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

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether Federal Rule of Evidence 404(b) allows third party propensity evidence that tends to exonerate a defendant where the stated purpose, historical origins, and legislative intent of the rule indicate it should be used to protect the accused.

II. Whether excluding propensity evidence implicating a third party in the crime charged violates a defendant's constitutional rights where individuals have a right to present a complete defense that cannot be outweighed by procedural rules with a weak policy rationale.

III. Whether the definition of a statement against penal interest under *Williamson v. United States* should be upheld where the definition only admits reliable statements, *stare decisis* disfavors overruling established precedent, and the current rule is the most feasible standard.

IV. Whether a co-defendant's non-testimonial confession should be excluded as violating the Confrontation Clause under *Bruton v. United States* where *Crawford v. Washington* concerned a legally distinct issue and the *Bruton* doctrine should be interpreted broadly to ensure that co-defendants get a fair trial.

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STATEMENT OF THE CASE

Statement of Facts

Anastasia Zelasko ("Ms. Zelasko") is on trial for allegedly participating in a two-person drug conspiracy. The United States seeks to admit the damaging hearsay statement of her co-defendant, Jessica Lane ("Lane"), while excluding testimony that shows another person may have committed the crime. Ms. Zelasko joined the elite United States women's Snowman Team on September 6, 2010. (R. 1). The team engaged in a series of rigorous events in the "physically demanding" Snowman Pentathlon at the World Winter Games, including: dogsledding, ice dancing, aerial skiing, rifle-shooting, and curling. (R. 1–2). Although in summer 2011 the team had yet to achieve stellar rankings, beginning that autumn the women's team had "markedly improved" during their practice runs. (R. 2). Unbeknownst to Ms. Zelasko or fellow teammate Lane, this improvement piqued the Drug Enforcement Agency's ("DEA") interest, and a member of the U.S. men's Snowman team, Hunter Riley ("Riley"), was recruited to gather information. (R. 2). On October 1, 2011, the DEA asked Riley to approach Lane to ask for a performance-enhancing steroid known as "ThunderSnow" that sport authorities would be unable to detect with a blood test (R. 2, 27).

Riley approached Lane to purchase ThunderSnow for his personal use. (R. 2). In 2011, Riley asked to buy "ThunderSnow" from Lane on three separate occasions: October 1, November 3, and December 9. (R. 2-3). Lane refused each time. (R. 2-3). Shortly thereafter on December 10, 2011, Peter Billings ("Billings"), coach of the women's Snowman team and Lane's long-time boyfriend, observed Lane and Ms. Zelasko engaged in a "heated argument." (R. 3). Lane shouted, "[s]top bragging to

everyone about all the money you're making!" (R. 3). Billings began to suspect that Lane was selling performance-enhancing drugs to members of the Snowman team. (R. 3).

The next day, Billings approached Lane about his suspicions. (R. 3). Lane denied that she was selling ThunderSnow. (R. 3). But, in an email to Billings dated December 19, 2011, Lane confessed:

> 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. (R. 3).

However, Lane never identified who her "partner" was. (R. 3). The government has conceded that Lane only had one partner. (R. 11, ll. 18–19).

On February 3, 2012, Ms. Zelasko accidentally shot Riley at the Snowman team's training area in Remsen National Park. (R. 3). Although some members of the Snowman team saw Riley yell at Ms. Zelasko a few days earlier, Riley's death was a tragic but accidental result of participation in a dangerous sport. (R. 3, 8). Ms. Zelasko was arrested for her role in Riley's death, and law enforcement obtained a warrant to search Ms. Zelasko's home. (R. 3). Law enforcement seized two doses of ThunderSnow and nearly five thousand dollars cash. (R. 3). The next day, the DEA executed another search warrant at the team's training center in Remsen National Park where large amounts of ThunderSnow were recovered, worth about $50,000. (R. 3). The DEA then searched Lane's home and found the following: $10,000 cash, over a dozen doses of ThunderSnow, and the computer Lane used to send the email to Billings. (R. 4).

Procedural History

On April 10, 2012, Ms. Zelasko and co-defendant Lane were indicted and charged with Distribution of and Possession with Intent to Distribute Anabolic Steroids, Simple Possession of Anabolic Steroids, Conspiracy to Murder, and First Degree Murder. (R. 4–5). At a pre-trial suppression hearing, Ms. Zelasko moved to admit witness Miranda Morris's ("Morris") testimony. Morris was prepared to testify that Casey Short ("Short"), a member of the Canadian Snowman team, sold a performance-enhancing drug that was determined to be a "chemical modification" of ThunderSnow within the last year. (R. 28). Short later joined the American team before the DEA began investigating the drug conspiracy involving Lane. (R. 24). In sum, Morris's testimony demonstrates that Short had a propensity to sell performance-enhancing drugs. (R. 7, 24–25). Additionally, the State moved to admit Lane's e-mail incriminating herself as well as an unnamed "partner." (R. 7).

On July 18, 2012, the United States District Court for the Southern District of Boerum ruled that: (1) Morris's testimony was not barred by Federal Rule of Evidence 404(b) and excluding this testimony would violate Ms. Zelasko's constitutional rights; and (2) co-defendant Lane's e-mail did not constitute a statement against penal interest pursuant to Federal Rule of Evidence 804(b)(3) and was also barred under *Bruton v. United States* as "an inculpatory statement of a non-testifying co-defendant" not subject to cross-examination. (R. 21-23). The United States filed an interlocutory appeal with United States Court of Appeals for the Fourteenth Circuit. (R. 30). The Fourteenth Circuit affirmed the District Court's ruling on both issues, holding that: (1) Rule 404(b) is not applicable where a defendant uses evidence to demonstrate a third party's propensity to engage in crime; (2) evidence necessary to preserve a criminal defendant's right to

present a full defense cannot be excluded based on a procedural rule with a weak policy rationale; (2) the United States Supreme Court's holding in *Williamson* prohibits admission of statements falling short of statements against penal interest; and (3) that the doctrine delineated in *Bruton v. United States* applies to both non-testimonial and testimonial statements. (R. 31).

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

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly held that Morris's testimony is admissible and Lane's email is inadmissible because suppression of Morris's testimony but admission of a co-defendant's incriminating confession would violate the Federal Rules of Evidence and Ms. Zelasko's constitutional rights. First, Morris's testimony should be admitted under Federal Rule of Evidence 404(b). Although Rule 404(b) prevents admission of evidence showing a person acted in accordance with a certain trait, both the legislative history and the common law origins of the rule indicate that it was intended only to protect defendants, not disinterested third parties. Rule 404(b)'s legislative history indicates that it was intended to prevent prejudice, and third parties cannot suffer prejudice because they cannot be convicted. Further, the history of propensity jurisprudence indicates that Rule 404(b) should only protect defendants because the common law rule was intended only to preserve an accused person's rights, and the Federal Rules of Evidence were enacted to codify that common law. Finally, the fact that the Federal Rules of Evidence favor admitting relevant evidence that helps place the

defendant on an even playing field with the prosecution gives further credence to the idea that Rule 404(b) does not apply to third parties.

Second, constitutional due process requires admission of Morris's testimony because it is central to Ms. Zelasko's ability to raise a complete defense. Ms. Zelasko has a constitutional right under the Due Process Clause and the Sixth Amendment to present testimony that is key to her defense strategy. While that right is not unlimited, the relatively inapplicable policy goals behind the Rule 404(b) are outweighed by Ms. Zelasko's constitutional right to present a crucial component of her defense. To hold otherwise is to put an arbitrary procedural rule before the interests of serving justice.

Third, it is uncontroverted that under this Court's definition of a statement in *Williamson v*. *United States*, co-defendant Lane's e-mail is not a statement against her penal interest and is therefore inadmissible hearsay. The *Williamson* standard should be upheld because it best serves the purposes behind the hearsay exception in question, there is no interest compelling enough to disturb the critical principle of *stare decisis*, and the *Williamson* standard is workable, consistent, and fair. The hearsay exception allowing admission of statements made against penal interest is premised on the notion that such statements are more reliable and rational people would not lie in a way that could expose them to criminal liability. Expanding the coverage of the exception would allow admission of remarks that have no presumed reliability, thwarting the purpose of enacting the hearsay rule as a whole. Further, *stare decisis* is critical to the American justice system, and courts should only disregard it to correct decisions that are unworkable or badly reasoned. However, the *Williamson* standard is more workable than any alternative and is based on the principles that guided Rule 804(b) (3)'s adoption.

Finally, Lane's e-mail is also inadmissible because it would significantly prejudice Ms. Zelasko. If Lane's e-mail is admitted, Ms. Zelasko will have no opportunity to cross-examine Lane, which would violate her Confrontation Clause rights and cause her significant prejudice under *Bruton v. United States*. Although this Court discussed the Confrontation Clause in depth in *Crawford v. Washington*, that opinion focused almost entirely on the distinction between testimonial and non-testimonial statements, leaving open the question of whether the *Bruton* doctrine applies to non-testimonial statements. In fact, the *Crawford* decision never discussed the *Bruton* doctrine. Additionally, the *Bruton* doctrine's purpose indicates that it should be interpreted broadly to protect defendants from prejudicial impact of admitting a co-defendant's confession. Thus, this Court should interpret the *Bruton* doctrine as applicable to both testimonial and non-testimonial statements. In sum, this Court should admit Morris's indispensable testimony and exclude co-defendant Lane's incriminating e-mail.

ARGUMENT

I. MIRANDA MORRIS'S TESTIMONY IS ADMISSIBLE BECAUSE THE PURPOSE, HISTORY, AND INTENT OF FEDERAL RULE OF EVIDENCE 404(B) INDICATES THAT THE RULE SHOULD ONLY BAN PROPENSITY EVIDENCE USED AGAINST A DEFENDANT.

Ms. Zelasko should be allowed to present Morris's testimony because the Federal Rules of Evidence allow reverse 404[1] evidence. Rule 404 was created to protect the accused, so Ms. Zelasko should be allowed to admit evidence of Short's past drug selling activities in this case. Rule 404(b) provides that evidence of a prior act is inadmissible

[1] Throughout this brief, third party propensity evidence used to exonerate the defendant will be referred to as "reverse 404(b)" evidence. *See, e.g.*, United States v. Seals, 419 F.3d 600, 606, (7th Cir. 2005); (R. 33-34).

when used "to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). Most Circuit Courts that have addressed this issue found that this rule does not extend to third party propensity evidence used to exonerate a defendant. *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005); *United States v. Seals*, 419 F.3d 600 (7th Cir. 2005). Thus, reverse 404 evidence should be admitted to show that Short might be involved in the two-person conspiracy in this case because Rule 404 was designed to protect criminal defendants.

A. The purposes of Rule 404(b) do not apply to reverse 404 evidence because a non-party cannot suffer prejudice, and evidence of a third party's guilt requires jurors to focus closely on the facts.

The ban on propensity evidence should not apply to third parties because the stated policies of the rule do not apply when propensity evidence is used to help a defendant. Propensity evidence is generally banned because of the "serious risks of prejudice, confusion and delay." FED. R. EVID. 404 advisory committee's note for 2006 amendments. However, reverse 404 evidence does not prejudice a defendant and actually focuses the trial and jury on relevant facts.

First, there is no prejudice in admitting reverse 404 evidence because the witness is not on trial. *Stevens*, 935 F.2d at 1404. As this Court stated in *Old Chief v. United States*, the primary reason for Rule 404(b) is the fear that juries would convict defendants who they thought deserved punishment for previous acts. 519 U.S. 172, 181 (1997). Prejudice to a defendant is certainly not an issue when evidence is being offered by the accused to negate guilt. *Stevens*, 935 F.2d at 1404. There is also no prejudice to a third party because there is no danger that the third party will be convicted because the third

party witness is not a defendant. *See Aboumoussallem*, 726 F.2d at 911–12 (2d Cir. 1984).

Second, there is no risk of misleading the jury or causing undue delay because reverse 404 evidence focuses the jury on the facts of the case and the court can always use Rule 403 to exclude the evidence if necessary. *Id*. Asking the jury to evaluate evidence about a third party's similar acts will not distract the jury. *Montelongo*, 420 F.3d at 1175. On the contrary, similar act evidence requires the jury to focus more on the facts of the case at hand to compare and contrast the facts with the reverse 404 evidence. *Id*. Additionally, if a court finds this propensity evidence misleading or unnecessary, it may still exclude the evidence under the standard 403 balancing test. *Aboumoussallem*, 726 F.2d at 912. Rule 404 does not need to categorically prohibit such evidence when Rule 403 already provides a substantial check on delay and jury confusion. *See id*. Thus, reverse 404 evidence is admissible because there is no risk of prejudice, delay, or confusion from third party propensity evidence.

B. The common law history of Rule 404(b) indicates that it was created to protect criminal defendants.

Since its inception at common law, Rule 404 was used to protect defendants from prejudicial propensity evidence. *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979). This Court has highlighted the importance of interpreting ambiguous evidentiary rules by relying on the common law. *Daubert v. Merrell Dow Pharms*., 509 U.S. 579, 587–88 (1993) (holding that the common law should "serve as an aid" to the application of the rules of evidence). Rule 404 evolved from common law principles that banned propensity evidence from being used against the defendant. *Carter v. Hewitt*, 617 F.2d 961, 968 n.6 (3d Cir. 1980) (describing Rule 404 as a "codification of the common law

approach"). The original rationale for the propensity prohibition was to prevent juries from convicting because they thought the defendant was a "bad actor." *Phillips*, 599 F.2d at 136. The Federal Rules of Evidence aim to continue this common law tradition. Wright & Graham, *Federal Practice and Procedure: Evidence*, § 5239, at 436–39. Further, the 2006 advisory committee notes to Rule 404 even explain the purpose of the rule by citing a case decided before the rules were adopted.[2] FED. R. EVID. 404 advisory committee's note (citing *Michelson v. United States*, 335 U.S. 469 (1948)). This Court in *Michelson* used the common law rule to reverse a defendant's conviction because the prosecution used evidence of his bad character at trial. 335 U.S. at 475. Thus, the history of Rule 404 demonstrates that it should only ban propensity evidence used against Ms. Zelasko.

C. The drafters of the Federal Rules of Evidence did not intend to exclude reverse 404 evidence because the rules as a whole are meant to be interpreted liberally, and Rule 404 in particular was intended to protect criminal defendants.

When courts interpret individual evidentiary rules, the statutory structure and purpose of those rules should inform the analysis. *See K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988). The drafters intended the Federal Rules of Evidence as a whole to be interpreted in favor of admitting relevant evidence. *See* FED. R. EVID. 401, 403. This Court has previously considered the "liberal thrust" of the Rules when deciding whether to admit evidence. *Daubert*, 509 U.S. at 588. A liberal interpretation would favor admitting reverse 404 evidence that is clearly relevant to the case. *See Montelongo*, 420 F.3d at 1175.

The drafters have also expressed a desire for Rule 404 in particular to be interpreted in favor of admitting defense-specific evidence. *See* FED. R. EVID. 404

[2] The federal rules were adopted in January 1975. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975). *Michelson* was decided in 1948, almost thirty years before the rules were adopted. *Michelson v.United States*, 335 U.S. 469 (1948).

advisory committee's note. Although Rule 404 uses the word "person," the advisory committee notes relevant to this section only discuss why propensity evidence should not be used against the defendant. *See* FED. R. EVID. 404(b)(1); FED. R. EVID. 404 advisory committee's note for 2006 amendments. Additionally, when discussing Rule 404(a), the 2006 committee notes endorse more lenient rules for defense-specific evidence because the defendant's liberty is at stake. FED. R. EVID. 404 advisory committee's note. The committee also noted that admitting propensity evidence about a victim under Rule 404(a) was justified as a "counterweight against the strong investigative and prosecutorial resources of the government." *Id*. (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES 264–65 (2d ed. 1999)). Thus, reverse 404 evidence should be admissible given the liberal structure of the Federal Rules of Evidence and the drafters' intent to protect criminal defendants under Rule 404.

In sum, Rule 404 allows third party propensity evidence. The purposes of Rule 404 are not obscured by reverse 404 evidence, and the rule's common law tradition shows that protecting a defendant's rights should be the paramount concern. Additionally, the drafter's did not intend for the rule to exclude relevant reverse 404 evidence. Thus, Morris's testimony is admissible under Rule 404.

II. EVEN IF MS. MORRIS'S TESTIMONY IS NOT ALLOWED UNDER FEDERAL RULE OF EVIDENCE 404, THE CONSTITUTION REQUIRES ADMISSION BECAUSE MS. ZELASKO'S RIGHT TO RAISE A COMPLETE DEFENSE AND PRESENT CRITICAL EVIDENCE OUTWEIGHS THE WEAK POLICY RATIONALE FOR BANNING REVERSE 404 EVIDENCE.

Ms. Zelasko has a constitutional right to present evidence that Short, not Ms. Zelasko, was involved in the conspiracy to sell steroids. This right outweighs arbitrary procedural rules, like the ban on reverse 404 evidence. The Fifth Amendment to the

United States Constitution promises that no citizen will be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Sixth Amendment goes on to guarantee that a criminal defendant has the right "to obtain witnesses in his favor." U.S. CONST. amend. VI. This Court has interpreted due process under the Fifth Amendment as affording every criminal defendant "a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The Court in *Chambers* also recognized the fundamental importance of allowing defendants to call their own witnesses. *Id*. at 302. Although the right to present evidence may occasionally give way to other legitimate policy interests, this Court has held that restrictions on a defendant's ability to present evidence must not be arbitrary or disproportionate to the policy goals those restrictions serve. *Holmes v. S. Carolina*, 547 U.S. 319, 326 (2006). Thus, any societal interests in excluding such evidence must be carefully scrutinized and weighed against the defendant's right to present a complete defense. *Id*. Hence, the Federal Rules of Evidence should "not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

Further, the right to present a complete defense outweighs procedural rules that, in reality, do not serve a legitimate state interest. *Id*. at 295. For example, this Court in *Chambers* held that a common law "voucher rule" that prohibited damaging cross-examination of a party's own witness did not trump a defendant's right to adequately examine his witness. *Id*. at 295, 297. The defendant in *Chambers* wanted to cross-examine a defense witness who had previously confessed to the same crime. *Id*. at 294. However, the voucher rule limited the defendant's ability to impeach that witness with his previous confession. *Id*. The Court held that the antiquated "voucher" rule did not

take precedence over the defendant's right to show that another man possibly committed the crime, especially when the state could not point to a legitimate rationale for the rule. *Id*. at 297. In contrast, discovery sanctions that preclude a defendant from calling a witness have been upheld when they protect the integrity of the adversarial process. *Taylor v*. *Illinois*, 484 U.S. 400, 416–17 (1988). The defendant in *Taylor* failed to identify a witness on a pretrial discovery request, so the Court did not allow this witness to testify at trial. *Id*. at 403. In upholding the lower court's decision, this Court noted that the state has a legitimate interest in punishing strategic and willful misconduct. *Id*. at 417.

Conversely, this Court has rejected rules that limited defendants from presenting evidence of a third party's guilt. *See*, *e*.*g*. *Holmes*, 547 U.S. at 330. The defendant in *Holmes* wanted to present evidence that another man committed the crime, but he was prevented from doing under a state procedural rule. *Id*. at 329. The procedural rule banned evidence of a third party's guilt when the prosecution presented evidence sufficiently demonstrating that the defendant was guilty. *Id*. This Court struck down that rule, concluding that when a jury evaluates the "strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id*. at 331. The third party guilt rule was therefore arbitrary and clearly did not outweigh the defendant's right to present a complete defense. *Id*.

In the same fashion, courts are more likely to find that an evidentiary rule is outweighed by the defendant's due process rights if the submitted evidence is the only avenue to explore a critical defense theory. *Chambers*, 410 U.S. at 302. For example, in *Washington v*. *Texas*, the court did not allow a rule against accomplice testimony to

prevent the defendant from presenting "vital" evidence at his murder trial. 388 U.S. 14, 16 (1967). The accomplice there was prepared to testify that he had committed the crime and the defendant was not present at the time of the murder. *Id*. However, a state statute banned this key testimony. *Id*. This Court concluded that the policies behind the statute did not outweigh the defendant's right to present "material" evidence. *Id*. at 23.

In contrast, this Court held in *United States v*. *Scheffer* that a defendant had no right to introduce polygraph evidence that was not a fundamental component of his defense. 523 U.S. 303, 315 (1998). There, the defendant was allowed to present all the factual arguments he wanted, but was merely prevented from presenting unreliable evidence that could only bolster his credibility. *Id*. at 317. This credibility evidence did not "significantly impair" the defendant's case and the Court therefore denied the defendant's constitutional challenge. *Id*.

Similarly, in *United States v*. *Lucas* the Sixth Circuit held that excluding reverse 404 evidence did not violate the defendant's due process rights because she had other ways to present her theory that another man committed the crime. 357 F.3d 599, 606 (6th Cir. 2004). The defendant in *Lucas* claimed that another man borrowed her rental car and placed cocaine in the vehicle. *Id*. at 603. Although the court excluded the man's previous cocaine conviction, it did allow two other witnesses to testify that the man had borrowed the car and acted strangely. *Id*. at 603-604. Thus, the *Lucas* defendant received due process because she was still able to present her theory that the other man had committed the crime. *Id*. at 606-07.

Further, a defendant has even been allowed to present testimony under hypnosis so long as the testimony is an indispensable part of the defense theory. *Rock v*. *Arkansas*,

483 U.S. 44, 57 (1987). In *Rock*, this Court struck down a state rule banning hypnosis testimony because the defendant could not meaningfully describe her version of events without hypnosis due to shock. *Id*. at 46, 61.Thus, even though the state may have had a substantial interest in banning such testimony, this Court still allowed the hypnosis testimony in *Rock* because it was a necessary part of the defendant's case. *Id*. at 57.

Here, there is no strong governmental interest in excluding Morris's testimony, yet excluding this testimony would certainly violate Ms. Zelasko's constitutional rights. Like the voucher rule in *Chambers*, a ban on reverse 404 evidence has no legitimate rationale.[3] Unlike the rule in *Taylor* that preserved the integrity of the judicial process, allowing reverse 404 evidence does not harm the system. Like the rule in *Holmes* that banned evidence of a third party's guilt, a ban on reverse 404 evidence would be arbitrary because the jury cannot adequately evaluate the strength of the prosecution's case without knowing the defense's theory of the case. Thus, there is no legitimate reason to prioritize a ban on reverse 404 evidence at the expense of Ms. Zelasko's constitutional rights. In contrast, excluding Morris's testimony significantly impairs Ms. Zelasko's constitutional rights because it is the only method for presenting a very plausible, alternative version of the case.

Because Morris's testimony is vital to Ms. Zelasko's defense, excluding this testimony violates Ms. Zelasko's constitutional rights. The propensity evidence at issue in this case is essential because it challenges the prosecution's theory of the defendant's motive as well as the prosecution's contention that Ms. Zelasko participated in the drug conspiracy. Like the excluded evidence in *Washington* that constituted the only way for the defendant to argue that an accomplice had committed the crime, in this case Morris's

[3] *See supra* Part I.A.1.

testimony is the only way for Ms. Zelasko to present the theory that Short is the other conspirator. (R. 14, ll. 25–27.). The affidavits from Morris and Doctor Wallace indicate that Short recently sold a chemical predecessor of the substance charged in this case. (R. 24–25, 28). Additionally, this sale was to a female member of the Snowman team. (R. 24–25). At the time the conspiracy transpired, Short was on the American team with co-defendant Lane, a known conspirator. (R. 24).

Finally, the government has conceded that only two people were involved in the alleged conspiracy. (R. 11, ll. 18–19). Unlike the credibility evidence in *Scheffer*, the evidence here casts doubt on the prosecution's theory of the case, and Morris's testimony does not merely bolster Ms. Zelasko's credibility. This case is also dissimilar to *Lucas*, where the defendant was able to call two witnesses to testify about another man's involvement in the crime. Here, Ms. Zelasko has no other method to introduce evidence demonstrating the likelihood that Short was Lane's co-conspirator. (R. 14, ll. 25–27). Additionally, this case is more similar to the hypnosis testimony in *Rock* because, unless the Morris testimony is admitted, these facts will never come to light. Thus, because Morris's testimony is the only way to demonstrate that Ms. Zelasko might not be involved in the alleged conspiracy, and because the United States has no legitimate interest in banning reverse 404 evidence Ms. Zelasko's constitutional rights outweigh the procedural rule at issue and Morris's testimony must be admitted.

III. THE NARROW INTERPRETATION OF "STATEMENT" UNDER *WILLIAMSON* SHOULD BE UPHELD BECAUSE IT SATISFIES THE PURPOSE BEHIND THE RULE, THERE ARE CLEAR *STARE DECISIS* GROUNDS FOR UPHOLDING THE RULE, AND THE RULE PROVIDES A WORKABLE STANDARD THAT IS CONSISTENT AND FAIR.

Co-defendant Lane's e-mail was properly excluded because maintaining a narrow interpretation of what constitutes a "statement" under the standard delineated in *Williamson v. United States* serves the drafters' intent for Federal Rule of Evidence 804(b)(3). Additionally, the importance of adhering to *stare decisis* outweighs any rationale for upsetting the *Williamson* precedent because that interpretation created a consistently applicable, fair, and workable standard. Further, Rule 804(b)(3) allows admission of statements that would typically be barred as hearsay. FED. R. EVID. 804(b)(3). Premised on the idea that out-of-court statements are unreliable because they are "subject to particular hazards" such as lying and poor memory, some out-of-court statements are permitted under Rule 804(b)(3) because they are less vulnerable to those hazards. *Williamson v. United States*, 512 U.S. 594, 598 (1994). Under Rule 804, statements against the declarant's "proprietary or pecuniary interest" or that expose her to "criminal liability" are admissible because a reasonable declarant would not have made them if she did not believe them to be true. Despite the dangers noted above, statements under Rule 804(b)(3) are trustworthy, especially when they "expose the declarant to criminal liability." FED. R. EVID. 804(b)(3). The theory behind Rule 804 is essentially that a reasonable person would not fabricate statements exposing her to criminal liability. *Williamson*, 512 U.S. at 599–600.

Further, ambiguity as to the scope of what is contained within one "statement" led the *Williamson* Court to examine the rule carefully, concluding that only remarks that are "individually self-inculpatory" constitute "statements" and are therefore admissible under Rule 804(b)(3). *Id*. In *Williamson*, this Court was confronted with two possible definitions of the word statement—one broad, consisting of an entire narrative or

extended declaration; the other narrow, consisting of only those individual statements that expose the declarant to liability. *Id*. Ultimately, a narrow interpretation was adopted because it better prevents admission of less reliable hearsay. *See id*.

The declaration at issue in *Williamson* was an entire conversation between the defendant's colleague and a DEA agent. *Id*. at 596. The colleague made some statements incriminating himself in a drug trafficking plan. *Id*. The colleague also made some statements that incriminated the defendant but exculpated himself. *Id*. Because the defendant's colleague was unavailable for testimony, the trial court improperly admitted the entire conversation—even those portions exculpating the colleague—on the theory that the colleague had "clearly implicated himself." *Id*. at 598. This Court reversed the trial court's ruling. *Id*. at 599. In doing so, the court held that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id*. In recognizing that statements that do not directly inculpate the declarant do not have the same indicia of reliability, this Court noted that "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id*. at 599–600. In fact, the colleague's self-exculpatory statements were indeed fabrications, thereby exemplifying the reason for adopting a narrow interpretation of what constitutes a statement. *Id*. at 600. Thus, by narrowly defining the word "statement," this Court has prevented admission of remarks that are more likely to be false.

A narrow standard for defining "statement" also better serves the purposes of Rule 804(b)(3) than a broad standard does because it increases the reliability of admitted evidence. Thus, the district court properly relied on the *Williamson* standard in excluding

Lane's e-mail in its entirety because: (1) the *Williamson* Court was correct in determining that a narrow standard achieves the goals of the hearsay exception; (2) *stare decisis* is an important bedrock principle of our justice system and should only be diverged from in extreme situations where there is no workable standard that is consistently applied. For these reasons, the Court should uphold *Williamson* and hold that the only remarks admissible under Rule 804(b)(3) are those that are individually self-inculpatory.

A. Lane's e-mail was properly excluded because the narrow *Williamson* standard achieves the policy goals of Rule 804(b)(3) by admitting only those remarks that common sense and logic dictates are reliable.

This Court's interpretation of what constitutes a "statement" under Rule 804(b)(3) best serves the Rule's purposes because it only permits the admission of reliable statements. Rule 804(b)(3) allows admission of certain statements that experience, logic, and common sense dictate are reliable enough to presented to a jury. FED. R. EVID. 804(b)(3) advisory committee's note (citing *Donnelly v. United States*, 228 U.S. 243, 277 (1913) (Holmes, J., dissenting)). Additionally, the *Williamson* Court correctly determined that while people often lie, they are unlikely to lie in such a way that would expose them to criminal liability. 512 U.S. at 599. However, statements exposing a declarant to liability can easily be interwoven with lies for the express purpose of lending credibility to those lies. *Id*. at 599–600. Common sense dictates that such intermingling of lies with truth is not reliable as a whole and as such should not be submitted to the jury. *See Williamson*, 512 U.S. at 599–600.

Adopting a broader interpretation of the word "statement" would frustrate the purpose of Rule 804(b)(3) because skilled liars could interweave falsities with vague assertions that seem mildly self-incriminating in order to have exempt these wholesale

fabrications from the hearsay requirement. *See id*. A narrower definition is more appropriate because even experienced liars would be unable to get falsities admitted at trial without actually exposing themselves to liability, thereby achieving the goal of admitting only those statements with heightened reliability. *See id*. The problems of a broad interpretation were best illustrated in *Lee v*. *Illinois*, where this Court acknowledged that it has "[c]onsistently recognized [that] a co-defendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." 476 U.S. 530, 545 (1986). To overturn the *Williamson* standard would be to disregard this Court's consistent recognition that statements that do more than directly implicate the declarant are unreliable. Thus, a narrower approach preserves the Court's concerns regarding apparent confessions that are truly fabrications intended to shift blame or curry favor.

Moreover, Rule 102 lends further support to a narrow interpretation with respect to Rule 804(b)(3) analysis. Rule 102 states "[t]hese rules should be construed so as to administer every proceeding fairly…*to the end of ascertaining the truth* and securing a just determination." FED. R. EVID. 102 (emphasis added). Not only would a broad definition of what constitutes a "statement" for Rule 804(b)(3) analysis admit more false statements,[4] but it would also add to the expense and delay of trials. If the scope of the definition of a statement is expanded beyond individually self-inculpatory remarks, then trial courts will be forced to determine which collateral statements before the court are

[4] In fact, much of what led this Court to adopt a narrow definition of the word "statement" was that the self-exculpatory statements made in *Williamson* were actually lies. *Williamson*, 512 U.S. at 600.

germane to the confession and are admissible. *See Williamson*, 512 U.S. at 604. The better course is to admit only those remarks that have heightened reliability—namely, those that are individually self-inculpatory—thereby reducing not only the work trial courts must do, but also reducing the number of false statements that cannot be cross-examined. *See id*. Thus, a narrow standard better serves the Rules of Evidence because it prevents unnecessary delay while emphasizing the importance of truth seeking as required under Rule 102. FED. R. EVID. 102.

Additionally, because the scope of statements admissible under Rule 804(b)(3) is not "firmly rooted" in our jurisprudence, the Court should be especially hesitant to expand the rule to cover unreliable collateral statements. "Firmly rooted" hearsay exceptions are "so trustworthy that adversarial testing can be expected to add little to its reliability." *White v. Illinois*, 502 U.S. 346, 357 (1992) (citing *Idaho v. Wright,* 497 U.S. 805, 820–21 (1990)). Firmly rooted hearsay exceptions have such a presumed level of reliability that admission of hearsay falling within those exceptions comports with the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (abrogated on other grounds). But statements against penal interest have no such indicia of reliability and as such are not firmly rooted. *Lee*, 476 U.S. 544. Because statements against penal interest are too unreliable to be firmly rooted in our system of jurisprudence, the scope of admissibility for these statements should not be expanded to cover self-exculpatory remarks that are even more unreliable.

Notably, the idea that statements against penal interest are an exception that is firmly rooted was rejected in *Lee v. Illinois* because the concept of statements against penal interest "defines too large a class for meaningful Confrontation Clause analysis."

476 U.S. 530, 544 (1986). Although some Circuit Courts of Appeal have considered statements against penal interest to be firmly rooted, these courts have done so based only on case law preceding *Lee* or misinterpreted its analysis. *See*, *e.g.*, *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (relying on *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983), to hold that the exception seems firmly rooted); *United States v. York*, 933 F.2d 1343, 1362 (7th Cir. 1991) *overruled on other grounds by Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999) (finding the exception firmly rooted, while paradoxically recognizing a need to examine the specific circumstances around the statement); *but see United States v. Flores*, 985 F.2d 770, 776 n. 13 (5th Cir. 1993) (declining to follow *York* and recognizing the faulty logic used by that court). Thus, because the class of statements covered under Rule 804(b)(3) is too large to be analyzed under the Confrontation Clause as one whole unit, the class as a whole cannot be considered firmly rooted. *See id*.

Furthermore, this new hearsay exception should not be expanded. One of the major criteria for determining whether an exception is firmly rooted is how long the exception has been recognized. *White*, 502 U.S. at 355 n.8 (finding an exception "firmly rooted" because it was at least two centuries old). As recently as 1973, this Court recognized that most state and federal cases would reject statements against penal interest because they are simply too unreliable. *Chambers*, 410 U.S. at 299. And, although the *Williamson* standard clarifies the Federal Rules of Evidence rather than a Confrontation Clause issue, "hearsay rules and the Confrontation Clause are generally designed to protect similar values." *California v. Green*, 399 U.S. 149, 155 (1970). A refusal to expand the scope of the *Williamson* standard will promote the policy goals of common

sense, logic, and truth inherent in Rule 804(b)(3) analysis. Thus, because statements against penal interest as a whole were considered too unreliable to be widely admitted until very recently, this Court should be very cautious about expanding the scope of Rule 804(b)(3) and should not interpret it to include unreliable collateral statements.

B. The narrow standard articulated in *Williamson* should be upheld because the *stare decisis* principle is crucial to our system of justice, is given the most credence in statutory interpretation cases, and should not be disregarded because *Williamson* provides a consistent, workable standard.

This Court should follow the *Williamson* standard for interpreting Rule 804(b)(3) because there is no compelling reason to deviate from the fundamental principle of *stare decisis*. This Court has held that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). The doctrine allows all citizens to rest assured that the law is based on reason and develops intelligibly, thus lending integrity to our entire system of governance. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). *Stare decisis*—which instructs the Court to follow its own precedent—is of such importance that judicial integrity requires courts to adhere to precedent even where it is believed that the precedent was decided incorrectly. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992). Overruling a case requires "some special reason over and above the belief that a prior case was wrongly decided." *Id*. Because no such special reason is present in the instant case, this Court should adhere to *stare decisis* and uphold the narrow *Williamson* standard.

As imperative as the *stare decisis* doctrine is in a typical case, it is even more crucial to follow in cases interpreting Federal Rules of Evidence. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Following precedent is most important "in the area of

statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Id*. Although Congress can easily change the Court's interpretation of a law or a rule, it cannot easily address questions requiring constitutional interpretation, so the Court is more willing to depart from *stare decisis* in cases requiring constitutional interpretation. *Burnet v*. *Coronado Oil & Gas Co*., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (citing several Supreme Court cases straying from *stare decisis* in constitutional interpretation cases). In cases that do not involve constitutional interpretation, "it is more important that the applicable rule of law be settled than that it be settled right . . . even where the error is a matter of serious concern." *Edelman v*. *Jordan*, 415 U.S. 651, 694 (1974). Thus, even if this Court believes *Williamson* was decided incorrectly, it should adhere to the *Williamson* standard to maintain the integrity of the judicial system.

Further, to ignore *stare decisis* and overturn *Williamson* is to overturn or call into question volumes of Supreme Court jurisprudence. This Court has decided a number of cases concerning whether a co-conspirator's confession is admissible absent the opportunity to test the confession through cross-examination. *Lee*, 476 U.S. at 544–45 (recognizing several other Supreme Court cases dealing with the issue). For example, in *Lee*, the Court acknowledged that it had "consistently recognized" that the reliability of a co-defendant's confession not subjected to cross-examination is presumptively nil even though that codefendant is implicating herself. *Id*. at 544. To allow a co-defendant's collateral statements simply because they are proximate to self-inculpatory statements would be contrary to post-*Lee* jurisprudence as well *Williamson* and its subsequent cases. This added authority cements the *Williamson* rule because while *stare decisis* is not a

commandment that must be absolutely adhered to in every situation, this Court should only stray from *stare decisis* where the prior decision is "unworkable" or "badly reasoned." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Thus, the *Williamson* standard provides a clear course of action for trial courts that can be applied consistently and fairly, and is far from being unworkable.[5]

Additionally, the narrow *Williamson* standard not only prevents trial courts from having to shoulder the undue burden and delay of arbitrarily determining what constitutes a collateral statement, but also prevents absurd results. Under *Williamson*, only those statements that are "individually self-inculpatory" are admissible. *Williamson*, 512 U.S. at 599–600. In his dissent, Judge Marino for the United States Court of Appeals for the Fourteenth Circuit cited two Seventh Circuit cases that applied the *Williamson* standard but arrived at different results, arguing that this demonstrates that the *Williamson* standard is therefore unworkable. (R. 51, ll. 19–23; R. 15, ll. 1–14). However, this limited example is insufficient to show unworkability because this Court has previously accepted the possibility of some disagreement as long as the standard provides some "objectively determinable constraints." *Holder v. Hall*, 512 U.S. 874, 888 (1994). Moreover, a statement that is "individually self-inculpatory" allows for a much more objective determination than does the alternative. Such statements are easily determined because trial courts can consider each remark individually and then decide systematically whether that remark exposes the declarant to criminal liability. *See Williamson*, 512 U.S. at 599–600. Conversely, if collateral statements were admissible, trial courts would be faced with determining which statements are collateral, which would draw an arbitrary line. Some courts would resolve the question by sheer proximity—ignoring context—while

[5] The workability of the *Williamson* standard is discussed above. *See supra* Part III(a).

others would be forced to sift through the mass of jurisprudence addressing statements against penal interest in an effort to figure out where the line is. *Williamson* therefore provides the most consistently applicable standard.

In fact, where trial courts are permitted to consider more than just individual remarks, absurdity results, and courts should strive to avoid absurdity. *Griffin v*. *Oceanic Contractors, Inc*., 458 U.S. 564 (1982). For instance, if neighboring remarks are admitted alongside self-inculpatory remarks, neighboring paragraphs should also be admitted for documents with multiple pages because they are a portion of the entire document. *See Williamson*, 512 U.S. at 599 (discussing remarks "proximity" to actually self-inculpatory statements). Further still, other works the declarant produced would need to be admitted to identify the author's writing style. The only way to prevent a limitless stream of admissible statements from being considered collateral is to affirm *Williamson*. Indeed, this Court addressed these issues when it resolved *Williamson*, formulating a rule that affords trial courts the discretion to consider a statement's context, thereby preventing admission of clearly non-inculpatory statements without having to determine when a statement is collateral or risking presenting the jury with more information than is prudent. *Williamson*, 512 U.S. at 599–600. For the reasons discussed above, because the *Williamson* standard is neither unworkable nor poorly decided, it should therefore be upheld on substantive and *stare decisis* grounds.

IV. CO-DEFENDANT LANE'S INCRIMINATING E-MAIL IS INADMISSIBLE BECAUSE THE *BRUTON* DOCTRINE APPLIES TO NON-TESTIMONIAL STATEMENTS AND ADMISSION WOULD VIOLATE MS. ZELASKO'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HER.

The United States should not be permitted to present Lane's e-mail because the *Bruton* doctrine requires that a defendant in a joint criminal trial have the opportunity to cross-examine a confessing co-defendant. The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This is "a fundamental right essential to a fair trial." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). Further, the right to confrontation includes the right to cross-examine. *Id*. at 404. Undeniably, a criminal defendant's right to confront the witnesses against her at trial is imperative in "exposing falsehood and bringing out the truth in the trial of a criminal case." *Id*. The United States Supreme Court has dealt extensively with the right to confront witnesses at trial in many different contexts.[6] Cross-examination, it seems, is one of the best tools for discovering the truth and is at its very core a "'functional right' designed to promote reliability." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). Because this Court has not yet explicitly concluded that the *Bruton* doctrine does not apply to non-testimonial statements, the best way to preserve Ms. Zelasko's constitutional right to confront the witnesses against her is to suppress co-defendant Lane's incriminating e-mail.

A. The *Crawford v. Washington* ruling does not impact *Bruton's* applicability to non-testimonial statements because two distinct, categorically separate legal questions were addressed in *Bruton* and *Crawford*.

[6] This Court has extended Confrontation Clause protection to jury determinations of whether a party's confession is voluntary, to the use of limiting jury instructions at joint trials, to the use of a co-defendant's confession against another co-defendant in joint criminal trials, and to the issue of how a testimonial hearsay statement should be tested for reliability. *See, e.g., Jackson v. Denno*, 378 U.S. 368 (1964); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Bruton v. United States*, 391 U.S. 123 (1968); *Crawford v. Washington*, 541 U.S. 36 (2004).

Because the *Bruton* and *Crawford* decisions addressed entirely different issues, *Crawford* does not limit *Bruton's* applicability to co-defendant Lane's incriminating e-mails. Under *Bruton v*. *United States*, admission in a joint trial of a co-defendant's incriminating statement violates a criminal defendant's Sixth Amendment right to confrontation because admission deprives her of the opportunity for cross-examination where the co-defendant does not testify. 391 U.S. 123, 13536 (1968). In *Bruton,* this Court tackled the difficult question of whether a defendant who was convicted at a joint trial was prejudiced when the government introduced his co-defendant's incriminating confession and relied solely on a limiting instruction to ensure that the jury did not consider that confession. 391 U.S. at 123-24. The *Bruton* Court held that by admitting the confession, the defendant's Sixth Amendment rights under the Confrontation Clause were violated because the risk that jury would disregard the limiting instruction was simply too great. *Id*. at 126. The Court also noted the inadequacy of relying on limiting instructions to prevent the jury from using a co-defendant's incriminating statement against a defendant. *Id*. at 134. Thus, the *Bruton* Court also concluded that, "where viable alternatives exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice." *Id*. at 134. The *Bruton* doctrine therefore was focused primarily on the harm that stems from admitting a co-defendant's incriminating statement without the opportunity to conduct cross-examination.

Additionally, although the case law regarding the *Bruton* doctrine deals in significant part with confessions made to law enforcement officers, this Court has never explicitly limited the *Bruton* doctrine's applicability to only police confessions. For example, in *United States v*. *Truslow*, the government attempted to admit a conversation

between several defendants that incriminated "not only the declarant but also his co-defendants." 530 F.2d 257, 259 (4th Cir. 1975). The fact that the statements at issue did not involve a confession to law enforcement did not factor into the court's analysis. *See id*. Rather, the court focused its analysis on the rule delineated in *Bruton* that "admission of such statements in a joint trial violates the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id*. at 260. The *Truslow* court never mentioned the context of the incriminating statement. *Id*.

Nearly forty years after *Bruton*, this Court held that the Confrontation Clause applies to both in-court and out-of-court statements, providing a distinct delineation between "testimonial" and "non-testimonial" statements. *Crawford v*. *Washington*, 541 U.S. 36, 51–52 (2004). The *Crawford* Court defined testimonial statements as those "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use a later trial." *Id*. at 51–52. Concerned primarily with a statement's reliability rather than the harm that would result if a defendant had no opportunity for cross-examination, this Court rejected the previously held notion that if a statement is reliable it is admissible, stating that "admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id*. at 62. Thus, while *Bruton's* language suggested a resolution to the question of whether limiting instructions were adequate to remedy the absence of an opportunity to conduct cross-examination, *Crawford's* language suggests only that there is a distinction between testimonial and non-testimonial statements.

Because the testimonial/non-testimonial distinction does not bear on whether the admission of a particular statement will cause the defendant prejudicial harm at trial, this

Court's opinion in *Crawford* does not impact its earlier decision in *Bruton*. *See* 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 (2012). In *Bruton*, this Court did not address whether the co-defendant's statement was reliable or unreliable; rather, the *Bruton* Court emphasized the harm a defendant experiences at trial when a confession is admitted and the defendant is unable to conduct cross-examination: "Plainly, the introduction of Evans' [the petitioner's co-defendant] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation." 391 U.S. at 127–28.

Additionally, there was no mention of the reliability of the testimony that was admitted at trial in *Bruton*. *See* 391 U.S. 123. In fact, the *Bruton* Court's analysis focused almost entirely on the prejudice that the defendant faced when deprived of the opportunity to cross-examine co-defendant Evans. *See id*. The *Bruton* Court expressly stated it would not address the question of constitutional reliability, asserting that it was not, at that time, deciding "any recognized exception to the hearsay rule insofar as [the defendant] is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." *Id*. at 128 n.3. Further, the *Crawford* opinion makes no mention of the *Bruton* doctrine itself—either in detail or generally—indicating that the Court was dealing with an entirely different issue. 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, 663 (2012).

Here, whether co-defendant Lane's e-mail is constitutionally reliable is a completely separate question from whether her e-mail will prejudice Ms. Zelasko. This Court has yet to rule on whether non-testimonial statements fall within the scope of the *Bruton* doctrine, so the only way to protect Ms. Zelasko's Sixth Amendment right to conduct cross-examination is to interpret *Bruton* as applicable to non-testimonial statements and suppress the e-mail altogether. Thus, because the issues decided in *Bruton v. United States* and *Crawford v. Washington* were separate and distinct, the *Crawford* decision should have no bearing on *Bruton's* applicability to non-testimonial statements.

B. The *Bruton* doctrine should be interpreted broadly because the *Crawford* Court did not expressly limit the Confrontation Clause's application to testimonial statements and the purpose of *Bruton* dictates a broad application.

Bruton should be liberally interpreted because a broad application is the only way to ensure that Ms. Zelasko's Sixth Amendment right to confront witnesses is preserved. This Court was confronted in *Crawford* with two separate proposals for applying the Confrontation Clause. 541 U.S. at 60.The first proposal was to limit the Confrontation Clause's application to only those situations involving testimonial statements, "leaving the remainder to regulation by hearsay law" to prevent the Clause from being applied too broadly. *Id*. at 61. The second proposal suggested implementing an "absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine" to prevent the Clause from being applied too narrowly. *Id*.

In adopting the second proposal, the *Crawford* Court held that testimonial statements would be barred absolutely unless the defendant had the opportunity to cross-examine the witness, but made no mention of a similar bar for non-testimonial statements. *Id*. at 69. With the *Crawford* decision, this Court effectively expanded its

approach to applying the Confrontation Clause, and, just two years later, in *Davis v. Washington* the Court decided that statements made during a 911 emergency call were non-testimonial. 547 U.S. 813, 828 (2006). However, no direct conclusion was made as to whether all non-testimonial statements are entitled to Confrontation Clause protection, and the question remains open with respect to U.S. Supreme Court jurisprudence. *See United States v. Williams*, 2010 U.S. Dist. LEXIS 100867 at *8 (E.D. Va. Sept. 23, 2010). At least one District Court has held that Confrontation Clause protection does include both testimonial and non-testimonial statements by co-defendants in a joint trial. *See id*.

Notably, the closest this Court has come to determining if non-testimonial statements fall under the *Bruton* doctrine was its decision in *Whorton v. Bockting*, where the Court, in dicta, commented about the Confrontation Clause's applicability to statements not requiring reliability testing. *Williams*, 2010 U.S. Dist. LEXIS 100867 at *8. However, this dicta is not instructive for two reasons. First, the statement was not imperative to the court's final ruling, and has been considered "wholly unessential" for its failure to address the central question at issue; and second, "the statement does not accurately reflect the relevant language of *Crawford*, which explicitly declined to impose such a rule." *Id*. at 10–11.

Further, the *Bruton* doctrine and its Confrontation Clause protections should apply to testimonial and non-testimonial statements alike in order to best preserve a criminal defendant's constitutional rights. *See United States v. Truslow*, 530 F.2d 257 (4th Cir. 1975); *United States v. Jones*, 381 F. App'x 148 (3d Cir. 2010). In *Truslow*, the Fourth Circuit held that statements admitted against one defendant but not the other were

highly prejudicial because "to require the jurors to ignore the inadmissible hearsay statements that strongly incriminate the appellants and to use it only against the declarant may ask the impossible." 530 F.2d at 262. Following suit, the Third Circuit in *Jones* noted that it has "interpreted *Bruton's* rule broadly, applying it not only to custodial confessions but also to informal statements." 381 F. App'x at 151.

Additionally, in *United States v. Ruff*, the Third Circuit's broad interpretation was further solidified when the *Ruff* court affirmed that statements are inadmissible "if they tended to implicate the non-confessing co-defendant." 717 F.2d 855, 857 (3d Cir. 1983). Thus, the *Bruton* doctrine has gained significant momentum, and it is now a well-established principle that a defendant's right to confront the witnesses against her is of the utmost importance: "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135.

In the immediate case, suppressing co-defendant Lane's e-mail is the only way to confront the possible prejudices that admission would inflict. It is inherent in our legal system that "our duty is to preserve intact our constitutional guaranties and apply them not only in the letter but in the spirit." *People v. Fisher*, 249 N.E. 336, 341 (N.Y. 1928) (O'Brien, dissenting). Because the *Crawford* decision did not impact this Court's ruling in *Bruton*, the *Bruton* doctrine applies to co-defendant Lane's non-testimonial e-mail, which should be inadmissible.

CONCLUSION

Ms. Zelasko respectfully requests that this Honorable Court affirm the United States Court of Appeals for the Fourteenth Circuit's decision and hold that: (1) Federal Rule of Evidence 404(b) allows admission of third party evidence that helps exonerate Ms. Zelasko; (2) exclusion of third party evidence tending to implicate that third party would violate Ms. Zelasko's right to present a complete defense; (3) the definition of "statement" in *Williamson* be upheld because this workable, established standard best implements the purpose of the rule; and (4) Ms. Zelasko's right to confront the witnesses against her extends to non-testimonial statements as well as testimonial statements.