Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALEXANDRA ZELASKO.

Respondent.

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

BRIEF FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTSi
TABLE OF AUTHORITIESiii
QUESTIONS PRESENTEDv
STATEMENT OF THE CASE1
SUMMARY OF THE ARGUMENT4
<u>ARGUMENT</u> 6
I. THE LOWER COURTS ERRED IN FINDING MORRIS'S TESTIMONY ADMISSIBLE BECAUSE, AS A MATTER OF LAW, FEDERAL RULE OF EVIDENCE 404(b) BARS THE ADMISSION OF ALL PROPENSITY EVIDENCE, REGARDLESS OF WHO
A. The Ban on All Propensity Evidence, Regardless of Who Attempts to Offer It, Is Supported by Congressional Intent as Reflected in the Text of Rule 404(b) and the Decisions of the Supreme Court
II. RESPONDENT'S RIGHT TO PRESENT A COMPLETE DEFENSE IS NOT VIOLATED BY EXCLUDING MORRIS'S TESTIMONY BECAUSE IT IS NOT RELATED TO THE CRIME AT ISSUE AND IS INADMISSIBLE UNDER THE RULES OF EVIDENCE
A. Excluding Morris's Testimony Does Deny Respondent the Right to Present a Complete Defense Because this Testimony is Not First-Hand Eyewitness Evidence Related to the
Crime at Issue
III. THE NARROW DEFINITION OF "STATEMENT" FOR ANALYZING STATEMENTS AGAINST INTEREST ADOPTED IN WILLIAMSON V. UNITED STATES SHOULD BE REPLACED WITH A STANDARD THAT ALLOWS FOR THE ADMISSION OF ALL RELIABLE STATEMENTS CONTAINED IN A SELF-
INCULPATORY NARRATIVE
Enforcement Following Arrest
1. The test proposed by Justice Kennedy in his Williamson concurrence provides a workable alternative to the narrow approach to statements against interest

2. Under a revised approach to Federal Rule of Evidence 804(b)(3), Lane's entire emo admissible as a statement against her penal interest	
IV. THE ADMISSION OF LANE'S EMAIL DOES NOT VIOLATE RESPONDENT'S SIXTH AMENDMENT RIGHTS BECAUSE IT IS A NON-TESTIMONIAL STATEM	ENT
AND IS THUS NOT SUBJECT TO THE CONFRONTATION CLAUSE	
<u>CONCLUSION</u>	33

TABLE OF AUTHORITIES

SUPREME COURT CASES

Bruton v. United States, 391 U.S. 123 (1968)	30, 32
Chambers v. Mississippi, 410 U.S. 284 (1973)	13, 14, 16
Crawford v. Washington, 541 U.S. 36 (2004)	30, 33
Davis v. Washington, 547 U.S. 813 (2006)	31, 33
Holmes v. S. Carolina, 547 U.S. 319 (2006)	13, 16
Huddleston v. United States, 485 U.S. 681 (1988)	
Lee v. Illinois, 476 U.S. 530 (1986)	21
Michigan v. Bryant, 131 S. Ct. 1143 (2011)	31
Michigan v. Lucas, 500 U.S. 145 (1991)	13
Montana v. Egelhoff, 518 U.S. 37 (1996)	
Payne v. Tennessee, 501 U.S. 808 (1991)	21
Rock v. Arkansas, 483 U.S. 44 (1987)	14
United States v. Scheffer, 523 U.S. 303 (1998)	13, 15, 16
Washington v. Texas, 388 U.S. 14 (1967)	13
Whorton v. Bockting, 549 U.S. 406 (2007)	31
Williamson v. United States, 512 U.S. 594 (1994)	
	•
CIRCUIT COURT CASES	
Agushi v. Duerr, 196 F.3d 754 (7th Cir. 1999)	
Berry v. Palmer, 518 F. App'x 336 (6th Cir. 2013) cert. denied, 134 U.S. 485 (2013)	
Brown v. Epps, 686 F.3d 281 (5th Cir. 2012)	
United States v. Barone, 114 F.3d 1284 (1st Cir. 1997)	
United States v. Blum, 62 F.3d 63 (2d Cir. 1995)	
United States v. Chapman, 345 F.3d 630 (8th Cir. 2004)	
United States v. Dale, 614 F.3d 942 (8th Cir. 2010)	
United States v. Ebron, 683 F.3d 105 (5th Cir. 2012), cert. denied, 134 U.S. 512 (2013)	23, 25
United States v. Gonzalez-Sanchez, 825 F.2d 572 (1st Cir. 1987)	
United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005)	
United States v. In, 111 F.3d 139 (9th Cir. 1997)	24
United States v. Jones, 381 F. App'x 148 (3d Cir. 2010)	32
United States v. Lucas, 357 F.3d 599 (6th Cir. 2004)	9, 10, 15
United States v. McCourt, 925 F.2d 1229 (9th Cir. 1991)	
United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005)	11, 23
United States v. Pabellon, 181 F.3d 93 (4th Cir. 1999)	24
United States v. Pelletier, 666 F.3d 1 (1st Cir. 2011)	24
United States v. Reed, 259 F.3d 631 (7th Cir. 2001)	17
United States v. Saget, 377 F.3d 223 (2d Cir. 2004)	21, 24, 25
United States v. Sasso, 59 F.3d 341 (2d Cir. 1995)	23
United States v. Seals, 419 F.3d 600 (7th Cir. 2005)	11, 17
United States v. Smalls, 605 F.3d 765 (10th Cir. 2010)	32
United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991)	9, 10, 18
United States v. Udeozor, 515 F.3d 260 (4th Cir. 2008)	
United States v. Underwood, 446 F.3d 1340 (11th Cir. 2006)	
United States v. Watson, 525 F.3d 583 (7th Cir. 2008)	32
United States v. Williams ASS F 2d 212 (2d Cir. 2006)	naccim

SECONDARY SOURCES

41 C.J.S., Homicide § 216 (1991) McCormick, § 256	
FEDERAL RULES	
Fed. R. Evid. 403	13
Fed. R. Evid. 404(b)	6, 7, 8, 9
Fed. R. Evid. 804(b)	

QUESTIONS PRESENTED

- I. Whether, as a matter of law, Federal Rule of Evidence 404(b) bars the admission of evidence of a third-party's prior acts when offered by the defendant purely for the purpose of demonstrating that the third party had a propensity to commit the crime with which the defendant is charged?
- II. Whether excluding evidence of a dissimilar third-party's prior acts when offered by the defendant purely for the purposes of demonstrating that the third party had a propensity to commit the crime with which the defendant is charged is constitutionally permissible given a defendant's right to present a complete defense.
- III. Whether the standard in *Williamson v. United States* for analyzing statements against penal interest under Federal Rule of Evidence 804(b)(3) should be modified to allow for the admission of reliable collateral statements, given that the circuit courts have inconsistently applied *Williamson* and freely admitted collateral statements under Rule 804(b)(3) when the statements at issue were not made to law enforcement?
- IV. Whether the non-testimonial statement of a non-testifying co-defendant implicating the Respondent is admissible at their joint trial under this Court's Sixth Amendment jurisprudence, which limits the application of the Confrontation Clause to testimonial statements.

STATEMENT OF THE CASE

On February 3, 2012, Respondent Alexander Zelasko shot and killed Hunter Riley ("Riley"). Respondent is a member of the women's United States Snowman Pentathlon Team ("U.S. Snowman Team"). (R. 8). Riley had been a member of the men's U.S. Snowman team, and had been working with the Drug Enforcement Administration ("DEA") as a confidential informant. (R. 8, 9). Respondent alleges that the shooting, which occurred on the Snowman team rifle shooting training grounds, was accidental. (R. 32). The United States contends, however, that Respondent shot Riley in order to cover up her role in a conspiracy to distribute performance-enhancing drugs to the members of the women's Snowman Team. (R. 32).

Respondent was arrested shortly after killing Riley. (R. 3). The DEA obtained a search warrant for Respondent's residence, which uncovered approximately \$5,000 in cash and two 50-milligram doses of "ThunderSnow." (R. 3). ThunderSnow is the street name of a bolasterone ester, an anabolic steroid as defined by 21 U.S.C. § 802(41)(A). (R. 2). ThunderSnow is undetectable by contemporary blood tests. (Wallace Aff. 27).

Respondent joined the U.S. Snowman Team in 2010. (R. 1). The following year, in August of 2011, Jessica Lane also joined the team. (R. 1). By the fall of 2011, the practice times of the women's Snowman team had markedly improved. (R. 2). At the direction of the DEA, Riley approached Lane on October 1 and November 3 of 2011, ostensibly seeking to purchase steroids for his personal use, to which Lane declined. (R. 2). Lane also denied Riley's request when he approached her again to purchase steroids for a third and final time on December 9, 2011. (R. 3).

1

¹ The Snowman is a competitive winter sport in which team members compete in five events, including dogsledding, ice dancing, aerial skiing, rifle shooting, and curling. (R. 8).

The following day, Peter Billings, the coach of the women's Snowman Team, observed Lane and Respondent engaged in a heated argument. (R. 3). Billings was also involved in a romantic relationship with Lane. (R. 9). During their argument Billings witnessed Lane angrily shouted at Respondent, "Stop bragging to everyone about all the money you're making!" (R. 3). Billings confronted Lane regarding the argument on December 19, 2011. (R. 3, 9). Specifically, Billings expressed his suspicion that Lane was distributing performance-enhancing steroids to the other members of the women's team. (R. 3). Lane denied Billings' accusation at the time. (R. 3).

Despite her initial denial, however, Lane later reached out to Billings via email regarding his suspicions. (R. 3). The email, dated January 16, 2012, reads:

Peter, I really need to talk to you. I know you've suspected before about the business my partner and I have been running with the female team. One of the members of the male team found out and threatened to report us if we don't come clean. My partner really thinks we need to figure out how to keep him quiet. I don't know what exactly she has in mind yet. Love, Jessie. (R. 29).

On January 28, 2012 – less than one week before the shooting – several members of the U.S. Snowman Team witnessed Respondent and the now-deceased Riley engaged in a heated argument. (R. 3). Just six days later, the men's Snowman Team, including Riley, competed in dogsled trials in Remsen National Park. Respondent alleges that she was practicing rifle shooting alone on a rifle range adjacent to the dogsled course. At approximately 10:15 A.M., Respondent shot and killed Riley (R. 3). Soon after Respondent was arrested for killing Riley, Billings turned over to police the email he had received from Lane describing her partner's desire to "keep [a member of the male team] quiet." (R. 16).

Following Riley's death, the DEA obtained and executed search warrants at the U.S. Snowman Team training facilities and the homes of several team members. (R. 3-4). In addition

to the evidence uncovered in Respondent's home, a search of Lane's apartment revealed twenty 50-milligram doses of ThunderSnow and \$10,000 in cash. (R. 4). Accordingly, Lane was placed under arrest. (R. 4). Additionally, DEA Agents uncovered 12,500 milligrams of ThunderSnow stored in the equipment room at the Snowman Team training facility. (R. 3). This amount of ThunderSnow is consistent with sale and not personal use. (Wallace Aff. 28).

On April 10, 2012, a grand jury indicted both Respondent and Lane for 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. 4-5).

On July 16, 2012, the United States District Court for the Southern District of Boerum held a hearing on the pretrial evidentiary motions brought by Respondent and the United States. (R. 6). Respondent sought to introduce the testimony of Miranda Morris, a former member of the women's Canadian Snowman Team. (R. 7). Morris alleges that while she was on the Canadian team, she purchased "White Lightening," an anabolic steroid, from her then-teammate Casey Short, who later transferred to the U.S. team. (Morris Aff. 24-25). ThunderSnow is a chemical derivative of White Lightening, a steroid found in the possession of members of several different Eastern European teams competing in the World Winter Games.² (Wallace Aff. 28). A search warrant executed at Short's apartment the day following Riley's death revealed no evidence. (R. 8). However, Respondent sought to introduce Morris's testimony as evidence of Short's propensity to sell a similar drug within the winter sports community, arguing that the ban on propensity evidence set forth by Federal Rule of Evidence 404(b)(1) does not apply when a defendant offers the evidence to cast doubt on the her guilt. (R. 12). The United States sought to

² The World Winter Games is an international competition in which the U.S. Snowman Team primarily competes (R. 1).

enter into evidence the email Lane sent to Billings on January 16, 2012 as an exception to hearsay under Federal Rule of Evidence 804(b)(3). (R. 16).

On July 18, 2012, the District Court found in favor of Respondent on both evidentiary issues. Pursuant to 18 U.S.C. § 3731 and 3731-(a), the United States brought an interlocutory appeal to the United States Court of Appeals for the Fourteenth Circuit. (R. 30). In a two-one decision, the Appellate Court affirmed the District Court on both issues. The majority held that first, Morris's testimony regarding Short's propensity to sell drugs is not barred by Federal Rule of Evidence 404(b). (R. 34). Alternatively, the court held that evidence of Short's propensity is necessary to ensure Respondent's constitutional right to offer a complete defense. (R. 38). Second, the majority held that Lane's email to Billings is inadmissible as a hearsay statement that does not meet the requirements of Rule 804(b)(3). (R. 42). Alternatively, the Appellate Court found that admitting Lane's email would violate Respondent's right to confrontation under the Sixth Amendment because Lane will not testify at trial. (R. 45). The United States filed a petition for writ of certiori to the United States Supreme Court, which this Court granted on October 1, 2013. (R. 55).

SUMMARY OF THE ARGUMENT

The United States respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit for two reasons. First, the lower court erred in finding that Morris's testimony regarding Short's prior acts is admissible because the testimony is barred by Federal Rule of Evidence 404(b) and is not necessary to ensure Respondent's right to present a complete defense. Second, the lower court erred in finding that Lane's email to Billings is inadmissible because the email constitutes a non-testimonial statement against Lane's

interest under Federal Rule of Evidence 804(b)(3), the introduction of which does not violate the Confrontation Clause.

First, Morris's testimony describing Short's prior acts is propensity evidence that is expressly prohibited by Federal Rule of Evidence 404(b). The lower courts improperly concluded that Rule 404(b) does not bar evidence of a third-party's propensity when it is offered by a defendant to cast doubt on the defendant's guilt. However, Rule 404(b) applies with equal force when the defendant seeks to introduce evidence of a third party's prior acts. Respondent seeks to admit evidence of Short's prior acts exactly for this impermissible purpose: to show that Short's prior act of selling drugs demonstrates her propensity for drug selling. Allowing Respondent to introduce this evidence would be to contravene the intent of the Rule drafters, who sought to exclude all propensity evidence because it is inherently prejudicial. Additionally, excluding evidence of Short's prior acts will not violate Respondent's right to present a complete defense pursuant to the Due Process and Confrontation Clauses of the Sixth Amendment. Excluding the evidence of Short's prior acts does not violate Respondent's right to present a complete defense because the testimony is not first-hand eyewitness evidence related to the crime at issue, and is irrelevant under Rule 402.

Second, Lane's email is admissible as an exception to hearsay under Federal Rule of Evidence 804(b)(3). As a threshold matter, this Court is asked to overturn its decision in *Williamson v. United States*, which held that for the purposes of applying Rule 804(b)(3), courts must only admit single declarations or remarks that are against the declarant's interest. This narrow definition of "statement" adopted in *Williamson* has been inconsistently applied by the lower courts. Accordingly, this Court is asked to adopt an approach that allows for the admission of reliable collateral statements. Furthermore, admitting Lane's email is not a violation of the

Bruton doctrine. Respondent's Sixth Amendment right to confront the witnesses against her is not violated because the email is a non-testimonial statement. Under this Court's reasoning in Crawford v. Washington and its progeny, the Confrontation Clause is not violated by the introduction of a non-testimonial statement.

ARGUMENT

I. THE LOWER COURTS ERRED IN FINDING MORRIS'S TESTIMONY ADMISSIBLE BECAUSE, AS A MATTER OF LAW, FEDERAL RULE OF EVIDENCE 404(b) BARS THE ADMISSION OF ALL PROPENSITY EVIDENCE, REGARDLESS OF WHO OFFERS IT.

Federal Rule of Evidence 404(b) expressly bans the use of propensity evidence. Propensity evidence, under the Federal Rules, is evidence of an actor's past crime, wrong, or other act to prove the actor's character and to show that on a particular occasion, the person acted in accordance with that character. Fed. R. Evid. 404(b). The issue before this Court is whether this ban on propensity evidence applies when *the defendant* seeks to offer evidence of a third party's past crimes or acts to show that the third party had a propensity to commit the offense with which the defendant is charged. Because Rule 404(b) is often invoked by prosecutors seeking to introduce evidence of a defendant's prior acts, propensity evidence of a third party, when offered by the defendant to demonstrate the party's propensity to commit the crime with which the defendant is charged, is often referred to as "reverse 404(b) evidence." *See United States v. Williams*, 458 F.3d 312, 317 (3d Cir. 2006).

This Court should hold that Rule 404(b)'s ban on propensity evidence applies in all circumstances, irrespective of which party attempts to introduce the evidence at trial. Holding that propensity evidence is banned in all circumstances is consistent with the rationale underlying the ban on propensity evidence, the text of the Rules of Evidence, the guidance of this Court, and the decisions of the federal circuit courts.

A. The Ban on All Propensity Evidence, Regardless of Who Attempts to Offer It, Is Supported by Congressional Intent as Reflected in the Text of Rule 404(b) and the Decisions of the Supreme Court.

Federal Rule of Evidence 404(b) bans the use at trial of any evidence of a person's prior acts to demonstrate that person's character in order to show that on a particular occasion, the person acted in accordance with that character. Fed. R. Evid. 404(b). The ban on propensity evidence serves to diminish the dangers posed by this type of evidence. Juries may be likely to infer that because a person acted in a particular way in the past, they acted in conformity with that character in the case at hand. *See Symposium on the Federal Rules of Evidence*, 71 NW. U. L. Rev. 635. This danger of giving undue weight to an actor's prior acts is present regardless of who attempts to offer the evidence. *Id*.

The text of Rule 404(b) demonstrates Congress's intent to ban all prior act evidence, regardless of who seeks to admit it at trial, if the evidence is offered to show that a particular person had a propensity to commit certain acts based on his or her prior acts. Rule 404(b) is devoid of any language suggesting that application of the Rule depends on which party attempts to admit propensity evidence. In contrast, Federal Rule of Evidence 404(a), which bans evidence of a person's character or traits, carves out explicit exceptions in which character evidence may be admissible. Fed. R. Evid. 404(a). In contrast to the explicit exceptions Congress created for the admission of character evidence under Rule 404(a), Rule 404(b) contains no such exceptions to the ban on evidence of prior crimes, wrongs, or acts when offered to show the actor's propensity to commit such acts. This lack of specificity demonstrates Congress's intent to ban evidence of any person's propensity to commit an offense, based on his or her prior crimes or acts.

Furthermore, this Court has "strongly suggested that Rule 404(b) should be applied to any actor." *See Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999) (citing *Huddleston v. United States*, 485 U.S. 681, 685-86 (1988)). In *Huddleston*, this Court explained, "Federal Rule of Evidence 404(b)—which applies in both civil and criminal cases—generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character ... The actor in the instant case was a criminal defendant *Our use of these terms is not meant to suggest that our analysis is limited to such circumstances*. 485 U.S. at 685-86 (1988) (emphasis added). The Court in *Huddleston* therefore recognized that Rule 404(b) is not limited to banning evidence of only a defendant's prior acts, and instead applies when the proffered propensity evidence involves the prior acts of other actors as well, including third parties. *See id*.

The lower courts in this case erred by failing to consider the legitimate basis underlying the ban on propensity evidence. The District Court supported its decision by explaining that the ban on propensity evidence in Rule 404(b) does not apply when the defendant offers the evidence because the basis for the Rule relates "to the danger of admitting propensity evidence against the defendant, not the use of such evidence by a defendant" (R. 21). This reasoning is flawed. As reflected in the text of Rule 404(b), propensity evidence, as a whole, is a particular type of evidence that is of little probative value. Instead, this type of evidence only encourages juries to give undue weight to someone's prior acts, despite the fact that one's past acts are, according to the Rules of Evidence, irrelevant to determining the issue at hand. *See* 71 NW U. L. Rev. Therefore, propensity evidence is always properly excluded, regardless of which party seeks to offer it.

B. No Circuit Court to Address the Issue Has Held that Propensity Evidence Offered by the Defendant is Admissible Purely for the Purpose of Demonstrating a Third Party's Propensity to Commit the Crime With Which the Defendant Is Charged.

Evidence of crimes, wrongs, or past acts may be admissible for certain purposes, but is uniformly barred to show propensity. Under Rule 404(b)(2), either party may introduce evidence of a person's past crime, wrong or other act for purposes *other than* demonstrating propensity, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2). Accordingly, courts may admit propensity evidence offered by either party if it is likely to prove one of the permissible uses enumerated in Rule 404(b)(2). *See, e.g., United States v. Lucas*, 357 F.3d 599, 606 (6th Cir. 2004).

The federal circuit courts have been inconsistent in their approach to reverse 404(b) evidence. *Compare United States v. Lucas*, 357 F.3d 599, 606 (6th Cir. 2004) (applying the standard analysis of Rule 404(b) to conclude evidence of absent third party's prior conviction for possessing and distributing cocaine was irrelevant to defendant's cocaine possession and distribution charge and was thus properly excluded) *with United States v. Stevens*, 935 F.2d 1380, 1404 (3d Cir. 1991) (applying a lower standard for admissibility under rule 404(b) when a defendant offers third party propensity evidence for one of the permissible purposes under Rule 404(b)(2)). However, not a single circuit court has allowed for the admission of reverse 404(b) evidence solely for the purpose of demonstrating the propensity of a third party to commit the crime with which the defendant is charged.

Where the proffered evidence does not go to one of the permissible uses, but is instead only offered to demonstrate a party's propensity, courts have uniformly found that it is inadmissible. *See, e.g., United States v. Williams,* 458 F.3d 312 (3d Cir. 2006). In *Williams*, the Third Circuit explained that "the prohibition against propensity evidence applies regardless of by

whom – and against whom – it is offered." *Id.* at 317. There, the defendant had been convicted for being a felon in possession of a firearm after police discovered a handgun in the bedroom in which he was arrested. *Id.* at 313. The defendant appealed his conviction on the grounds that the trial court had denied his attempt to introduce evidence that Urlin, another man with whom he had been arrested, had a prior conviction for possessing a handgun. *Id.* The defendant's purpose in attempting to introduce the evidence was to show that Urlin had a propensity for carrying firearms, and thus the handgun in the bedroom belonged to Urlin, and not the defendant. *Id.* at 314. The court affirmed the defendant's conviction, holding that the trial court properly excluded the evidence under 404(b), as it was offered for no purposes other than propensity. *Id.*

The *Williams* court addressed its earlier holding in *United States v. Stevens*, which held that if evidence is offered for one of the permissible purposes under Rule 404(b)(2), it becomes subject to the balancing test in Rule 403, which requires the court to consider the probative value of the evidence against its prejudicial effect. *See Stevens*, 935 F.2d at 1384. The *Stevens* court found that when applying Rule 403 to "reverse 404(b)" evidence, a lower standard of admissibility is required. *Id.* The court in *Williams* clarified the holding in *Stevens* by explaining that there is no need to engage in Rule 403 balancing unless and until the court first determines that the evidence is admissible under Rule 404(b)(2). *Williams*, 458 F.3d at 314. *See also United States v. Lucas*, 357 F.3d 599, 606 (6th Cir. 2004); *United States v. Blum*, 62 F.3d 63, 68 (2d Cir. 1995) (affirming admission of third party crimes relevant to prove motive, a permissible purpose under Rule 404(b)(2)); *United States v. McCourt*, 925 F.2d 1229, 1234-35 (9th Cir. 1991) (affirming exclusion of other crime evidence offered by defendant to show that third party acted in conformity with the prior act and therefore was likely the guilty party, explaining "[e]vidence

of 'other crimes, wrongs, or acts,' no matter by whom offered, is not admissible for the purpose of proving propensity ...").

Some federal courts have improperly noted that Rule 404(b) does not apply to a defendant who, in support of his defense, seeks to introduce evidence of a third-party's propensity to commit the offense with which the defendant is charged. *See, eg, United States v. Seals*, 419 F.3d 600, 606-07 (7th Cir. 2005); *United States v. Montelongo*, 420 F.3d 1169, 1173 (10th Cir. 2005); *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983). However, in each reported case in which such evidence was admitted, the defendant actually introduced the evidence for one of the permissible purposes enumerated in Rule 404(b)(2). Accordingly, in those cases, evidence of a third party's prior acts was not admitted to show the party's propensity, but for some other reason.

For instance, in *United States v. Seals*, the defendant sought to introduce evidence of other suspects' past crimes. 419 F.3d at 606-07. The Seventh Circuit noted its approval of the Third Circuit's reasoning in *Stevens*, yet it excluded the evidence because the past crimes were too dissimilar to constitute *modus operandi* to prove identity. *Id.* Similarly, In *United States v. Montelongo*, the Tenth Circuit acknowledged *Stevens*, and admitted 404(b) evidence as relevant to *the defendant's lack of knowledge*. 420 F.3d at 1173. Accordingly, both courts admitted the evidence for one of the "other purposes" listed in Rule 404(b)(2). In *United States v. Morano*, the Eleventh Circuit noted that, "Rule 404(b) does not specifically apply to exclude this evidence because it involves an extraneous offense committed by someone other than the defendant." 697 F.2d at 926. However, the evidence at issue was not offered for propensity, but to show identity and common plan, and was thus admissible under Rule 404(b)(2). Further, the *Morano* court noted that, although Rule 404(b) was not directly applicable, "the exceptions listed in the Rule

should be considered in weighing the balance between the relevancy of this evidence and its prejudice under Rule 403." *Id*.

Though the federal cases are inconsistent in their discussion of reverse 404(b) evidence, they all have a common thread. All of the circuit courts acknowledge that evidence of "other acts" can be offered by any party to a case when it is offered for the "other purposes" enunciated in Rule 404(b). None of the cases sanction the use of pure propensity evidence by any party.

In this case, the District Court erred in its reliance on *United States v. Stevens* to conclude that Rule 404(b) does not apply to "other crime" evidence offered by a defendant. (R. 21). This reliance on *Stevens* is unfounded, given that *Williams* limited the holding in *Stevens*, and clarified that third party propensity evidence is barred by rule 404(b) unless the evidence is offered for one of the "other purposes" enumerated in the rule. *Williams*, 458 F.3d at 314.

In affirming the District Court, the Fourteenth Circuit also erred in its interpretation of the case law regarding reverse 404(b) evidence. The Appellate Court cites to *Lucas* as one Court of Appeals to adopt the view that Rule 404(b) bars third party propensity evidence. (R. 34). As discussed in detail above, however, the majority of circuit court cases do indeed bar third party propensity evidence, *unless* it is offered for a permissible purpose.

Further, the Appellate Court cites to *Montelongo* to explain that "a majority of the Circuits ... hold 404(b) does not bar propensity evidence when offered by a criminal defendant." (R. 35). However, no circuit allows evidence purely for propensity purposes only. In *Montelongo*, the Tenth Circuit admitted 404(b) evidence as relevant to the defendant's lack of knowledge, which is a permissible purpose under Rule 404(b)(2). Here, Respondent seeks to admit Morris's testimony concerning Short's prior acts purely for the purpose of demonstrating

that Short had a propensity to sell drugs.³ Much like the evidence excluded in *Williams* and *Seals*, however, this evidence should be excluded, as demonstrating Short's propensity is an impermissible use of this evidence.

II. RESPONDENT'S RIGHT TO PRESENT A COMPLETE DEFENSE IS NOT VIOLATED BY EXCLUDING MORRIS'S TESTIMONY BECAUSE IT IS NOT RELATED TO THE CRIME AT ISSUE AND IS INADMISSIBLE UNDER THE RULES OF EVIDENCE.

Excluding Morris's testimony will not violate Respondent's constitutional right to present a complete defense pursuant to the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment. Typically, the right to present a complete defense is only violated when a court excludes first-hand eyewitness evidence related to the crime at issue. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

Additionally, a defendant's right to present a complete defense "must comply with established rules of procedure and evidence." *Chambers*, 410 U.S. at 302. Therefore, a criminal defendant's right to present evidence in his defense is not absolute, but is "subject to reasonable restrictions." *See United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Michigan v. Lucas*, 500 U.S. 145, 150 (1991); *Crane v. Kentucky*, 476 U.S. 683, 689 (1986). Therefore, a criminal defendant does not have a constitutional right to present evidence that is "inadmissible under standard rules of evidence." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion). *See also Holmes v. S. Carolina*, 547 U.S. 319, 326-27 (2006) (citing Fed. R. Evid. 403).

The lower courts in this case erred in finding that Morris's testimony is admissible to protect Respondent's constitutional right to present a complete defense. Excluding Morris's

13

³ Indeed, Respondent's counsel argued to the District Court that evidence "of [Short's] past drug dealing demonstrates Ms. Short's propensity to sell performance enhancing drugs," (R. 10) and that "[d]emonstrating Ms. Short's propensity to sell a very similar drug within this insular winter sports community would show that it was more likely that Ms. Short, not [Respondent], was the coconspirator..." (R. 12).

testimony does not violate Respondent's right to present a complete defense because the testimony is not first-hand eyewitness evidence related to the crime at issue, and is irrelevant under Federal Rule of Evidence 403.

A. Excluding Morris's Testimony Does Deny Respondent the Right to Present a Complete Defense Because this Testimony is Not First-Hand Eyewitness Evidence Related to the Crime at Issue.

A defendant's right to present a full defense is not violated by excluding certain evidence that is not reflective of first-hand eyewitness evidence related to the crime at issue. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). In *Chambers*, this Court reviewed a Mississippi law prohibiting a party from impeaching its own witnesses and a state hearsay rule that did not include an exception for statements against penal interest. *Id.* at 295. Chambers, charged with murder, unsuccessfully sought to treat as an adverse witness a person who repudiated an earlier sworn confession to the murder. *Id.* at 289. The state evidentiary rules at issue operated to exclude Chambers' cross-examination of the recanting witness and to exclude three witnesses who would have discredited the repudiation. *Id.* This Court held that the state rules violated Chambers' due process rights, but emphasized that its decision did not establish any new principle of constitutional law. *Id.* at 302. *See also Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (reversing denial of defendant's proffered evidence, reasoning that Arkansas' per se rule excluding all hypnotically refreshed testimony impermissibly infringed upon the defendant's constitutional right to testify on her own behalf).

In contrast, in *United States v. Scheffer*, a defendant unsuccessfully sought to introduce polygraph test results to support his claim that he did not knowingly use drugs. 523 U.S. 303, 308 (1998). On appeal, the defendant claimed that this exclusion violated his constitutional right to present a defense. This Court rejected his claim, explaining that exclusion of the polygraph

evidence did not keep the defendant "from introducing any factual evidence" but prevented him only "from introducing expert opinion testimony to bolster his own credibility." *Id*.

The Scheffer Court distinguished its decisions in Rock, Washington, and Chambers because "[t]he exclusions of evidence ... declared unconstitutional in those cases significantly undermined fundamental elements of the defendant's defense." Id. A common theme among the cases is that a court cannot deny a defendant the right to present relevant eyewitness testimony, or testimony of the accused related to her firsthand experience. In each case where the evidence was found improperly excluded, the evidence involved first-hand factual accounts relevant to the particular crime with which the defendant was being charged.

In *Scheffer* however, the excluded evidence merely prevented the defendant from bolstering his own credibility. It did not provide first-hand fact evidence related to the particular crime at issue and thus its exclusion did not violate the defendant's right to present a complete defense. *Id.* at 308. Following this Court's precedent, the Sixth Circuit in *United States v. Lucas* properly affirmed the exclusion of a third party's prior conviction. The court explained that the exclusion did not violate the defendant's right to a complete defense because the defendant was still able to explore her theory that a third party was in fact the culprit and present it to the jury through her own testimony, without the need for inadmissible evidence. 357 F.3d 599, 606-07 (6th Cir. 2004).

Here, Respondent is not attempting to offer evidence that someone else has confessed to the crime with which she was charged, or even that someone else has first-hand knowledge relevant to the crime. Rather, Respondent is trying to offer evidence that a third party once bought different drugs in Canada from another third party. (R. 15). Morris alleges that while she was on the Canadian team, she purchased a drug from her then-teammate Short, who later

transferred to the U.S. team (Morris Aff. R. 24-25). These facts are unrelated to the case at hand, and do not offer any indication that Morris knows someone else has confessed to the crime at issue or that Short was, in fact, the real culprit in this case. Unlike the evidence offered in *Chambers, Rock,* and *Washington*, Morris's testimony contains no first-hand fact evidence relevant to the crime at issue. Like in *Scheffer*, the evidence Respondent seeks to offer simply bolsters her own credibility for alleging that she was not involved in the conspiracy.

As the court in *Lucas* noted in denying the defendant's attempt to enter evidence of a third party's prior conviction, the Respondent in this case will still be permitted to argue her defense that someone else was involved in the conspiracy. Admitting Morris's testimony, however, is not necessary for Respondent to establish this defense; it only serves to bolster her credibility. As this Court held in *Sheffer*, excluding evidence that will only bolster the defendant's credibility does not constitute a constitutional violation. Like the defendants in *Shaffer* and *Lucas*, Respondent in this case still has the opportunity to present her defense; she is just not permitted to enter inadmissible propensity evidence to do so.

B. Excluding Morris's Testimony Does Not Violate Respondent's Right to Present a Complete Defense Because the Testimony is Irrelevant under Rule 402.

When exercising her right to present a defense, a criminal defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. *Chambers*, 410 U.S. at 302. Therefore, a criminal defendant does not have a constitutional right to present evidence that is "inadmissible under standard rules of evidence." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion). *See also Holmes v. S. Carolina*, 547 U.S. 319, 326-27 (2006). ⁴

16

-

⁴ Treatises this Court relied on in *Holmes* support the proposition that a criminal defendant does not have a constitutional right to present otherwise inadmissible evidence. See, *e.g.*, 41 C.J.S., Homicide § 216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by

Evidence that casts mere suspicion on another with no linking, substantive facts is not relevant under Rule 402, and therefore courts do not deny a defendant the right to present a complete defense by excluding it. Prior crimes evidence is irrelevant, and therefore inadmissible, when the similarities between the prior crime and the crime at issue are generic, dissimilar, and remote in time. *See e.g., United States v. Seals*, 419 F.3d 600, 607 (7th Cir. 2005); *Berry v. Palmer*, 518 F. App'x 336, 338, 343 (6th Cir. 2013) (affirming exclusion of witness testimony supporting defendant's theory that a third party committed the crime, where testimony claimed third party knew of the crime before it had been reported) *cert. denied*, 134 U.S. 485 (2013). In *Seals*, the defendant tried to offer evidence that a third party had committed the robberies of which he was accused. 419 F.3d at 607. The Seventh Circuit explained that the similarities argued by the defendant were generic: many robbers disguise their identity, carry firearms, and use stolen vehicles. *Id.* Further, additional facts underlying the two robberies showed that they were dissimilar, including the number and modus operandi of the robbers, the disguises they wore, and the guns they used. *Id.*

The court also emphasized the temporal and spatial differences between the crimes. The robberies occurred two weeks from each other and were thirty-one miles apart. *Id.* at 609. The court explained, "thirty-one miles might not appear very far on a globe, but in practical terms these two robberies occurred in separate countries." *Id.* at 607. Accordingly, the court excluded the evidence as irrelevant. *See also United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001) (affirming exclusion of evidence that brother of defendant charged with manufacturing

-1

the accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded").

methamphetamine had himself, less than a month earlier, manufactured methamphetamine in a different location).⁵

In this case, not only is evidence of Short's prior acts impermissible propensity evidence; it is also so dissimilar to the crime with which Respondent is charged that it is irrelevant. The evidence merely casts a weak suspicion on another, but Short's prior acts are in no way linked to the offense charged here. Accordingly, this evidence is inadmissible under both Federal Rules 404(b) and 402. Defendants do not have a constitutional right to present evidence that does not comport with evidentiary rules; thus excluding Morris's testimony does not deny Respondent her right to present a complete defense.

The lower courts erred in finding that the evidence that Short sold different drugs one time while in Canada a year ago raises a strong inference that Short was the second member of the conspiracy in this case. Instead, this evidence is merely speculative at best, and requires the trier of fact to make an inference based on propensity that is impermissible under the rules of evidence.

Much like the evidence of a third-party's crime offered in *Seals*, the evidence of Short's prior act is too generic and dissimilar to be admissible. Morris's testimony provides that a third party, Short, sold drugs to her more than a year before the crime at issue in this case. (Morris Aff. 25). The sale involved a different drug than the drug at issue in this case. Additionally, the drugs Short allegedly sold Morris have also been found in the possession of several eastern European teams. While ThunderSnow is a derivative of this drug, it cannot be specifically linked to Short in any way. This case involves a conspiracy between two people; Morris's testimony

⁵ In contrast, when a defendant offers evidence of a third party's prior acts that are significantly similar to the crime of which the defendant is accused, the court may admit the evidence. *See, e.g., United States v. Stevens*, 935 F.2d 1380, 1401-06 (3d Cir. 1991) (affirming admission of evidence of third party's prior robbery where robberies both took place within a few hundred yards of one another, both occurred between 9:30 and 10:30 pm, both were perpetrated on military personnel, and both robbers were described similarly by the victims).

concerning Short's prior drug sale only offers one isolated incident that does not mention a partner. Furthermore, in *Seals*, the thirty-one mile distance between the two crimes was considered to have occurred in separate countries for relevancy purposes. In this case, however, the prior act did in fact occur in another country. Drug deals, especially those involving performance enhancing drugs, are a common crime found throughout the globe, and cannot be linked in any specific way to Short. There is no other evidence implicating Short in this case. No contraband was discovered at her home and no other testimony points to her involvement. The evidence Respondent seeks to admit, therefore, is not relevant to the crime at hand. Accordingly, its exclusion in no way presents a violation of her constitutional right to a complete defense.

III. THE NARROW DEFINITION OF "STATEMENT" FOR ANALYZING STATEMENTS AGAINST INTEREST ADOPTED IN *WILLIAMSON V. UNITED STATES* SHOULD BE REPLACED WITH A STANDARD THAT ALLOWS FOR THE ADMISSION OF ALL RELIABLE STATEMENTS CONTAINED IN A SELF-INCULPATORY NARRATIVE.

Under Rule 804(b)(3), an out of court statement made by an unavailable declarant is admissible as an exception to hearsay if it constitutes a statement against the declarant's interest. A statement satisfies this exception and is thus admissible if it (1) had so great a tendency to expose the declarant to criminal liability that the reasonable person in the declarant's position would not have made it unless believing it to be true, and (2) is supported by corroborating circumstances indicating the statement's trustworthiness. Fed. R. Evid. 804(b)(3)(A)-(B).

This Court has adopted a very narrow definition of the term "statement" for the purposes of applying Federal Rule of Evidence 804(b)(3). *See Williamson v. United States*, 512 U.S. 594, 599 (1994). In *Williamson*, Harris, the declarant of the statements at issue, had been pulled over and consented to a search of his vehicle, which uncovered nineteen kilograms of cocaine. *Id.* at 596. Following his arrest, Harris confessed to a DEA Agent that he had received and transported

the drugs. *Id.* at 596-97. Harris also indicated that the drugs belonged to Williamson, the defendant. *Id.* at 597. At Williamson's trial for drug possession, Harris refused to testify, despite being held in contempt. *Id.* Because Harris was thus unavailable, the trial court allowed the prosecution to admit Harris's confession under Federal Rule of Evidence 804(b)(3), as statements against Harris's interest. *Id.* at 597-98. The DEA Agent who took Harris's confession read his statements into evidence, and Williamson was convicted. *Id.* at 597. Williamson appealed his conviction to this Court after the Eleventh Circuit affirmed, arguing that Harris's statements implicating him were not sufficiently against Harris's interest to satisfy the hearsay exception and thus should not have been admitted. *Id.* at 598.

As a threshold matter, this Court defined the term "statement" for the purposes of determining whether a particular statement is sufficiently against the declarant's interest to satisfy Rule 804(b)(3). *Id.* at 599. In a fractured opinion, the majority concluded that a "statement," for the purposes of applying Federal Rule of Evidence 804(b)(3), is defined as a "single declaration or remark." *Id.* Accordingly, a strict application of *Williamson* requires courts to consider each individual declaration or remark within a self-inculpatory narrative to determine whether, standing alone, it is sufficiently against the declarant's interest, such that a reasonable person would not have made it unless believing it to be true. *Id.* This narrow approach to statements against interest thus excludes collateral statements, even when they are contained in a generally self-inculpatory narrative. *Id.* at 600. In adopting this approach, the Court expressed concern regarding the reliability of collateral statements, especially when made to law enforcement following arrest, as were the statements in the case before it. *Id.* at 599-601. The Court noted that "[t]he arrest statements of a codefendant have traditionally be viewed with

_

⁶ Williamson also argued that the admission of Harris's statements violated his rights under the Sixth Amendment's Confrontation Clause. *See Williamson*, 512 U.S. at 598. Because the Court concluded that the statements were inadmissible under the Rules of Evidence, it did not rule on the constitutional issue. *Id.* at 605.

special suspicion." *Id.* at 601 (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)). Harris had confessed after he had been caught red-handed with a significant amount of drugs. *Williamson*, 512 U.S. at 596-97. Thus, his statements implicating Williamson as the owner of the drugs, even though contained in a self-inculpatory narrative, could have been an attempt to shift blame or curry favor with the police. *Id.* at 604. *Williamson* went on to hold that courts can only determine whether a statement is sufficiently against the declarant's interest by considering the surrounding circumstances. *Id.* at 603. Justice O'Connor, writing for the majority, emphasized that the issue under Rule 804(b)(3) "is always whether the statement was sufficiently against the declarant's penal interest ... *and this question can only be answered in light of all the surrounding circumstances.*" *Id.* at 603-04 (emphasis added).

The rule in *Williamson* – that collateral statements are inadmissible even if they are included in a broadly self-inculpatory narrative – has not been applied consistently by the federal circuit courts, given that *Williamson* also requires an examination of the totality of the circumstances. Many circuit courts have found that when the statements at issue were made in a context that differs from that in *Williamson* (i.e., a post-arrest confession to authorities), *Williamson*'s underlying rationale for limiting the admission of collateral statements does not apply, and thus collateral statements are freely admitted. *See, e.g., United States v. Saget*, 377 F.3d 223 (2d Cir. 2004); *United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997). The bright-line rule that *Williamson* attempted to create with its narrow definition of "statement" has in fact caused more confusion and inconsistency in application. This Court has not hesitated to overturn precedent that has proven unworkable. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (collecting cases). The considerations in favor or respecting stare decisis are not as paramount when the precedent concerns the application of evidentiary rules. *Id.* When faced with applying

the evidentiary rule concerning hearsay statements against interest, lower courts have inconsistently applied the narrow definition of "statement" required by the precedent of *Williamson*. Accordingly, this Court is asked to adopt an approach that allows for the introduction of generally self-inculpatory statements. In his concurrence to *Williamson*, Justice Kennedy looked to the Advisory Note to Rule 804(b)(3) to conclude that reliable collateral statements should, in fact, be admitted under this hearsay exception. Justice Kennedy provided a straightforward test that would allow for the admission of both statements directly against the declarant's interest, and collateral statements contained in a self-inculpatory narrative, if the circumstances demonstrate their reliability. *Williamson*, 512 U.S. at 620 (Kennedy, J., concurring). Such an approach, applied to this case, would allow for the admission of Lane's email as a self-inculpatory statement.

A. The Standard Adopted in *Williamson* Has Proven Difficult for the Lower Courts to Apply With Consistency When the Statements at Issue Were Not Made to Law Enforcement Following Arrest.

The Court's test for determining whether a statement is sufficiently against interest has caused confusion among the lower courts. When the statements at issue are similar to those in *Williamson* – that is, when they are made to law enforcement – the application of *Williamson* is relatively straightforward. *See, e.g., United States v. Chapman*, 345 F.3d 630 (8th Cir. 2004) (finding it was error for lower court to admit statements of an unavailable witness implicating the defendant, because the statements were made to law enforcement following the witness's arrest and thus were not sufficiently against his interest).

Where the statements at issue were not made to law enforcement, however, courts have failed to consistently apply *Williamson*'s narrow definition of "statement." Courts often conclude that the rationale in *Williamson* for adopting a narrow definition of statement does not apply with

equal force when the statements at issue were not made to law enforcement. *See e.g.*, *United States v. Ebron*, 683 F.3d 105 (5th Cir. 2012), *cert. denied*, 134 U.S. 512 (2013). In *Ebron*, the defendant was convicted for killing Barnes, a fellow inmate. *Id.* at 117. At trial, the jury heard testimony of Lamont Bailey, who explained that Mosley, another man involved in the murder, told Bailey that "He and Akh" (the defendant) went into Barnes's cell and "put in the work" (committed the crime). *Id.* at 132-33. The defendant appealed and argued that the portion of Mosley's statement referring to him was not sufficiently against Mosley's interest to meet the hearsay exception and thus should not have been admitted. *Id.* at 133.

The Fifth Circuit affirmed Ebron's conviction and concluded that *Williamson* is not applicable when the statements at issue are not made to law enforcement following an arrest. *Id.*Noting that this area of the law is fraught with uncertainty, the court held that the district court had not erred in admitting Bailey's testimony. *Id.* at 134. The court noted that "we are convinced that *Williamson*, despite some of its broad language, does not govern the admissibility of Bailey's testimony." *Id.* The court supported its conclusion by noting that *Williamson* was predicated on the assumption that the statement at issue was a post-arrest confession, while the statements in the present case were made to a fellow inmate. *Id.* at 157. Though other circuits have stopped short of holding that *Williamson* simply does not apply when the statements at issue were not made to law enforcement, they have been willing to admit collateral statements that implicate a defendant because, in light of the surrounding circumstances, there is less concern that the declarant is attempting to shift blame or curry favor. *See, e.g., United States v. Sasso*, 59 F.3d 341, 349 (2d Cir. 1995) (noting that *Williamson*'s narrow definition of statement

stemmed from recognition that the "declarant might attempt to shift blame to another by mixing within a narrative true and self-inculpatory statements and false blame-shifting ones.").⁷

Another difficulty posed by *Williamson*'s requirement that courts must independently consider each declaration or remark in a particular narrative to determine whether it is sufficiently against the declarant's interest is especially apparent in conspiracy cases. When both the declarant and the defendant are involved in a conspiracy, what appears to be a collateral statement that implicates the defendant may actually be a statement against the declarant's penal interest. *See, e.g., United States v. Saget*, 377 F.3d 223 (2d Cir. 2004). In *Saget*, for example, the Second Circuit reviewed the admission of several statements made by the defendant's coconspirator in the defendant's trial for firearms trafficking. *Id.* at 231. Writing for the court, then-Circuit Judge Sotomayor held that the district court had not abused its discretion by admitting the co-conspirator's statements. *Id.* The lower court had correctly concluded that the bulk of the declarant's statements were self-inculpatory because they described acts the defendant and declarant had committed together. *Id.*

Notably, the Court also held that it was not error to admit statements that described acts the defendant committed alone. *Id.* These statements concerning only the defendant's actions were admissible because, in context, they were against the declarant's interest, as they described how their trafficking conspiracy operated. *Id. See also United States v. Pelletier*, 666 F.3d 1, 8 (1st Cir. 2011) (affirming admission of collateral statements made to fellow inmate inculpating defendant, as they demonstrated declarant's "insider knowledge" of a criminal enterprise);

.

⁷ Even when the statements at issue *were* made to authorities, some courts have relied not on *Williamson*'s narrow definition of "statement," but it's "totality of the circumstances" rationale to admit collateral statements. *See, e.g.*, *United States v. Pabellon*, 181 F.3d 93 (4th Cir. 1999) (unpublished table decision) (finding it was not error to admit statement that "[the defendant] came to me in March of 1996 and asked me if I knew anyone who could have [the victim] killed," because it was contained in a broadly self-inculpatory narrative after the declarant approached the police on his own initiative); *United States v. In*, 111 F.3d 139 (9th Cir. 1997) (affirming admission of all statements contained in co-conspirator's plea agreement, including those implicating defendant, because, despite the rule in *Williamson*, "it would be impossible to parse out all non-self-inculpatory statements from the plea agreement.").

United States v. Watson, 525 F.3d 583, 587 (7th Cir. 2008) (affirming admission of collateral statements because they could implicate the declarant in a larger conspiracy).

Lane's email, the statements at issue in this case, reflect the quintessential situation in which *Williamson* becomes inherently difficult to apply. To begin, the statement is not a post-arrest confession made to law enforcement after arrest, but instead was made to Lane's close personal and romantic partner. (R. 29). Accordingly, as noted by the circuit courts, *Williamson*'s concern – that collateral statements contained within the email are mere attempts to shift blame or curry favor – is not at issue. *See, e.g., Ebron*, 683 F.3d at 134.

However, a strict application of *Williamson* requires the court to examine each remark within the email individually. The individual statements within Lane's email further demonstrate the problems posed by *Williamson*'s narrow definition of "statement." Each statement in Lane's email, standing alone, is not, individually, against Lane's interest. The statement most likely to incriminate her: "A member of the male team found out and threatened to report us if we don't come clean" is stripped of all context if it is not considered along with the sentence that immediately precedes it. (R. 29). That sentence, however, also does not, standing alone, implicate Lane: "I know you've suspected before about the business my partner and I are running." (R. 29). Without viewing the two sentences together, neither appears to be against Lane's interest.

Finally, the email contains statements that demonstrate the likely existence of a conspiracy, but these statements, too, do not appear to be sufficiently against Lane's interest when viewed individually. Lane's admission that her partner "really thinks we need to figure out how to keep [the male team member] quiet" (R. 29) could be viewed as self-inculpatory insofar as it connects Lane to a conspiracy. *See Saget*, 377 F.3d at 231. Without considering the

contextual information of the preceding sentences, however, which a strict application of *Williamson* would seem to require, this statement also loses its self-inculpatory nature.

B. Adopting an Approach that Allows for the Admission of Reliable Collateral Statements is Supported by Congressional Intent as Demonstrated in the Advisory Committee Notes to Federal Rule of Evidence 804(b)(3).

To remedy the inherent difficulties posed by the strict application of *Williamson*, this Court should adopt an approach that allows for the admission of collateral statements, on the condition that the circumstances demonstrate their trustworthiness. The Advisory Committee Notes to the Federal Rules of Evidence suggest that a proper interpretation of Rule 804(b)(3) allows for the admission of collateral statements. Relying on the Advisory Committee Note to guide his analysis, Justice Kennedy proposed such an approach as an alternative to the majority's narrow interpretation in *Williamson*. *See Williamson*, 512 U.S. at 611 (Kennedy, J., concurring).

Unlike the majority in *Williamson*, Justice Kennedy believed that Federal Rule of Evidence 804(b)(3) permits the introduction of a generally self-inculpatory narrative, including collateral statements that are demonstrated to be reliable. Justice Kennedy provided three reasons supporting his position: (1) the text of the Advisory Committee Note to Rule 804(b)(3); (2) the application of the exception at common law, which allowed for the admission of collateral statements; and (3) the fact that the exception would have no meaningful effect if collateral statements inculpating a defendant were not admissible. *Id.* at 614-16. Of particular importance, Justice Kennedy stressed that the Advisory Committee's Note directly answered the question, in the affirmative, of whether collateral statements are admissible under the Rule. *Id.* at 615. The Note indicates that "[the third-party confession] may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements." *Id.* (citing 28 U.S.C. App., 790). Justice Kennedy noted that relying on

the Advisory Committee Notes to interpret the Rules of Evidence is a well-established practice of this Court, and used them to conclude that certain collateral statements should be admitted, once they are determined to be reliable. 8 *Id.* at 614-15.

1. The test proposed by Justice Kennedy in his Williamson concurrence provides a workable alternative to the narrow approach to statements against interest.

Based on the guidance provided in the Advisory Committee Note to Rule 804(b)(3), Justice Kennedy proposed a straightforward test for determining whether a particular statement is admissible under the exception. First, a court should determine whether a statement offered under the exception "contained a fact against penal interest." *Id.* at 620. If the statement does contain such a fact, the court "should admit all statements related to the precise statement against penal interest, subject to two limits." Id. First, the court should exclude a collateral statement that is so self-serving as to render it unreliable. *Id.* Second, the entire statement should be excluded if the declarant made the statement under circumstances in which he or she had a "significant motivation to obtain favorable treatment, as when the government made an explicit offer of leniency in exchange for the declarant's admission of guilt." *Id.* Because this approach involves a fact-intensive inquiry, trial judges should be given wide discretion to examine a particular statement to determine whether all or part of it should be admitted. *Id.* at 621. Under the 2011 Rule amendments, the statements must also be supported by corroborating circumstances when offered in a criminal trial. See Fed. R. Evid. 804(b)(3)(B). Accordingly, if the statements at issue meet the above test, courts should then consider whether the statements are supported by corroborating circumstances.

_

⁸ Specifically, Justice Kennedy considered that the Advisory Committee Note references McCormick's Treatise on Evidence for guidance on balancing self-serving and disserving aspects of statements offered under Rule 804(b)(3). *Williamson*, 512 U.S. at 617. Justice Kennedy cited then McCormick, which provided that "[a] certain latitude as to contextual [i.e. collateral] statements, neutral as to interest, giving meaning to the declaration against interest seems defensible, but bringing in self-serving statements contextually seems questionable." *Id.* at 618 (citing McCormick, § 256, at 533).

2. Under a revised approach to Federal Rule of Evidence 804(b)(3), Lane's entire email is admissible as a statement against her penal interest.

As applied in this case, the approach to statements against interest proposed by Justice Kennedy would support the admission of Lane's email as a declaration against her interest. First, the email contains a fact against penal interest. Specifically, Lane wrote the email to Billings after he confronted her regarding his suspicion that she was involved in a conspiracy to sell drugs to the female members of the team. (R. 3). The email acknowledges that Billings "suspected before about the business my partner and I have been running with the female team." (R. 29). The very next sentence states "One of the members of the male team found out and threatened to report us if we don't come clean." (R. 29). These two statements, taken together, are both (1) an admission that Billings' suspicions were correct (as a member of the male team could not have "found out" about Lane's suspicious conduct, if it were not true), and (2) an acknowledgement that Lane was engaged in reportable conduct.

Furthermore, the email is not rendered inadmissible by the limiting principles Justice Kennedy proposes. First, there are no statements that are "so self-serving as to render the statement unreliable." Lane does note that she does not know "exactly what her partner has in mind yet." (R. 29). This is not a self-serving statement. It does not indicate that Lane wants to distance herself from her partner's plan to keep the male team member quiet; it does not suggest disagreement or fear about the plan. Instead, this statement simply suggests that Lane will confer with her partner to learn exactly what she has in mind. Second, the statements were not made under circumstances in which the declarant had a significant motivation to obtain favorable treatment. Significantly, the statements were not made to the government or law enforcement, but a close romantic partner. Thus, the circumstances do not demonstrate that Lane was motivated to fabricate her statements. Instead, when read together, the statements in the email

suggest that Lane is seeking help from her boyfriend in a situation that she knows exposes her to criminal liability.

Finally, the statements at issue here are supported by corroborating circumstances, as required by Federal Rule of Evidence 804(b)(3)(B). Just two months after Lane joined the U.S. Snowman Team, the team's practice times had markedly improved. (R. 2). Later, Billings witnessed Lane and the Respondent engaged in a heated argument, in which Lane shouted to Respondent, "Stop bragging to everyone about all the money you're making!" (R. 3). Lane sent Billings the email containing the incriminating statements just a few days after he confronted her with his suspicions that she was selling drugs to the members of the women's team. (R. 3). In the email, Lane indicated that her partner thought they needed to do something to keep a member of the male team quiet. (R. 29). Respondent and Riley, the now-deceased member of the men's Snowman team, were seen engaging in a heated argument just six days before Respondent shot and killed him. (R. 3). Furthermore, in addition to the 12,500 doses of ThunderSnow later uncovered in the Snowman team training facility, the drug was also uncovered at the homes of both Lane and Respondent. (R. 3-4). Accordingly, Lane's statements are supported by corroborating circumstances, and thus, should be found admissible under Federal Rule of Evidence 804(b)(3).

IV. THE ADMISSION OF LANE'S EMAIL DOES NOT VIOLATE RESPONDENT'S SIXTH AMENDMENT RIGHTS BECAUSE IT IS A NON-TESTIMONIAL STATEMENT AND IS THUS NOT SUBJECT TO THE CONFRONTATION CLAUSE.

The District Court erred in concluding that Lane's email is inadmissible under this Court's decision in *Bruton v. United States* because the rule in *Bruton* does not apply to non-testimonial statements, given this Court's later decision in *Crawford v. Washington*. In *Bruton*, this Court held that a defendant's Sixth Amendment right to confront the witnesses against him

was violated when the confession of his non-testifying co-defendant was introduced at their joint trial. 391 U.S. 123, 126 (1968). Bruton and his co-defendant, Evans, were both convicted of armed postal robbery. *Id.* at 124. A postal inspector testified that Evans had confessed to him that Evans and Bruton had committed the robbery together. *Id.* On appeal, the Eighth Circuit affirmed Bruton's conviction, noting that the trial court had instructed the jury that while Evans's confession was admissible against Evans, it should not be considered in determining Bruton's innocence or guilt. *Id.* at 124-25. This Court reversed, and, in what is now referred to as the "*Bruton* doctrine," held that when there is a substantial risk that the jury will look to incriminating statements made by a non-testifying co-defendant, despite instructions not to do so, the admission of the confession violates the defendant's right of cross-examination ensured by the Sixth Amendment's Confrontation Clause. *Id.* at 126.

Since the decision in *Bruton*, this Court has significantly clarified the situations in which the Confrontation Clause applies. In the landmark case of *Crawford v. Washington*, the Court held that the protections of the Confrontation Clause extend to *testimonial* out of court statements. 541 U.S. 36 (2004). Accordingly, under *Crawford*, the Confrontation Clause prohibits the admission of an unavailable declarant's statements only if they are testimonial in nature, unless the defendant had the prior opportunity to cross examine the witness. *Id.* at 53-54. Because the Confrontation Clause protects a defendant's right to confront the "witnesses" against him, it only ensures the defendant's right to cross examine those who "bear testimony." *Id.* at 51. The Court specifically noted that:

An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement. *Id.*

Crawford left open the question of whether the Confrontation Clause applies *only* to testimonial hearsay, but this question was soon answered in the affirmative. See Davis v. Washington, 547 U.S. 813 (2006).

It is now settled that a defendant's right to cross examination under the Confrontation Clause extends only to testimonial statements offered against him or her. See id. In Davis, this Court held that only testimonial statements cause a declarant to become a "witness" within the meaning of the Confrontation Clause: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Id. at 821. The Court explicitly noted that this limitation on the Confrontation Clause, clearly reflected in the Constitution's text, "must fairly be said to mark out not merely its core,' but its perimeter." *Id.* at 825. See also Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("Under Crawford, the Confrontation Clause has no application to [out-of-court non-testimonial statements] and therefore permits their admission even if they lack indicia of reliability"). The Court again recently re-affirmed the limited scope of the Confrontation Clause in *Michigan v. Bryant*, holding that a court must determine whether a statement is testimonial by viewing its primary purpose. 131 S. Ct. 1143, 1155 (2011). If the primary purpose of a statement is to create a record for trial, it is testimonial. *Id.* If, however, this primary purpose is absent, "the admissibility of the statement is the concern of state and federal rules of evidence, not the Confrontation Clause." Id. (emphasis added).

Unlike the situation in *Bruton*, which involved the testimonial confession of a codefendant, this Court's decisions in *Crawford* and its progeny indicate that a defendant's Sixth Amendment right to confrontation is not violated when the prosecution introduces the *nontestimonial* statements of a non-testifying co-defendant. The majority of the circuit courts that have addressed the issue have concluded that when the prosecution seeks to enter the statement of a non-testifying co-defendant at a joint trial, the statement is not barred by the *Bruton* doctrine if it is non-testimonial. *See, e.g., United States v. Dale,* 614 F.3d 942, 956 (8th Cir. 2010). In *Dale,* the Eighth Circuit held that a defendant's Sixth Amendment rights were not violated by the introduction of the statements of his co-conspirator recorded by a fellow inmate. *Id.*

The decision in *Dale* added to the long list of circuit court decisions holding that *Bruton* does not bar the admission of a co-defendant's non-testimonial statements, even when made to a confidential informant, cooperating witness, or undercover officer. *See, e.g., Brown v. Epps*, 686 F.3d 281 (5th Cir. 2012); *United States v. Smalls*, 605 F.3d 765 (10th Cir. 2010); *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009); *United States v. Watson*, 525 F.3d 583 (7th Cir. 2008); *United States v. Udeozor*, 515 F.3d 260 (4th Cir. 2008); *United States v. Underwood*, 446 F.3d 1340 (11th Cir. 2006); *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005). *But see United States v. Jones*, 381 F. App'x 148, 151 (3d Cir. 2010) (affirming District Court's admission of co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E), but noting "[w]e have interpreted *Bruton*'s rule broadly, applying it not only to custodial confessions but also to informal statements").

In this case, admitting Lane's email at the joint trial of Lane and Respondent will not violate Respondent's right to confrontation under the Sixth Amendment. Under *Crawford*, the Sixth Amendment only bars the *testimonial* statements of an unavailable declarant. The statements contained in Lane's email are not testimonial. The email is non-testimonial because, when it was made, its primary purpose was not to create a record that could later be used at trial. *See Michigan v. Bryant*, 131 S. Ct. at 1155. Instead, the statements in the email were made to Billings, Lane's close personal and romantic partner. (R. 29). Accordingly, when making these

statements, Lane was not "bearing testimony." *See Crawford*, 541 U.S. at 51. As this Court noted in *Davis*, the Confrontation Clause is not concerned with statements, like those in Lane's email, that do not involve testimony. *See* 547 U.S. at 821. Because Lane's email was non-testimonial, it is not barred under the *Bruton* doctrine.

Furthermore, the Fourteenth Circuit improperly concluded that *Bruton* applies in this case because it deals with prejudice to the defendant. While *Bruton* was indeed concerned with prejudice to the defendant, it was concerned with a particular type of prejudice: that caused by the introduction of a testimonial statement. Given this Court's Sixth Amendment jurisprudence, the Confrontation Clause is not concerned with non-testimonial statements, like the one at issue in this case. Had the primary purpose of Lane's statement been to create a record for trial, it would have been testimonial, and thus properly barred under *Bruton*. However, because it is not, and is instead a remark to a close friend, it is non-testimonial and thus not subject to the Confrontation Clause. Accordingly, Respondent's Sixth Amendment rights will not be violated by introducing the email at the joint trial.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court reverse the decision of the Fourteenth Circuit Court of Appeals because (1) Morris's testimony is inadmissible under Rule 404(b); (2) excluding Morris's testimony does not violate Respondent's right to present a full defense; (3) Lane's email is an admissible exception to hearsay under Federal Rule of Evidence 804(b)(3); and (4) admitting Lane's email does not violate Respondent's Sixth Amendment rights because it is a non-testimonial statement that is thus not subject to the Confrontation Clause.