grand jury returned five-count indictment against Defendants Zelasko and Lane. (R. 16.) Defendants are charged with (1) conspiracy to distribute and posses anabolic steroids, (2) distribution of anabolic steroids, (3) possession of anabolic steroids, (4) conspiracy to commit first-degree murder, and (5) first-degree murder. (R. 4-5.)

Once at the district court, Defendant Zelasko offered the testimony of Miranda Morris, via affidavit, at a pretrial motion hearing. (R. 10, 24-25.) The substance of Morris's affidavit is that the previous year, Short had sold her steroids while they were teammates on the Canadian Snowman Team. (R. 10.) Morris was apparently compelled by her conscience to come clean about her use of steroids as a Snowman competitor. (R. 10.) At the same hearing, the government sought to introduce Defendant Lane's incriminating email into evidence as well. (R. 15.)

Procedural History

On February 3, 2012, Defendant Zelasko was arrested and taken into federal custody. (R. 3.) The following day, Defendant Lane was taken into custody. (R. 4.) On April 10, 2012, Defendants Zelasko and Lane were indicted and charged on five counts of violating federal statutes: Count 1 – Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids pursuant to 21 U.S.C §§ 841(a)(1), b(1)(E) and 846; Count 2 – Distribution of and Possession with Intent to Distribute Anabolic Steroids pursuant to 21 U.S.C §§ 841(a)(1) and b(1)(E); Count 3 – Simple Possession of Anabolic Steroids pursuant to 21 U.S.C § 844; Count 4 – Conspiracy to Murder in the First Degree pursuant to 18 U.S.C. §§ 371 and 1111(a); and Count 5 – Murder in the First Degree pursuant to 18 U.S.C. § 1111(a). (R. 4-5.)

Before trial, Defendant Zelasko moved in limine to introduce the testimony of Miranda Morris pursuant to Federal Rule of Evidence 404(b) to show the propensity of a third party to sell very similar performance-enhancing drugs as those involved in the instant case. (R. 7.) The Government also moved in limine to admit an email sent by Defendant Lane to Peter Billings pursuant to the hearsay exception in Federal Rule of Evidence 804(b)(3). (R. 7.)

On July 16, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on both motions. (R. 6.) On July 18, 2012 the District Court ruled in favor of Defendant Zelasko on both motions, admitting the testimony of Miranda Morris and denying the Government's motion to admit the email. (R. 20-23.) The United States filed an interlocutory appeal pursuant to 18 U.S.C §§ 3731 and 3731-(a) in the United States Court of Appeals for the Fourteenth Circuit. (R. 30.) On February 14, 2013, the Court of Appeals affirmed both of the District Court's rulings, holding that: 1) Federal Rule of Evidence 404(b) does not apply to a defendant's introduction of evidence used to show the criminal propensity of a third party; 2) a

defendant's right to present a full defense under *Chambers v. Mississippi* encompasses such propensity evidence; 3) *Williamson v. United States*, though sometimes difficult to apply, remains binding precedent and bars the admission of statements collateral to declarations against penal interest; and 4) the *Bruton* doctrine still applies to both testimonial and nontestimonial statements following *Crawford v. Washington*. (R. 31.)

The United States subsequently filed a petition for a writ of certiorari, and on October 1, 2013, the Supreme Court of the United States granted certiorari. (R. 55.)

SUMMARY OF ARGUMENT

First, the Fourteenth Circuit Court of Appeals should be reversed because it erred in holding that Rule 404(b) applied only to prior bad acts of the defendant. The text of Rule 404(b) is unequivocal in its language that the prior bad acts of "a person[]" are "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." This reading of 404(b) is consistent with the statutory scheme of Rule 404 and the Federal Rules of Evidence as a whole. It is also consistent with the policies underlying Rule 404(b). Accordingly, Federal Rule of Evidence 404(b) bars, as a matter of law, evidence of a third party's propensity to commit an offense with which the defendant is charged.

Second, the Fourteenth Circuit Court of Appeals should also be reversed because it erred in holding that Defendant Zelasko's right to a complete defense would be violated by the exclusion of Morris's testimony. The exclusion of Morris's testimony does not violate Defendant Zelasko's right to a complete defense because it not critical and does not carry assurances of reliability. Furthermore, the restriction on the use of propensity evidence in Rule 404(b) is narrowly tailored to address the inherent unreliability and undue prejudice that results from inferring future conduct from past conduct. Therefore, Defendant Zelasko's constitutional right

to present a complete defense is not violated by the exclusion Morris's testimony about Ms. Short's alleged propensity to sell drugs.

Further, this Court should overrule the standard governing Federal Rule of Evidence 804(b)(3). Therefore, the Fourteenth Circuit Court of Appeals should be reversed, as the email is admissible under the standard first espoused in Justice Kennedy's concurrence in *Williamson*, which recognizes the admissibility of certain kinds of reliable collateral statements, provides more protection against the admission of unreliable evidence, and can be applied in a more consistent manner. The *Williamson* standard as it exist is difficult to apply and disregards the policy, as highlighted by the common law and the Advisory Committee's Note, that suggests certain kinds of collateral statements are admissible under the Rule.

Finally, the Fourteenth Circuit Court of Appeals erred in holding that admission of the nontestimonial email would violate the defendant's Sixth Amendment right under *Bruton*, and it should be reversed. This Court's decisions in *Crawford v. Washington* and *Davis v. Washington* explicitly confined the outer limits of the Sixth Amendment's Confrontation Clause to testimonial hearsay. Because the *Bruton* doctrine is constitutionally premised on the Confrontation Clause, and the entirety of this Court's precedent interpreting *Bruton* involved cases concerning testimonial hearsay, the *Bruton* doctrine must necessarily be similarly restricted to testimonial statements. The statement in this case is clearly nontestimonial, thus it's admission would not violate the Sixth Amendment under *Bruton*.

ARGUMENT

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RULE 404(B) BARS EXTRINSIC EVIDENCE OF A THIRD PARTY'S PRIOR BAD ACTS SOLELY TO SHOW PROPENSITY AS A MATTER OF LAW

Federal Rule of Evidence 404(b) bars the admission of extrinsic evidence for the purpose

of showing *a person's* character in order to prove a propensity to act in conformity with that character, regardless of whether that person is the a party to the litigation. Typically, the rule is used by prosecutors requesting to introduce evidence of a criminal defendant's prior misconduct as proof of motive or for some other purpose permitted in subsection (b)(2). *See Huddleston v. United States*, 485 U.S. 681, 682-83 (1988) (government introduced evidence of two prior instances defendant sold allegedly stolen goods to prove defendant's "knowledge" that goods at issue were stolen); Fed. R. Evid. 404(b)(2). Less frequently, a defendant – like Defendant Zelasko – seeks to introduce extrinsic evidence of third party's prior misconduct in an effort to exculpate herself for the offense with which she is charged. *See United States v. Lucas*, 357 F.3d 599 (6th Cir. 2004); *United States v. McCourt*, 925 F.2d 1229 (9th Cir. 1991); *accord Agushi v. Duerr*, 196 F.3d 754 (7th Cir. 1999) (in the civil context). Such evidence is colloquially referred to as "reverse 404(b)" evidence. *See id.*

A. The Plain Text of Rule 404(b) Bars Evidence of a Third Party's Propensity to Commit an Offense With Which the Defendant is Charged as a Matter of Law.

The Federal Rules of Evidence are a "legislative enactment" interpreted by the "traditional tools of statutory construction." *Beech Aircraft Corp. v. Rainy*, 488 U.S. 153, 163 (1988). "As always," statutory interpretation "starts . . . with the language of the statute." *Dean v. United States*, 556 U.S. 568, 572 (2009). The language of Rule 404(b) is clear: "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." Fed. R. Evid. 404(b)(1) (emphasis added). Evidence of a third party's propensity to commit a crime with which the

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¹ The prohibition on the introduction of extrinsic or "prior bad acts" character evidence, contained in Rule 404(b)(1), is subject to the exception that, "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

defendant is charged is prohibited because Rule 404(b) does not restrict itself to evidence offered to prove the character of the "defendant." *See* Fed. R. Evid. 404(b).

When interpreting a word within a statute, its "placement and purpose in the statutory scheme" are considered; context matters. *Bailey v. United States*, 516 U.S. 137, 145 (1995) (overruled on other grounds). The first sentence of Rule 404(b) plainly prohibits evidence of prior bad acts to prove "*a person's*" propensity to act in "accordance with [that] character." Fed. R. Evid. 404(b)(1) (emphasis added). In surrounding sentences, however, Rule 404 explicitly refers to a "*defendant*." for example, in 404(b)(2) in the context of notice requirements that a prosecutor must follow when introducing such evidence against a criminal defendant. Fed. R. Evid. 404(b)(2), *see also Lucas*, 357 F.3d at 605 n.1.² Moreover, Rule 404 establishes a general rule excluding the circumstantial use of character evidence, but provides exceptions for pertinent character traits of the "*defendant*," Fed. R. Evid. 404(a)(2)(A), a "*victim*," Fed. R. Evid. 404(a)(2)(B), or a "*witness*," Fed. R. Evid. 404(a)(3) (emphasis added). Therefore, it "appears that Congress knew how to delineate between subsets of 'persons' when it wanted to, and that it intended '*a person*[]' and '[*a defendant*]' to have different meanings when the Rules speak of one rather than the other." *McCourt*, 925 F.2d at 1232 (emphasis added).³

This construction of Rule 404(b) is consistent with the overall statutory scheme of the Federal Rules of Evidence. Rules 404, 607, 4608, 5 and 6096 specifically delineate the types of

² In 2011, the language of Rule 404 was amended "as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility." Fed. R. Evid. 404 advisory committee's note.

³ The 1991 amendment to Rule 404 added a pretrial notice requirement in criminal cases, but was not "intended to redefine what evidence would otherwise be admissible under Rule 404(b)." Fed. R. Evid. 404 advisory committee's note. Additionally, the 2000 amendment to Rule 404 are only implicated "when the accused attacks the character of an alleged victim under subdivision (a)(2)." *Id*.

⁴ "Who May Impeach a Witness." Fed. R. Evid. 607.

character evidence that are admissible, and who may introduce them. Here, Respondent Zelasko's attempted use of Ms. Short's prior criminal activity falls squarely within the prohibited uses in Rule 404(b)(1). Respondent Zelasko may introduce pertinent evidence of her own good character, Fed. R. Evid. 404(a)(2)(A), or that of the victim, Hunter Riley's, character, Fed. R. Evid. 404(a)(2)(B), or that of a witness's character when pertinent to the witness's truthfulness or untruthfulness, Fed. R. Evid. 404(a)(3). Rule 404(b) plainly prohibits Respondent Zelasko, however, from introducing evidence of Ms. Short's unrelated prior sale of a similar drug for the sole purpose of "show[ing] that on [this] particular occasion [Ms. Short] acted in accordance with the character" and sold the drugs at issue here. *See* Fed. R. Evid. 404.

This Court's decision in *Huddleston* is instructive on the scope and breadth of Rule 404(b). 485 U.S. at 682. In *Huddleston*, the Court explained that Rule 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on *the actor's* character, unless it bears upon a relevant issue . . . such as motive, opportunity, or knowledge." *Id.* at 685-86 (emphasis added); *see also* Fed. R. Evid. 404(b). The Court went on to state that, although "the actor in the instant case was a criminal 'defendant,'" its choice of "terms [was] not meant to suggest that its analysis [was] limited to such circumstances." *Id.* While acknowledging that evidence of prior bad acts was "not flatly prohibited," *Huddleston* specified that Rule 404(b) "protect[ed] against the introduction of extrinsic evidence when . . . offered solely to prove character." *Id.* at 687.

In the present case, the District Court granted Respondent Zelasko's motion to admit Morris's testimony that Ms. Short had in the past sold a similar drug, in order to show Ms.

⁵ "A Witness's Character for Truthfulness or Untruthfulness." Fed. R. Evid. 608.

⁶ "Impeachment by Evidence of a Criminal Conviction." Fed. R. Evid. 609.

Short's character and propensity to sell drugs like ThunderSnow – the crime with which Respondent Zelasko is accused. *See* (R. at 21, 32-33). The District Court erroneously found that "[t]he propensity evidence [was] not barred by Federal Rule of Evidence 404(b)," (R. at 21), in direct conflict with *Huddleston's* recognition that 404(b) "protects against the introduction of extrinsic act evidence . . . offered solely to prove character," *see* 485 U.S. at 687. And despite the lower court's admonition that "a majority of the Circuits that have considered the issue hold that FRE 404(b) does not bar propensity evidence when it is offered by a criminal defendant," (R. at 35), none has held that a criminal defendant may introduce evidence for the sole purpose of proving propensity toward criminal conduct, *see McCourt*, 925 F.2d at 1233 ("While [Respondent] correctly notes that several opinions 'state' that Rule 404(b) applies to acts committed by the defendant, none holds that it applies *only* to the defendant.").

In fact, none of the cases cited by the courts below support the introduction of Morris's testimony about Ms. Short's prior drug sales into evidence. In *United States v. Seals*, 419 F.3d 600, 607 (7th Cir. 2005), the "evidence proffered by [the defendants] . . . was irrelevant, and thus, inadmissible," because the evidence of the third party's prior misconduct was too "generic" to be relevant. Similarly, in *United States v. Montelongo*, 420 F.3d 1169, 1175 (10th Cir. 2005), the defendant's reverse 404(b) evidence was admissible on the grounds that it was relevant to the third party's "claim that he had no *knowledge* of the marijuana [at issue in the] case." (emphasis added); *see also* Fed R. Evid. 404(b)(2) (providing a "knowledge" exception to section 404(b)(1). Finally, in *United States v. Stevens*, 935 F.2d 1380, 1404 (7th Cir. 1991), the court merely considered the appropriate standard for "similarity" required when a defendant offers exculpatory reverse 404(b) evidence for a proper purpose. The court's explicit holding was narrow: "[T]he defendant, in order to introduce other crimes evidence, need not show that there

has been more than one similar crime, that he has been misidentified as the assailant in a similar crime, or that the other crime was sufficiently similar to be called a 'signature' crime." Thus, neither *Seals*, *Montelongo*, nor *Stevens* support the District Court's admission of Morris's testimony regarding Ms. Short's prior drug sale. Accordingly, the Fourteenth Circuit Court of Appeals should be reversed because Rule 404(b), as a matter of law, bars evidence of a third party's propensity to commit a crime with which the defendant is charged.

B. Extrinsic Evidence Offered Solely to Prove Propensity is Barred by Rule 404(b) as a Matter of Law Because Such Evidence is Always More Prejudicial Than Probative.

The policies underlying Rule 404 are applicable no matter whose character the evidence in question will impugn. Rule 404 attempts to address many concerns, but it reflects a deep-seated notion that "prior bad acts are generally not considered proof *any* person's likelihood to commit bad acts in the future and that such evidence should demonstrate something more than propensity." *Lucas*, 357 F.3d at 605; *accord McCourt*, 925 F.2d at 1235-36. Rule 404 recognizes that the "weak probative value of [such] evidence . . . is swamped by the countervailing considerations of fairness and efficiency." *McCourt*, 925 at 1236 (quoting 22 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5239, at 436, 438 (1978) (footnotes omitted)).

Indeed, Rule 403 allows for otherwise relevant evidence to be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. In this context, unfair prejudice is the "undue tendency to suggest decision on an improper basis." Fed. R. Evid. 403 advisory committee's note. The prohibition on character evidence introduced for the sole purpose of proving propensity in Rule 404(b), "reflect[s] the policies underlying [Rule 403]:" that this evidence carries inherent risks ranging from "wasting

time" to "inducing decision on a purely emotional basis." Id.

"[I]n some particular situations [Congress] restricted the admissibility of relevant evidence," even if it generally intended to place an emphasis on admissibility in enacting the federal rules. Fed. R. Evid. 402 advisory committee's note. Because the language of the statute, "not the legislative history," is "Congress's authoritative statement" of the law, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011), it is clear that "in the case of [extrinsic] evidence offered purely for propensity, Congress has resolved the balance in favor of exclusion," *McCourt*, 925 F.2d at 1236. Furthermore, irrespective of what the common-law rule once was, Rule 404(b) has abrogated it because it speaks directly to the question addressed by the common-law – *i.e.*, whether Rule 404(b) applies to *persons*, not only defendants. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." (internal quotations and citation omitted)).

The instant case squarely demonstrates the importance of Rule 404(b)'s applicability to extrinsic character evidence offered against a *person*. Respondent here attempts to offer evidence that merely because Ms. Short sold a drug similar to ThunderSnow in the past, it is possible that she, not Respondent, is the second party to the drug distribution conspiracy. (R. at 33, 34). Respondent offers no direct evidence in support of this claim. The only circumstantial evidence offered is Morris's testimony that Ms. Short sold her a similar drug the previous year. (R. at 25). From this mere fact Respondent Zelasko urges the court to allow a jury to infer that she is innocent, and Ms. Short is the second perpetrator in the conspiracy. Yet, even assuming *arguendo* that Morris's testimony is true – *i.e.*, Ms. Short actually sold drugs in the past – it is only marginally relevant because it still would not exculpate Respondent. In other words, even if

true, the fact that Ms. Short sold drugs on a previous occasion makes it only minutely less probable that Respondent is the second party to the drug distribution conspiracy. *See* Fed. R. Evid. 401. As such, any slight probativeness that Morris's testimony might have is vastly outweighed by the unfair prejudice that will result from its admission, and therefore, Morris's testimony must be excluded. *See* Fed. R. Evid. 403. Consequently, Morris's testimony is inadmissible under Rule 404(b) as a matter of law, and the Fourteenth Circuit Court of Appeals should be reversed.⁷

II.

A DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE IS NOT VIOLATED BY THE EXCLUSION OF EXTRINSIC EVIDENCE OF A THIRD PARTY'S PRIOR BAD ACTS OFFERED SOLELY TO PROVE PROPENSITY

Although defendant's have a right to present a complete defense, in *Chambers*, this Court reaffirmed the principle that "the accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability." *Id.* at 302. In *Chambers*, three

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⁷ Even if Federal Rule of Evidence 404(b) does not bar evidence of a third party's propensity to commit an offense with which the defendant is charged, Morris's testimony about Ms. Short's prior bad acts should be excluded under Huddleston. See 485 U.S. 681. Huddleston sets forth the standard by which prior bad acts evidence must be considered before it is admitted at trial. Id. at 691. First, the judge must determine that there is evidence sufficient for a jury to find, by a preponderance of the evidence, that that the person committed the prior act. See id. at 685. Next, four considerations are addressed to determine if the evidence is unduly prejudicial: (1) whether the evidence is offered for a proper purpose as outlined in Rule 404(b); (2) whether the relevancy requirements of Rules 402 and 104(b) are met; (3) whether the evidence passes the balancing test of Rule 403; and (4) whether a limiting instruction is given under Rule 105. Id. at 691-92. Because the petition for writ of certiorari is limited to whether as a matter of law Rule 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged, whether Morris's testimony is admissible on the facts of this particular case in light of the Huddleston standard is outside the scope of the question certified for review. See Sup. Ct. R. 21(1)(a) ("A brief on the merits . . . may not raise additional questions or change the substance of the questions already presented in [the questions certified for review]. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."). Accordingly, as a threshold matter, Morris's uncorroborated testimony is the only circumstantial evidence offered to show Ms. Short's prior bad act, and thus, there is insufficient evidence for a jury to reasonably find, by a preponderance of the evidence, that Ms. Short committed the alleged prior bad act. See Huddleston, 485 U.S. at 685. Furthermore, Morris's testimony is unduly prejudicial when considered in light of the *Huddleston* standard because it: (1) is not offered for a proper purpose under Rule 404(b)(2); (2) it is, at most, marginally relevant under Rules 402 and 104(b); (3) is more prejudicial than probative under Rule 403; and (4) a limiting instruction under Rule 105 will likely not cure the undue prejudice that would result in the form of jury confusion and wasted time. See id. at 691-92. Therefore, Morris's testimony is inadmissible under *Huddleston*.

confessions made by a third party, to a murder with which the defendant was accused, were improperly excluded as hearsay because they were "critical evidence" that "bore persuasive assurances of trustworthiness." 410 U.S. at 302. The confessions carried a "considerable assurance of . . . reliability" because each was "made spontaneously to a close acquaintance shortly after the murder had occurred" and "was corroborated by some other evidence." *Id.* at 300. The evidence's high degree of reliability served as the basis for the Court's holding that its exclusion violated due process. *Id.* at 302. The Court, however, restricted its holding to "the facts and circumstances of [the] case," and specified that its "holding [did not] signal any diminution in the respect traditionally accorded . . . in the establishment and implementation of . . . criminal trial rules and procedures." *Id.* at 302-03.

The ruling in *Chambers* turned on the fact that, while the third party's confessions "tended to incriminate him," they necessarily "tended to also to exculpate the [defendant]," given that the state's theory at trial excluded the possibility that "more than one person participated in the [murder]." *Id.* at 297-98. Hence, the exclusion of the third party's confessions inculpated the defendant, to the same extent that it exculpated the third party. *Id.* Unlike in *Chambers*, here, there is no direct relationship between Ms. Short's culpability for the prior drug sale, and the probability that Respondent Zelasko is the co-conspirator. This is, even if Ms. Short did sell drugs according to Morris's testimony, it is still entirely possible that Respondent Zelasko is the ThunderSnow co-conspirator. Not only is Morris's testimony not "critical evidence," like the confessions in *Chambers*, but it also lacks the "considerable assurance of . . . reliability" that the confessions in *Chambers* had," because "statements [such as Morris's] . . . lack the conventional indicia of reliability," and are therefore "traditionally excluded." *See id.* at 300-02.

In Michigan v. Lucas, 500 U.S. 145, 149 (1991), this Court reiterated that the right to

present even relevant evidence was "not without limitation." "The right may . . . bow," the Court explained, "to accommodate other legitimate interests in the criminal trial process." *Id*.

"Concerns about, among other things, . . . prejudice, confusion of the issues, . . . or [marginal relevancy]" may restrict a defendants right to present evidence, so long as the restriction is neither arbitrary nor disproportionate. *See Id*.

Michigan endorses a balancing test that weighs the government's legitimate interest in excluding otherwise relevant evidence against the defendant's due process rights. See id.; accord Fed. R. Evid. 403. Defendants must comply with rules of procedure and evidence, Chambers, 410 U.S. 301, unless the restrictions they impose are "arbitrary or disproportionate to the purposes they are designed to serve," Rock v. Arkansas, 483 U.S. 44, 56 (1987).

While Rule 404 may generally place an emphasis on admissibility, 404(b)(1) carves out a narrow but vital prohibition on extrinsic character evidence offered solely to show propensity. *See* Fed. R. Evid. 404; Fed. R. Evid. 403 advisory committee's note. "Surely a rule designed to exclude [evidence] whose trustworthiness is inherently suspect," does not violate due process. *See Rock*, 483 U.S. at 64 (Rehnquist, J., concurring). The permitted uses in 404(b)(2) demonstrate that the evidentiary restriction imposed by 404(b)(1) is narrowly tailored to address the concern that "our system of justice should not permit the trier of fact to infer that because *someone* was a bad guy *once*, [s]he is likely to be a gad buy again." *McCourt*, 925 F.2d at 1235-36 (emphasis added). Rule 404(b) is neither arbitrary nor disproportionate in addressing the concern that "a jury may choose to punish [a person] for the similar rather than [alleged] act, or the jury may infer [a person] is an evil [one] inclined to violate the law. *See Huddleston*, 485 U.S. at 686.

This reading of Rule 404(b) does not violate a defendant's constitutional right to present

a complete defense because that right does not imply the right to offer evidence that is otherwise inadmissible under the federal rules. *See Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Here, Respondent Zelasko is free to pursue her theory that Ms. Short was, in fact, the second party to the ThunderSnow conspiracy through other avenues permitted by the rules of evidence. *See Lucas*, 357 F.3d at 606-07. Therefore, Respondent Zelasko's right to present a complete defense under *Chambers* is not violated by the exclusion of Morris's testimony as to Ms. Short's charter, in order to prove Ms. Short has a propensity to sell drugs like ThunderSnow. Accordingly, the exclusion of Morris's testimony does not violate Respondent Zelasko's right to present a complete defense and the Fourteenth Circuit Court of Appeals should be reversed.

III.

THE STANDARD FROM WILLIAMSON V. UNITED STATES GOVERNING FEDERAL RULE OF EVIDENCE 804(B) SHOULD BE REPLACED WITH THE TEST PROPOSED BY JUSTICE KENNEDY IN HIS CONCURRENCE

A 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 civil or criminal liability" is admissible as a hearsay exception, so long as it "is supported by corroborating circumstances that clearly indicate its trustworthiness," if offered in a criminal case. (Fed. R. of Evid. 804(b)(3).)

In *Williamson v. United States*, 512 U.S 594 (1994), the Supreme Court clarified the scope of the hearsay exception found in Rule 804(b)(3). In *Williamson*, Reginald Harris was pulled over while driving a rental car with two suitcases containing nineteen kilograms of cocaine in the trunk. *Williamson*, 594 U.S. at 596. After he was arrested, Harris told a Drug Enforcement Administration (DEA) Agent that: Harris got the cocaine from an unknown Cuban man in Fort Lauderdale; the cocaine belonged to Williamson; and Harris received instructions to deliver the cocaine to a particular dumpster that night. *Id.* After the DEA Agent took steps to

arrange a controlled delivery of the cocaine, Harris recanted his story about the unknown Cuban and the dumpster and said that he had lied because he was scared of Williamson. *Id.* at 596-97. The real story, according to Harris, was that he was driving the cocaine to Atlanta for Williamson, and Williamson was driving in front of him in another rental car when he was pulled over. *Id.* Harris also said that Williamson had turned around and driven past the location of the stop where he would have been able to see Harris's car with its trunk open. *Id.* Thus, Harris explained, it would have been impossible to make a controlled delivery. *Id.*

When called to testify at Williamson's trial, Harris refused, despite having been given use immunity by the prosecution and being held in contempt of court. *Id.* The District Court, under Rule 804(b)(3), allowed the DEA Agent who interviewed Harris to testify as to what Harris had told him. *Id.* at 597-98.

In deciding whether Harris's confession was admissible against Williamson, the Supreme Court first adopted a narrow reading of the term "statement," defining it as "a single declaration or remark." *Id.* at 599. Then, the court found that "[Rule 804(b)(3)] does not allow admission of non-self-inculpatory statements even if they are made within a broader narrative that is generally self-inculpatory." *Id.* at 600-01. However, as the Court recognized, "whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest." *Id.* at 603. In other words, "the question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would have not made the statement unless believing it to be true,' and this question can only be answered in light of all the surrounding circumstances." *Id.* at 603-04.

In deciding that Rule 804(b)(3) presented an absolute bar to the admission of statements

authoritative guides on the issue, and instead, relied on circular reasoning to determine that "the policy expressed in the Rule's text points clearly enough in one direction." *Id.* at 602.

Additionally, the *Williamson* rule has been difficult to apply in practice leading to inconsistent results hinging largely on the whims and beliefs of the trial judge. This Court should, therefore, replace the *Williamson* standard governing Rule 804(b)(3) with the standard proposed by Justice Kennedy in his concurrence in *Williamson* – a standard that better accounts for the appropriate weight of competing policy interests of the Rule under different factual circumstances and is easier to apply consistently.

A. Insofar as it Governs the Application of Federal Rule of Evidence 804(b)(3), Williamson Should Be Overruled and Replaced With a Standard that Promotes a Higher Degree of Reliability, is More Easily Applied, and Recognizes the Rule's Foundational Principle Supporting the Admissibility of Some Collateral Statements.

Nothing in the text of Rule 804(b)(3) answers the question of whether statements collateral to self-inculpatory declarations are also admissible. And while it is clear that the basic foundation of the Rule is "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.* at 599, that alone does not resolve the issue. Indeed, commentators have long-debated the question and arrived at strikingly different answers covering the full range of the spectrum, from full admissibility of collateral statements to complete non-admissibility; and if anything, the weight of their analysis leans towards the admissibility of at least some types of collateral statements. *See id.* at 611-12 (Kennedy, J., concurring). Thus, the *Williamson* majority's reasoning that "the policy expressed in the Rule's text points clearly enough in one direction" to resolve the issue is confounding. *Id.* at 602. "[T]hat reasoning begs the question:

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⁸ Two out of three cited scholars would allow at least some collateral statements.

What is the policy expressed in the text on the admissibility of collateral statements?" *Id.* at 614 (Kennedy, J., concurring). And the majority's holding becomes even more surprising given its apparent disregard of the Advisory Committee notes and the common law background of the Rule.

Given that the text of Rule 804(b)(3) does not provide an answer, the Court should determine whether other authoritative sources provide guidance. And in this case, other sources definitively answer the question: both the Advisory Committee's Note on Federal Rule of Evidence 804 and the common law background of the against-interest hearsay exception illustrate that at least some collateral statements are admissible.

First, the Advisory Committee Note directly confronts the issue. In pertinent part, it reads:

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements... [Douglas v. Adams and Bruton v. United States] however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in Bruton. On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation."

Fed. R. Evid. 804 advisory committee's note. This Court has often referred to the Advisory Committee's Notes in interpreting the Federal Rules of Evidence, and there is "no reason to jettison that well-established practice here. [Citations omitted.]" *Williamson*, 512 U.S. at 614-15 (Kennedy, J., concurring). And the Notes, in no uncertain terms, state that "the third party confession ... may include statements implicating [the accused], and *under the general theory of*

declarations against interest they would be admissible as related statements." Fed. R. Evid. 804 advisory committee's note (emphasis added).

Further, the common law background that Congress legislated against also suggests that collateral statements should be admissible. "From the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement." Williamson, 512 U.S. at 615 (Kennedy, J., concurring) (quoting Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1, 57 (1944)). And the Advisory Committee's Note's reference to the "general theory" that related statements would be admissible under the Rule is another indication that the common law supports such a position. Id. "Absent contrary indications, [the Court] can presume that Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law." Id.

Despite these guiding sources of wisdom, the *Williamson* majority inexplicably stated that "[the Advisory Committee's] language is not particularly clear, and some of it – especially the Advisory Committee's endorsement of the position taken by Dean McCormick's treatise points the other way." *Id.* at 602. But even the language the Court cited from the treatise suggests that *some related statements may be admissible*: "A certain latitude as to contextual statements, neutral as to interest, giving meaning to the declaration against interest seems defensible, but bringing in self-serving statements seems questionable." *Id.* (quoting C. McCormick, Handbook of the Law of Evidence § 256 (1st ed. 1954).

What the *Williamson* majority was concerned with, and rightfully so on the facts of that case, was the significant motivation of an accomplice to attempt to shift blame in an attempt to

curry favor with law enforcement. Indeed, the Court was especially concerned with admitting the portions of Harris's confession where he attempted to paint Williamson as the big fish in the conspiracy. *See id.* at 604; *id.* at 608-09 (Ginsburg, J., concurring). But this goes to whether a statement is sufficiently self-inculpatory such that a reasonable person would not have made it unless believing it to be true; it is not determinative of the question of whether statements collateral to a declaration against penal interest are also admissible. And a categorical rule that excludes all such collateral statements is unnecessary, and, in fact, contrary to the purpose of Rule 804(b)(3).

Moreover, this concern can be similarly alleviated under a test that better accounts for the background and policy of the Rule, which favors the admissibility of *some* collateral statements.

Justice Kennedy, in his concurring opinion proposed a test that properly balances these competing concerns with respect to statements against penal interest that inculpate the accused:

A court should first determine whether the declarant made a statement that contained a fact against penal interest. [Citation omitted.] If so, the court should admit all statements related to the precise statement against penal interest, subject to two limits. Consistent with the Advisory Committee's Note, the court should exclude a collateral statement that is so self-serving as to render it unreliable (if, for example, it shifts the blame to someone else for a crime the defendant could have committed). In addition, in cases where the statement was made under circumstances where it is likely the declarant had a significant motivation to obtain favorable treatment, as when the government made an explicit offer of leniency in exchange for the declarant's admission of guilt, the entire statement should be inadmissible.

Id. at 620. This is the test the Court should adopt. ⁹ Unlike *Williamson*, this test upholds the

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⁹ In 2010, Rule 804(b)(3) was amended to impose an additional requirement that an against penal interest hearsay statement introduced by the government against a defendant also be "supported by corroborating circumstances that clearly indicate its trustworthiness" before it may be properly admitted Fed. R. Evid. 804(b)(3)(B). Prior to 2010, and when *Williamson* was decided, the corroborating circumstances requirement only applied to statements that tended to exculpate the defendant. In other words, it only applied those statements *introduced by the defendant*; prosecutors introducing statements that tended to inculpate the defendant through the exception did not previously need to show corroborating circumstances. Thus, the 2010 amendment gives more protection to a defendant in the form of an additional safeguard of reliability against whom the government is seeking to introduce a third party's

established principle from both the common law and Advisory Committee's Note that *some* collateral statements are admissible to provide context to a statement against penal interest. And it provides better safeguards on reliability than *Williamson*.

First, by requiring courts to determine at the outset whether or not the declarant made a statement admitting a fact against penal interest, Justice Kennedy's test presents an initial threshold founded on the basic rationale that people tend not to say things that may damage themselves unless having good reason to believe them to be true. And by not simply excluding all possible related statements, the test upholds the underlying principle, as laid out by the established common law of the against interest exception and the Advisory Committee's Note, that some statements related to an against-interest declaration should be admissible to provide context to the admitted fact against interest.

Second, by requiring courts to exclude any self-serving collateral statements, it squarely confronts the concern that "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature," *id.* at 599-600, and in certain circumstances, people may be motivated to mix lies with truth in an effort to shift blame or curry favor. The exclusion of all the self-serving parts of a statement containing facts against penal interest ensures that any attempts to curry favor with falsehood will be excluded as unreliable. But it will allow neutral statements for which, by definition, there would be nothing to be gained by making falsely to provide context to the facts against penal interest.

Finally, the requirement that courts should exclude an *entire statement* from evidence when it is made under circumstances where a declarant may have a significant motivation to

statement against penal interest, but it also provides further evidence of Congress's contemplation that third party statements against penal interest will at least sometimes otherwise be admissible against a defendant.

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obtain favorable treatment recognizes that the central consideration under any Rule 804(b)(3) ruling is whether the statement and admitted facts were truly *against interest*. This directs courts to weigh heavily the circumstances of each case that may cause the entire statement to be suspect. Courts are forced to explicitly consider the idea that a statement that appears to be against the declarant's interest on its face may, in certain situations, actually be motivated solely by an attempt to gain favorable treatment, and thus, would actually fall outside the exception. This is a safeguard that the *Williamson* approach considering "the total of the circumstances" as to each discrete statement simply did not encompass.

Additionally, as Judge Marino noted in his dissenting opinion below, the *Williamson* rule has traditionally posed questions that are, more often than not, much more easily asked than answered. (R. 49-51.) Justice Kennedy's standard, however, resolves the issues of a trial judge being forced to determine the precise boundaries of a "statement." It also replaces the difficult question of whether discreet statements are sufficiently against interest, which largely hinges on the whims and beliefs of the individual judge, with the simpler threshold question of whether the broader statement or confession contains a fact against interest. The policies and protections behind the Rule are then upheld through the exclusion of unreliable self-serving statements and explicit consideration of whether the circumstances surrounding the making of the statement contaminate its reliability. This test, therefore, not only better accounts for the foundational policies of the Rule and provides more safeguards, but it is easier to apply consistently.

B. Defendant Lane's Email in Its Entirety Is Admissible Against Defendant Zelasko Under Federal Rule of Evidence 804(b)(3) Because It Satisfies the Test Proposed by Justice Kennedy in His *Williamson* Concurrence.

Under the proposed test, three requirements must be met before a third party's statement against penal interest may be admitted into evidence by the government against a defendant

under Federal Rule of Evidence 804(b)(3). First, the statement must contain a fact against penal interest. Second, any collateral statements to the fact against penal interest that are so self-serving as to be unreliable must be excluded. Third, the entire statement must not have been made under circumstances that would likely result in a significant motivation on the part of the defendant to obtain favorable treatment. Finally, subject to Rule 804(b)(3)(B), the statement was be supported by corroborating circumstances that clearly indicate its trust worthiness.

Here, Defendant Lane's email contains at least two facts against her penal interest. First, Defendant Lane expresses concern that "one of the members of the male team" has found out about a "business" that Defendant Lane and her "partner" have been running and threatened to report them if they don't come clean. The fact that Defendant Lane is admitting involvement in an apparently "reportable" business would be damaging if she were to be prosecuted for her involvement. Additionally, the fact that Defendant Lane is reaching out for help because her partner thinks that they need to figure out how to keep the male team member quiet, implicates her in a conspiracy scheme centered around "keep[ing] him quiet."

Second, none of the statements are so self-serving as to render them unreliable.

Defendant Lane does not attempt to shift blame onto her partner; instead she talks explicitly about the two working together, and she is reaching out for help, presumably to assist her partner in the effort to keep the male team member quiet and prevent the business from being fully exposed.

Third, these facts do not present a situation where there is any likelihood that Defendant Lane has a significant motivation to obtain favorable treatment. She has not been made any promises by any government agent, and she was not coerced or even encouraged to say anything to the boyfriend. Instead, she voluntarily sent a private email to her boyfriend as a plea for help.

Finally, the contents of the statements are corroborated in multiple ways. First, Peter Billings confronted Defendant Lane with his suspicions concerning her involvement concerning the distribution of steroids to other female team members about a month prior to Defendant Lane sending him the email. This corroborates the veracity of her statement that "I know you've suspected about the business my partner and I have been running with the female team."

Additionally, the fact that Hunter Riley, a member of the male team, was shot and killed by Defendant Lane's alleged partner, about two weeks after the email was sent corroborates the idea that her partner was working on a way to keep "him" quiet. Riley had been working as an informant for the DEA and had confronted Defendant Lane several times trying to buy steroids. And the execution of the search warrants and the training facilities and Defendant Lane's house that uncovered large amounts of steroids had been recovered corroborates Defendant Lane's involvement in a reportable "business."

In sum, the email fulfills the three requirements of the proposed rule, and it is supported by a number of corroborating circumstances, all of which combined clearly indicate the trustworthiness of the statement. Therefore, the email should be admitted against Defendant Zelasko under Rule 804(b)(3).¹⁰

IV.

EVEN IF DEFENDANT LANE'S EMAIL IS NOT ADMISSIBLE AGAINST DEFENDANT ZELASKO, ADMITTING THE EMAIL AT A JOINT TRIAL WITH A PROPER LIMITING INSTRUCTION WOULD NOT VIOLATE DEFENDANT ZELASKO'S SIXTH AMENDMENT RIGHTS UNDER BRUTON.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The *Bruton* doctrine, first espoused by the Court in *Bruton v. United States*, 391 U.S. 123, 135-36 (1968),

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¹⁰ Even if the email is not admissible under the hearsay exception in Rule 804(b)(3), it should be admitted as a coconspirator statement in furtherance of the conspiracy under Rule 801(d)(2)(E). *See* Sup. Ct. R. 24.1(a)

essentially says that admitting an out-of-court confession of a non-testifying codefendant that implicates the defendant at a joint trial violates the Confrontation Clause, even with a clear limiting instruction to the jury. As the Court noted, the devastating effect of an accomplice's out-of-court confession implicating the defendant introduced at a joint trial, combined with the inherent unreliability of such a statement given the codefendant's motivation to shift blame to others, presents a context "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. When the accomplice does not testify and is not subject to cross-examination, "the unreliability of such evidence is intolerably compounded," and "[i]t was against such threats to a fair trial that the Confrontation Clause was directed." *Id.* at 136 (citing *Pointer v. Texas*, 380 U.S. 400 (1965)).

At the outset, the *Bruton* rule assumes the inadmissibility of an accomplice's statement against the defendant. ¹¹ If the statement is admissible against the defendant under evidentiary rules then the jury will not be instructed to disregard the statement, and the Confrontation Clause is not implicated, at least under *Bruton*.

Since *Bruton* was decided, the Court has clarified the parameters of the *Bruton* doctrine through a number of subsequent opinions. As it exists today, the *Bruton* doctrine is not implicated when a codefendant's non-testimonial statement, especially one that does not facially implicate the defendant, is introduced at a joint trial.

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¹¹ See id. at 128 fn. 3 ("We emphasize that the hearsay statement inculpating petitioner [Bruton] was clearly inadmissible against him under traditional rules of evidence, [citations omitted,] the problem arising only because the statement was ... admissible against the declarant Evans. [Citations omitted.] There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.")

A. Because the Scope of the Confrontation Clause is Limited to Testimonial Hearsay, and the *Bruton* Doctrine is Constitutionally Premised on the Confrontation Clause, Application of the *Bruton* Must Also Necessarily be Limited to Testimonial Hearsay.

The Sixth's Amendment's Confrontation Clause applies only to "testimonial" statements. Davis v. Washington, 547 U.S. 813, 823-24 (2006); Crawford v. Washington, 541 U.S. 36 (2004). In determining the scope of the Confrontation Clause, this Court in Crawford analyzed the historical background and common law that the Clause was founded upon. Crawford, 541 U.S. at 43-50. In doing so, the Court determined that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations against the accused... The Sixth Amendment must be interpreted with this focus in mind." Id. at 50. Thus, the Court determined that regulating out-of-court statements solely with the law of evidence may "render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." Id. at 51. However, "[t]his focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns." Id. (emphasis added). But, while it may have suggested so, Crawford did not explicitly answer the question of whether the Confrontation Clause applies only to testimonial statements because the statements at issue there were "testimonial under any definition." Id. at 61.

Two years later, however, the Court confronted the question head on, and answered it affirmatively, in *Davis v. Washington*:

The answer to [whether the Confrontation Clause applies only to testimonial hearsay] was suggested in *Crawford*, even if not explicitly held:

"The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused--in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid.* An 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." 541 U.S., at 51, 124 S.

Ct. 1354, 158 L. Ed. 2d 177.

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its "core," but its perimeter.

547 U.S. 823-24. And if testimonial hearsay marks out the *perimeter* of the Confrontation Clause itself, common sense dictates that the doctrines premised upon the Clause must also necessarily be so-restricted. Therefore, in light of *Crawford* and *Davis*, "the *Bruton* rule, like the Confrontation Clause upon which it is premised, does not apply to *nontestimonial* hearsay statements." *United States v. Smalls*, 605 F.3d 765, 768 fn. 2 (10th Cir. 2010) (emphasis added).

Moreover, the *Bruton* doctrine, as carved out by this Court, is built upon a line of cases concerning codefendant statements to government officials, every one of which was undoubtedly *testimonial* hearsay. *See Douglas v. Adams*, 380 U.S. 415, 416-17 (1965) (signed confession given to law enforcement); *Bruton*, 391 U.S. at 124 (oral confession to postal inspector); *Harrington v. California*, 395 U.S. 250, 253 (1969) (multiple confessions to police); *Richardson v. Marsh*, 481 U.S. 200, 203 (1987) (confession to police); *Cruz v. New York*, 481 U.S. 186, 188-89 (1987) (videotaped confession to Assistant District Attorney); *Gray v. Maryland*, 523 U.S. 185 (1998) (confession to police). Thus, the idea that the *Bruton* doctrine is confined to the same parameters as the constitutional provision it rests upon is supported, not only by common sense, but also the *entirety* of this Court's precedent interpreting it.

1. <u>Defendant Lane's Email is Clearly Nontestimonial, and thus, Even if it is not Admissible Against Defendant Zelasko Under the Rules of Evidence, Admitting it at a Joint Trial Would not Violate Bruton.</u>

In this case, the email sent by Defendant Lane was, by no definition, testimonial.

She was reaching out to her boyfriend in an effort to prevent the drug-running scheme

she was involved in from being uncovered. And the email in its entirety is clearly admissible against her as a statement by a party opponent under Federal Rule of Evidence 801(d)(2). Therefore, even if the email (or parts of it) is not admissible against Defendant Zelasko at a joint trial, the *Bruton* doctrine is not implicated. And a jury instruction to not use the email against Lane is sufficient to protect her rights under the Sixth Amendment.

B. Even if the *Bruton* Doctrine Applies to Nontestimonial Hearsay, It Does not Apply to Statements that Do not Facially Incriminate a Defendant and Are Not Otherwise Sufficiently Similarly Damaging to Overcome the General Assumption that Jurors Follow Their Instructions.¹²

It is an "almost invariable assumption of the law that jurors follow their instructions, [citation omitted,] which [this Court] ha[s] applied in many varying contexts." *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987) (giving numerous examples of cases applying the assumption). In most cases, therefore, a witness who testifies at a joint trial is not considered a *witness against* a defendant if the jury is instructed to consider that evidence only against a codefendant. *Id.* at 206. *Bruton*, however, "recognized a narrow exception to this principle." *Id.* at 207. *Bruton* and its progeny are founded on the principle that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135. It is the "powerfully incriminating" and "devastating" nature of introducing a codefendant's facially incriminating confession that violates the defendant's Sixth Amendment rights when the codefendant cannot be cross-examined. *Id.* at 135-36.

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¹² The Court of Appeals for the Fourteenth Circuit determined that this argument was not made in the District Court, and "it is therefore not preserved for appellate review." (R. 44.) However, whether a co-defendant's statement sufficiently harms a defendant is a central concern in determining whether a *Bruton* issue is raised. Further, the use of a seemingly neutral pronoun like "partner" in a codefendant confession introduced at a joint trial is an issue that this Court has yet to confront directly under *Bruton*. This Court should, therefore, consider the argument, even if it determines it to be outside the scope of the questions presented for review. *See* Sup. Ct. R. 24.1(a)

But not all codefendant confessions under Bruton are the same – a point this Court made clear in Richardson, In Richardson, Clarissa Marsh, Benjamin Williams, and Kareem Martin were charged with assault and murder. Richardson, 481 U.S. at 202. Marsh and Williams were tried jointly. Id. At their trial, Williams did not testify, but the government introduced a redacted version of his confession given to police shortly after his arrest. Id. at 203. The confession, however, had been redacted to omit all indication that anyone other than Williams and Martin participated in the crime, and when it was admitted, the jury was admonished not to use the confession in any way against the Marsh. *Id.* at 203-04. Unlike *Bruton*, the confession did not incriminate Marsh on its face; it only became incriminating when linked with evidence later introduced at the trial, including in part, Marsh's own testimony. *Id.* at 208. This "important distinction" placed the case outside the "narrow exception" created in Bruton. Id. Premising the discussion on the idea "that [Marsh] would have been harmed by Williams' confession if the jury had disobeyed its instructions," id. at 208, fn. 3 (emphasis in original), the Court found that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Id.* at 208. In other words, "while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton* 's exception to the general rule." *Id*.

However, in *Gray v. Maryland*, 523 U.S. 185 (1998), the Court held that not all methods of redaction are sufficient to pass constitutional muster under the *Bruton*. In *Gray*, Anthony Bell and Kevin Gray were indicted and tried jointly for murder. *Id.* at 188. Prior to trial, Bell gave a confession to the police, in which he admitted that he, Gray, and a third man Jacquin "Tank" Vanlandingham had participated in the murder. *Id.* The trial court allowed the State to introduce

a redacted version of the confession into evidence. *Id.* The detective who read the confession into evidence said the word "deleted" or "deletion" wherever Gray's or Vanlandingham's name appeared. *Id.* Immediately after the confession was read into evidence, the prosecutor asked the detective, "after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" *Id.* at 188-89. The officer answered, "That's correct." *Id.* at 189. A written copy of the confession was also introduced into evidence with the two names replaced with blank white spaces separated by commas. *Id.*

In determining where these facts fell on the spectrum of constitutional concern between *Bruton* and *Richardson*, the Court noted that the linkage rule from "*Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference." *Id.* at 196. And while the Court conceded several differences between Bell's redacted confession and the confession in naming the defendant in *Bruton*, *id.* at 194-95, it ultimately held that, "considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." *Id.* at 95.

1. <u>Defendant Lane's Email Does not Facially Incriminate Defendant Zelasko, and</u>
the Email's Reference to the Neutral Pronoun "Partner" Would Not Have a
Similarly Devastating Effect on Defendant Zelasko's Defense to Raise a Bruton
Issue. 13

Here, Defendant's Lane email referred to her "partner." It did not identify Defendant Zelasko, nor anyone else, by name. And it did not give any other indication as to whom Defendant Lane was referring to as her "partner." Whether or not such a reference is sufficient to

¹³ Given the procedural posture of the case, and the unpredictability of trial, it is almost impossible to accurately predict all of the circumstances that would be relevant to determining the outcome of a *Bruton* challenge. For the sake of argument, certain reasonable assumptions have been made: 1) Defendant Lane will not testify, 2) The full email will be admitted against Defendant Lane; 3) The email will be inadmissible against Defendant Zelasko and the jury will be properly instructed (as must be assumed for any *Bruton* issue); 4) Defendant Zelasko's trial strategy will aim to prove that Casey Short was Defendant Lane's "partner" in the conspiracy and her shooting of Hunter Riley was accidental.

raise a *Bruton* issue must turn on the harm it would cause to Defendant Zelasko's defense if the statement is admitted, and the jury is instructed to use it only against Defendant Lane.

Defendant Zelasko's apparent defense, as evidenced by her motion to introduce the testimony of Miranda Morris, that it was another member of the U.S. Women's Snowman team, namely Casey Short, who was involved in the conspiracy and distribution of ThunderSnow together with Defendant Lane. Given this understanding, Defendant Lane's reference to a "partner" in her email would not, in any way, interfere with Defendant Zelasko's apparent defense. In fact, in some ways the email would corroborate the defense; Defendant Zelasko's theory acknowledges that Defendant Lane had a partner. Admitting the email that refers to Defendant Lane's "partner" does not make it any harder for Defendant Zelasko to present a defense based on the idea that that partner was not her.

Nevertheless, the question of whether or not the jury would not, or could not be able to disregard the email as to her must also be considered. A neutral pronoun like "partner" is not as concerning as the word "deleted" or the blank spaces used in the confession admitted in *Gray*. And this Court has seemed to suggest that the use of a codefendant's confession may not violate *Bruton*, even if it has not explicitly so held. *See Gray*, 523 U.S. at 196 (wondering why the confession could not have been read as "Me and a few other guys" instead of "Me, deleted, deleted, and a few other guys." But the use of "partner" is likely more damaging than the confession in *Richardson*, which was redacted to omit any indication that the defendant was involved in the crime. However, the linkage required in this case at trial is in line with the basis of the finding in *Richardson*. The email would only become incriminating against Defendant Zelasko if linked to other evidence at trial, for example evidence indicating that Defendant Zelasko was concerned with "keeping someone quiet" or was involved in a "business" with

Defendant Lane. Therefore, on these facts, the use of "partner" falls outside *Bruton*'s narrow exception to the general rule that jurors can and will follow instructions. It would, therefore, be permissible under the Sixth Amendment to admit the statement against Defendant Lane with a proper limiting instruction.

CONCLUSION

Federal Rule of Evidence 404(b) bars, as a matter of law, evidence of a third party's propensity to commit an offense with which the defendant is charged. The plain text of Rule 404(b) makes clear that evidence of *a person's* prior bad 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). This interpretation of 404(b) is consistent with the policies underlying the rule. Namely, that "prior bad acts are generally not considered proof *any* person's likelihood to commit bad acts in the future and that such evidence should demonstrate something more than propensity." *Lucas*, 357 F.3d at 605. Accordingly, the Fourteenth Circuit Court of Appeals erred in holding that Rule 404(b) applied only to prior bad acts of the defendant, and thus, should be reversed.

Additionally, Defendant Zelasko's constitutional right to present a complete defense is not violated by the exclusion Morris's testimony about Ms. Short's alleged propensity to sell drugs. Morris's testimony is neither "critical evidence" nor carries "persuasive assurances of trustworthiness." *See Chambers*, 410 U.S. at 302. Furthermore, Rule 404(b) is narrowly tailored in its restriction and squarely focuses on the concern that when such evidence is presented to a jury, it "may choose to punish [a person] for the similar [act] rather than . . . [the] act [at issue], or the jury may infer [erroneously that a person] is an evil [one] inclined to violate the law. *See Huddleston*, 485 U.S. at 686. Therefore, the Fourteenth Circuit Court of Appeals erred in holding

that Defendant Zelasko's right to a complete defense would be violated by the exclusion of Morris's testimony and should be reversed.

Further, *Williamson v. United States* should be overruled insofar as it governs the application of Federal Rule of Evidence 804(b)(3). The *Williamson* standard as it exist is difficult to apply and disregards the policy, as highlighted by the common law and the Advisory Committee's Note, that suggests certain kinds of collateral statements are admissible under the Rule. It should be replaced with the standard first espoused in his concurrence in *Williamson*, which recognizes the admissibility of certain kinds of reliable collateral statements, provides more protection against the admission of unreliable evidence, and can be applied in a more consistent manner. Therefore, the Fourteenth Circuit erred in holding that the email in this case was not admissible under Rule 804(b)(3); it should be reversed.

Finally, this Court's decisions in *Crawford v. Washington* and *Davis v. Washington* explicitly confined the outer limits of the Sixth Amendment's Confrontation Clause to testimonial hearsay. Given that the *Bruton* doctrine is constitutionally premised on the Confrontation Clause, and the entirety of this Court's precedent interpreting *Bruton* involved cases concerning testimonial hearsay, the *Bruton* doctrine must necessarily be similarly restricted to testimonial statements. Therefore, the Fourteenth Circuit erred in holding that admission of the nontestimonial email would violate the defendant's Sixth Amendment right; it should be reversed.