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No. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

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

QUESTIONS PRESENTED

I. Does Federal Rule of Evidence 404(b), as a matter of law, bar evidence of a third party's prior act when the Rule serves to protect the defendant from prejudice and the evidence is offered by the defendant?

II. Does obstructing the defendant's ability to admit evidence of a third party's prior act violate the defendant's constitutional right to present a complete defense when the probative value of the evidence is great and the defendant is unable to present such evidence otherwise?

III. Does *Williamson v. United States* still hold as the standard for applying Federal Rule of Evidence 804(b)(3) when it creates a categorical definition that comports with the principle behind the hearsay exception?

IV. Does *Bruton* remain the standard for accomplice statements at a joint trial where a statement implicating the defendant is given by a non-testifying co-defendant, and therefore the defendant is denied an opportunity to confront her accuser as protected by the Sixth Amendment?

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Statement of Facts

Anastasia Zelasko and Jessica Lane were members of the women's United States Snowman Pentathlon Team ("Snowman Team"). (R. 1.) Casey Short became a member of the Snowman Team approximately in June of 2011. (R. 10, 25.) Peter Billings, the coach of the women's Snowman Team, was also Jessica Lane's boyfriend for several years. (R. 2, 3.) In the fall of 2011, the Snowman Team was preparing for its main competition, the Snowman Pentathlon at the World Winter Games. (R. 1.) The competition involves dogsledding, ice dancing, aerial skiing, rifle shooting, and curling, and is physically challenging. (R. 1, 2.) The Snowman Team's practice times improved in the fall of 2011. (R. 2.)

In the fall of 2011, the Drug Enforcement Administration ("DEA") began an investigation of alleged distribution of steroids on the Snowman Team. (R. 1, 2.) The DEA worked with their informant and United States men's Snowman Team member, Hunter Riley. (R. 1, 2.) Hunter Riley attempted to purchase anabolic steroids, referred to as ThunderSnow, from Jessica Lane on three separate occasions: October 1, 2011, November 3, 2011, and December 9, 2011. (R. 2, 3.) On no occasion was Riley able to obtain ThunderSnow from Lane. (R. 2, 3.)

On or about December 10, 2011, Billings observed Lane and Zelasko talking and heard Lane say to Zelasko, "Stop bragging to everyone about all the money you're making!" (R. 3.) Billings asked Lane nine days later if she was engaged in the distribution of ThunderSnow. (R. 2, 3.) Lane denied being involved in distributing steroids. (R. 2, 3.)

On January 16, 2012, Billings received the following email from Lane:

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

(R. 3.) On January 28, 2012 several members of the Snowman Team witnessed Zelasko and Riley engaged in an argument. (R. 3.)

On February 3, 2012, Zelasko was practicing on a rifle range for the World Winter Games. (R. 8.) The rifle range is adjacent to a part of a dogsled course used by male members of the Snowman team. (R. 8.) At around 10:15 AM Hunter Riley was killed by a bullet that was discharged from Ms. Zelasko's rifle. (R. 3, 8.)

The authorities issued a search warrant on Zelasko's home that evening. (R. 8.) The DEA found two 50-milligran doses of ThunderSnow consistent with personal use (R. 8, 28.) They also found $5,000 in cash. (R. 8.) The affidavit of Henry Wallace, a chemist with expertise in performance-enhancing drugs including anabolic steroids, states that ThunderSnow is generally used in 50- to 100-milligram daily doses, and that a quantity of two 50-milligram doses is consistent with personal use and not sale. (R. 28.)

At the Snowman Team's training facility, the authorities seized 12,500 milligrams of ThunderSnow, worth approximately $50,000, consistent with sale use. (R. 3, 28.) All of the Snowman Team's female members and staff had access to the equipment room where the ThunderSnow was discovered. (R. 8.) At the home of Lane, the DEA seized twenty 50-milligram doses of ThunderSnow, consistent with sale used. (R. 4, 28.) They also found $10,000 in cash and the laptop Lane used to write the email to Billings. (R. 4.) Zelasko and Lane were arrested on February 3, 2011 and February 4, 2011, respectively. (R. 31.) They were

charged with conspiracy to distribute and possession of anabolic steroids, as well as conspiracy and commission of murder in the first degree. (R. 5.)

Because it is undisputed that there were only two participants in the conspiracy, Zelasko moved the court to admit evidence of a third party's prior act of selling steroids to a member of the Canadian Snowman Team. (R. 7, 11.) Miranda Morris explains in her testimony that a former member of the Canadian Snowman team, Casey Short, sold her anabolic steroids. (R. 7.) Morris's affidavit states that before joining the U.S. Snowman team, Short was a member of the Canadian Snowman team and sold anabolic steroids known as White Lightning to Morris approximately two months before she transferred to the U.S. Snowman team. (R. 25.) The affidavit of Henry Wallace provides that ThunderSnow is a derivative of White Lightning. (R. 28.) The testimony was admitted by the district court, and the government filed an interlocutory appeal. (R. 20, 30.) The appellate court affirmed the district court's findings and held that Zelasko was able to admit Morris's testimony. (R. 30.)

The government sought to admit the email that Billings received from Lane notwithstanding objections from Zelasko that it did not satisfy the requirements of Rule 804(b)(3) under *Williamson* and implicated Confrontation Clause issues. (R. 7.) The district court denied the government's motion, and an interlocutory appeal was filed. (R. 20, 30.) The appellate court affirmed the district court. (R. 30.)

Procedural History

The Grand Jury indicted Zelasko and Lane with conspiracy to distribute and possess with intent to distribute anabolic steroids, distribution and possession with intent to distribute anabolic steroids, simple possession of anabolic steroids, conspiracy to murder in the first degree, and murder in the first degree on April 10, 2012. (R. 4, 5.)

On July 16, 2012, the District Court for the Southern District of Boerum heard oral arguments on two pretrial evidentiary motions: Zelasko's motion to admit the testimony of Morris, and the Government's motion to introduce the email sent from Lane to Billings. (R. 6.) On July 18, 2012, the District Court granted Zelasko's motion to admit Morris's testimony and denied the Government's motion to admit Lane's email. (R. 23.) Pursuant to 18 U.S.C. §§ 3731 and 3731(a), the United States filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. 30.)

On February 14, 2013, the Circuit Court affirmed the decision of the District court on both issues, holding that: (1) Federal Rule of Evidence 404(b) does not apply when the defendant offers evidence of propensity of a third party in order to exculpate herself; (2) the defendant's constitutional right to present a complete defense encompasses the right to introduce a third party's propensity evidence; (3) *Williamson* remains the controlling precedent barring admission of statements collateral to declarations against penal interest; and (4) *Crawford* does not restrict the *Bruton* doctrine to testimonial hearsay by non-testifying co-defendants. The Government subsequently filed a petition for writ of certiorari, and on October 1, 2013, the United States Supreme Court granted certiorari. (R. 31.)

SUMMARY OF THE ARGUMENT

In the present case, the lower courts both correctly ruled that (1) Federal Rule of Evidence 404(b) does not bar third party propensity evidence offered by a defendant; (2) the defendant's constitutional right to present a complete defense would be violated by the exclusion of the third party propensity evidence; (3) *Williamson* remains the controlling precedent and bars the admission of collateral statements under Rule 804(b)(3); and (4) the *Bruton* doctrine is not restricted to testimonial hearsay by non-testifying co-defendants.

First, as a matter of law, Rule 404(b) does not bar propensity evidence when it is offered by a defendant to exculpate herself. Rooted in common law, Rule 404(b) is intended to prevent unfair prejudice toward a criminal defendant. "Reverse 404(b)" evidence does not carry the risk of prejudice against a defendant because it is offered by the defendant, not against her. Additionally, concerns of waste of time and jury confusion can be dealt with through Rule 403 analysis. Therefore, the Fourteenth Circuit was correct in holding that Rule 404(b) does not apply when the defendant is offering third party propensity evidence.

Second, the exclusion of Morris's testimony would violate the Respondent's constitutional right to present a complete defense under *Chambers v. Mississippi.* First, this evidence is highly probative, sufficiently specific, and is the only evidence linking Ms. Short to the conspiracy Respondent is charged with. Second, excluding this evidence will serve no sufficiently legitimate policy interest, and admitting this evidence will not threaten judicial expediency or result in unfair prejudice.

Third, *Williamson* still serves as the appropriate standard in the admission of Rule 804(b)(3) evidence. Admitting only self-inculpatory statements that are against one's penal interest aligns with the principle of the Rule. As well, the standard is based upon a history of distrust of accomplice statements, and its narrow holding ensures that only the most trustworthy of statements are admitted.

Lastly, Confrontation Clause guarantees still exist under *Bruton* as applied to accomplice statements. A rule restricting testimonial statements developed by *Crawford* does not eliminate the need to measure reliability of accomplice statements in noncustodial settings. *Bruton* and *Crawford* were both concerned with ensuring that the reliability of statements is measured by

cross-examination and identified that accomplice statements have unique untrustworthiness that must be probed.

ARGUMENT

I. AS A MATTER OF LAW, FEDERAL RULE OF EVIDENCE 404(B) DOES NOT BAR EVIDENCE OF A THIRD PARTY'S PROPENSITY TO COMMIT AN OFFENSE WITH WHICH THE DEFENDANT IS CHARGED.

The primary evil that courts are concerned with in implementing Rule 404(b)—prejudice against a defendant—is absent in "reverse 404" cases, and therefore Rule 404(b) does not bar evidence of a third party's propensity to commit an offense with which the defendant is charged. *See United States v. Stevens*, 935 F.2d 1380, 1402 (10th Cir. 1998). Rule 404(b) bars the admission of propensity evidence in order to protect a defendant from unfair prejudice. *See id.* When it is the defendant who offers propensity evidence of a third party, it is commonly referred to as "reverse 404(b)" evidence. *See id.*

Federal Rule of Evidence 404(b) provides that "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). The ban on the use of propensity evidence serves the purpose of protecting a criminal defendant against a risk of prejudice. *See Michelson v. United States*, 335 U.S. 469, 475-76 (1948). When the defendant offers propensity evidence of a third party, the risk of prejudice to the defendant does not exist. Therefore, the majority of circuit courts have treated a "reverse 404(b)" question differently from a standard 404(b) question, and have held that, as a matter of law, Rule 404(b) does not bar evidence of a third party's propensity to commit an offense with which the defendant is charged. *See*, e.g., *United States v. Aboumoussallem*, 726 F.2d 906, 911-912 (2d Cir. 1984); *Stevens,* 935 F.2d at 1404-05; *United States v. Montelongo*, 420 F.3d 1169, 1175 (10th Cir. 2005). Common

law, public policy, and precedent agree that reverse 404 questions must be treated differently from standard Rule 404(b) questions, where a defendant is seeking to admit third-party propensity evidence for the purposes of self-exculpation.

A. Both Common Law and Public Policy Dictate that Rule 404(b) Does Not Apply When the Defendant Seeks to Admit Propensity Evidence of a Third Party to Exculpate Herself.

Common law and public policy behind Rule 404(b) dictate that the bar on propensity should only be applied when the evidence is offered against a defendant. Rule 404(b) exists so that juries do not use prior acts to convict a "bad person." *See Michelson*, 335 U.S. at 475-76. A "reverse 404(b)" question, therefore, does not involve the danger of convicting a "bad person," as it is the defendant who seeks to introduce this evidence to exculpate herself. The purpose of the Rule 404(b) is to shield defendants from unfair prejudice. *See id*. Thus, the main policy concern behind Rule 404(b) does not exist in the context of "reverse 404(b)" evidence.

Rule 404(b) is rooted in common law. The common law rule firmly held in policy and tradition that the prosecution is prohibited from initially attacking the defendant's character. John H. Wigmore, Evidence § 57 (3d. ed. 1940). Since Rule 404(b) is based on the common law rule, it involves the very same policy concerns. *See United States v. Dudek*, 560 F.2d 1288, 1295-96 (6th Cir. 1977). Additionally, the advisory notes to Rule 404(b) do not discuss whether the word "person" refers to anyone but the defendant. Fed. R. Evid. 404(b) advisory committee's notes. Therefore, the Court should interpret the Rule using common law principles. *See Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579, 587-88 (1993) (holding that common law principles should assist in interpreting the Federal Rules of Evidence).

Courts that follow common law tradition have generally prohibited the prosecution from using character evidence against the defendant. *See Michelson*, 335 U.S. at 475-76. Use of

propensity evidence against a defendant was prohibited not because character is irrelevant, but "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record . . . ." *Id*. at 476. Thus, the ban on the use of the propensity evidence is concerned not with whether the evidence is relevant or not, but with evidence having "too much" weight as to result in an unfair prejudice toward the defendant. *Id. See also United States v. Frankhauser*, 80 F.3d 641, 648 (1st Cir. 1996) (holding that the primary policy concern behind Rule 404(b) is making sure that juries convict a defendant not based on his prior acts, but based on the evidence that she committed the crime she is charged with).

In the context of "reverse 404(b)" evidence, the concern of unfair prejudice against the defendant is absent. *See Aboumoussallem*, 726 F.2d at 911; *Stevens,* 935 F.2d at 1404. Unfair prejudice against the defendant is not the only policy concern underlying Rule 404(b). However, the additional concerns that the admission of a third party propensity evidence may result in a waste of time or confuse the jury do not warrant barring "reverse 404(b)" evidence altogether. Courts have the ability to engage in Federal Rule of Evidence 403 analysis to screen out evidence the admission of which may result in either of those concerns. *See Aboumoussallem*, 726 F.2d at 912.

Here, Respondent seeks to introduce evidence tending to show that a third party, Ms. Short, was the second coconspirator. This evidence involves no dangers of prejudicing the defendant. Moreover, this evidence bears no risk of prejudice to Ms. Short either because she is not a party to this case. With the primary concern of unfair prejudice to the defendant absent, the Fourteenth Circuit was correct in holding that Rule 404(b) does not apply when the defendant is offering evidence of the propensity of a third party in order to exculpate herself. (R. 34.)

B. The Majority of Circuits Courts Agree that Rule 404(b) Does Not Bar Propensity Evidence When It Is Offered by a Criminal Defendant, and That the Rule 403 Balancing Test Should Apply Instead.

The majority of circuit courts have adopted a liberal approach to "reverse 404(b)" questions. They have held that Rule 404(b) does not apply to propensity evidence offered by a defendant, and that any concerns of waste of time or jury confusion can be dealt with by applying the Rule 403 balancing test to the evidence sought to be admitted. *See, e.g., Aboumoussallem*, 726 F.2d at 911-912; *Stevens,* 935 F.2d at 1404-05; *Montelongo*, 420 F.3d at 1204.

However, the Sixth, Seventh, and the Ninth Circuits have adopted a plain language approach. The plain language approach examines the Rule 404(b) use of "a person," as opposed to "a defendant," and applies Rule 404(b) not only to the prior act of the defendant, but also to the acts of absent third parties. *See United States v. Lucas*, 357 F.3d 599, 606 (6th Cir. 2004); *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir.1999); *United States v. McCourt*, 925 F.2d 1229, 1230 (9th Cir. 1991). Nevertheless, the liberal approach to "reverse 404(b)" evidence is most consistent with common law and the public policy behind Rule 404(b). Thus, the majority of the circuit courts are correct to hold that as a matter of law, the Rule 404(b) bar on propensity evidence does not apply when the defendant seeks to introduce it.

In *Aboumoussallem*, the Second Circuit held that the bar on propensity evidence does not apply when the defendant seeks to introduce third party propensity evidence. 726 F.2d at 912. The court held that the proper inquiry is whether the evidence is relevant to the defendant's defense, in which case the court should engage in Rule 403 balancing test analysis. *Id*. The defendant sought to introduce evidence that his co-conspirator cousins had previously duped an innocent person into transporting narcotics to support his defense that his coconspirator cousins

had similarly duped him. *Id*. The court engaged in Rule 403 balancing and excluded the evidence on relevancy grounds. *Id.* However, the court expressly disagreed with the district court's rationale that Rule 404(b), as a matter of law, bars that evidence as propensity evidence. *Id.*

Similarly, the Third Circuit held in *Stevens* that Rule 404(b) does not bar third-party propensity evidence when offered by the defendant. 935 F.2d at 1404-05. The court held that "reverse 404(b)" evidence does not involve the danger of prejudice to the defendant. *Id.* Therefore, "reverse 404(b)" evidence should be admitted as long it meets the relevancy requirement of Rule 401 and passes the Rule 403 balancing test. *Id.* The defendant was charged with aggravated sexual assault and robbery, and a substantial part of the prosecution's case was the victims' identification of the defendant out of a line-up. *Id.* at 1383. The defendant attempted to introduce the testimony of a victim of another robbery, which was so similar to the crime the defendant was charged with as to suggest that the same person had committed both. *Id.* This victim of the second robbery had failed to identify the defendant as his assailant, and the defendant sought to introduce his testimony to support his defense that he had been misidentified. *Id.* The Third Circuit held that as long as "reverse 404(b)" evidence "has a tendency to negate [the defendant's] guilt," it passes the Rule 403 balancing test and should be admitted. *Id.* at 1405.

In *Montelongo*, the Tenth Circuit relied on the approach taken by the Third Circuit in *Stevens* and engaged in a Rule 403 balancing test to admit "reverse 404(b)" evidence. 420 F.3d at 1174-75. Here, defendants were charged with possession with intent to distribute and conspiracy with intent to distribute more than fifty kilograms of marijuana. *Id.* The defendants sought to introduce evidence of a similar instance of drug trafficking involving two drivers

charged with the same crimes. *Id*. An individual the defendants claimed duped them into trafficking the marijuana was the person who hired the two drivers in that case. *Id.* at 1172. The Tenth Circuit reversed the district court's exclusion of the evidence based on a Rule 403 balancing test as articulated in *Stevens*. *Id.* at 1174-75. The court held that the evidence was probative to the defendant's defense and would not confuse the jury or constitute a waste of time. *Id.*

The minority of the circuit courts have chosen to follow the plain language approach when it comes to "reverse 404(b)" questions, and have held that the Rule 404(b) ban on propensity evidence applies to third parties as much as it applies to the defendant. *See Lucas*, 357 F.3d at 606; *Agushi,* 196 F.3d at 760; *McCourt,* 925 F.2d at 1230. In making this determination, all three circuits focused on the textual argument—Rule 404(b) uses the word "person," not "defendant,"—and therefore held that it cannot be construed to apply only to a defendant. *See id.*

The language of Rule 404(b) alone is not enough to dictate that that Rule 404(b) applies to non-defendants. The advisory notes to Rule 404(b) provide no indication that the word "person" is supposed to apply to anyone but a defendant. The common law rule against using propensity evidence, moreover, was intended to prevent unfair prejudice toward a criminal defendant. Rule 404(b), designed after the common law rule, carries the very same policy concerns. In the context of "reverse 404(b)" evidence, the prejudice against a defendant is absent, and the concerns of waste of time and jury confusion can be dealt with through Rule 403 analysis. Therefore, the Fourteenth Circuit was correct in joining their sister Circuits to hold that Rule 404(b) does not apply when the defendant is offering evidence of the propensity of a third party in order to exculpate herself.

II. THE EXCLUSION OF MORRIS'S TESTIMONY WOULD VIOLATE RESPONDENT'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE BECAUSE IT HAS SUBSTANTIAL PROBATIVE VALUE, IS THE ONLY PIECE OF EVIDENCE IMPLICATING MS. SHORT, AND IS SUFFICIENTLY SPECIFIC.

The right to present a complete defense is a fundamental constitutional right. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Respondent's constitutional right to present a complete defense will be violated if the evidence of Ms. Short's propensity to distribute illegal drugs is excluded. The probative value of this evidence to Respondent's defense is substantial. Respondent's constitutional rights outweigh any policy interests that would be advanced by excluding this evidence. *See id.* at 303.

As a general rule, the defendant, in exercising her right to present a complete defense, "must comply with established rules of procedure and evidence." *Chambers*, 410 U.S. at 302. However, "where constitutional rights directly affecting the ascertainment of guilt are implicated," those rules "may not be applied mechanistically to defeat the ends of justice." *Id.* The right to present a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 320 (2006) (quoting *United States v. Sheffer*, 523 U.S. 303, 308 (1998)). In order to determine if the evidence rule violates a "weighty interest of the accused," courts assess the probative value of the evidence as it relates to the defendant's right to present a complete defense. *Id.* at 320.

In *Chambers*, the Court held that the Mississippi's voucher and hearsay rules violated his constitutional right to due process. 410 U.S. at 303. The voucher and hearsay rules prevented the defendant from cross-examining and presenting prior inconsistent statements against an individual who had previously confessed to the murder of which the defendant was charged. *Id.*

In making this determination, the court stated that the evidence sought to be introduced by the defendant was "critical to [his] defense," and implicated his constitutional rights directly affecting the "ascertainment of guilt." *Id.* at 302.

The Court affirmed *Chambers* in *Holmes*, where it held that South Carolina's rule excluding third-party guilt evidence violated the defendant's right to have a "meaningful opportunity to present a complete defense." 547 U.S. at 319. Faced with various charges including murder, the defendant sought to introduce evidence that another individual had been in the victim's neighborhood on the morning the crime took place, and that he had either acknowledged that the defendant was innocent or actually admitted to committing the crimes himself. *Id.* at 322. The Court reversed the trial court's exclusion of this evidence. *Id.* The court held that a criminal defendant's constitutional rights are violated when the defendant may not introduce evidence of third-party guilt. *Id.* at 312. In its holding, the Court iterated that the right to present a complete defense is violated when it is "abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* at 321.

When the defendant is able to present her defense by otherwise admissible evidence, courts have held that the exclusion of third party guilt evidence does not violate the defendant's constitutional right to present a complete defense. *See Lucas*, 357 F.3d at 605-606. The Sixth Circuit held that excluding evidence of a third party's conviction for possession and distributing cocaine did not result in a constitutional violation. *Id.* The defendant was charged with knowingly and intentionally possessing cocaine, which was found in her car when she was pulled over for speeding. *Id.* at 604. She unsuccessfully attempted to introduce evidence that a third party who drove her car right before this incident had previous convictions for possession

and distributing cocaine. *Id.* at 604-605. The Sixth Circuit refused to admit this evidence, stating that defendant was still able explore and present to the jury her theory that the cocaine belonged to the third party through her own testimony and the testimony of two of her friends. *Id.* at 606.

Here, the exclusion of Morris's testimony would violate a "weighty interest of the accused" because it is sufficiently specific and it is the only evidence linking Short to this conspiracy. (R. 14, 33.) Morris's testimony would introduce evidence that one of the Respondent's teammates sold a very similar type of anabolic steroid—a chemical derivative of the steroid discovered at Lane's home, in an extremely similar context—to members of the Canadian women's Snowman team, less than a year before Riley's shooting. (R. 24-25). This evidence has a very high probative value, because it substantially supports Respondent's defense that she was not involved in the conspiracy, and therefore is not liable for any acts attributed to the conspiracy.

Second, the probative value of this evidence is drastically increased by the fact that this is a two-person conspiracy, as conceded by the government, and Morris's testimony is the only evidence linking Short to this conspiracy. (R. 14, 33.) In the context of a two-person conspiracy, limiting the ability of the Respondent to show that another member of the team had recently distributed a similar drug in a similar context would violate her right to present a complete defense, especially as it would invite the jury to make a negative inference about the lack of exculpatory evidence.

Moreover, this case is distinguishable from *Lucas* because the Respondent has no other evidence to link someone else to the conspiracy, and the type of the drug in question makes this evidence significantly more specific. *See* 357 F.3d at 605-606. First, while the defendant in

Lucas retained the ability to link the cocaine to the third person through her own testimony, and the testimony of her two friends, here, Morris's testimony is the only available piece of evidence linking Short to this conspiracy. *See id.* Second, the steroid previously sold by Short is a chemical derivative of ThunderSnow, making it likely that the jury would find this evidence highly probative as to the Respondent's defense that Short was the second coconspirator. (R. 28.)

When there exists a sufficiently legitimate policy interest to exclude the evidence, courts have been reluctant to hold that the defendant's constitutional right to present a complete defense is violated by the exclusion of that evidence. *See*, *e.g.*, *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (holding that the defendant's right to present relevant evidence may, in certain situations, "bow to accommodate other legitimate interests in the criminal trial process."). However, there are no "legitimate" policy interests that would be furthered by the exclusion of Mr. Morris's testimony. Moreover, the concerns of judicial expediency and reducing prejudice do not constitute legitimate policy interests in this case. First, the Respondent seeks only to introduce one piece of evidence as part of her small-scale defense, which is unlikely to waste significant judicial resources, or result in a waste of time. Second, this evidence concerns Ms. Short, not a party to this case, and therefore bears no risk of prejudice.

Ms. Morris's testimony has substantial probative value because it is sufficiently specific. Further, it is the only piece of evidence linking Ms. Short to the drug selling conspiracy. As well, it is especially relevant in the context of a two-person conspiracy with a limited number of potential coconspirators, where the jury is likely to be prejudiced by lack of evidence. Therefore, given the highly probative value of Ms. Morris's testimony as it pertains to the Respondent's right to present a complete defense, and the lack of legitimate government interests in excluding

this evidence, the Court should affirm the Fourteenth Circuit's decision to admit Ms. Morris's testimony.

III. *WILLIAMSON* REMAINS THE APPROPRIATE STANDARD FOR APPLYING RULE 804(B)(3) BECAUSE IT IS CONSISTENT WITH THE PRINCIPLE THAT DECLARATIONS AGAINST PENAL INTEREST ARE INHERENTLY MORE TRUSTWORTHY THAN NON-SELF-INCULPATORY STATEMENTS AND THE RULE WAS CORRECTLY APPLIED BY THE COURTS BELOW.

The standard developed in *Williamson* remains appropriate to apply to Rule 804(b)(3) because its narrow analysis aligns with the principle behind declarations against penal interest. This standard developed by this Court comports with a history of distrust of statements against penal interest. Further, the rule reflects the special distrust of accomplice statements and the importance of creating a standard that would produce reliable results. Due to its sensitivity to the common law and history, *Williamson* should continue to be upheld as the appropriate standard to apply Rule 804(b)(3).

The statements against penal interest exception is premised upon the "inherent reliability of statements" tending to incriminate the declarant. *Williamson v. United States*, 512 U.S. 594, 599–600 (1994). As such, statements that are not self-inculpatory must be separated from statements that are incriminating declarations, and only portions of the statement that are "actually incriminating of the declaration" are admitted. *Id.* at 599–600. Therefore, each hearsay statement must be separately parsed and each must be self-inculpatory to be admitted under the hearsay exception. *United States v. Jackson*, 335 F.3d 170, 179 (2d Cir. 2003).

Only statements that are self-inculpatory are taken as true, and they do not affect the credibility of the confession's non-self-inculpatory statements. *Williamson*, 512 U.S. at 600-01. The contrary would belie the principle behind Rule 804(b)(3). Nothing in the text of Rule 804(b)(3) or the general hearsay Rules suggest that admitting a statement would turn on whether

it is collateral to a self-inculpatory statement. *Id.* at 600. Further, whether a statement is collateral to a self-inculpatory statement does not enhance its reliability. *Id.* Therefore collateral statements, even neutral statements, should not be treated differently from other hearsay statements that are excluded because of their untrustworthiness. *Id.* Therefore, non-self-inculpatory statements are not admissible under Rule 804(b)(3). *Id.* at 601. The Rule also requires that the statement be "supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3)(B).

A. The *Williamson* Standard Arises from a History of Distrust of Declarations Against Penal Interest.

As held by this Court in *Williamson*, a declaration against interest covers only single declarations or remarks within a confession that are "individually self-inculpatory." 512 U.S. at 599. This reading was chosen by the Supreme Court because it properly reflects the principle behind Federal Rule of Evidence 804(b)(3), "that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id.* The appropriate standard is whether the statement is 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' . . . in light of all the surrounding circumstances." *Id.* at 604-05.

The Court has recognized in *Williamson*, "out-of-court statements are subject to particular hazards." 512 U.S. at 598. Due to this litany of hazards, the court prefers live testimony in order to observe the witness' demeanor to see if the witness is lying. *Id.* Further, in-court testimony forces the witness to take the oath and understand the gravity of the proceedings. *Id.* Most importantly, in-court testimony allows the opponent to cross-examine the witness, assessing whether the witness might have a faulty memory, may have misperceived the

events, or whether the witness misunderstood or took the events out of context. *Id.* Cross-examination therefore is a crucial tool to evaluate the reliability and trustworthiness of a statement.

When a statement implicates a co-defendant, there are even greater dangers. *Williamson*, 512 U.S. at 601. The co-defendant has a strong motivation to implicate the defendant and exonerate herself. *Id.* Therefore, a co-defendant's statements about what the defendant "said or did are less credible than ordinary hearsay evidence." *Id*. (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)).

Declarations against interest have long been viewed with distrust, especially in the context of co-defendant statements. 2 Kenneth S. Broun et al., McCormick on Evidence § 318 (7th ed. 2013); *Bruton v. United States*, 391 U.S 123, 141 (1968) (J. White, dissenting). Such distrust arose from *Chambers*. In *Chambers*, the Court found a violation of due process because third party statements were considered reliable enough that the defendant was denied the opportunity to cross-examine the declarant. McCormick on Evidence § 318 n.9. In fact, the intense distrust of inculpatory statements led the Federal Advisory Committee to first propose a rule barring all of them in 1969. *Id*. at § 318 n.11. However, this rule was never implemented, and the committee preferred that the statements be evaluated on a "case-by-case basis." *Id.* Still, the provision barring all inculpatory statements was reinstated in Uniform Rule of Evidence 804(b)(3) and has been adopted in at least six states in the country. *Id.*; Unif. R. Evid. 804(b)(3) (2005). Such a history comports with a narrow reading of statement in *Williamson*.

B. The Courts Below Correctly Applied *Williamson* in Barring the Admission of the Email.

The district and appellate court both correctly applied *Williamson* in holding that the email did not sufficiently expose Lane to criminal liability, nor was it trustworthy. Requiring

that the declaration must state facts that are against the penal interest of the declarant provides a safeguard of special trustworthiness. McCormick on Evidence § 316. The harm of making a statement against one's interest must also exist at the time the statement was made and there must be exposure to criminal liability, or else there is no force that would cause the declarant to speak accurately and truthfully. McCormick on Evidence § 319; *Roberts v. City of Troy*, 773 F.2d 720, 725-26 (6th Cir. 1985). There must be substantial exposure to criminal liability. *United States v. Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978).

The First Circuit applied the reasoning in *Williamson* to admit statements that it found to be self-inculpatory. *United States v. Monserrate-Valentin*, 729 F.3d 31, 55 (1st Cir. 2013). The statements admitted were of a co-conspirator stating that he committed a robbery. *Id.* at 53. Other statements include a conversation the defendant had with an informant, revealing his knowledge of the robbery. *Id.* at 55. In applying *Williamson*, the court established that some of the statements were not self-incriminating—statements that included "no one has evidence" and discussion about his reputation. *Id.* at 54. The court overruled the district court's finding that the statements taken in context with other statements made them self-inculpatory. *Id.* However, because the defendant did not explain how the statement was prejudicial, its admission was not considered harmful. *Id.*

In *United States v. Dargan*, the Fourth Circuit also applied *Williamson* to assess the "self-inculpatory quality" of statements made to a prison cellmate. 738 F.3d 643, 649-50 (4th Cir. 2013). Per the standard set out in *Williamson*, the court examined the context and the content of the statements as to whether they were self-inculpatory. *Id.* at 649. Like the First Circuit, the Fourth Circuit also examined corroborating circumstances. *Id.* at 650. The statements revealed

the defendant's knowledge of the operations and exposed him to liability, therefore meeting the requirements of the test. *Id.* at 649.

In assessing the admissibility of statements of a co-conspirator, the Seventh Circuit held that it "cannot simply admit all neutral statements that precede or follow a statement that is truly against the declarant's interest" when it applied *Williamson*. *United States v. Watson*, 525 F.3d 583, 587 (7th Cir. 2008). The court examined the statements in context to evaluate whether they were each self-inculpatory as to the declarant. *Id.* The statements were of a co-conspirator that admitted committing the robbery in question and named other conspirators. *Id.* at 650. The court found that the statements did expose the declarant to criminal liability, and there was no confrontation clause issue because the conspirators were not tried jointly, therefore the court admitted the statements. *Id.* at 650-51.

The Eleventh Circuit also applied the *Williamson* standard to assess whether a statement was truly self-inculpatory and trustworthy in *United States v. U.S. Infrastructure, Inc.* 576 F.3d 1195, 1209 (11th Cir. 2009). Applying the *Williamson* standard, the court examined the context of the statement, and found that it was inculpatory truly to the declarant and that he did not try to lessen his criminal liability by spreading his blame to others. *Id.* at 1208-09. Because the statement showed that the declarant tended to take bribes, the court held that the statement was against his penal interest. *Id.* at 1208. The statement was therefore admitted, passing each step of the *Williamson* analysis and held to be trustworthy. *Id.* at 1209.

The First, Fourth, Seventh, and Eleventh circuits use of *Williamson* demonstrate its continued appropriateness in analyzing declarations against interest. Having a strict, multi-faceted standard comes out of the general distrust of declarations against penal interest illustrated by the fact that the rule contains the clause that it must be "supported by corroborating

circumstances that clearly indicate its trustworthiness" in criminal matters. McCormick on Evidence §§ 318, 319(e). Historically, declarations against penal interest were not universally recognized, with many states discarding the rule in its entirety. *Chambers,* 410 U.S. at 299. The general distrust comes from the belief that "confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest." *Id.* at 299-300.

The courts below correctly applied *Williamson* in holding that the email was inadmissible. (R. 43.) Assessing the statements individually, the courts correctly found that they do not inculpate Lane or expose her to criminal liability. Unlike precedent, she does not confess to a crime, does not reveal detailed knowledge of a crime, nor does she implicate herself in making the statements. (R. 29.) Further, she attempts to shift blame by referring to the activities of her "partner," and not being responsible for any activities that her "partner" might do as she states she doesn't "know" what her partner will do. (R. 29.) Such statements reveal the untrustworthiness of the statement. *See U.S. Infrastructure, Inc.*, 576 F.3d at 1208-09.

Significantly, this statement is in the form of an email, setting it apart from precedent. As emails are written, formulated statements, there is little that can be said about their context, the tone of the voice, or the state of mind of the declarant as the Court is only presented with text of the statement. This stands in contrast to a situation where Lane would communicate the statement to Billings and he would be able to comment on Lane's demeanor and the context. Due to the circumstances of the email, one cannot assess whether there is a force that would cause the declarant to speak accurately and truthfully. *See* McCormick on Evidence § 319; *City of Troy*, 773 F.2d at 725-26.

In upholding *Williamson*, the doctrine of *stare decisis* necessitates "society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). Upholding *Williamson* contributes to the integrity of our "constitutional system of government." *See id.* Any other outcome would have to result only if the Court "felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez*, 474 U.S. at 266.

As demonstrated by precedent, the *Williamson* standard allows for easy implementation that is predictable and will promote judicial efficiency. The concerns of Judge Marin dissenting in the appellate opinion are unfounded as the use of *Williamson* by the circuit courts clearly demonstrates that application of the standard is not subject to the intense analysis with which he uses to dissect the statements. Further, an alternative standard that would serve to incorporate collateral statements would neglect a history of distrust of such statements and cautious use of declarations against interest. The narrow standard developed in *Williamson* will result in more consistent results and will not be left open to a subjective test of interpretation that a broader standard would allow. Such a risk is too great in the dispensing of justice. The circuit courts' use of *Williamson* demonstrates that it is a usable standard that is fair and should remain.

IV. A STATEMENT OF A NON-TESTIFYING CO-DEFENDANT IMPLICATES THE CONFRONTATION CLAUSE BECAUSE THE *BRUTON* DOCTRINE STILL REQUIRES ACCOMPLICE STATEMENTS BE TESTED BY CROSS-EXAMINATION BECAUSE OF THEIR UNIQUE UNTRUSTWORTHINESS, AND SUCH STATEMENTS MUST PASS THE RULE 403 TEST.

The *Bruton* doctrine remains the appropriate test in evaluating Confrontation Clause guarantees in the admission of accomplice testimony. *Bruton* is concerned with the harmfulness of the admission of accomplice statements untested by cross-examination, while *Crawford* overruled a test of reliability in evaluating Confrontation Clause guarantees. *See Cruz v. New*

York, 481 U.S. 186, 192-93 (1987). Additionally, *Crawford* does not affect the outcome of *Bruton* as it focuses on a test of reliability for statements in matters not concerning accomplice testimony. *Crawford v. Washington*, 541 U.S. 36, 44 (2004). Accomplice testimony requires that its reliability by evaluated by cross-examination in order to eliminate any sort of "abuses" of such testimony. *Id.* at 44. As put forth in the preceding section, accomplice statements are especially suspect and untrustworthy and therefore should be privy to narrow rules as to their admissibility.

Crawford was concerned with the admission of statements that were considered reliable under a "subjective" standard. *Crawford*, 541 U.S. at 63. The Court noted that notwithstanding accomplice statements' unreliability, they have continued to be routinely admitted. *Id.* at 64. This concern brought the Court to create a narrow rule that goes beyond a subjective reliability test to ensure Confrontation Clause guarantees that had been overlooked by the courts. *Id.* at 68. The Court held that the Constitution commanded reliability "be assessed in a particular manner . . . cross-examination." *Id.* at 61.

The *Roberts* test, which examined the reliability of the statement assessed by factors determined by a judge, had replaced the Confrontation Clause. *Crawford*, 541 U.S. at 62. For evidence to be admitted it had to fall within a "'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.'" *Id.* at 40 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). The testimony in *Crawford* was admitted initially under this test, considering several factors that made it trustworthy. *Id.* at 40. These factors included that her statement was corroborating her husband's story, that she was not shifting blame, and that she was being questioned by a "neutral" police officer. *Id*. The defendant had been convicted on the statement that had been recorded and played for the jury. *Id.* at 40-41. However, the appellate court

reversed. *Id.* at 41. Because the defendant's wife had offered two statements that contradicted one another, it held that the statement was therefore not trustworthy. *Id*. The Washington Supreme Court reinstated the conviction, however, and found that the statement was trustworthy because it was interlocking with the defendant's statement. *Id.* at 41. Due to the subjective factors that were being used to assess the testimony, leading to unpredictable outcomes and an inefficient use of judicial resources, the Court overruled the reliability test under *Ohio v. Roberts* and instead instated a rule that examined whether a statement was testimonial. *Id.* at 67-69. *Crawford*, therefore was concerned with creating a predictable test that provided Confrontation Clause guarantees, not with restricting *Bruton* in providing continued protection to scrutinize accomplice statements.

A. *Bruton* Is Still the Correct Standard to Evaluate Confrontation Clause Guarantees for Uniquely Untrustworthy Accomplice Statements.

The reasoning of the Court in *Bruton* recognized the untrustworthiness of accomplice statements both in common law practice and in legislation. The Court's reasoning should be upheld here in barring the statements due to Confrontation Clause violations.

In *Bruton*, this Court held that the admission of the confession of Bruton's co-defendant violated his right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. *Bruton*, 391 U.S. at 137. In so ruling, it overruled *Delli Paoli*, which held that the jury could follow instructions to disregard a confession. *Id.*; *Delli Paoli v. United States*, 352 U.S. 232, 248 (1957). The Court found that this reliance was false. *Id.* at 128. In making such a holding, it examined Justice Frankfurter's dissent, highlighting that "[t]he Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Id.* at 129 (quoting *Delli Paoli*, 352 U.S. at 248 (J. Frankfurter, dissenting)). Chief Justice Traynor

also stated in *People v. Aranda* that it would be a denial of due process to rely on a jury to disregard a co-defendant's confession that implicated another defendant when determining guilt of innocence. 407 P.2d 265, 271-72 (Cal. 1965)

Confrontation allows the defendant to bring to light and expose deficiencies and sources of error in hearsay. *Bruton*, 391 U.S. at 136 n.12. The main concern with the use of confrontation in *Bruton* was the constitutional harm to the defendant without the ability to cross-examine a non-testifying co-defendant. *Id.* However, *Crawford* was examining the narrow circumstance of a non-testifying non-defendant, where the defendant's wife provided statements and did not testify under the marital privilege. *Crawford*, 541 U.S. at 68. The Court in *Crawford* was also greatly concerned with accomplice statements being admitted without confrontation. *Id.* at 63-66. It held that cross-examination was the "crucible" of evaluating the reliability of evidence. *Id.* at 61. Further, the Court held that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62. Rather than allowing in a greater amount of evidence under a banner of "nontestimonial," the Court in *Crawford* was concerned with the amount of accomplice statements that were being admitted. *Id.* at 63-66. A "[v]ague standard" was not supported by *Crawford* in its holding. *Id.* at 68. The holding of *Crawford* therefore serves to limit the admission of testimony, especially accomplice testimony, rather than expand its admission.

The Court recognized the unique untrustworthiness of accomplice statements and the ineffectiveness of limiting instructions in the motivations for amending the Federal Rules of Criminal Procedure. Adding a clause that allowed in camera review of statements of confessions the prosecution intended to present in order to review a motion for severance brought by the

defendant, the Court amended Rule 14 of the Federal Rules of Criminal Procedure in 1966. *Bruton*, 391 U.S. at 131-32. This clause was accompanied by an advisory committee note explaining the need for the clause, stating that "[a] defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice." *Id.* at 132; Fed. R. Crim. P. 14 advisory committee's notes (1966).

The Tenth Circuit held that *Bruton* still applies in the admission of a non-testifying co-defendant's confession when it implicates the defendant at their joint trial as violating the defendant's Sixth Amendment Confrontation Clause rights. *United States v. Nash*, 482 F.3d 1209, 1218 (10th Cir. 2007). *Bruton* is applied when the statements are directly inculpatory, not "inferentially incriminating." *Id.* (quoting *United States v. Rahseparian*, 231 F.3d 1267, 1277 (10th Cir.2000)). The court found that admitting the testimony of statements made by the defendant to persons in prison violated *Bruton* even though they referred to a "partner" and not to the defendant directly. *Id*. Such statements, where the jury was able to infer the defendant from "partner" "reflect the kind of inference the Supreme Court has sought to prohibit in joint trials." *Id.* at 1219. The Tenth Circuit therefore held that the right to confrontation under *Bruton* was violated. *Id.*

The Sixth Circuit held that the right to confrontation is essential for a fair trial and fundamental in this country when holding that a defendant should be able to confront his co-defendant. *United States v. Canan*, 48 F.3d 954, 960-61 (6th Cir. 1995). The court applied *Williamson*, holding that each single declaration or remark must be evaluated whether it meets the requirements of Rule 804(b)(3). *Id.* Even though the defendant was present during the

interrogation of the co-defendant, that was videotaped, the court held that the defendant still needed the opportunity to cross-examine him. *Id.* at 962. Therefore, it held that the testimony violated the Confrontation Clause. *Id.* Further, the court in *Canan* held that the Sixth Amendment right of confrontation "should not be degraded in the name of expediency." *Id.* at 961.

The benefits of confrontation include an "(1) assurance 'that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury,' and (2) the fact that confrontation 'permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.'" *Id.* at 964 (quoting *California v. Green*, 399 U.S. 149, 158, (1970)).

Most fundamental is that this Court has already stressed in *Crawford* and in *Bullcoming* that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Crawford*, 541 U.S. at 54. An exception for certain statements, therefore, would run afoul of the limited role of the judiciary. *See id.* As it is not "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011) (quoting *Giles v. California*, 554 U.S. 353, 375 (2008)). Therefore, ignoring a history of mistrust of accomplice statements to apply an open-ended exception that nontestimonial statements are admissible would be contravening the very constitution that provides that right of confrontation and would exceed the judiciary's limited powers to resolve controversies before it.

It is the province of the Court to expound upon the Confrontation Clause only as necessary. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

To assess whether the Confrontation Clause bars the email, the Court must apply *Bruton* and its progeny. Evaluating the circumstances surrounding the email will provide important information in assessing whether the Confrontation Clause bars it. Courts before have admitted statements under an emergency exception, looking to whether the statement was made primarily to help police respond to an ongoing emergency. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011). Unlike emergency exception cases, the email here was a planned event. Emails are also premeditated, allowing opportunity for falsehoods to be formed. Further, blame shifting is evident here as the declarant Lane places another person, her "partner," as the actor in the email while she is the victim, unknowing of any future actions. (R. 29.) These circumstances combined together provide a high risk of untruthfulness in the statements.

As long as the defendant is implicated in the statement, there is a *Bruton* problem because the admission of the statement purports to establish that a "partner" committed an overt act. *See Nash*, 482 F.3d at 1218. The special circumstance in our case is that the statement was sent in an email. (R. 29.) Further, the email was sent at a time far detached from any key events. (R. 29.) There is little information as to its context. Emails are deliberatively sent, and often edited, versus spoken conversations that leave little opportunity for editing. It is not evident if the declarant was flustered at the time, or desperate for help. Emails do not reveal tone, express emotion, and do not convey truthfulness, unlike live testimony.

It is not dispositive that the statements were communicated to the co-defendant's boyfriend and coach. (R. 29.) This man was liable for the team and its progress. He would also be liable for any issues that arose if its progress was fraudulent. Therefore, there are serious

liability issues with the coach receiving the email, and motivation for Lane to pass the blame onto her "partner." Courts prior to *Crawford* have found that statements made to friends and family members violated the right to confrontation. *See, e.g., Holland v. Att'y Gen*., 777 F.2d 150, 152 (3d Cir. 1985) (finding a violation of the *Bruton* doctrine based upon admission of a nontestifying co-defendant's inculpatory statement to his wife); *Monachelli v. Warden, SCI Graterford*, 884 F.2d 749, 753 (3d Cir. 1989) (finding "that the *Bruton* rule is applicable where the statements of the non-testifying co-defendant were made in a non-custodial setting to family and friends"). As long as the statements result in some criminal liability, there is a Confrontation issue and their admission violates the core purpose of the Sixth Amendment.

B. Admission of the Email Is More Prejudicial than Probative and Should Be Barred by Rule 403.

The email is also more prejudicial because the jury can infer that the defendant committed a bad act in furtherance of the conspiracy and to prove co-conspirator liability. It can also be used to prove conspiracy to commit murder. Limiting instructions would not work; the statements referring to a partner must be stripped entirely.

There is a serious issue of spillover prejudice if the email is admitted. *United States v. Figueroa*, 618 F.2d 934, 946 (2d Cir. 1980). Although the email is being admitted against the co-defendant, the statements regarding the actions of a "partner" serve to prejudice the defendant, who is unable to cross-examine the co-defendant even though she is in the same room and does not have to testify. Such statements are "devastating" to the defendant. *Bruton*, 391 U.S. at 136. This prejudice unfairly gives the prosecution an advantage and causes great harm to the defendant. Securing "convenience in the administration of the law at the price of fundamental principles of constitutional liberty" is too high a price. *Id.* at 135 (quoting *People v. Fisher*, 164 N.E. 336, 341 (N.Y. 1928) (J. Lehman, dissenting)).

Even though the email does not specifically name Defendant, it is enough that it alludes to a "partner" that makes it damaging. (R. 3.) The jury would infer that the confession refers specifically to the defendant. *See Gray v. Maryland*, 523 U.S. 185, 192 (1998). Even statements that do not explicitly name defendants are still prejudicial and cannot be admitted. *Id.*

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court **AFFIRM** the decision of the Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

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Counsel for Respondent, 30

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