

Case No. 12-13

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term 2013

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 PETITIONER

QUESTIONS PRESENTED

- I. Does Federal Rule of Evidence 404(b) bar evidence of a third party's propensity to commit a crime when the plain language of the rule explicitly states "a person" and does not limit its application to "a defendant"?
- II. Is it constitutional under the Fifth and Sixth Amendments to preclude Defendant Zelasko from introducing evidence that is otherwise barred by the Federal Rules of Evidence in light of this Court's holding in *Chambers*?
- III. Should the narrow standard for the application of Federal Rule of Evidence 804(b)(3) set forth by the *Williamson* plurality be overruled in favor of Justice Kennedy's broader, more workable approach articulated in his *Williamson* concurrence and, if so, should Co-Defendant Lane's e-mail be admitted in its entirety?
- IV. Are Confrontation Clause rights only implicated when testimonial statements are at issue in light of this Court's decision in *Crawford*?

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STATEMENT OF THE CASE

Statement of Facts

Anastasia Zelasko (“Defendant Zelasko”) and Jessica Lane (“Co-Defendant Lane”) were members of the United States Women's Snowman Team (the “Snowman Team”). R. at 3. The Snowman Team competes in a winter sport known as the “Snowman,” which involves five events such as dogsledding and rifle shooting. R. at 8. On September 6, 2010, Defendant Zelasko joined the Snowman Team and on August 5, 2011, Co-Defendant Lane joined the Snowman Team. R. at 1.

The Snowman Team participates in several annual competitions, including the World Winter Games, “a physically demanding game consisting of dogsledding, ice dancing, aerial skiing, rifle shooting, and curling.” R. at 1–2. In competitions before August 2011, the Snowman Team never placed higher than sixth place. R. at 2. Beginning in August 2011, however, the Snowman Team’s practice rounds began to improve unexpectedly and at an unprecedented rate. R. at 2.

During 2011, Hunter Riley, a member of the Men’s Snowman Team, worked as an informant for the Drug Enforcement Agency (the “DEA”). R. at 1. In August 2011, the DEA suspected that members of the Women’s Snowman Team were using and distributing illegal anabolic steroids. R. at 2. Based on this suspicion, the agency requested that Mr. Riley approach Co-Defendant Lane about purchasing ThunderSnow, a performance-enhancing drug used by athletes. R. at 27–28. On October 1, 2011, November 3, 2011, and December 9, 2011, Mr. Riley unsuccessfully attempted to purchase ThunderSnow from Co-Defendant Lane. R. at 2.

On December 10, 2011, Peter Billings, the coach of the Women’s Snowman Team and longtime boyfriend of Co-Defendant Lane, witnessed the defendants in a dramatic dispute. R. at

3. The argument ended with Co-Defendant Lane yelling, “Stop bragging to everyone about all the money you're making!” R. at 3. Mr. Billings confronted Co-Defendant Lane on December 19, 2011, but she denied any involvement in distributing ThunderSnow. R. at 3. On January 16, 2012, however, Co-Defendant Lane sent an e-mail to Mr. Billings reading:

Peter,

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

Love,
Jessie

R. at 3.

Twelve days after sending this e-mail, on January 28, 2012, numerous Snowman Team Members witnessed “Defendant Zelasko and Hunter Riley engag[ing] in a heated argument.” R. at 3. Only three days after this heated argument, on February 3, 2012, Defendant Zelasko fatally shot Mr. Riley. R. at 3. The fatal shooting occurred on the Snowman Team training ground, which is located in Remsen National Park. R. at 3, 8. Mr. Riley died at the scene and police arrested Defendant Zelasko “shortly thereafter.” R. at 3. Defendant Zelasko admits to shooting Mr. Riley, but is now attempting to escape responsibility by claiming that the shooting was an accident. R. at 8.

On the same day, February 3, 2012, the DEA obtained a search warrant and lawfully searched Defendant Zelasko's residence. R. at 3. The DEA discovered and “seized approximately \$5,000 in cash and two 50 milligram doses of ThunderSnow.” R. at 3. On February 4, 2012, the DEA lawfully searched the Snowman Team's facilities and “recovered 12,500 milligrams of

ThunderSnow – valued at approximately \$50,000 – from the Team's equipment storage room.” R. at 3.

The DEA obtained a search warrant for Co-Defendant Lane's residence on the same day. R. at 4. During this lawful search, “the DEA seized \$10,000 in cash, twenty 50-milligram doses of ThunderSnow, and a laptop from which the abovementioned e-mail was sent.” R. at 4. Based on this substantial evidence, the DEA arrested Co-Defendant Lane. R. at 4.

Procedural History

The government brought five counts against each defendant: (1) Conspiracy to Distribute and Possess With Intent To Distribute Anabolic Steroids; (2) Distribution of and Possession with Intent to Distribute Anabolic Steroids; (3) Simple Possession of Anabolic Steroids; (4) Conspiracy to Murder in the First Degree; and (5) Murder in the First Degree. R. at 4–5.

The United States District Court in the Southern District of Boerum (the “District Court”) first heard this matter when a grand jury issued a True Bill on April 10, 2012. R. at 2. On July 16, 2012, Defendant Zelasko made a pretrial motion to introduce testimony of Miranda Morris, a member of the Canadian Snowman team. R. at 8. Ms. Morris signed an affidavit affirming that her former teammate, Casey Short, sold a different type of anabolic steroid, known as White Lightning, to members of the Canadian Snowman Team. R. at 24–25.

Defendant Zelasko sought to introduce Ms. Morris’ testimony as propensity evidence to help negate her guilt. R. at 11. Specifically, Defendant Zelasko claimed that she did not participate in any conspiracy to distribute illegal anabolic steroids; rather, that it was Co-Defendant Lane and Ms. Short who engaged in the conspiracy. R. at 11. Defendant Zelasko made this contention even though Ms. Morris’ testimony made no connection between Ms. Short, ThunderSnow, and the United States Snowman Team. R. at 24–25.

The government sought to introduce the e-mail exchange between Co-Defendant Lane and Mr. Billings. R. at 3. The District Court granted Defendant Zelasko's motion to admit Ms. Morris' testimony, but denied the government's motion to admit the e-mail exchange. R. at 30. The Fourteenth Circuit Court of Appeals affirmed both of the District Court's decisions. R. at 38, 46. The government has now timely appealed the decision. R. at 55. This Court granted petition for a writ of certiorari on October 1, 2013. R. at 55.

STANDARD OF REVIEW

The standard of review for each of the issues before this Court is de novo. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005) (admittance of Reverse 404(b) evidence is a question of law that is reviewed de novo); *United States v. Lucas*, 357 F.3d 599, 606 (analyzing de novo whether exclusion of Reverse 404(b) evidence violated the defendant's constitutional right to present a complete defense); *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (the question of whether to adhere to stare decision is a question of law, which is reviewed de novo); *United States v. Clark*, 717 F.3d 790, 813 (10th Cir. 2013) (“[W]hether the admission of the non-testifying codefendant's statements/confessions in a joint trial violated the defendant's Sixth Amendment right to confrontation” is reviewed de novo).

SUMMARY OF THE ARGUMENT

In the present case, the lower courts incorrectly held that: (1) Ms. Morris' testimony could be admitted; and (2) Co-Defendant Lane's e-mail to Mr. Billings dated January 16, 2012 could not be admitted. As to Ms. Morris' testimony, the lower courts incorrectly held that (1) Federal Rule of Evidence 404(b) does not bar evidence of a third party's propensity to commit an offense with which the defendant is charged; and (2) under *Chambers v. Mississippi*, Defendant Zelasko's constitutional right to present a complete defense would be violated by exclusion of a third party's propensity to distribute illegal drugs. First, by its plain language, Federal Rule of

Evidence 404(b) applies to any “person”— the rule is not limited to a “defendant.” Congress chose to use this language and any interpretation must align with Congress’ intent. Second, though *Chambers v. Mississippi* acknowledges a defendant’s right to provide a complete defense in limited circumstances, a defendant does not have an “unfettered right” to present witness testimony when that testimony is barred by the Federal Rules of Evidence. Because Ms. Morris’ testimony is barred by the plain language of Federal Rule of Evidence 404(b), precluding Ms. Morris’ testimony does not infringe on Defendant Zelasko’s right to present a complete defense.

As to Co-Defendant Lane’s e-mail to Mr. Billings, both lower courts relied on the plurality’s decision in *Williamson v. United States*, which requires a line-by-line analysis of a self-inculpatory statement and excludes all collateral statements. The *Williamson* approach should be overruled as it relates to providing the standard for applying Federal Rule of Evidence 804(b)(3) because it is ill-reasoned and difficult for lower courts to apply. Instead, this Court should adopt the approach Justice Kennedy outlined in his *Williamson* concurrence, which generally admits collateral statements, because this broader standard is consistent with the policy of Federal Rule of Evidence 804(b)(3) and provides clear guidance for lower courts.

The lower courts also incorrectly held that this Court’s decision in *Crawford v. Washington* did not modify this Court’s decision in *Bruton v. United States*. Based on the *Crawford* Court’s reasoning, Confrontation Clause rights are only implicated when testimonial statements are issue. This Court’s later decisions, and the majority of circuit courts addressing the issue, have made the same determination.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 404(B) BARS EVIDENCE OF A THIRD PERSON'S PROPENSITY TO COMMIT AN OFFENSE WITH WHICH THE DEFENDANT IS CHARGED BASED ON THE PLAIN LANGUAGE OF THE RULE.

Federal Rule of Evidence 404(b)(1) mandates that: "Evidence of a crime, wrong, or other act is not admissible to prove *a person's* character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1) (emphasis added). "Rule 404(b) is a 'specialized but important application of the general rule excluding circumstantial use of character evidence.'" *United States v. McCourt*, 925 F.2d 1229, 1232 n.1 (9th Cir. 1991) (quoting Fed. R. Evid. 404(b) advisory committee's note). This Court has stated that "Federal Rule of Evidence 404(b) . . . generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character." *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

When a defendant introduces evidence that shows a third person has a propensity to commit the crime that the defendant is being charged with, such evidence is called "Reverse 404(b)" evidence. *Lucas*, 357 F.3d at 601. Based on the plain language of Federal Rule of Evidence 404(b), Reverse 404(b) evidence falls within the rule and, therefore, cannot be admitted at trial.

To determine the meaning of a statute, courts must begin with the plain language and reasonably construe its meaning. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989). When the language is clear, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). "As Chief Justice John Marshall wrote in 1820, '[t]he case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did

not suggest.” Jessica Broderick, Comment and Casenote, *Reverse 404(b) Evidence: Exploring Standards When Defendants Want To Introduce Other Bad Acts*, 79 U. Colo. L. Rev. 587, 604 (2008) (quoting *United States v. Wiltberger*, 18 U.S. 76, 96 (1820)).

By its plain language, “Rule 404(b) applies to ‘a person’ and is not limited to the defendant.” *McCourt*, 925 F.2d at 1231. In *McCourt*, the defendant was convicted for allegedly filing false tax returns. *Id.* at 1230. The defendant sought to present evidence that a third party likely committed the crimes. *Id.* The lower court did not allow the defendant to present evidence of the third person’s prior criminal record to support the defendant’s theory. *Id.* at 1231. The defendant appealed the lower court’s decision, arguing that the lower court should have allowed evidence of the third party’s prior bad acts to come in during trial. *Id.*

The Ninth Circuit Court of Appeals agreed with the lower court, holding “Rule 404(b) applies to ‘other crimes, wrongs, or acts’ of third parties.” *Id.* The court reasoned that “the rules on character evidence use explicit language in defining whom they refer.” *Id.* The court noted that Rule 404(a)(1) refers to “a person” in one part, and “an accused” in another, where Federal Rule of Evidence 404(a)(2) refers to a “victim,” and Federal Rule of Evidence 404(a)(3), 607, 608, and 609 refer to a “witness.” *Id.* at 1232. The Ninth Circuit Court of Appeals opined that:

Congress knew how to delineate subsets of “persons” when it wanted to, and that it intended “a person” and “an accused” to have different meanings when the Rules speak of one rather than the other. Because Rule 404(b) plainly proscribes other crimes evidence of “a person,” it cannot reasonably be construed as extending only to “an accused.”

Id.; see also 22 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5239 (1978) (stating “proof of the conduct of a witness, codefendant, or even that of unidentified third persons is prohibited where the evidence is offered to prove their character as a basis for an inference as to their conduct”).

The Sixth Circuit Court of Appeals has applied the same rationale. *See Lucas* 357 F.3d at 601. In *Lucas*, the trial court convicted the defendant of cocaine possession and distribution. *Id.* Police officers found the cocaine after pulling over a rental car that the defendant was driving. *Id.* at 603. A third party used the rental car hours before the police officer stopped the defendant. *Id.* The defendant appealed the decision, arguing in part that the lower court erred by excluding “from trial any mention of the fact that [the third party] . . . had previously been convicted for cocaine trafficking.” *Id.* at 601. The defendant claimed that he unknowingly carried the cocaine in the rental car and theorized that the cocaine actually belonged to the third party. *Id.*

The appellate court rejected the defendant’s argument, holding that Federal Rule of Evidence 404(b) bars evidence of a third party’s propensity to commit an offense with which the defendant is charged. *Id.* at 606. The court reasoned that “prior bad acts are generally not considered proof of *any* person’s likelihood to commit bad acts in the future and that such evidence should demonstrate something more than propensity.” *Id.* (emphasis added). The court expressed its concern that “the defense wants the jury to make the inferential leap that because [the third party] sold drugs before, he is likely to have done so again.” *Id.*

The Ninth and Sixth Circuit Courts of Appeal’s reasoning is persuasive because the courts preserved the plain language of the rule. Federal Rule of Evidence 404(b) expressly states “a person” and does not limit its application to “an accused.” This Court should avoid any temptation to alter the meaning of the rule and should simply enforce Congress’ deliberate choice of words. Therefore, as a matter of law, Federal Rule of Evidence 404(b) bars evidence of a third person’s propensity to commit an offense with which the defendant is charged.

Circuits that have allowed Reverse 404(b) evidence to be admitted during trial reason that the defendant is not at risk of prejudice—the alleged purpose behind Rule 404(b). *See, e.g.,*

United States v. Montelongo, 420 F.3d 1169, 1174 (10th Cir. 2005). However, these circuits inappropriately limit the policy considerations of the rule and do not focus on the problems with propensity evidence generally. *Id.* While undue prejudice to a defendant is one policy consideration, this Court has recognized that the “overriding policy of excluding such evidence . . . [is] that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.” *Old Chief v. United States*, 519 U.S. 172, 181 (1997). Circuits admitting Reverse 404(b) evidence ignore these broader policy concerns.

Therefore, as a matter of law, the plain language of Federal Rule of Evidence 404(b) bars introduction of Reverse 404(b) evidence.

II. DEFENDANT ZELASKO DOES NOT HAVE A CONSTITUTIONAL RIGHT UNDER *CHAMBERS* TO PRESENT TESTIMONY ABOUT THIRD PARTY PROPENSITY EVIDENCE BECAUSE THIS TESTIMONY IS BARRED BY THE FEDERAL RULES OF EVIDENCE.

Although the Fifth and Sixth Amendments to the United States Constitution grant “criminal defendants ‘a meaningful opportunity to present a complete defense,’” such a right is not without limits. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). For example, “the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). To hold otherwise would, in application, make the Federal Rules of Evidence obsolete. *Id.*

A court’s preclusion of Reverse 404(b) evidence does not violate a defendant’s constitutional right to present a complete defense. *Lucas*, 357 F.3d at 606. In *Lucas*, the court did not allow the defendant to introduce evidence of a third party’s propensity to commit the crimes with which the defendant was charged. *Id.* The Sixth Circuit Court of Appeals affirmed the lower court’s ruling and opined that preclusion of Reverse 404(b) evidence did not violate the

defendant's right to present a complete defense. *Id.* The court reasoned that "a complete defense does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." *Id.* The court also noted that the defendant could elicit testimony and present other evidence to support his defense. *Id.*

Reverse 404(b) evidence is barred by the Federal Rules of Evidence. *See supra* Part I. "[T]he accused does not have an unfettered right to offer testimony that is . . . otherwise inadmissible under standard rules of evidence." *Taylor*, 484 U.S. at 410. Here, Defendant Zelasko is attempting to introduce Reverse 404(b) evidence to show a third party's propensity to help cast doubt on her guilt—a tactic forbidden by the Federal Rules of Evidence. Therefore, like the defendant in *Lucas*, Defendant Zelasko's constitutional right to present a complete defense is not violated by the exclusion of Ms. Morris' testimony.

This Court's decision in *Chambers v. Mississippi* does not demand a different result. 410 U.S. 284, 295 (1973). In *Chambers*, a jury convicted the defendant of murdering a police officer. *Id.* at 294. Before the trial began, a third party confessed to killing the police officer, but later repudiated his confession. *Id.* at 287. The State elicited testimony from the third party during trial that supported his repudiation. *Id.* at 293. On procedural grounds, the defendant was "unable either to cross-examine [the third party] or to present witnesses on his own behalf who would have discredited [the third party's] repudiation." *Id.* at 294. This Court held that the defendant's inability to confront the third party about the third party's initial confession violated the defendant's constitutional rights. *Id.* at 295. This Court expressed concern that "constitutional rights directly affecting the ascertainment of guilt [were] implicated." *Id.* at 302.

However, this Court later held that "*Chambers* specifically confined its holding to the facts and circumstances presented in that case." *United States v. Scheffer*, 523 U.S. 303, 315

(1998). In *Scheffer*, this Court unequivocally held that “*Chambers* does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence.” *Id.* at 316.

The preclusion of Ms. Morris’ testimony would not violate Defendant Zelasko’s constitutional rights because, unlike in *Chambers*, her testimony “does not directly affect[] the ascertainment of guilt.” In other words, while the testimony at issue in *Chambers* was considered the “smoking gun,” Ms. Morris’ testimony that another person, in another country, on a completely different Snowman Team, dealt a completely different anabolic steroid does nothing to “directly affect [Defendant Zelasko’s] ascertainment of guilt.” While each person has a right to present witnesses in his or her own defense, this right is not absolute. To hold otherwise would open up the floodgates and allow defendants to introduce irrelevant witness testimony, particularly in conspiracy cases.

Therefore, because Defendant Zelasko does not have an unfettered right to present witness testimony that is otherwise barred by the Federal Rules of Evidence and because Ms. Morris’ testimony does nothing to “directly ascertain guilt,” Defendant Zelasko does not have a constitutional right to present Ms. Morris’ testimony at trial.

III. THIS COURT SHOULD OVERRULE THE WILLIAMSON PLURALITY APPROACH ANALYZING FEDERAL RULE OF EVIDENCE 804(b)(3) AND INSTEAD ADOPT JUSTICE KENNEDY’S APPROACH OUTLINED IN HIS WILLIAMSON CONCURRENCE BECAUSE IT IS WORKABLE AND WELL-REASONED, AS ILLUSTRATED WHEN APPLIED TO CO-DEFENDANT LANE’S E-MAIL IN THIS CASE.

“Hearsay statements are generally inadmissible unless they fall within one of the exceptions to the hearsay rule.” 23 C.J.S. *Criminal Law* § 1776 (2013). Federal Rule of Evidence 804(b)(3) provides a hearsay exception for statements against a defendant’s penal interest. The rule is implicated when the declarant utters a statement that:

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)(A).¹

The penal interest exception is “founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made.” *Chambers*, 410 U.S. at 299. Indeed, “people seldom ‘make statements which are damaging to themselves unless satisfied for good reason that they are true.’” *Williamson v. United States*, 512 U.S. 594, 611 (1994) (Kennedy, J., concurring) (quoting Fed. R. Evid. 804(b)(3) advisory committee’s notes). These reasons ensure a level of trustworthiness that allows the statement, though hearsay, to be admitted as evidence. *Id.*

¹ Under this rule, two other requirements must be met. First, the statement must be “supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.” Fed. R. Evid. 804(b)(3)(B). Second, the declarant must be unavailable. *Id.* Because the DEA seized large amounts of ThunderSnow from Co-Defendant Lane’s residence, the drug allegedly involved in the conspiracy, corroborating circumstances exist that indicate the e-mail’s trustworthiness. It is also undisputed that “Co-Defendant Lane is unavailable within the meaning of 804(a)(1),” a requirement under Federal Rule of Evidence 804(b)(3). R. at 39.

This Court has adopted a narrow application of Federal Rule of Evidence 804(b)(3), as announced by the plurality in *Williamson*. 512 U.S. at 599 (plurality opinion). Under this approach, each sentence in the confession is examined independently, and only self-inculpatory statements are admitted. *Id.* at 604. Related collateral statements are outright banned under the *Williamson* approach.² In regards to precluding collateral statements under Rule 804(b)(3), this Court refused to examine the drafter’s intent found in the Advisory Notes. *Id.* at 602 (stating “the Rule’s text points clearly enough in once direction that it outweighs whatever force the Notes may have”).

This Court should overrule *Williamson*’s narrow standard as it relates to Federal Rule of Evidence 804(b)(3). Petitioner respectfully submits that the approach is unworkable and poorly reasoned. The standard should be broadened. This Court should instead adopt Justice Kennedy’s approach outlined in his *Williamson* concurrence.

A. This Court’s Standard For The Application Of Federal Rule Of Evidence 804(b)(3) Enunciated By The *Williamson* Plurality Should Be Overruled Because The Standard Is Unworkable In Practice And Ill-Reasoned.

Adherence to stare decisis helps “ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.” *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). However, “[s]tare decisis is not an inexorable command . . . and not a mechanical formula of adherence to the latest decision.” *Payne*, 501 U.S. at 827. “Indeed, ‘when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.’” *Holder v. Hall*, 512 U.S. 874, 935 (1994) (quoting *Payne*, 501 U.S. at 827)). This Court has also deviated from stare decisis when “experience has pointed up the precedent’s

² Justice Kennedy provided an example of a collateral statement in his *Williamson* concurrence. 512 U.S. at 611 (Kennedy, J., concurring). He stated that “the declarant may make his statement against interest (such as ‘I shot the bank teller’) together with collateral but related declarations (such as ‘John Doe drove the getaway car’).” These latter statements are collateral statements.

shortcomings.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 363 (2010) (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

This Court should overrule the *Williamson* standard because it is both unworkable and ill-reasoned. First, the standard is unworkable because “the surgical precision called for by *Williamson* is highly artificial and nearly impossible to apply.” *People v. Newton*, 966 P.2d 563, 578 (Colo. 1998). The intent of the *Williamson* standard is to require a line-by-line examination of an entire confession. 512 U.S. at 604. However, in reality, the standard has resulted in haphazard speculation by lower courts.

Since *Williamson*, circuit courts have inconsistently applied Federal of Evidence 804(b)(3). *See United States v. Hajda*, 135 F.3d 439, 444 (7th Cir. 1998); *but cf. United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995). For example, in *Butler*, the Seventh Circuit used a dramatically narrower application of Federal Rule of Evidence 804(b)(3). *Butler*, 71 F.3d at 253. There, the defendant was convicted of various firearm charges stemming from a police raid on a residence. *Id.* at 246. The firearms were found in the living room. *Id.* An unavailable witness admitted to being in the room prior to the raid, but testified that the defendant had never been in the living room. *Id.* at 247. The district court held that the unavailable witness’s statements could not be admitted using the penal interest exception. *Id.* at 247–48. The appellate court agreed, reasoning that “[t]he hearsay exception does not provide that any statement which ‘possibly could’ or ‘maybe might’ lead to criminal liability is admissible.” *Id.* at 253. Instead, the court emphasized that “only statements that ‘so far tend to subject’ the declarant to criminal liability” are admissible under the exception. *Id.*; *see also Ingram v. United States*, 976 A.2d 180, 186 (D.C. Cir. 2009) (holding the same).

Only three years later, the Seventh Circuit applied a liberal standard to Federal Rule of Evidence 804(b)(3), determining that statements suggesting “guilt by association” could be admitted under the rule. *Hajda*, 135 F.3d at 444. In *Hadja*, the government challenged an alleged former Nazi member’s naturalization in the United States. *Id.* at 443–44. The government attempted to introduce a statement made by the alleged former Nazi member’s father made at a Nazi collaboration trial several years earlier. *Id.* The father’s statement was that “My son . . . went to Germany to join the SS.” *Id.* at 443. The appellate court affirmed the lower court’s determination that the statement fell within the penal interest exception, reasoning “[g]iven the danger of guilty by association, it seems to us that a declarant’s statement that his son collaborated with the Nazis is contrary to a father’s interest when made at a Nazi collaboration trial.” *Id.* at 444; *see also United States v. Smalls*, 605 F.3d 765, 786 (10th Cir. 2010) (holding the penal interest exception applies when a declarant’s statement allows for a “possibility, however slight” of criminal liability).

Therefore, just like in *Citizens United*, “experience has pointed up [*Williamson*’s] shortcomings,” as evidenced by the inconsistent application of Federal Rule of Evidence 804(b)(3) by the Seventh Circuit. Specifically, the same court announced that the exception is not implicated when a statement “possibly could” or “maybe might” lead to criminal liability, but it later determined that “guilty by association” is sufficiently against a declarant’s penal interest to implicate the hearsay exception. The Seventh Circuit’s inconsistency illustrates the trend across the circuits, and the approach has proven unworkable. *See, e.g., Smalls*, 605 F.3d at 786 (broad approach adopted by Tenth Circuit); *Ingram*, 976 A.2d at 186 (narrow approach adopted by the District of Columbia Court of Appeals). Therefore, adopting a more workable

approach will lead to the more consistent application of Federal Rule of Evidence 804(b)(3) by the lower courts.

Second, this Court should overrule *Williamson* as it relates to providing the scope for Federal Rule of Evidence 804(b)(3) because the standard is poorly reasoned: the *Williamson* plurality inadequately analyzed collateral statements. *Williamson*, 512 U.S. at 612. To be sure, the language of Rule 804(b)(3) is silent regarding the admissibility of collateral statements under the rule, but the Advisory Committee Notes are not. The Advisory Notes provide that:

[T]he 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 ... *by no means require that all statements implicating another person be excluded from the category of declarations against interest.* Whether a statement is in fact against interest must be determined from the circumstances of each case.

Williamson, 512 U.S. at 601–02 (emphasis added).

As Justice Kennedy correctly pointed out in his concurrence, after citing four Supreme Court cases, “[this Court] ha[s] referred often to those Notes in interpreting the Rules of Evidence.” *Williamson*, 512 U.S. at 614–15 (Kennedy, J., concurring) (citations omitted). The *Williamson* plurality, despite Rule 804(b)(3)’s silence on collateral statements, failed to consider the Advisory Committee Notes’ comments on collateral statements in its reasoning. *Id.* at 612 (plurality opinion). Instead, the *Williamson* plurality stated only: “[T]he Rule’s text points clearly enough in one direction that it outweighs whatever force the Notes may have.” *Id.*

In sum, because the *Williamson* standard is unworkable and ill-reasoned, this Court should overturn the standard as it relates to providing a scope for Rule 804(b)(3). This Court should instead adopt Justice Kennedy’s approach outlined in his concurrence in *Williamson* because it does not suffer the same shortcomings.

B. This Court Should Instead Adopt Justice Kennedy’s Broad Interpretation Of Federal Rule of Evidence 804(b)(3) Because The Standard Is Well-Reasoned, Workable, And Reflects The Rationale Of The Penal Interest Exception.

Justice Kennedy announced a superior method for determining the scope of Federal Rule of Evidence 804(b)(3) in his *Williamson* concurrence. 512 U.S. at 620 (Kennedy, J., concurring). Under Justice Kennedy’s approach, “[a] court first should determine whether the declarant made a statement that contained a fact against penal interest. If so, the court should admit all statements related to the precise statement against penal interests.” *Id.* Justice Kennedy set forth two limits to this broad rule: (1) courts “should exclude a collateral statement that is so self-serving as to render it unreliable;” and (2) “where it is likely that the declarant had a significant motivation to obtain favorable treatment, . . . the entire statement should be inadmissible.” *Id.* Unlike the plurality’s approach, collateral statements may be admissible under Justice Kennedy’s approach. *Id.*

This approach, which does not outright preclude collateral statements, should be applied for three reasons. First, Justice Kennedy’s approach is well-reasoned. Where the plurality relied on the ambiguous text of the rule, Justice Kennedy considered the Advisory Committee’s Notes, the common law, and Congress’s intent in his decision-making. *Id.* at 614. Second, Justice Kennedy’s broad approach is workable. Tasking lower courts with classifying each statement as self-inculpatory, non-self-inculpatory, or self-exculpatory is burdensome and leads to inconsistent results—as evidenced by the Seventh Circuit’s holdings. *See Hajda*, 135 F.3d at 444; *but cf. Butler*, 71 F.3d at 253.

Finally, a broad approach that permits collateral statements is consistent with the rationale of the penal interest exception. Indeed, “[f]rom the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving

fact stated, but also to prove other facts contained in collateral statements connected with the dis-serving statement.” Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 57 (1944). Therefore, Justice Kennedy’s approach should replace the *Williamson* plurality’s approach.

C. Application of Justice Kennedy’s Standard To Co-Defendant Lane’s E-Mail Illustrates The Standard’s Effectiveness And Supports The E-Mail’s Admissibility In Its Entirety.

An application to this case illustrates the effectiveness of Justice Kennedy’s approach. The e-mail at issue reads:

Peter,

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

Love,
Jessie

R. at 3. Under Justice Kennedy’s approach, there must be a self-inculpatory statement in a confession for any part of the confession to be admitted under Federal Rule of Evidence 804(b)(3). This Court, however, may view each statement in the context of other collateral statements. Here, Co-Defendant Lane stated, “I really need your help,” a request to Mr. Billings. R. at 3. This plea for help can only be explained by looking at other statements in the entire e-mail. R. at 3. The next sentence reads, “I know you’ve suspected before about the business my partner and I have been running with the female team.” R. at 3. This statement is self-inculpatory, given the context, because it reasonably suggests that Defendant Lane is admitting to participating in distributing ThunderSnow—the business Mr. Billing confronted her about earlier. R. at 3.

Under Justice Kennedy’s approach, all collateral statements are admissible unless they are self-serving or if Co-Defendant Lane had significant motivation to falsify information to avoid legal trouble. Here, none of the statements are self-serving because none can be reasonably interpreted as being exculpatory. Additionally, because Co-Defendant Lane sent this message before any legal proceedings started to someone who had no authority to reduce future charges, such as a police officer, she did not have significant motivation to fabricate her statements. To be sure, Co-Defendant Lane had no knowledge that Mr. Billings worked as an undercover DEA agent. R. at 3. Therefore, under Justice Kennedy’s approach, the entire e-mail would be admitted in this case.

In sum, this Court should overrule the *Williamson* plurality opinion as it relates to providing the standard for application of Federal Rule of Evidence 804(b)(3) because it is unworkable and not true to the drafter of the rule’s intent. Instead, this Court should adopt Justice Kennedy’s standard for 804(b)(3) enunciated in his *Williamson* concurrence because it is well-reasoned and provides clearer guidance for lower courts, as illustrated by the application of the standard to Co-Defendant Lane’s e-mail in this case.

IV. THE *CRAWFORD* DECISION LIMITED THE *BRUTON* DOCTRINE BY ESTABLISHING THAT ONLY TESTIMONIAL STATEMENTS TRIGGER THE CONFRONTATION CLAUSE, AS ACKNOWLEDGED BY THIS COURT’S LATER PRECEDENT.

The Confrontation Clause of the Sixth Amendment provides that “in all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witness against him.” U.S. Const. amend. VI. The Confrontation Clause is implicated only when there are “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford v. Washington*,

541 U.S. 36, 52 (2004). As this Court stated, the Confrontation Clause “applies to ‘witnesses’ against the accused—in other words, those who bear testimony.” *Id.*

This Court enunciated in *Bruton v. United States* that a nontestifying co-defendant’s statements implicating another co-defendant violate the latter’s rights under the Confrontation Clause. 391 U.S. 123 (1968). The *Bruton* Court was concerned that “the introduction of [the nontestifying co-defendant’s] confession added substantial, perhaps even critical, weight to the Government’s case in a form not subject to cross-examination, since [he] did not take the stand.” *Id.* at 127. The *Bruton* Court neglected to distinguish between testimonial and nontestimonial statements, but this Court later addressed the issue. *See e.g., Crawford*, 541 U.S. at 52.

The *Crawford* doctrine modified the *Bruton* doctrine, requiring testimonial statements before the Confrontation Clause is triggered. *See Crawford*, 541 U.S. at 51. In *Crawford*, the Government attempted to introduce statements made by defendant’s wife that implicated defendant. *Id.* at 39–40. Defendant’s wife was unavailable to testify. *Id.* at 40. This Court declared that “admission of testimonial statements of a witness who did not appear at trial” violated the Confrontation Clause, reasoning that the Confrontation Clause is concerned only “with a specific type of out-of-court statement.” *Id.* at 54. This Court provided the example of “a person who makes a casual remark to an acquaintance” as the type of statement not within the Confrontation Clause’s purview. *Id.* at 51.

Since *Crawford*, this Court has consistently held that the admission of nontestimonial statements cannot violate a defendant’s Sixth Amendment rights, even in light of *Bruton*. *See Davis v. Washington*, 547 U.S. 813, 821 (2006) (stating “[i]t 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”); *Whorton v. Bockting*, 549 U.S.

406, 420 (2007) (“But whatever improvement in reliability *Crawford* produced must be considered together with *Crawford*’s elimination of Confrontation Clause protection against the admission of unreliable out-of court nontestimonial statements.”). This Court has never reached a different result.

Likewise, a majority of circuits that have addressed the issue acknowledge that *Crawford* modified the *Bruton* doctrine and agree that the Confrontation Clause no longer applies to nontestimonial statements. See *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010); *United States v. Berrios*, 676 F.3d 118, 127 (3d Cir. 2012); *United States v. Sutton*, 387 F. App’x 595, 602–03 (6th Cir. 2010); *United States v. Dale*, 614 F.3d 942, 956 (8th Cir. 2010); *Smalls*, 605 F.3d at 768 n.2; *United States v. Underwood*, 446 F.3d 1340, 1347–48 (11th Cir. 2006).

Therefore, based on this Court’s precedent, *Crawford* modified the *Bruton* doctrine and only testimonial statements implicate Confrontation Clause protections provided by the Sixth Amendment. The majority of circuits that have addressed the issue also made this interpretation, illustrating the clarity this Court has provided on the issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court REVERSE the decision of the United States Court of Appeals for the Fourteenth Circuit and hold that: (1) Federal Rule of Evidence 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged; (2) under *Chambers v. Mississippi*, Defendant Zelasko's constitutional right to present a complete defense would not be violated by exclusion of a third party's propensity to distribute illegal drugs; (3) *Williamson v. United States* should be overruled as it relates to providing a scope for Federal Rule of Evidence 804(b)(3) and replaced with Justice Kennedy's approach to the same issue outlined in his concurrence in *Williamson v. United States*; and (4) that this Court's decision in *Crawford v. Washington* modified the *Bruton* doctrine, requiring testimonial statements to implicate a defendant's rights under the Confrontation Clause.

Respectfully Submitted,

Team 27
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