NO. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2013

UNITED STATES OF AMERICA,

Petitioner,

— against —

ANASTASIA ZELASKO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

TEAM 15

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether Federal Rule of Evidence 404(b) bars a defendant's use of evidence of a third party's similar prior acts to show that the third party committed the crime.

II. Whether a defendant's constitutional right to present a complete defense requires that the defendant has the opportunity to present evidence of a third party's propensity to commit similar acts.

III. Whether Federal Rule of Evidence 804(b)(3) permits the admission of collateral statements that, while part of a broader narrative, are not self-inculpatory standing alone.

IV. Whether the Confrontation Clause bars a codefendant's non-testimonial, out-of-court statements that implicate the defendant at a joint trial.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

UNITED STATES COURTS OF APPEALS CASES:

CONSTITUTIONAL AMENDMENTS:

FEDERAL RULES OF EVIDENCE:

TREATISES, BOOKS, AND LAW REVIEW ARTICLES:

OPINIONS BELOW

The opinion of the Fourteenth Circuit Court of Appeals is unreported, but appears on pages 30–54 of the Record. The rulings of the United States District Court for the Southern District of Boerum are unreported, but appear on pages 20–23 of the Record.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which appears as Appendix "A."

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

This is an interlocutory appeal from two evidentiary rulings. Alexandra Zelasko has been taken into federal custody and charged, along with Jessica Lane, with conspiracy to distribute and possess with the intent to distribute anabolic steroids, distribution and possession with the intent to distribute anabolic steroids, simple possession of anabolic steroids, conspiracy to murder in the first degree, and murder in the first degree. (R. 4–5, 31).

On July 16, 2012, the district court heard evidence on motions from both Zelasko and the Government. (R. 7). First, Zelasko sought to introduce Miranda Morris' testimony about another team member's propensity to engage in the criminal conduct for which Zelasko was charged. (R. 7.) The Government sought to exclude this evidence under Federal Rule of Evidence 404(b). (R. 12.) Zelasko responded that Federal Rule of Evidence 404(b) does not apply to a defendant offering the evidence against a non-party third person, and that not allowing her to present this evidence would violate her constitutional right to present a complete defense under *Chambers v. Mississippi*. (R. 21–22.)

Next, the trial court considered the Government's motion to introduce a hearsay statement made by codefendant Lane in an e-mail under Federal Rule of Evidence 804(b)(3) as a statement against penal interest. (R. 16.) Zelasko argued that the out-of-court statements were not admissible against her as the e-mail did not meet the requirements of *Williamson v. United States*. (R. 16.) Further, even if the statements did, Zelasko's rights under the Confrontation Clause would be violated, because Lane would not testify and, as a result, could not be cross-examined. (R. 17–18.)

The district court found in favor of Zelasko on both motions, allowing Morris' testimony but excluding the e-mail. (R. 20–23.)

The Court of Appeals. The Government filed an interlocutory appeal under 18 U.S.C. §§ 3731 and 3731-A. (R. 30.) On February 14, 2013, the Fourteenth Circuit Court of Appeals affirmed the district court's evidentiary rulings, concluding that: (1) Federal Rule of Evidence 404(b) does not apply to a defendant's use of evidence to show the criminal propensity of a third party; (2) that a defendant's right to present a full defense encompasses such propensity evidence; (3) that *Williamson*, though sometimes difficult to apply, remains binding precedent that bars the admission of statements collateral to declarations against penal interest; and (4) that the *Bruton* doctrine applies to testimonial and non-testimonial evidence. (R. 31.) On October 1, 2013, this Court granted the Government's Petition for Writ of Certiorari to address the four issues. (R. 5.)

II. FACTUAL BACKGROUND

Zelasko and Lane are members of the women's United States Snowman Pentathlon team. (R. 1). The Snowman Pentathlon is a competition that consists of dogsledding, ice dancing, aerial

skiing, rifle shooting and curling. (R. 1–2.) The World Winter Games is the team's primary competition. (R. 1.)

The Government's Theory. The Government contends that Zelasko and Lane engaged in a conspiracy to sell performance-enhancing anabolic steroids. (R. 4–5.) To prove this, the Government intends to introduce evidence to show that Zelasko and Lane engaged in a conspiracy to sell anabolic steroids to their teammates and that Hunter Riley, a member of the men's team and a DEA informant, discovered the enterprise and Zelasko and Lane conspired to murder him to silence him. (R. 32.) Zelasko denies both allegations, maintaining that Riley's death was an accident and that she had no involvement with any conspiracy to sell performance-enhancing drugs. (R. 32.)

Morris' Testimony. Zelasko filed a motion to allow her to introduce Miranda Morris' testimony in an effort to prove that another person, not herself, was involved in the conspiracy to sell steroids. (R. 32.) Morris will testify that, in April 2011, another team member, Casey Short, sold an anabolic steroid known as White Lightning to her and their teammates while both were members of the Canadian Snowman team. (R. 32.) This is the same anabolic steroid involved in this case. (R. 32.) On October 1, November 3, and December 9, 2011, Riley approached Lane and sought to buy a derivative of White Lightening known as ThunderSnow,[1] ostensibly for his personal use. (R. 2–3.) Lane declined each request (R. 2–3.) By introducing evidence from Morris, Zelasko seeks to show that Short is Lane's coconspirator. (R. 32–33.) By casting doubt on her involvement in the drug selling conspiracy, this evidence casts considerable doubt on the

[1] ThunderSnow has been discovered in the possession of several eastern European teams that compete in the World Winter Games. (R. 28.) ThunderSnow is typically used in 50- to 100-milligram daily doses. Injection is the primary way of ingesting the drug. The steroid is often "cycled" using one dose per day for several months, then taking no doses for several weeks. (R. 28.) The DEA seized twenty 50-milligram doses of ThunderSnow at Lane's residence. (R. 4.) The DEA also seized 12,500 milligrams of ThunderSnow at the team's training facility. (R. 3.)

Government's theory that Zelasko intentionally shot and killed Riley to cover up her role in the conspiracy. (R. 33.) This evidence from Morris is the only way the defense can prove the defense's theory that the second coconspirator was Short, not Zelasko. (R. 14.)

Lane's E-mail. The Government filed a motion to introduce an e-mail from Lane to her boyfriend and coach, Peter Billings. (R. 33.) The January 16, 2012 e-mail[2] addressed Billings' suspicions and mentioned that a male member of the team had found out and was threatening to report them if they did not come clean. (R. 3.) The e-mail stated her partner wanting to figure out a way to keep him quiet, though she did not know what she had planned yet. (R. 3.)

SUMMARY OF THE ARGUMENT

This is an interlocutory appeal of issues related to two pieces of evidence. The lower courts reached the proper conclusion as to both and should be affirmed.

First, the trial court properly allowed Zelasko to introduce a third party's testimony to explore the theory that someone else committed the crime. Federal Rule of Evidence 404(b) does not bar a defendant's use of evidence to show the criminal propensity of a third party. To be sure, the Government may not offer propensity evidence against the defendant. But the same rule and its attendant rationale do not apply when the defendant seeks to introduce the evidence against a third party. The Rule's purpose is to prevent prejudice against a defendant. Zelasko intends to offer the testimony to negate her guilt and to show that Lane's coconspirator was another

[2] The Court of Appeals broke the email down into 5 separate statements:

> 1) "I really need your help;" 2) "I know you've suspected before about the business my partner and I have been running with the female team;" 3) "One of the members of the male team found out and threatened to report us if we don't come clean;" 4) "My partner really thinks we need to figure out how to keep him quiet" and 5) "I don't know exactly what she has in mind."

(R. 42 n.d.)

teammate, not Zelasko. The teammate, Short, is not a defendant and there is no risk of prejudice to her. The jury members may accept or reject the theory, but they should hear it.

Apart from the evidentiary basis, a defendant has the constitutional right to present a full defense, including the opportunity to present the propensity evidence. Grounded in the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and the Sixth Amendment's Confrontation Clause, Zelasko's rights necessarily trump evidentiary rules. This is particularly true in situations, like here, where the excluded evidence is the only evidence to support the defendant's theory.

This Court should affirm the decision to allow Zelasko to introduce the propensity evidence.

Second, the trial court properly excluded the e-mail Lane sent to Billings. While the e-mail generally suggested a conspiracy to distribute steroids, the standards for a statement against interest require more; a general statement that is not inculpatory to the codefendant is simply not enough. Indeed, the Federal Rule of Evidence 804(b)(3) should not substitute the requirements for a statement of a coconspirator in furtherance of a conspiracy—a standard for admission that the Government has waived. *Williamson*'s totality of the circumstances approach does not permit judges to rule on the admissibility of each discrete statement based on the cumulative effect of all the statements contained in the e-mail. No statement in the e-mail meets the standard.

The trial court also recognized that Zelasko had a right to confront her accusers and the fact Lane chose not to testify violated that right. Yet, the Government suggests that the Confrontation Clause rights announced in *Bruton v. United States* were severely limited by *Crawford v. Washington*. But *Crawford* considered a different issue, never so much as mentioning *Bruton*. The introduction of Lane's e-mail would violate Zelasko's rights under the Sixth Amendment.

Lane will not testify in the joint trial with Zelasko, and Lane's e-mail may implicate Zelasko in the eyes of the jury. *Bruton* mandates—even post-*Crawford*—that the out-of-court statement may not be admitted into evidence against Zelasko.

This Court should affirm the decision to exclude Lane's e-mail to Billings.

STANDARD OF REVIEW

The Court reviews evidentiary decisions of lower courts for abuse of discretion. *United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001).

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT MORRIS' TESTIMONY REGARDING SHORT'S PRIOR DRUG SALES WAS ADMISSIBLE.

As its first issue, the Government contends that Zelasko has no right under Federal Rule of Evidence 404(b) or the United States Constitution to introduce evidence that someone else committed the crime with which she was charged. (R. 34.) The district court disagreed, recognizing that the exclusion of evidence of third-party guilt would have denied her a fair trial. (R. 21–22.) The court of appeals affirmed, offering two separate justifications why the ruling was proper. (R. 33–38.) The appellate court correctly held that Morris' testimony was admissible as reverse Rule 404(b) evidence because Rule 404(b) concerns are not present when a defendant is offering evidence against a third party. (R. 35.) The appellate court also correctly concluded that Zelasko's constitutional right to a complete defense would be violated with the exclusion of Morris' testimony. (R. 38.) The record supports both justifications.

A. Morris' Testimony Regarding Short's Past Drug Sales Satisfies the Standard for Reverse Rule 404(b) Evidence.

The Sixth Amendment guarantees a defendant's right to present evidence and cross-examine witnesses against her. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). A major part of this guarantee is the right to present evidence of relevant third-party wrongdoing. This kind of evidence—often termed "reverse Rule 404(b) evidence"—has been recognized as critical to the defendant's exercise of his constitutional rights. *See, e.g., United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004).

The presentation of evidence concerning crimes other than those presently charged is generally regulated by Federal Rule of Evidence 404(b). This rule—though employed by the Government in most instances—permits other crimes evidence to be presented on any party's behalf. *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999) (citing Fed. R. Evid. 404(b)).. Evidence of third-party crimes may be admitted under Rule 404(b) when it bears on a relevant issue in the case. *Huddleston v. United States*, 485 U.S. 681, 686 (1988) (recognizing Rule 404(b) standard allows for the admission of evidence of third-party acts when the evidence is probative of a material issue other than character). The rule is applied differently, however, when defendants present other crimes evidence. The standard for similarity is lower when a defendant offers this kind of evidence because the traditional factor of prejudice to the defendant is absent. *United States v. Stevens*, 935 F.2d 1380, 1404 (3d Cir. 1991).

The appellate court properly affirmed the trial court's decision to allow Morris' testimony as reverse 404(b) evidence. Federal Rule of Evidence 404(b) establishes that a defendant must be tried only for the charged offense—not for past crimes, wrongs, acts, or for whom he or she is as a person. *McCormick on Evidence* § 190 (Edward W. Cleary ed., 3d ed. 1984). Rule 404(b) does not apply when the defense is offering evidence to cast doubt on the defendant's guilt.

1. The court of appeals applied the correct legal standard when it evaluated Morris' testimony under a reverse Rule 404(b) standard.

When a defendant offers evidence of the possibility that a third party is the true coconspirator, the traditional concerns behind rule 404(b) evaporate. That rule evolved from the common law precept that admitting evidence of past acts can lead a fact-finder to draw prejudicial inferences against defendants. Introducing evidence of Short's bad acts implicates none of those same policy concerns. Reverse 404(b) evidence is admissible when sufficient similarities between the two acts make the evidence relevant, and its probative value is not outweighed by its prejudicial effect. This standard preserves sufficient safeguards to ensure only relevant, probative, and not misleading evidence is admitted.

a. The traditional concerns addressed by Rule 404(b) are not present when a defendant is offering evidence against a third party.

Defendants use reverse 404(b) evidence to negate the defendant's guilt and raise the possibility that a third party committed the charged offense instead of the defendant. *United States v. Della Rose*, 403 F.3d 891, 901 (7th Cir. 2005). Courts apply two general standards for defendants seeking to admit evidence of other bad acts by third parties. The first standard was applied by the court of appeals and requires courts, in determining whether to admit reverse 404(b) evidence, to balance the probative value of the evidence against considerations, such as confusion of the issues, waste of time, and prejudice. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). The second standard, as advocated by the dissent below, would require the court to scrutinize reverse 404(b) evidence under the same standards as it would under regular 404(b) when the prosecution is offering it against a defendant.[3] *See United States v. McCourt*, 925 F.2d

[3] The dissent relies on *United States v. Lucas* for the proposition that the standard analysis of 404(b) should govern the admission of reverse 404(b) evidence. (R. 46–47) (Marino, J., dissenting). The Sixth Circuit Court of Appeals in *Lucas* held that the standard analysis of Rule 404(b) should *generally* be applied to cases where such evidence is

1229, 1232–33 (9th Cir. 1991). This Court should adopt the standard applied by the court of appeals because the regular concerns behind rule 404(b) are not present.

Courts have held the traditional concerns of Rule 404(b) are inapplicable when a defendant offers evidence of third party's previous crimes. For example, in *United States v. Morano*, the Eleventh Circuit court held that, where evidence is being used against a third party, Rule 404(b) does not apply to exclude evidence of an extraneous offense committed by someone other than the defendant. 697 F.2d 923, 926 (11th Cir. 1983). The court reasoned that because the evidence was not introduced to show the defendant had a criminal disposition to commit the crime, the policies implicated under the rule did not apply. *Id*. Similarly when considering reverse 404(b) evidence, the Third Circuit Court of Appeals rejected the Government's attempt to impose hard and fast preconditions on the admissibility of reverse Rule 404(b) evidence. *United States v. Stevens*, 935 F.2d at 1405. Further, the court held that reverse Rule 404(b) evidence is admissible if it negates the defendant's guilt and passes the Rule 403 balancing test. *Id*. at 1404–05.

Other courts have reached the same conclusion.[4] *See United States v. Aboumoussallem*, 726 F.2d 906, 911–12 (2d Cir. 1984) (holding that when a defendant offers evidence of a third

---

used against a third party. 357 F.3d at 606 The court acknowledged that other circuits had used a different standard in admitting reverse 404(b) evidence, stating "Nevertheless, we recognize, as do several of our sister circuits, that such evidence when presented by the defense, requires us to reconsider our standard analysis, as the primary evil that may result from admitting such evidence against a defendant—by tainting his character—is not present in the case of 404(b) evidence used against an absent person. *See, e.g.*, *United States v. Stevens*, 935 F.2d at 1404; *see also United States v. Wilson*, 307 F.3d 596, 601 (7th Cir. 2002). There is, therefore, some merit in considering the admissibility of such 404(b) evidence as depending on a straightforward balancing of the evidence's probative value under Rule 401 against Rule 403's countervailing considerations." The court stated that the evidence was only mildly relevant but noted that a more specifically similar crime—for example, he had used someone else's car to distribute cocaine—might have been admitted under this standard. *Id*. at 606. The court in *Lucas* left open the possibility that they could apply a different standard using the term generally. *Id*. The scenario as given here could be a time where the court may have used the standard in their sister courts, because it is the only evidence that the defendant has to pursue her theory.

[4] In addition, as acknowledged by the concurrence in *Seals*, when a defendant offers reverse 404(b) evidence, it does not apply in the same context as traditional 404(b) evidence. 419 F.3d at 611. The rule was designed to disallow evidence that simply suggested that, because the person has committed the offense in the past, they would act in accordance with their past acts. *Id*. The evidence here is not being offered to say that because a third party has committed this sort of offense in the past, they probably committed it again. *Id*. Rather, the evidence is being offered

party's other acts, "the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense"); *see also United States v. McClure*, 546 F.2d 670, 672–73 (5th Cir. 1977) (finding that while "strict standards for admissibility protect the defendant from prejudice" in the normal case, a defendant has a right, when offering evidence, to "present a vigorous defense," although the judge can exclude the evidence under Federal Rule of Evidence 403).

b. The reverse Rule 404(b) standard provides ample safeguards to ensure only reliable probative evidence will be presented to the jury.

The reverse Rule 404(b) standard allows courts to ensure only relevant probative evidence is presented to a jury. Adopting this standard does not allow a defendant to bring in evidence of any crimes committed by third parties because barriers still exist that the defendant must overcome. *United States v. Williams*, 458 F.3d 312, 313–14 (3d Cir. 2006). For example, the defendant must show that the evidence is relevant under Federal Rule of Evidence 401. *Id*. And, even if relevant, the third party acts must be measured against Federal Rule of Evidence 403 concerns. *Id*.

The Seventh Circuit Court of Appeals' explanation of this safeguard in *Seals* is instructive. There, four masked African-American men in camouflage fatigues robbed a credit union. 419 F.3d at 602–03. One wore a blonde wig, all were armed with handguns, and they used a stolen van. *Id*. An investigation led to the arrest of two men. *Id*. Both men gave statements admitting to their involvement and identifying their fellow robbers, one of whom was Seals. *Id*. One month before trial, the district court ordered the Government to produce police reports from a second

---

to show because of similarities of the two crimes that the likely identity of the culprit is the third party. The concurrence stated the use of evidence in this manner should fall under the exception to rule 404(b) for proof of identity; therefore 404(b) does not govern. *Id*.

bank robbery that happened in a town thirty-one miles away eight days after the robbery. *Id*. at 603. The second robbery was committed by five African-American males—one of which was dressed as a construction worker and another who wore a woman's dress—who were also armed with handguns. *Id*. The Government produced the reports, but made a motion in limine to exclude the evidence of the second robbery. *Id*. The district court granted the Government's motion, holding there were not enough similarities between the two robberies and that the evidence would confuse the jury. *Id*.

The district court applied the standard for admission that normal 404(b) evidence would receive. *Id*. at 606–07. But the Seventh Circuit court held that the district court applied too rigorous of a standard and instead opted to apply the standard from *Stevens*. *Id*. at 607. Under that standard, the court decided the propensity evidence was irrelevant and, therefore, inadmissible. *Id*. The court reasoned that the similarities between the two robberies were too generic. *Id*. The court pointed out that the number of robbers and the disguises were different. *Id*. Seals argued that the two robberies were substantially similar because, in his view, both involved a robber dressed as a woman. *Id*. The court rejected this argument because, even though they were both dressed in woman's clothing, the clothing was not similar. *Id*. In the robbery that Seals was charged with, there was a man dressed in a blonde wig and camouflage, while the second robbery involved a man in a dress. *Id*. Finally, the court noted the *modus operandi* of the two crimes were different, because in the robbery which Seals was charged with, the robbers jumped over the counter, while in the second robbery, the robbers waited on the customer's side of the counter for the tellers to deliver the money. *Id*.

The *Seals* case shows that even though the approach adopted by the court of appeals is a lighter standard, there are still sufficient procedural safeguards to ensure the evidence is reliable.

The evidence must be relevant. This is only satisfied if the other crime or act is similar enough to the charged crime. When a crime is not similar enough, it will not be allowed because it is irrelevant. Fed. R. Evid. 401. Even if relevant, the Rule 403 balancing test would still apply, and the crime could be excluded because of the possibility of misleading the jury or prejudice suffered by the other party.[5] Fed. R. Evid. 403.

2. The similarities of the crimes made Morris' testimony admissible as reverse Rule 404(b) evidence.

The appellate court also properly applied the law to the facts by holding Morris' testimony was admissible as reverse 404(b) evidence. The similarities between the acts of Short and the crimes Zelasko is charged with make the evidence relevant. Further, there is a low risk of prejudice, or misleading the jury.

In *Stevens*, a man robbed and sexually assaulted two Air Force police officers at gunpoint. 935 F.2d at 1384–85. The two victims later identified their attacker as Stevens from a wanted poster and at a lineup. *Id*. at 1385. At trial, Stevens sought to introduce evidence that a man named Tyrone Mitchell was assaulted three days after the two women were assaulted and it assumed a few hundred yards away under similar circumstances. *Id*. at 1401. Although police originally thought the same person had committed both assaults, Mitchell did not identify

[5] In *Lucas*, the evidence that the defendant was trying to have admitted into trial was simply that the third party had been convicted of distributing cocaine with no other similarities between the crimes. 357 F.3d at 601. This evidence would be excluded under the reverse Rule 404(b) standard as irrelevant due to general similarities. The dissent relies on this case for the fact that there is general contention that there is more prejudice and confusion created than probative value in Rule 404(b) evidence. (R. 46–47) (Marino, J., dissenting). But the less probative a piece of evidence is the stronger the argument for exclusion would necessarily be. In other words, the less the benefit to the truth-determining function of the jury of admitting it at trial and the more trial time the presentation of the evidence would consume the likelier the evidence would confuse the jurors by distracting them from more probative evidence. *United States v. Urfer*, 287 F.3d 663, 665 (7th Cir. 2002). However, when the similarities between the two crimes are high, the probative value is increased and the prejudice is reduced. It follows that the more similar the two crimes are the more probative and less prejudicial the evidence becomes because it lowers the confusion a jury could suffer, especially when a defendant is offering evidence of particularly similar crime. A blanket exclusion of reverse Rule 404(b) evidence under the normal Rule 404(b) requirements could lead to the exclusion of exculpatory evidence that has high probative value with greatly diminished prejudicial value.

Stevens as his attacker. *Id*. Stevens' defense theory was that the same person had most likely committed both crimes, and Mitchell's testimony proved the person was an unknown third party. *Id*. The court held that the evidence should have been allowed because the evidence not only negated his guilt but also passed the Rule 403 balancing test. *Id*. at 1406.

Morris' testimony supports the conclusion that Short was the true coconspirator. The only direct evidence that the Government must prove its case against Zelasko is the evidence found in the search of Zelasko's house. (R. 3, 37.) The evidence that Zelasko is trying to present is offered for essentially the same purpose, which shows another person committed the crime. (R. 32.) Further, the evidence here—unlike the evidence in *Seals*—is relevant. In *Seals*, the court stated that because the similarities were generic of most bank robberies, the evidence was irrelevant. 419 F.3d at 607. The similarities here are more specific. The sales were made within the same small sporting community. (R. 25.) While the evidence regarding Short happened while she was on the Canadian team, both involve sale to her team members at the time. (R. 25.) Within this community, there is evidence of a connected drug subset. (R. 28.) ThunderSnow was developed after White Lightning had been discovered in the possession of members of several eastern European teams that compete in the World Winter Games. (R. 28.) Further, Short not only had access to distribution and was selling a similar anabolic steroid, but the steroid used to manufacture ThunderSnow. (R. 28.) Short also had access to the largest amount of steroids found. (R. 3.) This evidence supports Zelasko's assertion that Short was the second coconspirator with Lane, which a reasonable juror could find to cast a reasonable doubt of Ms. Zelasko's guilt. This makes the evidence not just relevant, but also of substantial probative value.

Just as in *Stevens*, the evidence of Short's prior dealing of anabolic steroids should be allowed into evidence, especially in light of the high probative value of the evidence. The policy

concerns surrounding 404(b) of unfair prejudice to a party are not applicable when a defendant offers evidence about a third party. In holding this way, the court does not lose the power to make sure the evidence is reliable enough to put in front of the jury. The crimes must still be similar enough to be relevant. Even if the evidence is relevant, but highly prejudicial, the evidence can still be excluded under Federal Rule of Evidence 403. Moreover, the potential for waste of time or misleading the jury is minimal. (R. 35.) The defense is offering the evidence solely through the testimony of a single witness, and the prosecution will have the opportunity to thoroughly cross-examine the witness. (R. 38.)

B. Denying Morris' Testimony Regarding Short's Past Drug Sales Would Violate Zelasko's Constitutional Right to Present a Complete Defense.

If Rule 404(b) did not compel the defendant's right to introduce criminal propensity evidence, then the constitution required it. This Court has recognized the existence of a federal constitutional "right of a criminal defendant to present a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967) (citing U.S. Const. amend. XIV). That right is rooted in a number of provisions of the United States Constitution. In *Washington v. Texas*, this Court found it guaranteed by the Compulsory Process Clause of the Sixth Amendment. *Id*. In *Chambers v. Mississippi*, the right was found to rest in both the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. 410 U.S. 284, 294 (1973). In *Crane v. Kentucky*, the right was found to rest in the Sixth Amendment's Confrontation and Compulsory Process Clauses and the Fourteenth Amendment's Due Process Clause. 476 U.S. 683, 694 (1986). Regardless of the right's origin, if a defendant has the constitutional right to an opportunity to present a complete defense, then she has the constitutional right for an opportunity to offer evidence that some third party committed the crime to raise a reasonable doubt in the jury's mind the defendant is guilty. *See Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997).

Evidence rules must be viewed through the prism of the purposes they are designed to serve. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). When a defendant's constitutional right is implicated, and the policy behind the rule being enforced to exclude the evidence is absent, then the defendant's right to a defense outweighs the strict application of the rule. *See Green v. Georgia*, 442 U.S. 95, 97 (1979) ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of trial . . . and substantial reasons existed to assume its reliability."); *see also Chambers v. Mississippi*, 410 U.S. at 302 ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

In *Washington v. Texas*, the constitutional right of a defendant to present a complete defense outweighed a rule to exclude witness testimony. 388 U.S. at 15. There, the defendant was found guilty of murder and sentenced to 50 years imprisonment. *Id*. The defendant claimed he was innocent and accused a coconspirator, who had been found guilty of murdering the victim. *Id*. at 16. The defendant claimed he tried to dissuade the coconspirator from committing the crime and sought to offer the coconspirator's confession, who was the only other person who knew exactly who fired the gun. *Id*. However, a Texas evidentiary rule prevented persons charged or convicted as co-participants in the same crime from testifying for one another. *Id*. This Court reversed, holding the state arbitrarily denied him the right to put a witness on the stand in his favor. *Id*. at 22–23. The court declared the Texas rule unconstitutional because it prevented the accused from offering the confession to exculpate him, reasoning "[i]t is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of

defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief." *Id*. at 22.

The same thing happened in *Chambers v. Mississippi*. 410 U.S. at 285. There, the defendant was convicted of murdering a policeman. *Id*. Mississippi's "voucher rule" and hearsay rule prevented the defendant from introducing out-of-court statements made by a third party admitting to the murder the defendant was charged with, along with a withdrawn confession, which essentially prevented him from producing any evidence of a confession. *Id*. at 289, 297. This Court found that state evidentiary rules that precluded the accused from critical and reliable evidence violated due process, holding that the right to call witnesses is essential to due process and the minimum needed for a fair trial. *Id*. at 294. The Court reasoned: "[i]n these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id*. at 302. The rationale behind the hearsay rule was undermined under the circumstances because considerable assurance of its reliability had been provided. *Id*. at 300.

The principles that controlled in *Washington* and *Chambers* control here. Texas used a witness rule to exclude the codefendant's testimony. Mississippi used a rule of evidence to bar the exculpatory testimony of Chambers' witnesses. Both rules had the same effect. In each case, the rules denied the accused the benefit of material testimony that someone else committed the crime. In both cases, this Court held that the defendants should be allowed to offer the testimony normally barred by the various rules in their jurisdiction. In both cases, the underlying policy reasons behind the rules had been undercut. The policy rationale behind the rules in both cases was reliability. But in both cases, the reliability of the testimony was bolstered by other evidence. The State tried to use the rules' plain language to exclude the evidence, even though the

underlying rationale was not there. In both cases, this Court held that the testimony should have been permitted, and that the mechanical application of the rules was outweighed by the defendants' constitutional rights.

The Government's exclusion of Morris' testimony through Rule 404(b) furthers no legitimate interest that would justify its constitutional burdens. The Constitution prohibits imposing burdens on fundamental freedoms for all but the most compelling reasons. While this Court in *Chambers* and *Washington* was dealing with different rules to exclude exculpatory testimony, the reasoning behind these decisions applies with equal force here. Rules of evidence, accompanied by their legitimate policy concerns, can outweigh a defendant's constitutional right to a complete defense. But when the concerns are illegitimate, or the legitimate concerns behind the rule disappear, the constitutional right of the defendant outweighs the arbitrary enforcement of the rule. This is especially true when the excluded evidence is the sole evidence that the defendant has to present their defense.

Rule 404(b) furthers no purpose or policy concerns here. There is no risk of prejudice from introducing the Morris' testimony. (R. 38.) The policy concerns behind the rule deal with the prejudice that the party whom the evidence is offered against suffers by introducing this type of evidence. While concerns addressed by this rule are legitimate when applied to a defendant, a plaintiff in a civil case, or even potential witnesses, the same does not apply to a third party who will not participate. No one will suffer prejudice or adverse legal consequence by admitting this evidence. (R. 38.) The similarities of the two crimes raise the probative value, and diminish the possibility of any confusion suffered by the jury. Further, the prosecution will have the opportunity to cross-examine the witness and explain the impact they believe Morris' testimony will have to the jury, ultimately allowing the jury to weigh the value given to the evidence. (R.

35.) Zelasko, on the other hand, would suffer great prejudice by the exclusion of the testimony, which precludes her defense or would, at a minimum, make her rely on a seemingly hollow theory because without Morris' testimony she has no evidence to support it.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT LANE'S E-MAIL WAS INADMISSIBLE.

As its second issue, the Government contends that it may introduce the e-mail between Lane and Billings even though Lane will exercise her Fifth Amendment right not to testify. (R. 38.) The Government seeks to characterize this as a statement against interest under Federal Rule of Evidence 804(b)(3) because it has waived any argument that the out-of-court statement is admissible under Federal Rule of Evidence 801(d)(2) as a coconspirator statement. (R. 39.) The district court disagreed and excluded the statement. (R. 31.) The court of appeals affirmed, recognizing the email was not a statement against penal interest because none of the statements were specific enough to qualify under *Williamson v. United States*, 512 U.S. 594, 600–01 (1994). Moreover, the court of appeals provided an alternative justification that the introduction of the e-mail would violate the *Bruton* doctrine, because *Crawford* did not affect the *Bruton* doctrine. (R. 43–46.) The record supports either justification.

A. Lane's E-Mail Did Not Qualify as a Statement Against Interest Under Federal Rule of Evidence 804(b)(3) That Is Admissible Against Zelasko.

The Government argues that Lane's e-mail is admissible as a statement against interest under Rule 804(b)(3). (R. 38.) An out-of-court statement is only admissible under Rule 804(b)(3) if it is a "statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or 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). When deciding whether a

statement is admissible under 804(b)(3), each statement should be narrowly analyzed to determine if the statement is was made against penal interest. The e-mail was not.

1. The statements in the e-mail are not individually self-inculpatory.

This Court in *Williamson* announced the standard for admitting statements under 803(b)(4). The rationale is that only statements that are directly against penal interest are reliable enough to justify an exception to the general bar on hearsay. This Court rejected the view "that an entire narrative, including non-self-inculpatory parts (but excluding the clearly self-serving parts . . .) may be admissible if it is in the aggregate self-inculpatory." *Williamson*, 512 U.S. at 601. Rather, the most faithful reading of Rule 804(b)(3) does not allow admission of corollary statements—even if they are made within a broader narrative that is self-inculpatory. *Id*. The district court may not assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession. And this is especially true when the statement implicates someone else. *Id*. at 600–01.

The proximity of a statement to a self-inculpatory statement does not increase the statement's reliability. "The fact that a statement is self-inculpatory does make it more reliable, [but] the fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id*. at 600. In directing district courts to exclude self-exculpatory portions of otherwise self-inculpatory statements, this Court explained: "Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements." *Id*. To decide if the statements are truly self-inculpatory this Court adopted a narrow view of the term "statement," in which each individual statement is analyzed under a totality of the circumstances must be self-inculpatory. *Id*. at 599–

600. Holding that Rule 804(b)(3) does not permit the admission of collateral statements that, while part of a broader narrative, are not self-inculpatory standing alone. *Id*.

A narrow reading of the term statement means that each sentence in the e-mail must be analyzed as a statement. The appellate court did so, breaking the e-mail into five individual statements. (R. 42.) The court noted most statements were too ambiguous to admit under Federal Rule of Evidence 804(b)(3). (R. 42.) None of the statements expose Lane to criminal liability. (R. 42.) The most negative of all the statements referring to her business does not reveal the nature of the business. (R. 42.) Also, the mention of silencing the male team member communicates a lack of knowledge as to what that means. (R. 42.) However, even if some statements can come in under *Williamson*, the mentioning of a partner should be excluded from the statements given because it is not against the penal interest. *United States v. Doyle*, 130 F.3d 523, 543 n.16 (2d Cir. 1997).

2. The *Williamson* standard excludes non-trustworthy statements that are included in a self-inculpatory narrative.

The Second Circuit Court of Appeals illustrated in *Doyle* how the *Williamson* standard works effectively to exclude non-trustworthy statements. There, the court excluded a coconspirator's statement. *Id*. The court rejected the statement made by the coconspirator that the other party did not know of anything, while making a statement against his own penal interest. *Id*. The court reasoned that the statement added little additional weight to his confession, although the statement may have been made to either protect a coconspirator or to discourage the Government's investigation by persuading the Government that no federal party knew of the illegal purpose. *Id*. Further, attempting to shift the blame away from a friend who is also a probable focus of the investigation cannot be characterized as against the declarant's interest. *Id*.

Like *Doyle*, the statement regarding anything about having a partner should be omitted, but for the opposite reason. Lane's contention she had a partner could have been made to deflect blame away from herself. The Government contends Lane is referring to an illegal partnership in an email with her coach, who was also her significant other. (R. 33.) He had previously confronted Lane about selling steroids to which she denied. (R. 3.) As her significant other, he would not want her to engage in conduct that could subject her to legal consequences. And as her coach, this is an act that, if discovered, could seriously impact her professional career. The mentioning of a partner, potentially another member of the female team, could deflect some anger Billings had away from solely herself. This is exactly the concern this Court had in *Williamson*—one of the most effective ways to lie is to incorporate some verifiable truths into lies.

Mention of a partner in this situation does nothing to further any consequence that could come to Lane. (R. 42.) If the e-mail is read in the way the Government contends, adding a partner adds no additional weight to any repercussions as to herself. (R. 42.) "Such statements [against penal interest] are suspect insofar as they inculpate other persons. [T]hat a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Williamson*, 512 U.S. at 599. An accomplice's statements that shift or spread the blame to a criminal defendant falls outside the realm of those "hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to the statements' reliability." *White v. Illinois*, 502 U.S. 346, 357 (1992).

3. The *Williamson* standard should not be abandoned because the proposed solution would cause more problems than it purports to fix.

The dissent below calls for the abandonment of the *Williamson* standard for determining what is admissible under Rule 804(b)(3). (R. 48.) (Marino, J., dissenting). The dissent criticizes

the continued reliance on *Williamson*, pointing to the difficulty of splitting up a narrative into individual statements, and the problems surrounding whether a party is trying to curry favor in his statements. (R. 49–50.) The dissent views *Williamson*'s totality of the circumstances as not a true totality of the circumstances standard. (R. 51.) The dissent wants to adopt the test as proposed by Justice Kennedy in his concurrence in *Williamson*, which suggests that courts should first look to whether the declarant made a statement that contains a fact against penal interest. (R. 52) (Marino, J., dissenting) (citing *Williamson*, 512 U.S. at 620 (Kennedy, J., concurring)). If it does, Justice Kennedy believes the court should admit all related statements unless the related statement is "so self-serving as to render it unreliable" or made "under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment." *Id*. But this leads to more problems than it purports to solve.

Because the proximity to inculpatory statements does not make the corollary statements any more reliable, when applying Justice Kennedy's test, courts must rely on statements this Court has stated are unreliable to determine whether any statements would be admissible. This test also does not nullify the concerns the dissent had with determining what comprises each statement, as the first step is to determine if a statement is against the declarant's penal interest.

Finally, the proposed test would allow all corollary statements that related to the inculpatory statements unless the court determines the statements are too self-serving. Judges would first need to decide which statements are related to the inculpatory statement. There are no standards to guide this consideration. Each test will turn on the facts of each case. The admission of any self-serving statements could lead to admitting statements that are false because the proximity of statements to self-inculpatory ones do not guarantee its reliability. The fact that the declarant has something to gain necessarily makes the statement unreliable.

4. Any new test for statements against interest should not allow admission of any self-serving statements relating to an alleged coconspirator.

The statement against interest standard should not be a substitute for the Federal Rule of Evidence 801(d)(2), which regulates statements of coconspirators in furtherance of a conspiracy. If the Court alters the *Williamson* standard, it should go no farther than allowing statements truly neutral in view of the entire context and excluding any self-serving statements where the statements can be severed. *See United States v. Moskowitz*, 215 F.3d 265, 268–69 (2d Cir. 2000) (per curiam) (explaining that portions of an allocution against declarant's penal interest may be admitted if the blame-shifting portions of the allocution were removed and the jury was given a limiting instruction) (citing Fed. R. Evid. 801(d)(2)).. In the criminal context, a self-serving statement reduces the charges or mitigate the punishment for which the declarant might be liable. *See* M. Graham, *Federal Practice and Procedure* § 6795, at 810 n.10 (1992). Justice Kennedy's concurrence provides an example: "if two masked gunmen robbed a bank and one of them shot and killed the bank teller, a statement by one robber that the other robber was the triggerman may be the kind of self-serving statement that should be inadmissible." *Williamson*, 512 U.S. at 618. He acknowledged that the limit on collateral self-serving statements applies whether the statement would be made to authorities. *Id*. at 619.

If this standard is adopted by the Court, the statements as it pertains to Lane's alleged partner would still be inadmissible. This situation is analogous to the example of the bank robbers given in Justice Kennedy's concurrence. While the statement Ms. Lane made was not made to the police, her statement is still self-serving. Lane had reason to lie. On a personal and professional level, adding a partner in Lanes' email could be viewed as an attempt to deflect the blame from herself or, to some extent, try and mitigate her potential punishment. This is

especially true when viewing the statement regarding silencing the member of the male team. The email states that the idea to silence the male team member came from her partner. (R. 29.) Lane, not knowing how Billings would respond, could therefore be trying to shift the blame of silencing the other party onto her partner and away from herself, making it unreliable. Even though Justice Kennedy was promoting the expansion of collateral statements, this statement would be still self-serving and non-admissible. He specified that a statement that shifted the blame to another would be self-serving and be excluded. The statement of her partner coming up with the idea to silence the male member of the team functions to shift the blame of the idea away from herself and to her supposed partner.

Even though the rule as currently interpreted may keep out some probative truthful information it is outweighed strongly by the admission of non-truthful statements made by others in the narrative surrounding the truly self-incriminatory statements. An adoption of the test suggested by Justice Kennedy would add even more confusion. But under either standard, the statements relating to any alleged partner of Lane should be excluded.

B. The Admission of Lane's E-Mail Would Violate Zelasko's Constitutional Rights Under the *Bruton* Doctrine.

Even if a statement is properly admissible under the text of Rule 804(b)(3), the statement may not be admitted into evidence if it violates Zelasko's constitutional rights under the Sixth Amendment. The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. amend. VI.

In *Bruton v. United States*, this Court held that introduction of a codefendant's incriminating, out-of-court statement violates the defendant's right to cross-examination secured by the Sixth Amendment's Confrontation Clause, even if the jury is instructed to disregard the

statement in determining the defendant's guilt or innocence. 391 U.S. 123, 137 (1968). Thirty-six years later, this Court held in *Crawford v. Washington* that out-of-court statements that are testimonial must be excluded under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. 36, 68 (2004). *Crawford* defined "testimonial" in three ways. First, testimonial evidence comes from "an accuser who makes a formal statement to Government officers." *Id*. at 51. Second, testimonial statements include extrajudicial statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id*. at 51–52. Third, "testimonial statements" are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 52.

Crawford did not discuss whether the *Bruton* rule—concerning a special class of hearsay from a codefendant—survives the new testimonial versus non-testimonial distinction. But the dissent and the Government suggest that *Crawford* limited *Bruton* to testimonial statements. (R. 52.) (Marino, J., dissenting). The court of appeals properly rejected this ill-advised limitation.

1. *Bruton* concerned the prejudice defendants suffer when a non-testifying codefendant's confession is admitted at trial.

In *Bruton*, George Bruton and his codefendant were tried jointly before a jury for bank robbery. 391 U.S. at 124. The codefendant confessed to a postal inspector that he and Bruton had committed the robbery. *Id*. When the codefendant did not testify, the prosecution introduced the confession against Bruton. *Id*. at 125. The trial court issued a limiting instruction to the jury, informing the jury that the statement was hearsay as to Bruton and to only consider the evidence in determining the codefendant's guilt. *Id*. In holding this violated his right to confront his accusers, this Court stated that the risk that a jury will not or cannot follow instruction is so great,

and the consequences so devastating to the defendant, that it cannot be ignored. *Id*. at 135. This Court stated such codefendant confessions are devastating to other codefendants. *Id*. The inadmissibility of the statement against Bruton, and the likelihood of harmfulness led to the violation of the Confrontation Clause.[6] *Id*. at 128.

This Court in *Bruton* was not concerned with the constitutional reliability of statements made by a non-testifying codefendant, but rather the constitutional harm a defendant suffers from a non-testifying codefendant's confession. Therefore, if a codefendants confession violates the *Bruton* doctrine, because it is sufficiently harmful to another defendant. But if the statement does not incriminate another defendant, the statement is admissible because it is less harmful, not because the statement is more reliable.

Further evidence that this Court was not concerned with the reliability of a statement, but the prejudice suffered by the defendant can be seen in *Cruz v*. *New York*, 481 U.S. 186 (1987). There, Eulogio and Benjamin Cruz were codefendants jointly tried for felony murder. *Id*. at 189. Over Eulogio's objection, Benjamin's videotaped confession was introduced into evidence with a limiting instruction that it could not be used against Eulogio. *Id*. The Government called another witness who testified about a confession given by Eulogio, which recalled the same events as Benjamin's confession. *Id*. at 188–89. Eulogio was convicted. *Id*. at 189. Despite the corresponding confession, this Court overruled, finding that the confessions are covered by the

[6] This Court acknowledged that redacting references to a non-confessing codefendant may avoid the Confrontation Clause violation. *Id*. at 133–34 & n.10. Therefore, it may be argued that the neutral pronoun, partner, also takes this outside of the *Bruton* doctrine. However, this logic is flawed. If jurors are considered incapable of separating evidence against one defendant from evidence admitted against another, it is hard to contemplate how this evidence is any less condemning to a defendant than the evidence as presented in *Bruton*. Even though the statement does not name the codefendant specifically, the jury will use the information in basically the same way. This is a way for the prosecution to sidestep the *Bruton* violation, while getting the result that *Bruton* sought to avoid. The jury will view the defendants sitting together while a confession is presented that talks about a partner. In *Gray v*. *Maryland*, this Court found that redactions of codefendant confessions that simply replace names with obvious blank spaces, words such as "deleted," symbols, or other similarly obvious indications of alteration, do violate the *Bruton* doctrine and the Confrontation Clause. 523 U.S. 185, 188 (1998).

Bruton doctrine, which is solely concerned with the harmfulness of codefendant confessions, not their reliability. *Id*. at 192–93. This Court stated that the "law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds." *Id*.

2. *Bruton* was not limited by *Crawford* because *Crawford* involved the reliability of evidence, not the defendant's prejudice.

Crawford was fundamentally different. That case did not involve a non-testifying codefendant; instead, it was a unavailable witness who provided testimonial statements. In *Crawford*, this Court reconsidered the adequate indicia of reliability test from *Ohio v. Roberts*.[7] Michael Crawford stabbed a man who allegedly tried to rape his wife. *Crawford v. Washington*, 541 U.S. at 38. Statements were taken from Crawford and his wife. *Id*. While the statements matched mostly, his wife's statement differed as to whether the other man had drawn a weapon before Crawford assaulted him. *Id*. at 39. His wife did not testify under Washington's spousal privilege, and the State introduced her previous statement over his objection. *Id*. at 40. Crawford appealed, claiming a violation of the Confrontation Clause. *Id*. at 42. The Supreme Court of Washington found no violation because the statement satisfied *Roberts*. *Id*. at 41.

This Court concluded that the Confrontation Clause covers both live testimony and testimonial statements. *Id*. at 51–52. This Court said even though the Sixth Amendment's primary focus is testimonial hearsay, that is not its sole concern. *Id*. at 53. This Court further stated that "[t]estimonial statements of *witnesses* absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to

[7] The Supreme Court in *Ohio v. Roberts* articulated a test that addressed the issue of whether the admission of hearsay violates the Confrontation Clause because it is constitutionally unreliable. 448 U.S. 56, 66 (1980). Under this test, if a declarant was unavailable, the admission of hearsay would not violate the Confrontation Clause because of the lack of cross-examination if it could be proved that the statement "bears adequate indicia of reliability." *Id*. at 62–66.

cross-examine." *Id*. at 59 (emphasis added). Finally, this Court in reaching its decision pointed out that *Cruz v. New York* "addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's own confession against him in a joint trial." *Id*. This Court concluded there was a Confrontation Clause violation because, when there are testimonial statements are at issue, only confrontation satisfies constitutional demands. *Id*. at 68.

Crawford, just as its predecessor *Ohio v. Roberts*, is irrelevant to whether there is a *Bruton* violation. First, the cases deal with different declarants. Even though the solution to violating the Confrontation Clause is the same in both scenarios—confrontation—the constitutional concerns are distinct. *Crawford*, like *Roberts*, was concerned with the reliability of statements made by a non-testifying declarant. *Bruton* was concerned with the devastating practical effect and the constitutional prejudice suffered by a defendant from his codefendant's confession in the mind of the jury, not the reliability.

This Court acknowledged in *Crawford* that it was deciding a different issue than in *Cruz*. *Cruz* held that the reliability added by corroborating confession did not remove the concerns in *Bruton* because the reliability of the statement did not affect whether the jury would improperly use the codefendant's confession against the defendant. This Court noted in *Cruz*, that the case before it was "indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, the probability that such disregard will have a devastating effect, and the determinability of these factors in advance of trial." 481 U.S. at 193. Because the testimonial nature of the statement goes to the reliability of the statement itself, even non-testimonial statements would not resolve the Constitutional prejudice suffered by a defendant. While both of these Confrontation Clause issues are present in

a case where a codefendant is the declarant, not testifying, and has made a testimonial statement, it does not follow that solving the testimonial issue, making the statement constitutionally reliable, solves the issue of prejudice a defendant suffers. In other words, non-testimonial statements may raise the probative value of the statements and take out constitutional reliability concerns, but do nothing to the serious harm a defendant may suffer by the jury's consideration of that evidence.[8]

Further, the *Crawford* opinion itself implies that the Court did not intend for its testimonial/ non-testimonial dichotomy to affect the *Bruton* holding. Colin Miller, *Avoiding a Confrontation? How Courts Have Erred in Finding That Nontestimonial Hearsay Is Beyond the Scope of the* Bruton *Doctrine*, 77 Brook. L. Rev. 625, 665 (2012). In Crawford, this Court overruled the *Roberts* test of indicia of reliability, stating the only cure for testimonial statements was confrontation. If the only effect of *Crawford* was to overrule *Roberts*,[9] which had no bearing on *Bruton* dealing with the reliability and not harm, *Crawford* does not affect the *Bruton* issue. Also, while this Court in *Crawford* stated that the main concern of the Sixth Amendment was testimonial statements, this Court did not rule it was only violated by testimonial statements.

Crawford did not restrict *Bruton* to testimonial statements. *Crawford* involved concerns of allowing the Government to use hearsay statements of non-defendants that police obtain during formal interrogations into culpability and did not negate the concern in *Bruton* that using codefendant statements without the opportunity for confrontation causes constitutional harm.

---

[8] The fact that the concern behind *Bruton* was the misuse of evidence by the jury can be further found in decisions that have held *Bruton* does not apply to bench trials. *See United States v. Cardenas*, 9 F.3d 1139, 1155 (5th Cir. 1993) (joining several other circuits in finding that the *Bruton* doctrine is inapplicable to bench trials); *see also Rogers v. McMackin*, 884 F.2d 252, 254 (6th Cir. 1989) (finding that bench trials are "'not strictly speaking a *Bruton* case'" because *Bruton* did not concern the effectiveness of limiting instructions to the jury).

[9] *See Davis v. Washington*, 547 U.S. 813, 817–18, 827 (2006) (stating that *Crawford* overruled *Roberts*); *see also Whorton v. Bockting*, 549 U.S. 406, 420 (2007) ("Under Crawford, the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.").

Both testimonial statements under *Crawford* and nontestimonial statement of non-testifying codefendants under *Bruton* violate the Confrontation Clause. Thus, the court of appeals was correct in its holding Lane's e-mail should be excluded.

CONCLUSION

Respondent Anastasia Zelasko respectfully requests this Honorable Court to AFFIRM the decision of the United States Court of Appeals for the Fourteenth Circuit in all respects.

Respectfully submitted,

_____

ATTORNEYS FOR RESPONDENT

APPENDIX TABLE OF CONTENTS

Page

APPENDIX "A"

UNITED STATES CONSTITUTIONAL PROVISIONS

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.