No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN KRASLEY,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

The Third Circuit, deepening a mature circuit split regarding the scope of Federal Rule of Evidence 404(b), and its prohibition against propensity evidence, held that the Rule applies only to evidence of a *defendant's* other bad acts or crimes, not those of third parties. By contrast, three circuits—the Sixth, Seventh, and Ninth—have held that the Rule applies regardless of who committed the other acts. Besides the Third Circuit in the instant case, five circuits, the First, Second, Fifth, Tenth and Eleventh have held that the Rule does not apply to the prior acts of a third party, but four of those circuits—the Second, Third, Tenth and Eleventh—have issued conflicting decisions depending on whether it is the defendant or the government that is seeking to introduce the evidence regarding the third party, with only defendants having to satisfy the Rule's requirements.

The question presented is whether Rule 404(b) applies to all "person[s]," as the Rule explicitly provides, or instead only to a defendant's other bad acts or crimes, and not those of third parties.

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JOHN KRASLEY,
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- VS. -

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner John Krasley respectfully prays that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on July 11, 2022, in *United States v. John Krasley*, Third Circuit No. 21-1364, and as to which that court denied a petition for rehearing en banc on August 16, 2022.

OPINION BELOW

The Third Circuit's not precedential decision (Restrepo, Roth, and Funetes, JJ.) was filed on July 11, 2022. The judgment is attached at Appendix ("App'x") A. The opinion of the Third Circuit is attached at App'x B and is available at 2022 WL 2662045. Application for en banc rehearing was denied by order dated August 16, 2022, a copy of which is attached at App'x C.

JURISDICTIONAL GROUNDS

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 18 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties, namely, petitioner John Krasley and respondent United States.

FEDERAL RULE OF EVIDENCE INVOLVED

Federal Rule of Evidence 404 provides:

> **(b) Other Crimes, Wrongs, or Acts.**
>
> **(1) Prohibited Uses.** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> **(2) Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

STATEMENT OF THE CASE

This petition presents a recurring and important question that has deeply divided the federal courts of appeals and has also engendered confusion within several of the circuits: whether Federal Rule of Evidence 404(b), and its prohibition against propensity evidence, applies to the bad acts and crimes of all persons or just to those of the defendant. The Third Circuit, in the instant case, joined five other circuits in holding that the rule applies only to the acts of the defendant, not third parties.[1] But four of these six circuits, including the Third, have issued conflicting decisions on the issue depending on whether it is the defendant or the government seeking to introduce the third party's other acts, applying the requirements of the Rule only when it is the defendant seeking to introduce the evidence. The three circuits that have consistently applied the Rule to the acts of all persons correctly read the Rule, which refers generally to a "person," not the "defendant" or the "accused."

[1] In so holding, the Third Circuit followed its precedential decision in *United States v. Bailey*, 840 F.3d 99, 125 (3d Cir. 2016) ("Rule 404(b) only applies to evidence of a defendant's other bad acts or crimes, not those of third parties.").

A. Proceedings before the district court

The facts relevant to this petition are undisputed. Mr. Krasley was charged in an indictment in the Eastern District of Pennsylvania with child pornography ("CP") offenses involving the online circulation of images. The indictment set forth eight counts of receiving or distributing images, in violation of 18 U.S.C. § 2252(a)(2); two counts of transporting images, in violation of § 2252(a)(1); and four counts of accessing images with intent to view, in violation of § 2252(a)(4)(A).

It was undisputed below that between the years 2013 and 2018 CP was repeatedly accessed through IP addresses associated with the internet routers contained in Krasley's home. The dispute was whether Krasley was responsible. As to that critical issue there was a glaring evidentiary void at the core of the government's case: the government searched Krasley's home four times between 2006-2018, repeatedly seizing Krasley's computers, cellphones, and other electronic devices, without finding a trace of the charged CP or any other CP image. (App. 377, 570).[2] In addition, forensic experts for the government and defense testified that the internet signal from Krasley's home could have been accessed by others outside of Krasley's home, including several neighbors. (App. 668-73; 641-42).[3]

[2] This evidentiary hole was made even more glaring by the government's sworn representations that its expert forensic examiners can find images of child pornography and visits to child pornography websites even when viewers of child pornography are careful to try to hide their activity, (App. 575-77), and the government case agent's testimony that he has never before been involved in a case where an individual has been the subject of four searches with nothing of value being found. (App. 603).

[3] The experts differed as to how difficult it would have been for a neighbor to do this. The defense expert testified that it could have been easily done; the government expert opined that it would have required "sophisticated equipment." (App. 668-73; 613; 641-42).

The government attempted to fill the evidentiary hole of its failed searches with prior acts evidence. That evidence consisted of a thumb drive and internet relay chats ("IRC"). The thumb drive, recovered during a 2018 search of Krasley's home, contained "deleted videos" that could not be viewed. (App. 385). Agent James Munjone, of the U.S. Department of Homeland Security, testified that he could see the "file names" and that they were "consistent with child exploitation." (App. 385). Munjone testified that the files were created in November of 2010, and last accessed in May of 2012. (App. 465). On cross-examination, Munjone admitted that he does not know who placed the videos on the thumb drive, nor when the drive was first brought into Krasley's home. (App. 462-63). The thumb drive was apparently not in Krasley's home at the time of the government's previous search in 2013, as it was not found until the 2018 search.

As to the IRC, they took place on November 20, 2010, and were found on a Dell computer recovered from Krasley's basement during the 2013 search. (App. 444, 449). A government witness testified that the chats "related to the trading of child exploitation material," though no trades were ever found to have occurred and no such material was ever discovered. (App. 540). As with the thumb drive, Munjone conceded that he does not know who engaged in the chats. (App. 459).

The government argued for the admission of this evidence under Rule 404(b). (App. 64-67; 85-87). The government proffered the evidence as relevant to "the location of the person who used Krasley's internet connection" to commit the charged offenses. (App. 53). But the government, writing the proffer in the passive voice, did not allege who this "person" was. With respect to the IRC, for example, the government asserted:

> The evidence that there were logged IRC chats about trading child pornography on a computer in Krasley's basement suggests that child pornography trading activity was at least discussed on IRC from Krasley's residence in 2010. The fact

> that child pornography trading activity was discussed from Krasley's residence in 2010 has a tendency to show that the [charged] child pornography trading activity that occurred on Krasley's internet connection in 2013 through 2018 also occurred from within Krasley's residence.

(App. 60).

Overruling Krasley's objections, the district court found the evidence to be admissible under Rule 404(b), though the court initially recognized that the evidence was extremely prejudicial and that it presented an obvious propensity problem. (App. 391-97) (observing that the thumb drive is "the only thing that puts child pornography in [Krasley's] house[,]" the "relevance seems to be . . . propensity . . . [,]" and [t]he likelihood that the jury will accept the evidence for improper purpose, that prejudice is too great."). Nevertheless, the court ultimately allowed the evidence, accepting the government's argument that it was relevant to the issue of "location." (App. 417).

While the government admitted on appeal that it did not actually prove that Krasely committed the prior acts, Gov't Br. at 35 ("In fact, . . . the government . . . did not . . . prove . . . that Krasley was an author of the IRC chats or viewed or even knew of the existence of the deleted child pornography files on the thumb drive."), the government did not make this admission to the jury. Instead, the government strongly implied during closing argument that Krasley committed the prior acts. Immediately before discussing the evidence, the prosecutor stressed that "[Krasley] lived [in his house] with only his wife up until January of 2017 and then after January of 2017 he lived there alone." (App. 766) ("It was just him."). The prosecutor also made clear that the government did not consider Krasley's ex-wife as a suspect. (App. 779). ("[T]here's no evidence at all that it was Kimberly Krasley rather than John Krasley committing

the offenses."). The government suggested no one else who might have committed the prior acts.

B. Proceedings before the Third Circuit and the Decision Below

On appeal, Krasley argued, as he had below, that the government's theory of relevance, unusually proffered in the passive voice, contained an unstated propensity link, a link that becomes obvious when an actor is inserted, even one without an identity. Properly understood, the government's proffer, written in an active voice, and inserting the implicit propensity link, looks like this:

> A person discussed child pornography trading activity at Krasley's residence in 2010. That person has a propensity to view and trade child pornography and had continued access to Krasley's home through 2018. These facts have a tendency to show that the child pornography trading activity that occurred on Krasley's internet connection in 2013 through 2018 also occurred from within Krasley's residence.

The second sentence, the missing propensity inference, is logically necessary to complete the government's proffer. Without it the last step of the proffer—"the child pornography trading activity that occurred on Krasley's internet connection in 2013-2018 also occurred from within Krasley's residence"—does not logically follow from the first step—"child pornography trading activity was discussed from Krasley's residence in 2010." If the "person" who discussed CP trading in 2010 did not have a propensity to view and trade CP, if instead his discussions in 2010 were only a one-time event, then the existence of those discussions in 2010 would not make it any more likely that the subsequent CP offenses occurred at Krasley's home, as opposed to elsewhere.

In its response brief, the government, apparently recognizing the propensity problem with its 404(b) argument, raised a new argument, one which the Third Circuit ultimately adopted: the

"Filename and IRC Chat Evidence was Not Rule 404(b) Evidence Because There was No Claim that Krasley Authored or Viewed Them." Gov't Br. at 35. Krasley, in reply, argued that the government's new argument, in addition to being waived, was wrong; Rule 404(b) explicitly refers to the other acts of all "person[s]," not merely defendants.

The Third Circuit, in deciding the appeal, adopted the new argument from the government's brief: "Since it was not argued or established that Krasley committed any prior acts related to the videos or the chat messages, Rule 404(b) does not apply." App'x B at 8.[4] Thus, notwithstanding that the government's theory of relevance contained an obvious propensity link, the Third Circuit found it to be properly admitted.[5]

REASON FOR GRANTING THE PETITION

THE THIRD CIRCUIT'S HOLDING THAT RULE 404(b) IS INAPPLICABLE TO EVIDENCE OF THIRD PARTY PRIOR ACTS HIGHLIGHTS AN ACKNOWLEDGED CIRCUIT CONFLICT THAT REQUIRES RESOLUTION BY THIS COURT.

This case deepens the mature circuit split regarding whether Federal Rule of Evidence 404(b) applies to the prior acts of defendants only, or also to those of third parties. As discussed further below, three circuits have applied Rule 404(b), and its restrictions on the introduction of propensity evidence, to the prior acts of third parties in addition to those of defendants. In

[4] The court relied upon a prior Third Circuit decision, *United States v. Bailey*, 840 F.3d 99, 125 (3d Cir. 2016).

[5] The Court also stated that even if there was error it was harmless. App'x B at 12. But having ruled that there was no error, the Court did not address any of the Third Circuit's Rule 404(b) jurisprudence in which it has repeatedly found the erroneous admission of prior acts evidence to be prejudicial, even where the government's evidence of guilt was "substantial." *United States v. Brown*, 765 F.3d 278, 295 (3rd Cir. 2014). Instead, the Court erroneously addressed only the sufficiency of the government's other evidence. *See* App'x B at 12 ("the government presented abundant direct and circumstantial evidence for the jury to reach the same verdict without needing to consider the disputed evidence.").

contrast, six circuits, including the Third Circuit in the instant case, have limited Rule 404(b) and its restrictions to the prior acts of defendants, but four of those circuits have issued conflicting decisions depending on whether the government or a defendant seeks to introduce such evidence. Those four circuits have applied the rule's restrictions only to evidence of third party acts introduced by defendants.

Cases such as this one, where courts refuse to apply the restrictions of Rule 404(b) to the acts of third parties in contravention of the rule's clear text, demonstrate the need for this Court's resolution of the circuit conflict. The need for uniformity on this issue is particularly important since Rule 404(b) is "the most frequently utilized and cited rule of evidence, and has generated more published opinions than any other subsection of the rules." Clay Wilwol, *"Reverse" 404(b) Is Not an Evidence Law Issue: A Call to Revive the Compulsory Process Clause as a Vehicle for Evidence Admission*, 52 N.M.L. Rev. 242, 252 (2022). This case presents an ideal vehicle for resolution of the circuit conflict since the prior acts evidence was central to the case, and the Third Circuit's counter-textual interpretation of the Rule highlights the extreme dangers of that approach: the government here was able to evade Rule 404(b)'s propensity prohibition by merely refraining from explicitly naming Krasley as the person who committed the prior acts, though the government suggested no other possible suspect and strongly implied to the jury during closing argument that he was indeed the actor.

A. The Acknowledged Circuit Conflict Regarding the Application of Rule 404(b) to Third Party Acts is Mature.

Rule 404(b) restricts the introduction of prior acts evidence and prohibits its use to show propensity. Specifically, Rule 404(b) provides:

> **(b) Other Crimes, Wrongs, or Acts.**
>
> **(1) Prohibited Uses.** Evidence of any other crime,

> wrong, or act is not admissible to prove *a person*'s character in order to show that on a particular occasion the person acted in accordance with the character.
>
> **(2) Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Id. (emphasis added).

Three federal courts of appeal—the Sixth, Seventh and Ninth—have held that "person" within the text of the rule refers to both defendants and third parties and have therefore applied the rule's restrictions to evidence of the prior acts of both defendants and third parties. *See, e.g.*, *United States v. Lucas*, 357 F.3d 599, 605-06 (6th Cir. 2004) (holding that "prior bad acts are generally not considered proof of *any* person's likelihood to commit bad acts in the future and that such evidence should demonstrate something more than propensity" as required by Rule 404(b)) (emphasis in original); *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999) (holding that evidence of a third party's physical abuse of his child could not be introduced to show propensity because the restrictions of Rule 404(b) apply to all persons); *United States v. McCourt*, 925 F.2d 1229, 1232, 1236 (9th Cir. 1991) (holding that "because Rule 404(b) plainly proscribes other crimes evidence of 'a person,' it cannot reasonably be construed as extending only to 'an accused'").[6]

In contrast to the three circuits that have applied the clear text of Rule 404(b), the Third Circuit and five other circuits—the First, Second, Fifth, Tenth, and Eleventh—have held that

[6] *Lucas* and *McCourt* involved evidence introduced by the defendant, but it has been cited for the proposition that Rule 404(b) applies to third party acts in cases involving government-introduced evidence as well. *See, e.g.*, *United States v. Curtis*, No. 4:14CR0110, 2014 WL 6673850, at *6 (N.D. Ohio Nov. 24, 2014); *United States v. Bonds*, No. C 07-00732 SI, 2011 WL 13350459, at *2 (N.D. Ca. Mar. 7, 2011).

Rule 404(b) does not apply to third party acts. *See, e.g.*, *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 583 (1st Cir. 1987) (declining to apply Rule 404(b) to evidence of past crimes of associates of the defendant because "Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant"); *United States v. Brady*, 26 F.3d 282, 286-87 (2d Cir. 1994) (finding Rule 404(b) inapplicable to evidence of murders committed by associates of the defendants since none of the defendants were the actors); *United States v. Bailey*, 840 F.3d 99, 125 (3d Cir. 2016) (declining to apply Rule 404(b) to evidence of a murder committed by an associate of the defendants because "Rule 404(b) only applies to evidence of a defendant's other bad acts or crimes, not those of third parties"); *United States v. Sepulveda*, 710 F.2d 188, 189 (5th Cir. 1983) (holding Rule 404(b) did not apply to evidence of a co-conspirator's crimes in which the defendant was not implicated because Rule 404(b) "deals with acts committed by the defendant himself"); *United States v. Cushing*, 10 F.4th 1055, 1081-82 (10th Cir. 2021) (finding Rule 404(b) inapplicable to a statement that someone "got busted and went to prison" because the statement referred to a third party rather than the defendant); *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983) (declining to apply Rule 404(b) to evidence of past arson convictions of a third party allegedly hired by the defendant because the evidence did not relate to the defendant's propensity).

Four of these six circuits, however, have been inconsistent in their treatment of the Rule. Despite their holdings that Rule 404(b) does not apply in cases where the government sought to introduce prior acts evidence of third parties, the Second, Third, Tenth, and Eleventh Circuits have held that Rule 404(b) *does* apply to prior acts evidence of third parties when defendants seek to introduce that evidence. Courts refer to this defendant-introduced evidence as "reverse 404(b)" evidence. *See, e.g.*, *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984)

(applying Rule 404(b) to evidence the defendant sought to introduce of co-conspirators duping couriers to bolster his defense that they duped him); *United States v. Stevens*, 935 F.2d 1380, 1404 (3d Cir. 1991) (applying Rule 404(b) to evidence the defendant sought to introduce of a past crime perpetrated by an unidentified third party to show similarities to the charged crime); *United States v. Montelongo*, 420 F.3d 1169, 1174-75 (10th Cir. 2005) (applying Rule 404(b) to evidence of a third party's involvement in drug distribution that the defendants sought to introduce to show that the third party was responsible for the charged drug possession); *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989) (applying Rule 404(b) to evidence of a third party's past fraudulent conduct that the defendant sought to introduce to raise the inference that the third party had committed the charged fraud).[7] These four circuits thus follow the text of the rule and apply its limitations to evidence of third party prior acts when defendants seek to introduce such evidence, but do not apply the rule and its limitations when the government is the proffering party.

[7] The issue of what standard to apply to admission of "reverse 404(b)" evidence has also spawned division among the circuits. Some circuits apply the same standard that is applied as when the government seeks to introduce evidence of a defendant's prior acts. *See, e.g.*, *Lucas*, 357 F.3d at 606 (holding that the "standard analysis of Rule 404(b) evidence should generally apply"); *McCourt*, 925 F.2d at 1236 (holding that the same propensity prohibition applies). Other circuits apply some version of a lesser standard. *See, e.g.*, *Aboumoussallem*, 726 F.2d at 911 ("[T]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."); *United States v. Williams*, 458 F.3d 312, 317 (3rd Cir. 2006) ("Although, under *Stevens*, a defendant is allowed more leeway in introducing non-propensity evidence under Rule 404(b), he or she is not allowed more leeway in admitting propensity evidence in violation of Rule 404(b)."); *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005) ("Contrary to the district judge's statement, the defense is not held to as rigorous of a standard as the government in introducing reverse Rule 404(b) evidence."); *Montelongo*, 420 F.3d at 1174-75 (same); *Cohen*, 888 F.2d at 776 (noting "the standard for admission is relaxed when the evidence is offered by a defendant" but still requiring a non-propensity purpose).

The Third Circuit's conflicting decisions illustrate the confusion caused by applying the rule to evidence introduced by defendants but not to evidence introduced by the government. In *United States v. Williams*, the court applied the limitations of Rule 404(b) to "reverse 404(b)" evidence but explicitly stated more broadly, relying on the plain text of the rule, that "the prohibition against the introduction of bad acts evidence to show propensity applies regardless of whether the evidence is offered against the defendant or a third party." 458 F.3d 312, 317 (3d Cir. 2006). The court continued that "[r]ather than restricting itself to barring evidence that tends to prove 'the character of the accused' to show conformity therewith, Rule 404(b) bars evidence that tends to prove the character of any 'person' to show conformity therewith." *Id.* However, the court later contradicted this broad language and held in *Bailey*, as well as in the instant case, that government-proffered evidence is subject to Rule 404(b) only when it relates to a defendant's prior acts, not those of third parties. *Bailey*, 840 F.3d at 125 ("Rule 404(b) only applies to evidence of a defendant's other bad acts or crimes, not those of third parties."); App'x B at 8 ("Since it was not argued or established that Krasley committed any prior acts related to the videos or chat messages, Rule 404(b) does not apply.").

Courts and commentators have long recognized the circuit split on this issue and the confusion it has caused. *See, e.g.*, *Lucas*, 357 F.3d at 612 (Rosen, J., concurring) ("[B]ecause of the language used in Rule 404(b) . . . the circuits are divided on the issue of the Rule's applicability" to third parties.); *Wynne*, 606 F.3d at 873 n.3 (Martin, J., concurring) (same); *Duran-Moreno*, 616 F. Supp. 2d at 1167-70 (describing circuit conflict); Jessica Broderick, *Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U. Colo. L. Rev. 587, 596 (2008) ("Several circuits have expressly held that 404(b) does not apply to the other bad acts of someone other than the defendant . . . ."). The

division has also impacted the decision-making of state courts, which often look to the federal courts' interpretation of the Federal Rules of Evidence for guidance interpreting state evidentiary rules. *See, e.g.*, *State v. Vargas*, 20 P.3d 271, 278 n.8 (Utah 2001) ("In this instance, however, the federal courts are in conflict as to whether rule 404(b) applies to a 'person' who is not also the defendant.").

B. The Approach of the Sixth, Seventh and Ninth Circuits Correctly Applies the Clear Text of Rule 404(b).

The approach of the Sixth, Seventh and Ninth Circuits to consistently apply Rule 404(b) to all third party acts, and no matter the party proffering it, correctly interprets the unambiguous text of the rule. These circuits correctly "start with the text of the rule itself[,]" recognizing that "on its face, 404(b) applies to a 'person' and is not limited to the defendant." *McCourt*, 925 F.3d at 1231; *Lucas*, 357 F.3d at 605 ("By its plain terms, Rule 404(b) mandates that '[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a *person* in order to show action in conformity therewith,' instead of restricting itself to evidence proving 'the character of the accused.'") (quoting Rule 404(b)) (emphasis added); *Agushi*, 196 F.3d at 760 ("Rule 404(b) speaks not of the parties to a case, but of a 'person.'").

As the Ninth Circuit further recognized, it is readily evident in Rule 404's other provisions that "Congress knew how to delineate subsets of 'persons' when it wanted to, and that it intended 'a person' and 'an accused' to have different meanings when the Rules speak of one rather than the other." *McCourt*, 925 F.3d at 1232. For example, Rule 404(a), which establishes the general rule excluding "character evidence," provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in a accordance with the character or trait." Fed R. Evid. 404(a)(1). Rule 404(a)(2) and (3), by contrast, provides exceptions to this general rule for "defendants," and "victims" in criminal

cases and for "witnesses" in both civil and criminal cases. *McCourt*, 925 F.2d at 1232.[8] Accordingly, Rule 404(b)'s reference to "other crimes evidence of 'a person' . . . cannot reasonably be construed as extending only to 'an accused.'" *Id*.

Even circuits that do not apply Rule 404(b) to government-introduced evidence of third party acts have in other cases recognized the command of the rule's clear text. Notwithstanding its later contrary decision involving government-introduced evidence in *Bailey*, the Third Circuit relied on the plain meaning of Rule 404(b)'s text in *Williams* involving "reverse 404(b)" evidence: "That the prohibition against propensity evidence applies regardless of by whom—and against whom—it is offered is evident from Rule 404(b)'s plain language." *Williams*, 458 F.3d at 317. Furthermore, although the Eleventh Circuit held in *Morano* that Rule 404(b) does not apply to third parties, despite the Circuit's application of the rule's requirements to "reverse 404(b)" evidence in *Cohen*, it has repeatedly questioned *Morano* because of its divergence from the rule's text. *See United States v. Sellers*, 906 F.2d 597, 604 n.11 (11th Cir. 1990) ("We question *Morano*'s reasoning . . . . The plain language of Rule 404(b) refers to 'persons,' not

---

[8] Rule 404(2) and (3) provides:

> **(2) Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:
>
> **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
>
> **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
>
> **(i)** offer evidence to rebut it; and
>
> **(ii)** offer evidence of the defendant's same trait; and
>
> **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
>
> **(3) Exceptions for a Witness.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

'defendants,' and Rule 404(a) carves out specific exceptions relating to the 'accused,' 'victim[s],' and 'witness[es].'"); *Ermini v. Scott*, 937 F.3d 1329, 1342-43 (11th Cir. 2019) ("As we did in *United States v. Sellers*, we once again question *Morano*'s reasoning, which seems to us to flatly contradict Rule 404(b)'s clear text.").

Circuits applying the counter-textual reading occasionally rely upon this Court's decision in *Huddleston v. United States*, 485 U.S. 681 (1988). In *Huddleston*, the Court held that for the government to introduce evidence of a defendant's prior acts, it must make a conditional showing, pursuant to Rule 104(b), "that the act occurred and that the defendant was the actor." 485 U.S. at 689-90. The Second and Third Circuits have interpreted this language to mean that Rule 404(b) does not apply to acts of third parties. *See Brady*, 26 F.3d at 286-87 (citing *Huddleston* to find Rule 404(b) inapplicable to murders committed by third parties because the government did not try to show that the defendants were the actors); *Bailey*, 840 F.3d at 125 (same). However, the *Huddleston* Court also explicitly stated that its use of the term "defendant" was due to the facts of that case and that its holding should not be so limited: "The actor in the instant case was a criminal defendant, and the act in question was 'similar' to the one with which he was charged. Our use of these terms is not meant to suggest that our analysis is limited to such circumstances." 485 U.S. at 685-86. The Seventh Circuit cited this language to hold that Rule 404(b) does apply to third party acts. *See Agushi*, 196 F.3d at 760 ("Even though *Huddleston* involved a situation in which the defendant was the actor, the Court strongly suggested that Rule 404(b) should be applied to any actor."). This case would allow this Court to clarify the broader reach of its holding in *Huddleston* and ensure courts apply the clear text of Rule 404(b).

C. This Case Is an Ideal Vehicle for Resolving the Circuit Split on an Important, Recurring Issue.

This case is an ideal vehicle for this Court to resolve the conflict among the circuits on this important, recurring issue.

First, the issue was preserved at trial, fully briefed and argued on appeal, and addressed by the Third Circuit opinion. Second, the admissibility of the prior acts evidence was of critical importance. As the district court recognized when first discussing the evidence, it is "the only thing that puts child pornography in [Krasley's] house . . . the prejudice is so substantial." (App. 391). As discussed above, the evidence effectively filled the giant hole at the center of the government's case – the four searches of Krasley's home and electronic devices which failed to uncover any evidence of the charged offenses.[9]

[9] While the Third Circuit also stated that any error in admitting the evidence was harmless, the court, having found no error to have occurred, did not address any of its ample Rule 404(b) jurisprudence repeatedly holding the erroneous introduction of prior acts evidence to be reversible error, even where the government's evidence of guilt was "substantial." *Brown*, 765 F.3d at 295. *See also United States v. Caldwell*, 760 F.3d 267, 275 (3rd Cir. 2014) (reversing conviction and observing that "courts and commentators . . . appreciate the uniquely prejudicial impact that prior bad act evidence has on a jury."); *United States v. Smith*, 725 F.3d 340, 348 (3rd Cir. 2013) (reversing conviction); *United States v. Himelwright*, 42 F.3d 777, 783 (3rd Cir. 1994) (same); *Government of Virgin Islands v. Pinney*, 967 F.2d 912, 917 (3rd Cir. 1992) (same); *United States v. Sampson*, 980 F.2d 883, 888 (3rd Cir. 1992) (same). Accordingly, should this Court determine that the prior acts evidence was erroneously admitted, the case should be remanded to the Third Circuit for an appropriate consideration of whether the error was prejudicial, *see Clemons v. Mississippi*, 494 U.S. 738, 753-54 (1990), or this Court may determine for itself that the error was prejudicial. *See Satterwhite v. Texas*, 486 U.S. 249, 258-60 (1988) (reversing lower court's harmless error determination which erroneously focused on whether "legally admitted evidence was sufficient . . . .[instead of] whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.") (citation omitted). Here, as in *Satterwhite*, the Third Circuit mistakenly considered only the sufficiency of the government's other evidence. *See* App'x B at 12. ("The Government presented abundant direct and circumstantial evidence for the jury to reach the same verdict, without needing to consider the disputed evidence.").

Third, and finally, this case perfectly illustrates the extreme danger of reading Rule 404(b) as having no application to third parties. Under such an interpretation, the government, as it did here, can evade the propensity prohibition of the Rule by merely refraining from explicitly naming the defendant as the perpetrator of the prior acts. As discussed above, the government did not suggest to the jury that anyone other than Krasley committed the prior acts and instead strongly implied during closing argument that he was the actor. Nevertheless, the Third Circuit held that Rule 404(b) did not apply here because the "[t]he disputed evidence was not proffered as Krasley's prior acts." App'x B at 8.

Accordingly, the counter textual interpretation of the Rule effectively renders the Rule a nullity in any case where the prior acts were not the subject of a conviction. The government can introduce the acts, outside of the ambit of Rule 404(b), so long as the government only implies, but does not explicitly name, the defendant as the actor. A decision of this Court is needed to make clear that this is not a correct reading of the Rule. Through the grant of certiorari in this case, the Court can resolve the division and confusion that exists throughout the circuits on this critically important and recurring issue.

CONCLUSION

For the foregoing reasons, Petitioner John Krasley respectfully requests that this Court grant a writ of certiorari.

Respectfully submitted,

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