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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 RESPONDENT

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Attorneys for Respondent

Questions Presented

I. Whether, as a matter of law, Federal Rule of Evidence 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged.

II. Whether, under *Chambers v. Mississippi*, Defendant Anastasia Zelasko's constitutional right to present a complete defense would be violated by exclusion of evidence of a third party's propensity to distribute illegal drugs.

III. Whether *Williamson v. United States* should be overruled insofar as it provides a standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest, and if so, what standard should replace it.

IV. Whether, at a joint trial, the statement of a non-testifying co-defendant implicating the defendant is barred as violative of the Confrontation Clause under *Bruton v. United States*, even though the statement was made to a friend and thus would qualify as a non-testimonial statement within the meaning of the Court's subsequent decision in *Crawford v. Washington.*

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Statement of the Case

In February 2012, Anastasia Zelasko, Jessica Lane, Hunter Riley, and Casey Short were members of the United States Snowman Pentathlon Team training at Remsen National Park with coach Peter Billings. (Record 8-9) On February 4, 2012, Riley was killed on the training grounds by a bullet from Zelasko's competition rifle. (Record 8-9) Following Riley's death, Zelasko and Lane were charged together with five criminal counts, including murder, conspiracy to commit murder, and conspiracy to distribute anabolic steroids. (Record 4-5)

Zelasko joined the Snowman team in September 2010, and Lane joined in August 2011. (Record 2) Before August 2011, the women's team never ranked above sixth in the world, but that fall, the team's performance times significantly improved. (Record 2) During Lane's first four months on the team, Riley, acting as an informant on requests from the DEA, approached her three times attempting to purchase a steroid known as ThunderSnow. (Record 9) Lane refused. (Record 9) On December 19, Billings, who was also in a romantic relationship with Lane, accused her of selling steroids. (Record 9) Lane denied the accusation. (Record 9) However, on January 16, 2012, Lane sent Billings an email:

> 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 what exactly she has in mind yet.
>
> Love,
> Jessie

(Record 29) Billings forwarded the email to the authorities only after Riley's death. (Record 9)

On February 3, Riley was killed while competing by a bullet from Zelasko's competition rifle, which she was using to practice at the team training facility on an adjacent rifle range.

(Record 8) Zelasko was arrested, and $5,000 and two doses of ThunderSnow were found in her home. (Record 3, 8) Search warrants were subsequently executed at Lane's residence, where authorities found 20 doses of ThunderSnow and $10,000 in cash, and at the team's training facility, where authorities found 250 doses of ThunderSnow. (Record 8-9)

Zelasko and Lane were charged jointly with murder and conspiracy to murder Hunter Riley, as well as possession, intent to distribute, and conspiracy to distribute anabolic steroids. (Record 4-5) The Government's theory is that Zelasko and Lane were co-conspirators in a scheme to distribute ThunderSnow and that they conspired to kill Riley to silence his inquiries. (Record 32) Zelasko asserts that she was not a participant in what the Government concedes is a two-person drug conspiracy, and therefore she had no motive to kill Riley. (Record 11, 32)

The Government brings this interlocutory appeal from two of the district court's evidentiary rulings. (Record 30) First, the Government argues that the court erred in permitting Zelasko to introduce testimony showing that Short had sold the steroid from which ThunderSnow was derived less than a year earlier to Canadian teammates. (Record 32) This evidence would suggest that Short was the co-conspirator in Lane's conspiracy and that Zelasko had no motive to kill Riley. (Record 32) The district court held that Federal Rule of Evidence 404(b) does not bar the evidence. (Record 21) Alternatively, since Zelasko has no other evidence to implicate Short in the offenses, the court held that admission is necessary to preserve Zelasko's constitutional right to present a complete defense. (Record 22) Second, the Government contends that the district court erred in barring its introduction of Lane's email to Billings on January 16, 2012. (Record 33) The district court held that the email is hearsay not entitled to an exception under Federal Rule of Evidence 804(b)(3). (Record 22-23) Alternatively, because Lane will not testify or be cross-examined at the joint trial, the court held

that the Confrontation Clause of the Sixth Amendment bars admission of the email. (Record 23) The Court of Appeals for the Fourteenth Circuit affirmed the district court's rulings on February 14, 2013, (Record 35, 38), and this Court granted certiorari on October 1. (Record 55)

Summary of the Argument

This Court should affirm the lower court's holding that Zelasko may introduce evidence of a non-defendant's propensity to commit the crime with which Zelasko is charged for either of two reasons. *First*, as a matter of law, Federal Rule of Evidence 404(b) does not bar the introduction of non-defendant propensity evidence. Rule 404(b) is rooted in the common-law purpose of preventing prejudice to defendants, a risk that is not present when the proffered evidence implicates a non-defendant. Further, Rule 404(b) envisions that there will be exceptions to the rule where the probative value of evidence exceeds concerns such as efficiency and confusion of issues. The language of Rule 404(b) should not be read in a vacuum but rather in context of these historical and fairness underpinnings as evidenced by the five circuits that have expressly recognized this exception.

Second, even if the evidence is barred by Rule 404(b), its admission is required to provide for Zelasko's constitutional right to a complete defense under this Court's decision in *Chambers v. Mississippi*. As in *Chambers*, the evidence presented by Zelasko is critical, relevant to her defense, and not offensive to legitimate Government interests. A court need not be required to weigh the evidence further to determine if the constitutional right to present a complete defense is infringed.

The Court should also affirm the lower court's holding that the Government is barred from introducing the Lane email for either of two reasons. *First*, the Lane email is hearsay not entitled to an exception under Federal Rule of Evidence 804(b)(3) because it is not a statement

against penal interest under this Court's decision in *Williamson v. United States*. The rationale undergirding *Williamson*, that only individual self-incriminating statements may be presumed reliable, remains strong and is not undercut by the recipient of the statement. The lower court applied *Williamson*'s guidance reasonably by looking beyond the text of the Lane email and into the external circumstances surrounding its submission. The district court's determination, that no statement in the email incriminated Lane in light of these circumstances, deserves deference.

Second, even if the Lane email is admissible under Rule 804(b)(3), allowing its admission would violate the Confrontation Clause of the Sixth Amendment according to this Court's decision in *Bruton v. United States* because it is the statement of a non-testifying co-defendant. This protection articulated by *Bruton* is not limited by this Court's decision in *Crawford v. Washington*, and its application in this case furthers the policy goal of *Crawford*, *Bruton*, and the Sixth Amendment by preventing unfair prejudice to a criminal defendant.

Argument

I. Federal Rule of Evidence 404(b) does not prohibit a defendant like Zelasko from presenting evidence of a non-defendant's propensity to commit the offense with which the defendant is charged.

After Zelasko and Lane were indicted in an alleged conspiracy to distribute anabolic steroids, Zelasko sought to have a witness testify that Short, a non-defendant member of their team, had previously participated in a similar steroid distribution scheme. (Record 4-5, 10) Since the Government conceded that there were only two individuals involved in the conspiracy, this evidence would suggest that Short was Lane's co-conspirator and that Zelasko would therefore have had no reason to murder Riley to hide a conspiracy. (Record 10-11) The Government objected to the admission of this evidence, arguing that evidence of a third party's propensity to commit an offense is not admissible under Federal Rule of Evidence 404(b).

(Record 12) The district court overruled the Government's objection and allowed admission of the evidence. (Record 21) The court of appeals affirmed the district court's ruling. (Record 34)

Rule 404(b) provides that, generally, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, this Court has held that such a rule's application is not absolute but must rather bow where its restriction on a defendant's right to present evidence is "arbitrary or disproportionate to the purposes [it is] designed to serve." *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). The lower courts in this case followed this edict, finding first that admitting the evidence comported with Rule 404(b)'s historical purpose of protecting defendants from prejudice and second that barring the evidence based on Rule 404(b) would not compellingly serve the purposes of the Federal Rules of Evidence or the Government's concerns. (Record 21, 38) While the standard of review for a court's evidentiary ruling is generally abuse of discretion, this question of law is reviewed *de novo*. *United States v. Norris*, 428 F.3d 907, 913 (9th Cir. 2005).

a. Admission of non-defendant propensity evidence by a defendant comports with Rule 404(b)'s purpose of protecting defendants from prejudice.

Zelasko seeks to introduce evidence demonstrating that a non-defendant with a history of committing similar offenses is responsible for the criminal conduct with which Zelasko is charged. Because this evidence of prior acts does not put the non-defendant, or even a co-defendant, at risk of prejudice by the jury in this case, admission of the evidence comports with Rule 404(b)'s historical purpose of protecting defendants from prejudice in a proceeding.

Rule 404(b)'s purpose of protecting defendants from prejudice traces to the common law, where courts precluded the introduction of prior act evidence in order to protect defendants

against the tendency of a jury to "prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 476 (1948). This common-law philosophy was embraced in the adoption of Rule 404(b). *See Old Chief v. United States*, 519 U.S. 172, 181 (1997); Charles Wigmore, *Wigmore's Code of the Rules of Evidence in Trials at Law* §§ 355-56, p. 81 (3d ed. 1942). Numerous circuits have subsequently relied on this common-law basis. *See, e.g., United States v. Montelongo*, 420 F.3d 1169, 1174-75 (10th Cir. 2005); *United States v. Stevens*, 935 F.2d 1380, 1404 (3d Cir. 1991); *United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989); *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984). These courts have recognized that where there is no risk of prejudice to a defendant, like with the admission of evidence of a non-defendant's prior acts, the purpose of the rule is not advanced by exclusion of such evidence. *Id*. One circuit has even expressly held that the rule "does not apply to crimes, wrongs, or acts of another person." *United States v. Taylor*, 701 F.3d 1166, 1172 (7th Cir. 2012). This case presents the same situation. Neither Zelasko nor her co-defendant Lane is implicated in the evidence of Short's prior acts, so they stand no risk of the jury holding such acts against them in its deliberations. Rule 404(b)'s purpose, grounded in the common law, is not achieved by barring such evidence, and this Court should affirm its admissibility according to the precedent of the Second, Third, Seventh, Tenth, and Eleventh circuits.[1]

The Government attacks the admissibility of non-defendant propensity evidence by pointing to the cold language of Rule 404(b). Relying on an overambitious conception of the

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[1] In a dissent from the opinion of the Fourteenth Circuit, Judge Marino suggests that the drafters "chose to affirmatively move away from" the common law tradition in drafting Rule 404(b). (Record 47) However, this perspective not only runs counter to this Court in *Old Chief*, 519 U.S. at 181, it does not respect the Court's general articulations that the Federal Rules of Evidence should be construed in concert with and with flexibility toward the common law. *See Daubert v. Merrell Dow Pharms*., 509 U.S. 579, 587-88 (1993) ("common law . . . could serve as an aid to [Federal Rule of Evidence] application."); *Tome v. United States*, 513 U.S. 150, 173 (1994) ("Federal Rules of Evidence worked a change in common-law relevancy rules in the direction of flexibility.").

legislature's precision in word choice, it argues that by using the word "person" rather than *accused* or *defendant* in the rule to describe whose prior acts are inadmissible, the drafters intended that all propensity evidence be inadmissible, not only when implicating a defendant.[2] Fed. R. Evid. 404(b)(1). But the Government points to no legislative history that supports this theory, and the advisory committee's note, which should clarify the rule's scope, makes no mention of an intent to cover third-party acts. Fed. R. Evid. 404 advisory committee's note. Instead, it rests its case on a lone decision of the Sixth Circuit in *United States v. Lucas*, which holds that the rule bars admission of any third party's prior acts. 357 F.3d 599, 605 (6th Cir. 2004).

As the Fourteenth Circuit noted, this strict plain-language argument is "appealing in its simplicity" but has only been adopted by the *Lucas* court. (Record 34) Other courts have excluded third-party evidence under Rule 404(b), but those cases can be distinguished from *Lucas* in that the third parties implicated were co-defendants, not non-parties. *See, e.g., United States v. Amuso*, 21 F.3d 1251, 1262 (2d Cir. 1994) (court limited defendant's use of evidence showing co-defendant previously submitted false sworn statements to a court); *United States v. Wright*, 783 F.2d 1091, 1100 (D.C. Cir. 1986) (court barred defendant from questioning co-defendant on prior threats). Exclusion of propensity evidence in these cases actually supports the underlying purpose of Rule 404(b), preventing prejudice to defendants. But *Lucas* suggests barring evidence simply because it implicates a third party's propensity. Combining this distinction with the fact that the committee notes to Rule 404 only consider the implications of

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[2] The Government contends that the use of the word "defendant" in Rule 404(b)(2) demonstrates that, if the drafters had intended for Rule 404(b)(1) to cover only a defendant's prior acts, they would have used such language. (Record 13-14) However, the use of "defendant" in Rule 404(b)(2) is necessitated by an assignment of disparate responsibilities to a defendant and a prosecutor. Rule 404(b)(1) makes no such assignment, so use of "defendant" in the subsequent subpart is not a dispositive indication that the drafters intended "person" to embody a different meaning than the defendant or the accused.

Rule 404(b) for the "accused" and not any "person," *Lucas* appears to be an aberration rather than a general statement of a rule against admission of propensity evidence. Fed. R. Evid. 404 advisory committee's note. Given both Rule 404(b)'s adoption of the common law purpose of protecting defendants from prejudice and the surrounding precedent that reinforces application of the rule to achieve that end, admission of non-defendant propensity evidence like Zelasko seeks to admit ought not be barred by the rule.

b. Rule 404(b) envisions exceptions where the probative value of evidence exceeds the Government's concerns of unfair prejudice and efficiency.

Even if this Court finds that evidence of a non-defendant's propensity is generally inadmissible under Rule 404(b), the rule envisions exceptions that allow admission of prior act evidence that is generally barred. *See* Fed. R. Evid. 404(b)(2). As the courts have demonstrated, a defendant like Zelasko should be allowed to introduce evidence of a non-defendant's prior acts in cases where the probative value of the evidence exceeds the Government's concerns of unfair prejudice and efficiency.

Rule 404(b)(2) provides that evidence generally inadmissible under Rule 404(b)(1) may be admissible for purposes "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). These exceptions are made in recognition that probative value of generally inadmissible evidence can outweigh the concerns underlying its prohibition. Fed. R. Evid. 404 advisory committee's note. And the list of exceptions is not exhaustive. *Cohen*, 888 F.2d at 776. Several circuit courts have also recognized that, even if propensity evidence seems to be facially barred, a defendant may introduce evidence of a third party's prior acts against the propensity restriction of Rule 404(b)(1) if it is relevant under Federal Rule of Evidence 401 and passes the balancing test of Federal Rule of Evidence 403. *See Montelongo*, 420 F.3d at 1173-74; *United States v. Seals*, 419

F.3d 600, 606 (7th Cir. 2005); *Lucas*, 357 F.3d at 605; *Stevens*, 935 F.2d at 1405; *Cohen*, 888 F.2d at 776-77; *Aboumoussallem*, 726 F.2d at 912. Described as "reverse 404(b)" evidence since it is offered by a defendant, it has been deemed admissible when it tends to negate the defendant's guilt and where its probative value outweighs concerns such as confusion of the issues and undue waste of time. *Stevens*, 935 F.2d at 1404-05.

In *Stevens*, a defendant charged with sexual assault and robbery sought to introduce, by way of a single witness, evidence that another individual committed a similar crime three days after the crime with which the defendant was charged. 935 F.2d at 1401. He contended that if another individual committed a similar crime in a similar manner, it was likely that the same individual committed the crime in his case. *Id*. The district court refused to admit the evidence pursuant to Rule 404(b), but the Third Circuit reversed on appeal. *Id.* at 1383-84. After discussing state and federal precedent extensively, the circuit court held that, even in light of Rule 404(b), it was "well established that a defendant may use similar 'other crimes' evidence defensively . . . to negate his guilt." *Id*. at 1404 (quoting *State v. Williams*, 518 A.2d 234 (N.J. 1986)). The court held that such evidence should be admissible where it has a tendency to refute the defendant's guilt (satisfying the relevancy requirement of Rule 401) and where its probative value outweighs considerations of prejudice, efficiency, and potential confusion (the balancing required by Rule 403). *Id*. at 1404-05. In that case, the similarity of the other crime allowed the evidence to "easily satisfy" the requirement of relevancy, and considerations of prejudice, efficiency, and confusion were minimized because the evidence was not being used against the defendant and involved a single witness. *Id*.

The *Montelongo* court echoed *Stevens*. In *Montelongo*, the defendants were charged with intent to distribute marijuana based on a discovery of drugs in a semi-truck they were driving.

420 F.3d at 1171. In reversing the district court and finding that the defendant could cross-examine the non-defendant truck owner about a recent similar incident involving another truck the non-defendant owned, the Tenth Circuit held that rules of evidence could not be applied "mechanistically to defeat the ends of justice." *Id*. at 1173 (quoting *Richmond v. Embry*, 122 F.3d 866, 871-72 (10th Cir. 1997)). Conducting the same two-step analysis as the *Stevens* court, it also concluded that the similarity of the incidents made the evidence relevant and probative, and the limited nature of the evidence relieved any concerns that it might risk wasting time or causing confusion. *Id*. at 1174-75. Despite the general restriction of such evidence by Rule 404(b), the *Montelongo* court, like the *Stevens* court, showed that exception should be made for non-defendant propensity evidence that is otherwise probative and limited.

The lower courts followed the rationale of the *Stevens* and *Montelongo* courts. Since Zelasko sought to present evidence of Short's prior acts that raised a "strong inference" that Short was the second member of the conspiracy, the evidence was entitled to admission subject to the *Stevens* two-part test. (Record 21) The Fourteenth Circuit applied that test, recognizing the evidence as "certainly probative" to her case, and given the uncertainty of policy goals furthered by its exclusion, the court found its admission warranted and proper. (Record 37)

Rule 404(b) envisions that there will be exceptions to the general rule that prior act evidence is inadmissible, and the courts have demonstrated how such an exception should be applied when a defendant seeks to introduce evidence of a non-defendant's propensity in her own defense. Not only does this application comport with the common law purpose undergirding Rule 404(b), it is harmonious with the judiciary's general interest in allowing admission of evidence that is relevant under Rule 401 and not offensive to Rule 403. *See* Fed. R. Evid. 402. This Court has recognized that a defendant's right to present evidence in her defense

cannot be arbitrarily limited by strict application of a rule. *Michigan v. Lucas*, 500 U.S. at 151. Failure to allow admission of non-defendant propensity evidence in cases like Zelasko's would disregard that command. The lower court's holding should be affirmed.

II. Exclusion of evidence demonstrating a non-defendant's propensity to commit the offense with which Zelesko is charged denies her the constitutional right to present a complete defense as articulated by *Chambers v. Mississippi.*

Zelasko sought to have a witness testify to Short's prior acts in order to establish the likelihood that Short was the second member of the alleged conspiracy and therefore leave Zelasko without motive to commit the other crimes for which she is indicted. (Record 10-11) Since Zelasko had no other evidence to show that Short was the second co-conspirator, she argued that failure to admit the testimony would deny her the constitutional right to present a complete defense articulated by *Chambers v. Mississippi*, 410 U.S. 284 (1973). (Record 14) Although the Government objected, arguing that the prior act evidence was too weak to trigger a *Chambers* issue, the district court agreed with Zelasko, holding that the testimony was admissible on constitutional grounds under *Chambers*. (Record 15, 22) The court of appeals concurred with the district court. (Record 38)

This Court has held that the Sixth Amendment to the Constitution requires that a criminal defendant be afforded the opportunity to present a "complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). In presenting such a defense, "[t]he right[] to . . . call witnesses in one's own behalf [has] long been recognized as essential to due process." *Chambers*, 410 U.S. at 294. "That constitutional right is violated by the exclusion of probative admissible evidence that another person may have committed the crime." *Lunbery v. Hornbeak*, 605 F.3d 754, 760 (9th Cir. 2010) (citing *Chambers*, 310 U.S. at 302-03). This Court's ruling in *Chambers* requires that Zelasko be allowed to present testimony

revealing Short's prior acts because it is critical to her defense and overwhelmingly probative evidence that another person committed the crime with which she is charged. This question of constitutional due process is reviewed *de novo*. *United States v. Robinson*, 583 F.3d 1265, 1269 (10th Cir. 2009).

a. *Chambers* requires that Zelasko have an opportunity to present critical and relevant evidence to secure her right to a complete defense.

Chambers established that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." 410 U.S. at 294. In that case, the defendant was convicted of murder for the death of a police officer following a barroom brawl. *Id*. at 285. At trial, the defendant sought to introduce testimony that showed a non-defendant had previously confessed to the murder of the officer and later recanted. *Id*. at 289. The trial court barred admission of the testimony based on its application of the state's rules of evidence, focusing specifically on the hearsay rule. *Id*. After the Mississippi Supreme Court affirmed the conviction, this Court reversed, holding that the trial denied the defendant his constitutional right to due process. *Id*. at 285. Although the Court recognized that "perhaps no rule of evidence has been more respected" than the hearsay rule, even it could not be applied as an absolute. *Id*. at 302. Instead, the Court held that the rule should bow to the fundamental right of a defendant to present witnesses in his own defense where testimony offered was "critical" to the defense and achieved the rule's goal of trustworthiness. *Id*. Since the defendant's case was "far less persuasive than it might have been" had the evidence been admitted, *Id.* at 294, and the evidence "bore persuasive assurances of trustworthiness," the Court held that it was sufficiently relevant and fair to warrant admission. *Id.* at 302.

The testimony that Zelasko seeks to admit is as critical as, if not more than, that in *Chambers*. While the defendant in *Chambers* had other evidence and was not completely denied

an opportunity to present his defense that a non-defendant was responsible, *Id*. at 294, the testimony Zelesko seeks to admit is the only basis for her defense. (Record 14) Without its admission, she will be denied not only a complete defense but any defense at all. And the evidence is not just critical; it is relevant. Rule 401 provides that evidence is relevant where its has any "tendency to make a fact more or less probable." Fed. R. Evid. 401(a). For reverse 404(b) evidence, relevancy depends on similarity between the prior act and the present offense, and the "relatively low" bar of Rule 401, *Stevens*, 935 F.2d at 1384, is lowered even further. *See Id*. at 1404; *Montelongo*, 420 F.3d at 1173-74. Because Zelasko's evidence shows that Short's prior acts were significantly similar to those offenses with which she is charged, it tends to make the fact that Zelasko committed the offenses less probable and is therefore relevant to the case.[3]

Further, the achievement of the hearsay rule's purpose in *Chambers* parallels the achievement of Rule 404(b)'s purpose in this case. The *Chambers* court held that the application of the hearsay rule should be relaxed when its principal purpose, trustworthiness of the testimony, was achieved. 410 U.S. at 302. In Zelasko's case, the historical purpose of the rule barring propensity evidence, protecting defendants from prejudice, is also achieved. However, even if the Court does not agree with a strict anti-prejudice purpose of Rule 404(b), the general balancing bases for excluding relevant evidence established in Rule 403 are not served by barring the evidence, either. There is no risk of unfair prejudice from admission of the evidence since Short is a non-defendant, and courts dealing with similar reverse 404(b) issues have found that single-witness testimony does not pose significant threats of misleading the jury or wasting

[3] Despite the Government's contention that Short's prior acts are dissimilar to those Zelasko is charged with, the case possesses a number of unique factors like those envisioned in the Government's principal case, *United States v. Lucas*, to provide a sufficient basis for relevance. 357 F.3d at 606. The small, insular nature of the winter sports community and the unique, derivative nature of the drugs previously sold by Short and those implicated in the present offenses support a finding of similarity sufficient to meet the lowered bar for establishing relevancy.

time. *See Montelongo*, 420 F.3d at 1175; *Stevens*, 935 F.2d at 1405. The Fourteenth Circuit recognized that there are no genuine Government interests served by exclusion of the evidence. (Record 37-38) Lest the rule be improperly applied as to make its impact arbitrary, the testimony should be admitted. *Michigan v. Lucas*, 500 U.S. at 145. Otherwise, the rule will be "applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

b. The admissibility of evidence to establish a complete defense does not depend on the type of evidence but on its relevance to the proceeding.

The Government argues that *Chambers* should not apply, contending that the evidence that Zelasko seeks to admit is too weak to trigger a *Chambers* issue and infringe on the constitutional right to present a complete defense. (Record 15) In reading its own *weight of the evidence* component into the *Chambers* decision, the Government suggests that Zelasko's evidence should not be admitted because it is something less than another's confession. (Record 15) It relies again on *United States v. Lucas*, which barred the admission of a non-defendant's prior cocaine offenses in applying the *Chambers* doctrine. 357 F.3d at 601. The Government's reading of *Chambers* in light of *Lucas* goes too far. As the Fourteenth Circuit expressed, neither this Court nor any circuit court has expressed a "clear and articulable standard" for weighing evidence to determine if a constitutional right is triggered. (Record 36-37) That is because the *Chambers* Court weighed the evidence in question only insofar as necessary to deem it relevant. After finding the evidence relevant, the real focus in *Chambers* shifted to determining if the policy goal of the rule, promoting trustworthiness of testimony, was offended by admission of the evidence. 410 U.S. at 302. The Court found it admissible, not because the evidence involved a confession but because the policy interest was not furthered by exclusion. *Id.* The decision in *Lucas* also turned not on the fact that the evidence was something less than a confession but on

relevance. *Lucas*, 357 F.3d at 606 (holding that evidence may have been sufficiently relevant for admission if prior acts were more similar to the charged offense).[4]

The evidence that Zelasko seeks to present passes muster under *Chambers* because it is relevant and exclusion does not compellingly further the policy interests of the rule. The courts need not weigh anything beyond these factors in deciding to allow admission of the evidence. And although the court below did not need to reach this constitutional conclusion in light of their admission of the evidence under Rule 404(b), the holding buttresses the importance of protecting a right that this Court has called a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). As such, the lower court's holding should be affirmed.[5]

III. Under *Williamson*, the Lane email was properly excluded as hearsay evidence not entitled to exception under Federal Rule of Evidence 804(b)(3).

Lane's email to Billings, her boyfriend and coach, acknowledged his concern regarding a business that she and an unnamed partner were operating and expressed her own concern regarding an unknown plan by the same unnamed partner to prevent the business's exposure. (Record 29) The government sought to admit this email in its entirety against Zelasko as hearsay evidence entitled to the exception for statements against penal interests under Federal Rule of Evidence 804(b)(3). (Record 16-17) Zelasko argued that the email was not subject to the exception because it did not actually contain any statement against penal interest under the

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[4] The Government may argue that because the *Chambers* Court deemed the evidence in question "critical" to the defendant's case, it was weighing the evidence for something more than relevance. *Chambers*, 410 U.S. at 302. However, notwithstanding word choice, the Court's discussion of the significance of the evidence amounts to noting that the defense "was far less persuasive than it might have been" with the evidence admitted. *Id*. at 294. This tracks Rule 401's premise of relevancy that hinges on any "tendency to make a fact more or less probable," Fed. R. Evid. 401(a), suggesting that the *Chambers* Court was merely applying this established standard for relevancy.

[5] Finally, it is worth noting that a district court is generally entitled to significant deference in its rulings on evidentiary matters, as demonstrated by this Court's endorsement of the abuse of discretion standard for courts of appeals reviewing Rule 403 determinations. *See Old Chief*, 519 U.S. at 183 n. 7. Even if this Court finds that non-defendant propensity evidence is often inadmissible, it should not upset the lower courts' analysis in this case where there is no evidence that discretion was abused.

interpretive rule established by *United States v. Williamson*, 512 U.S. 594 (1994). (Record 16) The district court agreed with Zelasko and found the email inadmissible as hearsay. (Record 22) The court of appeals affirmed the holding. (Record 38)

Although hearsay evidence is generally inadmissible under Federal Rule of Evidence 802, Rule 804(b)(3) provides an exception for statements that "at the time of their making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. R. Evid. 804(b)(3). *Williamson* instructs courts how to determine whether such an exceptional statement is present in a declaration: the court must examine each individual statement of the declaration independently to determine whether it, by itself, is against penal interest. 512 U.S. at 599. In this case the trial court correctly applied the *Williamson* rule, examining each individual statement of the Lane email independently and determining that none of the statements taken individually expose Lane to criminal liability sufficient to give the statements the presumption of truth required by Rule 804(b)(3). (Record 22) Because the rationale of Rule 804(b)(3) supports the *Williamson* rule, this Court should adhere to its precedent and reaffirm its holding in *Williamson. See Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) (holding that, while not an "inexorable command" stare decisis is the "preferred course" to overruling prior decisions). Then, this Court should defer to the district court's evidentiary finding that the Lane email is inadmissible because the district court properly applied the *Williamson* rule and did not abuse its discretion. As this question first involves statutory interpretation of Rule 804(b)(3), it is a "quintessential question[] of law" and is reviewed *de novo*. *United States v. Savage*, 737 F.3d 304, 306 (4th Cir. 2013). However, if this Court reaffirms *Williamson*, it should give deference

to the district court's evidentiary determination absent an abuse of discretion. *United States v. Ironi*, 525 F.3d 683, 686 (8th Cir. 2008).

a. *Williamson* should remain a binding interpretive standard for Rule 804(b)(3) governing declarations against penal interest.

The Government seeks to introduce the Lane email as hearsay evidence entitled to exception under Rule 804(b)(3). (Record 15) It argues that the overall thrust of the email contextualizes the meaning of its individual statements in a way that makes them self-incriminating. (Record 17, 22) But this Court rendered the Government's argument futile in *Williamson*. By adhering to a narrow reading of what constitutes a statement against penal interest, *Williamson* required that only individual statements within a larger narrative that directly incriminate the declarant be admitted. 512 U.S. at 599. This interpretive rule remains suitable because the rationale behind Rule 804(b)(3) requires it and because no change in circumstances asserted by the Government overcomes this rationale to justify adopting a broader interpretation.

i. The rationale behind Rule 804(b)(3) requires *Williamson*'s narrow interpretation of "statement against penal interest" to include only individual statements that directly self-incriminate the declarant.

Rule 804(b)(3) allows a self-incriminating statement to be admitted despite its status as hearsay because such statements are of the kind that reasonable people tend not to make unless they believe them to be true. In *Williamson*, this Court expressly held that this rationale was not satisfied by an "extended declaration" that might contain "both self-inculpatory and non-self-inculpatory parts" but which "sufficiently inculpates" in the aggregate. 512 U.S. at 599. Instead, it found that, within a broader narrative or extended statement, only the individual statements which reasonable people tend not to make unless they believe them to be true are "declarations

or remarks . . . that are individually self-inculpatory." *Id.* Therefore, this Court established how to respect the rationale of Rule 804(b)(3): by admitting statements that incriminate the speaker directly while excluding assertions that are merely collateral to such statements. *Id.* at 599-600.

The alternative position espoused by Judge Marino's dissent from the Fourteenth Circuit, that collateral statements be admitted alongside directly self-incriminating statements so long as there are no reasons to find them unreliable, (Record 52-53), fails to respect the rationale of Rule 804(b)(3). Hearsay evidence is presumed inadmissible. Fed. R. Evid. 802. This presumption must work against admitting collateral statements unless they are found to be reliable, not the other way around. *See, e.g.*, *Idaho v. Wright*, 497 U.S. 805, 818 (1990) (holding that if hearsay statements "do not fall within a firmly rooted hearsay exception, they are presumptively unreliable and inadmissible"); *United States v. Hall*, 165 F.3d 1095, 1110 (7th Cir. 1999) (holding that the party "wishing to introduce hearsay evidence must rebut the presumption of unreliability by appropriate proof of trustworthiness"). The *Williamson* Court concurred. "We see no reason why collateral statements . . . should be treated any differently from other hearsay statements that are generally excluded." *Williamson*, 512 U.S. at 600.

Judge Marino also contended that sometimes even an incriminating statement might be given without its declarant believing it to be true. (Record 49) But the hearsay exceptions are not intended to prevent false positives from ever being admitted. A strong presumption of reliability is not equivalent to infallibility. *Hickory v. United States*, 160 U.S. 408, 419-20 (1896) (holding that it is "absurd and dangerous to invest with infallibility" any "piece of presumptive evidence"). Judge Marino also suggests that there is often no clear way to count the precise number of statements contained within a compound declaration. (Record 50) Yet *Williamson* begins by citing to the Federal Rules of Evidence definition of a "statement" as an

"assertion." 512 U.S. at 599 (quoting Fed. R. Evid. 801(a)). This at least provides some guidance to courts discerning statements for the purposes of 804(b)(3).[6] The rationale that admitted statements should be those that a reasonable person would only say if believed to be true cannot apply to an entire narrative. *Williamson*, 512 U.S. at 599 (finding that the Rule 804(b)(3) rationale "simply does not extend to the broader definition of 'statement.'"). Courts must parse narratives to determine which assertions comply with the rationale of Rule 804(b)(3) and which do not.

ii. The incriminating nature of a statement is not determined by its recipient, so a looser standard for admissibility is not warranted.

The Government attempts to distinguish *Williamson* by arguing that when a declarant speaks to a close acquaintance rather than to law enforcement, as in this case, the motivation to mix true and untrue statements into the same declaration is greatly reduced. (Record 17) This argument ignores that the rationale for excluding collateral statements is still present in this case. Again, *Williamson* recognizes the general problem that the presumed truth of self-incriminating statements "simply does not extend to the broader definition of 'statement.'" 512 U.S. at 599. Whether an email to a boyfriend or a statement to police, no extended declaration may be presumed to contain only true assertions. The Court reached its conclusion in *Williamson* on how 804(b)(3) must be interpreted not because the declaration was made to a police officer but because of the internal logic of the rule itself. The Court based its concern that falsehood might be mixed with truth on the perception that human nature tempts people to mix in untruths after first establishing credibility by giving away a little truth. *Id* at 599-600. Neither this logic nor the rule changes simply because the declaration was made to a different kind of recipient.

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[6] It would be inappropriate, for instance, to read *Williamson* as requiring that every individual word be interpreted independently of all other words. *See* Emily F. Duck, *The Williamson Standard for the Exception to the Rule against Hearsay for Statements against Penal Interest*, 85 J. Crim. L. & Criminology 1084, 1110 (1995).

Further, the notable difference between this case and *Williamson* is not the recipient of the declaration. Rather, it is that in *Williamson*, the declarant definitively made statements which were self-incriminating, 512 U.S. at 604. In this case, it is disputed whether Lane in fact made *any* directly self-incriminating statements in her email. Consequently, the issue in this case is not only the reliability of collateral statements accompanying self-incriminating statements but also whether any self-incriminating statements are even present. The procedure for determining the presence of a self-incriminating statement is precisely what *Williamson* has already decided. A given statement is not a "statement against penal interest" under 804(b)(3) unless, interpreted individually, it so far tended at the time of its making "to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Williamson*, 512 U.S. at 599. To the extent it argues for a "relaxed" version of the *Williamson* rule in this case, (Record 42), the Government urges the acceptance of statements which, by themselves, do not give any reason to think that they would only be made if believed to be true. Mere presence of a collateral statement within a larger declaration whose incriminating nature is in dispute does not warrant the strong presumption of truth required for the Rule 804(b)(3) exception. This is the import of the holding in *Williamson*, and that precedent should be affirmed.

b. Applying *Williamson*, admission of the Lane email is barred because no individual statement exposes the declarant to criminal liability.

The district court excluded the Lane email after applying the *Williamson* rule and determining that no individual statement within the email directly incriminated Lane. (Record 22, 41-43) This determination was correct because the rationale of *Williamson* requires that collateral statements within the same extended declaration be excluded in the totality of the circumstances analysis that is used to determine whether an individual statement is self-

incriminating. Further, this determination of the lower court is a factual one that should receive the deference of the Court.

i. *Williamson* requires that collateral statements be excluded from the totality of the circumstances analysis applied to individual statements within a narrative.

After parsing from a larger narrative the individual statements that must be examined independently for admissibility, *Williamson* requires courts to determine whether an individual statement is admissible under Rule 804(b)(3) by examining it in the context of the surrounding circumstances in which it was made. "The question . . . is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,' and this question can only be answered in light of all the surrounding circumstances." *Williamson*, 512 U.S. at 603-04 (quoting Fed. R. Evid. 804(b)(3)); *see also United States v. Barone*, 114 F.3d 1284, 1295 (1st Cir. 1997). The realm of *all surrounding circumstances* provides a court much information to consider. At the very least, a court is required to "inquire into factual circumstances surrounding the making of the larger statement, *not merely the sentences* surrounding the statement against interest itself." Duck, *supra* note 6 at 1112 (emphasis added). Further, the rationale of *Williamson* suggests that surrounding sentences should not be included in the surrounding circumstances test at all. The test should instead be limited to the circumstances in which the entire declaration was made, as the Fourteenth Circuit held. (Record 41) For instance, in *Idaho v. Wright,* this Court reviewed a trial court's hearsay determination that considered the presence of "indicia of reliability." 497 U.S. at 815. The Court held that "unless an affirmative reason, arising from the *circumstances in which the statement was made*, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial," exclusion is

required.[7] 497 U.S. at 821 (emphasis added). Because *Williamson* identified this same concern with reliability as the policy rationale behind Rule 804(b)(3) that requires the narrow reading of what constitutes a "statement against penal interest," it should be read in a similar vein as limiting the reliability examination to the circumstances in which the statement was made. Surrounding sentences within a declaration—the collateral statements that cannot be presumed true in the way that individually self-incriminating statements can—should be excluded from the interpretation of the meaning of a statement.

Williamson's primary holding, that only statements which are independently self-incriminating are admissible, rests on the presumed reliability that non-incriminating statements within a declaration lack. "The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability." *Williamson*, 512 U.S. at 600. This same reasoning should logically apply *a fortiori* to indicate that the fact that a statement is collateral to a *possibly* self-incriminating statement says nothing at all about the collateral statement's reliability for interpreting the possibly self-incriminating statement. Because no statement in the Lane email is definitively self-incriminating, according to the *Williamson* rule, collateral statements in the email should not be considered in the totality of circumstances analysis to bolster the incriminating nature of any individual statement.

Judge Marino suggested that this requirement is unworkable because it requires the consideration of the totality of the circumstances and yet it forbids interpreting the assertion in

[7] *Wright* was a constitutional case that did not involve the interpretation of a Federal Rule of Evidence. This Court has abrogated cases like *Wright* by removing discretion from trial courts to make reliability determinations when it comes to what the Confrontation Clause requires. *See Crawford v. Washington,* 541 U.S. 36 (2004). However, since this case involves the application of a statute, Rule 804(b)(3), which does still require trial courts to determine the reliability of hearsay statements in surrounding circumstances, the *Wright* analysis provides guidance.

light of collateral statements, which are part of the surrounding circumstances. (Record 51). But this argument ignores the full range of *surrounding circumstances* other than collateral statements. There is no contradiction here; collateral statements are just one part of surrounding circumstances, which the trial courts ought not use in determining whether an individual statement incriminate its declarant. Non-textual evidence of the surrounding circumstances must be considered.

ii. The district court's application of ***Williamson*** and determination that the Lane email is not entitled to exception under Rule 804(b)(3) deserves deference.

Since the district court applied the correct legal standard from *Williamson* to interpret the statute, its decision regarding the admission of hearsay testimony under Rule 804(b)(3) should be reviewed for abuse of discretion. *Ironi*, 525 F.3d at 686. Although the Government argues that the circumstantial context in which the email was written imbued each of its statements with a meaning against Lane's penal interest, (Record 17), the district court did not abuse its discretion when it rejected this argument and excluded the email after finding that no individual statement directly incriminated Lane.

By excluding collateral statements, the trial court did not err in finding that the surrounding circumstances do not indicate that a reasonable declarant would believe they were exposing themselves to criminal liability by making any of the individual statements in the email. Even taking the statement from the email that presents the closest case, "I know you have suspected before about the business my partner and I have been running," (Record 29), Lane did not indicate anything specific about the business in which she was involved. Even if her prior confrontation with Billings is taken to indicate that the business was in some way illicit, she admitted to no specific criminal activity. A reasonable person could refer to a business in an email, even one that is vaguely illegal, without thinking they were implicating themselves in any

particular criminal enterprise. Persons can only be held liable for particular crimes to which they are linked. Perhaps a motivated prosecutor might discover the email and decide to open an investigation searching for the specific crime at which the vague statement only hints. But such prosecution is too speculative to be considered actual exposure to criminal liability. *See United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995) (finding that a statement that "possibly could or maybe might lead to criminal liability" does not sufficiently "subject the declarant to criminal liability" to make the statement admissible).

The Lane email differs from the hypothetical example in *Williamson* where a declarant says, "Sam and I went to Joe's house" in circumstances in which "a reasonable person would realize that being linked to Joe and Sam would implicate the declarant in [their] conspiracy." 512 U.S. at 603. Unlike that conspiracy hypothetical, there is no inherently implicating outside fact here, such as a particular criminal enterprise or conspiracy, to which the email links Lane. Her admission that she operates a business does not connect her to any particular crime in the way that "Sam and I went to Joe's house" might connect a person to a conspiracy that was known to have been formed at that location. Prior to the email, Billings had confronted Lane with suspicions that she was selling steroids. (Record 9) But that confrontation took place nearly a month before the email, and a romantic couple would certainly have had conversations on all sorts of topics, and perhaps businesses, in the meantime. (Record 9)

The Government also urges sinister interpretations upon other statements in the email in hindsight. It suggests reading "keep him quiet" and "I don't know exactly what she has in mind yet" as indicators of an intent to kill because the email was "discovered during a DEA investigation in which an informant wound up dead." (Record 17) However, Rule 804(b)(3) defines a self-incriminating statement as one that exposes the declarant to criminal liability *at the*

time it was made. A drug investigation happened to coincide with the writing of the email, but there is no evidence in the record that Lane knew of that investigation. (Record 9) Further, Billings did not think to turn over the email until February 3, 2012, at the earliest. (Record 16) Thus it is reasonable to conclude, as the trial court did, that the email did not obviously link Lane to any specific criminality at the time it was written.

At best, these statements and circumstances present a "close call," (Record 44), in which even the dissent from the Fourteenth Circuit concedes that a judge could reasonably conclude that the statements should be excluded. (Record 51) Such cases are precisely the kind that warrant deference to the trial court's factual determinations. *Stevens v. United States*, 49 F.3d 331, 335 (7th Cir. 1995). The mere possibility of finding one or more of the statements self-incriminating in hindsight is not enough to overturn the determination the court in fact made. It was reasonable for the trial court to find that, considering all factors that *Williamson* allows to be considered, no statement in the email is individually self-incriminating and there are no other surrounding circumstances that necessarily warrant admission. The Lane email is not entitled to exception under Rule 804(b)(3), and that conclusion by the district court should be affirmed.

IV. The Confrontation Clause bars admission of a statement like the Lane email that is made by a non-testifying co-defendant and implicates another defendant because such a statement is not subject to cross-examination.

Even if this Court finds the Lane email admissible under Rule 804(b)(3), Zelasko's constitutional right to confrontation expressed by *Bruton v. United States,* 391 U.S. 123 (1968), bars its admission. The Government sought to admit the Lane email to incriminate Zelasko. (Record 18) But Lane will not testify and therefore avoids cross-examination. (Record 18) Zelasko objected to the admission, arguing that under the *Bruton* doctrine, the Confrontation Clause prohibits it as a statement of a non-testifying co-defendant in a joint trial. (Record 18-19)

The district court sustained Zelasko's objection and excluded the email. (Record 23) The court of appeals affirmed the district court's ruling. (Record 45)

The Sixth Amendment guarantees a defendant the right to confront witnesses against her. U.S. Const. amend. VI. As such, a co-defendant's statement that implicates another defendant in a joint trial may not be admitted if the co-defendant avoids testifying. *Bruton,* 391 U.S. at 137. The Government cannot have it both ways. Because the scope of the Confrontation Clause is not limited to testimonial statements by *Crawford v. Washington*, 541 U.S. 36 (2004), and adherence to the *Bruton* doctrine in this case furthers the policy goal of *Crawford*, *Bruton*, and the Sixth Amendment, admission of the Lane email ought to be barred. A Confrontation Clause issue is a mixed question of law and fact. *Horn v. Quarterman*, 508 F.3d 306, 312 (5th Cir. 2007). A mixed question of law and fact is reviewed *de novo*, using the facts as found by the district court. *Barrientes v. Johnson*, 221 F.3d 741, 750 (5th Cir. 2000).

a. *Bruton* bars the admission of a statement by a non-testifying co-defendant that implicates the defendant.

The *Bruton* doctrine developed from a case similar to this one. In *Bruton*, a defendant and co-defendant in a joint trial were charged with robbery. 391 U.S. at 124. During the pre-trial investigation, the co-defendant confessed his involvement to a postal inspector and implicated the defendant as his accomplice. *Id.* at 124. The Government introduced the co-defendant's confession against the defendant, despite the co-defendant's decision to not testify. *Id.* The district court instructed the jury to only consider the confession in determining the confessing co-defendant's guilt and to ignore it when assessing the guilt of the defendant. *Id*. at 125. Still, the non-confessing defendant was convicted. *Id.* at 124. This Court reversed, holding that the admission of the confession implicating the defendant violated his right to confrontation. *Id*. at 137. The Court held that "a major reason underlying the constitutional confrontation rules

is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him." *Id*. at 126 (quoting *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965)) (internal quotation marks omitted). Zelasko faces prejudice similar to the defendant in *Bruton*: a non-testifying co-defendant's statement, if admitted into evidence, will inevitably force the jury into unreasonable mental gymnastics. *Id*. at 130-31, 136.

As with Rule 404(b), preventing prejudice to defendants lies at the heart of the *Bruton* doctrine. 391 U.S. at 132. In Zelasko's case, the Government presented "powerfully incriminating evidence" from outside of court from a declarant who "stands accused side-by-side with the defendant." *Id*. at 135-136. The effect is "devastating" to the non-confessing defendant. *Id*. at 136. Not only is the credibility of the evidence suspect, "the unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."[8] *Id*.

The Sixth Amendment imposes strict requirements to prevent unfair prejudice. To admit evidence typically barred by the *Bruton* doctrine, courts must redact any references to the defendant. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). The *Richardson* Court held that only a non-testifying co-defendant's statement that does not implicate the defendant at all avoids prejudicing that defendant unfairly. *Id.* at 208. To meet this standard, a statement must not only be free of blank spaces or words such as "redacted" or "deleted" in lieu of defendant's name, it must not contain "any reference to his or her existence." *Gray v. Maryland*, 523 U.S. 185, 191-92 (1998) (quoting *Richardson*, 481 U.S. at 211). The Lane email, by use of the word "partner," clearly references another's existence and fails to meet this Court's redaction requirement. Lest

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[8] The credibility of accomplice testimony is suspect due to the accomplice's motivation to shift blame to others. *See Caminetti v. United States*, 242 U.S. 470, 495 (1917); *Crawford v. United States*, 212 U.S. 183, 204 (1909); *Stoneking v. United States*, 232 F.2d 385, 392 (8th Cir. 1956).

it unfairly prejudice Zelasko, the Court should follow its decisions in *Bruton* and *Richardson* and bar its admission.

b. Neither *Crawford* nor a subsequent decision limits the protection of the Confrontation Clause to testimonial statements.

The Government contends that the Court limited the application of the *Bruton* doctrine to testimonial statements in *Crawford*. (Record 18) While this Court's decision in *Crawford* added a new dimension to Confrontation Clause jurisprudence, it did not affect *Bruton* and its application to cases like Zelasko's. In *Crawford* itself, this Court did not limit the reach of the Confrontation Clause to testimonial statements, 541 U.S. at 61, and subsequent decisions further clarified the definition of testimonial statements without making a definitive ruling as to the continued application of *Bruton*. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Davis v. Washington*, 547 U.S. 813, 824 (2006). *Bruton* still governs the admissibility of a prejudicial co-defendant statement, like the Lane email, where the co-defendant does not testify.

Crawford addresses the reliability of hearsay evidence not tested by the gauntlet of cross-examination. 541 U.S. at 50-59. There, the defendant was convicted after the prosecution admitted an interrogation of his wife against him. *Id*. at 38. His wife did not testify at trial and left the defendant unable to test the reliability of the evidence through confrontation. *Id.* at 40. Finding the wife's interrogation testimonial, this Court barred its admission against the defendant as violating the Confrontation Clause. *Id.* at 68. The Government argues that this Court's decision in *Crawford* makes *Bruton* irrelevant by framing all Confrontation Clause challenges in terms of testimonial or non-testimonial statements. However, the Government takes *Crawford* too far. The *Crawford* Court expressly stated that their holding in that case did not limit the Confrontation Clause to testimonial statements. *Id.* at 61. Nor has the Court definitively limited

the Confrontation Clause to testimonial statements in subsequent cases despite further developing the differences between testimonial and non-testimonial hearsay.

In *Davis*, this Court specifically posed, but did not answer, the question of whether the Confrontation Clause is limited to testimonial statements. 547 U.S. at 824. Instead, the Court simply reiterated its historical analysis of the term "witness." *Id*. at 824. Focusing on the definition of that term as one who "bears testimony," this Court proclaimed imprecisely that "a limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not only its 'core,' but its perimeter." *Id*. The Court gives no indication whether such a perimeter stands as an impenetrable barrier, limiting the Confrontation Clause to testimonial statements, or only a soft line that divides most, but not all, cases.

A year later, the Court made another attempt to clarify the *Crawford* decision. In *Whorton*, the Court addressed *Crawford*'s reach while deciding a dissimilar case. 549 U.S at 420. The Court addressed the applicability of a standard for retroactivity of new criminal procedure rules. *Id*. at 409. As such, the question presented was whether or not the existing *Crawford* standard marked a "watershed rule that implicated the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 414 (internal citation omitted). No element of the decision required an interpretation of *Crawford*; it only called for a restatement and evaluation. Since *Whorton* adds nothing new to Confrontation Clause jurisprudence, it should not be given determinative authority on the interpretation of *Crawford*.

Second, *Whorton*'s assessment of *Crawford*'s effect on non-testimonial hearsay is dicta. In assessing the overall impact of *Crawford*, *Whorton* balances any improved reliability gleaned from the rule by pointing out in passing that *Crawford* limited the Confrontation Clause to testimonial statements. *Id.* at 419-20. However, the Court immediately went on to state its

uncertainty about whether or not *Crawford* improved reliability, adding "the question here is not whether *Crawford* resulted in some net improvement in the accuracy of fact finding . . . . Rather, the question is whether testimony admissible under [the previous rule] is so much more unreliable than that admissible under *Crawford* …. *Crawford* did not effect a change of this magnitude." *Id*. at 420. In sum, *Whorton* makes a claim about the reach of *Crawford*, but then indicates that it is irrelevant. *Whorton*'s assessment of *Crawford* is unnecessary to the resolution of the case, and should not be relied on.

In reading *Crawford* and its progeny and their effect on *Bruton,* this Court should narrow its focus. *Crawford* reserves the question of whether *Bruton* still applies, and the Court has not subsequently provided an answer. *Whorton* simply has no effect on *Crawford*, and *Davis* gives only a nebulous musing on its effect. Without a clear indication that *Bruton* has been overruled, its doctrine stands.[9]

c. Barring the statement of a non-testifying co-defendant when it implicates a defendant serves the policy goal of *Crawford, Bruton*, and the Sixth Amendment.

Fundamentally, *Crawford, Bruton*, and the Sixth Amendment share the same policy goal—ensuring defendants have the opportunity to cross-examine witnesses through whom the Government seeks their conviction. *Crawford*, 541 U.S. at 68; *Bruton*, 391 U.S. at 125. Accepting the Government's arguments and admitting the Lane email to incriminate Zelasko without an opportunity to cross-examine cuts against that critically important goal. But by upholding the district court's application of *Bruton*, this Court will satisfy it.

[9] Even if the Court adopts a testimonial requirement, the Lane email is arguably a testimonial declaration. Billings is the coach of a national sports team and, therefore, potentially a federal agent tasked in part with maintaining discipline on the team, a role that likely calls for occasional investigations. Lane knew Billings was inquiring into a potential drug conspiracy because he spoke with her about it. (Record 8) In this light, Billings's role resembles that of the postal inspector in *Bruton*, statements from whom this Court recognized as testimonial. *Crawford*, 541 U.S. at 57.

This Court's decision in *Crawford* references the trial of Sir Walter Raleigh frequently. *Crawford*, 541 U.S. at 44-45, 51-52, 62, 68. It labels that trial one of the "most notorious instances" of prosecutorial abuse that lead to the adoption of the Sixth Amendment's Confrontation Clause. *Id.* at 44. Sir Walter Raleigh faced trial on charges of treason, and the evidence against him included of a sworn statement and a letter from an alleged co-conspirator, Lord Cobham, implicating Raleigh in a treasonous plot to kill King James. *Id*. The prosecution argued that Cobham's statement and letter were reliable because the Crown had not promised him leniency, Cobham implicated himself in treason, and he had not made his statements under pressure from the authorities.[10] In addition, the prosecution offered into evidence the statement of Dyer, a pilot who recounted that he had heard a Portuguese sailor tell him that Raleigh and Cobham intended to kill the king.[11] Raleigh protested at the injustice of being unable to face his accuser but was ultimately convicted and received a death sentence. *Crawford*, 541 U.S. at 44.

If Sir Walter Raleigh's case were a seminal instance against which this Court has measured our Confrontation Clause, the *Crawford* framework that the Government espouses in this case falls short because it would only solve half of Raleigh's problems.[12] *Bruton,* by preventing testimony against individuals like Raleigh from persons not subject to cross-examination, solves them all. Zelasko faces similar difficulties, a non-testifying co-defendant incriminating her with a letter and the inability to subject that letter to cross-examination.

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[10] *See* Jeffrey L. Fisher, *Originalism As an Anchor for the Sixth Amendment*, 34 Harv. J.L. & Pub. Pol'y 53, 59 (2011).

[11] *See* Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause.* 64 Fla. L. Rev. 1669, 1680 (2012).

[12] Dyer's statement was non-testimonial hearsay, so the Confrontation Clause would not bar it under the Government's theory in Zelasko's case.

Crawford advocates reliability. *Bruton* warns against prejudice. Both of these ends are achieved through confrontation.

Zelasko is charged with conspiracy to distribute anabolic steroids. The only evidence that plausibly links Zelasko to Lane's drug distribution scheme is the Lane email. Lane will not take the stand, so the contents of the email cannot be tested by cross-examination. Instead, if the Lane email is admitted, the jury will be left with a reference to a "partner," and when considering whom that partner may be, they will only be able to "look across at [the defendant]" and make a prejudicial inference. *Gray*, 523 U.S. 185, 193. The Confrontation Clause exists to prevent just such an injustice. This Court should affirm the district court's refusal to admit the Lane email.

Conclusion

The judgment of the district court and court of appeals should be affirmed.

Respectfully submitted.

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Attorneys for Respondent

Appendix

Relevant Federal Rules of Evidence

Rule 401. Test for Relevant Evidence
Evidence is relevant if:

a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
b) the fact is of consequence in determining the action.

Rule 402. General Admissibility of Relevant Evidence
Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character Evidence; Crimes or Other Acts

a) . . .
b) **Crimes, Wrongs, or Other Acts.**
    1) **Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
    2) **Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
        A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

. . .

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

a) . . .
b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
    1. . . .
    2. . . .
    3. **Statement Against Interest.** A statement that:
        A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
        B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

        . . .