IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term 2014

UNITED STATES OF AMERICA,

Petitioner,

--against--

ANASTASIA ZELASKO,

Respondent.

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

- I. Does the Federal Rule of Evidence 404(b) allow the admission of propensity evidence against a non-party person when the plain language of the rule bars propensity evidence for any "person?"
- II. Does an exclusion of propensity evidence under 404(b) violate a defendant's right to present a complete defense under *Chambers v. Mississippi* when the excluded evidence does no more than suggest someone else could have committed one of the several charges at issue?
- III. Does a statement against penal interest require analyzing the totality of the circumstances where *Williamson v. United States* explained that context of the statement is necessary to determine if a reasonable person would have only made the statement if it were true?
- IV. Does the non-testimonial confession of a non-testifying co-defendant violate the confrontation clause under *Bruton v. United States* when the identity of the co-conspirator in confession is only discernible when compared with several other pieces corroborating evidence?

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STATEMENT OF THE CASE

Statement of Facts

Anastasia Zelasko ("Zelasko") was arrested for murder and possession of a controlled substance. Zelasko, Jessica Lane ("Lane"), and Casey Short ("Short") were teammates on the women's United States Snowman Pentathlon Team ("Snowman Team"). (R. 1,10.)

The Snowman Team competes primarily at the World winter games. (R. 1.) The Pentathlon is a collection of several winter sports including rifle shooting. (R. 2.) Zelasko joined the team about nine months before Short and one year before Lane. (R. 1, 24.) The Snowman Team showed significant improvement in practice times shortly after Lane joined the team. (R. 2.)

The DEA became suspicious of steroid abuse and enlisted Hunter Riley ("Riley"), a member of the men's Snowman Team, as an informant. (R. 1.) At the direction of the DEA, Riley approached Lane over the course of three months attempting to purchase an anabolic steroid known as "ThunderSnow." (R. 2,3.) Lane declined Riley's solicitation every time. (R. 2,3.) Shortly after, Peter Billings ("Billings"), head coach of the Snowman Team and boyfriend of Lane, witnessed Lane and Zelasko in a heated argument that ended with Lane shouting to Zelasko, "Stop bragging to everyone about all the money you're making!" (R. 1,3.) Billings suspected Lane was distributing performance-enhancing drugs to the team and confronted her, but Lane denied the allegations. (R. 3.)

About one month later, Lane confided in Billings via email and said:

"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 what exactly she has in mind yet.

Love, Jessie" (R. 3.)

About two weeks later several members of the Snowman Team witnessed Zelasko and Riley engaged in a heated argument. (R. 3.) Six days later Zelasko shot and killed Riley on the Snowman training grounds within the boundaries of Remsen National Park; Zelasko was arrested shortly after. (R. 3.) The same day, the DEA searched Zelasko's residence and seized two 50-milligram doses of ThunderSnow. The next day the DEA found 12,500 milligrams of ThunderSnow (approximately \$50,000 worth) divided into 250 separately packaged 50-milligram doses in the Snowman Team's equipment storage room. (R. 3,27.) The DEA also found twenty 50-milligram doses of ThunderSnow and \$10,000 cash in Lane's residence. (R. 3.) 250 doses is consistent with selling ThunderSnow and 2 doses is consistent with personal use. (R. 28.)

About four months after Riley was killed, Miranda Morris ("Morris") came forward with testimony concerning Short. (R. 25.) Morris and Short were teammates on the Canadian Snowman Team before Short joined the American team. (R. 24.) Morris stated that two months before Short left the Canadian team, she bought "White Lightning" from Short in Canada. (R. 25.) ThunderSnow was developed by chemically modifying White Lighting, which is also an anabolic steroid. (R. 28.) Morris came forward with her confession because her career recently ended due to injury, preventing her from further competition and a guilty conscious. (R. 10.)

Procedural History

Zelasko and Lane were charged with possession and conspiracy to distribute anabolic steroids under 21 U.S.C. §§ 841(a)(1),(b)(1)(E) and 846; simple possession of anabolic steroids under 21 U.S.C. § 844; murder in the first degree under 18 U.S.C. §§ 371; and conspiracy to murder in the first degree under 18 U.S.C. §§ 1111(a). (R. 4-5.)

The District Court held a hearing on July 16, 2012 to determine the admissibility of Lane's email and Morris' testimony. (R. 6-7.) The government sought to introduce Lane's email to show a conspiracy existed between Lane and Zelasko for both the distribution of ThunderSnow and conspiracy to murder Riley. (R. 11.) Zelasko sought to introduce Morris' testimony to show Short had a propensity to sell performance-enhancing drugs. (R. 10.) The defense claims there is no other way to prove Zelasko was not Lane's co-conspirator. (R. 14.) During the hearing, a number of concessions were made, namely Zelasko conceded the email qualified as a non-testimonial statement. (R. 19-20.) In addition, Lane will not testify at trial. (R. 18.) The District Court excluded the email evidence and allowed Morris' testimony. (R. 21-22.)

The United States brought an interlocutory appeal before the Fourteenth Circuit to rule on both pieces of evidence. (R. 30.) In spite of noting that the plain language of FRE 404(b) suggests Morris's testimony is inadmissible, the Circuit Court affirmed the district court's ruling on this "reverse 404(b)" evidence. (R. 34.) Additionally, the Circuit Court affirmed the district court's ruling on Lane's email. (R. 38.)

The United States petitioned for and was granted *certiorari* by this Court to decide the admissibility of the reverse 404(b) evidence and Lane's email. (R. 55.)

SUMMARY OF THE ARGUMENT

In the present case, both the lower courts erred by allowing Morris's testimony and disallowing Lane's email because: (1) the plain language of Rule 404(b) does not permit propensity evidence; (2) barring Morris's testimony is not the type of evidence that would not deny Zelasko the right to a fair trial; (3) the rule set forth in *Williamson v. U.S.* should be modified to incorporate a totality of the circumstances analysis for statements against penal interests exceptions; and (4) the Confrontation Clause is not violated by allowing non-testimonial confessions of a co-defendant under *Bruton*.

First, the Federal Rules of Evidence are interpreted the same as statutes. The first line of analysis is the plain language of the text. Common law meanings and advisory notes can only clarify the plain text when there is ambiguity or when the plain meaning would lead to an absurd, unconstitutional result. The plain language of 404(b) forbids the jury to engage in propensity reasoning for any *person*. This plain language reading is unambiguous and clearly means that propensity reasoning in unjustified, regardless of criminal prejudice. Rather, reverse 404(b) is nothing more than the clear exception stated in the Rule where evidence of other wrongdoing can be admitted to show intent, identity, motive, etc. Morris's testimony does not show an identifying method of drug distribution or a clear intent to sell drugs in the future, all it allows is for the jury to engage in forbidden and confusing propensity reasoning.

Furthermore, this testimony evidence does not meet the same standard as *Chambers v*.

Miss. Chambers was fact-specific and does not mean a defendant can introduce inadmissible evidence under the guise of a constitutional right. Rather, the constitutional right to a fair trial is violated when barring the evidence is arbitrary or disproportionate the intended purpose. The rule barring propensity reasoning is not arbitrary and serves the important purpose of directing the

jury to evaluate the facts of the case, not shadows of probabilities and assumptions. The evidence would have to be much stronger to be required for a complete defense. Typically, the kind of evidence required for a fair trial is a direct confession from the actual perpetrator or the only witness to the crime. The evidence is this case at best introduces another suspect, but does not clearly exonerate Zelasko.

Second, the proper test for evaluating a statement against penal interest is a totality of the circumstances. The *Williamson* rule is best applied when statements are viewed within context, both the textual construction and the situation in which they were made. The rule is always a question of whether a reasonable person would only make the statement if it were true. A reasonable person does not make whole statements out of context, so isolating parts of a statement misses the context the reasonable person intended to be included in the statement. Lane sent the email to her boyfriend in the context of having been confronted about dealing drugs to the team. Over the course of several sentences, she confided in him she was involved in the illegal business, had a partner, and intended to act in the future. Isolating any single sentence would miss the context of the situation, Lane would not have exposed her illicit business to her coach, risking penalty unless it was true.

Finally, a non-testimonial statement of a co-defendant does not violate the Confrontation Clause. *Crawford* indicated that disqualifying non-testimonial statements from Confrontation Clause analysis is consistent with constitutional rights. However, even under a *Bruton* analysis, Lane's confession does not violate the Confrontation Clause. *Bruton* and its progeny have disallowed confessions by non-testifying co-defendants, but carved out important exceptions. When the confession only inferentially implicates the other defendant when linked with corroborating evidence, the confession is admissible without cross-examination. Lane's email

only refers to Zelasko as her "partner," nowhere in the email does she give other identifying information. A jury could only link Zelasko to the conspiracy through the other corroborating evidence, such as the argument between Zelasko and Lane, the drug possession, and ultimately Riley's death. The lack of direct implication in Lane's email allows this evidence to be admissible without violating Confrontation.

ARGUMENT

I. PLAIN LANGUAGE GOVERNS THE FEDERAL RULES OF EVIDENCE, AND REVERSE 404(B) EVIDENCE IS NOT ADMISSIBLE WHEN FOLLOWING THE PLAIN LANGUAGE OF THE RULE.

"It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language."

United States, v. Apfelbaum, 445 U.S. 115, 121 (1980). The first maxim of statutory interpretation is that a statute's facial language is conclusive. Prisco v. Talty, 993 F.2d 21, 24 (3rd Circuit 1993). Even from the earliest cases, the Court has held that the 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. United States v. Wiltberger, 18 U.S. 76, 96 (1820). The Federal Rules of Evidence are a legislative enactment and therefore are interpreted as any other statute, by beginning with the plain language. See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) and Daubert, v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 586 (1993). The Court's role is to acknowledge that Congress enacted the words, and the Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases. United States v. Salerno, 505 U.S. 317, 321 (1992). A plain reading of the Federal Rules of Evidence does not allow reverse 404(b) evidence. The standard of review

for legal questions of statutory interpretation is de novo. *United States v. McCourt*, 925 F.2d 1229, 1231 (9th Cir. 1991).

The Federal Rules of Evidence are governed by their plain language. *Huddleston*, v. U.S., 485 U.S. 681, 685-687 (1988). In *Huddleston v. U.S.*, the defendant was charged with selling stolen videocassette tapes. *Id.* at 682. The prosecution introduced evidence of the defendant's prior history of selling stolen goods from the same source to show that the defendant knew the tapes were stolen. Id. at 683-684. The defendant argued that the evidence of his past acts should not be admitted without a showing by a preponderance of the evidence that the goods were in fact stolen. *Id.* at 686. The Court rejected defendant's argument of having a preponderance of the evidence requirement because there was no such requirement in the plain language of Rule 404(b). *Id.* at 687. The Court further stated that 404(b), "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge ... The actor in the instant case was a criminal defendant, and the act in question was 'similar' to the one with which he was charged. Our use of these terms is not meant to suggest that our analysis is limited to such circumstances." *Id.* at 685. The plain language of the 404b does not include a preponderance of the evidence standard, so it would have been improper for the court to read one into the Rule. Instead, the court found the evidence fit into the "knowledge exception" of rule 404(b). *Id.* at 686. The Court also suggests the plain language of the rule does not limit 404(b) to just defendants by pointing out that although this situation involved a criminal defendant they are in no way limiting their analysis to these circumstances. *Id.* at 685. *See also Agushi*, v. *Duerr*, 196 F.3d 754 (7th Cir. 1999)(reasoning even though Huddleston involved a situation in which the

defendant was the actor, the court strongly suggested that Rule 404(b) should be applied to any actor.)

By its plain language Rule 404(b) mandates that prior bad acts are not proof of any person's likelihood to commit bad acts in the future. United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004). In *U.S. v. Lucas*, the defendant, while on vacation, lent her rental car to an acquaintance. Id. at 602. The acquaintance borrowed the car for five hours. Id. After he returned, the defendant left with her car and drove off to pick up a friend. *Id.* at 603. While pulled over for speeding, cocaine was discovered in her car. *Id.* In her defense, defendant tried to show evidence that her acquaintance, to whom she lent the car, had a prior conviction of cocaine possession and therefore was more likely to have placed the cocaine in the car. *Id.* The court pointed out this type of evidence is not admissible according to the plain language of Rule 404(b). The rule explicitly bars propensity evidence against any person, not just defendants. *Id.* at 605. In addition, the defendant argued that there was no risk of prejudice to the third party because he was not the one on trial. *Id.* The policy behind 404(b) was to prevent unfair prejudice to criminal defendants. *Id.* The court, however, pointed to the Advisory Committee Notes following Rule 401, explaining that rules such as 404 are meant to prohibit certain types of evidence that would normally be considered relevant, but the resulting prejudice and confusion would outweigh the probative value. Id. The court reasoned a prior conviction of cocaine possession cannon be used for propensity reasoning, but could fall into the 404b exception for demonstrating intent. Id. at 606. However, "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. at 605-606. See also United States v.

Williams, 458 F.3d 312, 314 (3rd Cir. 2006)(holding Rule 404(b)'s proscription against propensity evidence applies regardless of by whom, and against whom, it is offered.)

Reading the plain language of rule 404(b) to exclude reverse 404(b) evidence is in line with the other Federal Rules of Evidence. McCourt, 925 F.2d 1229. In U.S. v. McCourt, the defendant was convicted of filing false tax return claims with the government. Id. at 1230. The false tax claims were all returned to the defendant's home. Id. In his defense, the defendant claimed the returns were meant for the previous owner of the home. Id. The defense tried to introduce evidence that the pervious homeowner was a convicted felon and therefore a more likely to have filed the false tax claims. *Id.* at 1231. It was disputed whether or not 404(b) would bar such evidence from being presented. *Id.* The court started by looking at the plain language of the rule and stating that, "on its face, Rule 404(b) applies to 'a person' and is not limited to the defendant. Id. The court then explained how this plain language fits in with the structure of the rest of the rules because, on the whole, the Rules use explicit language to define to whom they are referring. *Id.* at 1231-1232. For example: Rule 404(a) says evidence of a "person's" character is not allowed unless to show pertinent traits of an "accused"; Rule 404(a)(1) refers to a "victim;" and Rules 404(a)(3), 607, 608, and 609, all discuss a "witness." Id. "It therefore appears 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." *Id.* at 1232. Because Rule 404(b) plainly proscribes other crimes evidence of 'a person,' it cannot reasonably be construed as extending only to 'an accused.' *Id.* This plain language reading of Rule 404(b) is consistent with the scheme of the Rules. *Id.*

The old common law evidence rules do not overcome the current plain meaning of the Federal Rules of Evidence. *Bourjaily v. U.S.*, 483 U.S. 171, 177 (1987). In *Bourjaily v. U.S.*, the

defendant was recorded on a telephone call negotiating a cocaine deal with an FBI informant. Id. at 173-174. Defendant was charged with possession and intent to distribute the cocaine and his statements to the informant were used to show he was involved in a conspiracy. *Id.* at 174. Because defendant's statements were then made in furtherance of a conspiracy they were not considered hearsay. Id. Defendant contended that his hearsay statements could not be used to prove there was a conspiracy in order to have the statements themselves brought in, but that there needed to be independent evidence of a conspiracy. Id. at 177. Defendant cited two cases that did not permit hearsay statements to be used as evidence like this because the followed an old rule known as the "bootstrapping rule." Id. However, the cases defendant cited were decided before the Federal Rules of Evidence were implemented and by the face of the new language in the rules, the cases defendant cited no longer applied. *Id.* Defendant claims that Congress gave no evidence of getting rid of the old rule, but the court reasoned "it would be extraordinary to require legislative history to confirm the plain meaning of Rule 104." *Id.* The court held that the rule was sufficiently clear and because of this the old rule that defendant was arguing did not apply. *Id. See also* Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb.L.Rev. 908, 915 (1978) (footnote omitted)(In principle, under the Federal Rules no common law of evidence remains. 'All relevant evidence is admissible, except as otherwise provided....' In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.)

The plain meaning of a Rule may be informed by the common law meaning when the plain meaning is ambiguous. In *Tome v. U.S.*, this Court clarified the hearsay exception for a prior consistent statement. *Tome v. U.S.*, 513 U.S. 150, 157 (1995). *Rule 801* stated that a prior consistent statement "offered to rebut an express or implied charge against the declarant of recent

fabrication or improper influence or motive" was admissible, only if the statement was made prior to the alleged fabrication. *Id.* at 156-57. This Court used the common law understanding to resolve the ambiguity in what it meant to "rebut an express or implied charge." *Id.* at 160. Furthermore, this Court reasoned that the prior consistent statements would have "no relevancy to refute the charge unless the consistent statement was made before the source of bias..." *Id.* at 156. While this Court used common law understanding and Advisory Notes to resolve the ambiguities in the language, the Court noted that they provide only persuasive authority to resolving substantial questions or Rule interpretation while,"[i]t is the words of the Rules that have been authoritatively adopted..." *Id.* at 167-68 (Scalia, J. concurring). *See* also *Green v. Bock Laundry Machine Company*, 490 U.S. 504, 508 (1989)(Task of the court is not to fashion a rule that they find desirable, but to identify the rule congress made and begin with the text. If the text is ambiguous then the court can look to legislative history for guidance) *and United States v. Green*, 967 F.2d 459, 461 (10th Cir. 1992)(To interpret any statute, we must begin with the plain language of the statute itself. If the terms of the statute are unambiguous, our inquiry ends.)

By following the rules of statutory interpretation and the plain language of Rule 404(b), evidence of Casey Short's prior history with drugs cannot be admitted. Just as in *Huddleston* where the court did not allow a standard to be added that was not in the plain language, the idea of reverse Rule 404(b) should not be added because it is not in the language of the statute. *Huddleston* seems, in fact, to go contrary to the idea of reverse 404(b) by stating that the analysis done in their case applies to *any actor* and not just criminal defendants. In this case, Short would fall into the "any actor" category and so, evidence of her past crimes should not be allowed.

Prior alleged acts committed by Short are not in anyway evidence that she will commit a crime in the future. Just as in *Lucas* where the court didn't allow propensity evidence of a third

party because past acts are not evidence of future actions, the accusation that Short sold drugs in the past in no way shows she would again sell drugs. If the accusations that Short sold drugs are true, those actions took place in a different country, with different people, and involved a different drug. Those acts in no way predict her future, which is exactly why the plain language of 404(b) bars introduction of propensity evidence for any actor.

Not allowing propensity evidence against Short is in line with the other Federal Rules of Evidence. Just as in *McCourt*, where, under the plain language, the court held that propensity was barred even against third parties because those individuals are 'persons' as the language states, Short is also a 'person' and so is protected by the rule against introduction of propensity evidence. Even though Short is not actually a party in this trial, *McCourt* points out that this line of reasoning fits with the other rules of evidence that point out specific persons or types of individuals they are targeted against such as 'accused,' 'victim,' or 'witness.' Congress knew what it was doing when it picked those words and so Congress knew that it would be barring propensity evidence against people such as Short.

The old common law concerning propensity evidence does not overcome or take the place of the current plain reading of the Federal Rules of Evidence. Just as in *Bourjaily* where the court rejected an old evidence rule used before the Federal Rules of Evidence because the new rule was clear, this Court should not allow old common law to supersede Short's rights under the clear reading of Rule 404(b). A clear reading of the language of Rule 404(b) would not allow Zelasko to introduce reverse 404(b) evidence by way of Morris's testimony.

Rule 404(b) is not ambiguous and therefore does not need any guidance from the old common law to be interpreted. Unlike in *Tome*, where the Federal Rule was ambiguous in that it was uncertain what kind of prior statements were referred to by the rule, in the current case Rule

404(b) is not ambiguous. Rule 404(b) makes it clear that it blocks all propensity evidence against any "person." It was also admitted by the lower court that on its face Rule 404(b) appears to block all propensity evidence. As Short is a "person" and the language of 404(b) unambiguously states that propensity evidence is inadmissible against any "person," the introduction of Morris's testimony is violative of Rule 404(b).

There are some courts that have decided, despite the clear language of Rule 404(b), to allow in propensity evidence. In U.S. v. Montelongo, two defendants were driving a semi-truck, owned by their employer, when they were pulled over at a police checkpoint. *United States v*. Montelongo, 420 F.3d 1169, 1171 (10th Cir. 2005). The officers became suspicious of the defendants' behavior and asked for permission to search the vehicle, and defendants consented. *Id.* at 1172. During the search, the officers discovered a large amount of marijuana hidden in the semi-truck. Id. In an attempt to show that it was their employer who was responsible for the drugs being in the truck, defendants offered evidence that a very similar incident occurred with another of their employer's trucks and two different drivers. *Id. Montelongo* allowed propensity reasoning without a proper foundation for its conclusion. *Montelongo* based much of its reasoning on two cases, Stevens, and Agushi, both of which come out against allowing reverse 404(b) evidence being admitted. *United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991). Since Stevens was found to be somewhat confusing, the Third Circuit in Williams affirmed that it was not allowing Reverse 404(b) evidence. *United States v. Williams*, 458 F.3d 312, 314 (3rd Cir. 2006).

II. UNDER CHAMBERS V. MISSISSIPPI, THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A COMPLETE IS NOT VIOLATED BY EXCLUDING PROPENSITY EVIDENCE OF A THIRD PARTY

This Court should reverse the lower court's decision that, under *Chambers v. Mississippi*, the defendant be allowed to bypass the Federal Rules of Evidence by introducing propensity evidence. "State and federal rulemakers…have broad latitude under the Constitution to establish rules excluding evidence. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve." *United States v. Scheffer*, 523 U.S. 303, 303 (1998).

Rules of evidence do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or disproportionate to the purposes they were meant to serve. *Id.* In *United* States v. Scheffer, the defendant, a U.S. airman, was required to submit to a drug test and a polygraph test. *Id.* at 305-306. The airman's polygraph test came back with results that he was honest about not taking drugs, but afterwards his mandatory drug test came back positive for drug use. *Id.* at 306. The airman tried to introduce the results of the polygraph as evidence that he had not knowingly taken the drugs. *Id.* The polygraph test was found to be non-admissible according to Military Rule of Evidence 707, which does not allow polygraph tests used as evidence. Id. The airman contended that this violated his constitutional right to present a complete defense. Id. at 307. The airman based his argument on three Supreme Court cases, one of which being Chambers v. Mississippi, where in the court had found barring evidence in the situation necessary for a defense was unconstitutional. *Id.* at 316. The court held that "a defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions..." and the defendant's interest in presenting such evidence must "bow to accommodate other legitimate interests in the criminal trial process." Id. at 308. The court found

the legitimate interests the rule served were to ensure only reliable evidence is introduced, and to preserve the court's role in determining credibility. *Id.* at 306. In *Scheffer*, significant evidence demonstrated the unreliability of polygraphs, which is why the evidence was not allowed in. *Id.* In addition, The court held that *Chambers* and the other cases did not apply because in those cases excluding the evidence presented had "undermined fundamental elements of the defendant's defense," whereas that was not so in the present case. *Id.* at 315. The court also concluded by pointing out that *Chambers* confined its holding to the 'facts and circumstances' presented in that case." *Id.* at 316.

"A complete defense does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence. *Lucas*, 357 F.3d 599, 606. Again, the defendant in *Lucas* was convicted of possessing cocaine. *Id.* at 603. She lent her car to an acquaintance for several hours. *Id.* at 602. The defendant tried to introduce evidence that the acquaintance had previous convictions of possessing cocaine, but the court held that this evidence was barred by Rule 404(b) of The Federal Rules of Evidence. *Id.* at 605-606. The defendant argued that this denied her the right to present a complete defense. *Id.* at 604. Barring inadmissible propensity evidence did not disable the defendant from presenting a defense, rather the court stated that the defendant was able to present her defense through different avenues. *Id.* at 606. Therefore not allowing reverse 404(b) evidence was held by that court to not be unconstitutional. *See also Taylor v. Illinois*, 484 U.S. 400, 410 (1988)(The accused does not have an unfettered right to offer testimony that is ... otherwise inadmissible under standard rules of evidence).

"Chambers v. Mississippi, was an exercise in highly case-specific error correction," and was not establishing any new principles of constitutional law. See Chambers v. Mississippi, 410

U.S. 284, 302 (1973) and Montana v. Egelhoff, 518 U.S. 52 (1996). In Chambers, the defendant was convicted of shooting and killing a police officer. Chambers, 410, U.S. 284, 285. A few months later another man came forward and confessed to shooting the police officer, although he later repudiated his sworn confession. Id. at 287-288. The defendant was denied the opportunity to call the man who had confessed to the stand or any of the men who could testify with regards to the man who had confessed to the crime. *Id.* at 295-296. This was because of an old Mississippi evidence rule, known as the "voucher rule" that did not allow a party to impeach its own witness. Id. This effectively denied the defendant the chance to cross-examine witnesses and to call witnesses in his own behalf, which has long been recognized as essential to due process. Id. at 294. This Court found that the evidence rule had denied the defendant's right to a complete defense and held that he should be allowed to carry out his defense. However, this Court explicitly stated that *Chambers* was an exercise in very fact specific error correction. The right to present a complete defense does not allow defendant to bypass well-established and important rules of evidence. See also Michigan v. Lucas, 500 U.S. 145, 149 (1991)(Defendant's right to present relevant testimony may 'bow to accommodate other legitimate interests in the criminal trial process.")

Rule 404(b) does not abridge an individual's constitutional rights because it is not 'arbitrary' and it is not disproportionate to the purpose it was meant to serve. Just as in *Scheffer* where the evidence rule was used to bar evidence that was found to be unreliable, Rule 404(b) bar propensity evidence for any party because past actions are not proof of any future actions and should not be used as evidence to persuade otherwise. Just because Short possibly sold drugs one time before in no way is evidence that she is selling drugs again. The court in *Lucas* also points

out that rule 404 is meant to prevent prejudice and confusion that would outweigh the probative value of any evidence introduced.

Lucas builds on Scheffer's foundation by showing just that because Zelasko could not present the evidence she wanted, it was not a violation of her constitutional rights. Rule 404(b) protects against propensity evidence and possibly confusing the jury. Even though there was no threat of prejudice, the jury might still infer that Short committed the crime because she had been accused of dealing drugs before. It creates the undesirable result that Zelasko may escape prosecution by alleging that Short might have once committed a crime in a different country, with different people, and selling a different drug. Refusing to admit evidence such as this is not arbitrary and does serve the purposes Rule 404.

The type of evidence barred in *Chambers* and the evidence barred in the current case are both very different. In *Chambers*, evidence of another person confessing to the crime for which the defendant was being tried was barred. The defendant had evidence of that confession and other witnesses who could testify of the confession. In the current case, all Zelansko has is that Short might have once sold a different type of drug to different people in a different country. That evidence is nowhere near the level of an express confession barred in *Chambers*. *Chambers* also confined its holding to its specific facts, which means that it does not provide support under such a different situation for Zelansko's defense.

Under the plain language of Rule 404(b) of the Federal Rules of Evidence and the rules of the cases cited herein, propensity evidence applies to every person and not just defendants.

Zelasko's claim of being denied a complete defense does not carry much weight when compared to *Chambers*. Examining the differences in the evidence presented with the understanding that in

some situations the Federal Rules of Evidence do not permit relevant evidence to be admitted, not allowing Morris to testify is not a violation of Zelasko's constitutional rights.

III. THE APPLIED RULE FROM WILLIAMSON V. UNITED STATES SHOULD BE MODIFIED TO ADOPT A TOTALITY OF THE CIRCUMSTANCES ANALYSIS BECAUSE IT MORE CLOSELY HARMONIZES WITH THE ORIGINAL CONCERNS AND RULING OF THIS COURT.

Accomplices' confessions inculpating a criminal defendant are not within a firmly rooted exception to the hearsay rule as defined in our Confrontation Clause jurisprudence. Lilly v. Virginia, 527 US 116, 134 (1999). In general, where one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination. Lee v. Illinois, 476 U.S. 530, 541 (1986). However, when the declarant is unavailable to testify at trial, Rule 804(b)(3) provides for the admissibility of "[a] statement that [] a reasonable person would have made only if the person believed it to be true because, when made, it was . . . contrary to the declarant's propriety or pecuniary interest or ... expose[d] the declarant to ... criminal liability" or a "self-inculpatory statement." Fed. R. Evid. 804(b)(3)(A). Lane's email to Billings embodies the substance of self-inculpatory." "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Fed. R. Evid. 804 advisory committee's notes. In the email, Lane is affirming to her boyfriend that she is involved with a partner in illegal drug trafficking and perhaps, even conspiracy to murder. As Justice Holmes cogently recognized, "no other statement is so much against interest as a confession of murder." United States v. Smalls, 605 F.3d 765, 782 (10th Cir. 2010) (quoting Donnelly v. United States, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting)). Voluntarily verifying her participation in a partnership that would expose her criminal liability for drug trafficking and eventually murder can only be seen as self-inculpatory. While each dissected piece of the statement may not be self-inculpatory, the circumstances surrounding the email give it a self-inculpatory nature. The self-inculpatory nature of a statement can only be determined by viewing the statement in context. *United States v. Jordan*, 509 F.3d 191, 202 (4th Cir. 2007).

Since self-inculpatory statements are likely to be accompanied by statements that are not entirely self-inculpatory and would otherwise be inadmissible hearsay, the Court, in *Williamson*, instructed that "statement" should be defined narrowly. *Williamson v. United States*, 512 U.S.594, 599 (1994). But the Court conceded "confessions of . . . accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." *Id.* at 603. The analysis imposed on the lower courts then is how to balance the overall nature of the statement as an attempt to shift blame against a narrow definition of "self-inculpatory."

The *Williamson* majority addressed the difficulty by stating that the question under Rule 804(b)(3) is *always* whether the statement was "sufficiently" against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true and this question can only be answered in light of all the surrounding circumstances. *Id.* at 603-04. Thus, whether a statement is self-inculpatory or not can only be determined by viewing both the contextual wording of the statement itself and the circumstances under which it was made. *Id.* at 603-04. Justice O'Connor, writing for the majority in *Williamson*, illustrated the appropriateness of a "totality of the circumstances" test through a hypothetical. *Id.* at 603. In her hypothetical, she offered the sentence "Sam and I went to Joe's House." *Id.* at 603. The statement alone may not be self-inculpatory unless a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the

declarant in Joe and Sam's conspiracy. *Id.* at 603. Thus, the majority in *Williamson* arguably recognized that the statement of the declarant is exhibited in the context of the sentence not in the literal wording. Also, Justice Scalia, in his concurrence, noted that "even statements that are on their face neutral may actually be against the declarant's interest." *Id.* at 606 (Scalia, J., *concurrence*). Statements that give the police significant details about the crime may also, depending on the *circumstances*, be against the declarant's interest even though the declarant has not confessed to any element of a crime. *Id.* at 603 and 606 (Scalia, J. *concurring*)(emphasis added). Although the majority held that "statement" must be narrowly defined, the majority also recognized that defining "self-inculpatory" in each case can be a fact-intensive inquiry which would require careful examination of *all* the circumstances surrounding the criminal activity involved. *Id.* at 604 (emphasis added). Therefore, even under the narrow definition of the majority, a sterile parsing of individual sentences within the statement is inappropriate. The most appropriate test for determining "self-inculpatory" nature of each statement is totality of the circumstances.

The 1st Circuit Court, in *Monserrate-Valentin*, rejected the argument that *Williamson* created a per se bar to admission of any statement against interest that also incriminate other persons. *United States v. Monserrate-Valentin*, 729 F.3d 31, 49-50 (1st Cir. 2013). The statement at issue in *Monserrate-Valentin* "by its very nature" did not reflect that it was made with the intent to shift the blame to the other co-conspirators. *Id.* at 50. The "nature" of the statement was to merely describe what the declarant and the other unnamed co-conspirators had done with their ill-gotten proceeds. *Id.* at 50. The statement did not lend itself to improper inferences or speculation, but demonstrated the declarant's "insider's knowledge" as to the activities of the conspiracy. *Id.* at 51 and 55. While each part of the statement did not expose the defendant to

criminal liability, the circumstances surrounding the statement signified that he was directly involved in the conspiracy. *Id.* at 55. Further, the statements were made in an "unofficial, non-coercive atmosphere, between defendant and an acquaintance whom the defendant considered an ally. *Id.* at 58. The declarant had no reason to shift blame or curry favor with the authorities while making the statement. *Id.* In the language "by its very nature," the court conveyed that in its *Williamson* analysis it had weighed and balanced all of the circumstances surrounding the statement. Essentially, the court stated that as a practical matter, it considered the totality of the circumstances in determining whether a statement is self-inculpatory.

Under the circumstances, Lane's email to Billings is self-inculpatory. As stated by the majority in Williamson, the question under Rule 804(b)(3) is always whether the email to Billings was "sufficiently" against Lane's penal interest that a reasonable person in Lane's position would not have written the email unless believing it to be true. This question can only be answered in light of all the surrounding circumstances. Billings is not a judicial authority nor does he possess the power to offer Lane leniency under the law. Therefore, the email cannot reasonably be categorized as an attempt to curry favor with the authorities or shift blame. Lane wrote the email in response to a confrontation with Billings where Billings informed her of his suspicion that she was involved in illegal activity. Lane's email is analogous in "nature" to the confession in Monserrate-Valentin. Like the confession in Monserrate-Valentin, where the nature of the confession was not to shift blame but merely to describe the events and show an insider's knowledge, Lane's email affirmed Billings suspicion and showed Lane's insider knowledge. Lane did not expressly confess to any elements of a crime making the email similar to Justice O'Connor's hypothetical in Williamson. Each sentence may not be independently selfinculpatory, but a reasonable person would know that, following her confrontation with Billings, the email would link Lane to the drug trafficking. Her choice of words within the email further linked her to her partner's actions. She used phrases such as "we need to figure out how to keep him quiet" and "I don't know what she has in mind yet." Both phrases indicate that she has insider knowledge or is privy to the plans of her partner. Under the circumstances, the nature of the email was sufficiently against Lane's penal interest that a reasonable person would not have written the email unless she believed it to be true. Using a totality of the circumstances test, Lane's email is self-inculpatory.

IV. THE NON-TESTIMONIAL STATEMENT OF A NON-TESTIFYING CO-DEFENDANT IMPLICATING THE DEFENDANT DOES NOT VIOLATE THE CONFRONTATION CLAUSE UNDER BRUTON V. UNITED STATES BECAUSE THE CONFESSION ONLY INFERENTIALLY IMPLICATES THE CO-DEFENDENT AFTER EXAMINING THE COROBORATING EVIDENCE.

The Sixth Amendment's Confrontation Clause provides that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Supreme Court has long guarded this bedrock procedural guarantee as it applies to both federal and state prosecutions. Crawford v. Washington, 541 U.S. 36, 42 (2004). In Bruton v. United States, the Court held that a defendant is deprived of his rights under the Confrontation Clause when his non-testifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial. Bruton v. United States, 391 U.S. 123, 138 (1968). In deciding whether Bruton's protective rule applies to Zelasko with regard to the confession made by co-defendant Lane in an email to her boyfriend, it is necessary to consider Bruton in light of two later Supreme Court cases that helped define Bruton – Richardson v. Marsh, 481 U.S. 200 (1987) and Gray v. Maryland, 523 U.S. 185 (1998) – in connection with Crawford v. Washington. Review of a lower court's Confrontation Clause analysis is de novo. United States v. Saget, 377 F.3d 223, 230 (2004).

Generally, it is constitutionally inadmissible to introduce a co-defendant's confession against a defendant if the co-defendant is not testifying. Bruton v. United States, 391 U.S. 123, 138 (1968). In *Bruton*, at a joint trial, where the co-defendant did not testify, the government introduced the co-defendant's oral confession, which stated that both defendant's committed the robbery. *Id.* at 124-26. The trial judge instructed the jury that although the oral confession was admissible against the co-defendant, it was inadmissible hearsay against the defendant and had to be disregarded in determining the defendant's guilt or innocence. *Id.* at 124-26. On appeal, the Supreme Court held that, despite the limiting instruction, the introduction of co-defendant's confession at a joint-trial, violated the Sixth Amendment. Id. at 137. The co-defendant's confession was a "powerfully incriminating" statement against defendant. Id. at 136. Had the codefendant taken the stand and allowed the defendant to cross-examine, the jury could have weighed the co-defendant's testimony carefully given the recognized motivation to shift blame to others. Id. at 136. A defendant may be prejudiced by the admission of a statement or confession made by a co-defendant. *Id.* at 132. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Id. at 132. However, the Court recognized circumstances where a limiting instruction would adequately protect defendant from the prejudicial effects of the introduction at a joint-trial of evidence of a co-defendant's confession. *Id.* at 135.

Admitting a co-defendant's confession that is only "inferentially incriminating" when linked with other evidence does not violate a defendant's *Sixth Amendment* rights. *Richardson*, 481 U.S. at 208. In *Richardson*, the Court considered a redacted confession under the rule set out in *Bruton*. *Id.* at 203. The court noted that the confession in *Richardson* differed substantially from the inadmissible confession in *Bruton*. *Id.* at 208. The confession in *Bruton* "expressly

implicated" the co-defendant and there was not the slightest doubt that it would prove "powerfully incriminating." *Id.* at 208. Specific testimony stating, "the defendant helped me commit the crime" is more vivid and prejudicial than inferential incrimination. *Id.* at 208. The confession in *Richardson* had been redacted to remove all reference to the co-defendant. *Id.* at 203. The confession was not incriminating on its face, but only "evidence requiring linkage" meaning that it "became" incriminating in respect to the defendant "only when linked with evidence introduced later at trial." *Id.* at 208-09. The Court held that if the *Bruton* rule were extended to confessions that were incriminating by connection, "not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of a trial." *Id.* at 209. The admissibility of any inferentially incriminating confession could be altered later by admission of evidence linking the defendant to information in the confession. *Id.* at 209. The only feasible alternatives would be to never allow joint trial or forgo the use of codefendant confession. *Id.* at 210. That price is too high. *Id.* at 210. Confessions "are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. Id. at 210 (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)). The calculus changes when the confession does not name the defendant. Id. at 211. The Court allowed an exception to the *Bruton* rule for confessions that are only inferentially incriminating.

The holding in *Gray* further clarified the role of redacted confession under the *Bruton* rule. In *Richardson*, although the Court held that the redacted confession was admissible, it included "no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211, n. 5. The confession at issue in *Gray* directly implicated the non-confessing defendants, but the prosecution removed the names and replaced them with blanks or the word "deleted." *Gray*, 523 U.S. at 192. Thus, the confession still referred

to the "existence" of the non-confessing defendants. *Id.* at 192. The police detective that read the confession into evidence spoke the word "deleted" or "deletion" whenever the non-confessing defedants' names appeared. *Id.* at 188. Immediately after the police detective read the redacted confession into evidence, the prosecutor asked, "after he gave you that information, you subsequently were able to arrest [non-confessing defendant]; is that correct?" *Id.* at 188-89. The detective confirmed. *Id.* at 189. The actions of the prosecutor and the detective created a "powerfully incriminating" effect connecting the non-confessing defendants with the "blanks" or the work "delete" in the confession. *Id.* at 194-95. Even under the exception allowed in *Richardson*, the redacted confession with the blanks prominent in its presentation was "facially incriminated" the non-confessing defendants. *Id.* at 196. However, the Court allowed that, although the follow-up question asked by the prosecution eliminated all doubt in this case, the reference might not be transparent in other cases. *Id.* at 194-95. The inferentially incriminating exception under *Richardson* depends in significant part upon the *kind of*, not simple *fact of*, inference. *Id.* at 196 (emphasis original).

Not all hearsay implicates the *Sixth Amendment*. *Crawford*, 541 U.S. at 51. The text of the *Sixth Amendment's Confrontation Clause* applies to "witnesses" against the accused or those who bear "testimony." *Id.* at 51. "Testimony" is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). 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. *Id.* at 51. Thus, in *Crawford*, the Court divided "out of court statements" into two categories: testimonial and non-testimonial. *Id.* at 51-53. The Court stated that testimonial hearsay is the "primary" concern of the *Confrontation Clause*. *Id.* at 53. Where

non-testimonial hearsay is at issue, it is wholly consistent with the [Constitution] to exempted such statements from *Confrontation Clause* scrutiny altogether. *Id.* at 68.

Although the Bruton rule would generally bar the introduction of a non-testifying codefendant's confession, Lane's email falls outside the Bruton rule. Unlike Bruton, where the confession "expressly implicated" the co-defendant and there was not the slightest doubt that it would prove "powerfully incriminating," the email did not name or attempt to identify Zelasko as Lane's partner. Lane's email was more like the redacted confession in *Richardson*. Nothing in the email specifically pointed to Zelasko as Lane's "partner." If the email were incriminating to Zelasko, it could only be by later evidence linking Zelasko to Lane as her partner in drug trafficking. The email is in line with the inferentially incriminating standard in *Richardson*. Although the word "partner" does indicate that there is another person inculpated, the email is unlike the word "delete" in the confession in Gray. In Gray, redacting the confession did not result in inferential incrimination because the actions of the prosecutor and the manner of the redaction created a powerfully incriminating effect directly inculpating the defendants. There is no such effect with Lane's email. Evidence would have to be offered to link Zelasko as the "partner" referenced in Lane's email. The Court made clear in *Gray* that the inferentially incriminating exception under *Richardson* depends in significant part upon the kind of, not simple fact of, inference. The simple fact of inference is that the text of the email offers no substantial clues pointing toward Zelasko. However, the kind of inference is even more significant. Under Crawford, Lane's email is non-testimonial. It is not a solemn declaration or affirmation made for the purpose of establishing or proving some fact at a criminal proceeding. It was written to Billings, a loved one and trusted friend. No available circuit court cases indicate that a court has ever extended the definition of "testimonial" under Crawford to statements made

by a declarant to friend or associates. *See United States v. Franklin*, 415 F.3d 537, 545 (6th Cir. 2005)(statements were non-testimonial where witness "was privy to [Declarant's] statements only as his friend and confidant); *United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004)(Declarant's comments were made to love ones or acquaintances and are no the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.); and *Jordan*, 509 F.3d at 201 (statements made to a friend rather than a law enforcement personnel, appeared to flow more from atonement and contrition then from an attempt to record past events or shift blame to others with the knowledge that the statements would later be used in court). Since Lane's email was non-testimonial, it would fall under the allowance of the *Crawford* court making it constitutionally valid to exempted such non-testimonial statements from *Confrontation Clause* scrutiny altogether. Lane's email is the kind of inference that is not subject to the *Bruton* rule.

CONCLUSION

For the reasons stated above, the Petitioner requests this Court reverse the Fourteenth Circuit and remand.

	Respectfully submitted,
	11P
	Counsel for Petitioner
12 February 2014	

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