

TWENTY-NINTH ANNUAL
DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 12-13

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

--against--

ANASTASIA ZELASKO,

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF BOERUM**

-----X

UNITED STATES OF AMERICA

No. 12-98 (NJT)

---against---

INDICTMENT

**ANASTASIA ZELASKO and
JESSICA LANE,**

Defendants.

-----X

The Grand Jury Charges:

RELEVANT PERSONS AND EVENTS

1. At all times relevant to this Indictment, the Drug Enforcement Administration (“DEA”) was the government agency charged with the enforcement of the controlled substances laws and regulations of the United States.
2. At all times relevant to this Indictment, Anastasia Zelasko and Jessica Lane (“Defendants”) were members of the women’s United States Snowman Pentathlon Team (“Snowman Team”).
3. At all times relevant to this Indictment, Hunter Riley was a member of the United States men’s Snowman Team and an informant for the DEA.
4. At all times relevant to this Indictment, Peter Billings was the boyfriend of Defendant Lane as well as the coach of the United States women’s Snowman Team. The two had been romantically involved for several years at the time of the events alleged in this Indictment.
5. On or about September 6, 2010, Defendant Zelasko joined the United States women’s Snowman Team.
6. On or about August 5, 2011, Defendant Lane joined the United States women’s Snowman Team.
7. At all times relevant to this Indictment, the Snowman Team’s primary competition was the Snowman Pentathlon at the World Winter Games. This competition is a physically

demanding game consisting of dogsledding, ice dancing, aerial skiing, rifle shooting, and curling.

8. Prior to about August 2011, the United States women's Snowman Team had never ranked above sixth place in the World Winter Games or similar competitions. In fall 2011, the team's practice times markedly improved.

JURISDICTION AND VENUE

9. The offenses charged in this Indictment were carried out, at least in part, within the Southern District of Boerum.
10. The conspiracy and overt acts described in Counts One through Three entailed the distribution and possession of controlled substances that were introduced into and affected interstate commerce. 18 U.S.C. § 10.
11. The offenses described in Counts Four and Five were committed within a certain place and on certain lands reserved and acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, and acquired by the United States by consent of the legislature of the State of Boerum, to wit: Remsen National Park. 18 U.S.C. §§ 7 and 3236.

COMMON ALLEGATIONS

12. In or about August 2011, the Defendants conspired to possess and distribute and began possessing and distributing anabolic steroids, a Schedule III controlled substance, to their female teammates.
13. Specifically, the substance distributed in furtherance of the conspiracy was a bolasterone ester, an anabolic steroid as defined by 21 U.S.C. § 802(41)(A). The Defendants and their teammates dubbed this controlled substance "ThunderSnow."
14. On or about October 1, 2011, Hunter Riley, at the direction of the DEA, approached Defendant Lane and sought to buy ThunderSnow, ostensibly for his personal use. Defendant Lane declined.
15. On or about November 3, 2011, Hunter Riley again asked Defendant Lane about purchasing ThunderSnow. Defendant Lane again declined.

16. On or about December 9, 2011, Hunter Riley again asked Defendant Lane about purchasing ThunderSnow. Defendant Lane again declined.
17. On or about December 10, 2011, Peter Billings observed the Defendants engaged in a heated argument, which ended in Defendant Lane shouting, "Stop bragging to everyone about all the money you're making!"
18. On or about December 19, 2011, Peter Billings confronted Defendant Lane with his suspicion that she was distributing performance-enhancing steroids to the female members of the United States Snowman Team. Defendant Lane denied this accusation.
19. On or about January 16, 2012, Defendant Lane sent the following email to Peter Billings:

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

20. On or about January 28, 2012, several members of the United States Snowman Team observed Defendant Zelasko and Hunter Riley engaged in a heated argument.
21. On or about February 3, 2012, Defendant Zelasko shot and killed Hunter Riley on the Snowman Team training grounds located in the Southern District of Boerum and within the boundaries of Remsen National Park. Defendant Zelasko was arrested shortly thereafter.
22. On or about February 3, 2012, during the execution of a search warrant at the residence of Defendant Zelasko, in the Southern District of Boerum, the DEA seized approximately \$5,000 in cash and two 50-milligram doses of ThunderSnow.
23. On or about February 4, 2012, during the execution of a search warrant at the United States Snowman Team's training facilities, in the Southern District of Boerum and within the boundaries of Remsen National Park, the DEA recovered 12,500 milligrams of ThunderSnow – valued at approximately \$50,000 – from the Team's equipment storage room.

24. On or about February 4, 2012, during the execution of a search warrant at the residence of Defendant Lane, in the Southern District of Boerum, the DEA seized \$10,000 in cash, twenty 50-milligram doses of ThunderSnow, and a laptop from which the abovementioned email was sent. Defendant Lane was promptly arrested.

COUNT ONE

(Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids)

21 U.S.C. §§ 841(a)(1), (b)(1)(E) and 846

25. The allegations contained in paragraphs 1 through 24 of this Indictment are realleged and incorporated by reference as if fully set forth herein.

26. In or about and between August 2011 and February 2012, in the Southern District of Boerum, the Defendants did knowingly and intentionally conspire to distribute and to possess with intent to distribute a Schedule III controlled substance known as ThunderSnow, to wit: a bolasterone ester, an anabolic steroid as defined by 21 U.S.C. § 802(41)(A).

COUNT TWO

(Distribution of and Possession with Intent to Distribute Anabolic Steroids)

21 U.S.C. §§ 841(a)(1) and (b)(1)(E)

27. The allegations contained in paragraphs 1 through 24 of this Indictment are realleged and incorporated by reference as if fully set forth herein.

28. In or about and between August 2011 and February 2012, in the Southern District of Boerum, the Defendants did knowingly and intentionally distribute and possess with intent to distribute a Schedule III controlled substance known as ThunderSnow, to wit: a bolasterone ester, an anabolic steroid as defined by 21 U.S.C. § 802(41)(A).

COUNT THREE

(Simple Possession of Anabolic Steroids)

21 U.S.C. § 844

29. The allegations contained in paragraphs 1 through 24 of this Indictment are realleged and incorporated by reference as if fully set forth herein.

30. In or about and between August 2011 and February 2012, in the Southern District of Boerum, the Defendants did knowingly and intentionally possess a Schedule III controlled substance known as ThunderSnow, to wit: a bolasterone ester, an anabolic steroid as defined by 21 U.S.C. § 802(41)(A).

COUNT FOUR
(Conspiracy to Murder in the First Degree)
18 U.S.C. §§ 371 and 1111(a)

31. The allegations contained in paragraphs 1 through 24 of this Indictment are realleged and incorporated by reference as if fully set forth herein.

32. On or about and between October 1, 2011, and February 3, 2012, in the State and Southern District of Boerum, and within the boundaries of Remsen National Park, the Defendants did conspire to murder Hunter Riley, with malice aforethought, willfully, deliberately, maliciously, and with premeditation.

COUNT FIVE
(Murder in the First Degree)
18 U.S.C. § 1111(a)

33. The allegations contained in paragraphs 1 through 24 of this Indictment are realleged and incorporated by reference as if fully set forth herein.

34. On or about February 3, 2012, in the State and Southern District of Boerum, and within the boundaries of Remsen National Park, the Defendants did commit murder, as defined in 18 U.S.C. § 1111(a), by killing Hunter Riley, with malice aforethought, willfully, deliberately, maliciously, and with premeditation.

DATED: April 10, 2012

A TRUE BILL

Anthony Pace
United States Attorney

/s/

/s/

Assistant United States Attorney

Foreperson

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF BOERUM**

-----X
UNITED STATES OF AMERICA

Cr. No. 12-98

---against---

INDICTMENT

**ANASTASIA ZELASKO and
JESSICA LANE,**

Defendants.

-----X

July 16, 2012

TRANSCRIPT OF HEARING ON PRE-TRIAL MOTIONS BEFORE THE HONORABLE
NICHOLAS CRAWFORD,
DISTRICT JUDGE, UNITED STATES DISTRICT COURT

APPEARANCES:

For the United States of America:	Alexandra Lugo Assistant United States Attorney 300 Central Avenue Wake Forest, Boerum 40275
For Defendant Anastasia Zelasko:	Michael Rooney Rooney and Butler, LLP 1551 Sycamore Street Wake Forest, Boerum 40275
For Defendant Jessica Lane:	Max Killian O'Callahan, Hayes, and Lee 37 Park Avenue Wake Forest, Boerum 40275
Court Reporter:	Deirdre Putnam 300 Central Avenue Wake Forest, Boerum 40275

1 CLERK: United States of America versus Anastasia Zelasko and
2 Jessica Lane. Counsel, note your appearance for the record.
3 MS. LUGO: Alexandra Lugo, for the United States.
4 MR. ROONEY: Michael Rooney, of Rooney and Butler, LLP, for the
5 defendant, Anastasia Zelasko.
6 MR. KILLIAN: Max Killian, of O'Callahan, Hayes, and Lee for the
7 defendant, Jessie - ah... Jessica Lane.
8 THE COURT: Good afternoon. First of all, I understand we're
9 here on motions by Ms. Zelasko and also by the government
10 seeking to offer evidence against her. So, Mr. Killian? You and
11 your client will not be present for argument on these motions,
12 is that correct?
13 MR. KILLIAN: Yes, your Honor. This hearing does not concern us,
14 and we will be heard on our own motions at a later date.
15 THE COURT: Fine, Mr. Killian. Defendant Jessica Lane and her
16 counsel are excused for today. Okay, let's keep moving then. We
17 have one defense motion seeking to introduce the testimony of
18 Miranda Morris, represented in substance by her affidavit marked
19 as Exhibit A, to show the propensity of a third party to sell
20 very similar performance-enhancing drugs, is that correct?
21 MR. ROONEY: Yes, your Honor.
22 THE COURT: And second, there is a government motion to introduce
23 an email sent to Peter Billings, is that correct?
24 MS. LUGO: Yes, your Honor.
25 THE COURT: I'd like to turn first to the defense's motion to
26 admit the testimony of Miranda Morris. Actually, Mr. Rooney, can
27 you begin by summarizing some of the background of the case for
28 me?

1 MR. ROONEY: Certainly, your Honor. My client, Anastasia Zelasko,
2 is a member of the women's U.S. Snowman team along with Casey
3 Short and co-defendant Jessica Lane. Hunter Riley, the deceased,
4 was a member of the men's U.S. Snowman team. The Snowman is a
5 competitive winter sport involving five events, including
6 dogsledding and rifle shooting. In February 2012, the U.S. team
7 participated in trials for the international competition known
8 as the World Winter Games in Remsen National Park. On February
9 3, Ms. Zelasko practiced alone on a rifle range that had been
10 closed during the trials. The range was adjacent to a portion of
11 a dogsled course on which male members of the U.S. Snowman team
12 were competing. At approximately 10:15 AM, Hunter Riley was
13 killed by a bullet from Ms. Zelasko's rifle, a shooting we
14 contend was accidental. A search warrant was executed that night
15 on Ms. Zelasko's house, where two 50-milligram doses of a
16 steroid known as ThunderSnow were allegedly found along with
17 approximately \$5,000 in cash. The next day, a search was
18 conducted of the U.S. team's training facility, where 12,500
19 milligrams of ThunderSnow, worth approximately \$50,000, were
20 discovered hidden in an equipment room to which all female team
21 members and staff had access. The same day, a warrant was
22 executed on the apartments of Casey Short, where no evidence was
23 found, and Ms. Lane, where twenty doses of ThunderSnow and
24 approximately \$10,000 in cash were found. Ms. Zelasko and Ms.
25 Lane have been indicted for murder, conspiracy to commit murder,
26 conspiracy to distribute and possess with intent to distribute
27 steroids, possession of steroids, and distribution of and
28 possession with intent to distribute steroids.

1 THE COURT: Ms. Lugo, would you agree to stipulate to these
2 facts?

3 MS. LUGO: Yes, your Honor, except for the accidental nature of
4 the shooting. Also, I would like to add the following facts
5 based on our own investigation and testimony we plan to offer at
6 trial. First, in 2011 and 2012 Hunter Riley was cooperating with
7 the DEA as an informant. He approached Jessica Lane and
8 attempted to purchase steroids from her on October 1, November
9 3, and December 9, 2011. She declined his request each time. On
10 December 10, 2011, U.S. women's team coach Peter Billings
11 observed Ms. Zelasko and Ms. Lane arguing, and heard Ms. Lane
12 state, "Stop bragging to everyone about all the money you're
13 making!" On December 19, Mr. Billings confronted Ms. Lane, with
14 whom he was in a romantic relationship, about his suspicion that
15 she was selling steroids to team members, which she denied.

16 Several team members witnessed Ms. Zelasko in a heated
17 argument with Mr. Riley on January 28, 2012, less than a week
18 before the shooting. Finally, after the death of Mr. Riley, Mr.
19 Billings turned over to the government an email that Ms. Lane
20 had sent to him on January 16, 2012. The email is an
21 acknowledgement to Mr. Billings that Ms. Lane was engaging in
22 illicit sales of some sort to members of the female team in
23 partnership with a single other team member referred to only as
24 "my partner." The email indicates that this unidentified partner
25 was concerned about a male team member who had discovered the
26 illicit sales practice and was threatening to report it to
27 authorities, and thus needed to be... how is it phrased here...
28 "kept quiet."

1 THE COURT: Mr. Rooney, will you stipulate to these additional
2 facts?

3 MR. ROONEY: Yes, your Honor, but only for the purposes of
4 resolving the issues before us today.

5 THE COURT: In that case, please proceed with the argument on
6 your motion.

7 MR. ROONEY: Certainly, your Honor. The defense wishes to
8 introduce the testimony of Miranda Morris, represented in
9 substance by her affidavit, which is marked for identification
10 as Exhibit A. Ms. Morris states that on April 4, 2011, Casey
11 Short sold steroids to Ms. Morris while the two were teammates
12 on the Canadian Snowman relay team...

13 THE COURT: Just out of curiosity, Mr. Rooney, why is Ms. Morris
14 coming out with potentially self-incriminating information, and
15 why now of all times?

16 MR. ROONEY: Well, your Honor, Ms. Morris's affidavit reveals
17 that she has had to retire from her athletic career due to
18 injuries, and she has expressed a desire to come clean and clear
19 her conscience. I can't speak for Ms. Morris, but I believe she
20 is concerned that if she doesn't speak now, she may have the
21 sentence of an innocent person on her conscience as well.

22 THE COURT: Very well, Mr. Rooney. As you were saying.

23 MR. ROONEY: Yes, your Honor. Ms. Morris's testimony will assert
24 that Ms. Short sold her steroids approximately two months before
25 Ms. Short transferred to the U.S. Snowman team. Evidence of this
26 past drug dealing demonstrates Ms. Short's propensity to sell
27 performance-enhancing drugs, specifically steroids modified to

1 avoid detection, within the winter sports relay community. The
2 evid--

3 THE COURT: Mr. Rooney, I - I'm not sure I'm grasping the
4 relevance here.

5 MR. ROONEY: Your Honor, let me back up a bit here. The
6 government's position is that Ms. Zelasko intentionally murdered
7 the victim to conceal her role in a conspiracy to distribute
8 performance-enhancing drugs within the U.S. Snowman relay team.
9 My client's defense is that the killing was accidental. She was
10 not part of a drug conspiracy and therefore had no intent to
11 conceal any sort of conspiracy. While the evidence makes clear
12 and my client does not dispute that such a conspiracy existed,
13 it is also undisputed that there were only two participants in
14 the conspiracy. We contend that these two participants were Ms.
15 Lane and Ms. Short.

16 THE COURT: Ms. Lugo, is it correct that it is uncontested that
17 only two people were involved in the conspiracy?

18 MS. LUGO: Yes, your Honor. At this time the government does not
19 dispute that there were only two coconspirators involved.
20 However, we disagree that Ms. Short was a coconspirator with Ms.
21 Lane, and instead contend that the two coconspirators were Ms.
22 Lane and Ms. Zelasko.

23 THE COURT: Understood. Go on, Mr. Rooney.

24 MR. ROONEY: Thank you. The government argues that the first
25 coconspirator is Jessica Lane and the second is Ms. Zelasko.
26 Here, we have evidence that Ms. Short had recently sold a
27 steroid to Canadian team members. The steroid found in the
28 possession of U.S. team members is an ester, or chemical

1 derivative of the steroid sold by Ms. Short. Demonstrating Ms.
2 Short's propensity to sell a very similar drug within this
3 insular winter sports community would show that it was more
4 likely that Ms. Short, not my client Ms. Zelasko, was the
5 coconspirator, and this fact casts significant doubt on the
6 government's case.

7 THE COURT: Ms. Lugo, your response?

8 MS. LUGO: Your Honor, as discussed in our memorandum of law, the
9 government objects to the content of the testimony as plainly
10 barred by Federal Rule of Evidence 404(b). The text of that Rule
11 clearly states that - sorry, one moment - I'm reading from Rule
12 404(b)(1), your Honor, "evidence of a crime, wrong, or other act
13 is not admissible to prove a person's character in order to show
14 that on a particular occasion the person acted in accordance
15 with the character." Evidence of Ms. Short's prior bad acts
16 falls squarely within this Rule. The defense is offering the
17 evidence to show that on a particular occasion, Ms. Short acted
18 in character with this prior bad act, so it is not admissible
19 under Rule 404.

20 THE COURT: Yes, it does seem that the Rule plainly bars such
21 testimony. Mr. Rooney, how do you get around the problem posed
22 here by Rule 404(b)?

23 MR. ROONEY: Your Honor, 404(b)(1) does not apply when the
24 defense is offering evidence to cast doubt on the defendant's
25 guilt. That Rule evolved from the common law precept that
26 admitting evidence of past acts can lead a fact-finder to draw
27 prejudicial inferences against criminal defendants. Introducing
28 evidence of Ms. Short's prior bad acts implicates none of those

1 same policy concerns. Ms. Short is not on trial and thus there
2 is no risk of prejudice against her. Further, this evidence is
3 critical to showing that my client was not involved in the
4 conspiracy. It is central not only to her defense against the
5 drug charges but to defend against the conspiracy and murder
6 charges.

7 THE COURT: But Counsel, how do you get past 404(b)(1)'s use of
8 the word "person"? I mean I'm looking at it right now and it
9 says "person."

10 MR. ROONEY: Your Honor, while the Advisory Committee Notes do
11 not clarify the intended meaning of "person," all of the
12 discussion in the notes focuses on propensity evidence offered
13 against the defendant, and there is no suggestion of the
14 drafters' intent to protect third parties from unfair prejudice.
15 As noted in our memorandum, several Circuits agree with this
16 approach and have allowed the admission of propensity evidence
17 regarding a third party when offered by a criminal defendant.

18 THE COURT: Ms. Lugo?

19 MS. LUGO: Your Honor, policy debate aside, the plain language of
20 404(b) obviously bars Ms. Morris's testimony. The drafters used
21 the word "defendant" in 404(b)(2), requiring the government to
22 give notice when introducing this type of evidence for non-
23 propensity purposes. However, in 404(b)(1), the language simply
24 says "person." There are many instances where the drafters used
25 the word "defendant" and 404(b)(1) is just not one of those
26 instances. If the intent was to restrict propensity evidence
27 only when offered against criminal defendants, the drafters were

1 more than capable of doing so. Instead they used the word
2 "person" which, read plainly, applies to everyone.

3 THE COURT: Mr. Rooney, any further arguments regarding Ms.
4 Morris's testimony?

5 MR. ROONEY: Yes, your Honor. There is a fundamental
6 constitutional right at stake here as well. Admitting this
7 evidence implicates my client's constitutional right to offer a
8 complete defense, as outlined in the important and highly
9 relevant case of Chambers v. Mississippi. This evidence is
10 critical in showing that Ms. Short, not my client Ms. Zelasko,
11 was the second coconspirator, and thus that my client had no
12 motive to shoot the victim. As outlined in our memorandum,
13 courts have found the constitutional right to present
14 exculpatory evidence must be recognized when, as here, the
15 evidence demonstrates a strong possibility that a third party
16 committed the offense. Here, we have evidence not only that Ms.
17 Short previously sold drugs, but that she sold a very similar
18 type of undetectable steroid - in fact, a chemical predecessor
19 of the steroid allegedly sold here - to a member of the Canadian
20 women's Snowman team less than a year before the shooting which
21 prompted this investigation. I would refer your Honor to the
22 affidavit of Doctor Wallace marked as Exhibit B. These prior bad
23 acts are so similar to the alleged drug sales here that they
24 raise a strong inference that Ms. Short, not my client, was the
25 second coconspirator. Most importantly, Ms. Zelasko has no other
26 way of showing that Ms. Short was the second coconspirator and
27 that she is not guilty of these very serious charges. There are
28 no other avenues to present this defense to a jury.

1 THE COURT: Ms. Lugo, any response from the government on this
2 point?

3 MS. LUGO: Your Honor, I have no way to assess whether the
4 defense has any other way to explore this theory. The
5 government's position is that the constitutional right to offer
6 a complete defense does not imply a right to offer evidence that
7 is far weaker than necessary to trigger a Chambers issue and, as
8 here, inadmissible under the Rules of Evidence. Michigan v.
9 Lucas makes that abundantly clear. Further, this evidence does
10 very little to exculpate Ms. Zelasko, and thus, constitutional
11 concerns are not at issue. Ms. Morris's testimony merely shows
12 that a third party sold a different drug, in a different
13 country, to different people, nearly a year before Ms. Zelasko
14 shot the victim. This is simply nothing like Chambers v.
15 Mississippi, where the evidence at issue was a third party's
16 confessions to having committed the crime of which the defendant
17 was accused. Generously construed, Ms. Morris's testimony does
18 nothing more than invite speculation over one possible motive
19 for the killing. Allowing the testimony on constitutional
20 grounds would require an overly broad reading of Chambers, and
21 is simply not supported by the case law.

22 THE COURT: Thank you both. I'd like to now hear the government's
23 arguments for the admissibility of Ms. Lane's email to Mr.
24 Billings.

25 MS. LUGO: Yes, your Honor. Ms. Lane's email, marked for
26 identification as Exhibit C, was sent on January 16, 2012.

27 THE COURT: Mr. Rooney, will you stipulate that Exhibit C is an
28 accurate representation of the email sent by Ms. Lane?

1 MR. ROONEY: Yes, your Honor.

2 THE COURT: One second. Ms. Lugo, I take it the government does
3 not contend that this email implicates Mr. Billings in the
4 conspiracies here?

5 MS. LUGO: That is correct, your Honor. Mr. Billings promptly
6 turned the email over to authorities after the death of Mr.
7 Riley and submitted to questioning, and his cooperation has been
8 exemplary.

9 THE COURT: Okay. Even so, the email is hearsay. Under what
10 exception does the government seek to introduce it?

11 MS. LUGO: The email is an admission against penal interest,
12 Judge, and as such is admissible under Rule 804(b) (3).

13 MR. ROONEY: Your Honor, the email does not qualify under Federal
14 Rule of Evidence 804(b) (3) as a statement against penal
15 interest. The Supreme Court in Williamson v. United States
16 adopted a narrow reading of the term "statement" as it is used
17 in 804(b) (3). That case also held that 804(b) (3) requires each
18 statement to be narrowly analyzed to determine whether it was
19 made against penal interest. The rationale of Williamson is that
20 only statements that are directly against penal interest are
21 reliable enough to justify an exception to the general bar on
22 hearsay. Here, a narrow reading of the term statement means that
23 each sentence in the email must be analyzed independently as a
24 statement. None of these statements directly inculcates Ms. Lane
25 or could subject her to criminal liability. Ms. Lane's lack of
26 clarity as to her partner's intentions certainly does not
27 constitute a clear statement of illegal intent.

28 THE COURT: Ms. Lugo?

1 MS. LUGO: In Williamson, although the Supreme Court required
2 each statement to be considered on its own, it also made clear
3 that the inculpatory nature of a statement depends upon the
4 context. Considering the context of this email, discovered
5 during a DEA investigation in which an informant wound up dead,
6 keeping someone "quiet" is a clear characterization of illegal
7 activity that is against the declarant's penal interest.
8 Uncertainty as to what a partner "has in mind" is an uncertainty
9 as to methods, not the end goal of "silencing" a potential
10 snitch. The thrust of the entire email inculcates Ms. Lane and
11 the context renders each statement within the email against her
12 penal interest. In addition, the concern for unreliable
13 statements implicating potential co-defendants does not exist
14 where, as here, the statement was not made to law enforcement
15 officers. The legislative intent behind Rule 804(b)(3) and the
16 totality of the circumstances weigh towards the admission of
17 these statements.

18 THE COURT: Ms. Lugo, while I understand the importance of
19 context, the Rule cannot be read in the way you suggest without
20 modifying the holding of Williamson.

21 MR. ROONEY: Your Honor, if I may, the government has failed to
22 cite any authority supporting its position. The per se rule
23 under Williamson is consistent with the long-held rationale that
24 statements that are against one's penal interest are inherently
25 more reliable than most non-self-inculpatory statements.

26 THE COURT: All right, let's assume that I find that the email
27 falls within the penal interest exception. Even if that is the
28 case, Mr. Rooney also raised a Bruton issue in his response to

1 the government's motion. Ms. Lugo, how can you seek to admit Ms.
2 Lane's email to inculcate both Ms. Lane and Ms. Zelasko? Based
3 on the Bruton doctrine, wouldn't that violate Ms. Zelasko's
4 rights under the Confrontation Clause?

5 MS. LUGO: Your Honor, Bruton does not bar the admission of the
6 letter because the Supreme Court's more recent holding in
7 Crawford v. Washington restricted the Confrontation Clause's
8 application to testimonial statements. In doing so, Crawford
9 effectively modified the Bruton doctrine, rendering it
10 inapplicable in this case concerning a nontestimonial statement
11 by the co-defendant. The email was private in nature and was not
12 communicated to further a criminal prosecution, and is thus
13 nontestimonial. Several Circuits have held that, pursuant to
14 Crawford, the admission of nontestimonial hearsay statements
15 made by a co-defendant does not violate the Confrontation
16 Clause.

17 THE COURT: One second. Ms. Lugo, do we know that Ms. Lane is not
18 going to testify?

19 MS. LUGO: We have been assured by her attorney that she will
20 not.^a

21 THE COURT: Mr. Rooney, any argument?

22 MR. ROONEY: Your Honor, if this email were admitted into
23 evidence, my client's rights under the Confrontation Clause
24 would be violated. To Ms. Lugo's point regarding case law from
25 other Circuits, there is a split as to whether Crawford affects
26 Bruton at all. The Third Circuit has indicated that Crawford did

^a For the purposes of the 2014 Jerome Prince Memorial Evidence Competition, assume that a co-defendant's statement that she will not testify at trial is sufficient to allow the trial and appellate courts to decide a *Bruton* issue arising on a pre-trial motion.

1 not restrict Bruton to testimonial statements. The Bruton court
2 was concerned with the constitutional harm that would result
3 from the admission of statements by a co-defendant who asserts a
4 constitutional privilege against self-incrimination and thus
5 cannot be cross-examined. In Crawford, the issue before the
6 Supreme Court was whether the recorded statement of the
7 defendant's wife could constitutionally be used against him when
8 the statement was obtained in an interrogation by police and the
9 wife did not testify. Crawford presented additional concerns of
10 allowing the government to use hearsay statements of non-
11 defendants that police obtain during formal investigations into
12 culpability, and did not negate the concern in Bruton that using
13 co-defendant statements without the opportunity for
14 confrontation causes constitutional harm. In short, both
15 testimonial statements under Crawford and nontestimonial
16 statements of non-testifying co-defendants under Bruton violate
17 the Confrontation Clause.

18 THE COURT: All right, I've heard enough on the Bruton issue. Are
19 there any other objections from the defense?

20 THE COURT: Anything else, counselor?

21 MR. LUGO: Nothing further, your Honor.

22 THE COURT: Thank you, counselors. I will issue my decision from
23 the bench on Thursday and a written order soon thereafter

24

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF BOERUM**

-----X
UNITED STATES OF AMERICA

--against--

Cr. No. 12-98

ANASTASIA ZELASKO,

Defendant.

-----X

July 18, 2012

DECISIONS ON PRE-TRIAL MOTIONS BEFORE THE HONORABLE NICHOLAS
CRAWFORD,
DISTRICT JUDGE, UNITED STATES DISTRICT COURT

APPEARANCES:

For the United States of America:

Alexandra Lugo
Assistant United States Attorney
300 Central Avenue
Wake Forest, Boerum 40275

For Defendant Anastasia Zelasko:

Michael Rooney
Rooney and Butler, LLP
1551 Sycamore Street
Wake Forest, Boerum 40275

Court Reporter:

Deirdre Putnam
300 Central Avenue
Wake Forest, Boerum 40275

1 THE COURT: Good morning, counselors. After considering the
2 motions before the court, I have reached a decision. Seeing no
3 objections from counsel, I will announce my decision from the
4 bench. You may pick up copies of the formal order and decision
5 from my clerk tomorrow.

6 The testimony of Miranda Morris, the substance of which is
7 reflected in her affidavit marked as Exhibit A, is admissible at
8 trial. The propensity evidence is not barred by Federal Rule of
9 Evidence 404(b) because the common law basis for the Rule
10 related to the danger of admitting propensity evidence against a
11 defendant, not the use of such evidence by a defendant to
12 exculpate herself by incriminating a third party. The court
13 finds persuasive the reasoning of the Third Circuit in United
14 States v. Stevens that there is no danger of prejudice to the
15 third party since she is not a defendant in this case.

16 Counsel has assured the court that there is no other
17 evidence to implicate Casey Short other than Ms. Morris's
18 testimony. Assuming this is true, the testimony also raises
19 constitutional issues regarding Defendant Zelasko's ability to
20 present a complete defense as per Chambers v. Mississippi. There
21 is no other evidence implicating Ms. Short in this case. No
22 contraband was discovered at her apartment and no other
23 testimony points to her involvement. Yet the evidence that Ms.
24 Short recently sold very similar drugs to at least one and
25 possibly more female members of another national winter sport
26 team raises a strong inference that Ms. Short and not Defendant
27 Zelasko was the second member of the conspiracy. As an
28 alternative holding, I therefore find Ms. Morris's testimony

1 admissible pursuant to Defendant Zelasko's constitutional right
2 to present a complete defense under Chambers v. Mississippi.

3 The government's motion to admit against Defendant Zelasko
4 Exhibit C, an email allegedly sent by Co-Defendant Lane on
5 January 16, 2012, is denied. As a threshold matter, I should
6 note that the email is admissible against Co-Defendant Lane as a
7 statement by a party opponent, but that neither party addressed
8 whether the email is admissible against Defendant Zelasko as a
9 coconspirator statement under Rule 801(d)(2)(E). Therefore, that
10 argument is waived.

11 The government argues that all the statements in the email
12 fall under the hearsay exception for statements against penal
13 interest contained in Federal Rule of Evidence 804(b)(3). Under
14 the Supreme Court's analysis in Williamson v. United States,
15 however, each individual statement must be considered to
16 determine whether it was contrary to penal interest when made.
17 None of the statements contained in the email inculcates Co-
18 Defendant Lane because, when considered independently, they do
19 not admit any wrongdoing or expose Lane to criminal liability.

20 The government argues in essence that, although each
21 sentence is not inculpatory on its own, the inculpatory thrust
22 of the statements in the email makes the entire email admissible
23 under Rule 804(b)(3). In the alternative, the government argues
24 that the reasoning underlying the Williamson standard does not
25 apply where, as here, the statements were not made to a law
26 enforcement officer and thus do not carry the same threat of
27 untruth. However, a holding in line with either of these
28 theories would affect a large proportion of statements against

1 penal interest and essentially modify the Williamson standard,
2 an action which is beyond the authority of this court. The
3 statements in Exhibit C are therefore barred as hearsay.

4 Moreover, even if the email were admissible as a statement
5 against penal interest, the Confrontation Clause would
6 independently bar its admission. As interpreted in Bruton v.
7 United States, the Confrontation Clause bars the admission of an
8 inculpatory statement of a non-testifying co-defendant against a
9 defendant at trial. Particularly in consideration of Co-
10 Defendant Lane's decision not to testify at the joint trial,
11 where she will be plainly visible at counsel table, there is no
12 excuse here to take shortcuts across Defendant Zelasko's
13 constitutional right to cross-examination. Contrary to the
14 government's contentions, Crawford v. Washington did not inject
15 a "testimonial statement" requirement into the Bruton rule.
16 Testimonial statements in the Crawford context and Bruton
17 statements of non-testifying co-defendants present distinct
18 situations in which a defendant's ability to confront a witness
19 is compromised. The contents of Exhibit C must be excluded as
20 evidence against Defendant Zelasko.

21 * * * *

EXHIBIT A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF BOERUM**

-----X

UNITED STATES OF AMERICA

**AFFIDAVIT OF MIRANDA MORRIS
IN SUPPORT OF DEFENDANT
ZELASKO'S MOTION TO ADMIT
EVIDENCE**

--against--

ANASTASIA ZELASKO,

Cr. No. 12-98

Defendant.

-----X

STATE OF BOERUM)
 : SS.:
COUNTY OF BOERUM)

I, Miranda Morris, being duly sworn, declare under penalty of perjury:

1. My name is Miranda Morris. I was born on May 23, 1992, in the Province of Ontario, Canada. I currently live in Toronto. I was a member of the Canadian Snowman winter sport team from February of 2009 until December of 2011, when I retired after suffering a severe leg injury during practice.
2. Casey Short was my teammate on the Canadian Snowman team from the time I joined until June of 2011, when she transferred to the U.S. Snowman team. During this time I spoke infrequently with Ms. Short, who tended to keep to herself at first. Beginning in or around February of 2011, however, I would occasionally see her meeting or leaving practice with individual members of the female Snowman team.
3. Team practices occurred at our team facility at Alice Hill Park in Pembroke, Ontario.

4. On March 27, 2011, after a team practice, Ms. Short approached me in the parking lot as I walked to my car. She revealed to me that she had sold a type of steroids known as White Lightning to other members of the team and asked me if I wanted to purchase some. She said she had connections with a lab that designed White Lightning to be undetectable by the drug tests used in all the national competitions and that almost all the other members of the female team were using it and had not been caught. I told her I wasn't certain, and I would have to think about it.
5. On April 2, 2011, I approached Ms. Short after practice and told her I wanted to purchase White Lightning from her. We discussed the amount to be purchased and the cost and arranged to make the exchange two days later.
6. On April 4, 2011, I purchased twenty doses of White Lightning for C\$4,000 in Canadian dollars from Ms. Short in Pembroke, Ontario. She gave me instructions on how to inject the steroids, dosage information, and a brief explanation of the possible side effects. She told me I would not be disappointed.
7. Looking back at my athletic career, I regret having betrayed my own integrity and that of the sport by purchasing and using performance-enhancing drugs. I provide my testimony in this case hoping that it may help atone for that betrayal by bringing the truth to light.

/s/

Miranda Morris

Sworn to me and subscribed before me
This 8th day of JUNE, 2012.

/s/

Notary

EXHIBIT B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF BOERUM**

-----X

UNITED STATES OF AMERICA

**AFFIDAVIT OF HENRY WALLACE
IN SUPPORT OF DEFENDANT
ZELASKO'S MOTION TO ADMIT
EVIDENCE**

--against--

ANASTASIA ZELASKO,

Cr. No. 12-98

Defendant.

-----X

STATE OF BOERUM)
 : SS.:
COUNTY OF BOERUM)

I, Henry Wallace, being duly sworn, declare under penalty of perjury:

1. My name is Henry Wallace. I was born on August 23, 1966, in the State of Boerum. I currently live in Springfield, Boerum. I attended the University of Boerum, where I received my Bachelor of Science in Chemistry, Master of Science in Chemistry and Doctorate in Chemical Biology. I wrote my doctoral thesis on methods of detection of performance-enhancing drugs, including anabolic steroids. I teach introductory and intermediate chemistry classes at the University of Boerum and have done so for fifteen years. From 2002 to 2006, I served as a drug testing consultant to the National Basketball League, and from 2006 to 2012 as a consultant to the American Baseball

Association. During this time, I performed and supervised hundreds of blood tests for anabolic steroids and other performance-enhancing drugs. Through my own research and participation in conferences and symposia, I have developed a working knowledge of the most common detectable and undetectable performance-enhancing drugs used by professional athletes.

2. On information and belief, 12,500 milligrams of liquid, divided into 250 separately packaged 50-milligram doses with bottles and labels, were discovered and seized at the training facility of the U.S. women's Snowman team located at 523 Pennhurst Road, Wake Forest, Boerum within Remsen National Park on February 4, 2012, by the Drug Enforcement Agency ("DEA"). The DEA provided me with a sample of 200 milligrams of the liquid seized at this facility.
3. I have examined the samples seized by the DEA at 523 Pennhurst Road on February 4, 2012. I identified 200 milligrams of a type of anabolic steroid known by the street name "ThunderSnow." ThunderSnow is undetectable by contemporary blood tests.
4. On information and belief, twenty 50-milligram doses of liquid were discovered at the residence of Jessica Lane by the DEA on February 4, 2012. The DEA provided me with one 50-milligram sample of this liquid.
5. I have examined the sample discovered at the residence of Jessica Lane on February 4, 2012, and identified 50 milligrams of ThunderSnow.
6. On information and belief, two 50-milligram doses of liquid were discovered at the residence of Anastasia Zelasko by the DEA on February 3, 2012. The DEA provided me with one 50-milligram sample of this liquid.

7. I have examined the sample discovered at the residence of Anastasia Zelasko on February 3, 2012, and identified 50 milligrams of ThunderSnow.
8. ThunderSnow is an ester of another anabolic steroid known as bolasterone, for which the Canadian street name is “White Lightning.” That is, ThunderSnow was developed through a chemical modification of White Lightning. On information and belief, White Lightning has been discovered in the possession of members of several eastern European teams that compete in the international World Winter Games competition.
9. ThunderSnow is typically used in 50- to 100-milligram daily doses. Injection into the bloodstream is the primary delivery method. The steroid is often “cycled” by using one dose per day for a few months and then taking no doses for several weeks. A quantity of 250 50-milligram doses is consistent with sale and not personal use. A quantity of two 50-milligram doses is consistent with personal use and not sale.

/s/

Henry Wallace

Sworn to me and subscribed before me
this 13th day of JUNE, 2012.

/s/

Notary

EXHIBIT C

From: **Jessica Lane** <JLane@commtel.net>
Date: Mon, Jan 16, 2012 at 10:57 PM
Subject: I need to talk to you...
To: Peter Billings <Peter.Billings@SnowmanTeamUSA.org>

Peter,

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.

Love,
Jessie

**UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

-----X
UNITED STATES OF AMERICA,
Appellant,

---against---

Cr. No. 13-452

ANASTASIA ZELASKO

Defendant-Appellee.

-----X
February 14, 2013

Before: CHAZANOFF, RICHARDSON and MARINO, Circuit Judges:

OPINION OF THE COURT

RICHARDSON, Circuit Judge.

This interlocutory appeal, brought by the United States pursuant to 18 U.S.C. § 3731 and 3731-(a)^a arises directly from the District Court’s rulings against the government on two pretrial evidentiary motions presenting four legal questions of first impression in this Circuit. Specifically at issue are: 1) whether Federal Rule of Evidence (“FRE”) 404(b) bars a defendant’s use of evidence to show the criminal propensity of a third party; 2) whether, regardless of FRE 404(b), a defendant’s constitutional right to a full defense entitles her to

^a 18 U.S.C. § 3731 provides in pertinent part: “An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.” 18 U.S.C. § 3731-(a) provides: “When, pursuant to 18 U.S.C. § 3731, the United States appeals the decision or order of a district court suppressing or excluding evidence, in the discretion of the court of appeals, an appeal by the United States may also lie to that court from the decision or order of the district court admitting evidence upon the motion of the defendant, if the court of appeals determines that the ruling of the district court involves a substantial question of law.” [NOTE: Section 3731-(a) is a fictional statute invented for purposes of the 2014 Jerome Prince Memorial Evidence Competition.]

present such propensity evidence; 3) whether the email sent by Co-Defendant Lane to Peter Billings allegedly suggesting a conspiracy to distribute steroids is admissible as a statement against penal interest under *Williamson v. United States*, 512 U.S. 594 (1994); and 4) whether *Crawford v. Washington*, 541 U.S. 36 (2004), restricts the *Bruton* doctrine to the testimonial statements of a non-testifying co-defendant. Upon our review of these issues, we affirm the District Court's rulings that FRE 404(b) does not apply to a defendant's use of evidence to show the criminal propensity of a third party; that a defendant's right to present a full defense encompasses such propensity evidence; that *Williamson*, though sometimes difficult to apply, remains binding precedent that bars the admission of statements collateral to declarations against penal interest; and that the *Bruton* doctrine applies to testimonial and nontestimonial evidence.

Procedural Background

The Defendant, Anastasia Zelasko, was taken into federal custody on February 3, 2012, and Co-Defendant Jessica Lane was taken into federal custody the following day. On April 10, 2012, the Grand Jury returned an indictment charging the Defendants with conspiracy to distribute and possess with intent to distribute anabolic steroids, distribution and possession with intent to distribute anabolic steroids, simple possession of anabolic steroids, conspiracy to murder in the first degree, and murder in the first degree.

On July 16, 2012, the District Court heard evidence and argument concerning the following pretrial evidentiary motions: Defendant Zelasko's motion to introduce the testimony of Miranda Morris to show the propensity of a third party to sell performance-enhancing drugs, and the government's motion to introduce an email sent by Co-Defendant Lane. On July 18, 2012, the District Court ruled in favor of Defendant Zelasko to admit Morris's testimony and

against the government to exclude the email. The government now appeals the rulings on both motions.

Factual Background

The government's theory is that Defendant Zelasko and Co-Defendant Lane were engaged in a conspiracy to sell anabolic steroids. At trial, the prosecution plans to introduce evidence to show that 1) Defendant Zelasko and Co-Defendant Lane engaged in a conspiracy to sell anabolic steroids to their teammates on the U.S. Women's Snowman's Team and 2) that the victim, Hunter Riley, found out about this enterprise and Defendant Zelasko and Co-Defendant Lane conspired to murder him in order to silence him. Defendant Zelasko contends that the killing of Hunter Riley was an accident and that she did not participate in the conspiracy to sell performance enhancing drugs and therefore had no motive to murder Mr. Riley.

Defendant Zelasko is seeking to present the testimony of a witness, Miranda Morris, in order to suggest that a third party, Casey Short, was the other member of the two-person conspiracy along with Co-Defendant Lane. According to an affidavit proffered by the defense, Ms. Morris will testify that in April 2011, while a member of the Canadian Snowman team, Ms. Short sold an anabolic steroid known as White Lightning to Ms. Morris and other Canadian teammates during meetings at the Canadian training facility. A chemist who works closely with anabolic steroids submitted an accompanying affidavit in the court below, stating that structurally, ThunderSnow is an ester (in other words a chemical derivative) of White Lightning. Defendant Zelasko does not deny that this is propensity evidence. It is being offered to suggest that Ms. Short has a "propensity" to sell a substantially similar drug within the same insular winter sports community, and therefore raise the possibility that Ms. Short is the true

coconspirator in this case. By casting doubt on her involvement in the drug selling conspiracy, Defendant Zelasko argues that this evidence casts considerable doubt on the government's theory that she intentionally shot and killed Hunter Riley to cover up her role in the conspiracy. Defense counsel contends, and the government does not dispute, that the propensity evidence is the only evidence available to present the defense's theory that Ms. Short was the second coconspirator in this case.

To support its case, the government seeks to introduce an email sent by Co-Defendant Jessica Lane to Peter Billings. In the email, Co-Defendant Lane requests Mr. Billings's help with a problem — namely, the suspicions of an unnamed member of the male team and her partner's desire to “keep him quiet” — that has arisen in connection with her “business.”^b The government argues that the email is strong evidence of a two-person drug selling conspiracy run by Co-Defendant Lane and her “partner” because of the reference to their “business” with the female team. Further, the email suggests that Mr. Reilly's death was an effort to “keep him quiet” and not the unfortunate byproduct of the dangers inherent in sports involving firearms. Defendant Zelasko argues that this email is inadmissible against her under FRE 804(b)(3) and the *Bruton* doctrine.

Analysis

A. Admissibility of the “Reverse 404(b)” Evidence

FRE 404(b) typically is invoked by defense counsel to prevent the government from introducing propensity evidence against the criminal defendant. When the defendant offers propensity evidence of a third party in order to exculpate herself, this type of evidence has been commonly referred to as “reverse 404(b)” evidence. *See, e.g., United States v. Seals*, 419 F.3d

^b The full text of the email is reproduced in Section C, *infra*, of this opinion.

600, 606 (7th Cir. 2005). The admissibility of “reverse 404(b)” evidence is a matter of first impression in this Circuit.

The government’s contention is that the text of FRE 404(b)(1) plainly bars the admission of Ms. Morris’s testimony. FRE 404(b)(1) states 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.” The government argues that the plain text of the Rule bars admitting propensity evidence of any *person*. Further, the government buttresses this argument by pointing out that the drafters explicitly provided a notice provision in FRE 404(b)(2), requiring the government to provide notice to a criminal defendant in the few limited exceptions within which the government is allowed to use such evidence. The government argues that this demonstrates that the drafters were careful in choosing the word “person” at certain times and “defendant” at others.

Defendant Zelasko responds by invoking the common law tradition from which this Rule evolved. While the plain language of the Rule initially suggests this evidence is inadmissible, the Defendant argues that the purpose of the Rule is to prevent prejudice against a criminal *defendant*.

Although the plain text of FRE 404(b) appears to bar propensity evidence, we hold that FRE 404(b) does not apply when the defendant is offering evidence of the propensity of a third party in order to exculpate herself.

While the government’s position is appealing in its simplicity, we are aware of only one Court of Appeals that has adopted that view. In *United States v. Lucas*, the Sixth Circuit ruled that the defendant was prohibited from introducing evidence of a third party’s conviction for drug possession with intent to distribute. 357 F.3d 599, 606 (6th Cir. 2004). *Lucas* held that “the

standard analysis of Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party, not charged with any crime.” *Id.*

Despite the plain language of the Rule, a majority of Circuits that have considered the issue hold that FRE 404(b) does not bar propensity evidence when it is offered by a criminal defendant. *See, e.g., United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005). While we do not base our decisions on a circuit scorecard, we find the reasoning of the Circuits cited in the defendant’s brief to be compelling. FRE 404 is rooted in common law and the policy at common law was to protect the criminal defendant from a conviction based on evidence of prior acts. *See* Charles Wigmore, *Wigmore’s Code of the Rules of Evidence in Trials at Law* §§ 355-56, p. 81 (3d ed. 1942). While the text of FRE 404 obviously serves as our starting point, the Advisory Committee Notes do not shed any more light on the issue for us. The Committee Notes do not directly discuss whether defendants can introduce propensity evidence of third parties.

Most compelling, the policy reasons behind FRE 404 apply here with much weaker force, if any force at all. The third party is not at risk of conviction in this case. The evidence will not prejudice a jury against her because she is not a party to this case. *See, e.g., Montelongo*, 420 F.3d at 1174.

Defendant Zelasko will offer this evidence as tending to negate her guilt and show that a third party, Ms. Short, was the second coconspirator. As previously stated, Ms. Short is not a defendant, and there is no risk of prejudice to her. The jury is fully capable of following the theory offered by the defense and choosing whether or not to credit it.

B. The Morris Testimony and Due Process

While the District Court held that Ms. Morris's testimony was not barred by FRE 404(b), the court alternatively held that Defendant Zelasko's motion to admit the testimony must be granted in order to protect her constitutional right to present a complete defense pursuant to the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment.

While conceding that in some cases a defendant's constitutional right to present a complete defense may trump evidentiary rules, the government argues that this right is not so broad as to encompass any evidence that may potentially cast doubt on a defendant's guilt. Policy-driven evidentiary rules commonly limit the admissibility of such evidence.

At its core, the government's argument is that Ms. Morris's testimony does not present strong enough evidence to trigger a constitutional right. In its brief, the government contrasts the facts of this case with *Chambers v. Mississippi*, in which the Supreme Court held that the defendant's constitutional right to admit a third party's confessions to the crime outweighed the fact that admission of the confessions was properly barred as hearsay. The government argues that far from the "smoking gun" exculpatory evidence offered in *Chambers*, Ms. Morris's testimony merely shows that Ms. Casey sold a different drug, in a different country, to different people. The government maintains that such speculative evidence does nothing to cast doubt on Defendant Zelasko's guilt in the present matter, and thus, excluding this evidence will not violate her constitutional rights.

Extensive case law supports the principle that "few rights are more important than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). While this suggests that evidentiary rules must at times yield to the ends of justice, neither the Supreme Court nor our sister Circuits have identified a clear and articulable standard

dictating what weight of exculpatory evidence triggers this constitutional right. The Supreme Court has stated that “[r]estrictions 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). At the same time, “[t]he right [to offer relevant evidence] may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” *Id.* at 149. Thus, our analysis requires weighing the government’s stated interest in restricting given evidence against the Defendant’s strong interest in presenting a complete defense. Where the evidence offers substantial probative value to the defense and where the policy interests furthered by a given evidentiary rule are not sufficiently “legitimate,” the evidence must be admitted on constitutional grounds.

Defendant seeks to introduce evidence that one of her fellow teammates sold an extremely similar anabolic steroid in a nearly identical context, less than a year before Mr. Riley was shot. This evidence is certainly probative in that it casts significant doubt on the Defendant’s participation in the drug-selling conspiracy and thus calls into question the government’s theory of the case. Rather than showing a mere past sale of a different drug, the affidavit shows that Casey Short has a propensity to distribute anabolic steroids to winter sports teams. This evidence is specific enough and probative enough to cast doubt on the Defendant’s guilt. Further, as the Defendant argued below, this is the only available evidence linking Ms. Short to the drug selling conspiracy. This raises additional concerns, as barring the evidence would seriously hinder the Defendant’s ability to present her defense to the jury.

On the other side of the equation, it is not at all clear what policy goals would be furthered by excluding Ms. Morris’s testimony. While the government rightly argues that promoting judicial expediency and reducing prejudice are legitimate policy goals in a general

sense, there is nothing to suggest that these policies will be undermined by admitting Ms. Morris's testimony in the present case. Judicial expediency is not threatened, because this evidence will not bog down the courts— quite the contrary, the Defendant notes that Ms. Morris's testimony is offered as part of a relatively modest defense. Similarly, there is no risk of prejudice in admitting the testimony, as Ms. Short is not a party to this action. Thus, we fail to identify a government interest furthered by the exclusion of the evidence.

Evidentiary rules “may not be applied mechanistically to defeat the ends of justice.” *Chambers*, 410 U.S. at 302. In finding the evidence sufficiently probative to outweigh the government's policy-driven interests in excluding it, we hold that admitting Ms. Morris's testimony falls within Defendant Zelasko's constitutional right to offer a complete defense, and we thus affirm the District Court's decision to admit the testimony on these grounds.

C. Admissibility of the Lane Email under FRE 804(b)(3)

The government next argues that the District Court erred in ruling that the email is inadmissible under the hearsay rules. It is the government's position that the entire contents of the email are admissible under FRE 804(b)(3) as statements against penal interest.^c For the reasons set forth below, we disagree with the government that the email is an admissible statement against penal interest and affirm the decision of the District Court.

1. Legal Standard

FRE 802 provides that hearsay statements are not admissible unless a federal statute, rule prescribed by the Supreme Court, or the Federal Rules of Evidence otherwise provide. FRE 804

^c The email in its entirety is admissible against Co-Defendant Lane as a statement by a party opponent under FRE 801(d)(2). The issue before this court, however, is whether the email may also be admitted against Defendant Zelasko. It should also be noted that the parties below did not address the email's admissibility against Defendant Zelasko under FRE 801(d)(2)(E) as a statement of a coconspirator in furtherance of a conspiracy. As such, our analysis is confined to whether the district court properly analyzed the email as a statement against penal interest pursuant to FRE 804(b)(3).

contains exceptions to the general prohibition on admitting hearsay statements made by unavailable declarants. FRE 804(a) sets forth criteria for being unavailable and FRE 804(b) outlines the exceptions to the bar on admitting hearsay evidence.

FRE 804(b)(3) provides, in relevant part, that a statement is admissible if:

(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...

Our analysis is confined to this requirement of FRE 804(b)(3).

2. Discussion

Co-Defendant Lane is unavailable within the meaning of 804(a)(1), which provides that a witness is unavailable if she is “exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies.” Co-Defendant Lane will be exercising her Fifth Amendment privilege not to testify. Thus, if the email from Co-Defendant Lane to Mr. Billings conforms to one of the exceptions outlined in FRE 804(b), it will not be excluded as hearsay. Because, as noted above, the government has waived any argument that the email is admissible under FRE 801(d)(2)(E) as a coconspirator statement, the only applicable exception for the email is FRE 804(b)(3).

The government argues that the entire email is admissible under FRE 804(b)(3) as a statement against Co-Defendant Lane’s penal interest. Defendant Zelasko counters that neither the email itself, nor any of the individual statements contained therein, have “so great a tendency . . . to expose [Co-Defendant Lane] to . . . criminal liability” so as to be admissible under FRE 804(b)(3). The full email is reproduced below:

Peter,

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.

Love,
Jessie

In *Williamson v. United States*, the Supreme Court acknowledged that “statement,” as it is used in FRE 804(b)(3), has two possible interpretations. The first interpretation is that statement includes an “extended declaration” and would permit the admission of an “entire [narrative] — even if it contains both self-inculpatory and non-self-inculpatory parts — so long as in the aggregate the [narrative] sufficiently inculpates” the declarant. *Williamson v. United States*, 512 U.S. 594, 599 (1994). The second interpretation is that statement means “a single declaration or remark” that is “individually self-inculpatory.” *Id.* The Court rejected the first interpretation and held that FRE 804(b)(3) does not permit the admission of collateral statements that, while part of a broader narrative, are not self-inculpatory standing alone. *Id.* at 599-600.

The Supreme Court endorsed the narrower reading of statement because it is most consistent with the principle behind the exception. FRE 804(b)(3) is premised on “the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.” *Id.* at 599. This rationale, however, does not extend to collateral statements that are not self-inculpatory. The fact that a narrative, on the whole, is inculpatory does not, in and of itself, make each component of the narrative more credible. *Id.* at 599. The Court further reasoned that “[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.* at 599-600. Thus the

Supreme Court decided that the approach that best honors the rationale of the exception is to admit statements that directly inculcate the declarant but to exclude statements that are collateral to the inculpatory admission.

Whether a statement is against the declarant's penal interest "can only be determined from viewing it in context." *Id.* at 603. The proper inquiry under FRE 804(b)(3) is 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 (internal citations and quotations omitted); *see also United States v. Barone* 114 F.3d 1284, 1295 (1st Cir. 1997) ("[A] totality of the circumstances test should be applied to the particular statement at issue in order to determine whether it comports with the rationale upon which Rule 804(b)(3) is premised.").

The statements at issue in this case present a close call. The government stresses that *Williamson* requires us to look at the totality of the circumstances to determine whether the email is admissible under FRE 804(b)(3). Cumulatively, the statements in the email imply that Co-Defendant Lane is involved in an illicit "business" that she fears will be imminently discovered and that she and her partner are in the beginning stages of planning how to address the problem. Thus, the government argues that the entire email is against Co-Defendant Lane's penal interest and admissible under FRE 804(b)(3).

We are more persuaded by Defendant Zelasko's argument that *Williamson's* totality of the circumstances approach still does not permit us to rule on the admissibility of each discrete statement based on the cumulative effect of all of the statements contained in the email. Instead,

the email contains five individual statements.^d None of these statements tends to expose Co-Defendant Lane to criminal liability. Even the most damning statement in the email about the “business” that Lane and her partner run does not expose Lane to criminal liability because it does not reveal the nature of the business. The more cryptic statements such as the statement that Lane’s partner is concerned about “keeping [the male team member] quiet” are even less likely to subject Lane to criminal liability. Lane does not express agreement with her partner and instead communicates her lack of knowledge as to what her partner “has in mind” as a method of silencing the male team member. These statements are non-inculpatory statements that *Williamson* held should not be admitted under FRE 804(b)(3).

The government contends that the *Williamson* standard should be relaxed in this case because the statement at issue was not made to a law enforcement officer and is therefore more reliable than a collateral statement made in a formal confession. The government posits that *Williamson* and its progeny were especially concerned about collateral statements made by persons caught in the act of wrongdoing that point the finger at another party. It is likely that statements made under these circumstances are attempts to “curry favor” with law enforcement by shifting blame to another party and are thus not truly against the declarant’s penal interest. *Barone*, 114 F.3d at 1302. The email, on the other hand, was not meant to curry favor with its intended recipient or to shift blame to Co-Defendant Lane’s “partner.” Instead, the email communicates Co-Defendant Lane’s involvement in a drug distribution conspiracy and her growing concern that the conspiracy has been discovered. Thus, the government argues, the entire email falls within the declaration against penal interest exception. The government,

^d These statements are 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.”

however, is unable to direct us to any binding authority for the proposition that collateral statements that form part of a generally self-inculpatory, informal narrative to non-law-enforcement are subject to a relaxed standard; *Williamson* itself most certainly does not so hold. Under that standard that *Williamson* requires us to apply, the collateral statements in the email concerning Co-Defendant Lane's partner do not implicate Co-Defendant Lane in any criminal activity and are therefore inadmissible under FRE 804(b)(3) as interpreted in *Williamson*.

3. Revisiting *Williamson*

The dissent scolds us for our continued reliance on *Williamson*. As an intermediate appellate court, it is not our role to revisit recent and binding precedent of the Supreme Court of the United States. We adhere to the "preferred course" of stare decisis, which "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Moreover, although *Williamson* is often, as here, difficult to apply, that in itself is not a reason to reject a standard carefully crafted by the Court – a standard that federal courts have applied effectively for more than twenty years.

D. The Nontestimonial Email and the *Bruton* Doctrine

The government next contends that the District Court erred in barring the email on grounds that admission would violate the Confrontation Clause of the Sixth Amendment. In arguing that the email is admissible, the government relies on cases from other Circuits holding that the Supreme Court's opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), restricts the *Bruton* doctrine to testimonial hearsay by non-testifying co-defendants. Because the email at issue is clearly nontestimonial, the government argues the email is not covered by the Confrontation Clause. Defendant Zelasko counters that the *Bruton* doctrine remains fully intact,

post-*Crawford*, because the Supreme Court addressed wholly separate issues in those cases. That is, Defendant Zelasko argues *Crawford* is concerned with the reliability of hearsay (as tested by cross-examination) admitted against an accused, whereas *Bruton* deals with the prejudice a defendant suffers when presented with her non-testifying co-defendant's inculpatory statement. We agree with Defendant Zelasko and, for the following reasons, affirm the decision of the District Court.

In *Bruton v. United States*, the Supreme Court held that admitting the confession of a non-testifying co-defendant that implicates the defendant at a joint trial, even with a limiting instruction to the jury, violates the Confrontation Clause. 391 U.S. 123, 135 (1968). In light of this long-standing rule, it appears clear to us that the introduction of Co-Defendant Lane's email would violate Defendant Zelasko's rights under the Sixth Amendment. Lane will not testify in the joint trial with Zelasko, and Lane's email may well implicate Zelasko in the eyes of the jury.^e

More than forty years after *Bruton*, the Supreme Court decided *Crawford* and held that the Confrontation Clause bars hearsay statements by a witness that are testimonial in nature, unless the witness is unavailable and the defendant was previously able to cross-examine the witness, regardless of whether such statements are deemed reliable by a trial judge. *Crawford*, 541 U.S. at 53-54. In so holding, the Court exempted so-called "nontestimonial" hearsay from *Crawford*'s proscription, *id.* at 68, and has not yet provided a definitive distinction between testimonial and nontestimonial statements. *See, e.g., Michigan v. Bryant*, 131 S. Ct. 1143

^e The government argues in the alternative that Co-Defendant Lane's reference in the email to her "partner" does not so blatantly identify Defendant Zelasko as her accomplice as to raise a *Bruton* issue. The government failed to make this argument at the District Court level and it is therefore not preserved for appellate review. Even so, the seemingly neutral pronoun "partner" is sufficiently prejudicial to violate the *Bruton* doctrine. *Cf. Gray v. Maryland*, 523 U.S. 185, 193 (1998) ("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. . . .").

(2011). Nonetheless, the Supreme Court has provided enough guidance with its “primary purpose” test for lower courts to categorize out-of-court statements clearly “taken for use at trial” as testimonial, and other hearsay as nontestimonial. *Id.* at 1155. Even though we now hold otherwise, some Courts of Appeals have taken this general dichotomy within *Crawford* jurisprudence to mean that the Confrontation Clause and, by extension the *Bruton* doctrine, only apply to testimonial hearsay. *See, e.g., United States v. Dale*, 614 F.3d 942, 949 (8th Cir. 2010).

These decisions miss the point of the *Bruton* doctrine. *Crawford* and its testimonial/nontestimonial distinction merely stand for the proposition that “the only indicium of reliability [for testimonial hearsay] . . . is the one the Constitution actually prescribes: confrontation.” *Crawford*, 541 U.S. at 68-69. Rather than constitutional reliability, *Bruton* deals with the entirely separate question of intractable prejudice to a defendant by the admission of a non-testifying co-defendant’s inculpatory hearsay statement. Although confrontation is the solution to both *Bruton* and *Crawford*, they remain legally distinct issues. *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).

We hold, as a matter of law, that a defendant is unconstitutionally prejudiced by the admission of a co-defendant’s inculpatory statement, whether it is testimonial or nontestimonial, unless the co-defendant is available for cross-examination. This prejudice cannot be cured by a jury instruction. Therefore, we find that the District Court properly excluded Co-Defendant Lane’s email, and we conclude that it would violate the Confrontation Clause to admit the email in a joint trial of Co-Defendant Lane and Defendant Zelasko, if Lane does not testify.^f As the

^f At the hearing on July 16, 2012, counsel for Co-Defendant Lane stated to the District Court that Lane would be exercising her Fifth Amendment right not to testify at trial.

Supreme Court has stated, “[h]aving decided *Bruton*, we must face the honest consequences of what it holds.” *Cruz v. New York*, 481 U.S. 186, 193 (1987).

MARINO, Circuit Judge, dissenting.

A. Admissibility of the “Reverse 404(b)” Evidence

The majority acknowledges that the plain text of FRE 404(b) clearly prohibits the introduction of propensity evidence – regardless of the party offering it. Despite such obvious indications of the drafters’ intent, the majority chooses to impose its own view of what the rule *should be*. Neither defense counsel nor the majority of this court argues that the plain text of FRE 404 permits the admission of propensity evidence by defense counsel. Such an argument would be disingenuous or, at a minimum, completely unpersuasive. The drafters clearly chose to prohibit propensity evidence on a broader scale than the common law tradition had provided.

Faced with directly conflicting language in the Rule, the majority falls back on policy, arguing that “the policy reasons behind FRE 404 apply here with much weaker force, if any force at all.” While it is true that the third party is not at risk of conviction in this case, prejudice to a defendant is not the only policy consideration behind FRE 404. Rather, the language of the Rule and the choice to bar *all* propensity evidence, highlight that the drafters were concerned generally with the inherently prejudicial effect of this type of evidence. The Sixth Circuit in *United States v. Lucas* realized this. 357 F.3d 599, 606 (6th Cir. 2004). The court observed that the Advisory Committee Notes “explain that rules such as Rule 404 and those that follow it are meant to prohibit certain types of evidence that are otherwise clearly ‘relevant evidence,’ but that nevertheless create more prejudice and confusion than is justified by their probative value.” *Id.* This reasoning convinced the court to hold that the Rule and the following notes demonstrate that “prior bad acts are generally not considered proof of *any* person’s likelihood to commit bad

acts in the future and that such evidence should demonstrate something more than propensity.”
Id.

The plain text of FRE 404(b) and the accompanying Advisory Committee Notes reflect the drafters’ intent to limit the use of propensity evidence, regardless of which party is offering it. The majority opinion attempts to return to a common law tradition that the drafters chose to affirmatively move away from. In this case, defense counsel does not even attempt to argue that Ms. Morris’s testimony is anything other than propensity evidence. It is clearly barred by FRE 404(b).

B. The Morris Testimony and Due Process

As the majority would have it, so long as evidence is being offered by the defense, the Federal Rules of Evidence should fall away, becoming nothing more than advisory guidelines for a judge to consider in passing. While “the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense,” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), it is well established that the Constitution “does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence.” *Lucas*, 357 F.3d at 606.

In *Lucas*, the defendant wished to offer evidence of a third party’s conviction for possessing and distributing cocaine in order to cast doubt on the government’s theory that Lucas knowingly possessed cocaine found in a car she was driving. *Id.* at 605-06. The Sixth Circuit held that barring this evidence did “not prevent[] [Lucas] from presenting a complete defense,” because she was still able “to explore her theory that [someone else] was in fact the culprit.” *Id.*

Ms. Morris’s testimony is significantly more attenuated than the evidence rejected in *Lucas*. Defendant Zelasko is not attempting to show that someone else committed the crime of which she is accused. Instead, she wishes to show that a third party, Ms. Short, sold anabolic

steroids in Canada. The Defendant argues, and the majority surprisingly agrees, that because this evidence casts some doubt on one possible motive Defendant Zelasko may have had, it is sufficiently exculpatory to override the Federal Rules of Evidence.

There is nothing preventing Defendant Zelasko from arguing that she was not a participant in the ThunderSnow conspiracy, and that the shooting was accidental. As a result, Defendant Zelasko is not entitled to any constitutional right to present Ms. Morris's testimony. Casting light on Ms. Short's past activities adds little more than texture to the defense, and the motion should be denied accordingly.

C. Admissibility of the Lane Email under FRE 804(b)(3)

In the overwhelming majority of cases, adherence to stare decisis is the best policy. Courts, however, should not cripple themselves by following precedent that is "unworkable or badly reasoned," especially in cases involving evidentiary rules. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Stare decisis is neither an "inexorable command" nor a "mechanical formula of adherence to the latest decision." *Id.* at 828. By following *Williamson*, I fear that today's majority has elected to walk the path of blind obedience.

1. *Williamson* Cannot Be Applied Consistently

When a court must determine whether a confession or statement is admissible under FRE 804(b)(3), *Williamson* requires the judge to parse the declarant's narrative into discrete "statements." The judge must then, applying a totality of the circumstances approach, determine which of these discrete statements are self-inculpatory. Assuming there are corroborating circumstances that illustrate their trustworthiness, those self-inculpatory statements will be admissible under the exception. All "collateral" statements that are not self-inculpatory do not fall within the exception and thus must be excluded.

Take the following hypothetical case. A man is lingering across the street from a bodega that has just been robbed. During the robbery, the store clerk is shot and killed. The man outside the bodega watches as detectives canvass the scene, speaking to witnesses. As the detectives walk across the street, the man approaches them and says, “I just want to get this off my chest and confess to helping in that robbery.” He then proceeds to tell detectives that he acted as a look-out for the group that robbed the store.

Under *Williamson*, each sentence in this confession must be independently examined and admitted only if it is self-inculpatory. Any non-self-inculpatory statements, and especially any self-exculpatory statements, should not be admitted. *Williamson v. United States*, 512 U.S. 594, 600-01. But the application is considerably less clear than the rule suggests. The sentence “I just want to get this off my chest and confess to helping in that robbery” is simultaneously inculpatory and exculpatory. On one hand, the declarant is certainly exposing himself to criminal liability by admitting to his role in a robbery and felony murder. Any prosecutor would use it as strong proof of guilt. On the other hand, he is trying to “curry favor” with law enforcement—a tactic that *Williamson* was especially concerned with— by voluntarily confessing. Perhaps he believes that it is inevitable that the detectives will approach and question him and thereby elicit a damning statement that he would prefer to preempt. Perhaps he believes that his candor, coupled with his minimal role as a lookout, will help him to avoid serious charges. Perhaps he wants to point the finger at the people who carried out the actual robbery. Or perhaps he is a deeply religious man with no ulterior motive who truly wishes to confess and face the consequences of his conduct. Each of these rationales is equally plausible and, under *Williamson*, each has different implications for whether the statement in its entirety can be admitted into evidence.

This hypothetical also illustrates the difficulty in pinpointing what exactly constitutes a “statement.” As interpreted in *Williamson*, “statement” means “a single declaration or remark.” *Id.* at 599. “I just want to get this off my chest and confess to helping in that robbery” is a complete sentence, and thus could be considered a “single declaration or remark” so as to constitute one statement. But the sentence also reveals two things: first, that the declarant wants to get something off his chest, and second, that the declarant participated in the robbery. Would *Williamson* require the court to consider first whether “I want to get this off my chest” fits within the exception and next consider the confession that the declarant helped in the robbery? If the former portion of the sentence is not self-inculpatory, must it be excluded from evidence despite the fact that it provides context for the second portion of the sentence? Courts could easily reach divergent conclusions on this question, illustrating how malleable the *Williamson* test is in practice.

Like the hypothetical, the statement at issue is a prime example of how unworkable *Williamson* is. For example, the majority finds that the statement “I really need your help” is not against Co-Defendant Lane’s penal interest and is thus inadmissible. The majority is almost correct; in a vacuum, a request for help is not self-inculpatory. However, whether the request for help is self-inculpatory can only be explained by looking to the request in context. If Co-Defendant Lane fears that the male team member will report her for distributing drugs (which is presumably the “business” to which she refers), then the request for help is feasibly a request for help in silencing the male team member and is thus self-inculpatory. But looking to other statements to provide context is arguably what *Williamson* prohibits. As *Williamson* cautions, each statement should be examined independent of collateral statements because, , “one of the

most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.” *Williamson*, 512 U.S. at 599-600.

This leaves the court to decide whether each independent statement contained within the email is self-inculpatory using the manipulable “totality of the circumstances” approach. Yet the *Williamson* rationale also prohibits the trial judge from looking to the other statements in the narrative or the inculpatory thrust of the narrative as factors relevant to the totality of the circumstances. Thus the determination of whether a statement is against the declarant’s penal interest cannot be guided by a true totality of the circumstances approach. Instead, the determination will vary depending on the whims and beliefs of the trial judge. For example, a judge might conclude that the statement “[o]ne of the members of the male team found out and threatened to report us if we don’t come clean” is against Co-Defendant Lane’s penal interest because it shows that she is embroiled in activity that another athlete thinks is reportable conduct. A judge might just as reasonably conclude that it is a neutral collateral statement because it could not subject Co-Defendant Lane to criminal charges and is thus excludable hearsay. The end result of this piecemeal analysis will be the admission of a series of heavily redacted and choppy statements that are ostensibly stripped of the extraneous, non-inculpatory baggage that once gave them context.

2. Precedent Interpreting *Williamson* Does Not Provide Clear Guidance

The hypothetical described above and the actual statements at issue in this case illustrate how unpredictable the *Williamson* rule is. Case law is of little instructive value. To put it frankly, the decisions issued by federal courts interpreting FRE 804(b)(3) are all over the map, if not off the map entirely. For example, in *United States v. Hajda* the Seventh Circuit held that it was against the declarant’s penal interest to admit that his son joined the S.S. in Germany

because “[g]iven the danger of guilt by association, it seems to us that a declarant’s statement that his son collaborated with the Nazis is contrary to a father’s interest when made at a Nazi collaboration trial.” 135 F.3d 439, 444 (7th Cir. 1998). The statement was an admission against penal interest despite the fact that nothing contained within the statement could have subjected the declarant to criminal liability. Three years prior, however, the same court narrowly construed FRE 804(b)(3), stating that “the hearsay exception does not provide that any statement which ‘possibly could’ or ‘maybe might’ lead to criminal liability is admissible; on the contrary, only those statements that ‘so far tend to subject’ the declarant to criminal liability, such that ‘a reasonable person would not have made it unless it were true’ are admissible.” *United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995). Thus, a declarant’s statement that he was in the same room where police found illegal firearms was not an admissible declaration against penal interest because of the speculative nature of any criminal prosecution based on the statement. These divergent interpretations of the Rule’s breadth, decided by the same circuit within three years, demonstrate the unworkability of the penal interest exception jurisprudence.

3. Alternative Approach

When the Supreme Court decided *Williamson*, it claimed the blanket exclusion of collateral statements was consistent with the underlying theory of FRE 804(b)(3) that “reasonable people ... tend not to make self-inculpatory statements unless they believe them to be true.” *Williamson*, 512 U.S. at 600-01. Neither the Advisory Committee Notes nor the common law tradition from which the exception developed supports this conclusion. *See id.* at 614-17 (Kennedy, J., concurring in judgment). In the hope that in the future the Supreme Court will reconsider *Williamson*, I note that there are undoubtedly several better approaches to determining whether a statement is admissible under FRE 804(b)(3). For example, one potential

approach is that outlined by Justice Kennedy in his concurring opinion in *Williamson*. Justice Kennedy proposed that courts should first look to whether the declarant made a statement that contains a fact against penal interest. If so, the court should admit all related statements unless the related statement is “so self serving as to render it unreliable” or made “under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment. *Id.* at 620 (Kennedy, J., concurring in judgment). *See also United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997).

For the reasons explained above, I dissent from the majority’s holding on this point of law and its continued reliance on *Williamson*. Were this a majority opinion, I would reach a decision as to which approach would best serve the statement against penal interest exception and remand to the trial court for a decision consistent with that approach.

D. The Nontestimonial Email and the *Bruton* Doctrine

Crawford v. Washington, 541 U.S. 36 (2004), and its progeny make clear that the right to confrontation applies only to testimonial hearsay. I see no reason in logic or in law for the majority to exempt the *Bruton* doctrine from this constitutional principle. Indeed, nearly all the Circuits that have decided the issue have concluded that *Crawford* constrains *Bruton* to testimonial out-of-court statements by a non-testifying co-defendant. *See, e.g., United States v. Dale*, 614 F.3d 942 (8th Cir. 2010).

Yet the majority seeks to separate *Crawford* from *Bruton* on the erroneous theory that “*Crawford* is concerned with the reliability of hearsay (as tested by cross-examination) admitted against an accused, whereas *Bruton* deals with the prejudice a defendant suffers when presented with her non-testifying co-defendant’s inculpatory statement.” The very statements at issue in *Bruton* were testimonial in nature. Bruton’s co-defendant confessed to a postal inspector who

was investigating the charged robbery. *Bruton v. United States*, 391 U.S. 123, 124-25 (1968). Thus when it formulated its rule against co-defendant statements at joint trials, the Supreme Court was concerned with the admission of testimonial 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 (internal quotations omitted).

As the Supreme Court’s Confrontation Clause jurisprudence stands today, Defendant Zelasko’s Sixth Amendment rights would not be violated if Co-Defendant Lane’s email were introduced in a joint trial. The Supreme Court has noted that an “accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* at 51. When Co-Defendant Lane sent the email, she meant to obtain the assistance of her long-term boyfriend in furtherance of the charged conspiracy, not to advance the criminal prosecution of Defendant Zelasko. Co-Defendant Lane “simply was not acting as a *witness*; she was not *testifying*.” *Davis v. Washington*, 547 U.S. 813, 828 (2006) (emphasis in original). The email is nontestimonial in nature, and Defendant Zelasko is not constitutionally entitled, under the Confrontation Clause, to cross-examine her co-defendant on such statements. I would hold that it is wholly consistent with the *Bruton* doctrine to admit the email at a joint trial.

E. Conclusion

The majority today resolves four questions of law with four wrong-headed answers, gratuitously restricting the government’s ability to do justice. I dissent.

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,
-against-
ANASTASIA ZELASKO
Respondent.

October 1, 2013

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limited to the following certified questions:

- I. Whether, as a matter of law, Federal Rule of Evidence 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged.
- II. Whether, under *Chambers v. Mississippi*, Defendant Anastasia Zelasko's constitutional right to present a complete defense would be violated by exclusion of evidence of a third party's propensity to distribute illegal drugs.
- III. Whether *Williamson v. United States* should be overruled insofar as it provides a standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest, and if so, what standard should replace it.
- IV. Whether, at a joint trial, the statement of a non-testifying co-defendant implicating the defendant is barred as violative of the Confrontation Clause under *Bruton v. United States*, even though the statement was made to a friend and thus would qualify as a non-testimonial statement within the meaning of the Court's subsequent decision in *Crawford v. Washington*.

· The Court has requested the parties to brief this issue. Petitioner United States, accordingly, will argue that *Williamson* should be overruled, advocate for a standard to replace it, and argue the application of that standard to the instant case. Respondent Zelasko will argue for reaffirmation of *Williamson* and argue that its standard was correctly applied by the courts below.