No. 12-13

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

PETITIONER,

v.

ANASTASIA ZELASKO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether, as a matter of law, Federal Rule of Evidence 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged.

2. Whether, under *Chambers v. Mississippi*, Defendant Anastasia Zelasko's constitutional right to present a complete defense would be violated by exclusion of evidence of a third party's propensity to distribute illegal drugs.

3. Whether *Williamson v. United States* should be overruled insofar as it provides a standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest, and if so, what standard should replace it.

4. Whether, at a joint trial, the statement of a non-testifying co-defendant implicating the defendant is barred as violative of the Confrontation Clause under *Bruton v. United States*, even though the statement was made to a friend and thus would qualify as a non-testimonial statement within the meaning of the Court's subsequent decision in *Crawford v. Washington.*

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STATEMENT OF THE CASE

This court is being asked to uphold the Fourteenth Circuit Court of Appeals ruling in favor of Anastasia Zelasko's pretrial motion to admit the affidavit of Miranda Morris and the denial of the government's motion to exclude Jessica Lane's email. Ms. Zelasko is being charged by the government along with Co-Defendant Lane with conspiracy to distribute and possess with intent to distribute anabolic steroids, distribution and possession with intent to distribute anabolic steroids, simple possession of steroids, conspiracy to murder in the first degree, and murder in the first degree. **R. 31.**

Ms. Zelasko is seeking to admit testimony of Ms. Morris, a former member of the Canadian Snowman Team. **R. 32.** The affidavit, Exhibit A, states that Ms. Morris was approached by Ms. Short in April 2011to purchase an illegal anabolic steroid known as White Lightning. **R. 24-25.** Further Ms. Zelasko has an accompanying affidavit which demonstrates the strong link between White Lightning and ThunderSnow, the latter being the illegal anabolic steroid she is being charged with distributing. **R. 32.** The affidavit Exhibit B is by Henry Wallace, a chemist, and former consultant to professional sports leagues. **R. 26.** The affidavit states that Thunder Snow was developed through a chemical modification of White Lightning. **R. 28.** Also ownership of two 50 milligram doses of the substance is consistent with personal use and not sale. **R. 28.** The evidence in Ms. Morris' affidavit is being used to suggest that it was Ms. Short who was a member of the conspiracy with Ms. Lane. **R. 32.**

The government is seeking to admit an email sent by Ms. Lane to Peter Billings, Exhibit C. **R. 29.** The government believes that the email is evidence of a two person conspiracy involving Ms. Lane and her partner due to the words business and partner. **R. 33.** The email also contains a reference to Ms. Lane's partner's desire to keep him quiet. **R. 29.** The government

contends that the identity of the partner is Ms. Zelasko and that the email suggests that Hunter Reilly's death was an effort to keep him quiet. **R. 33.**

The initial order from the United States District Court, Southern District of Beorum found FRE 404(b) to not be applicable to Ms. Morris' affidavit as the common law basis for the Rule was related to evidence being admitted against a defendant. **R. 21.** Also as an alternate decision on the affidavit the court held the Ms. Zelasko has a constitutional right to present a complete defense. **R. 22.** They also found the evidence in Exhibit C to be hearsay statements and barred them. **R. 23.** Upon this order the government properly filed a notice of appeal. **App. 30.**

The Fourteenth Circuit Court of Appeals held that the lower court's rulings against the government two pretrial motions present four separate legal issues. **R. 30.** In regard to the first issue the court ruled that FRE 404(b) does not apply to the affidavit as the defendant was bringing forth evidence of a third party's propensity with the purpose to exculpate herself. **R. 34.** They also held that the testimony of the affidavit could be brought in as it falls within Ms. Zelasko's constitutional right to offer a complete defense. **R. 38.** Third, the court decided in Ms. Zelasko's favor in denying admission of Ms. Lane's email as they included non-inculpatory statements. **R. 42.** On the final issue the court denied the email of Ms. Lane as it would unconstitutionally prejudice her through a co-defendant's inculpatory statements that are unavailable for cross-examination. **R. 45.** This court is being asked to uphold the Fourteenth Circuit Court of Appeals' rulings in favor of Ms. Zelasko.

SUMMARY OF THE ARGUMENT

FRE 404(b) is meant to protect the interests of the defendant, not a third party's interest at trial. Beyond the Federal Rules of Evidence, the Constitution protects defendants in criminal cases by allowing them latitude in presenting a complete defense including the admission of testimony. Statements that are collateral to declarations against penal interests are barred through the Court's decision in *Williamson*. Finally the *Bruton* doctrine applies to both testimonial and nontestimonial evidence. The Fourteenth Circuit Court of Appeals correctly held that an affidavit should be admitted to evidence as it demonstrated a third party had recently sold a similar anabolic steroids, similar to the type of drug the defendant was being charged with distributing. Also that an email should be barred from evidence as it presents the defendant without her guarantees of confronting the witness as well the email lacked sufficient terminology to represent against penal interest.

FRE 404(b) "prohibits admission of evidence of a crime, wrong or other act to prove a person's character in order to demonstrate that on a particular occasion the person acted in accordance with the character." The common law tradition from the origins of the Rule evolved suggests that the Rule is to prevent prejudice against a criminal defendant. Courts have allowed evidence of a third party's propensity to be brought in by a defendant being charged of a similar crime, as the third party is not at risk for being prejudiced in the trial. The evidence must still pass the relevance and balance tests set forth in the Rules. Those Rules however may not be used arbitrarily or disproportionately against the defendant. Further a defendant is permitted to present a full defense at her criminal trial. This includes offering testimony that has probative value to the defense and will cast doubt upon their guilt.

Ms. Zelasko is on trial for distributing an illegal substance as well as being part of conspiracy to sell illegal substances as well. The affidavit of Ms. Morris states that Ms. Short sold similar steroids, and that evidence does not prejudice any party at trial. Therefore the affidavit of Ms. Morris is necessary for Ms. Zelasko to put on a complete defense. That defense includes the notion that Ms. Zelasko was not part of the conspiracy. Rather the conspirators were Ms. Short and Ms. Lane.

The email sent from Ms. Lane to Mr. Billings lacks clarity and does not include any inculpatory statements. Generally hearsay statements are prohibited as evidence unless an exception exists. FRE 804(b)(3) acts as an exception to hearsay statements that are made by a party against their penal interests. In *Williamson*, the Supreme Court held that a statement has two possible interpretations. The first one being an extended version that permits entrance of an entire narrative including both the inculpatory and non-inculpatory parts. The second view is that a statement means a single declaration or remark. The Court rejected the former view and went with the latter interpretation towards the admission of collateral statements.

The email from Ms. Lane to Mr. Billings was vague in nature. The email lacked sufficient clarity in what business she and her co-conspirator were running. Also the phrase that states her partner is concerned with keeping [the male team member] quiet does not meet the level of an inculpatory statement. Rather this email is to be read narrowly in the terms of *Williamson* in mind. That narrow interpretation of the email fails to implicate Ms. Zelasko in the conspiracy in any fashion and should not be allowed through FRE 804(b)(3).

The Confrontation Clause of the Sixth Amendment requires that the defendant have the right to cross-examine a witness at their trial. The Bruton doctrine, the Court held that admission of a non-testifying co-conspirator's confession at trial that implicates a defendant violates the

Confrontation Clause of the Sixth Amendment. The government is attempting to introduce Ms. Lane's email even though Ms. Lane will be unavailable to be cross-examined. The government seeks to use a limiting instruction to avoid any further prejudice on the defendant. Yet, without the ability to cross examine Ms. Lane the defendant would be unduly prejudiced in her trial as she is listed as a co-conspirator in the government charges, regardless of any limiting instruction that would be provided to the jury. The Fourteenth Circuit Court of Appeals correctly held that Ms. Zelasko should be permitted to introduce Ms. Morris' affidavit, as well as prevent Ms. Lane's email from being introduced at trial.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE COURT OF APPEALS HOLDING THAT THE FEDERAL RULE OF EVIDENCE 404(B) DOES NOT BAR THE ENTRANCE OF A THIRD PARTY'S PROPENSITY TO DISTRIBUTE PERFORMANCE ENHANCING DRUGS.

Ms. Zelasko was not part of a conspiracy with Ms. Lane to distribute the banned substance known as ThunderSnow and should be permitted to bring forth evidence of Ms. Short's involvement in distributing a similar banned substance called White Lightning. Ms. Zelasko has been charged by the government for knowingly and intentionally conspiring with Ms. Lane to distribute and possess with intent to distribute a Scheduled III controlled substance known as ThunderSnow, an anabolic steroid with properties that made the substance undetectable. Ms. Zelasko has evidence of another party, Ms. Short previously selling a very similar anabolic steroid to another World Winter Games athlete shortly before the alleged conspiracy took place. Ms. Zelasko should be allowed to use this evidence as a way to cast doubt upon her involvement in the conspiracy. The Federal Rules of Evidence prohibit:

> "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404

This rule is traditionally applied towards the defendant in a criminal trial, with the goal of preventing a prosecuting attorney from using the defendant's prior history to tarnish their character in the eyes of the jury. However, courts have permitted a defendant to put forth evidence of other crimes under this rule if that evidence tends to refute the defendant's guilt of the crime they are being charged. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). Additionally the evidence being proffered by the defendant must be relevant under the Federal

Rules of Evidence 402, as well as pass the balancing of interest in Federal Rule of Evidence 403. *Id*. The court stated in *Seals*, that the defendant was permitted to use evidence of another robbery, so long as it was similar to the one he was being charged with. *Id*, at 607. Yet the similarities between the other robbery and the one at issue were generic, as the disguises were not similar and the robbers used different guns. *Id*. Other circuits have agreed with the *Seals* decision, as FRE 404(b) does not act as a bar when the defendant is bringing forth evidence of a third party's propensity to commit an act. *United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005), *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983), *United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991). Specifically in the *Montelongo* case, the defendant was permitted to bring forth evidence of a prior drug conspiracy charge involving transportation of marijuana in a truck. The evidence would be brought out during the cross examination of the truck's owner who had two other drivers get caught transporting marijuana. The evidence was relevant in the way it demonstrated that another party had committed a similar act to the one the defendant was being charged with. *Montelongo*, 420 F.3d at 1173.

The affidavit by Ms. Morris states that she was provided White Lightning by Ms. Short. This evidence has a probative value to the case as it illustrates Ms. Short's propensity to distribute a performance enhancing drug to an athlete that competed for their countries' Snowman Team. The specific drug that was sold by Ms. Short was known as White Lightning, this drug served as the chemical basis for ThuderSnow according to an affidavit of a prominent drug testing consultant. This connection between the charges against Ms. Zelasko and the previous drug distribution of a similar substance creates serious probative value in the affidavit. Therefore the affidavit should be brought in to evidence for the purpose of allowing Ms. Short to be viewed as the coconspirator with Ms. Lane.

A. Ms. Short's Interest Is Not Prejudiced As She Is Not A Defendant At Trial.

Under FRE 404(b) it is the defendant's rights that are sought to be protected, not the rights of a third party who has no interest in the case at hand. There is a "lower standard of similarity should govern reverse 404(b) evidence because prejudice to the defendant is not a factor." *Id*, at 1174-75. The rule should be more lenient when the defense is offering the evidence as, "we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword." *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir.1984). Thus Ms. Zelasko may use evidence under FRE 404(b) with less scrutiny compared to the government's proffered evidence. The charges brought forth by the government against Ms. Zelasko and Ms. Lane were for conspiracy to distribute banned substances, they were the only defendants named. The affidavit was signed by Ms. Morris who provided the testimony in an effort to atone for her previous unfaithfulness in using performance enhancing drugs. Therefore Ms. Short is not subject to prejudice through admission of Ms. Morris' affidavit.

B. Ms. Morris' Affidavit Presents Relevant Evidence Regarding The Charges Brought Forth By The Government Against Ms. Zelasko.

The admission of a third party affidavit regarding the sale of a performance enhancing drug meant to aid athletes and foil detection services serves a relevant purpose in Ms. Zelasko's case. The Federal Rules regarding evidence are liberalized toward the admission of relevant evidence. *Tome v. United States*, 513 U.S. 150, 174 (1995). The rules "direct the trial judge generally to admit all evidence having any tendency to make the existence of a material fact more probable or less probable than it would be without the evidence." *Id*. The material fact in

Ms. Zelasko's case is her involvement with Ms. Lane in a conspiracy to distribute a performance enhancing drug to her teammates and others that is difficult to detect by sport authorities.

The rules of evidence provide that if the offered evidence has "substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility" *Holt v. United States*, 342 F.2d 163, 166 (5th Cir. 1965). Evidence of a similar crime occurring five months before the charged offense was held to be probative in discovering the identity of the perpetrator of the charged offense. *Id*. Ms. Morris' affidavit declares that she purchased drugs from Ms. Short on April 4, 2011 for the purpose of performing better as an athlete. The charges brought up against Ms. Zelasko start approximately August 2011, this is within four months of the drug purchase between Ms. Morris and Ms. Short. The evidence of this transaction is relevant as it provides timely information about a party who has committed a similar act to the one Ms. Zelasko is being charged for by the government. It is likely that a participant in a conspiracy to distribute drugs would have done so before. The evidence contained in the affidavit has value to the case, and generally evidence that adds probative value should be viewed with an error on the side of admittance.

The type of drug sold to Ms. Morris by Ms. Short is very similar to the drug that Ms. Zelasko is being charged with distributing. The court in *Montelongo* examined common facts between the evidence being offered and the facts that the defendant was being charged with. *Montelongo*, 420 F.3d at 1172. These specific facts included "The truck Mr. Brown and Mr. Hernandez drove was owned by Mr. Gomez; the marijuana was packed in duffle bags; and it was hidden in the sleeping compartment of the cabin." *Id*. The facts that are relevant in the affidavit such as the use of the drug being purchased, the non-detection ability of the drug, as well as the recipient of the purchase all make the affidavit relevant to Ms. Zelasko's case. Further the

information provided by a drug testing consultant of major sport leagues lends more value to the distinct similarity in the drug that was sold by Ms. Short and the drugs that were sold in the conspiracy charges brought forth against Ms. Zelasko and Ms. Lane. The factors contained in the affidavit make the document admissible as it is relevant to the central issue at hand.

C. <u>The Evidence Contained In The Affidavit Of Ms. Morris Is Comprehensible And Produces No Delay To The Trial Process.</u>

The evidence brought forth in the affidavit will not cause a delay or confusion to the jury in the trial. A judge may reject evidence "if the probative value of the evidence is substantially outweighed by its tendency to prejudice a party or delay a trial." *Tome*, 513 U.S. at 174. When a defendant sought to bring in evidence of another party's similar crime the court held that similarities between the two crimes would not have distracted the jury from the main issue at hand. *Montelongo*, 420 F.3d at 1175. Rather it would have the opposite effect in highlighting the "central issue at trial." *Id*. The affidavit brings up evidence directed at the central issue at trial, a conspiracy to sell and distribute illegal performance enhancing drugs. The charges brought against Ms. Zelasko allege her involvement in the conspiracy. The affidavit focuses only on the sale of a banned substance between two athletes that are members of their countries' Snowman Team. Therefore the affidavit provides evidence that is essential to the case against Ms. Zelasko, and not any other outside matter.

If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. *Old Chief v. United States*, 519 U.S. 172, 173 (1997). In *Old Chief* the court determined the evidence being proffered by the government would lure the jury into

making unfair characterizations about the defendant. The jury in Ms. Zelasko's case will not be prejudiced against her for hearing the evidence; rather they will be able to make their own conclusions about the participants of the charged conspiracy.

Rule 403 authorizes a court to "exclude evidence to avoid the needless presentation of cumulative evidence." *United States v. Kizeart*, 102 F.3d 320, 325 (7th Cir. 1996). When evidence has an independent evidentiary value it raised the probative effect and moves the evidence from being cumulative to being a contributing factor in the determination of the truth. *Id*. The affidavit being offered brings to light specific evidence for the first time of another party committing a similar act. This affidavit also contributes to the defense being offered by Ms. Zelasko that it was another party involved in the conspiracy to distribute illegal substances with Ms. Lane. Therefore the evidence stated in the affidavit should be allowed into trial as it passes the balancing test set forth in FRE 403.

The evidence presented by the affidavit is both clear and quick. The length of the affidavit is approximately two pages. The affidavit of Ms. Morris is concise and does not mislead or confuse the jury in any fashion. Rather it demonstrates that a third party has committed a similar act that Ms. Zelasko is currently being charged with by the government. Therefore the affidavit should be allowed into evidence under FRE 404(b).

II. MS. ZELASKO MUST BE ALLOWED TO PRESENT THE AFFIDAVIT OF MS. MORRIS, AS IT IS HER CONSTITUTIONAL RIGHT TO BE AFFORDED A COMPLETE DEFENSE AGAINST CHARGES BROUGHT FORTH BY THE GOVERNMENT.

The defendant's right to present a full defense is a fundamental element of due process set forth from the Constitution of the United States. *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. N.Y. 1976). The rights of an accused defendant to call witness on their behalf are recognized as a fundamental part of due process. *Chambers*, 410 U.S. at 294. Ms. Zelasko has

been charged by the government as a conspirator and individually for distributing and possessing a banned substance along with conduct that resulted in the death of a person. Ms. Zelasko has become a defendant in a criminal proceeding where she must be provided certain guarantees in crafting a defense. The most important guarantee established by the Constitution is the ability to put forth a complete and thorough defense. This includes the admission of any testimony brought forth by the defendant that would help exculpate them in trial.[1] Ms. Zelasko seeks to bring forth an affidavit made by Ms. Morris which implicates Ms. Short in prior sales of a similar steroid to a female Snowman athlete of which Ms. Zelasko is being accused of selling by the government.

These rights provided to Ms. Zelasko are not absolute though, as a defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability." *Id*, at 302. The defendant in a case "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois,* 484 U.S. 400, 410 (1988). In the Taylor decision, the court was concerned about the defendant gaining a tactical advantage through the misuse of the discovery process by not divulging a proper witness list. *Id,* at 415. Ms. Zelasko though is not concealing any information in the affidavit she wishes to present at trial. Ms. Zelasko is wishing to simply put forth facts before the court and in doing so will give the prosecution proper time to examine the affidavit as well. The affidavit should be allowed into evidence as it has properly been distributed to the court before the proceeding and will not give the defense any tactical advantage in the proceeding.

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[1] Professor Nagareda characterized *Chambers* as establishing that "the accused in a criminal proceeding has a constitutional right to introduce *any* exculpatory evidence, unless the State can demonstrate that it is so inherently unreliable as to leave the trier of fact with no rational basis for evaluating its truth." John H. Blume et. al., Every Juror Wants A Story: Narrative Relevance, Third Party Guilt and the Right to Present A Defense, 44 Am. Crim. L. Rev. 1069, 1095 (2007)

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Evidence brought by the defense should not be excluded by restrictions that or arbitrary or disproportionate to the purpose that those rules are designed to serve. *Harris v. Thompson*, 698 F.3d 609, 626-27 (7th Cir. 2012). When a child died of asphyxiation and both parties agreed to that point, the lone witness was a child. *Id*, at 612. That witness was paramount to the accused as his testimony was able to dispel the charges against the accused. The Court viewed the testimony of the child being excluded as a disproportionate use of discretion by the judge. *Id*, at 613. Ms. Zelasko also is attempting to use evidence that will point to her innocence, and the likelihood that the prosecution is charging the wrong individual creates the necessity that this testimony be allowed into the record.

The rights of an accused though do not require criminal courts to allow irrelevant evidence to be admitted. *Crane v. Kentucky,* 476 U.S. 683, 689–90 (1986). When a young man was charged with murder and gave a confession to the murder, the circumstances around the confession were key and pertinent to the matter of his guilt. *Id*. The Court determined that the circumstances of that confession were vital to the charge at hand. *Id.* Ms. Zelasko is in a similar situation as she seeks to bring forth relevant evidence that will cast doubt upon her guilt. In doing so Ms. Zelasko is not attempting to stretch or create a new right through the admission of the affidavit. She is merely wishing to illustrate there exists another party to the conspiracy of which she is being charged. If evidence is deemed to be overwrought and confusing it will disrupt judicial expediency. Courts have discretion over the schedule of a case in order to complete the trial in a timely manner. *United States v. Ellis*, 263 Fed. Appx. 286, 288 (4th Cir. 2008). There are no legitimate policy considerations for denying evidence that is crucial to The resources being used the affidavit has already been created and can be introduced quickly with no delay the court proceeding. In fact the importance of the defendant receiving a fair trial is

central[2]. The testimony of Ms. Morris is important to Ms. Zelasko's defense; therefore it is her Constitutional right to have that testimony presented at trial.

III. *WILLIAMSON V. UNITED STATES* SHOULD NOT BE OVERRULED AS IT AS IT PROVIDES A STANDARD FOR THE APPLICATION OF FEDERAL RULE OF EVIDENCE 804(B)(3), GOVERNING DECLARATIONS AGAINST PENAL INTEREST, WHICH IS READILY APPLIED AND FLEXIBLE.

This Court should affirm the Fourteenth Circuit Court of Appeal's decision. *Williamson v. United States* was decided two decades ago, and has been consistently interpreted to bar the type of evidence the government is attempting to introduce. Rule 804(b)(3) "permits the introduction of statements against penal interest - defined as statements tending to subject the declarant to criminal liability."[3] Generally, hearsay is excluded due to its unreliable and untrustworthy nature.[4] Hearsay is not conducted under oath, and does not allow for cross-examination to attempt to determine the reliability of the statement or of the party making the statement.[5] The Court in *Williamson v. United States* held in regards to Federal Rule of Evidence 804(b)(3) that, "the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading, so that only those remarks within a confession that are individually self-inculpatory are covered." 512 U.S. 594, (U.S. 1994). Without a narrow reading of the Rule the Court feared the exception would eviscerate the Rule. In order to determine how the rule in *Williamson* is the best rule, it is important to look at the history of Federal Rule of

[2] "The court must bear in mind that the ultimate goal of our system is justice." *United States v. Clinger*, 681 F.2d 221, 223 (4th Cir. Md. 1982)

[3] Andrew R. Keller, Note, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 Colum. L. Rev. 159, 159 (1983).

[4] V John Henry Wigmore, Evidence in Trials at Common Law 1362, at 3 (James H. Chadbourne rev., 1974).

[5] *Id.*

Evidence 804(b)(3), other tests that were used before *Williamson*, *Williamson* and any prodigy formed post-*Williamson*, and actions taken by the Courts and Congress in relation to Rule 804.

A. **The History of Federal Rule of Evidence 804 Shows That The Rule Was Well Thought-out, and That Its Amendments Have Not Addressed This Issue.**

In 1969, the first draft of the Federal Rules of Evidence was completed.[6] The Advisory Committee to the Standing Committee on Rules of Practice and Procedure refused to allow the admission of statements against penal interest that inculpated the defendant and stated that "statements of codefendants have traditionally been regarded with suspicion because of the readily supposed advantages of implicating another."[7] When the Supreme Court issued the official draft of the Federal Rules of Evidence, it omitted the restriction against inculpatory statements against penal interest from Rule 804(b)(3). The accompanying Advisory Committee Note (Committee Note) explained that such inculpatory statements could qualify as statements against interest within the meaning of the Rule.[8] Rule 804(b)(3) was interpreted in several different ways by different circuits. Without any actual federal guidance on the issue, the rule was applied and interpreted differently among the different circuits. Although the Rules have amended several times since their inception, and Rule 804 has been specifically amended, there has never been an amendment that addresses the underlying controversy that gave rise to rules either before or after *Williamson.*

B. **Rules Before *Williamson***

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[6] Keller, supra note 3, at 174.

[7] Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 378 (1969).

[8] See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 321, 327-28 (1972).

Prior to *Williamson*, some courts had admitted collateral statements provided that they were "sufficiently integral" to the entirety of statements against interest.[9] In support of this approach, the Second Circuit stated, "it suffices for admission under that rule that a remark which is itself neutral as to the declarant's interest be integral to a larger statement which is against the declarant's interest." [10]

The Eighth Circuit held that portions of hearsay statements which do not by themselves, inculpate the declarant, inadmissible. *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978). In *Lilley*, the court held that only directly self-inculpatory portions of a declarant's statement may be admitted under FRE 804(b)(3). *Id.* at 188. The court stated that admitting only the disserving portions best complies with the Rule's premise that a statement is trustworthy only to the extent that it is against the declarant's penal interest. *Id.*

In *U.S. v. Porter*, the Tenth Circuit adopted an approach which is similar to *Lilley* and similar to the approach the Supreme Court adopted in *Williamson*. *United States v. Porter* 881 F.2d 878 (10th Cir. 1989). The Tenth Circuit held that for purposes of FRE 804(b)(3), statements could be severed between the portion directly against the declarant's penal interest and the

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[9] United States v. Casamento, 887 F.2d 1141, 1171-72 (2d Cir. 1989) ("Admitting the entire statement even though it contains a reference to others is particularly appropriate when that reference is closely connected to the reference to the declarant"); United States v. Lieberman, 637 F.2d 95, 103 (2d Cir. 1980) (holding statement which on its own was not damaging to be against interest because it was probative of declarant's knowledge of the crime); United States v. Garris, 616 F.2d 626, 630 (2d Cir.), cert. denied, 447 U.S. 926 (1980); United States v. Barrett, 539 F.2d 244, 252 (1st Cir. 1976) (admitting a collateral statement that was arguably disserving because it strengthened the impression that he had an insider's knowledge of the crimes).

[10] United States v. Lieberman, 637 F.2d 95, 103 (2d Cir. 1980) (citing United States v. Garris, 616 F.2d 626, 630 (2d Cir.), cert. denied, 447 U.S. 926 (1980)).

portion that was not against the declarant's penal interest. *Id.* The differing interpretations and circuit split led to the Supreme Court of the United States taking the issue and addressing how the rule should be interpreted and applied.

C. Williamson and It's Prodigy

It is important to note that not only has *Williamson* been consistently applied, many courts have interpreted *Williamson* correctly, and even expanded on its application. Courts in the Third Circuit have held that only portions of a sentence that implicates a declarant are admissible and other portions of same sentence are inadmissible. *Ciccarelli v. Gichner Sys. Group, Inc.,* 862 F. Supp. 1293, 1297–1300 (M.D. Pa. 1994).

The Sixth Circuit has held that when a defendant seeks to admit statements under Fed. R. Evid. 804(b)(3), collateral statements, even ones neutral as to interest, should be treated the same as other hearsay statements and collateral statements do not become admissible based on their proximity to self-inculpatory ones. *United States v. Price*, 134 F.3d 340, 346–347 (6th Cir. 1998). The Sixth Circuit has also held that each portion of a proffered out-of-court statement must be examined to determine whether it tended to subject a defendant to criminal liability before it can be admitted under Fed. R. Evid. 804(b)(3). *United States v. Jinadu*, 98 F.3d 239, 246 (6th Cir. 1996).

The Seventh Circuit has held that "[p]ortions of inculpatory statements that pose no risk to the declarants are not particularly reliable; they are just garden variety hearsay".[11] Similarly, the Ninth Circuit has ruled that because the "statement against penal interest" exception is premised on inherent reliability of statements that tend to incriminate defendant, statement that

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[11] Carson v. Peters, 42 F.3d 384, 386 (7th Cir. 1994); *see also* Ormsby Motors, Inc. v. General Motors Corp., 842 F. Supp. 344, 348–349 (N.D. Ill. 1994), appeal dismissed, 32 F.2d 240 (7th Cir. 1994)

includes both incriminating declarations and corollary declarations that, taken alone, are not inculpatory of declarant, must be separated and only that portion that is actually incriminating of declarant is admissible under this exception. *LaGrand v. Stewart*, 133 F.3d 1253, 1267–1268 (9th Cir. 1998).[12]

D. Congress Has Not Altered Rule 804

It is important to note that Congress has made no attempt to alter the language of the Rule, and as the Court in *Williamson v. United States* pointed out "Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpatory statements."[13] It is also important to note that since *Williams,* the Rules have been amended several times. [14] In fact, Rule 804 itself has been revised and amended since *Williams.*[15] The fact that Congress did not act and that the committee has not changed the *Williamson* interpretation shows that *Williamson* is the best way to apply Rule 804. In this case, Rule 804 and the *Williamson* test were correctly applied. Ms. Zelasko's email was analyzed in accordance with *Williamson* and was properly excluded.

IV. THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT IMPLICATING THE DEFENDANT IS NOT BARRED AS

[12] *See also* United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000)

[13] *Id at* 600.

[14] The rules have been amended: eff. Dec. 1, 1994; Sept. 13, 1994, Pub. L. 103–322, title IV, §40141, title XXXII, §320935, 108 Stat. 1918, 2135; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 17, 2000, eff. Dec. 1, 2000; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 12, 2006, eff. Dec. 1, 2006; Sept. 19, 2008, Pub. L. 110–322, §1(a), 122 Stat. 3537; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 16, 2013, eff. Dec. 1, 2013.

[15] The Rule was amended in 1997, 2010, and 2011.

VIOLATIVE OF THE CONFRONTATION CLAUSE UNDER *BRUTON V. UNITED STATES*, BECAUSE *BRUTON* AND *CRAWFORD V. WASHINGTON* ARE TWO SEPARATE TESTS WHICH DEAL WITH TWO SEPARATE ISSUES.

Bruton and *Crawford* are two different tests based on two different criteria, and should be treated as such. *Crawford* deals with constitutional reliability, whereas *Bruton* deals with the inadmissibility of evidence under the Federal Rules of Evidence. These two tests focus on two separate issues and should not be used interchangeably.

A. Both *Crawford* And *Roberts* Are Constitutional Reliability Tests

In *Ohio v. Roberts,* the Court stated that the "indicia of reliability" requirement has been proven "by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" Mattox v. United States, 156 U.S., at 244 cited in Ohio v. Roberts, 448 U.S. 56, 66 (U.S. 1980). This "indicia of reliability" requirement has also been referred to as a constitutional reliability requirement.[16] The Court in *Crawford* chose to use this language, even when it was overruling *Roberts.* The Court in *Crawford* stated "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford v. Washington, 541 U.S. 36, 68-69 (U.S. 2004). It is important to note that even in *Crawford,* the Court did not define the definition of the term "testimonial" is, instead stating that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."*Id.* The Court did overrule the adequate indicia of reliability test finding it to be "so unpredictable that it failed to provide

[16] 77 Brooklyn L. Rev. 625.

meaningful protection from even core confrontation violations." *Id.* However, the Court replaced *Roberts* with this test: "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."*Id.*

B. ***Bruton*** **Is A Test Of Constitutional Harmfulness**

The Court in Bruton held that "[i]t was enough that that procedure posed 'substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.'" *Jackson v. Denno*, 378 U.S., at 389 cited in *Bruton v. United States*, 391 U.S. 123, (U.S. 1968). The Court in *Cruz v. New York* stated that "[i]n Bruton v. United States, 391 U.S. 123 (1968), we held that a defendant is deprived of his rights under the Confrontation Clause when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. 481 U.S. 186, 187-188 (U.S. 1987). The Court was using this language to highlight the fact that this test was one of constitutional harmfulness and violations of rights, not on the reliability or lack thereof, of another person.

C. Courts Have Consistently Held That Non-Testimonial Statements Do Not Fall Under The Bruton Analysis.

A majority of circuits have continued to apply that non-testimonial statements do not fall under the *Bruton* analysis. In fact this Court has already distinguished *Bruton* from *Crawford* stating that "[i]t is the testimonial character of the statement that separates it from other hearsay

that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (U.S. 2006).

In *Reid v. State*, the Supreme Court of Georgia held that "Bruton is not applicable to a statement which 'is not the custodial confession of a non-testifying accomplice which details the criminal participation of' a co-defendant." 437 S.E.2d 646 (Ga. 1993). In *Reid*, the court found that a codefendant confession did not violate the Bruton doctrine not simply because it was noncustodial but because it "was admissible against all defendants as the statement of a co-conspirator made prior to the termination of the conspiracy."*Id.* "The Bruton doctrine does not depend upon the unreliability of codefendant confessions; it depends upon their constitutional harmfulness. It depends upon how much damage the admission of such a confession would cause to other defendants at trial, not upon whether the confessor thought that the statement would be available for use at a later trial."[17]

[17] 77 Brooklyn L. Rev. 625, 679

CONCLUSION

The FRE protects a defendant at trial from evidence that will unfairly prejudice them. The defendant at trial is granted the right under the Constitution to present a complete defense. These protections were created with the purpose of giving a defendant many opportunities to protect themselves before the government could take away their liberties. An individual has the right to introduce evidence that is relevant to their argument if that evidence adheres to the other rules of evidence. Ms. Zelasko is seeking admission of an affidavit with the purpose of showing another party has the propensity to sell a similar anabolic steroid for which Ms. Zelasko is being charged with distributing. The other party is not named in the case and therefore will not be prejudiced through the admittance of the affidavit. The affidavit will not confuse the jury and will help cast doubt upon Ms. Zelasko's guilt in the case. Ms. Zelasko as a defendant has a constitutional right to a complete defense, and her defense will be brought out through the affidavit.

The FRE do not allow hearsay statements to be admitted into evidence. There are exceptions to the rule, including FRE 804(b)(3). That rule stipulates hearsay statements made by a party against their penal interests shall be permitted into evidence. When at a joint trial a non-testifying co-defendant attempts to implicate the defendant through a statement that statement is prohibited from being entered into evidence. That statement would violate the Sixth Amendment's Confrontation Clause as defined in the Court's *Bruton* decision. The government is attempting to admit evidence of an email sent by Ms. Lane, who is the listed co-conspirator of Ms. Zelasko in the complaint. The email was sent to Mr. Billings with details of a business being run by Ms. Lane and her partner, as well as a statement regarding the partner wishing to keep quiet a potential threat. This email does not reach the level of statements against penal interest for the other party involved. More importantly Ms. Lane will not be available to be cross-

examined at trial, thus denying the defendant her right to confront the witness under the Sixth Amendment. The email should not be admitted to evidence as the statements made do not provide clarity on the parties involved and their intent, further the declarant is unavailable at trial. Therefore the affidavit by Ms. Morris should be permitted into evidence, and the email sent by Ms. Lane should be barred.