
No. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

-against-

ANASTASIA ZELASKO,

Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether, as a matter of law, Federal Rule of Evidence 404(b) permits Respondent Zelasko's exculpatory use of third-party propensity evidence when the evidence is highly probative due to the significant similarity to the charged crime, and the evidence would not substantially raise the issues of jury confusion, waste of time or prejudicial risk.

II. Whether, under *Chambers v. Mississippi*, the exclusion of a third party's propensity to distribute illegal drugs would violate Respondent Zelasko's right to present a complete defense, where such evidence is the sole proof that Respondent was not the second coconspirator?

III. Whether *Williamson v. United States* must be upheld when it provides a sufficiently clear standard to apply Federal Rule of Evidence 804(b)(3) by effectively balancing Respondent Zelasko's individual liberty interests against law enforcement interests.

IV. Whether, under *Bruton v. United States*, at a joint trial, a non-testifying co-defendant's statement implicating Respondent Zelasko violates the Confrontation Clause even when the statement was made to a friend and, hence, a nontestimonial statement within the meaning of *Crawford v. Washington*.

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STATEMENT OF THE CASE

Statement of Facts

Respondent Anastasia Zelasko joined the United States women's Snowman Team on or about September 6, 2010. (R. 1.) The Snowman Team participates in the Snowman Pentathlon, which is a winter sport that includes five events including dogsledding and rifle shooting. (R. 8.) In fall 2011, the team's practice times in the Snowman Pentathlon markedly improved, a few months after Co-Defendant Lane joined the United States women's Snowman team. (R. 2.) Casey Short, a former member of the Canadian Snowman relay team and an alleged former dealer of illegal steroids, is also a teammate on the winter Snowman Team. (R. 8.) Peter Billings, who was the boyfriend of Co-Defendant Lane and coach of the United States women's Snowman team, observed a conversation between the two Co-Defendants regarding a financial issue, and later approached Co-Defendant Lane with the suspicion that she was distributing an illegal steroid to the Snowman Team, which Co-Defendant Lane denied. (R. 1, 3.)

On January 16, 2012, however, Co-Defendant Lane disclosed to Billings in an e-mail that she and a partner were engaged in running a "business . . . with the female team," that a member from the male Snowman Team threatened to report them if they did not admit their guilt, and that her business partner desired to find a method to keep the male team member quiet. (R. 3.)

On February 3, 2012, while practicing for the competition alone, Respondent Zelasko shot and killed Hunter Riley, a team member of the men's Snowman Team and an informant for the Drug Enforcement Administration (DEA), within a rifle range in Remsen National Park. (R. 3.) A subsequent search of Respondent Zelasko's apartments

revealed two 50-milligram doses of a performance-enhancing steroid known as "ThunderSnow" and $5,000 cash. Another subsequent search of Co-Defendant Lane's apartment revealed and twenty doses of ThunderSnow and $10,000 cash. (R. 4.) Although a search of Ms. Short's apartment revealed no ThunderSnow, a search of the U.S. Snowman Team's training facilities revealed 12,500 milligrams of ThunderSnow, valued at approximately $50,000. (R. 3, 8.)

Procedural History

The government later charged Co-Defendant Lane and Respondent Zelasko with murder, conspiracy to commit murder, conspiracy to distribute and possess with intent to distribute steroids, and distribution of and possession with intent to distribute steroids. (R. 4, 5.)

In District Court, the testimony from Ms. Morris regarding Ms. Short's propensity to sell illegal performance enhancing steroids was admitted on two grounds. (R. 21.) First, the court admitted the evidence on the ground that the common law basis for the Rule, protecting the defendant from unwarranted character inferences, is not at issue in this case because Ms. Short is not a defendant. (R. 21.) Additionally, the court held that denying such evidence would constitute a deprivation of Respondent Zelasko's right to a complete defense under *Chambers v. Mississippi*. (R. 21, 22.) The court further denied the government's motion to admit against Respondent Zelasko the aforementioned e-mail from Co-Defendant Lane to Peter Billings under Rule 801(d)(2)(E). (R. 22.) Finally, the court held that Co-Defendant Lane's statements implicating Respondent Zelasko in the conspiracies are inadmissible on the grounds that admitting them where Co-Defendant Lane would not testify violates the Confrontation Clause. (R. 23.) The

United States Court of Appeals for the Fourteenth Circuit affirmed each holding. (*See* R. 33-46.)

This Court must decide whether Federal Rule of Evidence 404(b) prohibits evidence regarding Ms. Short's prior drug related conduct, and whether categorical exclusion of that evidence would deny Respondent Zelasko's right to a complete defense under *Chambers v. Mississippi*. Additionally, the Court must decide whether to overrule *Williamson v. United States*'s standard for the application of Federal Rule of Evidence 804(b)(3), and whether the statement of a non-testifying co-defendant implicating Respondent Zelasko violates the Confrontation Clause under *Bruton v. United States* even though the statement is nontestimonial under *Crawford v. Washington*.

SUMMARY OF THE ARGUMENT

In the present case, the lower court correctly ruled that: (1) Federal Rule of Evidence 404(b) does not bar Respondent Zelasko's exculpatory use of third party propensity evidence to engage in performance-enhancing drug distribution; (2) the suppression of evidence regarding Ms. Short's propensity to engage in drug trafficking deprives Respondent Zelasko of her constitutional right to present a defense pursuant to *Chambers v. Mississippi*; (3) *Williamson v. United States* should not be overruled insofar as it provides an effective standard for the application of Federal Rule of Evidence 804(b)(3); and (4) a non-testifying co-defendant's statement implicating Respondent Zelasko violates the Confrontation Clause even when the statement was made to a friend and is consequentially nontestimonial.

First, Rule 404(b) permits Respondent Zelasko's exculpatory use of a third party's prior crime evidence to show Ms. Short's propensity to engage in performance-enhancing

drug distribution because Rule 404(b) purports to bar the government's use of the defendant's propensity evidence. When the prior crime evidence is significantly similar to the charged crime in terms of timing, location, and manner, and the evidence would not substantially raise prejudicial risk, the third-party propensity evidence must be admitted to assist the jury's fact-finding mission.

Second, in *Chambers v. Mississippi,* the Court held that denying the admission of evidence that shows third-party guilt constitutes a denial of one's constitutional right to due process. Denying Respondent Zelasko's motion to introduce testimony regarding Ms. Short's propensity to traffic illicit steroids to winter sports teams violates her constitutional right to due process because, where there are only two possible conspirators, this denial would eliminate her chance to prove that she had no motive to kill Riley. Furthermore, the government has proffered insufficient policy goals to support the exclusion of this evidence.

Third, *Williamson v. United States*, should not be overruled because its standard best protects individuals from prosecutors and plaintiffs seeking to introduce statements that have a substantial likelihood to be unreliable. The standard in *Williamson* makes sense because mere proximity to a self-inculpatory statement is not enough of a reason to assume that such statement is likely to be reliable. Additionally, while the standard in *Williamson* may be critiqued for being difficult to apply predictably and consistently, other suggested standards are likely to *further complicate* the application of Rule 804(b)(3).

Last, *Crawford v. Washington* notwithstanding, there is no legitimate reason for courts to find that the doctrine in *Bruton v. United States* does not apply to nontestimonial

statements. Not only did *Crawford* cite *Bruton* with approval, there are a variety of circumstances where a motive for falsely reporting a confession that never in fact occurred can influence a non-testifying co-defendant implicating another co-defendant. Allowing a non-testifying co-defendant to implicate another co-defendant directly violates both the text and spirit of the Confrontation Clause.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 404(b) DOES NOT BAR RESPONDENT ZELASKO'S EXCULPATORY USE OF THIRD PARTY PROPENSITY EVIDENCE TO ENGAGE IN PERFORMANCE-ENHANCING DRUG DISTRIBUTION BECAUSE THE EVIDENCE HAS HIGH PROBATIVE VALUE DUE TO THE SIGNIFICANT SIMILARITY TO THE CHARGED CRIME AND BECAUSE IT IS UNLIKELY TO PREJUDICE THE JURY IN ANY MEANINGFUL WAY.

The rationale behind the codification of Rule 404(b) permits criminal defendants to introduce other-crimes evidence of a third party for exculpatory purposes because Rule 404(b) codified a common-law rule to bar *prosecution's* use of the defendant's propensity evidence. *See United States v. Krezdorn*, 639 F.2d 1327, 1332-33 (5th Cir. 1981); Fed. R. Evid. 404(b). Given that Rule 404(b) is drafted in general terms of "a person's character," it is *possible* to broadly interpret, under Rule 404(b), that the defendant cannot use the propensity evidence of a third party as "a person." *United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004). That said, the validity of such a broad interpretation has never gained much acceptance amongst judges and scholars. *See* Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404 (b)*, 87 Nw. U. L. Rev. 651, 670-71 (1993). Hence, the mechanical application of Rule 404(b) to bar the defensive,

exculpatory use of third-party misconduct misconstrues the congressional intent behind Rule 404(b). *Id*. at 671 (finding that the comments to the Federal Rules' predecessors, the Uniform Rules of Evidence and the A.L.I. Model Code of Evidence, had rules similar to Rule 404(b) solely for protection of the defendant). Barring evidence in this manner may also cause unwanted results; for instance, a wrongfully charged defendant would be deprived of any recourse to introduce relevant prior crimes of a third party. *See United States v. Stevens*, 935 F.2d 1380, 1406 (3d Cir. 1991) (holding that the defendant's use of third party evidence to refute eyewitness identification was admissible).

Permitting the criminal defendant's exculpatory use of third-party misconduct is another common-law rule, adopted by this Court as early as in 1891. *Alexander v. United States*, 138 U.S. 353 (1891). In a murder case where the defendant offered to prove, as an alternative explanation of the victim's death, that the deceased was having an affair with a married woman and her husband, armed with guns, was hunting the deceased, this Court decided that the trial judge may exclude evidence of third-party propensity evidence had the evidence been "so remote in time and place." *Id*. at 356–357. If "the time and the circumstances attending the murder were uncertain or obscure," the evidence is admissible. *Id*. Modern courts followed suit and, after the enactment of the Federal Rules of Evidence, began to call it as "reverse-404(b)" evidence. *See Stevens*, 935 F.2d at 1404; *Agushi v. Duerr*, 196 F.3d 754, 760-62 (7th Cir. 1999); *United States v. Reed*, 259 F.3d 631, 634 (7th Cir.2001); *United States v. Montelongo*, 420 F.3d 1169, 1174-75 (10th Cir. 2005); *United States v. McClure*, 546 F.2d 670, 673 (5th Cir. 1977). Generally, the defendant can introduce other-crimes evidence of a third party if such evidence tends to negate the defendant's guilt. *Reed*, 259 F.3d at 634. In determining the

admissibility, "a district court should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time and confusion of the issues under Rule 403," and similarity is a significant factor in determining probative value. *Id*. In such situations, Rule 404(b) never bars the long-standing common law rule.

A. Ms. Short's Prior Crime Evidence is Highly Probative Because There Are Significant Similarities of Timing, Location, and Manner Between The Prior Crime And The Charged Crime.

To be admitted as reverse 404(b) evidence, "the evidence [must] satisfy the relevancy standard of Rule 401 [that the evidence had a tendency to make the defendant's guilt less probable]." *Stevens*, 935 F.2d at 1405. In *Stevens,* when the defendant was convicted of a robbery, based on eyewitness identification, the defendant attempted to offer the testimony of another victim in a similar robbery. *Id*. at 1401. Both were armed robberies with a handgun, occurred within a few hundred yards of one another between 9:30 p.m. and 10:30 p.m., and had military personnel victims. *Id*. In determining admissibility, the "critical question" for the court was whether there was a "degree of similarity" between the charged crime and the third party's other-crimes. *Id*. at 1401. Because the timing, location, and manner of the two crimes were substantially similar, the reverse 404(b) evidence was found admissible. *Id*. at 1406. In contrast, when similarity was rather "generic," the evidence was found inadmissible. *See United States v. Seals*, 419 F.3d 600, 606-09 (7th Cir. 2005) (finding that different types of guises, different types of guns, different modus operandi, and a lower similarity in time and location constitute generic similarities). Notably, defendants are not required to establish that "the [other-crimes evidence is] so distinctive as to constitute 'signature' crimes" because such a high standard is only required of the State. *Stevens*, 935 F.2d at 1403.

Here, the other-crime that Ms. Short committed is significantly similar to the two-person drug conspiracy, charged against Respondent Zelasko. The manner of the two crimes is almost identical. In both crimes, a member of a national Snowman team is believed to have sold anabolic steroids, specifically designed to be undetectable by conventional drug tests at around $200 per dose. According to Ms. Morris, Ms. Short utilized her status as a female Canadian team member to have access to the team and sold the drug to "almost all the other members of the female team." (R. 25.) In the present case, Co-Defendant Lane and another team member "have been running [the drug business] with the female team." (R. 3.) Though the steroids are called ThunderSnow in the U.S. and White Lightning in Canada, the difference is insignificant because one is a mere ester of the other, and both are directly injectable into bloodstream. (R. 28.)

The timing is also similar. Ms. Short engaged in the drug transactions in April 2011 in Canada; the transactions in the US must have occurred around February 2012, when Mr. Riley was shot. It is highly possible that the US female team had used the drug as early as in fall 2011, when Ms. Short transferred to the US team and "the team's practice times markedly improved." (R. 2.) Juxtaposed with the consistency of the US female team's past performances, the records tend to show that the female team's performance was enhanced by an unusual feature. *Id*.

Lastly, the locations of the drug transactions, in Canada and in the US, appear to be the practice facilities owned by the teams. In Canada, Ms. Short contacted and distributed drugs at the team facilities (R. 24-25.); the drug activities of the U.S. team members also seem to center around the team facility since the most of the drugs were

found at the team facility. All in all, the factors establish that Ms. Short has a propensity to engage in performance-enhancing drug distribution.

The government may argue that due to certain differences, Ms. Short's other-crime evidence is not similar but rather generic. For instance, in the U.S. case, the manner of solicitation and the manufacture of the drug are unclear so that it is hard to draw an inference. Yet, as pointed out above, the reverse 404(b) evidence is not required to constitute signature crimes. *Stevens*, 935 F.2d at 1403. Moreover, the other-crime evidence of Ms. Short is not generic. It is so similar to the alleged two-person conspiracy with regard to the nature of the drug and the people around it. The similarity is ample enough for the jury to consider in evaluating the whole evidence. Therefore, the similarities of the manner, timing, and location amply establish the relevance and high probative value of Ms. Short's prior crime to show her propensity to engage in performance-enhancing drug distribution.

B. The Probative Value of Ms. Short's Prior Crime Evidence Is Not Substantially Outweighed By Rule 403 Considerations Because The Evidence Directly Addresses The Central Issue.

Even with the relevant reverse 404(b) evidence, the district court must consider countervailing Rule 403 considerations. *See Stevens*, 935 F.2d at 1405; Fed. R. Evid. 403. When the defendants were prosecuted based on marijuana found in the truck that they were driving, they attempted to proffer the prior incidence evidence that marijuana was found in another truck of the owner. *Montelongo*, 420 F.3d at 1171-72. The court found that, because the defensive evidence would focus on the central issue, there is no "real danger that the similarities between the two crimes would have distracted the jurors' attention from the real issues in the case." *Id*. at 1175 (internal quotation marks omitted).

Thus, the probative value of the evidence is not substantially outweighed by "confusing the jury[,] the potential of an undue waste of time [or] cumulative [evidence]." *Id*. at 1176. When the other-crimes evidence is not concrete, the evidence was found more unfairly prejudicial than probative. *United States v. Hill*, 322 F.3d 301, 304-06 (4th Cir. 2003) (when convicted of defrauding a victim for over $100,000, the defendant offered to provide evidence that the victim previously gave $10,000 as a gift to another person and sued later, claiming it was a loan). Yet, in general, the risk of prejudice is significantly less than the prosecutorial evidence because as non-party, the third party cannot be subject to any kind of prejudice. *United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989).

In the present case, the danger of confusing the issues, misleading the jury or wasting time is not present because, if proffered, the evidence will directly address the central issue underlying in Counts 1, 2, 4 and 5: whether Respondent Zelasko participated in the two-party drug conspiracy with Co-Defendant Lane. Since the government fails to explain why Respondent Zelasko, as co-conspirator, only possesses the drug consistent with "personal use and not sale" while Co-Defendant Lane's drug quantity meets "sale and not personal use," the evidence that Ms. Short masterminded drug transactions in a similar manner will help the jury to resolve justifiable doubts rising from the government theory. (R. 28.) Moreover, unlike *Hill*, the defense is offering concrete other-crimes evidence. *Hill*, 322 F.3d at 304-06. Ms. Morris's testimony is not a mere speculation. Ms. Morris will testify under penalty of perjury and provide details of Ms. Short's prior crime. Thus, the Ms. Morris testimony presents no Rule 403 issues.

The government may argue that presenting third party's prior bad act is "prejudicial to fair consideration in that it [would be] easier for the jury to lay the blame on [the third party] for the drug deal despite evidence presented at trial." *Lucas*, 357 F.3d at 606. Yet, such logic is misleading because it masks complicated Rule 403 judicial balancing considerations. More importantly, holding an individual to the same rigorous standard as the government, which has potentially limitless institutional resources, would be too harsh. Therefore, as the probative value of the Ms. Morris testimony will not be substantially outweighed by Rule 403 considerations, Ms. Short's prior crime evidence must be admitted.

II. THE SUPPRESSION OF MS. SHORT'S PROPENSITY EVIDENCE TO ENGAGE IN DRUG TRAFFICKING DEPRIVES RESPONDENT ZELASKO OF HER CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE PURSUANT TO *CHAMBERS V. MISSISSIPPI* BECAUSE SUCH EVIDENCE BEARS ON THE CREDIBILITY OF HER ALIBI AND IS CENTRAL TO HER CLAIM OF INNOCENCE.

In *Chambers v. Mississippi*, this Court held that a defendant's constitutional right to admit evidence of a third party's guilt may outweigh evidentiary rules that would otherwise prohibit that evidence. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This Court best articulated the standard for evaluating those instances in which the ends of justice may require the trumping of evidentiary standards in *Michigan v. Lucas*, where the court stated that "the right [to offer relevant evidence] may, in appropriate cases, bow to accommodate other legitimate interest in the criminal trial process." 500 U.S. 145, 149 (1991). Thus, if the proffered evidence is probative and the interests the government contends are at stake in admitting the evidence are not "legitimate," the Court must admit the evidence on constitutional grounds.

Evidence of Ms. Short and Ms. Morris's prior transactions in illegal drug trafficking meets the standard under *Chambers* because denying the admission of this evidence would constitute a denial of Respondent Zelasko's opportunity to present a complete defense. The government contends that Ms. Morris's testimony is irrelevant because it shows that a third party sold a different drug, in a different country, to different people. However, this Court has held that evidence "has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions, but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." *Old Chief v. United States*, 519 U.S. 172, 187 (1997). According to this logic, while evidence may not be directly relevant, it may be absolutely necessary as part of the "narrative" that a defendant presents to the jury. Likewise, the Supreme Court has also held that the exclusion of "competent, reliable evidence" when such evidence is "central to the defendant's claim of innocence" deprives the defendant of "the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (*citing United States v. Cronic*, 466 U.S. 648, 656 (1984)) (emphasis added). Hence, where evidence that could complete a defendant's central narrative is denied, such denial constitutes a clear constitutional deprivation.

In *House v. Bell*, the defendant claimed that evidence barred by procedural rules showed his "actual innocence," and was therefore sufficient to except his claims from procedural default. 547 U.S. 518 (2006). At issue in *House* was the sufficiency of the defendant's showing to except his claim from procedural default. *Id.* at 540. Indeed, the

defendant's claim stated that the semen on the victim's clothing was not his, but belonged to her husband. *Id*. The prosecution disputed the admission of this evidence, arguing that the new evidence was immaterial, in that the charge of murder, at the guilt phase, "neither sexual contact nor motive were elements of the offense, so in the State's view the evidence, or lack of evidence of sexual assault or sexual advance" was of no consequence. *Id.* This Court, however, held that the evidence had probative value even though the government asserted no sexual charge, and that that probative value was enough to overcome the state evidentiary rule barring the evidence. In holding so, the Court stated that where the jury had come to the conclusion that the murder had come in the course of a rape or kidnapping:

> [A] jury informed that fluids on the victim's garments could have come from [the defendant] might have found that [the defendant] trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from [the defendant] would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative.

Id. at 541. Thus, in this case, the evidence used to eliminate a possible motive was admissible, even though it did not completely exonerate the defendant, as the admission did in *Chambers*.

Like the defendant in *House*, Respondent Zelasko's constitutional right to a fair trial depends on her ability to provide evidence that would possibly negate any motive on her part. In *House*, the defendant offered evidence of the semen to disprove one motive that the jury actually speculated on in his actual sentencing. Respondent Zelasko's proffered evidence is even stronger: it demonstrates a strong possibility that a third party committed the offense, and not Respondent Zelasko. Because there exist only two

possible conspirators in this case, evidence that a teammate of hers previously engaged in drug trafficking with winter sports teams would completely exonerate her. The affidavit from Doctor Wallace, testifying that the acts are so similar to the alleged drug sales that they raise a strong inference that Ms. Short was the second coconspirator, is crucial to Respondent Zelasko's defense. This evidence meets the *Chambers* standard better than the evidence presented in *House* for another reason: it is the only available evidence linking Ms. Short to the drug selling conspiracy. Denying Respondent Zelasko the right to introduce this evidence would leave the jury with no room to speculate regarding the possibility of a third party coconspirator. This denial fits cleanly with the standard set forth in *Chambers v. Mississippi*, in that it would constitute a denial of her right to have the prosecutor's case encounter meaningful adversarial testing. The Court should therefore admit the evidence that Ms. Short has previously sold extremely similar illegal anabolic steroids to another winter sport team.

A. The Court Should Admit The Evidence To Engage In Drug Trafficking Because The Government Failed To Provide Sufficient Policy Goals To Bar The Admission of Ms. Morris's Testimony.

As previously mentioned, the standard set forth in *Lucas* states, "the right [to offer relevant evidence] may, in appropriate cases, bow to accommodate other legitimate interest in the criminal trial process." This is the counterweight in excluding probative evidence, a denial of which would otherwise constitute a denial of the defendant's right to due process. Moreover, the *Lucas* Court further held that the "alternative sanctions" to preclusion should "be adequate and appropriate in most cases." *Lucas*, 500 U.S. at 152 (*citing Taylor v. Illinois*, 484 U.S. 400, 413 (1988)). The government argues that judicial expediency and prejudice to Ms. Short constitute the "legitimate interests in the criminal

trial process" as part of the counterweights in the *Lucas* standard. The government, however, has offered no reasonable basis to believe that either of these interests would be affected whatsoever in admitting the evidence that Ms. Short sold similar anabolic steroids to a different winter sports team, and there is every reason to believe that Ms. Morris's testimony is reliable and highly probative.

The Supreme Court has held that "a State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case," and those exclusions "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 56, 61 (1987). Additionally, the Court has held that evidentiary rules "may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. Ms. Morris's testimony meets this standard, in that it is decidedly reliable and probative. In *Rock*, the Court held that Arkansas' *per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his or her own behalf. In doing so, the Court stated that the corroborating evidence and other means of verifying the accuracy of the testimony would reduce the chances that the admission of the evidence would prejudice the prosecution's case. *Rock*, 483 U.S. at 45.

In contrast, our case involves the testimony of Ms. Morris, who is revealing potentially incriminating evidence regarding her purchases of illegal drugs. The Federal Rules of Evidence regard statements against self-interest to be so reliable, that they exclude statements against self-interest from the rule against hearsay. Fed. R. Evid. 804 (b)(3). This evidence, presented via affidavit, is far more reliable than hypnotically induced testimony from a defendant, and therefore it should meet the standard set forth

by the Court in *Rock v. Arkansas.* Asserting policy goals that would not be affected whatsoever should not preclude the admission of this evidence on the grounds that Ms. Morris's statements are unreliable. Therefore, the government cannot argue that this evidence should be barred on the ground that it is unreliable.

First, the government has proffered no evidence that Ms. Morris's testimony regarding Ms. Short's prior acts in engaging with illegal drug trafficking would counteract judicial expediency. The evidence offered in this case is part of a relatively simple defense, and is only offered to provide the jury with a chance to speculate that Respondent Zelasko may not be the coconspirator. Introducing this evidence would possibly lead to the introduction of other evidence of Ms. Short's propensity to engage in drug trafficking, but there is little reason to believe that it would be so cumulative such that it would bog down the entire judicial process.

Second, there is no basis for believing that the introduction of Ms. Morris's testimony would prejudice Ms. Short. Prejudice only applies to the parties in the action that would be affected by the introduction of the evidence. Ms. Short is not a party to this case, and therefore her interests would not be affected by the introduction of the evidence. Furthermore, the introduction of this evidence would have no effect on Ms. Short in future litigation because the issue of Ms. Short's guilt is not being litigated in this case; her possible guilt is only offered to provide the jury with one possible inference regarding the nonexistence of Respondent Zelasko's motive.

III. *WILLIAMSON V. UNITED STATES* SHOULD BE UPHELD BECAUSE IT SUCCESSFULLY PROVIDES A SUFFICIENTLY CLEAR STANDARD TO APPLY FEDERAL RULE OF EVIDENCE 804(B)(3) BY EFFECTIVELY BALANCING RESPONDENT ZELASKO'S INDIVIDUAL LIBERTY INTERESTS WITH LAW ENOFRRCEMENT INTERESTS.

Williamson v. United States should not be overruled insofar as it provides an effective standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest. *Williamson v. United States*, 512 U.S. 594 (1994). Rule 804(b)(3) provides, in relevant part, that a statement is admissible if:

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

Fed. R. Evid. 804(b)(3). This Court decided *Williamson* twenty years ago, and federal courts have applied *Williamson* ever since. *See*, *e.g.*, *United States v. Dargan*, 738 F.3d 643, 649 (4th Cir. 2013). *Williamson*'s central issue was whether the term "statement" should be read more expansively as an extended declaration, or narrowly as a "single declaration or remark." *Williamson*, 512 U.S. at 599 (1994). Ultimately, the court in *Williamson* adopted the narrower definition, which limited the term "statement" to only "those declarations or remarks within the confession that are individually self-inculpatory" for the purposes of Rule 804(b)(3). *Id.* As such, federal courts were directed to consider whether each and every "single declaration or remark" of the entire confession is admissible under Rule 804(b)(3). *Id.*

The rationale for adopting the narrow definition over the broader one is simple: "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id.* Indeed, "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id.* While self-inculpatory statements are

generally more reliable, just because a statement is "collateral to a self-inculpatory statement" does not mean that the collateral statement should be trusted. *Id.* at 600. Hence, "mere proximity" to a self-inculpatory statement is not enough of a reason to assume that such statement is likely to be reliable. *United States v. Soriano*, 346 F.3d 963, 980 (9th Cir. 2003).

While the government may argue that *Williamson* was especially concerned about collateral statements made by persons caught in the act of wrongdoing that point the finger at another party, the ruling in *Williamson* is not limited to such a concern. Indeed, there is not any binding authority that stands for the proposition that collateral statements that form part of a generally self-inculpatory, informal narrative to non-law enforcement are subject to a relaxed standard. There are, however, plenty of cases applying *Williamson* to various different contexts. For example, "[t]he cases interpreting and applying *Williamson* include at least two civil trials." *Silverstein v. Chase*, 260 F.3d 142, 146–47 (2d Cir. 2001) (referring to *Schimpf v. Gerald, Inc.,* 52 F. Supp. 2d 976, 985–86 (E.D. Wis. 1999) (involving alleged securities fraud); *Ciccarelli v. Gichner Sys. Group, Inc.*, 862 F. Supp. 1293, 1298 & n. 3 (M.D. Pa. 1994) (involving alleged ERISA violation)).

Regardless of what the specific context of a particular statement is, collateral statements that are not against a defendant's interest "do not become more reliable merely because they are collateral to admissions against [a defendant's] interest," period. *Silverstein*, 260 F.3d at 146. Indeed, "collateral statements that are neutral as to the declarant's interest should not be treated differently from other generally excluded hearsay statements," as such statements are still likely to be untrustworthy despite their

"collateral" nature. *Id.* (*citing Williamson*, 512 U.S. at 600). That's not to say that context is irrelevant, as *Williamson* "does not mean that the trial judge must always parse the statement and let in only the inculpatory part." *United States v. Paguio*, 114 F.3d 928, 934 (9th Cir. 1997). It is important to not forget that, under *Williamson*, each statement sought to be introduced Rule 804(b)(3) is still required to be "examined in context, to see whether as a matter of common sense the portion at issue was against interest and would not have been made by a reasonable person unless he believed it to be true." *Id.*

One of the principal arguments against *Williamson* is that the case's standard is difficult to apply predictably and consistently. Even assuming the standard in *Williamson* is difficult to apply, other suggested approaches would be equally as difficult in application. For example, Justice Kennedy suggests a standard whereby "all statements related to the precise statement against penal interest" would be admissible subject to two limits: (1) courts "should exclude a collateral statement that is so self-serving as to render it unreliable;" and (2) in "cases where the statement was made under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment." *Williamson*, 512 U.S. at 620 (Kennedy, J., concurring in judgment). These two limits are just as, if not more, vague and subject to inconsistent application as the *Williamson* standard itself. The phrase "so self-serving as to render it unreliable" provides no guidance as to where the line would be drawn for being sufficiently "self-serving" enough to constitute a bar to admissibility. The term "significant motivation" also provides little to no guidance as to what kinds of motivations would be significant enough to preclude application of Rule 804(b)(3). As such, application of Justice

Kennedy's rule would be more likely to *further complicate* the application of Rule 804(b)(3) than to simplify the rule in any meaningful way.

Last, from a policy perspective, *Williamson*'s "narrow" interpretation of what constitutes a statement for the purposes of Rule 804(b)(3) best protects individuals from prosecutors and plaintiffs seeking to introduce statements that have a substantial likelihood to be unreliable. Indeed, if all statements related to the statement against penal interest were admissible, there would be a substantial likelihood that the jury will hear unreliable statements and convict individuals based on those statements. The entire rationale behind Rule 804(b)(3) essentially gets flipped on its head because statements that are neutral as to a defendant's interest will be found admissible. Just because a particular statement is collateral to a statement against a declarant's penal interest *does not* mean that the "commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true" still applies. It is simply unfair to make such assumptions when people's liberty and freedom are on the line.

IV. AT A JOINT TRIAL, THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT IMPLICATING THE DEFENDANT MUST BE BARRED AS VIOLATIVE OF THE CONFRONTATION CLAUSE UNDER *BRUTON V. UNITED* STATES BECAUSE MERE NONTESTIMONIAL STATUS IS INSUFFICIENT TO PROTECT AGAINST THE SUBSTANTIAL DANGERS OF FALSE ACCUSATION.

The Sixth Amendment of the Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Bruton v. United States*, this Court held that "admission at a joint trial of a non-testifying defendant's statement inculpating a co-defendant violates the co-

defendant's Confrontation Clause rights, notwithstanding a curative instruction." *United States v. Dale*, 614 F.3d 942, 955 (8th Cir. 2010) (*citing Bruton v. United States*, 391 U.S. 123, 135-36 (1968)). A few decades later, in *Crawford v. Washington*, the Supreme Court held that "the Confrontation Clause prohibits the admission of evidence of out-of-court 'testimonial' statements against a criminal defendant, unless the defendant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant." *Id.* (*citing Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

Since *Crawford*, several federal appeals courts have concluded that "the out-of-court statement of a co-defendant made unknowingly to a government agent is not 'testimonial' within the meaning of *Crawford*" on the false premise that *Crawford* implicitly meant to alter the *Bruton* doctrine. *Id.* at 956 (*citing United States v. Udeozor*, 515 F.3d 260, 269–70 (4th Cir. 2008); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008); *United States v. Underwood*, 446 F.3d 1340, 1347–1348 (11th Cir. 2006); *United States v. Hendricks*, 395 F.3d 173, 182–184 (3d Cir. 2005); *United States v. Saget*, 377 F.3d 223, 229–230 (2d Cir. 2004)). The Third Circuit, on the other hand, has indicated that nontestimonial statements from co-defendants may violate the *Bruton* doctrine. *See United States v. Jones*, 381 F. App'x 148, 151 (3d Cir. 2010). Specifically, the Third Circuit has "interpreted *Bruton*'s rule broadly, applying it not only to custodial confessions but also to informal statements." *Id.*

As such, there remains an open question as to whether *Crawford* did, in fact, intend to drastically limit *Bruton* to testimonial statements. That said, when viewed holistically, it is "highly unlikely that *Crawford* (a case that *expanded* the Confrontation Clause's application) would have eviscerated *Bruton* (a Confrontation Clause case that

Crawford cited) so casually." *United States v. Williams*, 1:09CR414 JCC, 2010 WL 3909480, at *4 (E.D. Va. Sept. 23, 2010). Indeed, *Crawford* appears to cite *Bruton* with approval, stating that, "[w]e similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine" in reference to the *Bruton* case. *Crawford v. Washington*, 541 U.S. 36, 57 (2004). Hence, "[i]f all the Court did in *Crawford* was overrule *Roberts*," then it becomes clear that the *Crawford* opinion "had no effect on the *Bruton* doctrine because the *Roberts* test for constitutional reliability had no effect on the *Bruton* doctrine, which is solely concerned with constitutional harmfulness." Colin Miller, *Avoiding A Confrontation? How Courts Have Erred in Finding That Nontestimonial Hearsay Is Beyond the Scope of the Bruton Doctrine*, 77 Brook. L. Rev. 625, 665 (2012).

Nearly two decades before *Crawford*, the Supreme Court held in *Cruz v. New York* that "[h]aving decided *Bruton,* we must face the honest consequences of what it holds." 481 U.S. 186, 193 (1987). Indeed, the Court in *Cruz* was concerned by the possibility that there could be "a motive for falsely reporting a confession that never in fact occurred" on the part of a co-defendant. *Id.* at 192. Testimonial or not, the statement of a non-testifying co-defendant implicating another co-defendant can be influenced by this the same "motive for falsely reporting a confession that never in fact occurred" that the Court was concerned about in *Cruz*. *Id.* To ignore that fact is to fail to effectively deny a fundamental right that the Constitution has long sought to protect.

Take the following hypothetical: Suppose you have a situation where Sam tells John that Adam is helping Sam sell drugs. Assume that Sam and Adam become co-defendants in a criminal prosecution for possession with intent to distribute a Schedule III

substance. Further assume that Adam is completely innocent and that Sam simply told John that Adam was selling drugs because Sam wanted to make false accusations against Adam to disqualify Adam from an upcoming sporting event. In such a scenario, even though the statements of Sam are nontestimonial, there is a clear motive on the part of Sam to falsely accuse Adam of criminal conduct. Indeed, as the District of Columbia Court of Appeals has acknowledged, "[w]hether or not it is testimonial, a defendant's extrajudicial statement directly implicating a co-defendant is equally susceptible to improper use by the jury against that co-defendant." *Thomas v. United States*, 978 A.2d 1211, 1225 (D.C. 2009).

The case of Respondent Zelasko presents exactly the type of situation where a substantial danger for a false accusation exists in the context of a nontestimonial statement with the email sent from Co-Defendant Lane to Mr. Billings. The facts on the record make clear that both Respondent Zelasko and Co-Defendant Lane were engaged in a heated argument that ended in Co-Defendant Lane shouting "[s]top bragging to everyone about all the money you're making!" (R. 12.) The context of the email sent from Co-Defendant Lane to Mr. Billings also matters because Mr. Billings was not only the coach of the United States women's Snowman Team, but Co-Defendant Lane's boyfriend for several years at the time of the incident. (R. 3.)

Hence, there are several reasons to be concerned about the admission of the statements Co-Defendant Lane made to Mr. Billings. For example, Co-Defendant Lane could have been jealous and resentful of Respondent Zelasko and wanted to implicate her to the coach of the Snowman Team. Co-Defendant Lane could also be trying to mitigate *her own* conduct to her boyfriend by suggesting that she has a partner who has been

acting in compliance with her. Regardless of the *actual* motivation for this statement however, the simple fact remains that Respondent Zelasko will not be able to confront her accuser if the email from Co-Defendant Lane made to Mr. Billings is admitted. To allow a statement to come into evidence would stand in clear violation of the text and spirit of the Confrontation Clause, because there simply is "no sound reason for courts to find that nontestimonial statements fall outside the scope of the *Bruton* doctrine." Colin Miller, *Avoiding A Confrontation? How Courts Have Erred in Finding That Nontestimonial Hearsay Is Beyond the Scope of the Bruton Doctrine*, 77 Brook. L. Rev. 625, 665 (2012).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) that Federal Rule of Evidence 404(b) does not bar Respondent Zelasko's exculpatory use of third party propensity evidence to engage in performance-enhancing drug distribution; (2) that the suppression of Ms. Short's propensity evidence to engage in drug trafficking deprives Respondent Zelasko of her constitutional right to present a defense pursuant to *Chambers v. Mississippi*; (3) that *Williamson v. United States* should not be overruled insofar as it provides an effective standard for the application of Federal Rule of Evidence 804(b)(3); and (4) that a non-testifying co-defendant's statement implicating Respondent Zelasko violates the Confrontation Clause even when the statement was made to a friend and is consequentially nontestimonial.

Respectfully Submitted,

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Counsel for Respondent

Date: February 12, 2014.