IN THE

SUPREME COURT OF THE UNITED STATES

October 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 RESPONDENT

QUESTIONS PRESENTED

1. In light of its common law roots, whether Federal Rule of Evidence 404(b), as a matter of law, permits evidence of a third party's propensity to commit an offense with which the Respondent is charged?

Suggested Answer: Yes

2. Whether, under *Chambers v. Mississippi*, excluding Ms. Morris's testimony violates Respondent Anastasia Zelasko's constitutional right to present a complete defense when the absence of that testimony effectively bars Ms. Zelasko from exercising that right?

Suggested Answer: Yes

3. Whether this Court should continue to uphold Williamson v. United States as the standard for applying Federal Rule of Evidence 804(b)(3), when it has been upheld by the Supreme Court, followed by many of the states, and it is the most balanced, practical approach for adhering to the principles set forward in the Federal Rules of Evidence and hearsay jurisprudence?

Suggested Answer: Yes

4. In a joint trial, whether the incriminating statement of a non-testifying co-defendant should be barred as violative of the Confrontation Clause, under Bruton v. United States as the defendant is unable to cross-examine the incriminating co-defendant?

Suggested Answer: Yes

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STATEMENT OF THE CASE

Anastasia Zelasko joined the Women's United States Snowman Pentathlon Team (Women's Team) in September of 2010. (R. at 1). The Snowman Pentathlon consists of five events, including dog sledding and rifle shooting at the international World Winter Games. (R. at 8). In or about August 2011, it is alleged that two members of the Women's team began to possess and distribute anabolic steroids, known as "Thunders now," in order to boost the team's performance. (R. at 2). The Government alleges that the two conspiring members of the team were Ms. Zelasko and her teammate and codefendant, Ms. Jessica Lane. (R. at 2).

Hunter Riley, a member of the Men's United States Snowman Pentathlon Team (Men's Team), working for the Drug Enforcement Agency (DEA) at the time, was directed to approach Ms. Lane to purchase ThunderSnow as part of the DEA's investigation into the alleged conspiracy. (R. at 2). Though Mr. Riley asked Ms. Lane for ThunderSnow in October, November, and December, Ms. Lane declined each time. (R. at 2-3).

In December, Peter Billings, the coach of the Women's Team, and Ms. Lane's boyfriend, observed an argument between the defendants, in which Ms. Lane allegedly yelled "Stop bragging to everyone about all the money you're making!" (R. at 3). Though Mr. Billings confronted Ms. Lane about whether she was distributing ThunderSnow to the team, she denied any such behavior. (R. at 3). On January 16, 2012, Ms. Lane emailed Mr. Billings asking him for help, implicating herself and her "partner," and stating that her partner was worried about a member of the male team who had found out about the business and that they needed to keep him quiet. (R. at 3). The partner remained unnamed throughout the email. (R. at 3).

On January 28, 2012, multiple members of the Men's Team and Women's Team are alleged to have witnessed an argument between Ms. Zelasko and Mr. Riley. (R. at 8). On

February 3rd, 2012, Mr. Riley was accidentally shot and killed by Ms. Zelasko's gun as she was practicing on the rifle range. (R. at 8).

Following the shooting of Mr. Riley, Ms. Zelasko's home was searched, and two small personal sized doses of 50-milligrams of ThunderSnow were found, as well as approximately \$5,000 cash. (R. at 8, 28). However, a search of Ms. Lane's home revealed approximately 10 times as many doses of ThunderSnow, and twice as much cash. (R. at 8). A subsequent search of the training facility revealed 12,500 milligrams of ThunderSnow, with a value of \$50,000; all team members and staff had access to this room. (R. at 8).

The Respondent contends that Ms. Lane's partner was not Ms. Zelasko, but teammate Casey Short, who had previously sold a similar steroid to Ms. Morris, a former competitor on the Canadian team. (R. at 10). An affidavit, signed by Henry Wallace, an expert in chemistry and biology, and a drug-testing consultant, states that the drug found in the training facility is a chemical modification of the steroid sold by Ms. Short. (R. at 28). As both the Respondent and the Government are in agreement that only two members of the team were involved in actually selling the steroids, the Respondent presented that Ms. Zelasko was not a part of this conspiracy, and therefore had no reason to purposely shoot Mr. Riley. (R. at 11).

During a hearing on pre-trial motions, the Respondent sought to introduce the testimony of Miranda Morris. (R. at 10). Ms. Morris's affidavit states that Ms. Short sold her steroids shortly before Ms. Short became a member of the United States team in June, 2011. (R. at 10, 24). The Respondent contends that this testimony shows that Ms. Zelasko was not the partner mentioned in Ms. Lane's email, but that Ms. Short was the aforementioned partner. (R. at 14). The Government objected to the admission of the testimony, stating that it should be barred by Federal Rule of Evidence 404(b). (R. at 13).

At the same hearing, the Government sought to introduce Ms. Lane's email to Mr. Billings as a statement against interest under 804(b)(3). (R. at 15). The Respondent contended that under *Williamson*, the statement is not truly against interest, and should not be admitted. (R. at 16). Additionally, under the Bruton Doctrine, the Respondent contended that introduction of the email would be violative of the Confrontation Clause.

On July 18, 2012, the Honorable Nicholas Crawford, District Judge for the United States District Court- Southern District of Boerum, ruled that Miranda Morris' testimony should be admitted at trial. (R. at 21). Judge Crawford also ruled that the Ms. Lane's email to Mr. Billings should not be admitted at trial. (R. at 22).

On February 14, 2013, the United States Court of Appeals for the Fourteenth Circuit ruled on an interlocutory appeal by the United States, upholding the District Court's decision to admit Ms. Morris's testimony and exclude the Ms. Lane's email to Mr. Billings. (R. at 31).

This appeal follows.

SUMMARY OF THE ARGUMENT

In the instant case, both lower courts correctly ruled that: (1) Federal Rule of Evidence 404(b) permits the introduction of "reverse 404(b)" evidence by the defendant, (2) under *Chambers v. Mississippi*, Ms. Zelasko's right to present a complete defense would be violated by the exclusion of Ms. Morris's testimony, (3) *Williamson v. United States* should not be overruled, and (4) the introduction of non-testimonial evidence from a non-testifying codefendant should be barred under *Bruton v. United States* regardless of the holding of *Crawford v. Washington*.

First, Federal Rule of Evidence 404(b) permits the introduction of "reverse 404(b)" evidence and allows a defendant to enter evidence that shows a third party's propensity to

commit the crime in question. Though not explicit within the Rule's text, common law and policy considerations prove that this type of evidence was intended to be allowed. The intention of 404(b) exclusions, protection of the criminal defendant from unfair prejudice, is not risked by "reverse 404(b)" evidence as it is inherently exculpatory in nature. Additionally, admissibility of evidence under 404(b) should be analyzed with respect to actual harm done to the defendant, not hypothetical concerns.

Second, *Chambers v. Mississippi* stands for the proposition that if critical defense evidence is excluded by the mechanical application of otherwise valid rules, a due process violation results if it denies the defendant a meaningful opportunity to present a defense. In the instant case, the exclusion of Ms. Morris's testimony indicating that Ms. Short sold the Canadian team a substantially similar steroid in temporal proximity to her transfer to the United States team, prevents Ms. Zelasko from mounting a meaningful defense. With no directly inculpatory evidence, this testimony would tend to exculpate Ms. Zelasko and under *Chambers* must be admitted in order for Ms. Zelasko to be afforded the due process rights fundamental to a fair trial.

Third, *Williamson v. United States* sets the standard that for the admission of codefendant statement against a defendant, it must be truly self-inculpatory, rather than just an attempt to shift blame. As *Williamson* is based on the policy and principle of Federal Rule of Evidence 804(b)(3) and has been upheld consistently over the past twenty years, under the doctrine of *stare decisis* it should remain the standard for courts. Additionally, no other policy could properly uphold the underlying principle of Federal Rule of Evidence 804(b)(3) and therefore no other policy should replace *Williamson*.

Finally, as the *Bruton* doctrine was not altered by *Crawford*, the admission of non-testimonial incriminating evidence from a co-defendant is barred as it violates the Confrontation Clause. Whereas *Bruton v. United States* addressed non-testimonial and testimonial hearsay with regard to harm to the defendant, *Crawford v. Washington* addressed only testimonial hearsay relating to potential unreliability. As these two cases were not argued on the same issue, and *Crawford* did not directly overrule *Bruton*, the analysis of non-testimonial hearsay, such as Lane's email, should be viewed only under the *Bruton* doctrine. As such, the email should be excluded. If the Court finds *Crawford* did overrule *Bruton*, this case is the appropriate time to review the history of *Crawford* and the implications of the decision and clarify the holding as non-binding with regards to non-testimonial hearsay.

ARGUMENT

I. IN LIGHT OF ITS UNDERLYING JUSTIFICATIONS ROOTED IN THE COMMON-LAW AND THE RIGIDITY OF ITS PLAIN LANGUAGE, THIS COURT SHOULD FIND THAT FEDERAL RULE OF EVIDENCE 404(B), AS A MATTER OF LAW, PERMITS THE ADMISSION OF "REVERSE 404(B)" EVIDENCE OFFERED BY A CRIMINAL DEFENDANT AS IT CARRIES NO SIGNIFICANT RISK OF UNDUE PREJUDICE.

This Court should hold that, as a matter of law, Federal Rules of Evidence 404(b) permits the admission of "reverse 404(b)" evidence. In light of the rule's common law predecessor, and because "reverse 404(b)" evidence poses no risk of unfair prejudice to the criminal defendant, applying the rigid plain language of Rule 404(b) to the admission of that evidence inappropriate. As such, this Court should not be persuaded by the simplicity of that approach. Instead, this Court should find that the standard rules of admissibility, specifically Rules 401 and 403, provide trial courts sufficient latitude to consider the admissibility of "reverse 404(b)" evidence in light of concerns actually implicated by that evidence. As this is a question of law, this Court should review the present issue *de novo*. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-33 (1991).

Rule 404(b) states 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ." Fed. R. Evid. 404(b).

A. The application of FRE 404(b) to "reverse 404(b)" evidence should be guided by that rule's common-law predecessor and not the rule's plain language because the latter approach yields results contrary to its intended purpose.

Rule 404(b)'s categorical exclusion is intended to "protect a *party* to the litigation – in particular, the criminal defendant – from the prejudice of the propensity/character taint danger". *United States v. Lucas*, 357 F.3d 599, 611 (Rosen, J., concurring). Although not abundantly clear from the text of the rule itself, Rule 404(b) must be understood in light of its common-law roots. *See United States v. Dudek*, 560 F.2d 1288, 1295-96 (6th Cir. 1977) (noting that Fed. R. Evid. 404(b) restates the common law).

At common law, "the doing of a criminal act, not part of the issue, [was] not admissible as evidence of the doing of the criminal act charged." Wigmore, *Code of Evidence*, 3d ed., p. 81; *see also* Wright & Graham, *Federal Practice and Procedure: Evidence*, § 5239, pp. 436-439. This rule was based on a belief that "juries will tend to give it excessive weight, and . . . that no one should be convicted of a crime based on his or her previous misdeeds." *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985). This rule, therefore, was designed to avoid presenting evidence to the trier-of-fact that would overly prejudice the criminal defendant. *Id*. FRE 404(b) reflects this policy. *Dudek*, 560 F.2d at 1295-96.

The text of Rule 404(b) reflects a codified determination that the risk of unfair prejudice posed by other-act evidence offered solely for character-propensity reasoning will *always*

outweigh its probative value. The Advisory Committees recognize that "[the] circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice...." Fed. R. Evid. 404 advisory committee's notes on 2006 Amendment. By its plain language, FRE 404(b) categorically excludes that evidence. This is consistent with the common-law.

That categorical exclusion, however, is triggered only by the purpose for which the evidence is offered. See Fed. R. Evid. 404(b). If offered to prove something other than solely character-propensity, then the trial court *may* admit that evidence under general rules of admissibility – the categorical exclusion does not apply. See Fed. R. Evid. 404(b). Thus, the mechanical application of Rule 404(b) protects against unfair prejudice. This is consistent with Rule 404(b)'s common-law roots. Because only a party to the litigation can be truly prejudiced by the admission of evidence, it follows that Rule 404(b)'s categorical exclusion is designed to protect a *party*, specifically the criminal defendant. Again, this policy is consistent with the common-law.

Rule 404(b)'s plain language, however, does not reflect its underlying purpose when applied to the admission of "reverse 404(b)" evidence. When Rule 404(b)'s plain language is applied to "reverse 404(b)" evidence – exculpatory evidence offered by a criminal defendant showing a third-party's propensity to commit certain acts for which the defendant is now charged, the result is categorical exclusion. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005); *United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004); *United States v. McCourt*, 925 F.2d 1229 (9th Cir. 1991). "Reverse 404(b)" evidence, however, poses no risk of unfair prejudice to the criminal defendant. *United States v. Stevens*, 935 F.2d 1380, 1404-05 (3rd Cir. 1991)(citing *State v. Garfole*, 76 N.J. 445, 388 A.2d 587 (1978)(stating unfair prejudice to the defendant is not a factor in the context of "reverse 404(b)" evidence)). Yet despite the absence of

a substantial degree of prejudice, the plain language of Rule 404(b) categorically excludes "reverse 404(b)" evidence. This result cannot be reconciled with the rule's common law justification.

Notwithstanding the absence of prejudice to the criminal defendant in 404(b) evidence, the Sixth and Ninth Circuits conclude that Rule 404(b)'s categorical exclusion of "reverse 404(b)" evidence falls within 404(b)'s plain language. *Lucas*, 537 F.3d at 606; *McCourt*, 925 F.2d at 1229. This approach, although simplistic, is misguided.

While a rule's plain language is the first place a court should look when interpreting a statute, strict adherence to a rule's plain language is inappropriate when it yields unjust or absurd results. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989); *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980).

Applying Rule 404(b)'s plain language to "reverse 404(b)" evidence subjects that evidence to the same standard – the *Huddleston* standard ¹ – that FRE 404(b) imposes on prosecutors for the very purpose of protecting against unfair prejudice. *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988). Unless the evidence meets the same standard, the result will be the categorical exclusion of "reverse 404(b)" evidence. *But see United States v. Aboumoussallem*, 726 F.2d 906, 911 (2nd Cir. 1984)(stating that the standard of admissibility for "reverse 404(b)" evidence offered by a criminal defendant as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword).

This result, however, erroneously assumes that a criminal defendant poses substantially the same degree of unfair prejudice to herself as a prosecutor would if the prosecution was

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¹ The Huddleston Standard is a four-prong test for admissibility of Rule 404(b) evidence to protect against unfair prejudice. The four prongs are: evidence must be offered for a proper purpose; evidence must be relevant under Rule 402; evidence's probative value must substantially outweigh its potential for unfair prejudice; the jury must only consider the evidence for the purpose under which it was admitted

allowed to admit evidence solely for character-propensity reasoning. *See Stevens*, 935 F.2d at 1404-05. But this assumption is wrong. *Id*. When a defendant offers "reverse 404(b)" evidence relating to the propensity of a third party, there is no risk of unfair prejudice to the defendant. *Id*. Applying a rule that is justified on a specific condition when that condition is not present is an absurd result.

Therefore, the plain language of Rule 404(b) should not be applied to "reverse 404(b)" evidence offered by a criminal defendant because the result will be a categorical exclusion based on underlying justifications which are not implicated in a "reverse 404(b)" context – an absurd result.

B. Because 404(b)'s plain language is too rigid, other rules of evidence depart from the general ban on character propensity evidence when, as here, the underlying justifications for those rules are not implicated.

When a particular type of character-propensity evidence does not pose a substantial risk of unfair prejudice to a criminal defendant, the Federal Rules of Evidence have departed from categorical exclusion of that evidence. In such instances, the trial court evaluates the admissibility of the evidence by determining its relevancy and weighing its probative value against considerations actually implicated by the evidence. See; Fed. R. Evid. 404(a); Fed. R. Evid. 404(b); Fed. R. Evid. 608.

For example, Rule 404(a)(2)(A) and Rule 404(a)(2)(B) are exceptions to the categorical exclusion of propensity evidence in criminal cases. Fed. R. Evid. 404(a). These rules permit a criminal defendant to offer pure character-propensity evidence relevant to a pertinent trait of either the defendant or the victim. Fed. R. Evid. 404(a). The rules' underlying justification is based on the "relative presence and absence of prejudice in the various situations." Fed. R. Evid. 404(a) advisory committee's note to the proposed rule (citing Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L. Rev. 574, 584 (1956)). These rules correctly recognize that

categorically excluding propensity evidence is unwarranted in the relative absence of prejudice posed by that evidence when offered by a defendant.

Similarly, Rule 608 departs from the categorical exclusion of character-propensity evidence with respect to a witness's character for truthfulness because "the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence." Fed. R. Evid. 608 notes of committee on the judiciary, Senate Report No.93-1277. Because the traditional rationale underlying categorical exclusion is not implicated, Rule 608 evidence is subject only to traditional admissibility inquires: relevancy and balancing of probative value against relevant Rule 403 considerations.

Although no explicit exception exists for "reverse 404(b)" evidence offered by a criminal defendant, the Federal Rule of Evidence's departure from the categorical exclusion of character-propensity evidence casts doubt on the rigid application of Rule 404(b)'s plain language to situations where the concerns underlying that rule are not implicated. Because Rule 404(b) serves to protect criminal defendants from undue prejudice, and because a plain language application of the rule to would achieve an absurd result, this Court should find that Rule 404(b) does not categorically exclude a defendant's proffered "reverse 404(b)" evidence of third party's propensity. *Huddleston*, 485 U.S. at 691.

C. The admissibility of "reverse 404(b)" evidence should properly acknowledge actual concerns posed by the evidence, not justify its exclusion based on concerns not implicated by the proffered evidence.

This Court should find the Third Circuit's reasoning in *Stevens* persuasive on the admissibility of "reverse 404(b)" evidence. *Stevens*, 935 F.2d at 1380. In *Stevens*, the court properly acknowledged that Rule 404(b)'s categorical exclusion of "reverse 404(b)" evidence is unwarranted because the risk of unfair prejudice to the criminal defendant is not a factor.

Stevens, 935 F.2d at 1380. Therefore, according to the court in Stevens, the admissibility of "reverse 404(b)" evidence requires only that evidence be relevant and that its probative value not be outweighed by *applicable* Rule 403 considerations *Id*. Though the holding in Stevens was subsequently narrowed, the reasoning is still persuasive. *United States v. Williams*, 458 F.3d 312, 317 (3rd Cir. 2006).

Unlike a plain language application of Rule 404(b), the *Stevens* reasoning affords trial courts sufficient latitude to consider the admissibility of "reverse 404(b)" evidence in light of concerns actually implicated by that evidence, but without "unnecessarily compartmentaliz[ing] the permissible uses of 'reverse 404(b)' evidence." *Stevens* at 1404 (rejecting government's attempt to impose hard and fast preconditions on the admission of "reverse 404(b)" evidence); *but cf. Lucas*, *537 F.3d at 606; McCourt*, *925 F.2d 1229*. The United States Courts of Appeals for the First, Seventh, and Eleventh Circuits agree. *United States v. Reed*, 259 F.3d 631, 634 (7th Cir.2001); *United States v. Morano*, 697 F.2d 923, 926 (11th Cir.1993); *United States v. Gonzales-Sanchez*, 825 F.2d 572, 582 n. 25 (1st Cir.1987). The Tenth Circuit, although not explicitly holding that Rule 404(b) does not apply to third party propensity evidence, implies this result. *United States v. Montelongo*, 420 F.3d 1169, 1174-75 (10th Cir.2005) (stating that "a lower standard of similarity [between the crime at issue and 'other crimes' evidence] should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor.")(quoting *Stevens*, 935 F.2d at 1404).

The heightened admissibility standards imposed by Rule 404(b) are not justified when applied to "reverse 404(b)" evidence because the pre-conditions imposed by the rule are rooted in a common-law concern for the risk of unfair prejudice that propensity-based evidence poses to a criminal defendant. *Huddleston*, 485 U.S. at 691-92. Because "reverse 404(b)" evidence

carries no risk of unfair prejudice to the defendant, this Court should avoid "unnecessarily compartmentaliz[ing] the permissible uses of 'reverse 404(b)' evidence." *Stevens*, 935 F.2d at 1404. Thus, this Court should find that as a matter of law, Rule 404(b) permits the admission of "reverse 404(b)" evidence and that the general rules of admissibility are sufficient to govern said admissions because they provide a trial court with latitude in considering that evidence in light of the concerns it actually poses.

II. UNDER CHAMBERS V. MISSISSIPPI, MS. ZELASKO'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE WOULD BE VIOLATED BY THE OTHERWISE VALID EXCLUSION OF PROBATIVE, RELEVANT, AND RELIABLE EVIDENCE THAT IS CRITICAL TO HER THIRD-PARTY GUILT DEFENSE AS IT WOULD EFFECTIVELY DENY MS. ZELASKO THE ABILITY TO MOUNT ANY DEFENSE AGAINST THESE FEDERAL ACCUSATIONS.

Ms. Zelasko's constitutional right to due process rooted in the Fifth Amendment, assures her "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(citing *California v. Trombetta*, 467 U.S. 479 (1984)). This concept is fundamental to a fair trial. *See Washington v. Texas*, 388 U.S. 14 (1967). And, as this court found in *Chambers*, that right includes the right to present relevant, reliable evidence that a third-party may have committed the crime for which the defendant is now charged. *Chambers v. Mississippi*, 410 U.S. 284 (1972); *see also Crane*, 476 U.S. at 690 (relevant, reliable evidence casting doubt on the reliability of a confession to support a defense of unknown third-party guilt); *United States v. Holmes*, 547 U.S. 319 (2006)(recognizing defendant's right to present a third-party guilt defense). As this case concerns whether evidentiary ruling(s) will infringe on a defendant's constitutional rights, this Court should apply a *de novo* standard of review. *See United States v. White Buffalo*, 84 F.3d 1052, 1054 (8th Cir. 1996)

The Government has a qualified interest in promulgating rules of evidence, and a defendant does not have unencumbered rights to present any evidence she wishes. *See Taylor v.*

Illinois, 484 U.S. 400 (1988). But as this Court recognized in *Chambers*, depending on the facts and circumstances of a case, mechanically excluding critical defense evidence under even valid rules of evidence can deprive the defendant of a meaningful opportunity to present a complete defense. *See Chambers*, 410 U.S. at 302; *see also Crane*, 476 U.S. at 690 (defendant denied meaningful right to present a complete defense when reliable, relevant evidence relating to the reliability of prior confession was excluded as irrelevant to ascertainment of guilt); *Holmes*, 547 U.S. at 319 (defendant denied right to present a complete defense by rule's arbitrary exclusion of third-party guilt evidence).

In *Chambers*, the defendant, charged with murder, sought to establish a third-party guilt defense. *Chambers*, 410 U.S. at 298. The defendant proffered testimony from three individuals to whom a third-party had previously confessed to committing the murder for which the defendant was charged. *Id.* The evidence was excluded because it was hearsay and, at that time, Mississippi recognized a hearsay exception for statements against the declarant's pecuniary interests but not those against the declarant's penal interests. *Id.* The defendant was unjustly prevented from establishing a third-party guilt defense when he was not permitted to cross-examine or impeach his own witness, who happened to be the third-party the defendant contended was the guilty party, even when the witness became adverse. *Id.*

The Supreme Court, acknowledging that "few rights are more fundamental than that of an accused to present witnesses in his own defense," found that the defendant's right to due process, under the facts of that case, was violated by the exclusion of the proffered defense evidence because the rejected evidence "bore adequate assurances of trustworthiness" and "was critical to [the defendant's] defense." *Id.* at 302. The Court stated that "where constitutional rights directly

affecting the ascertainment of guilt are implicated," otherwise valid rules of evidence may not be "applied mechanistically to defeat the ends of justice." *Id*.

As in *Chambers* and *Crane*, Ms. Zelasko seeks to establish a defense of third-party guilt. *Chambers*, 410 U.S. at 289; *Crane*, 476 U.S. at 685. Ms. Zelasko supports that defense with the testimony of Ms. Amanda Morris, who will testify based on first-hand knowledge as to the following facts: roughly 2 months before Ms. Short transferred to the Women's Team she was distributing "White Lightning," a specific type of undetectable steroid, to members of the Canadian Women's Team, including Ms. Morris. (R. at 24-25). Further, Ms. Morris will testify that Ms. Short was knowledgeable about the use and manufacturing of the steroid – even claiming to have connections with a laboratory that produced the steroid. (R. at 25).

That testimony, in conjunction with other evidence, tends to refute the theory that Ms. Zelasko is the unidentified second co-conspirator, a theory the Government supports with no direct evidence. Ms. Morris's testimony demonstrates that Ms. Short recently engaged in acts that bear similarities to those the Government accuses Ms. Zelasko of committing. (R. at 24-25). If believed, this evidence makes it more likely that Ms. Short, and not Ms. Zelasko, was the second co-conspirator; other evidence supports this theory. (R. at 11). Ms. Zelasko joined the Women's Team in September of 2010. (R. at 1). But Ms. Lane and Ms. Short joined in August 2011 and June of 2011, respectively, which coincides with the time that the women's Snowman team began performing at unprecedented levels. (R. at 1-2);(R. at 24). Additionally, the amount of steroid seized from Ms. Zelasko's residence was consistent with personal use, not distribution. (R. at 28). Moreover, the amount of steroids found in the team's locker room – an area to which all members of the team, including Ms. Morris had access – is consistent with distribution. (R. at 8, 28). This defense offers an alternate theory as to the identity of the co-conspirator, a fact at

issue going directly to the ascertainment of guilt. This testimony is particularly critical to Ms. Zelasko's defense because it is her sole means of establishing her third-party guilt defense in a meaningful way. (R. at 14). Notwithstanding its relevance and criticalness, under the mechanical application of otherwise valid rules of evidence, Ms. Morris's testimony may be excluded. *See* Fed. R. Evid. 403; Fed. R. Evid. 404(b); Fed. R. Evid. 801. As in *Chambers* and *Crane*, Ms. Zelasko's constitutional right to present a complete defense would be violated if the rules of evidence were mechanically applied so as to exclude Ms. Morris's testimony. *Chambers*, 410 U.S. at 302-03; *Crane*, 476 U.S. at 691.

As in *Chambers*, Ms. Morris's testimony is critical to Ms. Zelasko's third-party guilt defense; its absence would effectively deny her the capacity to mount a defense at all. *Chambers*, 410 U.S. at 302-03; *see also Crane*, 476 U.S. at 691 (defendant denied the basic right to have the prosecutor's case encounter and survive the meaningful adversarial testing by the exclusion of evidence critical to defense). Ms. Morris's testimony, as in *Chambers*, bears assurances of reliability and therefore should not be excluded or limited as hearsay. *Id.* Nor should Ms. Morris's testimony be excluded as impermissible other-act evidence because it does not pose a serious risk of unfair prejudice to either party or otherwise threaten judicial expediency. Ms. Zelasko shares a common predicament with the defendant in *Chambers* and this Court should not be hesitant to preserve the fundamental fairness of Ms. Zelasko's trial. *See Chambers*, 410 U.S. at 284.

First and foremost, Ms. Morris's testimony is relevant to the ascertainment of Ms.

Zelasko's guilt to the extent it tends to make it more likely that Ms. Short is the second unidentified co-conspirator and makes is less likely that Ms. Zelasko was the co-conspirator.

Because the Government must prove the identity of those it believes committed the charged

crimes, Ms. Morris's testimony, like the evidence in *Chambers*, is relevant to the jury's ascertainment of the defendant's guilt. *Chambers*, 410 U.S. at 302; *see also Crane*, 476 U.S. at 689 (finding that reliability of defendant's own confession was an issue for the jury's determination and goes directly to the jury's ascertainment of the guilt); *contra United States v. Scheffer*, 523 U.S. 303, 308 (1998) (expert testimony about defendant's mindset was a collateral matter and not directly related to the jury's ascertainment of guilt); *Montana v. Egelhoff*, 518 U.S. 37 (1996) (defendant's proffered evidence showing that defendant was voluntarily intoxicated did not go directly to the jury's ascertainment of guilt because mens rea was not a statutory element of the crime for which the defendant was charged).

Second, as in *Chambers*, Ms. Morris's testimony is absolutely critical to Ms. Zelasko's defense of third party guilt. *Chambers*, 410 U.S. at 300. In *Chambers*, the Court found that the defendant's third-party guilt defense was "far less persuasive than it might have been given the opportunity" to present his sole evidence tending to establish a link between the third-party and the murder at issue. *Chambers*, 410 U.S. at 294. In Crane, the Supreme Court suggested that evidence relating to the reliability of defendant's own confession was critical to his defense of unknown third-party guilt because it was "indispensable to any chance of it succeeding." *Crane*, 476 U.S. at 691. Whether a defendant's proffered evidence is critical to her defense depends not on the merits of that defense but instead on the impact its absence would have on the defendant's ability to present a meaningful defense. *Id*.

As in *Chambers* and *Crane*, Ms. Morris's testimony is so critical to Ms. Zelasko's defense of third party guilt that its exclusion would effectively bar Ms. Zelasko from presenting a defense whatsoever. *Chambers*, 410 U.S. at 302-03; *Crane*, 476 U.S. at 690-91. In order to establish a third-party guilt defense, Ms. Zelasko, as in *Chambers*, needs evidence tending to link

the third-party to the crimes for which she is now charged. *Chambers*, 410 U.S. at 294; see also *DiBenedetto v. Hall*, 272 F.3d 1, 8 (1st Cir. 2001)("Evidence that tends to prove a person other than the defendant committed a crime is relevant, but there must be evidence that there is a connection between the other perpetrators of the crime, not mere speculation on the part of the defendant."). Ms. Morris's testimony tends to establish the requisite link between the unidentified co-conspirator, the distribution of the specific types of steroid within the insular community of competitive winter sporting, and Ms. Short. Therefore, as in *Chambers*, Ms. Zelasko's third-party guilt defense would be "far less persuasive than it might have been given the opportunity" to present Ms. Morris's testimony to the jury because Ms. Zelasko would not be able to support the existence of that link with affirmative defense evidence. *Chambers*, 410 U.S. at 294; *see also Scheffer*, 523 U.S. at 308 (finding no constitutional violation when the court heard all the relevant details of the charged offense from the accused perspective and that the accused was not barred from introducing any factual evidence).

Ms. Zelasko's problem however, is exacerbated by the fact that Ms. Morris's testimony is the only evidence known to Ms. Zelasko that tends to link Ms. Short to the conspiracy at issue. In this way, Ms. Morris's testimony is akin to the evidence at issue in *Crane*. *See Crane*, 476 U.S. 683. In *Crane*, the Court reasoned that by excluding evidence relating to the reliability of the defendant's confession, "the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Crane*, 476 U.S. at 689. Here, Ms. Zelasko would be in a similar situation because without Ms. Morris's testimony Ms. Zelasko would be unable to answer the question: If not Ms. Zelasko, then who? As in *Crane*, Ms. Zelasko's third-party guilt defense would be meaningless in the absence of Ms. Morris's testimony. *Crane*, 476 U.S. at 691. Thus, Ms.

Morris's testimony, like the evidence in *Crane*, is "indispensable to any chance" of Ms. Zelsako's third part defense succeeding. *See Id.; see also United States v. Lucas*, 357 F.3d 599, 606-07 (6th Cir. 2004) (finding no violation of defendant's right to present a defense when there were other means to present evidence supporting defendant's defense).

Finally, Ms. Morris's testimony bears assurances of reliability. Like the hearsay statements in *Chambers*, details of Ms. Morris's testimony are against her interests. *Chambers*, 410 U.S. at 300. Although distinguishable from *Chambers* in that Ms. Morris's statements may not expose her to criminal liability, Ms. Morris's testimony details her involvement in serious criminal activity and calls into question the validity of Ms. Morris's professional career. (R. at 24-25). This testimony is not in Ms. Morris's favor. As in *Chambers*, Ms. Morris's testimony falls within the "basic rationale of the exception for declarations against interest." *Chambers*, 410 U.S. at 302. In addition, because Ms. Morris came forward with this information, concerns about perjured testimony are minimal. (R. at 25). To the extent that concerns about Ms. Morris's testimonial capacities are implicated, she will be present in the courtroom, under oath, and subject to cross-examination by the prosecution. California v. Green, 399 U.S. 149 (1970). Also, like the evidence in *Chambers*, Ms. Morris's testimony is corroborated by other evidence in the case. Chambers, 410 U.S. at 300-01. The testimony of Henry Wallace, an expert in performanceenhancing drugs, tends to suggest that Ms. Morris's testimony is accurate because it corroborates essential aspects of Ms. Morris's testimony: the type of drug sold and how it is manufactured. According to Ms. Morris's testimony, Ms. Short sold a steroid known as "White Lightning" in Canada and claimed to have connections with the steroid's manufacturer. (R. at 24-25). Mr. Wallace would testify that "ThunderSnow," the steroid at issue in this case, is a chemical derivative of a Canadian drug known as "White Lightning." (R. at 28). Similar to *Chambers*, Ms. Morris's testimony bears indicia of reliability in and of itself as well as by virtue of other evidence in the case. *Chambers*, 410 U.S. at 300. Ms. Morris's testimony, therefore, bears assurances of reliability.

Unquestionably, "the Constitution leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues." *Crane*, 476 U.S. at 690 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). These concerns are not implicated here as Ms. Morris's testimony would neither mislead nor confuse the jury. An ultimate issue at trial will be the identity of the second co-conspirator. To the extent that Ms. Morris's testimony provides a basis for an alternate theory as to who the second co-conspirator is, it has the effect of focusing, not distracting or confusing, the jury from an ultimate issue at trial. Additionally, Ms. Morris's testimony is part of a modest defense; she is one of two defense witnesses. As such, concerns about judicial expediency are unwarranted. Additionally, Ms. Morris's testimony, other-act propensity evidence, does not pose a risk of unfair prejudice to either party. *United States v. Stevens*, 935 F.2d 1380, 1404-05 (3rd Cir. 1991)(citing *State v. Garfole*, 76 N.J. 445, 388 A.2d 587 (1978))(noting that unfair prejudice to the defendant is not a factor in the context of "reverse 404(b)" evidence).

As Ms. Zelasko's livelihood is at stake, due process requires that she be afforded a meaningful opportunity to defend against the charges that threaten her liberty. *See Crane*, 476 U.S. at 690. Here, the Government's theory of guilt is only conditionally relevant; most of the Government's evidence is only inculpatory if the jury believes that Ms. Zelasko is the second co-conspirator. Yet the Government has no evidence tending to prove that requisite fact beyond a reasonable doubt. To allow the government to convict on conditional relevance but preclude the

defendant from defending in the same way is irreconcilable with the guarantees of due process. As Justice O'Connor has noted, "an evidentiary ruling whose sole purpose is to boost the State's likelihood of convictions distorts the adversarial process." *Montana v. Egelhoff*, 518 U.S. 37, 68 (1996). (O'Connor, J., dissenting)(citing Washington, 388 U.S. at 25)(Harlan, J., concurring in the result)).

Under *Chambers*, excluding Ms. Morris's relevant, reliable, and critical testimony by way of the mechanical application of the rules of evidence would effectively prevent Ms.

Zelasko from presenting a defense at all. *Chambers*, 410 U.S. at 302. Ms. Zelasko would be compelled to mere silence and cross-examining government witnesses. While entirely permissible as a chosen defense strategy, forced silence is repugnant to the notion of due process as a government-imposed strategy. The Constitutional guarantees of due process go further—Ms. Zelasko must be afforded "a meaningful opportunity to present a complete defense." *Crane*, 476 U.S. at 690 (quoting *Trombetta*, 467 U.S. at 485).

III. THIS COURT SHOULD DECLINE TO OVERRULE WILLIAMSON V. UNITED STATES AS IT PROVIDES A BALANCED AND APPROPRIATE STANDARD FOR THE APPLICATION OF FEDERAL RULE 804(B)(3), GOVERNING DECLARATIONS AGAINST PENAL INTEREST AND NO STANDARD COULD REASONABLY REPLACE IT

In its 1994 opinion in *Williamson v. United States*, the United States Supreme Court established that admissions of arrested accomplices may be admitted against a co-defendant only if they are truly self inculpatory rather than mere attempts to shift blame or curry favor. *Williamson v. United States*, 512 U.S. 594 (1994).

The Court began by interpreting the word "statement" narrowly to mean "a single declaration or remark," as opposed to an "extended declaration" that would allow for collateral, non-inculpatory statements to be admitted in a broader self-inculpatory statement. *Id.* at 599. The Court held that in order to determine whether a statement is truly self-inculpatory, courts

must look at each statement individually and decide whether to admit each individual statement, rather than the entire narrative as a whole. *Id*.

The Court's reasoning is consistent with the Advisory Committee Notes and policy concerns of Rule 803(b)(3) which it relied on in coming to its decision. This holding has continued to be upheld by the Supreme Court and has been adopted by many states. Given *Williamson's* consistency with the principles of the Hearsay Rule, that many states have adopted the holding, the Supreme Court has continued to uphold it, and that no other system could reasonably replace it, this Court should continue to follow the precedent set in *Williamson*.

A. The *Williamson* Court's holding and reasoning were consistent with the policy and principle of 804(b)(3).

As *Williamson* is consistent with the underlying principle of the hearsay doctrine and the Advisory Committee Notes to 804(b)(3), and as it limits the inherent concerns of hearsay, this Court should continue to recognize it as the controlling jurisprudence of the Supreme Court.

In *Williamson*, Reginald Harris was pulled over for weaving on the highway. *Williamson* 512 U.S. at 596. After Harris was stopped, he consented to a search of the car, which revealed 19 kilograms of cocaine. *Id.* Though Harris initially lied, stating that he had gotten the cocaine from a Cuban who was an acquaintance of the defendant Williamson, and that he was supposed to leave the drugs in a dumpster, he ultimately cooperated with the Drug Enforcement Administration (DEA). *Id.* at 596-7. Harris admitted to the DEA that he had been transporting the cocaine to Atlanta for the defendant, and that the defendant had been driving ahead of him and had seen the stop. *Id.* at 597. When Williamson was apprehended, Harris refused to testify, but the District Court allowed his prior statement to the DEA as an admissible statement against interest under Rule 804(b)(3) after Harris was determined to be unavailable as a witness. *Id.* at 598.

The *Williamson* Court reversed, and held that the trial court must look at each individual statement within the larger confession to determine if each statement is individually admissible, determined by whether it is truly self-inculpatory. *Id.* The courts must view the statements in context, questioning "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." *Id.* at 603. The *Williamson* Court stressed that this standard was increasingly important when statements implicate a coconspirator, as the individual making the statement may be attempting to shift blame or curry favor. *Id.*

In its opinion, the Court emphasized several important policy principles in the American system of justice. *Id.* First, the Court looked to the policy of the Hearsay Rule, Federal Rule of Evidence 802. *Id.* The Court reiterated that the Hearsay Rule is premised on the theory that out-of-court statements are subject to particular hazards such as lying, misperception, faulty memory, misunderstanding, and the possibility of certain acts or statements being taken out of context. *Id.* at 598. The Court further emphasized that these dangers are mitigated by requiring in-court statements when possible as the speakers will be under oath, and most importantly to the Court, subject to cross examination. *Id.*

Rule 804(b)(3) was developed under the principle that people tend not to make self-inculpatory statements unless they believe them to be true. However, the Court acknowledged that "one of the most effective ways to lie is to mix falsehood with truth, especially truth that seems persuasive because of its self-inculpatory nature." *Id.* at 600. Because of this concern, the Court came to its ultimate conclusion that each statement must be viewed individually in context regarding its self-inculpatory nature. *Id.* The Court reasoned that "nothing in the text of Rule 804(b)(3) or the general theory of the Hearsay Rules suggests that admissibility should turn on

whether a statement is collateral to a self-inculpatory statement." *Id*. The Court further reasoned that the most faithful reading of 804(b)(3) would not allow such statements, even those made within a broader self-inculpatory narrative. *Id*.

The Court recognized fears noted by Justice Kennedy's concurrence, primarily that the reading of the Rule adopted by the plurality would "eviscerate the against penal interest exception," and make it lack any meaningful effect. *Id.* While the Court did acknowledge this concern, it reasoned that 804(b)(3) would still apply in many circumstances and allow the admission of truly self-inculpatory statements, in the spirit of the Rule. *Id.*

In the Advisory Committee Notes to 804(b)(3), Congress explicitly stated that they had deleted a provision refusing to admit statements against interest by a co-defendant, explaining that excluding these statements went against the "general approach in the Rules of Evidence." H.R. CONF. REP. No. 1597, 93d Cong., 2d Sess. 12 (1974). However, the Committee, similar to the *Williamson* Court, emphasized the importance of inquiring into the circumstances and excluding statements that may have been made in an attempt to curry favor or shift blame. *Id*.

B. The holding in *Williamson* has withstood the test of time and has continued to be upheld, and this Court should continue to do so.

The Supreme Court has continued to follow *Williamson*; many states have also followed the *Williamson* decision as well. As *Williamson* was decided twenty years ago, it has withstood the test of time, and has proved to be the most balanced and consistent test for the admission of self-inculpatory statements under 804(b)(3).

The Supreme Court had occasion to revisit the *Williamson* decision in *Lilly v. Virginia*, 527 U.S. 116 (1999). The *Lilly* Court treated *Williamson* in a positive light, reiterating the notion that "one of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id.* at 133. The Court noted

that "shift or spread the blame to a criminal defendant" fall outside the realm of 804(b)(3). *Id.* at 137. The Court further noted that several states have adopted this view of the hearsay doctrine. In Footnote 4, the *Lilly* Court pointed out that among the states that have not adopted the Williamson ruling, several do not allow the admissions of a statement made by a codefendant implicating both himself and the accused in any manner, regardless of the inculpatory nature of the statement. *Id.* at 149.

As was pointed out by the *Lilly* Court, though *Williamson* was not decided under the Constitution, many states have chosen to follow its ruling.² In 2012, the Supreme Court of Pennsylvania found that the approach taken in *Williamson* was "sound" and "in accord with both the fundamental purpose ... And prior caselaw interpreting the scope of the declaration against penal interest." *Commonwealth v. Brown*, 52 A.3d 1139, 1181 (Pa. 2012). The Supreme Court of Washington similarly adopted *Williamson*, stating that it is "consistent with the rule's underlying principle." *State v. Roberts*, 14 P.3d 713, 727 (Wash. 2000). The Washington Supreme Court's reasoning was consistent with that in *Williamson*, noting that hearsay is subject

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² States that have followed the holding in Williamson in part or in whole include, but are not limited to: Alaska (Linton v. State, 901 P.2d 439 (Alaska App., 1995)), Arizona (State v. Nieto, 924 P.2d 453 (Ariz.Ct.App., 1996)), California in People v. Duarte, 12 P.3d 1110 (Cal., 2000)), Colorado (People v. Newton, 940 P.2d 1065 (Colo. App., 1996)), Connecticut (State v. Schiappa, 728 A.2d 466 (Conn., 1999)), The District of Columbia (Thomas v. US, 978 A.2d 1211 (D.C., 2009)), Delaware (Smith v. State, 647 A.2d 1083 (Del., 1994)), Florida (Brooks v. State, 787 So.2d 765 (Fla., 2001)), Idaho (State v. Averett, 136 P.3d 350 (Idaho Ct.App., 2006)), Iowa in State v. Hallum, 585 N.W.2d 249 (Iowa, 1998), Kentucky in Osborne v. Commonwealth, 43 S.W.3d 234 (Kentucky, 2001). Louisiana (State v. Anthony, 695 So.2d 1142 (La.Ct.App., 1997)), Maryland (State v. Matusky, 682 A.2d 694 (Md., 1996)), Michigan (People v. Barrera, 547 N.W.2d 280 (Mich., 1996)), Minnesota (State v. Ford, 539 N.W.2d 214 (Minn., 1995)), Mississippi (Williams v. State, 667 So.2d 15 (Miss., 1996)), Nebraska (State v. Phillips, 840 N.W.2d 500 (Neb., 2013)), New Mexico (State v. Benavidez, 992 P.2d 274 (N.M., 1999)), New York (People v. James, 717 N.E.2d 1052 (N.Y., 1999)), North Carolina (State v. Barnes, 481 S.E.2d 44 (N.C., 1997)), Oregon (State v. Wilson, 918 P.2d 826 (O.R., 1996)), Pennsylvania (Commonwealth v. Brown, 52 A.3d 1139 (Pa., 2012)), Rhode Island (State v. Bunnell, 47 A.3d 220 (R.I., 2012)), South Carolina (State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999)), Tennessee (State v. Dotson, 254 S.W.3d 378 (Tenn., 2008)), Texas (Bullock v. State, 982 S.W.2d 579 (Tex.App.-Houson (1st Dist.) 1998)), Washington (State v. Roberts, 14 P.3d 713 (Wash., 2000)), West Virginia (In Interest of Anthony Ray Mc., 489 S.E.2d 289 (W.Va., 1997)), and Wyoming (Johnson v. State, 930 P.2d 358 (Wyo., 1996)).

to many concerns, such as the propensity to lie, and the whole statement approach may admit statements that give cause for concern. *Id.* at 495, 272.

As *Williamson* has controlled for twenty years, and as many states have adopted it since the Supreme Court reached its decision, this Court should adhere to *stare decisis* and continue to uphold *Williamson* as a balanced and fair approach for applying Rule 804(b)(3).

C. The Williamson decision should continue to be upheld as any other policy would not be consistent with the principle of 804(b)(3).

As discussed in the lower court's opinion, courts are to "adhere to the 'preferred course' of *stare decisis*, which 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Zelasko*, Cr. No. 13-452 (14th Cir., 2013) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Courts may decide not to follow precedent if it is "unworkable or badly reasoned," but *Williamson's* logic is sound and regularly upheld. *Id*.

As stated by the Court of Appeals of New York, any *per se* rule that would require "invariable redaction of the name of a co-perpetrator in any declaration against penal interest ... would unduly restrict the declaration against penal interest exception to the Hearsay Rule." *People v. James*, 717 N.E.2d 1052, 1062 (N.Y. 1999). Similarly, ruling in the alternative and allowing all statements that are part of a larger self-inculpatory theme would go too far, as discussed by the opinions in *Williamson*. *Williamson*, 512 U.S. 594. Because of these concerns on either end of the spectrum, the *Williamson* Court adopted a correct, balanced approach.

In the case at hand, in which the Government would like to admit an email that is only minimally self-inculpatory, and certainly does not explicitly inculpate the co-defendant, it would be detrimental to overturn *Williamson* in favor of a broad reading of 804(b)(3). To allow all

statements that are part of a larger self-inculpatory theme would go entirely against the Confrontation Clause concerns addressed by the Hearsay Rule. Justice O'Connor's majority opinion accurately expressed concern that a co-defendant, not subject to cross-examination or an oath, may be more apt to lie, padding those lies with self-incriminating details to curry favor or shift blame in a less obvious manner. By admitting these statements without affording the defense the opportunity to cross-examine the declarant would violate the entire principle of the hearsay law, and violate the basic rights afforded to defendants in Ms. Zelasko's position.

Though *Williamson* was decided by Justice O'Connor's plurality opinion, the majority of the Court explicitly agreed with the idea of limiting the meaning of 804(b)(3) to exclude all collateral statements. Additionally, the entire Court agreed that not all collateral statements should be admitted. *Williamson*, 512 U.S. 594.

In Justice Scalia's concurrence, he agreed with adopting a strict reading of the term "statement" and further emphasized the fact that "naming another person...in a context where the declarant is minimizing culpability or criminal exposure, can bear on whether the statement meets the 804(b)(3) standard." *Id.* at 608. In Justice Ginsburg's concurrence, she and Justices Blackmun, Stevens, and Souter agreed with Justice O'Connor's unease about the inherent untrustworthiness of statements implicating another person. *Id.* Justice Ginsburg's concurrence, joined by Justices Blackmun, Stevens, and Souter, would have adopted an even stricter reading of 804(b)(3) and conclude that all of the statements made by Mr. Harris implicating the defendant should have been excluded. *Id.* In his concurrence, Justice Kennedy, joined by Chief Justice Rehnquist, and Justice Thomas, though disagreeing with the exclusion of all collateral statements, still maintains a balance, stating that only some collateral statements may be admitted. *Id.*

All Justices agreed that not all collateral statements should be admissible in court, and the majority agreed that collateral statements should be eliminated entirely, showing how vital the Court as a whole finds the principle embedded in Rule 804(b)(3). *Id.* This Court should therefore uphold *Williamson*, and continue to adhere to the values of the American judicial system.

IV. AS THE *BRUTON* DOCTRINE WAS NOT OVERTURNED OR LIMITED BY *CRAWFORD V. WASHINGTON*, THE EMAIL FROM LANE TO BILLINGS WAS PROPERLY EXCLUDED BY THE LOWER COURTS.

Bruton v. United States sets forth the standard that the incriminating statement of a non-testifying co-defendant is inherently harmful to the defendant regardless of a limiting instruction to the jury and is therefore inadmissible. Bruton v. United States, 391 U.S. 123, 126 (1968). The Government contends that Bruton was altered by Crawford v. Washington to make the doctrine apply only to testimonial hearsay. Crawford v. Washington, 541 U.S. 36 (2004); (R. at 18). This assertion, however, is misguided as Crawford did not address the issue of non-testimonial hearsay and therefore should not be interpreted to affect the holding in Bruton with regard to non-testimonial hearsay. Crawford, 541 U.S. at 62; See Colin Miller, Avoiding a Confrontation? How Courts Have Erred in Finding The Non-testimonial Hearsay is Beyond the Scope of the Bruton Doctrine, 77 Brook, L. Rev. 625 (2012).

While the Respondent contends that the *Bruton* doctrine remains fully intact even after *Crawford*, should this Court find that *Crawford* does hold non-testimonial hearsay admissible, we respectfully request, given the series of problematic rules and conclusions drawn from *Crawford* and its progeny, that this Court take this opportunity to reassess the validity and accuracy of *Crawford*'s testimonial/non-testimonial dichotomy for purposes of the Confrontation Clause.

The issue on appeal, the incriminating email sent by co-defendant Lane to her boyfriend, Peter Billings, is undoubtedly non-testimonial, as it was made to a friend, not law enforcement and not in the course of any investigation or interrogation. *Davis v. Washington*, 547 U.S. 813, 822 (2006); (R. at 29). The non-testimonial nature of the email, however, should not bar the defendant from being able to present an adequate defense or confront her accuser, as *Crawford*, which requires testimonial statements to be applied, is not relevant or, if it is relevant, it should be overturned presently. As the issue of the relationship between *Bruton* and *Crawford* is a question as a matter of law, this issue should be reviewed *de novo* by this Court. *United States v. Mason*, 668 F.3d 203 (5th Cir. 2012) (holding that an analysis of a defendant's sixth amendment rights shall be reviewed de novo on appeal); (R. at 45); 5 Am. Jur. 2d Appellate Review § 647.

A. The *Bruton* Doctrine remains intact as it is based on harmfulness to the defendant in cases of testimonial or non-testimonial statements, while *Crawford* is based on reliability of evidence only in cases of testimonial statements.

As indicated in subsequent cases, the doctrine developed in *Bruton* was based entirely on the harmfulness of the testimony and its likelihood to prejudice the jury against the defendant, not the reliability of such testimony. *Cruz v. New York*, 481 U.S. 186, 187 (1987). The case at bar presents a situation fitting squarely under the *Bruton* doctrine, as the email is non-testimonial, but extremely harmful to the defendant. (R. at 29). In writing about the "business my partner and I have been running" Lane directly states the other person, likely the co-defendant in the jury's eyes, is a partner in the illegal activity and that said partner wants to "figure out how to keep [Hunter Riley] quiet." (R. at 29). This statement is clearly exceedingly harmful without the opportunity for the cross-examination to explain to whom exactly the "partner" refers. As we contend, Ms. Short was in fact the co-conspirator and admitting the email implying that Ms. Zelasko was the co-conspirator is highly prejudicial and harmful, even with a limiting

instruction. (R. at 14). Under *Bruton*, admitting the email would violate the Confrontation Clause. *Bruton*, 391 U.S. at 126.

The Government claims that in 2004, *Crawford* overruled *Bruton*. (R. at 18). This view is misguided because *Crawford* addressed only the narrow issue of the admissibility of testimonial hearsay and is based on the premise that testimonial hearsay is inherently unreliable if not confronted in court. *Crawford*, 541 U.S. at 36. The *Crawford* opinion never addressed the admissibility of non-testimonial statements and therefore should not be read to hold any legal precedent with respect to non-testimonial statements. *Id.* Similarly, *Bruton* did not address the issue of reliability, but rather was exclusively based on harm. *Bruton*, 391 U.S. at 126; *Cruz*, 481 U.S. at 186. Therefore, though related, these two cases address different aspects of the Confrontation Clause and do not affect each other as evidenced by the text of each. Miller, *supra* at 627.

Based on how lower courts have interpreted methods of avoiding a *Bruton* issue, it is evident that *Bruton* and *Crawford* are two distinct legal issues and only *Bruton* addresses confrontation from the viewpoint of harm to the defendant. Therefore, as they address different Confrontation problems entirely, *Crawford* should have no bearing on *Bruton*. For example, every court that has taken on the issue, has found that the *Bruton* doctrine is not applicable to bench trials. *United States v. Cardenas*, 9 F.3d 1139, 1155 (5th Cir. 1993) (Joining the 6th, 7th, 1st, and 9th circuits in holding that *Bruton* does not apply to bench trials.); Miller, *supra* at 653. If the concern for reliability was at issue, a bench trial would be just a susceptible to unreliable evidence as a jury trial. *Supra* at 654. Apparently, the concern is not over if the evidence is reliable or trustworthy, but rather hinges on the fact that a judge could adequately weigh evidence deemed inadmissible, whereas a jury could not. *Supra*.

In addition to bench trials exemptions from a *Bruton* issue, most circuit courts have held that redacting a statement, even post *Crawford*, is acceptable under *Bruton* to mitigate harm to the defendant. *United States v. Winston*, 55 F. App'x 289, 294 (6th Cir. 2003); Miller, *supra* at 655. Redacting otherwise inadmissible statements makes it clear that *Bruton* is addressing only the issue of harm or prejudice to the defendant as the redaction does not alter reliability, but rather changes the likelihood that the jury will assume the defendant was the individual in the confession or statement. *Winston*, 55 F. App'x at 294.

Courts resolve *Bruton* issues with regard to interlocking testimony in a way that indicates harmfulness is the concern, not reliability. *Cruz*, 481 U.S. at 192. The interlocking nature of the confessions in question lead the court to analyze whether it was the unreliability or the harmfulness of the confession that was driving the desire to exclude the testimony. *Id.* The Court found that interlocking testimony is likely to be highly reliable, as it is nearly the same as the confession of the defendant, yet it required exclusion anyway. *Id.* at 191-192. The analysis of the testimony was based solely on harm done to the defendant, and excluded under the *Bruton* doctrine. *Id.* This decision clearly indicated that the *Bruton* doctrine was concerned with only harm, not reliability, as the testimony in question was both reliable and harmful. *Id.*

When the Supreme Court overruled *Ohio v. Roberts* in *Crawford v. Washington*, the case did not alter the law based on the holding of *Bruton*, as the undertaking was with regards to the standard of reliability required to meet constitutional scrutiny for testimonial statements, not the harm done to the defendant by non-testimonial statements. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (Creating the "adequate indicia of reliability" test for unavailable co-defendant testimony.) As *Roberts* was not related to *Bruton*, when *Crawford* overruled *Roberts*, Bruton was not affected. *Roberts* was merely setting the standard for what the Court could look to in order to

determine reliability – not harm. *Roberts*, 448 U.S. at 66. Therefore, as the lower courts in the instant case have correctly held, the new standard set in *Crawford* is not an alteration of the *Bruton* doctrine, but rather an analysis of an entirely separate legal principle. (R. at 43-45). Justice Scalia, writing for the majority, did not intend to overturn or limit *Bruton*, and his opinion in *Crawford* did not do so.

B. If the Court determines *Crawford* was intended to limit *Bruton*, this case is an appropriate time to revisit and review *Crawford*.

The Respondent contends that *Bruton* remains unchanged by both *Roberts* and *Crawford*, however, should this Court find that *Crawford* did overrule *Bruton*, this case is an opportune time to revisit the legal standard set forth and determine whether the *Crawford* standard is workable. Many scholars have concluded that the loose framework and unclear definition of "testimonial" has created substantial problems for the courts due to unclear tests and evolving factors. Geoffrey Burkhart, *A Guide to the Confrontation Clause*, 101 III. B.J. 304 (2013); Michael D. Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining "Testimonial"*, 10 Lewis & Clark L. Rev. 531, 533 (2006); Tom Lininger, *Prosecuting Batterers after Crawford*, 91 Va. L. Rev. 747, 766-67 (2005); Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. Rev. 185, 189-99 (2004).

In particular, the line of forensic report cases holding lab results and identifications are testimonial and therefore the custodian must be confronted have wreaked havoc on the judicial system by requiring prosecutors to abandon traditional methods of entering evidence and bring individuals to court who previously had never been necessary. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009); *Davis v. Washington*, 547 U.S. at 813. These cases have created confusion for both parties and have not proven to protect the rights of the accused any better than

the reliability test provided by *Robert. Roberts*, 448 U.S. at 66. Additionally, the "911 cases" regarding whether the "primary purpose" of an emergency call is to render aid or provide future testimony has created varied results by jurisdiction and created factors that are not consistent in all instances. *Michigan v. Bryant*, 131 S.Ct 1143, 1150 (2011); *Davis*, 547 U.S. at 827-288; Burkhart, *supra* at 306. As it has been a decade since *Crawford* was decided, now is an opportune time to assess if the testimonial/non-testimonial dichotomy is actually a better analysis than the "adequate indicia of reliability" test. *Roberts*, 448 U.S. at 66; *Crawford*, 541 U.S. at 36. The Respondent poses that it is not.

When analyzing Confrontation Clause, the Court should evaluate the success of the Crawford standard and find that the Third Circuit's analysis in Hendricks is a more effective way to protect the rights of the accused. See United States v. Jones, 381 F.App'x 148, 151 (3rd. Cir. 2010) (Holding that *Bruton* should be broadly construed and applied to both testimonial and nontestimonial hearsay, despite Crawford.); United States v. Hendricks, 395 F.3d 173, 179 (3d Cir. 2005). Though altered by Berrios, when analyzing methods of determining reliability and harmfulness, the Court will find that the framework explained in *Hendricks* addressed both testimonial and non-testimonial incriminating statements and created a clear method of determining admissibility. United States v. Berrios, 767 F.3d 118, 126 (3r Cir. 2012); Hendricks, 395 F.3d at 179. In *Hendricks*, the Court reasoned *Crawford* only applied to testimonial hearsay and in turn the analysis of non-testimonial hearsay reverted back to the standard set in *Roberts*, which explained but did not alter Bruton. Berrios, 767 F.3d at 126; Hendricks, 395 F.3d at 179. By retaining the "adequate indicia of reliability" standard for non-testimonial hearsay, the Court would be able to achieve its objective of ensuring that out of court statements admitted as evidence are likely to be truthful, reliable, and not overly prejudicial.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that this Honorable

Court AFFIRM the decision of the United States Court of Appeals for the Fourteenth Circuit

and hold, as a matter of law, that (1) Federal Rule of Evidence 404(b) permits the introduction of

"reverse 404(b)" evidence by the defendant, (2) under *Chambers v. Mississippi*, Ms. Zelasko's

right to present a complete defense would be violated by the exclusion of Ms. Morris's

testimony, (3) Williamson v. United States should not be overruled, and (4) the introduction of

non-testimonial evidence from a co-defendant should be barred under Bruton v. United States

regardless of the holding of Crawford v. Washington.

Respectfully Submitted,

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Counsel for Respondent

Date: February 10, 2014

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