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**N o. 12–13**

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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**UNITED STATES OF AMERICA,**

**Petitioner,**

**-against-**

**ANASTASIA ZELASKO,**

**Respondent.**

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**ON WRIT OF CERTIORARI TO THE**

**COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT**

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# BRIEF FOR RESPONDENT

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Counsel for Respondent

## QUESTIONS PRESENTED

I. Did the circuit court properly hold that Morris' testimony, which implicated Short in the crimes with which Zelasko is charged, is admissible because Rule 404(b) does not apply when the defendant offers evidence of a third party's propensity to commit an offense with which the defendant has been charged, and even if Rule 404(b) does apply, did the circuit court nevertheless still properly admit Morris' testimony because Zelasko is constitutionally entitled to present a complete defense?

II. Did the circuit court properly hold that Lane's email failed to meet hearsay exception 804(b)(3) by applying the dependable *Williamson* test, which ensures the reliability of statements against interest by requiring that each declaration or remark within a narrative be individually self-inculpatory?

III. Was the circuit court correct in holding that the use of Lane's non-testimonial email in Zelasko and Lane's joint trial violated Zelasko's Confrontation Clause rights under *Bruton*, which held that the use of a non-testifying co-defendant's statement that implicates the defendant is constitutionally harmful, even after *Crawford*, the constitutional reliability case that linked Confrontation Clause violations to testimonial hearsay?

## TABLE OF CONTENTS

**QUESTIONS PRESENTED** ..... i

**TABLE OF CONTENTS** ..... ii

**TABLE OF AUTHORITIES** ..... iv

**STATEMENT OF THE CASE** ..... 1

**Statement of Facts** ..... 1

**Procedural History** ..... 3

**SUMMARY OF THE ARGUMENT** ..... 4

**ARGUMENT** ..... 6

**I. THE CIRCUIT COURT PROPERLY HELD THAT THE *HUDDLESTON* STANDARD FOR RULE 404(B) DOES NOT BAR ZELASKO FROM INTRODUCING EVIDENCE OF SHORT'S PROPENSITY TO COMMIT OFFENSES WITH WHICH ZELASKO HAS BEEN CHARGED, AND EVEN IF THE *HUDDLESTON* STANDARD DOES APPLY, MORRIS' TESTIMONY SHOULD NEVERTHELESS BE ADMITTED, BECAUSE IT SATISFIES THE *HUDDLESTON* STANDARD, AND BECAUSE ZELASKO INDEPENDENTLY HAS A CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.** ..6

**A. *Huddleston* does not apply to defendants seeking to introduce evidence of a third party's propensity to commit an offense with which the defendant has been charged—reverse 404(b) evidence—because there is no risk of prejudice, the standard for admissibility of reverse 404(b) evidence should logically be lower than Rule 404(b) evidence, and because the Federal Rules of Evidence were intended to promote admission.** ..... 9

**B. Even if this Court finds that *Huddleston* applies to third party propensity evidence, Morris' testimony is still admissible, because it meets the stringent *Huddleston* standard, and Zelasko independently has the constitutional right to present a complete defense.** ..... 12

**II. THE CIRCUIT COURT PROPERLY AFFIRMED THE DISTRICT COURT'S DECISION THAT LANE'S EMAIL IS INADMISSIBLE HEARSAY EVIDENCE, BECAUSE THE DISTRICT COURT APPLIED THE FAITHFUL *WILLIAMSON* STANDARD AND FOUND THAT THE INDIVIDUAL DECLARATIONS IN THE EMAIL DID NOT SATISFY THE 804(B)(3) EXCEPTION.** ..... 17

**A. The lower courts correctly applied the *Williamson* standard by determining that each remark within Lane's email—standing alone, but in context—was not sufficiently against Lane's penal interest to meet Rule 804(b)(3).** .....18

**B. *Williamson* should continue to be the test for Rule 804(b)(3), because it is most faithful to the reasoning behind the penal interest exception, and because following *stare decisis* promotes judicial predictability and efficiency.** .....24

**III. FURTHER, THE CIRCUIT COURT PROPERLY AFFIRMED THE DISTRICT COURT'S EXCLUSION OF LANE'S EMAIL FROM THE JOINT TRIAL ALTOGETHER, BECAUSE THE USE OF A NON-TESTIFYING CO-DEFENDANT'S IMPLICATING STATEMENT AT A JOINT TRIAL—EVEN A "NON-TESTIMONIAL" STATEMENT MADE TO A FRIEND—VIOLATES THE *BRUTON* DOCTRINE, WHICH SHOULD REMAIN FULLY INTACT IN A POST-*CRAWFORD* WORLD.** .....28

**CONCLUSION** .....33

## TABLE OF AUTHORITIES

### UNITED STATES SUPREME COURT CASES

*Bruton v. United States*, 391 U.S. 123 (1968) ..... *passim*

*Chambers v. Mississippi*, 410 U.S. 284 (1973) .....12, 14

*Coffin v. United States*, 156 U.S. 432 (1895).....16

*Crawford v. Washington*, 541 U.S. 36 (2004) ..... *passim*

*Cruz v. New York*, 481 U.S. 186 (1987) .....30, 31

*Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) .....11

*Davis v. Washington*, 547 U.S. 813 (2006).....29

*Delli Paoli v. United States*, 352 U.S. 232 (1957).....28

*Dickerson v. United States*, 530 U.S. 428 (2000) .....27

*Donnelly v. United States*, 228 U.S. 243 (1913).....25

*Huddleston v. United States*, 485 U.S. 681 (1988) ..... *passim*

*In re Winship*, 397 U.S. 358 (1970) .....11

*Martin v. Ohio*, 480 U.S. 228 (1987) .....11

*Michigan v. Lucas*, 500 U.S. 145 (1991) .....15

*Ohio v. Roberts*, 448 U.S. 56, 66 (1980).....29

*Payne v. Tennessee*, 501 U.S. 808 (1991).....27

*United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940) .....10

*Whorton v. Bockting*, 549 U.S. 406 (2007).....29

*Williamson v. United States*, 512 U.S. 594 (1994) ..... *passim*

**UNITED STATES COURTS OF APPEALS CASES**

*Agushi v. Duerr*, 196 F.3d 754 (7th Cir. 1999) .....8

*Beckett v. Ford*, 384 F. App'x 435 (6th Cir. 2010).....21

*Carson v. Peters*, 42 F.3d 384 (7th Cir. 1994).....21

*Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir. 1996).....28

*United States v. Aboumoussalem*, 726 F.2d 906 (2d Cir. 1984) .....8, 9, 10, 13

*United States v. Ashfield*, 735 F.2d 101 (3rd Cir. 1984).....23

*United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997).....20, 21

*United States v. Berrios*, 676 F.3d 118 (3d Cir. 2012) .....29

*United States v. Bowe*, 426 F. App'x 793 (11th Cir. 2011) .....28

*United States v. Canan*, 48 F.3d 954 (6th Cir. 1995).....21

*United States v. Carroll*, 207 F.3d 465 (8th Cir. 2000) .....13

*United States v. Costa*, 31 F.3d 1073 (11th Cir. 1994).....21

*United States v. Dale*, 614 F.3d 942 (8th Cir. 2010) .....6, 29

*United States v. Dargan*, 738 F.3d 643 (4th Cir. 2013).....28

*United States v. Figueroa-Cartagena*, 612 F.3d 69 (1st Cir. 2010) .....29

*United States v. Holland*, 76 F. App'x 452 (3d Cir. 2003).....28

*United States v. Jackson,* 335 F.3d 170 (2d Cir. 2003) .....21

*United States v. Jinadu*, 98 F.3d 239 (6th Cir. 1996) .....20

*United States v. Johnson,* 581 F.3d 320 (6th Cir. 2009).....29

*United States v. Johnson*, 440 F.3d 832 (6th Cir. 2006).....21

*United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006) .....24

*United States v. Lucas*, 357 F.3d 599 (6th Cir. 2004) .....8

*United States v. McClure*, 546 F.2d 670 (5th Cir. 1977) .....8

*United States v. McCourt*, 925 F.2d 1229 (9th Cir. 1991) .....8

*United States v. Mendoza*, 85 F.3d 1347 (8th Cir. 1996).....21

*United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005) .....7

*United States v. Moses*, 148 F.3d 277 (3d Cir. 1998) .....20, 21

*United States v. Nagib*, 56 F.3d 798 (7th Cir. 1995) .....21

*United States v. Murray*, 474 F.3d 938 (7th Cir. 2007) .....9

*United States v. Phillips*, 599 F.2d 134 (6th Cir. 1979) .....9

*United States v. Reed,* 259 F.3d 631 (7th Cir. 2001) .....8

*United States v. Ricardo*, 472 F. 3d 277 (5th Cir. 2006) .....28

*United States v. Smalls*, 605 F.3d 765 (10th Cir. 2010).....23, 29

*United States v. Sposito*, 106 F.3d 1042 (1st Cir. 1997).....21

*United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991) .....8

*United States v. Thomas*, 571 F.2d 285 (5th Cir. 1978).....18

*United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001) .....21

*United States v. Wilson,* 605 F.3d 985 (D.C. Cir. 2010).....29

*Vincent v. Seabold*, 226 F.3d 681 (6th Cir. 2000).....21

*Wynne v. Renico*, 606 F.3d 867 (6th Cir. 2010) .....9

**UNITED STATES DISTRICT COURT CASES**

*Bihani v. Obama*, 662 F. Supp. 2d 9 (D.D.C. 2009) .....28

*United States v. Williams*, 1:09CR414 JCC, 2010 WL 3909480 (E.D. Va. 2010).....31, 32

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. VI ..... *passim*

U.S. Const. amend. XIV .....14

**STATUTORY PROVISIONS AND FEDERAL RULES**

18 U.S.C. § 371 .....3

18 U.S.C. § 1111 .....3

18 U.S.C. § 3731 .....3

21 U.S.C. § 841 .....3

21 U.S.C. § 844 .....3

Fed. R. Evid. 104 .....7, 15

Fed. R. Evid. 401 .....11

Fed. R. Evid. 402 .....7, 8

Fed. R. Evid. 403 .....7, 8, 14, 15

Fed. R. Evid. 404(b) ..... *passim*

Fed. R. Evid. 802 .....24

Fed. R. Evid. 804 ..... *passim*

**SECONDARY SOURCES**

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Samuel Buffaloe, Minimizing Confrontation: The Eighth Circuit Uses Crawford to Avoid Bruton for Non-Testimonial Statements United States v. Dale, 76 Mo. L. Rev. 895 (2011) .....31, 32

Zachary El-Sawaf, Incomplete Justice: Plugging the Hole Left by the Reverse 404(b) Problem, 80 U. Cin. L. Rev. 1049 (2012) .....16, 17

## STATEMENT OF THE CASE

### Statement of Facts

Ms. Anastasia Zelasko, the Respondent in this case, has been accused of egregious crimes arising from her association with the United States Snowman Pentathlon Team. (R. at 8.) She joined the team in September of 2010, and under the coaching of Peter Billings, Zelasko and her teammates, Casey Short and Jessica Lane, practiced dogsledding, ice dancing, aerial skiing, rifle shooting, and curling for the World Winter Games. (R. at 1-2.) Zelasko became acquainted with Hunter Riley—a member of the men's U.S. Snowman Pentathlon Team and a secret Drug Enforcement Agency ("DEA") informant—when both the men's and women's teams were training at Remsen National Park. (R. at 2-3.)

On behalf of the DEA, Riley repeatedly asked around the women's team for an anabolic steroid named "ThunderSnow." (R. at 2-3.) ThunderSnow was developed through the modification of another steroid, technically named Bolasterone, but colloquially named "White Lightning." (R. at 28.) Specifically, Riley attempted and failed to purchase ThunderSnow from Lane on three separate occasions. (R. at 2.)

Billings, who was Lane's boyfriend as well as her coach, also suspected that Lane was distributing performance-enhancing steroids to members of the women's team. (R. at 1, 3.) He confronted Lane with this suspicion in December of 2011. (R. at 3.) Lane explicitly denied any such involvement. (R. at 3.) About a month later, she sent a cryptic email to Billings. (R. at 3.) In the email, Lane did not admit to any criminal activity but spoke vaguely about running a "business" with a "partner" on the women's team. (R. at 3.)

In February of 2012, several tragedies occurred for the members of the United States Snowman Pentathlon team. Riley was shot and killed when Zelasko was practicing on a closed

rifle range that was adjacent to a portion of the dogsled course on which the male members were competing. (R. at 8.) The DEA discovered $50,000 worth of ThunderSnow in the female equipment room of the U.S. Snowman Training Facility, to which all female team members and staff had access. (R. at 8.) In Lane's apartment, the DEA found twenty doses of ThunderSnow and approximately $10,000 in cash; two doses and about $5,000 cash were allegedly found in Zelasko's residence as well. (R. at 8.) As a result, Zelasko and Lane were indicted for murder, conspiracy to commit murder, conspiracy to distribute and possess with intent to distribute steroids, possession of steroids, and distribution of and possession with intent to distribute steroids. (R. at 8.)

The Government plans on using Lane's vague email from January, 2012 to attempt to prove both Lane and Zelasko's guilt. (R. at 18.) The full text of the email reads:

> 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, 16.) Zelasko will not have the opportunity to cross-examine Lane on the email during their joint trial, because Lane plans on exercising her Fifth Amendment right. (R. at 18.)

To defend herself, Zelasko plans on utilizing the testimony of Miranda Morris. (R. at 10.) Morris came clean about her athletic career after Zelasko was arrested, admitting that she had purchased White Lightning from Short less than a year earlier, in April of 2011, when the two women had competed together for the Canadian Snowman team. (R. at 10, 25.) Judge Crawford

observed in pre-trial motions that Morris' testimony stands alone in implicating Short, because no steroids or cash had been found in her residence. (R. at 8, 21.)

**Procedural History**

On April 10, 2012, Zelasko was indicted and charged with conspiracy to distribute and possess with intent to distribute anabolic steroids contrary to 21 U.S.C. §§ 841(a)(1), (b)(1)(E) and 846; distribution of and possession with intent to distribute anabolic steroids contrary to 21 U.S.C. §§ 841(a)(1) and (b)(1)(E); simple possession of anabolic steroids contrary to 21 U.S.C. § 844; conspiracy to murder in the first degree contrary to 18 U.S.C. §§ 371 and 1111(a); and murder in the first degree contrary to 18 U.S.C. § 1111(a). (R. at 1-5.) Before trial, Zelasko moved to introduce Morris' testimony as a part of her defense to suggest that Short, rather than Zelasko, was Lane's co-conspirator. (R. at 10-11.) The Government moved to admit Lane's vague email under Rule 804(b)(3) as a statement against penal interest. (R. at 15-16.)

On July 16, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on the motions. (R. at 6.) On July 18, 2012 the District Court ruled in favor of Zelasko, thereby admitting Morris' testimony and excluding Lane's email. (R. at 20-23.) The Government filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit pursuant to 18 U.S.C. §§ 3731 and 3731-(a). (R. at 30.) On February 14, 2013, the circuit court affirmed the decision of the district court on all issues, holding that: (1) Rule 404(b) does not apply when the defendant is offering evidence of the propensity of a third party in order to exculpate herself; (2) admitting Morris' testimony falls within Defendant Zelasko's constitutional right to offer a complete defense; (3*) Williamson,* though sometimes difficult to apply, remains binding precedent that bars the admission of statements collateral to declarations against penal interest; and (4) the *Bruton* doctrine applies to testimonial and non-

testimonial evidence. (R. at 31, 34, 38.) The Government filed a petition for a writ of certiorari, and on October 1, 2013 this Court granted certiorari. (R. at 55.)

## SUMMARY OF THE ARGUMENT

This case is about prejudice: the prejudice a defendant suffers when she is not able to use reverse 404(b) evidence to present a complete defense, the prejudice a defendant suffers when unreliable hearsay evidence is admitted against her, and the prejudice a defendant suffers when she cannot cross-examine the witnesses testifying against her. The circuit court properly protected Zelasko from that prejudice by affirming the district court's decision to admit Morris' testimony and exclude Lane's email.

The circuit court properly affirmed the district court's decision to admit Morris' testimony. The circuit court correctly reasoned that reverse 404(b) evidence—evidence offered by a defendant of a third party's prior bad acts to exculpate herself—should not be subjected to the *Huddleston* standard, which requires that evidence be offered for a proper purpose under Rule 404(b)(2). The court's reasoning was appropriate because reverse 404(b) evidence does not create the same risk of prejudice that regular Rule 404(b) evidence poses. Moreover, given that the Federal Rules of Evidence were intended to liberalize the admission of evidence, coupled with the fact that it is only logical that reverse 404(b) evidence have a lower threshold for admission than Rule 404(b) evidence, the circuit court properly affirmed the admission of Morris' testimony. Even if this Court holds that *Huddleston* standard applies to reverse 404(b) evidence, Morris' testimony was properly admitted because her testimony satisfies the standard—it is being offered for a proper purpose—to prove the identity of Lane's co-conspirator. Furthermore, this Court must admit Morris' testimony, because Zelasko has a constitutional right under the Sixth and Fourteenth Amendments to present a complete defense.

The courts below also properly dealt with Lane's cryptic email by excluding it as inadmissible hearsay evidence, because the email does not meet the requirements of hearsay exception 804(b)(3). In *Williamson v. United States*, this Court held that non-inculpatory statements within a generally inculpatory narrative do not satisfy Rule 804(b)(3), and that each declaration or remark within a narrative must be individually against the declarant's interest to be admitted. 512 U.S. 594, 599 (1994). Following the *Williamson* standard, the lower courts individually assessed the statements within the email and correctly held that the vague statements did not meet Rule 804(b)(3), because when considered independently, the statements did not contain any admission of wrongdoing or subject Lane to criminal liability. (R. at 22.) *Williamson* should continue to be the standard for defining the contours of Rule 804(b)(3), because its test reflects the underlying principle behind the hearsay exception, and because the honoring of *stare decisis* promotes judicial predictability and efficiency.

Lane's email cannot be used against co-defendant Lane in the joint trial either, because such a use would violate Zelasko's Confrontation Clause rights under the original *Bruton* doctrine, which should remain fully intact in a post-*Crawford* world. In *Bruton*, the Supreme Court—concerned with Constitutional harmfulness—held that the use of a non-testifying co-defendant's statement at a joint trial that implicates the defendant violates the defendant's Confrontation Clause rights under the Sixth Amendment. 391 U.S. 123 (1968). Years later, the Supreme Court—concerned with constitutional reliability—held that the Confrontation Clause is violated when testimonial hearsay is used against a defendant and the defendant cannot cross-examine the declarant, unless the declarant is unavailable and the defendant had prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36 (2004). Some courts have interpreted *Crawford* to accordingly inject a testimonial requirement into the *Bruton* doctrine.

*See e.g., United States v. Dale*, 614 F.3d 942 (8th Cir. 2010). This court should correct that misappropriation of *Bruton* and *Crawford*, however, because *Crawford*'s constitutional reliability holding should not eliminate *Bruton*'s constitutional harmfulness rule. Zelasko is just as harmed by a statement that Lane made to Billings, as she would be by a statement made to the police.

## ARGUMENT

### I. THE CIRCUIT COURT PROPERLY HELD THAT THE *HUDDLESTON* STANDARD FOR RULE 404(B) DOES NOT BAR ZELASKO FROM INTRODUCING EVIDENCE OF SHORT'S PROPENSITY TO COMMIT OFFENSES WITH WHICH ZELASKO HAS BEEN CHARGED, AND EVEN IF THE *HUDDLESTON* STANDARD DOES APPLY, MORRIS' TESTIMONY SHOULD NEVERTHELESS BE ADMITTED, BECAUSE IT SATISFIES THE *HUDDLESTON* STANDARD, AND BECAUSE ZELASKO INDEPENDENTLY HAS A CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

The circuit court properly held that the *Huddleston* standard for Rule 404(b) does not apply to reverse 404(b) evidence, and thereby protected Zelasko from the prejudice that occurs when a defendant is forbidden from presenting a complete defense. Rule 404(b) was intended to protect defendants from unfair prejudice. To further protect defendants, this Court adopted the stringent *Huddleston* standard for Rule 404(b). Yet, the Government contends that *Huddleston* applies to reverse 404(b) evidence as well. This position would further prejudice defendants by excluding highly probative evidence that demonstrates their innocence. Holding reverse 404(b) evidence to the same stringent standard as Rule 404(b) evidence is contradictory to the purpose of Rule 404(b), the purpose of the Federal Rules of Evidence in general, and established criminal evidentiary burdens. If this Court nevertheless holds that the *Huddleston* standard applies to reverse 404(b) evidence, Morris' testimony should still be admitted anyway, because it satisfies

the stringent standard. Most importantly, Morris' testimony must be admitted, because Zelasko has a constitutional right to present a complete defense.

Rule 404(b) prohibits the use of "evidence of a crime, wrong, or other act… 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). However this evidence may be admitted for a proper purpose, such as: "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident…" Fed. R. Evid. 404(b)(2). In *Huddleston v. United* States, this Court held that evidence is properly admitted under Rule 404(b) where: (1) the evidence is offered for a proper purpose under Rule 404(b); (2) the evidence is relevant under Rule 402, with conditional facts determined by the jury per Rule 104(b); (3) the probative value is not substantially outweighed by unfair prejudice under Rule 403; and (4) upon request, the trial court instructs the jury that the similar acts evidence is to be considered only for the proper purpose for which is was admitted under Rule 105. 485 U.S. 681, 691-92 (1988). Rule 404(b) applies in both criminal and civil cases. *Id*. at 685. In general, however, Rule 404(b) is invoked by prosecutors seeking to introduce evidence of the defendant's other crimes, wrongs, or acts. Fed. R. Evid. 404 advisory committee's note.

To raise a reasonable doubt, a criminal defendant may wish to introduce evidence of a third party's other bad acts to show that the third party has a propensity to commit crimes similar to the one the defendant has been charged. Using prior acts in this manner is known as "reverse 404(b) evidence." Circuit courts are split on whether the stringent *Huddleston* standard applies to reverse 404(b) evidence.

The majority of circuits impliedly hold that the *Huddleston* standard does not apply to reverse 404(b) evidence, because these courts subject reverse 404(b) evidence to a weaker

standard than what *Huddleston* requires.[1] *United States v. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005) ("the admissibility of reverse 404(b) evidence depends on a 'straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues'" (citations omitted)); *United States v. Stevens*, 935 F.2d 1380, 1404-05 (3d Cir. 1991) (reverse 404(b) evidence may be admitted as long as it tends to negate the defendant's guilt and satisfies Rule 403 balancing test); *United States v. Aboumoussalem*, 726 F.2d 906, 911-12 (2d Cir. 1984) (when a defendant offers propensity evidence of a third party, "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"); *United States v. McClure*, 546 F.2d 670, 672-73 (5th Cir. 1977) (when the defendant offers propensity evidence of a third party, such evidence is admissible, although the judge can exclude pursuant to Rule 403). These courts analyze third party propensity evidence not under *Huddleston*, but rather subject it to relevancy under Rule 402 and balancing under Rule 403. *See id.*

A few misguided circuits have disregarded the rationale of Rule 404(b) and held that *Huddleston* applies to all parties, regardless of whether the evidence is being offered to support the defendant's case. *United States v. Lucas*, 357 F.3d 599, 605-06 (6th Cir. 2004) (the standard Rule 404(b) test should also apply when defendants offer propensity evidence of a third party); *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999) (same); *United States v. McCourt*, 925 F.2d 1229, 1236 (9th Cir. 1991) (same).

[1] Some courts purport to apply the *Huddleston* standard when defendants offer evidence of a third party's propensity to commit a crime, but then only analyze relevancy and Rule 403 balancing. *See e.g., United States v. Reed,* 259 F.3d 631, 634 (7th Cir. 2001). Because these courts neglect to consider a proper purpose for the propensity evidence under Rule 404(b)(2), which the standard requires, these courts are not actually applying the *Huddleston* standard for Rule 404(b).

### A. ***Huddleston* does not apply to defendants seeking to introduce evidence of a third party's propensity to commit an offense with which the defendant has been charged—reverse 404(b) evidence—because there is no risk of prejudice, the standard for admissibility of reverse 404(b) evidence should logically be lower than Rule 404(b) evidence, and because the Federal Rules of Evidence were intended to promote admission.**

The circuit court adopted the reasoning of the majority of circuits and rightly held that *Huddleston* does not apply to reverse 404(b) evidence. Their decision was proper, because there is no risk of prejudice to defendants or third parties, the Federal Rules of Evidence should be liberally construed to favor admission, and reverse 404(b) should logically have a lower threshold for admission than Rule 404(b) evidence because defendants must only raise a reasonable doubt.

The purpose of Rule 404(b) is to protect defendants from unfair prejudice; the Rule specifically diminishes the risk that: (1) the jury will 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) 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). However, concerns about prejudice against the defendant are absent in reverse 404(b) situations. *Aboumoussallem*, 726 F.2d at 912. "[T]he primary evil that may result from admitting such evidence against a defendant – by tainting his character – is not present," because the jury is not evaluating the third party's guilt; rather; they are evaluating the defendant's guilt. *United States v. Murray*, 474 F.3d 938, 939 (7th Cir. 2007) (citations omitted). Because the third party is not on trial, the jury cannot convict him for being a "bad man." *Wynne v. Renico*, 606 F.3d 867, 874 (6th Cir. 2010) (Martin, J. concurring) (citations omitted). Even if the trial ends in acquittal, and the Government subsequently puts the third party on trial, *Huddleston* will then protect that third party from any Rule 404(b) evidence offered against them. *Id*. Thus, "the standard of

admissibility when a criminal defendant offers [reverse 404(b)] evidence as a shield need not be as restrictive as when the prosecution uses such evidence as a sword." *Aboumoussallem*, 726 F.2d at 911-12.

This Court should interpret Rule 404(b) consistently with the purpose of the Rule rather than adhere to the plain meaning of the Rule, because the plain meaning leads to a result that severely prejudices defendants. The Government focuses on the fact that Rule 404(b) was written broadly to exclude any "evidence of a crime, wrong, or other act… 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) (emphasis added). The Government contends that the drafters were fully capable of drafting Rule 404(b) to read "[*a defendant's*] character," rather than "a *person's* character" if that was their intention. Zelasko does not dispute this contention. However, Zelasko does dispute the contention that this Court should interpret Rule 404(b) using the "plain meaning rule." Where the plain meaning is "'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose rather than the literal words." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (citations omitted). The plain meaning rule leads to absurd legal conclusions, contrary to the policy behind the intention of the rule.

The purpose of Rule 404(b) is to protect defendants from prejudice, as evidenced by the advisory committee notes, which exclusively cite concerns about prejudice against defendants, *not* third parties. Fed. R. Evid. 404 advisory committee's note; (R. at 13.) When the Rule prevents the prosecution from introducing evidence of a defendant's prior bad acts, the purpose of the Rule is advanced. The purpose is hardly advanced, however, if it is the defendant who will be deprived of bringing forth highly exculpatory evidence that supports her defense theory. In fact, preventing a defendant from bringing forward reverse 404(b) directly frustrates the purpose

of the Rule, because it is the defendant who is prejudiced if reverse 404(b) evidence is deemed inadmissible under Rule 404(b).

Defendants will be further prejudiced if this Court holds reverse 404(b) evidence to the same standard as Rule 404(b) evidence, because such a reading places a burden on the defendant to admit exculpatory evidence. In any criminal trial, the prosecution must prove that the defendant is guilty beyond a reasonable doubt—the highest evidentiary burden. *In re Winship*, 397 U.S. 358, 361 (1970). The criminal defendant, however, has no burden of proof—she must only raise a reasonable doubt. *Martin v. Ohio*, 480 U.S. 228, 234 (1987). Rule 404(b) is intended to protect defendants—not prevent them from raising a reasonable doubt. Therefore, it is nonsensical to hold reverse 404(b) evidence to the same stringent standard, because it adds an unnecessary obstacle for defendants seeking to admit this exculpatory evidence.

Subjecting reverse 404(b) evidence to the same standard as Rule 404(b) evidence is entirely contradictory to the purpose of the Federal Rules of Evidence. The Federal Rules of Evidence are meant to favor admission and should be liberally construed. *See e.g., Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 588 (1993) (acknowledging the "liberal thrust of the Federal Rules"). The text of Rule 401 highlights this principle, considering that evidence is admissible if "it has *any* tendency to make a fact more or less probable than it would be without the evidence" Fed. R. Evid. 401(a) (emphasis added). Considering the high probative value of reverse 404(b) evidence, this Court should favor its admission to be consistent with the liberal slant of the Rules, rather than unduly prejudice defendants by holding reverse 404(b) evidence to the same stringent standard as Rule 404(b).

As a result, this Court should affirm the circuit court and admit Morris' testimony. Prejudice is not a legitimate concern: Zelasko will not be unfairly convicted because the jury

thinks that she is a bad person, and the same is true for Short, because she is not on trial. The purpose of the Rule is to minimize prejudice against the defendant, and a plain reading of the Rule leads to a contrary result, because it would be the defendant who is prejudiced if she is forbidden from admitting reverse 404(b) evidence. The liberal slant of the Rules, coupled with the low burden on the defense, demands that reverse 404(b) evidence be subjected to a lower standard than Rule 404(b) evidence. Therefore, the circuit court properly admitted Morris' testimony.

### B. Even if this Court finds that *Huddleston* applies to third party propensity evidence, Morris' testimony is still admissible, because it meets the stringent *Huddleston* standard, and Zelasko independently has the constitutional right to present a complete defense.

Should this Court does hold that the stringent *Huddleston* standard applies to reverse 404(b) evidence, Morris' testimony is admissible, because it satisfies the standard. It is being offered for a proper purpose—to prove the identity of Lane's co-conspirator. Furthermore, Morris' testimony is independently admissible because Zelasko has a constitutional right to present a complete defense under *Chambers,* and because Zelasko has no other avenue to implicate Short.

Morris' testimony satisfies the four requirements of the *Huddleston* standard. First, it is offered for one of the proper purposes listed in Rule 404(b), because it is being offered to prove identity—not just a matter at issue, but *the* matter at issue in this case. Evidence is properly admitted under Rule 404(b)(2) to prove identity where:

> based solely on the evidence comparing the past acts and the charged offense, a reasonable juror could conclude that the same person committed both crimes. Two factors are relevant in analyzing the question. The first is the distinctiveness of the facts that make the crimes unique and the second is the proximity of the crimes in space and time.

*United States v. Carroll*, 207 F.3d 465, 469 (8th Cir. 2000). Morris' testimony asserts that the both crimes are unique, and they are close in time.[3] Short sold a steroid known as White Lightning to her teammates on the Canadian Snowman team. (R. at 24-5.) Less than a year later, ThunderSnow, chemically derived from White Lightning, was found in the hands of women on the U.S. Snowman team. (R. at 14, 28.) The Canadian incident is so similar in method to the crime for which Zelasko has been charged, that together both incidents bear her signature. Morris' testimony demonstrates that Short has a propensity to sell anabolic steroids to members of Snowman teams, and it is substantially probative to suggest the identity of Lane's co-conspirator. Therefore, Morris' testimony makes it reasonable for any juror to infer that Short committed both crimes, and thus she must be permitted to testify.

Second, Morris' testimony meets *Huddleston,* because it is relevant. Reverse 404(b) evidence is relevant where the third party's propensity to commit misconduct is material "to prove some fact pertinent to the defense." *Aboumoussallem*, 726 F.2d at 91. In the context of Zelasko's defense theory, the proffered reverse 404(b) evidence is relevant to support the inference that Short, not Zelasko, was the co-conspirator. The similarity between the crime in Canada and the crime in the United States further illustrates the relevance of Morris' testimony. ThunderSnow was developed through a chemical modification of White Lightning, the anabolic steroid Short was selling to members of the women's Canadian Snowman team, less than one year prior. (R. at 14, 28.) This is certainly relevant because it raises a strong inference that Short, not Zelasko, was Lane's co-conspirator. Whether Zelasko was Lane's co-conspirator is a fact of consequence, and Morris' testimony makes the fact less probable than it would be otherwise. Therefore, Morris' testimony is relevant.

[3] Although the crimes are not close in space, this inquiry should not prevent the evidence from being admitted, considering Short moved from Canada to the United States. A juror can reasonably infer that upon moving to the United States, Short continued to sell a steroid similar to the steroid she sold in Canada.

Third, Morris' testimony survives *Huddleston,* because its probative value exceeds its prejudicial effect. Evidence should be admitted as long as its prejudicial effect does not substantially outweigh its probative value. Fed. R. Evid. 403. The probative value of Morris' testimony is tremendous—it strongly supports Zelasko's innocence. Meanwhile, as previously discussed, the prejudice is minimal, if any. Therefore, Morris' testimony survives Rule 403 balancing.

Finally, Morris' testimony survives *Huddleston*, because upon the Government's request, the jury can be instructed the similar acts evidence is to be considered only for the proper purpose for which it was admitted—identity.

Furthermore, Morris' testimony is independently admissible because Zelasko has a constitutional right to present a complete defense. The Sixth and Fourteenth Amendments of the United States Constitution guarantee defendants the right to defend against the government's allegations. *See* U.S. Const. amend VI; U.S. Const. amend. XIV. This is a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). In *Chambers*, the defendant was convicted of murdering a policeman after the trial court refused to allow the defendant to cross-examine a key witness and excluded exculpatory evidence by strictly applying Mississippi's hearsay rule. *Id.* at 285, 289-90. This Court held that despite the state's hearsay rule, the evidence was admissible because the defendant's right to present a complete defense must prevail. *Id.* at 302.

Since *Chambers*, this Court has steadfastly recognized the importance of a criminal defendant's right to present a complete defense, even where evidence may be at odds with procedural rules. While this Court has acknowledged that the right to present a defense is not absolute, "Restrictions on a criminal defendant's right[]… to present evidence may not be

arbitrary or disproportionate to the purposes they are designed to serve." *Michigan v. Lucas*, 500 U.S. 145, 151 (1991). Nevertheless, evidentiary rules of exclusion must yield to "legitimate interests in the criminal trial process." *Id.* at 149. Thus, the circuit court properly determined that the "analysis requires weighing the government's stated interest in restricting given evidence against the [d]efendant's strong interest in presenting a complete defense." (R. at 37.)

The Government's stated interest in restricting Morris' testimony is lacking. They cite "judicial expediency" and "reducing prejudice," yet neither is truly an issue. (R. at 37.) As the circuit court recognized, "this evidence will not bog down the courts," nor will it prejudice any party. (R. at 38.) Admittedly, the testimony is prejudicial against Short, but she is not a party to this suit. Nor does the evidence prejudice the defendant—quite the contrary, Zelasko will be prejudiced if she is forbidden from presenting her complete defense. Thus, in weighing the Government's interest against Zelasko's right to present a complete defense, the scale is undeniably tipped in Zelasko's favor.

Morris' testimony is a part of Zelasko's complete defense, that Short was Lane's co-conspirator, not Zelasko. Despite this, the Government contends that Morris' testimony is too attenuated to be exculpatory. (R. at 15.) This argument is preposterous for two reasons. First, Morris' testimony concerning Short's prior drug crimes invites the strong inference that Short, not Zelasko, was Lane's co-conspirator. Second, the Government's argument violates Rule 104, because it goes to the weight of Morris' testimony, not the admissibility; the former is decided by the jury, while the latter is determined by the judge. *See* Fed. R. Evid. 104. Given that Morris' testimony is relevant and survives Rule 403 balancing, the evidence is admissible and a jury can later decide whether the evidence raises a reasonable doubt as to Zelasko's guilt.

Zelasko would be deprived of her constitutional right to present a complete defense if Morris' testimony is excluded. This is because Morris' testimony is the only avenue in which Zelasko can introduce evidence to raise a reasonable doubt; no cash or drugs were found in Short's residence. (R. at 8.) Without Morris' testimony, Zelasko is left with no mechanism to disprove the Government's allegations against her.

Most importantly, if similarly situated defendants are prevented from using reverse 404(b) evidence to present a complete defense, this Court will set precedent that will surely incarcerate the innocent. Our criminal justice system was founded on the principle that it is better to let the guilty go free than incarcerate the innocent. *See Coffin v. United States*, 156 U.S. 432, 456 (1895). Consider the case of Roger Gillispie, who was wrongfully convicted of raping three women. Zachary El-Sawaf, Incomplete Justice: Plugging the Hole Left by the Reverse 404(b) Problem, 80 U. Cin. L. Rev. 1049, 1049 (2012). The victims picked Gillispie out of a lineup, despite the fact that he did not remotely resemble the description the victims gave to police originally. *Id.* Gillispie maintained his innocence throughout his trial and ultimately his incarceration. *Id.* at 1049-50. He sought post-conviction relief based on evidence that suggested that another man, who resembled the victims' original description of the perpetrator, was the actual rapist. *Id.* at 1050. This man was convicted of other sexual assaults, and the descriptions of the assaults were undeniably similar to the sexual assaults for which Gillispie was serving time. *Id.* Unfortunately, no DNA evidence was available that would concretely prove Gillispie's innocence, so his entire defense relied on implicating this third party. *Id.* The trial court, however, refused to admit the evidence of the third party's prior bad acts, despite its exculpatory nature. *Id.* As a result, Gillispie spent more than twenty years in prison for a crime that he did not commit. *Id.* at 1049. Gillispie's story is not unique; defendants, especially those who have been

accused due to poor eyewitness identifications, often rely on reverse 404(b) evidence to raise a reasonable doubt. Without that powerful reverse 404(b) evidence, other defendants will end up wrongfully incarcerated, like Gillispie.

Should this Court apply the *Huddleston* standard to reverse 404(b) evidence, Zelasko still prevails because Morris' testimony meets the standard. Moreover, Morris' testimony is independently admissible, because Zelasko has a constitutional right to present a complete defense. The Federal Rules of Evidence should not be mechanistically applied to no end—a defendant's right to a defense must prevail. Therefore, this Court should affirm the decision of the circuit court and admit Morris' testimony.

## II. THE CIRCUIT COURT PROPERLY AFFIRMED THE DISTRICT COURT'S DECISION THAT LANE'S EMAIL IS INADMISSIBLE HEARSAY EVIDENCE, BECAUSE THE DISTRICT COURT APPLIED THE FAITHFUL *WILLIAMSON* STANDARD AND FOUND THAT THE INDIVIDUAL DECLARATIONS IN THE EMAIL DID NOT SATISFY THE 804(B)(3) EXCEPTION.

The courts below properly protected Zelasko from the prejudice a defendant suffers when unreliable hearsay evidence is admitted against her by keeping Lane's email away from the eyes of the jury. The Government attempts to use Lane's out-of-court message to inculpate Zelasko, on the theory that the general thrust of the email sufficiently inculpates Lane to meet hearsay exception 804(b)(3). (R. at 22.) The language of the hearsay exception for statements against interest is exacting, however, and it requires that the statement be such that, "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).

This Court further toughened this standard in *Williamson v. United States* when it interpreted Rule 804(b)(3) narrowly and expressly rejected the type of "general thrust" argument

that the Government is presently making. 512 U.S. 594 (1994). *Williamson* limited "statements" against penal interest to "single declarations or remarks" that are "individually self-inculpatory." *Id.* at 599. As a result, the lower courts correctly applied *Williamson*'s test for Rule 804(b)(3) when they broke down the email into five individual declarations and analyzed whether they were sufficiently against Lane's penal interest in light of the surrounding circumstances. The district court did not abuse its discretion when it held that none of the five declarations satisfied Rule 804(b)(3), because the declarations—even in context—were too unclear to be sufficiently against Lane's interest.

Finally, this Court should revitalize *Williamson* as the controlling standard for Rule 804(b)(3), because the *Williamson* test is most faithful to the underlying principle behind the hearsay exception for statements against penal interest, that "reasonable people…tend not to make self-inculpatory statements unless they believe them to be true." *Williamson*, 512 U.S. 599. Additionally, *Williamson* should remain the test for Rule 804(b)(3), because *stare decisis* promotes judicial predictability and efficiency.

### A. The lower courts correctly applied the *Williamson* standard by determining that each remark within Lane's email—standing alone, but in context—was not sufficiently against Lane's penal interest to meet Rule 804(b)(3).

The courts below followed the Supreme Court's directive in *Williamson* for applying hearsay exception 804(b)(3) by dividing up Lane's email into individual declarations or remarks and analyzing them in context. Hearsay exception 804(b)(3) requires that the declarant be unavailable,[4] and that the statement in question have "so great a tendency" to expose the declarant to criminal liability, that "a reasonable person in the declarant's position" would not

[4] Both parties agree that the declarant in this case, Lane, is unavailable as required by Fed. R. Evid. 804(a)(1), as she will be asserting her Fifth Amendment privilege. *See United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978).

have made the statement unless she believed it to be true.[5] Fed. R. Evid. 804(a); Fed. R. 804(b)(3)(A). In *Williamson*, this Court defined the Rule 804(b)(3) "statement" as a "single declaration or remark" that is "individually self-inculpatory." *Williamson*, 512 U.S. at 599. The *Williamson* rule accordingly requires courts to divide up any generally self-inculpatory narratives into individual declarations or remarks. *Id.* at 604. Once the broad narratives are properly parsed, the *Williamson* rule requires that the individual declarations be analyzed in context. *Id.* at 603. As a result, the lower courts properly applied the *Williamson* rule by so parsing Lane's email and viewing the individual declarations in the context of the case. The court did not abuse its discretion by holding that none of the statements were sufficiently against Lane's interest to meet Rule 804(b)(3), because even in context, the statements were too ambiguous to sufficiently subject Lane to criminal liability.

The lower courts correctly applied *Williamson* by parsing Lane's email into individual declarations or remarks. In *Williamson*, this Court was asked to decide whether a broad narrative that included both self-inculpatory and non-self-inculpatory parts, which consist of self-serving statements and neutral or "collateral" statements, could satisfy Rule 804(b)(3) and therefore be admitted. *Id.* at 599. The *Williamson* court was faced with a broad confession that came from the lips of Harris, a man who had been caught red-handed with 19 kilograms of cocaine. *Id.* at 596. After originally lying to the DEA, Harris eventually gave them the "real story," which included statements that implicated himself as well as statements that shifted blame to the "big fish," Williamson. *Id.* at 597, 609 (Ginsburg, J., concurring).

[5] Zelasko acknowledges that Fed. R. Evid. 804(b)(3) was revised in 2010 and now additionally requires that the statements be "supported by corroborating circumstances that clearly indicate its trustworthiness" for statements used to inculpate the defendant. Fed. R. Evid. 804(b)(3)(B). However, Zelasko omits discussion on the corroboration requirement, as neither of the lower courts addressed this second subsection of Rule 804(b)(3).

To decide whether it was proper to admit Harris' whole narrative, the Court first had to decide whether a "statement" for purposes of Rule 804(b)(3) meant an "extended declaration" or "a single declaration or remark." *Id.* at 599. The Court acknowledged that if the former definition were adopted, "Harris' entire confession—even if it contains both self-inculpatory and non-self-inculpatory parts—would be admissible so long as in the aggregate the confession sufficiently inculpates him." *Id.* Justice O'Connor, writing for the majority, expressly rejected the broader definition:

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement."

*Id.* at 599-600. The majority then explicitly directed the district courts not to "just assume for purposes of 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession," and warned that courts should be especially weary, "when the statement implicates someone else." *Id.* at 601. Finally, the Court laid out the ultimate test for Rule 804(b)(3): "The question under 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true' and this question can only be answered in light of all the surrounding circumstances." *Id.* at 603-4.

Many circuits have thus interpreted *Williamson* as requiring the parsing of generally self-inculpatory narratives as well as the analysis of those individual declarations in context;[6] according to the Sixth Circuit, post-*Williamson*, "when ruling upon a narrative's admissibility under this rule, a court must break it down and determine the separate admissibility of each

[6] *See United States v. Moses*, 148 F.3d 277 (3d Cir. 1998) (acknowledging context requirement for *Williamson* application); *United States v. Jinadu*, 98 F.3d 239, 246 (6th Cir. 1996); *see also United States v. Barone*, 114 F.3d 1284, 1295 (1st Cir. 1997) (applying totality of the circumstances test for Rule 804(b)(3) decisions).

'single declaration or remark.'" *United States v. Canan*, 48 F.3d 954, 959 (6th Cir. 1995) (citations omitted).[7] The Seventh Circuit similarly verbalizes what *Williamson* requires: "after *Williamson*, each portion of the proffered out-of-court statement must be examined to determine whether it tended to subject the declarant to criminal liability." *United States v. Nagib*, 56 F.3d 798, 804 (7th Cir. 1995).[8] The First, Second, and Eighth Circuits have similar parsing requirements after *Williamson*. *See United States v. Sposito*, 106 F.3d 1042, 1048 (1st Cir. 1997) (*Williamson* test requiring "sentence-by-sentence analysis of the testimony"); *United States v. Jackson,* 335 F.3d 170, 179 (2d Cir. 2003) ("In *Williamson's* wake, we have repeatedly emphasized that each particular hearsay statement offered under Rule 804(b)(3) must be separately parsed and must, itself, be self-inculpatory"); *United States v. Mendoza*, 85 F.3d 1347, 1352 (8th Cir. 1996) (same).[9]

Whether the statement in question was made during a custodial interrogation is just one circumstance to consider in making Rule 804(b)(3) assessments:

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, *made while in custody*, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest.

*Williamson,* 512 U.S. at 601 (emphasis added) (citing Fed. R. Evid. 804 advisory committee's note); *Moses,* 148 F.3d at 280 (custodial setting—or lack thereof—is a circumstance surrounding the statement to be analyzed); *Barone,* 114 F.3d at 1286 (same); *see also United States v. Costa*, 31 F.3d 1073, 1078 (11th Cir. 1994) (criticizing another court's Rule 804(b)(3) analysis, because

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[7] *Accord Beckett v. Ford*, 384 Fed. App'x 435 (6th Cir. 2010); *United States v. Johnson*, 440 F.3d 832 (6th Cir. 2006); *Vincent v. Seabold*, 226 F.3d 681 (6th Cir. 2000).

[8] *Accord United States v. Westmoreland*, 240 F.3d 618, 626 (7th Cir. 2001); *Carson v. Peters*, 42 F.3d 384 (7th Cir. 1994).

[9] *Contra United States v. Paguio*, 114 F.3d 928, 934 (9th Cir. 1997) (Government's argument that *Williamson* "required the district judge to parse the statement and exclude the non-inculpatory parts" was an "incorrect" reading of the Rule).

the court did not "adequately take into account the circumstance that the confession was made while in custody"). Hence, *Williamson* and the circuits analyze police custody merely as a factor to be considered in making Rule 804(b)(3) determinations. Despite this, the Government presently argues that *Williamson*—or at least the full force of *Williamson*—only applies to statements made during custodial interrogations. (R. at 22.) This is an argument that only one circuit supports.[10]

The lower courts followed *Williamson* and its progeny by first dividing up Lane's email and analyzing each declaration individually. The district court did not just assume that any of the statements in the email were self-inculpatory, merely because they were part of a larger confession. Instead, the district court stated the *Williamson* rule and then applied it: "none of the statements contained in the email inculpates Co-defendant Lane because, *when considered independently*, they do not admit any wrongdoing or expose Lane to criminal liability." (R. at 22) (emphasis added). In assessing this decision made by the district court, the circuit court similarly followed *Williamson* by rejecting the Government's "cumulative effect" argument for admitting the entire email. Instead, the circuit court parsed the email into five individual declarations:

> 1) "I really need your help;" 2) "I know you've suspected before about the business my partner and I have been running with the female team;" 3) "One of the members of the male team found out and threatened to report us if we don't come clean;" 4) "My partner really thinks we need to figure out how to keep him quiet;" and 5) "I don't know exactly what she has in mind."

(R. at 42.) By parsing the email and rejecting the Government's general thrust argument, the lower courts embraced *Williamson*'s narrow definition of what statement means under Rule 804(b)(3).

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[10] *See United States v. Ebron*, 683 F.3d 105, 133-34 (5th Cir. 2012) ("statement made outside a custodial context does not provide the same set of incentives that create the risk of an unreliable statement" and therefore Williamson does not apply).

Next, the lower courts properly applied *Williamson* by viewing the individual declarations from Lane's email in context and treating the lack of custodial interrogation as merely a circumstance to be considered. The district court was well aware of the surrounding circumstances in pre-trial. Not only did the district court have access to the indictment, but Judge Crawford specifically asked counsel for the "background of the case." (R. at 7.) After hearing the Government's arguments concerning the context of Lane's email and the insinuation that the reasoning behind *Williamson* only applies to custodial statements, Judge Crawford stated that he understood "the importance of context," but rejected the Government's reading of *Williamson.* (R. at 17.) The circuit court discussed the facts and surrounding circumstances of the case at length, and similarly acknowledged the importance of context when making Rule 804(b)(3) assessments. (R. at 41.) The court even admitted that, "the statements at issue in this case present a close call," but the district court still found that the circumstances did not adequately shed light on Lane's statements to satisfy Rule 804(b)(3). (R. at 41.)

The district court did not abuse its discretion by parsing the email and finding the individual statements insufficiently self-inculpatory. Rule 804(b)(3) assessments are reviewed under the abuse of discretion standard, and as such are only overturned when there is, "a distinct showing that it was based on a clearly erroneous finding of fact, or an erroneous conclusion of law or manifests a clear error in judgment." *United States v. Smalls*, 605 F.3d 765, 773 (10th Cir. 2010). The Government cannot present such a showing here, because the district court correctly applied the *Williamson* rule, and excluded statements that were too ambiguous to meet Rule 804(b)(3). In *United States v. Ashfield,* the Third Circuit held that hearsay must be objectively contrary to the declarant's interest to meet Rule 804(b)(3), and that the district court therefore did not abuse its discretion by excluding a statement that was "so general that it never expressly

assumed responsibility" for the crime. 735 F.2d 101, 110 (3rd Cir. 1984). In *United States v. Leahy*, the Seventh Circuit similarly held that Rule 804(b)(3), "does not provide that any statement which 'possibly could' or 'maybe might' lead to criminal liability is admissible…Rather, the statement itself, taken as is, must basically admit to criminal behavior." 464 F.3d 773, 798 (7th Cir. 2006) (citations omitted). Lane's statements, viewed individually, were too general; they certainly did not admit to any criminal behavior. Lane speaks broadly of a secret business and about her lack of knowledge regarding her partner's actions, none of which are clear admissions of criminal activity. Further, these statements point the finger at another person, which *Williamson* expressly warned courts to be cautious about. Hence, the lower courts correctly applied *Williamson*, and the district court did not abuse its discretion by excluding the email.

### B. ***Williamson* should continue to be the test for Rule 804(b)(3), because it is most faithful to the reasoning behind the penal interest exception, and because following *stare decisis* promotes judicial predictability and efficiency.**

*Williamson* should be revitalized as the standard for applying Rule 804(b)(3), because it best reflects the reasoning behind the hearsay exception concerning statements against penal interest. Out-of-court statements are "subject to particular hazards" of unreliability,[11] and the Federal Rules of Evidence therefore require that such statements be kept away from the factfinder. *See* Fed. R. Evid. 802. The Rules also provide exceptions for statements that are less susceptible to the typical hearsay pitfalls. It was in this vein that the legislature drafted Rule 804(b)(3), noting that the exception was based on the assumption, "that persons do not make statements which are damaging to themselves unless satisfied for a good reason that they are true." Fed. R. Evid. 804 advisory committee's note (citations omitted). Accordingly, Justice O'Connor's test in *Williamson* best honors the legislative intent behind the exception, because its

[11] *Williamson*, 512 U.S. at 598.

narrow approach favors excluding statements that do not have the clear, legislatively-backed signs of reliability. Justice O'Connor's test is also workable. As the circuit court noted, *Williamson* is "a standard that federal courts have applied effectively for more than twenty years." (R. at 43.) Finally, even if *Williamson* may be difficult to apply, that is not a sufficient reason to overturn precedent. The far better course is to reinvigorate *Williamson* and follow *stare decisis*, which promotes judicial stability and efficiency.

Justice O'Connor's test in *Williamson* best honors the principle behind the hearsay exception for statements against penal interest, because it focuses on the logic behind the Rule and errs on the side of excluding potentially reliable evidence rather than admitting potentially unreliable evidence. Before Rule 804(b)(3) was drafted, the common law only admitted hearsay statements that were against the declarant's pecuniary or proprietary interests. The courts were hesitant to allow for the admission of statements against penal interest, because they distrusted the reliability of third party confessions used to exculpate the accused. Fed. R. Evid. 804 advisory committee's note. As the drafters of Rule 804(b)(3) noted: "one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant." *Id.* Justice Holmes wrote a scathing dissent in *Donnelly v. United States*, addressing this common law treatment of statements against penal interest: "The rules of evidence…are based on experience, logic, and common sense… no other statement is so much against interest as a confession of murder." 228 U.S. 243, 277-78 (1913). Even though the drafters eventually adopted Holmes' argument and added statements against penal interest to Rule 804(b)(3), they still required the additional "corroboration" requirement for statements against penal interest being used to exculpate the

defendant. Fed. R. Evid. 804 advisory committee's note. This served to mollify the courts' suspicions. *Id.* The current version of Rule 804(b)(3) still illustrates the drafters' suspicion regarding statements against penal interest, as it requires corroboration for third party statements used to both inculpate and exculpate the accused. Fed. R. Evid. 804(b)(3)(B).

As a result, O'Connor's narrow approach to Rule 804(b)(3) is preferred for two main reasons. First, reading Rule 804(b)(3) narrowly makes it more difficult for parties to enter hearsay statements against penal interest, which honors the general distrust concerning the unreliability of third party confessions offered to inculpate or exculpate the accused. Second, Justice O'Connor appreciates that the exception for statements against penal interest is just that: an *exception* to the general rule that hearsay is too unreliable to submit to the jury. Therefore she requires that a statement coming in under the exception have the proper indicia of reliability. Declarations that are individually self-inculpatory are admissible, because they are flagged as being more reliable—according to the drafters' logic—while collateral or self-serving statements are excluded, because they do not have sufficient signs of reliability.

Justice Kennedy's broad approach in his concurrence from *Williamson*, in contrast, would allow for the admission of declarations that do not have the requisite indicia of reliability. His approach has two basic steps. First, Justice Kennedy requires the court to look at the total narrative or confession to see if it contains any statements against penal interest. *Williamson*, 512 U.S. at 620. Second, if the court finds at least one statement against penal interest, the court must admit all related statements, excepting any statements that are "so self-serving as to render [them] unreliable." *Id.* In this way, Justice Kennedy's approach broadens the scope of Rule 804(b)(3) and allows two types of statements not allowed by the language of the exception: 1) statements that are neutral as to penal interest, and 2) statements that are self-serving, but not

self-serving enough to render them unreliable. He bases this approach heavily on an advisory note that suggests the general theory of statements against interest would allow for the admission of third party confessions that implicate the accused. *Id.* at 614 (citations omitted). But as the majority notes, some of the other commentary rubs against the section Justice Kennedy relies on. *Id.* at 602. Justice Kennedy fails by attempting to inject Rule 804(b)(3) with his own test for reliability, based on contradictory excerpts from the advisory notes; Justice O'Connor succeeds by coming up with a standard that helps the courts honor the test created by the legislature.

Finally, even if the *Williamson* test may be difficult to apply, *stare decisis* still calls for its continuation. This Court has described *stare decisis* as 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. 808, 827 (1991). It is thus said, that, "adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Id.* (citations omitted). However, *stare decisis* is not an "inexorable command," and it is not at its highest strength when addressing rules concerning Constitutional, procedural, or evidentiary rules. *Id.* at 828. Nevertheless, this Court has held that *stare decisis* is a strong enough policy that there needs to be a "special justification" to overrule it. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). *Stare decisis* has been broken for cases that were unworkable or badly reasoned, cases that were divided by narrow margins with spirited dissents, cases that have been questioned by this Court in later opinions, and cases that have defied consistent application by the lower courts. *Payne,* 501 U.S. at 827-28. Though the *Williamson* test is an evidentiary rule that may be difficult to apply, it is not unworkable or badly reasoned. The circuits have largely embraced and worked with the

narrow *Williamson* approach.[12] *Williamson* was not marked by a spirited dissent, nor has it been questioned by members of this Court in subsequent decisions. *Williamson* must be reaffirmed.

## III. FURTHER, THE CIRCUIT COURT PROPERLY AFFIRMED THE DISTRICT COURT'S EXCLUSION OF LANE'S EMAIL FROM THE JOINT TRIAL ALTOGETHER, BECAUSE THE USE OF A NON-TESTIFYING CO-DEFENDANT'S IMPLICATING STATEMENT AT A JOINT TRIAL—EVEN A "NON-TESTIMONIAL" STATEMENT MADE TO A FRIEND—VIOLATES THE *BRUTON* DOCTRINE, WHICH SHOULD REMAIN FULLY INTACT IN A POST-*CRAWFORD* WORLD..

The lower courts justly concluded that Lane's email would violate Zelasko's Confrontation Clause rights under the *Bruton* doctrine and thereby protected Zelasko from the prejudice a defendant suffers when she cannot cross-examine the witnesses testifying against her. The Sixth Amendment Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right to…be confronted with the witnesses against him." U.S. Const. amend. VI. A significant, underlying justification for the Clause is to provide the defendant the opportunity to cross-examine . *Bruton v. United States*, 391 U.S. 123, 126 (1968) (citations omitted). In *Bruton,* this Court overruled its earlier Confrontation Clause case regarding the use of a non-testifying co-defendant's statement at a joint trial. *Id.* In that earlier case, *Delli Paoli v. United States*, this Court held that the use of a non-testifying co-defendant's statement at a joint trial, which implicates the accused, would not violate the Confrontation Clause, so long as the court adequately instructed the jury to disregard the statement when deciding the defendant's guilt. 352 U.S. 232 (1957). The *Bruton* court overruled *Delli Paoli*, declaring that even the best jury instructions could not protect the defendant from the devastating constitutional harm that occurs

[12] *See United States v. Dargan*, 738 F.3d 643, 649 (4th Cir. 2013); *United States v. Bowe*, 426 F. App'x 793, 796 (11th Cir. 2011); *Bihani v. Obama*, 662 F. Supp. 2d 9 (D.D.C. 2009); *United States v. Ricardo*, 472 F.3d 277, 287 (5th Cir. 2006); *United States v. Holland*, 76 F. App'x 452, 456 (3d Cir. 2003); *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996).

when a non-testifying co-defendant's statement, which implicates the accused, is presented to the jury in a joint trial. *Bruton,* 391 U.S. 123.

More than thirty years later in *Crawford v. Washington*, this Court overruled the *Ohio v. Roberts* rule, which was not concerned with constitutional harmfulness, but rather the constitutional reliability of hearsay statements used against the accused. For hearsay evidence to be admitted against a defendant without violating the Confrontation Clause, the old *Roberts* rule required: 1) that the prosecution produce the declarant at trial for cross-examination, or that the state prove the declarant's unavailability, and 2) that the hearsay have "indicia of *reliability*." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (emphasis added). In overturning *Roberts*, the *Crawford* court criticized the earlier test for not sufficiently protecting the defendant from the testimonial statements of witnesses who the defendant could not cross-examine. *Crawford*, 541 U.S. 36. The *Crawford* court analyzed the history of the Confrontation Clause and concluded that where testimonial evidence is at issue, "the Sixth Amendment demands what the common law required—unavailability and prior opportunity to cross-examine." *Id.* at 68. Though this Court did not specifically link the Confrontation Clause solely to testimonial hearsay in *Crawford*, it later did so in *Davis v. Washington* and *Whorton v. Bockting*.[13] Though this Court has never held that *Bruton* is limited to testimonial hearsay, this Court's emphasis on the testimonial/non-testimonial dichotomy in *Crawford* and its progeny has led many circuits to erroneously limit *Bruton*'s proscription to testimonial hearsay statements.[14] This Court should affirm the decision of the circuit court and correct the other circuits' misappropriation of the *Bruton* doctrine,

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[13] *Davis v. Washington*, 547 U.S. 813 (2006); *Whorton v. Bockting*, 549 U.S. 406 (2007).

[14] *See United States v. Berrios*, 676 F.3d 118 (3d Cir. 2012); *United States v. Figueroa-Cartagena*, 612 F.3d 69 (1st Cir. 2010); *United States v. Dale*, 614 F.3d 942 (8th Cir. 2010); *United States v. Smalls*, 605 F.3d 765 (10th Cir. 2010); *United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010); *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009); *contra United States v. Williams*, 1:09CR414 JCC, 2010 WL 3909480 (E.D. Va. 2010).

because *Crawford*'s constitutional reliability test should not eviscerate *Bruton*'s constitutional harmfulness test, and because the *Crawford* court meant to expand—not limit—the protection of the Confrontation Clause.

*Bruton* should apply to non-testimonial statements post-*Crawford*, because the *Bruton* holding concerned constitutional harmfulness, while the *Crawford* holding dealt with constitutional reliability. The *Bruton* court held that the Confrontation Clause was violated when, "the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial," because the admission of such evidence is "*devastating* to the defendant." *Bruton*, 391 U.S. at 135-36 (emphasis added). In *Crawford*, this Court was responding directly to the old *Roberts* reliability test: "Where testimonial statements are at issue, the only indicium of *reliability* sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69. In *Cruz v. New York*, this Court demonstrated the distinction between the Confrontation Clause threats of unreliability and harmfulness. 481 U.S. 186 (1987). The *Cruz* Court was faced with the question of whether a *Bruton* violation exists if the co-defendant's confession being offered at a joint trial is found to be reliable as an interlocking confession—a confession that confirms the defendant's own statements. *Id.* This Court confirmed that a *Bruton* violation did occur in that context—no matter how reliable the co-defendant's statement was. *Id.* In fact, the *Cruz* Court went one step further and noted that it was more devastating, and thus certainly a Confrontation Clause violation, when a co-defendant's confession at a joint trial interlocks with the defendant's statements: "A co-defendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but *enormously damaging* if it confirms, in

all essential respects, the defendant's alleged confession. *Id.*, at 192 (emphasis added). Accordingly, if *Bruton* was not affected by the *Roberts* reliability test assessed by this Court in *Cruz*, it is illogical that *Bruton* now would be limited by *Roberts'* successor.[15]

Despite this illogic, the circuits' current treatment does more than just limit *Bruton*; it erroneously eviscerates *Bruton*, a case that this Court has not explicitly overruled. This evisceration occurs because there is no need for *Bruton* analysis if the doctrine is limited only to testimonial hearsay. Under the circuits' current treatment, if the statement is found to be testimonial, it is automatically barred under *Crawford*; if it is non-testimonial, the defendant is offered no Confrontation Clause protection. Zelasko's Confrontation Clause rights are thus barren without *Bruton* despite the prejudice she would suffer. Like the statements used against *Bruton*, Lane's statements are devastating to Zelasko in their joint trial, because of the harm Zelasko will suffer without the ability to cross-examine Lane. That devastating harm does not change simply because the statements were made to Lane's lover and not a police officer.

The circuits that have limited *Bruton* to non-testimonial hearsay have also erred in viewing *Crawford* as a case that narrows the defendant's Confrontation Clause rights, rather than broadening them. In *United States v. Williams*, the court found the *Bruton* doctrine to remain fully intact post-*Crawford*. 1:09CR414 JCC, 2010 WL 3909480 (E.D. Va. 2010). The court based its decision partially on the rationale that it is, "highly unlikely that *Crawford* (a case that expanded the Confrontation Clause's application) would have eviscerated *Bruton* (a Confrontation Clause case that Crawford cited) so casually. *Id.* at 4. Samuel Buffaloe similarly observes that, "in [*Crawford*], the Court determined that the right to confrontation applied to statements made in court as well as "testimonial" statements made outside of it. Several Circuit

[15] *See generally* Colin Miller, Avoiding A Confrontation? How Courts Have Erred in Finding That Nontestimonial Hearsay Is Beyond the Scope of the Bruton Doctrine, 77 Brook. L. Rev. 625 (2012).

Courts have ironically used this expansion of the Confrontation Clause against defendants wishing to invoke Bruton to avoid joint trials.[16] The *Williams* court and Mr. Buffaloe's observations demonstrate the oddness in utilizing *Crawford* to limit Confrontation Clause rights, and there can be no doubt that viewing *Crawford* in this way limits the defendant's Confrontation Clause rights. Zelasko and other defendants in her position will remain unable to cross-examine co-defendants due to the Fifth Amendment privilege, and without the fully-intact *Bruton* doctrine, they will not be able to do anything about the devastating prejudice that they will suffer. This Court should affirm the Fourteenth Circuit's revival of *Bruton* to protect Zelasko and other defendants from that prejudice.

[16] Samuel Buffaloe, Minimizing Confrontation: The Eighth Circuit Uses Crawford to Avoid Bruton for Non-Testimonial Statements, 76 Mo. L. Rev. 895 (2011).

## CONCLUSION

For the foregoing reasons, Zelasko respectfully requests that this Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold:

(1) Rule 404(b) does not apply to criminal defendants seeking to introduce evidence of a third party's propensity to commit an offense with which the defendant has been charged;

(2) *Williamson* is reaffirmed as the standard for applying Rule 804(b)(3); and

(3) *Bruton* remains fully intact post-*Crawford* and applies to non-testimonial hearsay.

Respectfully submitted,

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Counsel for Respondent

Date: February 12, 2014.