
No. 12 – 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2013

UNITED STATES OF AMERICA,

Petitioner,

-- against --

ANASTASIA ZELASKO,

Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether Federal Rule of Evidence 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged when such a bar violates the policy considerations upon which the rule is based?

II. Whether, under *Chambers v. Mississippi*, Defendant Anastasia Zelasko's constitutional right to present a complete defense is violated by exclusion of evidence of a third party's propensity to distribute illegal drugs when the evidence is both exculpatory and reliable?

III. Whether the standard from *Williamson v. United States* should be reaffirmed and applied to exclude a hearsay statement that is not sufficiently self-inculpatory, contains self-serving exculpatory portions, and has no corroborating circumstances that indicate its reliability as required by Federal Rule of Evidence 804(b)(3)?

IV. Whether the constitutional protections provided by *Bruton v. United States* will continue to be upheld when, at a joint trial, the statement of a non-testifying co-defendant implicating the defendant is offered without opportunity for cross-examination in light of this Court's decisions in *Crawford v. Washington* and *Davis v. Washington*?

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The decision of the United States District Court for the District of Boerum is unreported and set out in the record. (Record on Appeal ("R.") at 20−23.) The opinion of the United States Court of Appeals for the Fourteenth Circuit is also unreported and set out in the record. (R. at 30−46.)

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of two Federal Rules of Evidence, 404(b) and 804(b)(3). Federal Rule of Evidence 404(b) provides:

> (b) Crimes, Wrongs, or Other Acts.
>
> > (1) *Prohibited Uses*. 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.
> > (2) *Permitted Uses; Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
> >
> > > (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
> > > (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 404(b).

Federal Rule of Evidence 804(b)(3) provides:

> (3) *Statement Against Interest*. A statement that:
>
> > (A) 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; and
> > (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Fed. R. Evid. 804(b)(3).

This case also involves the right to present a complete defense as derived by this Court from the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend XIV, §1, cl. 3; the Compulsory Process Clause of the Sixth Amendment, U.S. Const. amend. VI; and the Confrontation Clause of the Sixth Amendment. *Id*; *see Chambers v*. *Mississippi*, 410 U.S. 284 (1973).

Finally, this case involves the Confrontation Clause of the Sixth Amendment as well as the Due Process Clause of the Fourteenth Amendment, as interpreted by this Court in *Bruton v*. *United States*, 391 U.S. 123 (1968). U.S. Const. amend VI; U.S. Const. amend. XIV, §1, cl. 3.

STATEMENT OF THE CASE

A. Statement of the Facts

Defendant Anastasia Zelasko ("Ms. Zelasko"), co-defendant Jessica Lane ("Defendant Lane"), and Casey Short ("Short") were members of the United States women's Snowman Pentathlon Team ("Snowman Team"). (R. at 1, 8.) Ms. Zelasko joined the team on September 6, 2010, and Defendant Lane joined on August 5, 2011. (R. at 1.) Short joined in June of 2011, after transferring from the Canadian Snowman Team. (R. at 1, 24; Exhibit ("Ex.") A.) While a member of the Canadian Snowman Team, Short sold a type of steroids known as "White Lightning" to other female teammates. (R. at 24−25; Ex. A.) Miranda Morris, one of Short's Canadian teammates, purchased White Lightning from Short on April 4, 2011.[1] (R. at 25; Ex. A.)

As members of the Snowman Team, Ms. Zelasko, Short, and Defendant Lane represented the United States at the World Winter Games by competing in the Snowman Pentathlon event. (R. at 8.) The event consisted of dog sledding, ice dancing, aerial skiing, rifle shooting, and curling. (R. at 2−3.) The team was coached by Peter Billings ("Billings"). (R. at 1.) Billings was also Defendant Lane's boyfriend, and the two had been involved romantically for several years. (R. at 1.) Prior to August of 2011, the highest the United States women's Snowman Team had placed in the World Winter Games was sixth. (R. at 2.) In the fall of 2011, however, the Snowman Team began to improve its practice times markedly. (R. at 2.)

Hunter Riley ("Riley"), now deceased, was a member of the United States men's Snowman Team. (R. at 1.) From 2011 to 2012, Riley cooperated with the Drug Enforcement Agency (the "DEA" or the "Government") as an informant. (R. at 9.) In furtherance of this

[1] The information concerning Short's sale was provided during the prosecution of this case by affidavit. (Ex. A). Morris indicated in her affidavit that the reason she shared the information now was to "atone for [her] betrayal" to her "own integrity and that of the sport." (R. at 25; Ex. A.)

relationship, Riley attempted to purchase bolasterone ester, an anabolic steroid referred to as "ThunderSnow" by Snowman Team members, from Defendant Lane in October, November, and December of 2011. (R. at 2−3.) Defendant Lane declined to sell ThunderSnow to Riley on each occasion. (R. at 2−3.) Chemist Henry Wallace has identified ThunderSnow as a chemically modified version of White Lightning. (R. at 28; Ex. B.)

In early December 2011, Billings observed Ms. Zelasko and Defendant Lane engaging in a heated argument in which he heard Defendant Lane shout, "Stop bragging to everyone about all the money you're making!" (R. at 3.) Shortly thereafter, Billings confronted Defendant Lane regarding his suspicions that she was "distributing performance-enhancing steroids to the female members of the United States Snowman Team." (R. at 3.) Defendant Lane denied her involvement. (R. at 3.) On January 16, 2012, however, Defendant Lane sent an email to Billings stating:

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

(R. at 3.) In late January 2012, several members of the Snowman Team observed a heated argument between Riley and Ms. Zelasko. The subject of the argument remains unknown. (R. at 3.)

In February of 2012, the men's and women's Snowman Teams participated in trials for the World Winter Games at Remsen National Park. (R. at 8.) In preparation for this event, on February 3, 2012, Ms. Zelasko practiced alone on a rifle range. (R. at 8). This range was closed during the trials. (R. at 8.) The range was adjacent to a portion of the dogsled course on which

members of the men's Snowman Team were competing. (R. at 8.) At approximately 10:15 am, a bullet from Ms. Zelasko's rifle struck and killed Riley. (R. at 3, 8.) Authorities arrested Ms. Zelasko shortly thereafter. (R. at 3.)

The Government subsequently executed a search warrant for Ms. Zelasko's home. (R. at 3.) During the search, two 50-milligram doses of ThunderSnow[2] and approximately $5,000 in cash were seized. (R. at 3, 8.) On February 4, 2012, the Government executed a second search warrant at the training facility for the Snowman Team. (R. at 3, 8.) During the course of this search, the Government recovered approximately 12,500 milligrams of ThunderSnow, an estimated value of $50,000, in the equipment room. (R. at 8.) Notably, every female member of the United States Snowman Team and its staff have access to this area. (R. at 3, 8.) The same day, the Government executed search warrants on the individual residences of Short and Defendant Lane. (R. at 8.) At Short's apartment, the Government did not seize any evidence. (R. at 8.) At Defendant Lane's apartment, however, the Government seized approximately 20 50-milligram doses of ThunderSnow, $10,000 in cash, and a laptop. (R. at 4, 8.) Defendant Lane was immediately arrested. (R. at 4.)

B. Procedural History

On April 10, 2012, a grand jury indicted both Ms. Zelasko and Defendant Lane for the following charges: (1) Conspiracy to distribute and possess with intent to distribute anabolic steroids; (2) distribution of and possession with intent to distribute anabolic steroids; (3) simple possession of anabolic steroids; (4) conspiracy to murder in the first degree; and (5) murder in the first degree. Before trial, Ms. Zelasko moved to introduce the testimony of Miranda Morris to prove the propensity of Short to sell performance-enhancing drugs. (R. at 31.) Ms. Zelasko

[2] According to the affidavit of Henry Wallace, "ThunderSnow is typically used in 50- to 100- milligram doses" that may be "cycled." (R. at 28; Ex. B.) Further, "[a] quantity of two 50-milligram doses is consistent with personal use," while a "quantity of 250 50-milligram doses is consistent with sale." (R. at 28; Ex. B.)

offered this evidence to negate her involvement in the drug conspiracy by demonstrating that a third party, Short, was the second co-conspirator. (R. at 35.) The Government moved to admit the email sent by Defendant Lane to Billings on January 16, 2012. (R. at 15.)

On July 16, 2012, the United States District Court for the Southern District of Boerum (the "District Court") heard oral argument on the pre-trial evidentiary motions. (R. at 31.) Two days later, the District Court ruled in favor of Ms. Zelasko on both motions. (R. at 21, 22.) The Government filed an interlocutory appeal pursuant to 18 U.S.C. §§ 3731 and 3731-a. (R. at 30.) The United States Court of Appeals for the Fourteenth Circuit (the "Fourteenth Circuit") affirmed the decision of the District Court on all issues, holding that: (1) the testimony of Miranda Morris was admissible under Federal Rule of Evidence ("FRE") 404(b) or, alternatively, was protected by the constitutional right to assert a complete defense; and (2) the email exchanged between Defendant Lane and Billings was inadmissible under FRE 804(b)(3) as interpreted in *Williamson v*. *United States* or, alternatively, its introduction into evidence violated the Confrontation Clause. The Government filed a petition for writ of certiorari, which was granted by this Court on October 1, 2013. (R. at 55.)

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of both lower courts. First, common law principles and policy dictate that FRE 404(b) apply to bar evidence that the Government seeks to admit to prove the propensity of a *defendant* to engage in criminal activity but not to bar evidence that a defendant seeks to admit to prove the criminal propensity of a *third party*. The Rule is only designed to prevent prejudice to a defendant. Thus, the testimony of Miranda Morris should be admitted to demonstrate the propensity of Short, a third party, to engage in drug sales. Alternatively, if the testimony is inadmissible under FRE 404(b), it is nevertheless admissible if

the exclusion of the evidence denies a defendant the constitutional right to present a complete defense. As this Court acknowledged in *Chambers v. Mississippi*, exclusion may violate the right to present a complete defense if the testimony bears "persuasive assurances of trustworthiness" and is critical to the defense. 410 U.S. 284, 302 (1973). In this case, the testimony of Miranda Morris is reliable, exculpatory evidence necessary for Ms. Zelasko to present a complete defense. Therefore, it was properly admitted by the lower courts.

Second, the lower courts properly excluded Defendant Lane's email. FRE 804(b)(3) provides that hearsay is admissible only when the statement has "so great a tendency . . . to expose the declarant to civil or criminal liability" that a reasonable person would not make it unless it was true. This Court's decision in *Williamson* made clear that this exception should be narrowly construed to exclude statements that are neither credible nor trustworthy. This includes statements which are not truly self-inculpatory or have elements of blame-shifting or exculpation. Additionally, FRE 804(b)(3) requires corroborating circumstances which indicate the trustworthiness of the statement, such as inquiring about the motives or manner in which the statement was made and whether those factors suggest reliability.

The statement at issue is not sufficiently self-inculpatory, contains elements which tend to minimize the declarant's involvement, and does not contain the corroborating circumstances indicating trustworthiness as required by the Rule. The analysis in *Williamson*, while fact-intensive and detailed, is readily applied, reaches a proper result, and should not be overturned based solely on its complexity. Therefore, this Court should reaffirm *Williamson* and affirm the Fourteenth Circuit's finding that Defendant Lane's statement is inadmissible.

Even if this Court finds Defendant Lane's statement admissible under the hearsay exception, it should make clear that the constitutional protection provided by its decision in

Bruton v. United States is still valid where one party's confession is offered at a joint trial without cross-examination. As stated by this Court, there exists an unacceptable risk of prejudice where a confession implicating an unknown co-conspirator is admitted at a joint trial, even where the judge provides limiting instructions to the jury.

A jury cannot be expected to "determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." *Bruton v. United States*, 391 U.S. 123, 131 (1968). If Defendant Lane's statement is admitted at trial, it will impermissibly prejudice Ms. Zelasko by suggesting to the jury that she is the "partner" referred to in the statement, without the government ever having to offer any proof. Because of the unacceptable risk of prejudice created by admitting such evidence, this Court should affirm both lower courts' holdings that such an admission violated Ms. Zelasko's rights to confrontation under the Sixth Amendment and due process under the Fourteenth Amendment.

ARGUMENT

I. THE TESTIMONY OF MIRANDA MORRIS WAS PROPERLY ADMITTED BECAUSE FEDERAL RULE OF EVIDENCE 404(b) DOES NOT PROHIBIT THE DEFENDANT'S USE OF EVIDENCE TO SHOW THE CRIMINAL PROPENSITY OF A THIRD PARTY AND BECAUSE EXCLUSION OF THIS EVIDENCE WOULD VIOLATE MS. ZELASKO'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE THAT IS GROUNDED IN THE FOURTEENTH AND SIXTH AMENDMENTS.

This Court should affirm the holdings of both the District Court and the Fourteenth Circuit that the testimony of Miranda Morris is admissible under FRE 404(b) and, alternatively, that inclusion of the Morris testimony falls within Ms. Zelasko's constitutional rights under the Fourteenth and Sixth Amendments to present a complete defense. (R. at 38.)

FRE 404(b) provides, in relevant part, that "[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(b)(1). FRE 404(b)(2) permits such evidence for other purposes, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FRE 404(b)(2). In this case, the purpose of the Morris testimony is to establish that Short's prior sale of anabolic steroids to her Canadian teammate proves that on this occasion, she "acted in accordance with [that] character" and participated in the conspiracy to sell anabolic steroids, i.e. she has a propensity to commit that crime. (R. at 10.)

By its plain terms, FRE 404(b) seemingly prohibits this evidence; however, as a majority of the circuit courts have recognized, the standard for admissibility under FRE 404(b) must be relaxed when a criminal defendant seeks to admit third-party character evidence. *See, e.g.*, *United States v. Seals,* 419 F.3d 600, 606 (7th Cir. 2005); *United States v. Stevens,* 935 F.2d 1380 (3d Cir. 1991); *United States v. Gonzalez–Sanchez,* 825 F.2d 572, 582 (1st Cir. 1987); *United States v. Aboumoussallem,* 726 F.2d 906, 911–12 (2d Cir. 1984); *United States v. Morano,* 697 F.2d 923, 926 (11th Cir. 1983). This Court should adopt the same view and affirm the lower court's holding that the Morris testimony is admissible.

Even if this Court finds that FRE 404(b) excludes the admission of the Morris testimony, this Court has held that an evidentiary rule cannot trump the constitutional right to present a complete defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1974). As recognized by this Court, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane*

v. *Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations and citations omitted). In this case, the Morris testimony is reliable, exculpatory evidence that must be admitted so as not to violate Ms. Zelasko's constitutional right.

A. The Testimony of Miranda Morris Was Properly Admitted Because Both the Source of and the Policy Behind Federal Rule of Evidence 404(b) Permit the Admission of Evidence to Show the Criminal Propensity of a Third Party When Introduced by a Defendant.

This Court should affirm the decision of the lower courts because the origins of and the policy considerations behind FRE 404(b) support admission of criminal propensity evidence when introduced by a criminal defendant. Traditionally, the prosecution uses FRE 404(b) to introduce evidence of past crimes of a defendant. *See, e.g*., *United States v*. *Powell*, 587 F.2d 443, 448 (9th Cir. 1978) (denying the Government's motion to introduce evidence of defendant's prior convictions for possession of marijuana because it was a "forbidden use of the prior conviction" under FRE 404(b)). Criminal defendants, however, may apply FRE 404(b) to admit evidence relating to third parties for the purpose of negating their own guilt. *United States v*. *Alayeto*, 628 F.3d 917, 921 (7th Cir. 2010). This particular application is known as "reverse 404(b) evidence." *United States v*. *Montelongo*, 420 F.3d 1169, 1175 (10th Cir. 2005).

Federal circuit courts addressing the admissibility of reverse 404(b) evidence have developed two approaches: (1) Apply FRE 404(b) equally to admit or exclude evidence submitted by the prosecution and the criminal defendant; and (2) apply a relaxed standard to evidence submitted by the criminal defendant. *Compare United States v*. *Lucas*, 357 F.3d 599, 606 (6th Cir. 2004) (holding that "the standard analysis of Rule 404(b) evidence should [be] . . . appl[ied] in cases where such evidence is used with respect to an absent third party"), *with Stevens*, 935 F.2d 1380, 1404−05 (stating that a "lower standard . . . should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor"). The second of these is the

approach taken by the majority of the circuits, and it is the approach that most accurately reflects the common law origins of FRE 404(b) and the policy considerations behind the Rule. *See, e.g.*, *Montelongo*, 420 F.3d at 1174; *United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001); *Stevens,* 935 F.2d 1380; *see also United States v. Murray*, 474 F.3d 938, 939 (7th Cir. 2007) (noting that "[c]oncern with the poisonous effect on the jury of propensity evidence is minimal" when a defendant attempts to employ reverse 404(b) evidence). This Court should adopt the majority approach and further find that FRE 404(b) does not categorically exclude propensity evidence when introduced by a criminal defendant.

i. An Interpretation of Federal Rule of 404(b) that Permits Admissibility of Criminal Propensity Evidence by a Defendant is Supported by the Rule's Common Law Origins and Policy Considerations.

The relaxation of the admissibility standard for evidence under FRE 404(b) has been adopted by the First, Second, Third, Fifth, Seventh, and Eleventh Circuits. *Seals,* 419 F.3d at 606; *Stevens,* 935 F.2d at 1404; *Gonzalez–Sanchez,* 825 F.2d at 582; *Aboumoussallem,* 726 F.2d at 911–12; *Morano,* 697 F.2d at 926; *United States v. Krezdorn,* 639 F.2d 1327, 1332–33 (5th Cir. 1981). To determine whether third party evidence is admissible, these courts look only to whether the evidence meets the FRE 401 relevancy requirement and whether the prejudicial effect substantially outweighs the probative effect of the evidence pursuant to FRE 403. *Stevens*, 935 F.2d at 1404. These courts justify the lower standard because the policy reasons behind FRE 404(b) are substantially weakened by application of the Rule to evidence introduced by the criminal defendant. *Murray*, 474 F.3d at 939.

As both the District Court and the Fourteenth Circuit recognized, the FRE 404(b) prohibition against the introduction of propensity evidence is grounded in the common law. *See United States v. Lynn*, 856 F.2d 430, 434 (1st Cir. 1988) ("Rule 404(b) codifies the common law

prohibition against the admission of propensity evidence—that is, evidence presented to encourage the inference that because the defendant committed a crime once before, he is the type of person to commit the crime currently charged."); (R. at 21, 35). Specifically, the common law rule stated that "the doing of a criminal act, not part of the issue, is not admissible as evidence of the doing of the criminal act charged." *United States v. Lucas*, 357 F.3d 599, 611 (6th Cir. 2004) (Rosen, J., concurring) (internal citations omitted). The underlying policy reflects two considerations, both of which mandate the protection of the *criminal defendant*:

> (1) that the jury may convict a "bad man" who deserves to be punished not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged.

United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979). Put differently, the purpose of the common law rule was to prevent the jury from punishing a defendant for conduct unrelated to the charged crime. In this case, however, applying FRE 404(b) to bar criminal propensity evidence is not within the purview of this concern. The Morris testimony is not a "prior act" for which the jury would punish Ms. Zelasko. In fact, it is just the opposite. The Morris testimony is exculpatory evidence that would allow the jury to infer that another individual, namely Short, committed the crime charged. Moreover, as a third party who is not on trial for a crime, Short is not in danger of a jury conviction for being a "bad [wo]man."

Such considerations are cited by circuit courts to justify application of a lower standard to reverse 404(b) evidence, specifically an inquiry into only the relevancy and probative value of the evidence. *See, e.g.*, *Seals*, 419 F.3d at 607; *Stevens*, 935 F.2d at 1404−05; *Aboumoussallem*, 726 F.2d at 911−12. In *United States v. Aboumoussallem*, the United States Court of Appeals for the Second Circuit addressed an individual charged with narcotics trafficking. 726 F.2d at 911. In an effort to prove that he was "duped" by his cousins' plan to carry contraband into the United

States, the defendant sought to introduce evidence that his cousins tricked another individual into transporting contraband into the United States almost six months earlier. *Id*. Acknowledging the policy considerations for FRE 404(b), the Second Circuit noted that "the risks of [jury] prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense" because such evidence is "typically objectionable not because it has no appreciable probative value but because it has too much." *Id*. (internal citations and quotations omitted).

When FRE 404(b) evidence is introduced by the criminal defendant, however, this "too much" argument does not operate with equal force. *Id*. Reverse 404(b) evidence is probative of the defendant's innocence, not his or her guilt. *See id*. The Second Circuit held that in these reverse 404(b) cases, "the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense." *Aboumoussallem*, 726 F.2d at 911−12. Because the evidence satisfied the relevancy standard, the only remaining inquiry was whether the evidence was admissible under FRE 403. *Id*. at 912. In the same way, the Morris testimony is evidence of a specific act that is probative of Ms. Zelasko's innocence and does not carry the same risk of jury prejudice with which FRE 404(b) is primarily concerned.

The United States Court of Appeals for the Third Circuit echoed a similar sentiment in *United States v*. *Stevens*. 935 F.2d 1380 (3d Cir. 1991). In *Stevens*, a defendant sought to admit testimony from an individual claiming to be a victim of a robbery similar to that which the Government charged the defendant with committing. *Id*. at 1401. This victim would testify that the defendant was not his attacker. *Id*. The defendant believed this would establish that he was also not the perpetrator of the crime charged. *Id*. In articulating the standard for admission of

reverse 404(b) evidence, the Third Circuit adopted the reasoning of the New Jersey Supreme Court that "a lower standard of similarity should govern . . . because prejudice to the defendant is not a factor." *Id*. at 1404. In doing so, the Third Circuit emphasized that under the reverse 404(b) circumstances, the defendant admits this evidence "exculpatorily" and, thus, there is no longer a risk that the jury will use this evidence to prejudice the defendant when it renders its decision. *Id*. at 1403 (quoting *State v*. *Garfole*, 388 A.2d 587, 591 (N.J. 1978)).

The Third Circuit admitted the testimony, holding that the defendant need only show that the evidence "has a tendency to negate his guilt" and that it passes a balancing test under FRE 403. *Stevens*, 935 F.2d at 1404−05. This decision further emphasizes the counterintuitive result that could occur if the Morris testimony is excluded by a strict application of FRE 404(b). As exculpatory evidence, the Morris testimony should be admitted because its inclusion would not prejudice Ms. Zelasko. To the contrary, Ms. Zelasko would be benefited by inclusion of this evidence, as it casts doubt on both her participation in the drug conspiracy and her intent with respect to the death of Riley.

More recently, in *United States v*. *Montelongo*, the United States Court of Appeals for the Tenth Circuit weighed in on this question. 420 F.3d 1169 (10th Cir. 2005). In *Montelongo*, authorities arrested the defendant after finding marijuana in the sleeping compartment of the truck in which he was riding but did not own. *Id*. at 1172. The defendant sought to introduce evidence that circumstances similar to his own occurred a few months earlier in a truck owned by the same individual. *Id*. The Tenth Circuit reversed the district court's exclusion of the testimony, noting that FRE 404(b) is "typically used by prosecutors seeking to rely on a criminal defendant's prior bad act . . . ." *Id*. at 1174. While not expressly stating that a lower standard applies to evidence introduced pursuant to FRE 404(b) by a criminal defendant, the Tenth Circuit

noted that "there [was 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. Instead, "it would have highlighted the central issue at trial—namely, which man was responsible for the contraband." *Id*. As evidence that tends to indicate someone else was responsible for the conspiracy to distribute steroids, the Morris testimony is precisely the type of evidence that should be introduced to a jury and not the type of evidence that FRE 404(b) was designed to exclude.

Notably, none of these cases dealt specifically with evidence designed to prove the propensity of an individual for crime, i.e. the only purpose for which prior acts cannot be admitted under FRE 404(b). Instead, they dealt with introduction of evidence to prove a plan, identity, and knowledge. *See, e.g*., *Stevens*, 935 F.2d at 1405 (noting that the defendant submitted the evidence for the purpose of establishing identity). Their reasoning, however, is applicable to all contexts in which a criminal defendant seeks to admit prior acts evidence under FRE 404(b). *See, e.g*., *id*. (emphasizing that when a defendant submits reverse 404(b) evidence there is no risk of jury prejudice). In light of the purposes of FRE 404(b), it is illogical to apply the Rule to exclude evidence offered by a criminal defendant, particularly where it serves to negate his or her guilt.

This Court need not adopt a bright line rule that all evidence offered by a criminal defendant is automatically admissible under Rule 404(b). It should, however, in light of the policy considerations and support from the circuits, hold that third party criminal propensity evidence introduced under Rule 404(b) by a criminal defendant to negate his or her own guilt is not categorically barred by the Rule's prohibition. In doing so, this Court should affirm the

findings of both the District Court and the Fourteenth Circuit that the Morris testimony was properly admitted.

ii. A Plain Meaning Interpretation of Federal Rule of Evidence 404(b) is Contrary to the Policy Considerations Underlying the Rule and the Intent of its Drafters.

In contrast, a minority of circuits incorrectly interpret FRE 404(b) to apply equally to all parties regardless of whether the evidence is offered by the prosecution or defense. *See, e.g.*, *Lucas*, 357 F.3d at 605; *United States v. McCourt*, 925 F.2d 1229, 1235 (9th Cir. 1991). Like the Government in this case, these courts rely exclusively on the plain meaning of FRE 404(b) and its inclusion of the word "person" in lieu of "criminal defendant" in its text. In *United States v. Lucas*, the United States Court of Appeals for the Sixth Circuit emphasized that the plain terms of FRE 404(b) prohibit introduction of "crimes, wrongs, or acts . . . to prove the character of a *person*" and not the "character of the accused." *Lucas*, 357 F.3d at 605. Therefore, the Sixth Circuit concluded, FRE 404(b) applied with equal force to exclude the third-party propensity evidence submitted by the defendant. *Id*.

This narrow focus, however, is contrary to the purpose of the Rule itself. As Judge Rosen noted in his concurrence, "both the source and policy underlying FRE 404(b) demonstrate that the Rule is intended to protect *a party* to the litigation—in particular, the criminal defendant." *Id*. at 611 (Rosen, J., concurring) (emphasis in original). In his analysis, Judge Rosen noted approval for the Third Circuit's test in *Stevens* to be applied to criminal propensity evidence introduced by the defendant and stated that "the relevancy/prejudice test and rationale set out by the Third Circuit in [*Stevens* is] more compelling than the standard Rule 404(b) analysis . . . where, as here, the prior 'bad act' is that of an absent third party . . . offered as

exculpatory evidence *by* the defense." *Id*. (Rosen, J., concurring) (emphasis in original). In light of these considerations, this Court should adopt this test to assess reverse 404(b) evidence.

Further, while the Advisory Committee notes accompanying FRE 404(b) do not specify that a "criminal defendant" is the "person" to whom it refers, the notes to the 2006 Amendment to FRE 404 reflect the aforementioned policy considerations. Specifically, the notes state that the "circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion, and delay." Fed. R. Evid. 404(b) advisory committee's note. In the context of evidence introduced by a criminal defendant, the prejudice is a non-factor, as the evidence he or she produces is exculpatory and, therefore, will not negatively affect the jury's decision-making with respect to that defendant.

Further, the note cites Justice Jackson's opinion in *Michelson v*. *United States*, which was decided before the creation of the FRE. *Id*. In *Michelson*, Justice Jackson noted, "The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v*. *United States*, 335 U.S. 469, 475−76 (1948)). Justice Jackson's concern echoes that of the circuit courts that have relaxed the FRE 404(b) admissibility standard. *See, e.g*., *Aboumoussallem*, 726 F.2d at 911−12 (noting that 404(b) evidence is "typically objectionable not because it has no appreciable probative value but because it has too much"). The fact that these considerations are cited in the notes of the Advisory Committee further reflect the idea that FRE 404(b) is designed to protect the criminal defendant, and that the Rule should not be read so literally as to exclude evidence submitted by a criminal defendant. Therefore, this Court should find that, as a matter of law,

FRE 404(b) does not bar evidence of a third party's propensity to commit an offense and affirm the holding of both lower courts that the Morris testimony is admissible.

B. Even if the Testimony of Miranda Morris is Inadmissible Under Federal Rule of Evidence 404(b), the Right to Present a Complete Defense, Grounded in the Fourteenth and Sixth Amendments to the Constitution, Mandates Its Admission.

Even if this Court finds that FRE 404(b)(3) precludes the admission of evidence to demonstrate the propensity of a third-party to commit a crime, denying admission of this evidence violates Ms. Zelasko's constitutional right to present a complete defense. A fundamental tenet of our criminal justice system is the right of the defendant to defend the charges brought against him or her. *See, e.g.*, *Chambers*, 410 U.S. at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). This Court has held that, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations and citations omitted). In other words, the evidentiary rules "may not be applied mechanistically to defeat the ends of justice." *Id*. at 302. Therefore, testimony that might otherwise be inadmissible can be admitted when its exclusion would violate a defendant's constitutional right. *Chambers*, 410 U.S. at 302−03.

Chambers is the seminal case on this issue. 410 U.S. 284. *Chambers* dealt with a confession of a third party to the same murder with which the prosecution charged the defendant. *Id*. at 287−88. Although the third party confessed to this murder to three separate individuals, he repudiated his prior sworn confession at a later preliminary hearing. *Id*. at 288. At trial, the court excluded the testimony of the three individuals to whom the third party confessed as hearsay and refused to allow cross-examination of the third party as an adverse witness. *Id*. at

291−22. The *Chambers* Court declared that operation of the hearsay rule to exclude the testimony violated the constitutional right to present a complete defense. *Id*. at 302. In doing so, the Court noted that the testimony was both "critical" to the defense and bore "persuasive assurances of trustworthiness." *Id*. While not a bright line rule, these findings reflect the considerations this Court should focus on in addressing a potential violation of the right to assert a complete defense.

This Court reinforced that standard in *Crane v*. *Kentucky*. 474 U.S. 683. In *Crane*, a minor defendant alleged that officers coerced his confession. *Id*. After determining that the confession was voluntary, the trial court refused to allow evidence of the alleged coercion. *Id*. at 684. In reversing the lower court, the *Crane* Court held that the circumstances surrounding the confession were relevant to its reliability and that exclusion of such evidence violated the right to "a fair opportunity to present a defense." *Id*. at 687.

In rendering these decisions, this Court did not lay out a test to determine what was necessary for the exclusion of evidence to rise to the level of a constitutional violation. As the Fourteenth Circuit noted, however, this Court has traditionally applied a balancing test weighing the "[r]estrictions on the criminal defendant's right[] . . . to present evidence" against "the purposes [those rules] are designed to serve." *Michigan v*. *Lucas*, 500 U.S. 145, 151 (1991); (R. at 37). In this case, Ms. Zelasko's strong interest in presenting this critical, reliable, exculpatory evidence is greater than the Government's interest in excluding criminal propensity evidence pursuant to FRE 404(b).

As in *Chambers*, the evidence here is critical to Ms. Zelasko's defense. There is no indication in the record that Ms. Zelasko would be able to procure admissible testimony that contains the same information as that of the Morris testimony. (R. at 14, 21, 37.) Because the

Morris testimony is the only source of evidence that casts doubt on Ms. Zelasko's participation in the drug conspiracy, as well as her motive in the death of Riley, its exclusion would significantly prejudice Ms. Zelasko. (R. at 14, 21, 37.) As in both *Crane* and *Chambers*, this evidence relates to Ms. Zelasko's guilt in the crime charged. As the Government stipulated, there were only two conspirators involved in the distribution of the anabolic steroid ThunderSnow to the women's Snowman Team. (R. at 11.) Importantly, while one of those conspirators is positively identified as Defendant Lane, the other is not yet identified. (R. at 11.) Here, the Morris testimony provides evidence that not only did Short previously sell drugs of a similar variety to her Canadian Snowman teammates, but that these actions are so similar as to raise a strong possibility that Short, not Ms. Zelasko, was the second party to the conspiracy. It also raises significant doubt as to Ms. Zelasko's intent to kill Riley. This is exactly the type of testimony this Court held must be admitted in *Chambers*.

With respect to "persuasive assurances of trustworthiness" as identified in *Chambers*, the Morris testimony reflects an admission by Miranda Morris to the illegal purchase and sale of anabolic steroids, an unlawful act. (R. at 25; Ex. A.) Morris indicates in her affidavit that her reason for making these statements is to "atone for [her] betrayal" to her "own integrity and that of the sport." (R. at 25; Ex. A.) Thus, Morris' goal in divulging this information is rooted in the desire to repent, not to exculpate herself or Ms. Zelasko from liability. These considerations make it more likely that her statements are trustworthy.

Conversely, the Government's interest in excluding the Morris testimony is slight. As the Fourteenth Circuit acknowledged, there are no clear policy goals furthered by the exclusion of this testimony. (R. at 38.) While the Government in the lower court cited to issues such as "judicial expediency," the Morris testimony will not add significant length to the judicial

proceedings. In fact, the affidavit containing a majority of the proposed testimony is a mere two page document. (Ex. A). Further, there is no risk of prejudice to either Ms. Zelasko or Short through the admission of this testimony. Short is not a defendant in this litigation; therefore, the jury will not punish her for her prior act. Ms. Zelasko, on the other hand, benefits from the inclusion of this testimony, as the evidence tends to negate her participation in the drug conspiracy. Based upon these considerations, Ms. Zelasko's interest in presenting this reliable, exculpatory evidence is far greater than the Government's interest in excluding the testimony. Therefore, this Court should affirm the holdings of the lower courts and find that Ms. Zelasko's constitutional right to present a complete defense compels the admission of the Morris testimony.

II. DEFENDANT LANE'S STATEMENT IS INADMISSIBLE HEARSAY UNDER FEDERAL RULE OF EVIDENCE 804(b)(3) BECAUSE IT WAS NOT A STATEMENT AGAINST INTEREST AND BECAUSE ITS ADMISSION VIOLATES MS. ZELASKO'S CONSTITUTIONAL RIGHTS.

Defendant Lane's email does not qualify as a statement against penal interest under FRE 804(b)(3) and is therefore inadmissible hearsay. Admission of Defendant Lane's email also violates Ms. Zelasko's constitutional rights. The decision of the courts below, therefore, should be affirmed.

FRE 804(b)(3) provides, in relevant part, that a statement is admissible if it is one "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it . . . had so great a tendency to . . . expose the declarant to civil or criminal liability." FRE 804(b)(3). FRE 804(b)(3) must be construed narrowly to ensure that statements are sufficiently against interest so as to guarantee reliability. The statement at issue here, Defendant Lane's email, is inadmissible because it contains no such assurances of truthfulness or reliability.

The Fourteenth Circuit properly affirmed the District Court's finding that the email from Defendant Lane to Billings was inadmissible hearsay that did not meet the requirements set out by this Court in *Williamson v. United States* for admissions against penal interest. (R. at 23, 42.) This Court should affirm that finding and reaffirm its holding in *Williamson* to ensure that only truly trustworthy and reliable statements are admitted under a hearsay exception.

Even if the statement fits within an exception to the hearsay rule, which it does not, the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment prevent its admission at the joint trial of Defendant Lane and Ms. Zelasko. Even with limiting instructions to the jury, the admission of the statement without an opportunity for cross-examination would unconstitutionally prejudice Ms. Zelasko. Without the right to cross-examine the declarant, the jury will draw impermissible inferences from Defendant Lane's statement because Ms. Zelasko has minimal, if any, means of rebutting the inference. This Court should make clear that the constitutional protections set down in *Bruton v. United States* are still valid and bar the admission of an alleged co-conspirator's statement at a joint trial without the right to cross-examination.

A. Defendant Lane's Statement Does Not Qualify as a Statement Against Penal Interest Under the Plain Language of Federal Rule of Evidence 804(b)(3) or This Court's Holding in *Williamson* and is Therefore Inadmissible.

Hearsay is prohibited by the both the common law and the Federal Rules of Evidence because it prevents the fact-finder from completing its essential task of making a credibility determination. *Williamson v. United States*, 512 U.S. 594, 598 (1994) (stating the testimonial dangers of lying, misperception, or misunderstanding cannot be minimized for hearsay as they can for in-court statements through credibility determinations and cross-examination). Some hearsay, however, is admissible when it has sufficient alternative guarantees as to its trustworthiness and reliability. *Id*. at 598–99. One such exception is for statements against penal

interest, or statements that at the time of their utterance have such a tendency to subject the speaker to criminal liability that a reasonable person would not make it unless it were true. *Id*. Here, the Government asserts that the email from Defendant Lane to Billings is admissible as an admission against penal interest under FRE 804(b)(3). (R. at 16.) The plain language of the Rule, however, suggests the opposite conclusion.

FRE 804 states, in pertinent part, that hearsay may be admissible if the declarant is unavailable, as long as the statement is one "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it . . . had so great a tendency to . . . expose the declarant to civil or criminal liability." Fed. R. Evid. 804(b)(3)(A). The statement must be "supported by corroborating circumstances that clearly indicate its trustworthiness, [and in the criminal context must] ten[d] to expose the declarant to criminal liability." Fed. R. Evid. 804(b)(3)(B). This Court held that FRE 804(b)(3) should be narrowly construed, and that each statement must be viewed individually before determining if it is truly so self-inculpatory that it can be deemed trustworthy and reliable. *Williamson*, 512 U.S. 594. The District Court correctly found, and the Fourteenth Circuit affirmed, that Defendant Lane's statement does not qualify under this exception. (R. at 22–23, 41–43.) The evidence lacks the indicia of reliability and truthfulness required for its admissibility under FRE 804.

i. Defendant Lane's Statement Does Not Qualify as a Statement Against Penal Interest Under Federal Rule of Evidence 804(b)(3) and Under this Court's decision in *Williamson*.

This Court has held that the FRE 804(b)(3) exception should be given a "narrow" scope when analyzing the admission of evidence. *Williamson*, 512 U.S. at 599 ("[T]he principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading."). This narrow interpretation is warranted because one making a potentially self-inculpating statement will often "mix falsehood with truth, especially truth that seems particularly persuasive

because of its self-inculpatory nature." *Id*. at 599–600. Because of this risk, the *Williamson* Court held that each statement must be looked at individually to see if it is truly self-inculpatory. *Id*. at 600–01. Furthermore, collateral statements—those alongside the truly self-inculpatory ones—and particularly those that are exculpatory or shift blame must be excluded because they are "less credible than ordinary hearsay evidence." *Id*. The analysis must center upon "whether the statement was sufficiently against the declarant's penal interest." *Id*. at 603–04. This necessarily requires examining the context in which the statement was made. *Id*.

In *Williamson*, the prosecution charged the defendant with conspiracy to possess and distribute cocaine, possession with intent to distribute, and traveling interstate to promote distribution. *Williamson*, 512 U.S. at 596–97. Williamson's alleged co-conspirator, Harris, confessed after being pulled over while transporting the cocaine; however, he changed his story after his first confession and implicated Williamson. *Id*. Harris' second confession revealed that he knew the cocaine was in the car, but that he was transporting it from Florida to Atlanta for Williamson. *Id*. Williamson had been following Harris in a separate vehicle when he was pulled over. *Id*.

Harris refused to testify at Williamson's trial or to sign or record any of his confessions. *Id*. Although Harris was given immunity and ordered to testify, he still refused. *Williamson*, 512 U.S. at 597. As a result, the district court ruled that the agent who took Harris' confession could testify about the statements under FRE 804(b)(3). *Id*. Williamson was convicted and subsequently appealed, alleging that the admission of Harris' confession violated both FRE 804(b)(3) and his constitutional rights under the Confrontation Clause of the Sixth Amendment. *Id*. at 598. The Eleventh Circuit affirmed without opinion. *Id*.

On appeal, the Court held that FRE 804(b)(3) requires a narrow interpretation of the word "statement." *Williamson*, 512 U.S. at 599–600. In so holding, courts must analyze each individual statement to determine whether or not it is truly against the speaker's interest. *Id*. at 604. Finding at least part of Harris' statement admissible, the Court reversed and remanded in order for the court below to conduct a fact-intensive inquiry to determine "whether each of the statements in Harris' confession was truly self-inculpatory." *Id*. As an example of an admissible utterance, the Court pointed to Harris' statement that he knew there was cocaine in the trunk, which caused him to "essentially forfeit[] his only possible defense to a charge of cocaine possession, lack of knowledge." *Id*. at 604. The rest of his confession "did little to subject himself to criminal liability," and could even be viewed as advancing his interests by placing the more serious charges on another party. *Id*. Thus, those statements were patently inadmissible under FRE 804(b)(3). *Id*.[3]

Here, the statement lacks any indicia of reliability and trustworthiness. Defendant Lane's email to Peter Billings read:

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

(R. at 29; Ex. C.)

[3] Justice Scalia wrote separately in a concurrence to emphasize that the holding "did not require the simplistic view of [804(b)(3)] that Justice Kennedy attributes to it," but rather requires a look to whether the statement is truly against interest. Justice Scalia writes that a statement is not inadmissible merely because it "names another person or implicates a codefendant." *Williamson*, 512 U.S. at 605–06. In a separate concurrence, Justice Ginsburg was joined by Justices Blackmun, Stevens, and Souter in agreeing that the case should be reversed, but found that none of Harris' statements could properly be admitted under FRE 804(b)(3) because his self-inculpatory statements were "too closely intertwined with his self-serving declarations to be ranked as trustworthy." *Id*. at 608. Justice Ginsburg, however, joined the decision to vacate and remand because she believed that the government should still be afforded "an opportunity to argue that the erroneous admission of the hearsay statements, in light of the other evidence introduced at trial, constituted harmless error." *Id*. at 607–10.

Nothing in this statement has "so great a tendency . . . to expose the declarant to . . . criminal liability" that it creates a realistic presumption of credibility. Fed. R. Evid. 804(b)(3). Defendant Lane's statement contains vague generalities that do not indicate any definitive existence of criminality. None of these statements inculpate Defendant Lane to any degree of certainty. Even if this statement is found to be suggestive of criminal conduct, it is largely an attempt to inculpate the unnamed partner, and to make Defendant Lane appear innocent by comparison in any further criminality that might occur. This mixture of self-inculpatory and self-exculpatory statements is precisely the concern this Court cited when it construed FRE 804(b)(3) narrowly. *Williamson*, 512 U.S. at 599–600.

As this Court explained, "[o]ne 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*. Justices Ginsburg, Blackmun, Stevens, and Souter opined that the Court should take one step further and reject even clearly self-inculpatory statements when they become intertwined with self-exculpatory statements in an attempt to shift blame. *Id*. (Ginsburg, J., concurring). According to the concurrence, these statements can no longer be viewed as reliable or trustworthy. *Id*. at 608 (Ginsburg, J., concurring). Much like Harris' admission in *Williamson*, in which he inculpated himself as to possession but placed much greater blame on Williamson as the ringleader, Defendant Lane's statement is inadmissible under FRE 804(b)(3) because it lacks the necessary reliability and trustworthiness for admission of a statement against penal interest.

The Government contends that Defendant Lane's statement creates no concern as an unreliable statement because it was not made to a law enforcement officer. (R. at 17.) As pointed out by the District Court, however, this contention has no basis in precedent and, further, defies logic. (R. at 17, 22.) A statement truly against one's penal interest made to a law

enforcement officer has a significantly higher "tendency to . . . expose the declarant to . . . criminal liability" than a cryptic, and not necessarily inculpatory, statement made in a casual email to a significant other. Fed. R. Evid. 804(b)(3). The realistic threat of criminal prosecution is precisely what makes such statements reliable and excepted from the prohibition on hearsay. Where, as here, there is no "tendency to . . . expose the declarant to . . . criminal liability," no guarantee of reliability or truthfulness exists. *Id*.

The context of the statement also weighs against its admission. The "corroborating circumstances that indicate trustworthiness" and "tend to expose the declarant to criminal liability" as required by FRE 804(b)(3)(B) do not exist. Fed. R. Evid. 804(b)(3)(B). First, the circumstances surrounding the arrests do not corroborate the inference that Ms. Zelasko is the "partner" to which the email refers. (R. at 29.) The indictment alleges that the Government found 2 50-milligram doses of ThunderSnow in Ms. Zelasko's home. (R. at 8.) An expert in the field of performance-enhancing drugs indicated, however, that this amount is "consistent with personal use and not sale." (R. at 9, 27–28; Ex. B.) In stark contrast, the indictment alleges that the Government seized ten times this amount of ThunderSnow from the home of Defendant Lane. (R. at 8.) Additionally, an affidavit of a former teammate of Short reflects that Short sold similar performance-enhancing drugs in the past, casting significant doubt on the inference that Ms. Zelasko was the partner to which the email referred. (R. at 8; Ex. A). Finally, the email recipient, Billings, has been in a romantic relationship with Defendant Lane for several years. (R. at 1, R. at 9). This relationship casts doubt on the reliability of the statements contained therein. All of these facts place Defendant Lane's credibility into question. Therefore, this Court should find that the email is inadmissible.

ii. *Williamson* Remains Valid, is Readily Applied, and Should Be Reaffirmed.

While *Williamson* certainly requires an intensive inquiry when conducting an analysis concerning the admissibility of evidence, it should not be overturned, or even modified. As this Court has held, "a respect for precedent is, by definition, indispensable," and cases should only be overruled in narrow circumstances. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (citing Lewis F. Powell, *Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History* 13, 16 (1990)). Judge Marino's dissenting opinion in the court below fails to quote the entirety of the language from this Court's decision in *Payne*, and understates the importance of precedent. (R. at 48). While *stare decisis* is not an "inexorable command or a mechanical formula," it is "the preferred course because it 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." *Payne v. Tennessee*, 501 U.S. 801, 827 (1991); *see also Crawford v. Washington*, 541 U.S. 36, 75 (2004) (Rehnquist, CJ., concurring) (quoting same).

In limited circumstances, this Court has determined that overturning precedent is appropriate. This includes where "the rule has proven to be intolerable simply in defying practical workability." *Casey*, 505 U.S. at 854. This is not the case here. While the fact-sensitive inquiry demanded by *Williamson* can prove an intensive task, its regular use at both the trial and appellate levels demonstrates that it is perfectly workable and not overly burdensome, particularly when weighed against the due process rights it protects.

Some courts have, however, failed to appropriately apply *Williamson*. *See e.g.*, *United States v. Hadja*, 135 F.3d 439, 444 (1st Cir. 1998) (holding that a father's statement that a son was a nazi-collaborator at a hearing to determine whether the father was a collaborator was

sufficiently against interest despite it being entirely exculpatory as to himself and holding the same as to the sister's identical statements at her collaboration trial); *see also United States v*. *Smalls*, 605 F.3d 765, 780–86 (10th Cir. 2010) (failing to give proper consideration to the self-exculpatory nature of an inmate's statements); *United States v*. *Ebron*, 683 F.3d 105 (5th Cir. 2012). These courts have failed to ensure the reliability of the proffered statements against interest, and have admitted statements which were entirely exculpatory; this is in direct contravention to this Court's holding in *Williamson*. The failure of these circuit courts to properly apply *Williamson* is precisely why this Court should clarify that FRE 804(b)(3) requires a narrow construction, and applies to all statements against interest regardless of the context in which they are made.

In *Ebron*, for example, the Fifth Circuit Court of Appeals improperly applied the *Williams* standard. 683 F.3d 105 (2012). Joseph Ebron was sentenced to death for the murder of a fellow inmate, and he appealed on several grounds. *Id*. at 117. Pertinently, two challenges centered around FRE 804(b)(3). *Id*. at 132–35. The first was regarding the statement of an alleged accomplice in the murder, which was testified to by another inmate after the alleged accomplice committed suicide. *Id*. The second was a series of letters from an alleged associate of Ebron whom the victim had testified against. *Id*. While the conclusion reached by the Fifth Circuit was ultimately correct under *Williamson*, the Fifth Circuit reached this conclusion utilizing the improper standard. In its analysis of the first statement, the Fifth Circuit noted that both parties agreed that the statement was against the declarant's interest. *Id*. at 132. The statement detailed the alleged accomplice and someone he referred to as Akh—which the government alleged was Ebron—stabbing the victim "so many times that they had to take breaks." *Id*. at 132–33. Ebron, however, alleged the portion regarding Akh should have been

excluded because it was a non-self-inculpatory portion of the statement. *Id*. at 133. The Fifth Circuit, instead of looking to whether the specific statement would tend to subject the declarant to criminal liability, held that *Williamson* applied only to custodial statements made to authorities. *Id*. at 133–34. This conclusion conflated a determination of whether a statement was testimonial with whether it met the requirements of the specific hearsay exception. *See Crawford v*. *Washington*, 541 U.S. 36 (2004) (discussing the implications of a statement being testimonial under Confrontation Clause analysis).

The Fifth Circuit did not need to read this non-existent requirement into the holding of *Williamson*, as the declarant's statement fell squarely within the definition of a statement against penal interest. *Ebron*, 683 F.3d at 133; *see* 5 Federal Evidence § 8:129 (4th ed.) (describing *Williamson* as holding that statements naming another person can clearly qualify as statements against interest as long as the individual statement is sufficiently self-inculpatory to the declarant). The declarant stated that he and "Akh went in [the cell] and put in work, [and the declarant] stabbed [the victim] so many times that they had to take breaks." *Ebron*, 683 F.3d at 133. This singular statement is inculpatory and in no way shifts blame or creates any of the fears of unreliability identified in *Williamson*. *Id*. The Fifth Circuit should have applied the framework of *Williamson* and analyzed the individual statement to determine if it was truly self-inculpatory.

The Fifth Circuit then addressed the second statement, the letters from the alleged associate. *Id*. at 134. The opinion does not disclose the exact nature or contents of the letters, however, on its face, the admission of entire letters—most likely containing a mix of non-inculpatory and inculpatory statements—is directly contrary to this Court's holding in *Williamson*. *Id*. The *Ebron* court's use of pre-*Williamson* case law to support its affirmance

further supports this observation. *See id*. at 134–35. This Court held in *Williamson* that courts may not admit a broad, generally self-inculpatory narrative, but must examine each individual statement to determine if it is sufficiently self-inculpatory to assure its credibility. *Williamson*, 512 U.S. at 600–01. It is highly unlikely—if not impossible—that admission of an entire letter, let alone several letters, could meet this standard. To prevent such error, this Court should uphold its finding in *Williamson* and emphasize that it applies to all uses of FRE 804(b)(3), emphasizing the requirement for a narrow interpretation and ending improperly broad analysis by lower courts.

The facts here lend themselves quite readily to an analysis under *Williamson*. The statements by Defendant Lane are not sufficiently self-inculpatory, contain self-exculpatory elements, and possess no corroborating circumstances that demonstrate the credibility of the information. Both the District Court and the Fourteenth Circuit examined the facts and existing law and came to this same conclusion. This finding was proper because, as the *Williamson* Court noted, FRE 804(b)(3) must be given a narrow interpretation that comports with the Rule's purpose of only allowing hearsay which has sufficient guarantees of trustworthiness and reliability. This Court should affirm and uphold *Williamson* to ensure that statements against interest are only admissible when credible and reliable.

B. Even If Defendant Lane's Statement Fits Within a Hearsay Exception, its Admission Violates Ms. Zelasko's Constitutional Rights Under the Confrontation Clause.

Even if this Court were to overrule *Williamson* and find that Defendant Lane's email was admissible hearsay, it should affirm the holdings of the District Court and Fourteenth Circuit that Ms. Zelasko's Sixth Amendment right to confront witnesses against her and her Fourteenth Amendment right to due process would be violated by its admission. Despite this Court's focus on the Confrontation Clause and testimonial statements in *Crawford*, it should make clear that

the constitutional protections provided by its decision in *Bruton v. United States* are still valid and necessary. *Crawford v. Washington*, 541 U.S. 36 (2004); *Bruton v. United States*, 391 U.S. 123 (1968). Neither *Crawford* nor *Davis* explicitly overturned the decision in *Bruton*, and nothing in either decision's dicta suggests this conclusion. *Crawford*, 541 U.S. 36; *Davis v. Washington*, 547 U.S. 813 (2006). Rather, "[the] issue continues to be governed by constitutional law," and "the admission of a co-defendant's confession that implicated the defendant violate[s] that defendant's Sixth Amendment [right] to confront his accusers." The Honorable Paul W. Grimm et. al., *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial?*, 40 U. Balt. L.F. 155, 196–97 (2010).

In *Bruton*, this Court held that the confession of an alleged accomplice who does not testify at a joint trial cannot be introduced even if the jury receives limiting instructions. *Bruton*, 391 U.S. at 135–37. This Court noted that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id*. at 135. Bruton had been tried in a joint trial on charges of armed postal robbery with his alleged accomplice. *Id*. at 124. The alleged accomplice twice confessed to a postal inspector that he had an accomplice, but refused to name Bruton in the latter confession. *Id*. At trial, the judge instructed the jury that it could not use the accomplice's confession against Bruton. *Bruton*, 391 U.S. at 125. Bruton was found guilty. *Id*.

In *Bruton*, this Court held that such an admission causes prejudice that cannot be remedied—even with limiting instructions—without violating a defendant's constitutional rights. *Id*. at 131. This Court explained that a "jury cannot segregate evidence into separate intellectual boxes [and] determine that a confession is true insofar as it admits that A has committed criminal

acts with B [while] effectively ignor[ing] the inevitable conclusion that B has committed those same criminal acts with A." *Id*. To allow such evidence would "deprive an accused of the right to cross-examine the witnesses against him[, which] is a denial of the Fourteenth Amendment's guarantee of due process of law." *Id*. at 131 n.5 (quoting *Pointer v*. *Texas*, 380 U.S. 400, 405 (1965)) (internal quotations omitted).

In 2004, this Court in *Crawford* opted not to define the boundaries of the Confrontation Clause but stated that testimonial hearsay was within its ambit. *Crawford*, 541 U.S. at 53–61 (rejecting an approach that applies the Confrontation Clause only to testimonial statements). The Court declined to give an exact definition of testimonial hearsay, but indicated that one definition would include only "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. *Crawford* itself involved an assault and attempted murder trial in which the defendant's spouse was barred from testifying due to spousal privilege, but the government was allowed to use the spouse's prior statement to police. *Id*. at 38. The government obtained a conviction. *Id*. After a lengthy discussion on the common law origins of the Confrontation Clause, this Court stated that while its precise domain is unclear, testimonial statements not subject to cross-examination are clearly violative under any view. *Id*. at 53.

The question as to the bounds of the Confrontation Clause would seem to have been resolved in *Davis*, two years after *Crawford*, when the Court stated that it is only the testimonial nature of evidence that can cause a violation of the Confrontation Clause. *Davis*, 547 U.S. at 821–23. The factual and procedural differences between *Bruton* and the duo of *Crawford* and *Davis*, however, should cause this Court to conclude that the admission of an alleged accomplice at a joint trial causes such incurable prejudice that even explicit instructions cannot remedy it.

Davis involved a domestic abuse case in which the victim refused to testify, and as a result, the government used her statements to a 9-1-1 operator under the "excited utterance" and "present sense" hearsay exceptions. *Davis*, 547 U.S. 820. This Court found that the statements were properly admitted hearsay, concluding they were non-testimonial and, therefore, did not violate the Confrontation Clause. *Id*. at 828–29.

In both *Crawford* and *Davis*, the statements admitted were those of either a witness or a victim. By contrast, the statements here and in *Bruton* were those of an alleged co-conspirator, posing a distinct and unique harm from that alleged in *Crawford* or *Davis*. A jury that has read an alleged co-conspirator's confession must "perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then ignor[e] it in determining the guilt or innocence of any codefendants of the declarant." *Bruton*, 391 U.S. at 131. To believe that absent cross-examination an alleged co-conspirator's statement will be given proper weight by the jury, even with instructions, is at best "unmitigated fiction." *Id*. at 129 (quoting *Krulewitch v*. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). Here, despite the generic language of "partner" used in the email—which Ms. Zelasko contends refers to Short—if presented at trial, "[a] juror who wonders to whom partner might refer need only lift his eyes to Zelasko, sitting at counsel table, to find what will seem the obvious answer." (R. at 44 (quoting *Gray v*. *Maryland*, 523 U.S. 185, 193 (1998).) Without the ability to cross-examine and refute this inferential leap, admission of the statement is constitutionally unacceptable.

As stated by this Court in *Bruton*, allowing an alleged co-conspirator's confession to be admitted with no opportunity for cross-examination will not only violate the Confrontation Clause but will also result in "a denial of the Fourteenth Amendment's guarantee of due process of law." *Bruton*, 391 U.S. at 131 n.5 (quoting *Pointer*, 380 U.S. at 405); *see also Lilly v*.

Virginia, 527 U.S. 116, 123 (1999) ("In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, 'to be confronted with the witnesses against him.'"). If Defendant Lane's email is admitted, the jury will be prejudiced against whoever they presume to be her partner. "This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand." *Bruton*, 391 U.S. at 132. The factual and procedural differences between this case and cases such as *Crawford* or *Davis* should compel this Court to reaffirm and clarify its holding in *Bruton* and to protect Ms. Zelasko's constitutionally guaranteed rights.

This Court ultimately does not need to reach this issue because the statement by Defendant Lane is inadmissible hearsay. If the issue is reached, however, this Court should affirm both the District Court and the Fourteenth Circuit and hold that admission of an alleged co-conspirator's confession at a joint trial without a right to cross-examination violates Ms. Zelasko's constitutional rights. This conclusion comports with prior precedent, protects established constitutional rights, and gives much-needed guidance to the courts below.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

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Counsel for Respondent

Date: February 12, 2014