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. Does Federal Rule of Evidence 404(b) prevent an accused from introducing evidence of a third party's propensity to commit an offense with which the defendant is wrongly charged.

- II. Whether the inability to introduce evidence of a third party's propensity to commit an offense—the only evidence available to prove such a fact—violates Ms. Zelasko's constitutional right to present a complete defense.
- III. Whether *Williamson v. United States* should be overruled and allow narratives containing both inculpatory and non-inculpatory statements alike to qualify as exceptions to the rule against hearsay.
- IV. Whether an inculpatory statement by a non-testifying co-defendant skirts the Confrontation Clause of the Sixth Amendment and is admissible without the opportunity for the defendant to cross-examine her co-defendant.

TABLE OF CONTENTS

Questions Pr	esented		
Table of Con	ntents		i
Table of Aut	horities		······································
Constitutiona	al Provi	sion Inv	volved1
Statutory Pro	ovisions	Involve	ed1
_			
			6
Argument			8
I.	Evide	ence 404 nt a con Feder evide	of Ms. Zelasko's motion was proper application of Federal Rule of 4(b) and necessary to guarantee Ms. Zelasko's constitutional right to applete defense. Tal Rule of Evidence 404(b) allows a criminal defendant to offer nece of a third party's propensity to commit an offense for which the dant is charged.
		1.	Common law tradition—the spirit of Federal Rule of Evidence 404(b)—allows a criminal defendant to offer evidence of a third party's propensity to commit a certain offense in order to exculpate herself.
		2.	Despite the seemingly simple language of Federal Rule of Evidence 404(b), a majority of the circuit courts have adopted and applied the common law interpretation of Rule 404(b)11
		3.	Allowing a criminal defendant to offer evidence of a third party's propensity to commit a certain offense is probative to the defendant while not at all prejudicial to a third party
	B.		natively, Ms. Zelasko possesses a constitutional right to present a lete defense
		1.	An individual possesses a strong constitutional right to present a

		2.	An individual's constitutional right to present a complete defense can outweigh evidentiary rules.		
		3.	When applying a balancing test, Ms. Zelasko's constitutional right to present a complete defense is not substantially outweighed by the Government's interest in restricting such evidence20		
II.	The denial of the Government's motion to admit the email from Ms. Lane was proper because the email did not reach the hearsay exception of a statement against penal interest and because Ms. Zelasko would not possess the opportunity to confront her non-testifying co-defendant				
	A.	taken	email from Ms. Short to Mr. Billings is not permissible because, when as individual statements pursuant to <i>Williamson v. United States</i> , it not reach an exception to the rule against hearsay22		
		1.	Federal Rule of Evidence 804(b)(3) allows a statement made by an unavailable declarant to be admissible if the statement is against the declarant's penal interest		
		2.	Williamson v. United States requires each statement, as defined by Federal Rule of Evidence 804(b)(3), to be read as a single declaration that, in order to be admitted, must be individually self-inculpatory		
		3.	Under the totality of the circumstances, the statements made by Ms. Lane—taken individually—do not expose her to criminal liability and thus, do not reach an exception to the rule against hearsay26		
	B.	Bruto	natively, the Confrontation Clause of the Sixth Amendment and on v. United States bar the admission of an inculpatory statement by a non-testifying co-defendant		
		1.	The Sixth Amendment's Confrontation Clause provides a procedural guarantee for a criminal defendant to have the opportunity of a face-to-face confrontation with witnesses testifying against her		
		2.	Bruton v. United States prohibits the admission of an unreliable inculpatory statement made by a non-testifying co-defendant29		
		3.	Ms. Lane's email falls within the non-testimonial classification from <i>Crawford</i> and its progeny, still subject to Confrontation Clause scrutiny		
Conclusion			33		

TABLE OF AUTHORITIES

United States	Supreme	Court	Cases:
----------------------	---------	-------	--------

Bruton v. United States, 391 U.S. 123 (1968)	24, 29, 30
California v. Trombetta, 467 U.S. 479 (1984)	17
Chambers v. Mississippi, 410 U.S. 284 (1973)	16, 17, 19, 20
Crane v. Kentucky, 476 U.S. 683 (1986)	15, 17, 19
Crawford v. Washington, 541 U.S. 36 (2004)	28, 31, 33
Cruz v. New York, 481 U.S. 186 (1987)	24
Donnelly v. United States, 228 U.S. 243 (1913)	23
Douglas v. Alabama, 380 U.S. 415 (1965)	28, 29
Dowling v. United States, 493 U.S. 342 (1990)	14
Fry v. Pliler, 551 U.S. 112 (2007)	19
Gray v. Maryland, 523 U.S. 185 (1998)	24
Holmes v. South Carolina, 547 U.S. 319 (2006)	18, 21
Huddleston v. United States, 485 U.S. 681 (1988)	12–14
<i>In re Oliver</i> , 333 U.S. 257 (1948)	17
Lee v. Illinois, 476 U.S. 530 (1986)	24, 29
Lilly v. Virginia, 527 U.S. 116 (1999)	24, 30
Maryland v. Craig, 497 U.S. 836 (1990)	29
Mattox v. United States, 156 U.S. 237 (1895)	28
Michelson v. United States, 335 U.S. 469 (1948)	10
Michigan v. Lucas, 500 U.S. 145 (1991)	19
Montana v. Egelhoff, 518 U.S. 37 (1996)	19, 20
Nevada v. Jackson, 133 S.Ct. 1990 (2013)	13

Old Chief v. United States, 519 U.S. 172 (1997)	9, 10, 15
Pointer v. Texas, 380 U.S. 400 (1965)	28
Rock v. Arkansas, 483 U.S. 44 (1987)	16, 19
Taylor v. Illinois, 484 U.S. 400 (1988)	17
United States v. Inadi, 475 U.S. 387 (1986)	32
United States v. Matlock, 415 U.S. 164 (1974)	23
United States v. Scheffer, 523 U.S. 303 (1998)	19
Washington v. Davis, 547 U.S. 813 (2006)	32
Washington v. Texas, 388 U.S. 14 (1967)	16, 17
Webb v. Texas, 409 U.S. 95 (1972)	17
White v. Illinois, 502 U.S. 346 (1992)	24, 30
Williamson v. United States, 512 U.S. 594 (1994)	23–26
United States Circuit Court Cases:	
United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984)	12, 13
United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005)	12, 13
United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991)	12, 13
Constitutional Provisions:	
U.S. Const. amend. VI	1, 28
Federal Statutes:	
Federal Rule of Evidence 403	1, 8, 14, 15, 20
Federal Rule of Evidence 404	1, 9
Federal Rule of Evidence 804	1, 23

CONSTITUTIONAL PROVISION INCLUDED

The Sixth Amendment of the United States Constitution provides:

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

STATUTORY PROVISION INCLUDED

Federal Rule of Evidence 403 provides:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rule of Evidence 404(b) provides:

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

Federal Rule of Evidence 804(b)(3) provides:

- (b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
 - (3) Statement Against Interest. A statement that:

- (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's propriety or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
- (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal libality.

STATEMENT OF THE CASE

In this case, the Court is being asked to decide whether an individual charged with a serious crime can utilize the tools and protections the Constitution and Federal Rules of Evidence provide for her defense. Simply, this case encapsulates the primary premise of the American justice system: innocent until proven guilty. More broadly, this case hinges on whether this Court will allow a criminal defendant to employ the protections the Constitution and the law guarantee her. The Court should take this opportunity to protect, rather than abandon, criminal defendants.

Ms. Anastasia Zelasko, the Respondent, is a hardworking member of the women's United States Snowman team. R. at 8. The Snowman is a winter sport that consists of five elements in a pentathlon setting: dogsledding, ice dancing, aerial skiing, rifle shooting and curling. R. at 2. Ms. Zelasko joined the women's Snowman team in September 2010. R. at 1. Historically, the United States women's Snowman team has not performed particularly well—never ranking above sixth place in competition prior to the fall of 2011. R. at 2. That all changed, however, mere months after two members joined the team. Ms. Zelasko's co-defendant in this case, Jessica Lane, joined the U.S. Snowman team in the late summer of 2011. R. at 1. Also in the

late summer of 2011, Casey Short transferred from the Canadian women's Snowman team to the U.S. women's Snowman team. R. at 10.

In February of 2012, the men and women's U.S. Snowman teams were participating in trials for the World Winter Games in Remsen National Park. R. at 8. During her usual course of training, Ms. Zelasko was practicing alone on a rifle range adjacent to a portion of the dogsled course. R. at 8. On February 3, 2012 at approximately 10:15 AM, Ms. Zelasko was practicing her rifle shooting while the men's U.S. team practiced on the dogsled course. R. at 8. Tragically, a stray bullet from Ms. Zelasko's rifle accidentally struck Hunter Riley, a member of the men's U.S. Snowman team, which ultimately resulted in his death. R. at 8.

A search warrant was then executed on Ms. Zelasko's house. R. at 8. During the search, law enforcement officers found two 50-milligram doses of an anabolic steroid known as ThunderSnow as well as \$5,000 in cash. R. at 8. This amount of ThunderSnow is consistent with the amount used for personal use. R. at 27. Subsequently, a search was executed on the U.S. Snowman team's training facility. R. at 8. During this search, 12,500 milligrams of ThunderSnow were found hidden inside an equipment room that was accessible by all female team members and staff, including Ms. Lane and Ms. Short. R. at 8. The amount found in the training facility is consistent with the amount of ThunderSnow trafficked. R. at 27. A search of Casey Short's apartment turned up nothing while a search of Ms. Zelasko's co-defendant Jessica Lane's apartment turned up twenty doses of ThunderSnow and \$10,000 in cash. R. at 8.

At an evidentiary hearing, the Government indicated that the deceased, Hunter Riley, was cooperating with the Drug Enforcement Agency ("DEA") as an informant. R. at 9. In such a capacity, Mr. Riley had approached Jessica Lane on three separate occasions in late 2011 to purchase steroids from her—attempts that Ms. Lane rebutted on every occasion. R. at 9. On

December 10, 2011, the U.S. women's team coach Peter Billings—who also was romantically involved with Ms. Lane—overheard a conversation between the two co-defendants Ms. Zelasko and Ms. Lane. R. at 9. Over a week later, Mr. Billings approached his girlfriend to confront her about his suspicion she was selling steroids, which Ms. Lane denied. R. at 9. Over three weeks later, Ms. Lane sent an email to her boyfriend confessing that she sold steroids with an unnamed partner. R. at 29. Additionally, Ms. Lane indicated that a member of the men's Snowman team had discovered Ms. Lane and her partner were selling steroids. R. at 29. The male member of the team threatened to report both Ms. Lane and her partner if they did not come clean. R. at 29. In the email, Ms. Lane stated that her partner wanted to find a way to keep the male member of the team quiet. R. at 29. At no point during the email did Ms. Lane reveal the identity of her partner or the male member of the team.

Almost two weeks later, several individuals witnessed an intense argument between Ms. Zelasko and Mr. Riley. R. at 9. The Government offered no evidence or testimony indicating who saw this intense argument or if any of the individuals heard anything that was discussed between the two co-defendants. Terribly, Mr. Riley was accidently struck with the stray bullet from Ms. Zelasko's rifle a week later. R. at 9.

A federal Grand Jury indicted co-defendants Ms. Zelasko and Ms. Lane on April 10, 2012. R. at 5. Both Ms. Zelasko and Ms. Lane were indicted on five counts: Count I – Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids, a violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E) and 846; Count II – Distribution of and Possession with Intent to Distribute Anabolic Steroids, a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(E); Count III – Simple Possession of Anabolic Steroids, a violation of 21 U.S.C. § 844; Count IV – Conspiracy

to Murder in the First Degree, a violation of 18 U.S.C. §§ 371 and 1111(a); and, Count V – Murder in the First Degree, a violation of 18 U.S.C. 1111(a). R. at 5.

On July 16, 2012, the District Court for the Southern District of Boerum heard evidence and argument on two pretrial evidentiary motions: first, Ms. Zelasko's motion to introduce the testimony of Miranda Morris; and second, the Government's motion to introduce the email sent by co-defendant Ms. Lane to Mr. Billings. R. at 31. The District Court ruled in favor of Ms. Zelasko's motion, reasoning that Federal Rule of Evidence 404(b) does not bar propensity evidence because the common law basis for the Rule originated from fear of admitting such evidence against a defendant, not by a defendant. R. at 21. Alternatively, the District Court additionally found the testimony of Ms. Morris to be admissible in order to allow Ms. Zelasko to present a complete defense under Chambers v. Mississippi. R. at 21–22. Furthermore, the District Court denied the Government's motion for failure to reach the hearsay exception for statements against penal interest, based on Williamson v. United States, which requires each individual statement to be considered independently. R. at 22. The District Court's admission of Ms. Lane's email would prevent Ms. Zelasko from confronting an inculpatory statement made by her non-testifying co-defendant. R. at 23. The Government appealed the decision to the United States Court of Appeals for the Fourteenth District, claiming error on the District Court for granting Ms. Zelasko's motion while denying its own motion.

The Fourteenth Circuit affirmed the District Court in a 2-1 decision. R. at 46. In its decision, the Fourteenth Circuit affirmed that Federal Rule of Evidence 404(b) does not bar propensity evidence based upon the conclusion that a majority of the Circuit courts have reached similar conclusions regarding the common law application, despite seemingly simple language of the Rule. R. at 35. Additionally, the Fourteenth Circuit noted that "few rights are more

important than that of an accused to present witnesses in his own defense." R. at 36. As such, the court found that the prejudice to Ms. Zelasko, by not allowing the testimony of Ms. Morris substantially outweighed any benefit to the Government in preventing the testimony or any potential prejudice to Ms. Lane. R. at 37–38. Additionally, the Fourteenth Circuit found the email from Ms. Lane to be inadmissible by the *Williamson v. United States* requirement to narrowly read each individual statement and because a defendant is unconstitutionally prejudiced by the admission of a non-testifying co-defendant's inculpatory statement. R. at 40–42, 45. The Government sought a writ of certiorari to this Court, which was granted on October 1, 2013, on the four issues the District Court and the Fourteenth Circuit agreed upon. R. at 55.

SUMMARY OF ARGUMENT

The issue before this Court is not a complicated one, nor is it one that requires a change in the Court's trajectory. Rather, it hinges upon the protections guaranteed to an accused by the Constitution. It is well established that the Constitution—and this Court—guarantee protections to criminal defendants. Among the most basic of these rights is the opportunity to present a complete defense and the right to confront any witnesses that testify against the defendant. This Court has the opportunity to further reinforce and clarify those rights in its decision.

The District Court and Fourteenth Circuit each correctly concluded that an individual charged with a crime possesses the opportunity to present a complete defense. This Court has long recognized the importance of not allowing the state to prove the guilt of a defendant by showing her having committed prior bad acts, even of the same import. Nowhere in this Court's tradition, however, has the Court—or even the common law tradition—prevented a criminal defendant from attempting to prove her innocence by offering evidence suggesting another

committed the crime for which she is charged. Certainly, if the underpinning of the American justice system is innocent until proven guilty, Ms. Zelasko must be allowed to offer evidence of her innocence by the suggestion that someone else committed the crime for which she is charged.

Similarly, and consistent with such a principle, a criminal defendant has long been permitted—in fact, *entitled* to —the opportunity to present a complete defense while on trial. This constitutional right, while in no way absolute, can outweigh evidentiary rules. Specifically, without a legitimate state justification for the prohibition of the evidence, the defendant may offer such evidence as a way to exculpate herself from the crime for which she is charged. When applying the balancing test necessary for determining admissibility, courts must weigh whether, on the one hand, Ms. Zelasko's constitutional right to a complete defense against, on the other hand, the probative value to the Government in not allowing the evidence.

Additionally, the decision to deny the Government's motion to allow an email from Ms. Lane was proper because the email failed to qualify as a hearsay exception. This Court held that when statements are made against one's penal interest, the statements must be read individually within the context of the narrative. Such a reading of the email, however, prevents it from reaching an exception to the rule against hearsay. No statement in the email inculpates the declarant, Ms. Lane, so as to allow for its admission in the case against Ms. Zelasko.

A primary tenent of a criminal defendant's right to a fair trial is the ability to confront any witness who testifies against her. Such a right is rooted within the Bill of Rights. While not absolute, this Court has been careful to carve out exceptions to the Confrontation Clause in fear of preventing a criminal defendant from receiving fair treatment in the eyes of the law. Specifically, the Court has been hesitant to allow for the unreliable statements that could lead to a defendant's conviction without allowing for cross-examination. The Court should protect Ms.

Zelasko from such treatment by allowing non-testimonial statements made by an accomplice or co-defendant to be subject to Confrontation Clause scrutiny.

ARGUMENT

I. THE GRANTING OF MS. ZELAKSO'S MOTION WAS PROPER APPLICATION OF FEDERAL RULE OF EVIDENCE 404(b) AND NECESSARY TO GUARANTEE MS. ZELASKO'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

The decision to grant Ms. Zelasko's motion was an apt application of Federal Rule of Evidence 404(b) and effectively protected Ms. Zelasko's constitutional right to present a complete defense. In the present case, Ms. Zelasko appropriately sought to introduce evidence that a third party, not part of the current action, committed the acts for which Ms. Zelasko herself was wrongly charged. Additionally, the District Court's decision protected one of the most important rights of a criminal defendant: the ability of an accused to present her case in chief. Thus, the court's decision to grant the Respondent's pretrial evidentiary motion was proper.

A. Federal Rule Of Evidence 404(b) Allows A Criminal Defendant To Offer Evidence Of A Third Party's Propensity To Commit An Offense For Which The Defendant Is Charged.

In certain instances, such as the case at bar, a criminal defendant—as part of her defense—might wish to introduce evidence of a third party's prior actions in an attempt to exculpate herself. Coined by the circuit courts as "reverse Rule 404(b) evidence," this rule allows a criminal defendant to properly offer character evidence of another's actions in an attempt to exonerate herself. Of course, as with all character evidence, the proposed evidence must be consistent with the balancing test found in Federal Rule of Evidence 403. Fed. R. Evid. 403 (requiring the court to consider whether the evidence will unduly prejudice the defendant, mislead the jury or waste time). When applying Rule 403, any potential prejudice to the

Government or Ms. Short does not substantially outweigh the probative value of allowing the Rule 404(b) evidence to Ms. Zelasko.

This Court's decision to affirm the District Court and Fourteenth Circuit's decision to permit the testimony of the Respondent's witness is consistent with this Court's—and a majority of the circuits'—jurisprudence. In fact, this issue is narrow: whether a *criminal defendant* possesses the ability to introduce evidence of a third party's propensity to commit an offense for which she has been charged. This brief does not attempt to argue that propensity evidence should always be allowed; in fact, the Respondent concedes that propensity evidence is barred in certain instances when offered by the prosecution against the defendant. When introduced by a defendant regarding a third party in order to prove her innocence, however, the evidence should be allowed.

1. Common law tradition—the spirit of Federal Rule of Evidence 404(b)—allows a criminal defendant to offer evidence of a third party's propensity to commit a certain offense in order to exculpate herself.

Generally, the use of character evidence is not admissible to prove that an individual acted in such a way at a specific time. Federal Rule of Evidence 404(b) states "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). Rule 403 prohibits the prosecution from "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged." *Old Chief v. United States*, 519 U.S. 172, 180–81 (1997). Anecdotally, the purpose of this Rule is to prevent the prosecution from introducing prior convictions or bad acts of a criminal defendant to establish the likelihood of his guilt.

In fact, Rule 404(b) evolved from the common law. This Court recognized that the common law prohibits the "prosecution to [introduce] any kind of evidence of a *defendant's* evil character to establish a probability of his guilt." *Michelson v. United States*, 335 U.S. 469, 475 (1948) (emphasis added). In *Michelson*, this Court specifically noted that "the state may not show defendant's prior trouble with law . . . even though such facts might logically be persuasive." *Id.* (emphasis added). Evidence of such character would weigh heavily on the jury and unfairly prejudice the defendant. *Id.* The language of Rule 404(b) reflects the common law tradition and directly addresses the admission of propensity evidence. *Old Chief*, 519 U.S. at 181. Further, this Court limits propensity evidence when it would be an "improper basis' for conviction." *Id.* at 182 (citation omitted). Thus, the common law tradition that motivated Rule 404(b) existed to prevent the introduction of prejudicial evidence against a criminal defendant that might unfairly lead to her conviction in the current action.

This Court has recognized that Rule 404(b)'s tradition prevents the state from introducing propensity evidence against the defendant. *See, e.g., Michelson*, 335 U.S. at 475. In order to remain true to the spirit of the law, propensity evidence should not be allowed to be admitted against a defendant. Nowhere in the common law, however, is there a suggestion that the criminal defendant cannot offer the propensity of a third party—that is not subject to the action—to commit an offense for which the defendant is charged. Thus, the spirit of Rule 404(b) allows for the introduction of "reverse Rule 404(b)" evidence. That is, a criminal defendant—in accordance with the common law tradition—can properly introduce evidence of a third party's propensity to commit the offense with which the defendant is charged with.

In the case at bar, the evidence suggests Ms. Short's propensity to traffic anabolic steroids. The Morris testimony indicates that Ms. Short sold an anabolic steroid chemically

similar to ThunderSnow to the Canadian women's Snowman team prior to transferring to the United States team. R. at 25. Upon Ms. Short's transfer to the American team, the team's performance greatly improved. R. at 2. Months after her transfer, an amount indicating the trafficking of ThunderSnow was found in the training room of the women's Snowman facility. R. at 27–28. This cannot be a coincidence.

The present case posits an easily answerable proposition: can a criminal defendant introduce evidence of a third party's propensity by invoking an evidentiary rule that exists to protect and prevent prejudice against that defendant? In short, yes. As noted, the common law tradition—the inspiration behind the codified Rule 404(b)—was to protect criminal defendants from being prejudiced by propensity evidence that wrongly led to their conviction. In the present case, Ms. Zelasko will not be prejudiced in any way by the Rule 404(b) evidence. Rather, the Respondent wishes to introduce evidence of a third party's propensity to commit the offense for which she is wrongly charged. Introduction of such evidence is consistent with the common law tradition that inspired Rule 404(b).

2. Despite the seemingly simple language of Federal Rule of Evidence 404(b), a majority of the circuit courts have adopted and applied the common law interpretation of Rule 404(b).

The Fourteenth Circuit's decision to adopt "reverse Rule 404(b)" evidence as admissible did two things: first, it recognized that the plain language of Rule 404(b) was not consistent with its purpose; and, second, it adopted the majority view of the rule regarding "reverse Rule 404(b)" evidence. By adopting the majority view of Rule 404(b) and "reverse Rule 404(b)," the Fourteenth Circuit accepted and implemented the common law interpretation of the Rule.

In its opinion, the Fourteenth Circuit acknowledged the Government's argument that the plain text of Rule 404(b) bars admission of any propensity evidence. R. 34. The Petitioner

argues that the fact that Rule 404(b)(1) states that propensity evidence cannot be used to "show that on a particular occasion the *person* acted in accordance with the character" disallows the Respondent from introducing propensity evidence of a third party. R. 34. Yet, the plain language of Rule 404(b) is not necessarily indicative of this Court's interpretation of the rule. For example, in *Huddleston v. United States*, this Court recognized that the plain language of Rule 404(b) was a starting point. 485 U.S. 681, 687 (1988). Yet, also imperative was to understand the history—legislative, Advisory Committee notes, among others—behind Rule 404(b). *Id.* As discussed, *supra*, the common law tradition behind Rule 404(b) hinged on protecting the criminal defendant by disallowing propensity evidence against her.

To develop its understanding of Rule 404(b), this Court explored the Advisory Committee Committee notes behind the rule. In *Huddleston*, this Court noted that the Advisory Committee "specifically declined to offer any 'mechanical solution' to the admission of evidence under 404(b)." *Id.* at 688 (citations omitted). The Court—by interpreting the Advisory Committee's notes—indicated that the trial court should evaluate this evidence under a typical admissibility analysis; that is, "the determination must be made whether the risk of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Id.* The Petitioner suggests such a mechanical solution that, if adopted, will create a rigid test. Rather, to remain consistent with this Court's precedent, a flexible test should be implemented.

By adopting the admissibility of "reverse Rule 404(b)" evidence, the Fourteenth Circuit aligned itself with a majority of the other circuit courts. *See, e.g., United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005); *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984). The general rule, then, when allowing

"reverse Rule 404(b)" evidence must be two-pronged: first, whether the evidence is relevant and probative to some pertinent fact of the defense; and second, if so, a standard application of Rule 403's balancing test follows. *See Huddleston*, 485 U.S. at 686, 688; *Aboumoussallem*, 726 F.2d at 912. Additionally, the evidence being introduced must not only be relevant, but probative—like any character evidence under Rule 403. *Huddleston*, 485 U.S. at 686; *Stevens*, 935 F.2d at 1404–05. Thus, for the use of "reverse Rule 404(b)" evidence to be proper, the evidence being introduced must be relevant and probative to the defense and still be proper under Rule 403.

Specifically, the Tenth Circuit considered a case of similar import to the case at bar. In *Montelongo*, two men were charged with multiple drug charges—including trafficking. 420 F.3d at 1170–71. Both of the individuals charged attempted to bring in evidence suggesting a third party was responsible for the trafficking organization and the two men charged were misled. *Id.* at 1172. The Tenth Circuit reasoned that under the application outlined in *Aboumoussallem* and *Stevens*, the evidence of the third party's propensity to commit an offense that the defendants were charged with was probative and would not confuse the jury nor waste the court's time. *Id.* at 1174–75. Thus, the Tenth Circuit—in a case of similar facts—allowed a defendant to offer such Rule 404(b) evidence in his defense.

This case exhibits a proper use of "reverse Rule 404(b)" evidence. The Respondent wished to offer evidence of a third party's propensity to commit the offense for which she was wrongly charged. Ms. Zelasko wanted Ms. Morris—a former teammate of Ms. Short—to testify to Ms. Short's trafficking of anabolic steroids while a member of the Canadian Snowman team. R. at 24–25. The Morris testimony would do two things: first, identify Ms. Short as the individual who sold anabolic steroids to multiple members of the Canadian Snowman team, and two, identify Ms. Short as the individual whom she bought anabolic steroids from. R. 24–25. In

its essence, the Morris Testimony identified Ms. Short as an individual in the Snowman community who trafficked an ester of ThunderSnow—the drug for which the Respondent is being charged with trafficking. Under "reverse Rule 404(b)," such evidence would be relevant and probative to part of the defense—fulfilling the first prong of the requirement for admissible "reverse Rule 404(b)" evidence.

3. Allowing a criminal defendant to offer evidence of a third party's propensity to commit a certain offense is probative to the defendant while not at all prejudicial to the third party.

As noted, when the first prong of "reverse Rule 404(b)" evidence is met, the second prong mandates the court to then analyze the evidence—like all character evidence—under Rule 403. Federal Rule of Evidence 403 dictates that a court must weigh, on one hand, the probative value of the evidence, while on the other hand, consider the danger of the evidence causing unfair prejudice, confusing the jury or needlessly wasting time. Fed. R. Evid. 403. In the context of Rule 404(b), a court balances the danger of unfair prejudice against the probative value of the given propensity testimony. *See, e.g., Dowling v. United States*, 493 U.S. 342, 346 (1990). Much like any other propensity evidence, "reverse Rule 404(b)" evidence must—according to the trial court—meet the probative value outweighing unfair prejudice threshold in the context of Rule 403 in order to be admissible.

In understanding Rule 404(b) evidence, it is appropriate to look at the purpose and history of the Rule. This Court noted that because there is no "mechanical solution" to admission of evidence under Rule 404(b), the trial court should assess such evidence under the usual rules of evidence admissibility—that is, Rule 403. *See, e.g., Huddleston*, 485 U.S. at 688. The trial court must determine whether the admission of evidence makes a fact more likely to have occurred. Fed. R. Evid. 403. This is distinct from relevance. To determine relevance, a

court must find that the probative value is not substantially outweighed by its prejudicial effect. *Id.* On the other hand, the prejudicial effect of Rule 403 speaks to "the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 519 U.S. at 180. Therefore, in its determination, the court must consider if evidence is so probative as to not be substantially outweighed its effect on the fact finder in determining guilt of the specific offense charged.

In the present case, the probative value of the Morris testimony is not substantially outweighed by any prejudicial effect the evidence might have on a third party. The Respondent wishes to introduce the evidence for no other reason than to exculpate herself. R. at 14. In fact, Ms. Morris's testimony—as part of completing the Respondent's defense strategy—is the only way in which such evidence may be introduced. R. at 14. The Government's objection to such evidence is that it may cause judicial inefficiency and would prejudice Ms. Short, the third party of whose propensity the Respondent hopes to show. R. at 37. While, in a typical context, Rule 404(b)'s purpose is to protect the defendant against unfair prejudice by the state introducing propensity evidence, in this case, such evidence is being introduced by the defendant against a third party not at all involved in the case. In fact, the third party will not be prejudiced at all because Ms. Short is not a party to this action. R. at 38. Therefore, any potential prejudice that Ms. Short might experience as a non-party to this case does not substantially outweigh the probative value to Ms. Zelasko.

B. Alternatively, Ms. Zelasko Possesses A Constitutional Right To Present A Complete Defense.

Although accused, criminal defendants still possess constitutional rights—primarily and most importantly—to a fair trial. As part of such a canon, criminal defendants possess constitutional due process rights to present a complete defense. *See generally Crane v.*

Kentucky, 476 U.S. 683 (1986). On the other hand, evidentiary rules exist to control the process of trials in the courts. While regularly acting in harmonious conjunction, at times, a defendant's constitutional right clashes with evidentiary rules. When such a collision occurs, evidentiary rules should "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process." Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). Of course, as an accused, a defendant's constitutional rights do not unconditionally trump evidentiary rules, but when no valid state justification exits, the intrusion of the defendant's constitutional right violates her due process.

By finding that Ms. Zelasko possessed a constitutional right to present a complete defense, this Court would be consistent with its prior decisions. This Court maintains a long tradition of protecting criminal defendants. While this Court has appropriately limited such a principle from being uncompromising, in the instant case, the Government possessed no legitimate justification to allow for the encroachment of Ms. Zelasko's fundamental right to defend herself. Therefore, the District Court properly granted the Respondent's motion to allow Ms. Morris to testify.

1. An individual possesses a strong constitutional right to present a complete defense.

Certainly, a criminal defendant possesses many constitutional rights regarding her defense. Perhaps most fundamental and overarching among these rights is a right to present a complete defense. *See, e.g., Chambers*, 410 U.S. at 302. In *Washington v. Texas*, this Court outlined the fundamental rights of an accused, including: the right to offer the testimony of witnesses, the right to compel a witness's attendance, the right to present the defendant's version of the facts, the right to confront witnesses against her, and the right to establish her own defense. 388 U.S. 14, 19 (1967). Chief Justice Warren concluded that the opportunity of a

defendant to establish her own defense "is a fundamental element of due process of law." *Id.* This right, too, serves as "an essential attribute of the adversary system itself." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). Thus, in harmony with this Court's jurisprudence and fundamental to the American justice system rests the right of a defendant to present a complete defense.

This Court's tradition and jurisprudence places great emphasis on the right of a criminal defendant to have the opportunity to present a complete defense. The Constitution of the United States guarantees criminal defendants "a meaningful opportunity to present a complete defense." Nevada v. Jackson, 133 S.Ct. 1990, 1992 (2013) (quoting Crane, 476 U.S. at 690). In fact, this Court has routinely stated that the opportunity to present a defense is among the most fundamental rights an accused possesses. See, e.g., Chambers, 410 U.S. at 302; Webb v. Texas, 409 U.S. 95, 98 (1972); In re Oliver, 333 U.S. 257, 273 (1948). Such a right, according to this Court in *In re Oliver*, is "basic in our system of jurisprudence;" and, when curbed, is a denial of a defendant's due process rights. In re Oliver, 333 U.S. at 273. In Crane, this Court noted that the opportunity to be heard "would be empty if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence." Crane, 476 U.S. at 656. The Fourteenth Amendment extends the right to a complete defense to defendants as a way to promote a standard of fairness. California v. Trombetta, 467 U.S. 479, 485 (1984). Thus, this Court places a strong emphasis on a defendant's right to present a complete defense—including through her ability to call to witnesses and present her version of the facts.

In the present case, the evidence that Respondent wishes to introduce could exculpate her. At the very least, the testimony of Miranda Morris would create a theory of the case that would not involve Ms. Zelasko. Ms. Morris would testify that while a member of the Canadian

Snowman team, Ms. Short revealed to her that she sold anabolic steroids by the name of White Lightening, an ester of ThunderSnow, to many members of the Canadian Snowman team. R. at 25, 28. In fact, Ms. Morris—as a member of the Canadian Snowman team—admits that she purchased White Lightening from Ms. Short. R. at 25.

At the evidentiary hearing, Ms. Zelasko's counsel stated that her defense was twofold: first, the killing of Mr. Riley was accidental; and second, the drug conspiracy—which the Government concedes only involved two people—consisted of Ms. Lane and Ms. Short. R. at 11. The Respondent's ability, then, to introduce evidence that Ms. Short had a propensity to sell an anabolic steroid chemically similar to ThunderSnow would create doubt as to Ms. Zelasko's involvement. R. at 12. In fact, the introduction of this Rule 404(b) evidence likely implicates Ms. Short—rather than Ms. Zelasko—as Ms. Lane's co-conspirator. The testimony, if allowed, tends toward a reasonable doubt that Ms. Zelasko committed the crime for which she is charged. The introduction of the Morris testimony, then, allows Ms. Zelasko to propose a defense that could lead to her innocence. A defense that, if the Morris testimony were not to be introduced, would not be able to be made by the Respondent. Thus, Ms. Zelasko possesses a strong constitutional right to introduce the Rule 404(b) evidence in order to present a complete defense.

2. An individual's constitutional right to present a complete defense can outweigh evidentiary rules.

A criminal defendant's strong presumption of her constitutional right to present a complete defense can, at times, come into conflict with federal or state evidentiary rules. The Court has placed limits on state and federal rulemakers to establish rules excluding evidence from criminal trials. *Holmes v. South Carolina*, 547 U.S. 319 (2006). This Court has held that evidentiary rules may so impede the discovery of truth, "as well as the doing of justice," that they preclude the "meaningful opportunity to present a complete defense" that is a guaranteed

right of defendants by the Constitution. *Crane*, 476 U.S. at 690; *see also United States v. Scheffer*, 523 U.S. 303, 329 (1998) (Stevens, J., dissenting). While in no way an absolute rule, a defendant's constitutional right to present a complete defense can outweigh evidentiary rules when the exclusion reaches a due process violation.

The rule delineated by this Court is that evidentiary rules—such as rules of evidence exclusion—are not overcome by due process considerations any time that favorable evidence is excluded. *See, e.g., Fry v. Pliler*, 551 U.S. 112, 124 (2007) (referencing *Scheffer*, 523 U.S. at 316). Rather, due process considerations "hold sway over evidentiary rules when the exclusion of evidence 'undermine[s] fundamental elements of the defendant's defense." *Pliler*, 551 U.S. at 124 (quoting *Scheffer*, 523 U.S. at 315). The elements of a defendant's defense hinge on the elements of a fair trial outlined in *Washington* and the Sixth Amendment. Included in the elements of a defendant's defense is, indeed, the opportunity to submit a complete defense. *See supra*, I.B.1. Thus, in certain instances, the inability of a defendant to present a complete defense because of evidentiary rules can unconstitutionally prejudice her.

It is important to note, however, that the rule from *Chambers* is not all-inclusive. That is, in certain cases, an individual's right may "bow to accommodate other legitimate interests in the criminal process." *Chambers*, 410 U.S. at 295; *see also Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Rock*, 483 U.S. at 55. This Court has been clear that such instances exist when a valid state justifications is present to overcome the strong presumption of a defendant's constitutional right. *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996). In *Crane*, this Court noted "in the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right . . ." to her defense. 476 U.S. at 690. Thus, evidentiary rules outweigh a defendant's constitutional right only when a valid state justification exists.

In the case at bar, the Government presents no justifiable means as to why Ms. Morris's testimony should be excluded. At the evidentiary hearing, the Government noted that the Morris testimony should not be allowed because it was weak and did little to exculpate the Respondent. R. at 15. In fact, the Government stated that Ms. Morris's testimony would do little but invite speculation of motive of the death of Mr. Riley. R. at 15. In its decision, the Fourteenth Circuit noted that two primary concerns of the Morris testimony being allowed are judicial expediency and reducing prejudice. R. at 37–38. The trial court—as the most appropriate fact finder—considered the Government's interests and justifications for the exclusion of the Morris testimony, yet found that the interests did not substantially outweigh the probative value of the evidence. R. at 21. Thus, no legitimate state justification exists to outweigh the Respondent's constitutional right to present a complete defense.

3. When applying a balancing test, Ms. Zelasko's constitutional right to present a complete defense is not substantially outweighed by the Government's interest in restricting such evidence.

For an evidentiary rule to outweigh a defendant's constitutional right, the state must show a valid justification in favor of the rule. As noted, *supra*, criminal defendants possess a strong constitutional and fundamental right to present a complete defense. *See, e.g.*, *Chambers*, 410 U.S. at 302. On the other hand, in instances where the state possesses a valid justification for the exclusion of the evidence based upon an evidentiary rule, that presumption can be overcome. *See, e.g.*, *Egelhoff*, 518 U.S. at 53. In the present context, a trial court applies Rule 403 to determine whether the probative value of the evidence—including the defendant's undeniable constitutional right in that analysis—is substantially outweighed by other factors, including unfair prejudice, confusion of the issues or misleading of the trier of fact. Fed. R. Evid. 403. Implicitly, the deference of the trial court should be to a defendant's constitutional right.

This Court, while not explicit, has decided the principle—and a specific application—on which this case rests. In *Holmes v. South Carolina*, this Court expressed that the "Constitution . . . prohibits the exclusion of defense evidence under rules that serve not legitimate or that are disproportionate to the ends that they are asserted to promote." 547 U.S. at 326. While the Court recognized that the evidence could be excluded if other legitimate factors substantially outweighed its probative value, evidence used to show that someone else committed the crime for which the defendant is charged should be allowed unless it is repetitive, marginally relevant, possesses an undue risk of prejudice or a confusion of the issues. *Id.* at 326–27. In fact, this Court specifically mentioned an application of this principle as found in "rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." *Id.* at 327. Thus, the trial court is to balance, on the one hand, a defendant's constitutional right, and on the other hand, any other factors, including a state's justification for excluding the evidence, prejudice and confusion.

The District Court made such a determination by balancing the interests of Ms. Zelasko, the Government and Ms. Short. In the present case, Ms. Zelasko wished to present her defense, which included testimony that cast doubt on her being involved in a drug conspiracy, by attempting to show that someone else was involved in such a conspiracy. R. at 11–12. On the other hand, the Government wished to exclude the Morris testimony because, among other reasons, the evidence would create confusion of motive and for prejudicial reasons. R. at 15, 37–38. Ms. Morris's testimony would seemingly cast doubt on Ms. Zelasko's involvement in the drug conspiracy by potentially implicating Ms. Short as the other co-conspirator. Without such testimony, Ms. Zelasko cannot introduce similar evidence of her innocence. R. at 14.

The testimony potentially incriminating Ms. Short, however, does her no harm. Ms. Short is not a party to the present action. R. at 1. Thus, despite evidence showing the propensity of Ms. Short to traffic in anabolic steroids, as a third party she cannot be unduly prejudiced in this case. When the trial court and the Fourteenth Circuit considered this, both courts found that Ms. Short could not be prejudiced in a case she is not part of. R. at 21, 38. Therefore, the probative value of allowing the Morris testimony as a vehicle for the Respondent to present a complete defense substantially outweighs the Government's interest in preventing such evidence.

II. THE DENIAL OF THE GOVERNMENT'S MOTION TO ADMIT THE EMAIL FROM MS. LANE WAS PROPER BECAUSE THE EMAIL DID NOT REACH THE HEARSAY EXCEPTION OF A STATEMENT AGAINST PENAL INTEREST AND BECAUSE MS. ZELASKO WOULD NOT POSSESS THE OPPORTUNITY TO CONFRONT HER NON-TESTIFYING CO-DEFENDANT.

The decision to deny the Government's motion to admit Ms. Lane's email was consistent with this Court's decision in *Williamson* and conforms to an appropriate interpretation of the Sixth Amendment. In the case at bar, the Government attempted to introduce a statement from the Respondent's non-testifying co-defendant that implicated her in a criminal offense that Ms. Zelasko did not commit. It is upon this statement that the Government rests its case in chief. By denying the motion, the District Court applied *Williamson* and sought to protect an accused from being barred from confronting a witness against her in trial. Thus, the denial of the Petitioner's motion was proper.

A. The Email From Ms. Short To Mr. Billings Is Not Admissible Because, When Taken As Individual Statements Pursuant To *Williamson v. United States*, It Does Not Reach An Exception To The Rule Against Hearsay.

It is well established in this Court's jurisprudence that hearsay statements are not admissible unless a valid exception to the rule against hearsay exists. A common exception to this rule relies on when an unavailable declarant makes a statement against her penal or

pecuniary interest. Under this Court's guidance in *Williamson v. United States*, the District Court in this case properly analyzed the email sent from Ms. Lane as individual, non-inculpatory statements. 512 U.S. 594 (1994). Although *Williamson* presents no definitive test, the District Court's conclusion remains consistent with the principle that statements are admitted on an individual basis based upon the implication of each statement.

1. Federal Rule of Evidence 804(b)(3) allows a statement made by an unavailable declarant to be admissible if the statement is against the declarant's penal interest.

In certain instances during a trial or hearing, statements made by another are typically not admissible. These hearsay statements are not admissible unless a federal statute, rule prescribed by this Court or the Federal Rules of Evidence provide otherwise. Fed. R. Evid. 802. Within the context of the Federal Rules of Evidence, Rule 804 contains exceptions to the general prohibition of admitting hearsay statements when the declarant is unavailable. Fed. R. Evid. 804. The text of Rule 804(a) prescribes criteria of what it means for a declarant to be unavailable while Rule 804(b) outlines exceptions to the bar on inadmissible hearsay evidence. *Id.* Specifically, and within the context of the case at bar, a statement that would typically be hearsay is admissible if the declarant is unavailable and the statement is "so contrary to the declarant's proprietary or pecuniary interest." Fed. R. Evid. 804(b)(3). In addition to Rule 804(b)(3), this Court has routinely recognized that, generally, statements against penal interest are not excluded as hearsay and admissible. See, e.g., United States v. Matlock, 415 U.S. 164, 177 (1974) (stating that statements against penal interest carry their own indicia of reliability); Donnelly v. United States, 228 U.S. 243, 272–77 (1913). Thus, when a declarant is unavailable, the court properly relies on statements against penal interest because of their inherent reliability.

2. Williamson v. United States requires each statement by an unavailable declarant, as defined by Federal Rule of Evidence 804(b)(3), to be

read as a single declaration that, in order to be admitted, must be individually self-inculpatory.

This Court's decision in Williamson requires courts to consider a potential narrative against penal interest by an unavailable declarant as individual statements for admissibility purposes. Such a principle primarily hinges on the fact that a statement against penal interest is not a firmly rooted exception to the rule against hearsay. See Lilly v. Virginia, 527 U.S. 116, 134 (1999). Specifically, within the context of co-defendants, the Court noted that statements "that shift or spread blame to a criminal defendant, therefore, fall outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability." Id. at 117 (quoting White v. Illinois, 502 U.S. 346, 357 (1992)). In fact, this Court has found—on multiple occasions—that statements by a co-defendant that inculpate a defendant are not per se admissible. See, e.g., Lilly, 527 U.S. at 134; see also Gray v. Maryland, 523 U.S. 185 (1998); Lee v. Illinois, 476 U.S. 530, 540 (1986); Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J. dissenting); Bruton v. United States, 391 U.S. 123, 141–42 (1968) ("Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."). Statements against one's penal interest are typically admissible, even though hearsay. Such a hearsay exception, however, is not a blanket rule to be applied by the courts.

The rule, then, stands to be that when a declarant makes a statement against his penal interest, such a statement *may* be admissible. Yet, the language of Rule 804(b)(3) does not specify what a statement is. This Court stated that "statements," for purposes of Rule 804(b)(3), could be interpreted in two ways: first, as a report or narrative, or second, as a single declaration or remark. *Williamson*, 512 U.S. at 599. The first interpretation would admit entire statements by an unavailable declarant if, "in the aggregate the [statement] sufficiently inculpates him." *Id.*

On the other hand, the second interpretation would construe Rule 804(b)(3) to "cover only those declarations or remarks within [the statement] that are individually self-inculpatory." *Id.* This Court concluded that the narrow reading—that requiring the reading of each statement individually to determine whether they are inculpatory—most accurately followed the principle and spirit behind Rule 804(b)(3). *Id.* In its reasoning, this Court recognized that a reasonable person would not make self-inculpatory statements unless they were true. *Id.* It made clear, however, that such logic does not extend to collateral statements that themselves are not self-incriminating. *Id.* Thus, potentially inculpatory statements should be viewed individually, but most importantly must be observed in context.

In the present case, the Government wishes to introduce an email from co-defendant Jessica Lane that allegedly implies the Respondent's involvement in the drug conspiracy and the death of Mr. Riley. R. at 9. The email was sent nearly a month after Mr. Billings confronted his girlfriend Ms. Lane about her selling of steroids to the Snowman team. R. at 9. The email was short—only five sentences. R. at 29. Individually, each sentence reads as follows: (1) "I really need to talk to you;" (2) "I know you've suspected before about the business my partner and I have been running with the female team;" (3) "One of the members of the male team found out and threatened to report us if we don't come clean;" (4) "My partner really thinks we need to figure out how to keep him quiet;" and (5) "I don't know what exactly she has in mind yet." R. at 29. In order for these statements to be admissible, they individually must be inculpatory and expose Ms. Lane to criminal liability.

By reading each statement individually from Ms. Lane's email, no statement exposes itself as inculpatory. That is, no statement from the email is against Ms. Lane's penal interest. On the email's face, two statements seem to have the most potential to be incriminating;

however, neither statement itself rises to the threshold created by this Court. The first statement is "I know you've suspected before about the business my partner and I have been running with the female team." R. at 29. The statement itself does not indicate the *type* of business Ms. Lane might be running with her partner. Thus, on its face, it is not admissible. Additionally, the statement "[m]y partner really thinks we need to figure out how to keep him quiet," could be construed as leading to an inculpatory statement. On its own, the statement indicates an attempt to keep an individual from talking. Cryptic, certainly. Incriminating, dubious. Reading the email from Ms. Lane, under this Court's analysis in *Williamson*, would lead to the email being not admissible because, on their own, the statements do not implicate Ms. Lane.

3. Under the totality of the circumstances, the statements made by Ms. Lane—taken individually—do not expose her to criminal liability and do not reach an exception to the rule against hearsay.

This Court's decision in *Williamson* hinged on the fact that general proclamations and stories—in and of themselves—may contain some truths, but not the complete truth. *Williamson*, 512 U.S. at 599–600. Accordingly, just because a narrative is inculpatory does not make the whole story either entirely inculpatory or entirely credible. *Id.* In many self-inculpatory statements and confessions, falsities come forth; in fact, "one 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.* In essence, the context of the statements matter. Under Rule 804(b)(3), the proper inquiry is whether "the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and this question can only be answered in *light of all the surrounding circumstances.*" *Id.* at 603–04 (emphasis added). Thus, when considering the admission of inculpatory statements by an unavailable declarant, the statements must be

viewed individually—but in light of the surrounding circumstances—to determine whether they reach an exception to the rule against hearsay.

As noted, none of the individual statements, in and of themselves, rises to the level of implicating Ms. Lane. Even taken with the context of the surrounding circumstances, the individual statements fail to be inculpatory. Such a standard requires the statements to simultaneously be read individually and within the context of the surrounding circumstances. Ms. Lane's statement about being in business with her partner mentions no specificity regarding the type of business or who her partner was. R.at 29. Even within the context of the email, Ms. Lane makes no other mention of the business and certainly no mention of an illegal drug business. R. at 29. Thus, when read in light of circumstances, the potentially most incriminating statement of the email does not give rise to implicating Ms. Lane. Additionally, the statement about keeping "him" quiet fails to inculpate Ms. Lane. While the email previously discusses an individual reporting Ms. Lane and her partner, the statement by Ms. Lane makes no mention of what it would mean to silence the individual nor does she seem, at any point in the email, to agree with such a sentiment. Such a statement would in no way implicate Ms. Lane. Contextually, the trial court must apply a balancing test to weigh, on the one hand, the impact of each statement individually against Ms. Lane's penal interest while, on the other hand, considering the evidentiary rules allowing such statements. The Williamson decision—in light of previous decisions by this Court—points toward an analysis that prevents Ms. Lane's email from being admitted because its lack of individually inculpatory statements.

B. Alternatively, The Confrontation Clause Of The Sixth Amendment And *Bruton v. United States* Bar The Admission Of An Inculpatory Statement Made By A Non-Testifying Co-Defendant.

This Court's jurisprudence demonstrates a long history protecting a criminal defendant's right to a fair trial. One protection of that fair trial right is the ability of a defendant to confront—through cross-examination—any witnesses who testify against her. This guarantee of the Sixth Amendment protects accomplices and co-defendants from passing blame for offenses from themselves to the other defendants. Recently, this Court has taken to distinguishing between testimonial and non-testimonial statements for purposes of Confrontation Clause scrutiny. Without a clear, bright line delineating these classifications, non-testimonial statements should not be excluded from Confrontation Clause scrutiny.

1. The Sixth Amendment's Confrontation Clause provides a procedural guarantee for a criminal defendant to have the opportunity of a face-to-face confrontation with witnesses testifying against her.

In its pertinent part, the Sixth Amendment says, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This Court has repeatedly held that the "right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him," which is secured by the Sixth Amendment. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). *See also Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Douglas v. Alabama*, 380 U.S. 415 (1965). In *Pointer*, this Court recognized that a major premise underlying the Confrontation Clause is to "give the defendant charged with crime an opportunity to cross-examine the witnesses against him." 380 U.S. at 406–07. Thus, the Sixth Amendment provides constitutional protections that allow the benefit of seeing a witness face-to-face and of subjecting him to cross-examination. *Mattox v. United States*, 156 U.S. 237, 240 (1895); *see also Crawford*, 541 U.S. at 57. In its essence, the purpose of the Confrontation Clause is to ensure the reliability of evidence being used against a

defendant. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). A criminal defendant, then, possesses a constitutional right to cross-examine any witnesses used against her.

In the present case, the Respondent was charged with multiple counts, based primarily on an email sent by her co-defendant. R. at 10. As per her constitutional right to confront witnesses, Ms. Zelasko possesses the opportunity to cross-examine the email through its author, her co-defendant Ms. Lane. Yet, Ms. Lane has made clear she will invoke her right to not testify against herself. R. at 18. In so doing, Ms. Lane is infringing upon the Respondent's ability to cross-examine any witnesses against her. Thus, on its face, the admission of the email sent by Ms. Lane would violate the Respondent's constitutional right to confront witnesses against her.

2. Bruton v. United States prohibits the admission of an unreliable inculpatory statement made by a non-testifying co-defendant.

Fortunately, this Court considered a case of similar import when it decided that a statement by a non-testifying co-defendant that implicated the defendant at a joint trial violates the Confrontation Clause. *Bruton*, 391 U.S. at 135. The decision to prohibit such statements in *Bruton* hinged on the lack of reliability in a co-defendant's implicating statement regarding her co-defendant. *Id.* at 136. Although courts are to instruct juries to weigh an accomplice's testimony carefully, this Court noted that "the unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* Such a principle hinges on the fact that an accusation by a co-defendant is presumptively suspect and, under the Sixth Amendment, must be subject to cross-examination. *Douglas*, 380 U.S. at 419. A statement made by an accomplice, then, must reach a sufficient "indicia of reliability" in order to overcome the inherent fabrication of the statement and be properly admissible. *Lee*, 476 U.S. at 546. This Court holds a co-defendant's statement that attempts to spread the blame to another defendant is improper.

In *Lilly v. Virginia*, the defendant's accomplice, who was tried separately, made statements to law enforcement officers indicating that Lilly had committed a murder. 527 U.S. at 121. When called to testify, the accomplice refused to testify and instead invoked his Fifth Amendment right against self-incrimination. *Id.* The state, then, introduced a tape of the accomplice's statement to be admitted in place of the testimony. *Id.* In its decision, this Court concluded that "it is clear that our cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability." *Id.* at 133 (quoting *White v. Illinois*, 502 U.S. 346, 357 (1992)); *see also Bruton*, 391 U.S. at 123. This Court held, then, that the statement made by the accomplice was not admissible because the defendant did not have the opportunity to cross-examine the non-testifying accomplice's unreliable statement.

The case at bar presents many facts similar to *Lilly*. Much like in *Lilly*, the Respondent's conviction pivoted on the testimony of her co-defendant's statement. Although without admitting so, the Government relies heavily on Ms. Lane's email in order to pursue its charges against Ms. Zelasko. Ms. Lane's email was sent to her boyfriend Mr. Billings, the coach of the men's Snowman team. R. at 29. Ms. Lane, like the accomplice in *Lilly*, will not testify at trial to the statements she made, in order to invoke her Fifth Amendment right against self-incrimination. R. at 18. Thus, the Government—in order to convict Ms. Zelasko—must rely on the email statement made by Ms. Lane.

The email from Ms. Lane, much like the statement made in *Lilly*, is unreliable and highlights the concern this Court emphasized when disallowing such statements. In fact, the email from Ms. Lane is much less reliable than the statement made in *Lilly*. The email attempts

to spread blame to Ms. Lane's co-conspirator, but does so without actually indicating who her co-conspirator is, what it is their business was or what she and her co-conspirator were going to do. R. at 29. Rather, Ms. Lane indicates that her unnamed business partner wishes to keep an individual quiet. R. at 29. The email, of course, does not indicate *how* that will happen, but only that her unknown business partner thought about keeping him quiet. R. at 29. Such a statement, then, is unreliable. The fact that Ms. Lane will not testify at trial further extenuates the concern with allowing the admissibility of such an email. Otherwise, Ms. Zelasko will not be able to confront the witness against her.

3. Ms. Lane's email falls within the non-testimonial classification from *Crawford* and its progeny, still subject to Confrontation Clause scrutiny.

After *Bruton* and *Lilly*, this Court has considered several cases with specific facts regarding the admissibility of such statements. In *Crawford*, the Court began to draw a distinction among statements it had not done before: testimonial versus non-testimonial statements. 541 U.S. at 68. In its holding, this Court noted that out-of-court statements made by witnesses that are testimonial in nature are barred from admission—because of the Confrontation Clause—unless witnesses are unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of reliability. *Id.* at 53–54. Thus, when testimonial statements are involved, the Confrontation Clause prevails over the use of evidentiary rules to determine their admissibility. *Id.* at 61. In its decision, the Court noted—but did not hold—that non-testimonial statements' admissibility is left to the States to determine in within the development of their hearsay law. *Id.* at 68. In fact, Justice Scalia's majority opinion indicated that such statements were not exempted from Confrontation Clause scrutiny altogether. *Id.* This Court,

then, did not definitively exclude non-testimonial statements from the protection of the Confrontation Clause.

After Crawford, the Court considered another case that left the resolution of nontestimonial statements open for interpretation. In Washington v. Davis, this Court considered whether a call to a 911 emergency operator by a victim classified as a testimonial statement for purposes of admissibility regarding the Confrontation Clause. 547 U.S. 813 (2006). The Court entered into an exploration of Crawford and its testimonial versus non-testimonial distinction. Id. at 821–31. The majority opinion held that this specific type of statement—that is, a statement in an ongoing emergency—was non-testimonial and itself was not subject to the Confrontation Clause. Id. at 829. In its opinion, this Court focused on the importance of timing. Refusing to create an exhaustive classification of testimonial and non-testimonial statements, the Court concluded that statements are testimonial when "the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. at 822. The timing of the statement is important because this Court did not want to allow out-of-court statements as a "weaker substitute for live testimony." United States v. Inadi, 475 U.S. 387, 394 (1986). Thus, while the Court did specify a type of non-testimonial statements—namely, an emergency—it did not, on the whole, create a list or bright-line rule regarding the distinction between testimonial and non-testimonial statements.

In the case before the Court, the email does not give rise to a specific statement within the limited distinctions of testimonial and non-testimonial statements defined by *Crawford* and *Davis*. The declarant of the statement is unavailable and Ms. Zelasko had no prior opportunity to cross-examine the declarant. R. at 18. Additionally, while *Davis* does define a class of non-

testimonial statements, that class does not apply to this case. The email from Ms. Lane was not written within the context of an emergency as defined by *Davis*. Nor would this email classify within the testimonial definition from *Crawford*. Since it rises to neither of these definitions, the email fits within the non-testimonial category described in *Crawford*—which this Court specifically indicated are not exempted from Confrontation Clause scrutiny. *See Crawford*, 541 U.S. at 68. Thus, the email is subject to Confrontation Clause analysis, which would exclude the email based on Ms. Zelasko's inability to cross-examine the witness against her.

CONCLUSION

The case before the Court hinges on the basic premise of the fundamental, essential rights of an accused. The Court has an opportunity to protect the rights of criminal defendants in a way that is compatible and consistent with its prior decisions. In fact, the decision to affirm the Fourteenth Circuit will not change this Court's past precedent or alter the way in which trial courts in this country do business. Rather, it will reinforce the importance of fair trials and the protections guaranteed by the Constitution of the United States.

Therefore, for the reasons stated within, the Respondent Ms. Anastasia Zelasko respectfully requests this Court to AFFIRM the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

s/ 21R

21R

Counsel for Respondent