22R

No. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2014

UNITED STATES OF AMERICA,

Petitioner,

-- against --

ANASTASIA ZELASKO,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Does Federal Rule of Evidence 404(b) allow evidence of a third party's propensity to commit an offense as a means to exculpate oneself of the charges asserted?

II. Does *Chambers v. Mississippi* allow Defendant Anastasia Zelasko to present evidence of a third party's propensity to distribute illegal drugs as a constitutional right to present a complete defense?

III. Should *Williamson v. United States* be reaffirmed as the standard for the application of Federal Rule of Evidence 804(b)(3), which has governed declarations against penal interest?

IV. Does the Sixth Amendment Confrontation Clause prohibit the admission of a statement by a non-testifying co-defendant implicating the defendant at a joint trial under *Bruton v. United States*, even though the statement was made to a friend, thus qualifying as non-testimonial under *Crawford v. Washington*?

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STATEMENT OF THE CASE

Statement of Facts

Anastasia Zelasko ("Zelasko") is a member of the women's U.S. Snowman team. (R. 8.) The Snowman is a competitive winter sport composed of five different events. (R. 8.) Hunter Riley ("Riley"), who was cooperating as an informant for the DEA in 2011 and 2012, was a member of the male U.S. Snowman team. (R. 8-9.) On October 1, November 3, and December 10, 2011, Riley attempted to purchase steroids from Jessica Lane ("Lane"), and Lane denied each offer. (R. 9.) Lane was another teammate on the women's U.S. Snowman team and was involved in a romantic relationship with the team's coach, Peter Billings ("Billings"). (R. 8-9.)

On December 10, 2011, Billings observed Zelasko and Lane having an argument and Billings overheard Lane state, "stop bragging to everyone about all the money you're making!" (R. 9.) On December 19, 2011, Billings confronted Lane with his suspicion that she was supplying teammates with steroids, which she denied. (R. 9.) On January 28, 2012, several team members had observed Zelasko and Riley engaging in an argument. (R. 9.) On February 3, 2012, at approximately 10:15 AM, while Zelasko was practicing shooting on a closed rifle range for one of the events, Riley was struck and killed by a bullet from Zelasko's rifle. (R. 8)

Later that night, a search warrant was executed on Zelasko's house, where two 50-milligram doses of a steroid known as ThunderSnow and $5,000 in cash were found. (R. 8.) On February 4, 2012, a search was executed on the U.S. team's training facility, where 12,500 milligrams of ThunderSnow were found in the equipment room. (R. 8.) All female teammates and staff had access to this area of the facility. (R. 8.) Later that day, search warrants were executed on the apartments of two other teammates, Casey Short ("Short") and Lane. (R. 8.) No evidence of contraband was discovered in Short's apartment, but twenty doses of ThunderSnow and $10,000 were discovered in Lane's apartment. (R. 8.)

After the death of Mr. Riley, Billings turned over an email to the government that Lane had sent him on January 16, 2012. (R. 9). The email[1] references a business being run between Lane and an unidentified partner. (R. 29).

Ms. Miranda Morris ("Morris") is a former member of the Canadian Snowman from February 2009 to December 2011. (R. 24). Short was a fellow team member on the Canadian Snowman team with Morris from February 2009 until June of 2011. (R. 24). In June 2011, Short transferred to the United States Snowman team. On March 27, 2011, Morris was approached by Short who offered to provide her with a performance enhancing steroid known as "white lightning" and claimed that it was untraceable and other members of the team were using it without being caught. (R. 25.) Subsequently, on April 4, 2011, Morris purchased 20 doses of the steroid and Short gave her specific instructions on how to properly administer the steroid. Morris came forward with this information after expressing a desire to come clean and clear her conscience. (R. 10.)

Procedural History

On February 3, 2012, Zelasko was taken into federal custody and Lane was taken into custody the next day. (R. 31.) The Grand Jury returned an indictment, which charged Zelasko and Lane with conspiracy to distribute and possess with intent to distribute anabolic steroids, distribution and possession with intent to distribute anabolic steroids, simple possession of anabolic steroids, conspiracy to murder in the first degree, and murder in the first degree. (R. 31.)

On July 16, 2012, the District Court for the Southern District of Boerum was presented with two pretrial evidentiary motions. (R. 31.) The Defendant, Zelasko, moved to introduce

[1] The email contains five individual statements reproduced below,
1) "I really need your help;" 2) "I know you've suspected before about the business my partner and I have been running with the female the 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 think we need to figure out how to keep him quiet" and 5) "I don't know exactly what she has in mind."

testimony of Miranda Morris in regards to the propensity of a third party to sell similar performance-enhancing drugs. (R. 31.) The government made a motion to introduce an email sent by Lane to Peter Billings. (R. 31.)

On July 18, 2012, the District Court granted the Defendant's motion to introduce Miranda Morris's testimony and denied the government's motion to introduce the email. (R. 31-32.) Pursuant to 18 U.S.C. § 3731 and 3731-A, the United States filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. 30.) On February 14, 2013, the Circuit Court affirmed the decision of the District Court on all issues, holding that: (1) Federal Rule of Evidence 404(b) does not bar a defendant from offering evidence of the propensity of a third party in order to exculpate oneself; (2) the admitting of Miranda Morris's testimony is within Zelasko's Constitutional right to offer a complete defense; (3) that *Williamson* remains binding precedent that bars the admission of statements collateral to declarations against penal interest, and 4) that the *Bruton* doctrine applies to testimonial and nontestimonial evidence. (R. 31.)

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

SUMMARY OF THE ARGUMENT

In the present case, the lower courts both correctly ruled that: 1) FRE 404(b) does not bar a defendant's use of evidence to show the criminal propensity of a third party, 2) that a defendant's right to present a full defense must encompass such propensity evidence, 3) that *Williamson* still remains binding precedent that prohibits the admission of any statements collateral to individual declarations against penal interest, and 4) that the *Bruton* doctrine remains in effect after *Crawford* and bars the confession of a nontestifying codefendant

implicating the defendant trial regardless of its classification as testimonial or non-testimonial. First, the testimony of Miranda Morris was properly admitted under Federal Rule of Evidence 404(b). Although Miranda Morris' testimony is propensity evidence subject to FRE 404(b), that rule does not bar a Defendant from offering third party propensity evidence for the purposes of exculpation. Second, the testimony provided by Morris was properly admitted to allow the Defendant a complete defense under the Due Process Clause. The information is material to Zelasko's defense, as Morris' testimony showing Short's propensity to sell similar steroids is clearly exculpatory on the charge of conspiracy. Without the proffered testimony, Zelasko's constitutional right to present a complete defense would be violated and therefore its exclusion would be unconstitutional.

Third, the Circuit Court properly held the email by Lane to Billings inadmissible under the hearsay exception of FRE 804(b)(3) for statements against a declarant's penal interest. Under *Williamson* the statements within the email are to be analyzed individually to determine whether they subject the declarant to criminal liability. However, none of the individual statements in the email subject Defendant Lane to criminal liability to be admissible as statements against her penal interest. Moreoever, *Williamson's* precedent in this case should be reaffirmed and remain binding as this email exemplifies the fears of unreliability that *Williamson* addressed. Fourth, the Circuit Court properly held that *Bruton* doctrine bars the admission of Lane's email to Billings during a joint trial with Co-Defendant Zelasko. *Bruton* prohibits the admission into evidence of a confession by a non-testifying co-defendant implicating the defendant in a joint trial. *Bruton*'s prohibition on constitutional harm remains intact after *Crawford* which had no effect on *Bruton* because it dealt with the separate issue of constitutional reliability.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 404(b) DOES NOT BAR A DEFENDANT FROM OFFERING PROPENSITY EVIDENCE OF A THIRD PARTY FOR THE PURPOSES OF EXCULPATING ONESELF.

Federal Rule of Evidence 404(b)(1) provides that, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Traditionally, Rule 404(b) is used to prevent the government from introducing propensity evidence, which is "unduly prejudicial to the defense." *People v. Falsetta,* 21 Cal. 4th 903, 986 P.2d 182 (1999). However, a defendant might want to introduce evidence of a third party's propensity to commit wrongs "for defensive purposes if it tends, alone or with other evidence, to negate the defendant's guilt of the crime charged against him." *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999). The use of propensity evidence of a third party by the defense is often referred to as "reverse 404(b)" evidence. *United States v. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005).

In determining the appropriate standard of review for admissibility of 404(b) evidence, the circuit courts are split. The Court of Appeals in the Sixth Circuit adopted a three-tiered approach when reviewing the admissibility of evidence. *United States v. Matthews*, 440 F.3d 818, 828 (6th Cir. 2006). The first step of this approach is to review for clear error on the part of the district court's factual determination. *Id*. Next, the reviewing court should determine de novo whether the evidence is "admissible for a legitimate purpose." *Id*. Finally, the reviewing court should determine whether the lower court abused its discretion in balancing the probative value of the evidence against the potential prejudicial effect. *Id*. Given the complexity of the evidentiary issue before the Court, it is the Defense's position that the three-tiered approach should be adopted to review the admissibility of "reverse 404(b)" evidence.

Traditionally, Rule 404(b) has been a shield for defendants to protect themselves from prejudice resulting from damaging propensity evidence offered by the state. This Court should hold that Rule 404(b) does not bar evidence being offered by a defendant for the purposes of exculpation. The Defendant, Zelasko, is looking to introduce the testimony of Miranda Morris regarding the culpability of a third party, Casey Short. (R. 32.) Accordingly, the District Court judge properly admitted the testimony, as there is no risk of prejudice to Zelasko.

Zelasko, wishes to introduce evidence of a third party's propensity to sell contraband in an attempt to prove her lack of involvement in a conspiracy. In *Montelongo*, the defendants were arrested for possession with intent to distribute marijuana and conspiracy to possess with intent to distribute marijuana. 420 F.3d 1169, 1174, at 1171. Montelongo and his alleged co-conspirator were arrested when it was discovered that the trailer they were hauling contained "twenty-five bundles of marijuana contained in duffle bags, weighing ninety-three kilograms, and having a street value of $200,000 to $250,000." *Id.* at 1172. The owner of the trailer had a similar previous incident with another two drivers a few months prior. *Id*. Both drivers were arrested for having marijuana contained in duffle bags and hidden in the sleeping compartment of the trailer. *Id*. The same individual owned both trailers, but he was never found guilty in the previous matter. *Id*.

The defendants in *Montelongo* wished to cross-examine the owner of the trailer about the previous incident in order to exculpate themselves. *Id.* at 1173. The District Court found any evidence of the previous incident to be inadmissible under Fed.R.Evid. 404(b). *Id.* at 1174. The Court of Appeals for the Tenth Circuit reversed, finding that "reverse 404(b)" evidence is admissible for defensive purposes if it helps negate the guilt associated with the charges. *Id*. In

the present case, Zelasko wishes to use Morris's testimony as a way to negate the guilt associated with her involvement in an alleged conspiracy to sell steroids.

In *United States v. Stevens*, the defendant was convicted of robbery and sexual assault. 935 F.2d 1380, 1383 (3rd Cir. 1991). On appeal, the defense argued that the lower court erred in not admitting testimony of Tyrone Mitchell, the victim of a similar crime. *Id.* at 1401. The defense's position was that given the high degree of similarity between the crimes, it is "likely" that both were committed by the same perpetrator. *Id.* at 1383. The Court uses a quote from Wigmore's evidence treatise, stating:

> It should be noted that ["other crimes"] evidence may be also available to negative the accused's guilt. E.g., if A is charged with forgery and denies it, and if B can be shown to have done a series of similar forgeries connected by a plan, this plan of B is some evidence that B and not A committed the forgery charged. This mode of reasoning may become the most important when A alleges that he is a victim of mistaken identification.

Id. at 1402. Miranda Morris's testimony shows Casey Short's propensity to sell a steroid that is similar in its chemical makeup. (R. 11-12.) Given the high degree of similarity in the contraband sold, the testimony of Morris shows that it is likely both drugs came from the same source. In focusing on the evidence in dispute, the Third Circuit discussed the dichotomy between introducing evidence to incriminate a defendant and evidence to exculpate a defendant under Rule 404(b). *Id*.

The *Stevens* Court also focuses on the rationale presented in *State v. Garole*, a New Jersey case involving a defendant charged with sexually molesting two children. *Id.* at 1403. The defendant sought to introduce that he had been indicted for five similar incidents, with four of those indictments being dismissed. *Id*. The Supreme Court of New Jersey held that:

> We are of the view ... that a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crime evidence defensively than is exacted from the State when such evidence is used incriminatorily.... [O]ther-crimes evidence submitted by the prosecution has the distinct capacity of prejudicing the accused....

> Therefore a fairly rigid standard of similarity may be required of the State if its effort is to establish the existence of a common offender by the mere similarity of the offenses. But when the defendant is offering that kind of proof exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily, and subject to rules of competency, an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made.

Stevens, 935 F.2d at 1403. The Court cites the rationale in *Garole* to be most persuasive, stating that a strict standard of similarity does not have to be imposed on "reverse 404(b)" evidence as there is no risk of prejudice to the defendant. *Id.* at 1404. While the government can contend that the similarity of the drugs is too far attenuated, this Court should impose a less strict standard for similarity as the evidence proffered prejudices a party not involved in this case. The Court further determined that the admissibility of "reverse 404(b)" evidence "depends on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues." *Stevens*, 935 F.2d at 1404-05. The fact that the steroids seized are a chemical derivative of those sold by Casey Short, makes the testimony offered highly probative and cannot be a waste of this Court's time or confuse the issues.

In *United States v. McClure*, defendant was arrested after selling heroin to an undercover DEA agent. 546 F.2d 670, 671 (5th Cir. 1977). The defense wished to introduce testimony by other persons that the DEA informant had intimidated the defendant and coerced him into selling contraband. *Id*. The Fifth Circuit found that "evidence of a systematic campaign of threats and intimidation against other persons is admissible to show lack of criminal intent by a defendant…" *Id.* at 672-673. The Court reasoned that usually evidence of similar crimes, if offered by the prosecution against the defendant, needs stricter protocol to govern the admissibility to "protect the defendant from prejudice." *Id.* at 673. However, when the defendant

is the one seeking to introduce the evidence, then his "right to present a vigorous defense required the admission of the proffered testimony." *Id*.

However, not all circuits are in agreement as to the admissibility of "reverse 404(b)" evidence. The Court of Appeals in the Sixth Circuit determined that the plain language of the rule mandates that propensity evidence is inadmissible to prove the character of any person and not just the "character of the accused." *United States v. Lucas* 357 F.3d 599, 605 (6th Cir. 2004). However, the Sixth Circuit did go on to specify that it recognizes the standard analysis must be reconsidered when such evidence is presented by the defense, as there is no risk of prejudice when evidence is offered against an absent person. *Id*. The Court determined that the straightforward balancing test presented in *Stevens* should be how "reverse 404(b)" evidence is handled. *Id*.

The government contends that Zelasko was involved in a conspiracy to sell a steroid, known as "ThunderSnow." The evidence that is being proffered casts doubt on Zelasko's involvement with the alleged conspiracy by introducing the propensity evidence of a third party to sell a similar steroid to winter teams in the Olympics. Given the high degree of similarity between the acts and the probative value of the testimony, the evidence proffered must be allowed to negate the guilt associated with the alleged conspiracy.

II. UNDER *CHAMBERS V. MISSISSIPPI*, THE DEFENDANT HAS A CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE AND EXCLUSION OF MS. MORRIS'S TESTIMONY WOULD RESULT IN A VIOLATION OF DUE PROCESS.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). While evidentiary rules are designed to "assure both fairness and reliability," the rules cannot "be applied mechanistically to defeat the ends of justice." *Id*. "In applying its evidentiary rules a State must evaluate whether

the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Rock v. Arkansas*, 483 U.S. 44, 55 (1987).

In *Chambers*, the defendant asserted that a third party committed the crime for which he was charged. 410 U.S. at 287-88. This third party had allegedly confessed his involvement in the crime to three separate individuals. *Id*. The defendant sought to call the third party as an adverse witness to question him on his confession. *Id.* at 291. After cross-examination of the third party, the trial court denied the defendant's request stating that the witness was hostile, but not adverse. *Id*. The defendant then sought to introduce the testimonies of the three individuals to whom the third party allegedly confessed. *Id.* at 292. The question before the Court was whether the application of the evidentiary rule denied the defendant due process of law.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Id.* at 294. While the Court maintains that a State must comply with the established rules of evidence, exceptions need to be made when the evidence is "likely to be trustworthy" and potentially exculpatory. *Id.* at 302. The Court found that the testimony sought "was critical to Chambers' defense." *Id*. In situations where a defendant's penal interests are at stake, evidentiary rules need to have enough flexibility to allow for a defense. *Id*. Denying potentially exculpatory evidence based on the language in a rule, unfairly prejudices a defendant and creates a miscarriage of justice.

In *Holmes v. South Carolina*, the defendant was convicted of "first-degree criminal sexual conduct, first-degree burglary, and robbery, and sentenced to death." 547 U.S. 319 (2006). The defendant sought to introduce, *inter alia*, evidence that a third party committed these crimes. *Id*. The lower courts rejected the evidence, citing that the introduction of evidence that suggests

the guilt of a third party does not raise a reasonable inference when the weight of evidence is against the defendant. *Holmes,*546 U.S. at 324. This Court reversed that ruling, holding:

> A criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce evidence of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.

Id. at 319. The government is offering evidence to support their belief that Zelasko was involved in a conspiracy to sell steroids and Morris's testimony is being used to refute those allegations. The denial of Morris's testimony would violate Zelasko's constitutional right to a complete defense. This Court emphasizes that state and federal rule makers have broad latitude to create rules for the admissibility of evidence, but due process allows the accused "a meaningful opportunity to present a complete defense." *Id*.

Even if the Court fails to recognize the admissibility of "reverse 404(b)" evidence offered by the defendant, Miranda Morris's testimony should be admitted under the Due Process Clause. As previously stated in *McClure*, a defendant has a constitutional right to "present a vigorous defense…" and denying Zelasko the ability to admit this potentially exculpatory evidence violates that right. 546 F.2d 670, at 673. The evidence proffered shows that Casey Short had a propensity to sell a very similar steroid to other winter sports teams. Since there is no dispute that the alleged conspiracy only involved two people and one of those people is the Defendant Lane, the evidence is highly probative on the issue of Zelasko's lack of involvement.

III. *WILLIAMSON v. UNITED STATES* SHOULD REMAIN INTACT INSOFAR AS IT EXEMPLIFIES THE RATIONALE BEHIND FRE 804(b)(3) AND ITS APPLICATION WAS PROPER IN THE CIRCUIT COURT.

The government seeks to reverse the circuit court's decision to hold an email, sent by Co-Defendant Lane to Billings, inadmissible under the hearsay exception of Federal Rule of Evidence 804(b)(3) for statements against declarant's penal interest. In the email, Co-Defendant

Lane requests Billings' help with a problem – specifically, the suspicions of an unnamed member of the male team and her unnamed partner's desire to keep him quiet – that has arisen in connection with her unspecified "business". (R. 29.) The government stated that the email was evidence of a drug selling conspiracy, run by Co-Defendant Lane and her "partner", and evidence that the death of DEA's informant, Hunter Riley, was an effort to keep him quiet and not an accident. In essence, the government argued that although each sentence is not inculpatory on its own, the inculpatory thrust of the statements in the email makes the entire email admissible under Rule 804(b)(3). The circuit court properly determined that the email was inadmissible hearsay because when analyzed under this Court's precedent of *Williamson v. United States*, the individual statements in the email did not subject Co-Defendant Lane to criminal liability to deem them as "against her penal interest." (R. 43.)

FRE 802 provides that hearsay statements are not admissible unless a federal statute, rule prescribed by the Supreme Court, or the Federal Rules of Evidence otherwise provide. Fed. R. Evid. 802. Hearsay statements are inadmissible because being made out of court, they cannot be subjected to in court procedures designed to ensure the trustworthiness and reliability of the evidence. However, exceptions to the rule against hearsay exist because some out-of-court statements display indicia of reliability to overcome hearsay dangers. FRE 804 provides hearsay exceptions for unavailable declarants and outlines the criteria for determining the unavailability requirement.

FRE 804(b)(3) provides, in relevant part, that a statement is admissible if:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability…

Fed. R. Evid. 804 (b)(3). Co-Defendant Lane is unavailable within the meaning of FRE 804(a)(1) because she will invoke her Fifth Amendment privilege, exempting her from testifying about the subject matter of her email. (R. 18). The government has failed to argue the admissibility of the email under FRE 801(d)(2)(E) as a coconspirator statement. (R. 38.) Thus, the admissibility analysis of the email at issue is confined to FRE 804(b)(3) as a statement against the declarant's penal interest. Abuse of discretion is the proper standard of review of a district court's evidentiary rulings. *GE v. Joiner*, 522 U.S. 136 (1997). It is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous. *Id.*

This Court has already interpreted Federal Rule of Evidence 804(b)(3) in *Willamson v. United States*. In *Williamson*, the defendant was convicted of cocaine related charges after his coconspirator confessed to a DEA agent that defendant was the drugs' owner. *Williamson*, 512 U.S. 594 (1994). The confessions were introduced into evidence through the DEA agent as statements against the declarant's interest and upon granting writ, this Court reversed, clarifying the application of FRE 804(b)(3). *Id*. The threshold question for this Court was to determine what the Rule meant by "statement". *Id.* at 599. It was decided that statement meant, "a single declaration or remark"; therefore, Rule 804(b)(3) covers only those declarations within the confession that are "individually self-inculpatory." *Id.* This interpretation was consistent with the rationale behind the Rule that "reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id.* The majority further reasoned that "the fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts," because "[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; *See* Stephen A. Saltzburg, *Declarations Against Interest*, *Crim. Just.* 36 (2001). This Court held that FRE 804(b)(3) cannot be read to permit the admission of "collateral statements" that, while part of a broader narrative, are not self-inculpatory standing alone. *Id.* at 600.

Following the *Williamson* precedent, the lower court properly affirmed the exclusion of Co-Defendant Lane's email. The circuit court agreed with the district court in that none of the statements contained in the email inculpate Co-Defendant Lane because, when considered independently, they do not admit any wrongdoing or expose Lane to criminal liability. Further, the circuit court properly rejected the government's argument that the *Williamson* standard should be relaxed in this case. The government's contention was that *Williamson*'s primary concern of a party shifting blame to another does not apply, where the email was not made to law enforcement. However, the government was not able to provide the circuit court with any binding precedent for their proposition. (R. 43).

When analyzing statements under FRE 804(b)(3), the court must carefully parse the relevant portions of the statement and cannot admit portions that do not incriminate the declarant. *Williamson,* 512 U.S. at 595***;*** *See,* United States v. Benabe, 436 Fed. Appx. 639, 652 (7th Cir. 2011). The hearsay exception does not provide that any statement which "possibly could" or "maybe might" lead to criminal liability is admissible; on the contrary, only those statements that "so far tend to subject" the declarant to criminal liability, such that "a reasonable person would not have made it unless it were true" are admissible. *U.S. v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995) (citing Fed. R. Evid. 804(b)(3)). In *Butler*, a convicted felon faced prosecution for federal firearms violations arising out of circumstances in which police, executing a search warrant, found him in an apartment along with a pistol with an obliterated

serial number wrapped in a stocking cap. The trial court excluded as hearsay, testimony from defendant's investigator, that a friend unavailable at trial said that he was in the room where the gun was found. The court, affirming a conviction, said that the friend, though placing himself in the room where the guns were found, "did not admit to anything remotely criminal: he did not admit that he had possession of any gun…[his] statement, at most, placed him at risk of being in some type of 'constructive possession' of a weapon which is not a risk sufficient to provide the guarantee of reliability or truthfulness the 804(b)(3) exception is based on." *Butler,* 71 F.3d at 253. Here, just as in *Butler*, Co-Defendant Lane's email is subject to *Williamson*, and when examined individually, the statements do not subject Co-Defendant Lane to criminal liability. The statement regarding the "business" that Lane and her partner run do not reveal the nature of the business. Also, the statement that Lane's partner is concerned about "keeping [the male team member] quiet" is less likely to submit Lane to criminal liability as it concerns the partner and not her. The statement that Lane does not know what her partner has in mind shows a lack of knowledge and agreement. These statements, just as the testimony in *Butler*, do not pose a risk sufficient to provide the guarantee of reliability that FRE 804(b)(3) requires.

In *Leahy v. United States*, a defendant wanted the district court to admit a letter from an investigator to an FBI agent in which the investigator stated that she found no fraud. *Leahy v. United States*, 464 F.3d 773, 797 (7th Cir. 2006). The circuit court agreed with the district court's finding that the letter did not subject the author to any criminal liability so it was properly excluded as hearsay. *Id.* at 798. The court made the point that "the statement itself, taken as is, must basically admit to criminal behavior." *Id.* Here, Co-Defendant Lane's email does not come close to admitting any criminal behavior. Even the statement that a "male team member found out and threatened to report us if we don't come clean", when examined individually and in the

context given, does nothing more than vaguely admit to suspicious behavior that could be reported. Co-Defendant Lane's statements show a lack of knowledge as to her partner's actions, a lack of agreement, and fail to reveal any criminal nature concerning her business. Thus, the email was properly excluded as inadmissible hearsay.

The 11th Circuit in *United States v. Hardy* held that the district court did not abuse its discretion in finding that a declarant's statement was not admissible as a statement against interest under Fed. R. Evid. 804(b)(3). *Hardy*, 389 Fed. Appx. 924 (11th Cir. 2010). In this case, the Defendant facing prosecution for "felon in possession of a gun" sought to introduce witness testimony of a man named "Black" who apparently had told defendant he had a gun for sale. *Id.* The court held that the statement was at best ambiguous and, thus, not clearly against the declarant's penal interest. *Id.* Here, Co-Defendant Lane's email is at best ambiguous because it does not admit any wrongful behavior, fails to provide the identity of her "partner", and her "business" lacks any explicit criminal nature. Thus, the lower court did not abuse its discretion in holding the ambiguous email inadmissible at trial.

The strongest argument for the admissibility of Co-Defendant Lane's email is that collateral statements should be viewed when determining the inculpatory nature of individual statements within a broader narrative. Thus, when viewed in its entirety the email subjects Co-Defendant Lane to criminal liability to be admissible under FRE 804(b)(3). The dissent by Judge Marino in the circuit court opinion reasoned that under *Williamson*, it is difficult to pinpoint exactly what constitutes inculpatory statements. Moreover, the dissent argues that *Williamson*'s application is unworkable because it prohibits looking at other statements in the narrative or the inculpatory thrust of the narrative, leaving the court with "a series of heavily redacted and choppy statements that are ostensibly stripped of the extraneous, non-inculpatory baggage that

once gave them context." (R. 51). The government and the dissenting opinion of the circuit court attempt to change *Williamson's* rationale but this rule is the only way to ensure that truly reliable statements are admitted against an accused at trial.

In *United States v. Williams*, Defendants faced prosecution for narcotic trafficking and murder. The prosecution was allowed to introduce testimony of a third party that spoke with a co-defendant about why the crimes were committed. *United States v. Williams*, 506 F.3d 151 (2d Cir. 2007). The court found the statements admissible under FRE 804(b)(3) because they described acts that the defendants committed jointly, thus rendering the statements adverse to their penal interest. *Id.* at 155. Unlike *Williams*, the statements in the email by Co-Defendant Lane do not describe any illegal acts nor do they admit any criminal behavior. For example, the statement that Lane's partner is concerned with "keeping [the male team member] quiet" does not admit any criminal wrongdoing by Lane because she is expressing her unidentified partner's intention. Examined individually under *Williamson*, none of these statements have sufficient reliability or truthfulness because they fail to subject Co-Defendant Lane to any criminal liability.

In *United States v. Mussare*, witnesses testified that a co-defendant bragged that he and Mussare had beaten and branded a victim the evening before**.** The statements were admissible under FRE 804(b)(3), because the co-defendant took credit for criminal activity, which unquestionably subjected him to criminal liability. *United States v. Mussare*, 405 F.3d 161, 168 (3d Cir. 2005). Where statements inculpate both the speaker and the defendant challenging their admission, the statements are admissible so long as they were "self-inculpatory" and not simply self-serving attempts to deflect criminal liability. *Id.* Here, Co-Defendant Lane's email is not self-serving as it does not directly shift blame to another, however, the statements are not self-

inculpatory. Unlike *Mussare*, the email does not take any credit for criminal behavior, it simply states a "business" without revealing its nature or the identity of the "partner". In addition, Lane does not express agreement with her partner but instead expresses lack of knowledge as to her partner's intentions. Co-Defendant Lane's email is inadmissible because Lane's statements are vague and do not unquestionably subject her to criminal liability to be adverse to her penal interest.

For 20 years, this Court has adhered to the *Williamson* standard, indicating that this rule, although possibly difficult to apply, remains a legitimately stable precedent. The important doctrine of stare decisis is the means by which the Court ensures that the law will not merely change erratically, but will develop in a principled and intelligible fashion. *Vasquez v. Hillery*, 474 U.S. 254 (1986). Every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective. *Id.* at 266. The government argued that the difficulty in applying *Williamson* calls for reconsideration of its holding. However, there is no reason to believe that this Court's long commitment to the *Williamson* precedent is outdated, ill-founded, or even legitimately vulnerable to serious reconsideration. The government was not able to present the circuit court with any binding authority for the proposition that *Williamson* should be relaxed when informal narratives to non-law enforcement are at issue. This is because, as in the previously mentioned cases, circuit courts have consistently held *Williamson* to only admit individually self-inculpatory statements; thus, defeating any argument concerning difficulty in application. This Court should reaffirm *Williamson* because the need to ensure that only truly reliable statements are admissible against an accused at trial is as compelling today as it was at its inception.

IV. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BARS THE ADMISSION OF AN INCULPATORY STATEMENT OF A NONTESTIFYING CO-DEFENDANT AGAINST A CRIMINAL DEFENDANT AT TRIAL.

This Court should affirm the ruling of the Fourteenth Circuit finding that the government is prohibited from introducing Co-Defendant Lane's email into evidence at a joint trial with Defendant Zelasko. The Confrontation Clause of the Sixth Amendment prohibits the government from doing so.

A. This Court Has Ruled That The Sixth Amendment Confrontation Clause Protects Criminal Defendants From Admissions Of Non-Testifying Co-Defendants At Trial

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. AMEND. VI. This Court has interpreted that right to bar the confession of a non-testifying co-defendant, which implicates a co-defendant at a joint trial. *Bruton v. United States,* 391 U.S. 123 (1968). In *Bruton* co-defendants George Bruton and Williams Evans were being charged together for bank robbery. *Id.* at 124. Evans made an oral confession to a postal inspector that he and Bruton had committed the robbery. *Id.* The prosecutor introduced Evan's confession at trial as evidence against Evans. *Id.* Evans did not testify at the joint trial. *Id.* A limiting instruction was given to the jury that they could not use Evan's confession against Bruton to determine his guilt or innocence. *Id.* at 125. Both Evans and Bruton were found guilty. *Id.* at 124. This Court held that the admission of Evan's confession violated Bruton's Sixth Amendment Confrontation Clause right stating, "[w]e hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth

Amendment." *Bruton,* 391 U.S. at 126. This Court noted in its reasoning that in the abstract, admitting Evan's confession against him would not raise a Confrontation Clause issue because that evidence would only be allowed to be used against Evans, "[i]f it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor." *Id*. However, practically speaking, "such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors." *Id.* at 129. Therefore, it is clear that in deciding *Bruton* this Court was extremely concerned with the prejudicial effects that would result from admitting a confession of a non-testifying co-defendant that implicated another defendant at trial.

Bruton is directly applicable to the facts here. The government is seeking to admit the email of Co-Defendant Lane as an admission against her penal interest during a joint trial with Co-Defendant Zelasko. (R. 16.) It has been assured that Lane will not testify (R. 18.) The email authored by Lane makes references to "my partner" and thus during a joint trial, implicates Zelasko[2] (R. 29.) This is exactly the type of evidence that *Bruton* demands must be excluded. Admitting the email here against Lane and asking the jury not to use it against Zelasko is asking it to do precisely what this Court said the Constitution's Sixth Amendment forbids. As this Court said in *Bruton,* "[a] jury cannot 'segregate evidence into separate intellectual boxes.' It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." *Id.* at 131. Furthermore, this Court noted that a limiting instruction to the jury in regards to Zelasko is not a proper substitution for the right of

[2] The government failed to make the argument that "partner" does not so blatantly identify Defendant Zelasko as her accomplice in order to raise a *Bruton* issue at the District Court and it is therefore not preserved for appellate review. (R. 44)

Confrontation secured in the Sixth Amendment, "we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination" *Bruton,* 391 U.S. at 137. Given that Lane will not testify, her confession implicating Zelasko will stand completely unimpeached and Zelasko will have no opportunity to confront it. Therefore, *Bruton* demands that Co-Defendant Lane's email cannot be introduced at a joint trial with Zelasko if Lane will not testify.

This Court has recognized the importance of consistency in its rulings through the principle of *stare decisis* stating that "[*s*]*tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Although precedent is not an inexorable command that must be followed, this Court has acknowledged that "departure from precedent is exceptional, and requires 'special justification'." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). This Court has never overruled *Bruton* and in fact has affirmed its holding in many subsequent cases. *See*, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("[W]e continue to apply Bruton where we have found that its rationale validly applies"); *Cruz v. New York*, 481 U.S. 186, 193 (1987) ("Far from carrying Bruton to the outer limits of its logic, our holding here does no more than reaffirm its central proposition."); *Lilly v. Virginia*, 527 U.S. 116, 128 (1999) ("In the years since Bruton…we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person."); *Gray v. Maryland*, 523 U.S. 185, 197 (1998) ("We hold that the confession here…falls within the class of statements to which Bruton's protections apply."); *Williams v.*

Illinois, 132 S. Ct. 2221, 2256 (2012) (citing *Bruton v. United States*, "[W]e have held that limiting instructions may be insufficient in some circumstances to protect against violations of the Confrontation Clause."). Since *Bruton* has never been overruled by this Court, but rather has been affirmed in many cases since its decision, this Court should adhere to the principle of *stare decisis* and find that Co-Defendant Lane's email is barred pursuant to *Bruton*.

B. *Crawford v. Washington* Changed The Test For Constitutional Reliability And Thus Has No Effect On *Bruton* Which Protects Against Constituional Harm

In *Crawford v. Washington,* this Court held that the Confrontation Clause bars testimonial statements of witnesses absent from trial, unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. 541 U.S. 36, 59 (2004). Statements are testimonial when "the circumstances objectively indicate that there is no… ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). In deciding *Crawford* this Court overruled its previous decision in *Ohio v. Roberts*. 448 U.S. 56, 66 (1980). *Ohio* directed the Confrontation Clause inquiry, in cases where a hearsay statement of a non-testifying witness was sought to be introduced, to whether a particular statement had an "indicia of reliability" to give it "particular guarantees of trustworthiness." *Id.* If the statement met these requirements, it would be admitted because it was thought to be constitutionally reliable. *Id.* The impetus for the shift in Confrontation Clause analysis found in *Crawford* is the idea that the reliability of evidence should not be a substitute for what the Sixth Amendment actually demands, confrontation. This Court stated, "[i]t is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands." *Id.* at 65. Furthermore, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because

a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford,* 451 U.S. at 62. Therefore, in deciding *Crawford* this Court was addressing the issue of constitutional reliability, holding that cross-examination, not a trial judge's determination of the truthfulness of a statement, is what the Sixth Amendment demands. As this Court stated, "[t]he *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one." *Id.* at 62.

In interpreting *Crawford* many circuit courts have held that *Crawford* limits *Bruton* to apply only in cases where the statement in question is testimonial. *United States v. Watson*, 525 F.3d 583 (7th Cir. 2008); *United States v. Underwood*, 446 F.3d 1340 (11th Cir. 2006); *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004); *United States v. Dale*, 614 F.3d 942 (8th Cir. 2010). The Third Circuit has held that *Crawford* does not place such a limitation on *Bruton* and that *Bruton* applies regardless of whether the statement is testimonial or non-testimonial. *United States v. Jones*, 381 F. App'x 148 (3d Cir. 2010). Lane's email was a personal message sent to her boyfriend and thus would not qualify as testimonial under this Court's test in *Davis.* This could lead to the conclusion that, based on *Crawford*, the e-mail should not be subject to the protections of the Confrontation Clause and should be freely admitted at a joint trial. However, this conclusion confounds the holdings of *Crawford* and *Bruton* and should not be followed.

Bruton and *Crawford* deal with two independent Confrontation Clause issues: constitutional harm versus constitutional reliability. The *Bruton* decision can be properly characterized as a decision that seeks to protect defendants from constitutional harm. The admission of Evan's confession in *Bruton* was not a literal violation of the right to confront, since the jury would be instructed to use the evidence only against Evans. However, this Court

found that instruction was too prejudicial and could not be effective. By barring this type of evidence, this Court was concerned with the constitutional harm that would be had to a defendant who would have no opportunity to confront a damaging confession. *Crawford* on the other hand deals with the entirely separate issue of constitutional reliability. *Crawford's* holding shifted the test for reliability away from whether the statement seemed particularly truthful, back to the text of the Sixth Amendment, which demands confrontation. Since these two decisions deal with two entirely different Sixth Amendment issues, the decision in *Crawford* has no effect on the decision in *Bruton*. It is no surprise then, that in *Crawford* this Court did not overrule *Bruton* and has never done so since. *Bruton* was mentioned in *Crawford* as an example of a case where this Court found that inopportunity to cross-examine violated the Sixth Amendment, "[w]e similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine." *Id.* at 57 (citing *Bruton v. United States)*. Therefore, because *Bruton* and *Crawford* addressed different constitutional issues, it is clear that *Crawford* has no effect on *Bruton.* The application of the *Bruton* doctrine here bars the admission of Lane's email and this Court should therefore affirm the decision of the circuit court on this issue.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) FRE 404(b) does not apply to a defendant's use of evidence to show the criminal propensity of a third party; (2) that a defendant's constitutional right to present a complete defense encompasses such propensity evidence; (3) that *Williamson* remains binding precedent that bars the admission of statements collateral to declarations against penal interest; and (4) that the *Bruton* doctrine applies to testimonial and non-testimonial evidence.

Respectfully Submitted,

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Counsel for Respondent

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