No. 13-452

IN THE

SUPREME COURT OF THE UNITED STATES

February Term 2014

UNITED STATES OF AMERICA,

Petitioner,

-- against –

ANASTASIA ZELASKO,

Respondent.

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

BRIEF FOR RESPONDENT

Team 16
Counsel for Respondent

QUESTIONS PRESENTED

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.

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STATEMENT OF THE CASE

Statement of Facts

Anastasia Zelasko ("Ms. Zelasko") and Jessica Lane ("Ms. Lane") were members of the women's United States Snowman Pentathlon Team ("Snowman team"). (R. 1). Ms. Zelasko joined the women's Snowman team around September 6, 2010. (R. 1). Less than a year later, on or about August 5, 2011, Ms. Lane joined the women's Snowman team. (R. 1). Peter Billings was the coach of the U.S. women's Snowman Team and also Ms. Lane's boyfriend. (R. 1). The Snowman Team chiefly competes in the Snowman Pentathlon at the World Winter Games. (R. 1). This competition is a physically demanding game consisting of five events: dogsledding, ice dancing, aerial skiing, rifle shooting, and curling. (R. 1).

The U.S. Snowman team in February 2012 competed in trials for the World Winter Games in Remsen National Park, which is an international competition. (R. 8). On February 3, Ms. Zelasko practiced alone on a rifle range that had been closed during the trials. (R. 8). Adjacent to the range was a portion of a dogsled course on which several male members of the U.S. Snowman team were competing. (R. 8). Around mid-morning at 10:15, Hunter Riley, a member of the men's U.S. Snowman team, was killed by a stray bullet from Ms. Zelasko's rifle. (R. 8). Mr. Riley was later revealed to be cooperating with the DEA as an undercover informant. (R. 9).

On the evening of the February 3, a search warrant was executed on Ms. Zelasko's house. (R. 8). The search yielded roughly $5,000 in cash along two 50-milligram doses of an anabolic steroid known as "ThunderSnow." (R. 8.) ThunderSnow is a performance-enhancing drug that is an ester of another anabolic steroid known as bolasterone, more commonly known in Canada as "White Lightning." (R. 28). In other words, ThunderSnow is an offshoot of "White Lightning"

through a chemical modification which is virtually undetectable by contemporary blood tests. (R. 27). Information suggests "White Lightning" has been extensively used by members of several eastern European teams that compete in the international World Winter Games competition. (R. 28).

According to Doctor Henry Wallace, a respected expert on performance-enhancing drugs used by professional athletes, ThunderSnow is generally injected into the bloodstream as the primary delivery method. (R. 28). Typically, ThunderSnow is injected daily in doses between 50 and 100 milligrams. (R. 28). The steroid is then "cycled" by using one dose per day for a few months and then taking no doses for several weeks. (R. 28). For sale and delivery of the steroid, a quantity of 250 50-milligrams is considered consistent to meet black-market demands. (R. 28). Conversely, a quantity of two 50-milligram is considered consistent with strict personal use and not sale. (R. 28).

Under the direction of the DEA, Mr. Riley repeatedly sought out Ms. Lane to buy ThunderSnow for his personal use. (R. 2). Each time, on or about November 3, 2011, and December 9, 2011, Ms. Lane declined. (R. 3). On or about December 10, 2011, Peter Billings observed the Ms. Zelasko and Ms. Lane in an argument. (R. 3). The argument ended in Ms. Lane shouting, "Stop bragging to everyone about all the money you're making!" (R. 3). Peter Billings later confronted Ms. Lane about being involved in distributing illegal steroids to members of the men and women's U.S. Snowman team. (R. 3). Ms. Lane denied the accusation. (R. 3). Roughly a month after the confrontation, Peter Billings received this email from Ms. Lane: "Peter, I really need your help. I know you've suspected before about the business my partner and I have been running with the female team. One of the members of the male team found out and threatened to report us if we don't come clean. My partner really thinks we need to figure out how to keep him

quiet. I don't know what exactly she has in mind yet. Love, Jessie." (R. 3).

On February 4, 2012, police officials executed another search at the U.S. Snowman team's training facility. (R. 8). This search revealed 12,500 milligrams of ThunderSnow, estimated at $50,000, hidden in an equipment room to which all female team members and staff had exclusive access. (R. 8). Ms. Lane's house was also searched that same day where twenty more doses of ThunderSnow, approximately $10,000 in cash, and a laptop were seized. (R. 8). Finally on February 4, 2012, Casey Short's apartment was searched and no evidence was found. (R. 8). Ms. Short was a member of the Canadian Snowman winter from at least February 2009 until June of 2011 when she transferred to the U.S. Snowman team. (R. 24).

According to an affidavit by Miranda Morris, who was a member of the Canadian Snowman team with Ms. Short until she transferred, Ms. Short sold the anabolic "White Lightning" to Ms. Morris and other teammates. (R. 32). Many of the transactions occurred inside the Canadian Training facility. (R. 32). After Ms. Short transferred to the U.S. women's Snowman team, their practice times noticeably improved. (R. 2). Prior to her arrival, the female Snowman team had never ranked above sixth place in the World Winter games or similar competitions. (R. 2).

Procedural History

Ms. Zelasko and Ms. Lane were indicted for murder, conspiracy to commit murder, conspiracy to distribute and possess with intent to distribute steroid, possession of steroids, and distribution of and possession with intent to distribute steroids. (R. 8). Ms. Zelasko entered federal custody on February 3, 2012. (R. 31). The following day, Ms. Lane was taken into federal custody. (R. 31). The Grand Jury on April 10, 2012, returned an indictment charging the two 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. (R. 31).

On July 16, 2012, the District Court heard evidence and argument concerning pretrial evidentiary motions: Ms. Zelasko's motion to introduce the testimony of Ms. Morris to show the propensity of a third party, Ms. Short, to sell performance-enhancing drugs, and the government's motion to introduce an email sent by Ms. Lane. (R. 31). The District Court on July 18, 2012, ruled in favor of Ms. Zelasko to admit Ms. Morris's testimony and against the government to exclude the email. (R. 21-23). After the verdict, the government appealed both rulings on the two motions. (R. 30). On February 14, 2013, the Court of Appeals for the Fourteenth Circuit again found in favor of Ms. Zelasko and upheld the District Court's decision. (R. 38, 45-46).

On October 1, 2013, the Supreme Court granted the government's petition for a writ of certiorari to the Court of Appeals for the Fourteenth Circuit ruling.

SUMMARY OF THE ARGUMENT

In the present case, the lower courts both correctly ruled that: (1) the testimony of Ms. Morris regarding a prior drug exchange with Ms. Short, a non-party teammate, is admissible under Federal Rule of Evidence 404(b); (2) Alternatively, Ms. Morris's testimony raises a strong inference that Ms. Short, and not Ms. Zelasko, was the second member of the conspiracy and thus admissible pursuant to Ms. Zelasko's constitutional right to present a complete defense under *Chambers v. Mississippi*; (3) Ms. Lane's email was inadmissible hearsay because none of the statements in the email subjected her to criminal liability, and therefore did not meet the hearsay exception under Rule 804(b)(3); and (4) The email, while non-testimonial, was still a hearsay statement made by an unavailable co-defendant, and admission of that statement would violate Ms. Zelasko's rights under the Confrontation Clause.

First, the testimony of Ms. Morris regarding a prior drug sale with Ms. Short, a non-party teammate, is admissible under Federal Rule of Evidence 404(b). Although the testimony describes a prior act of Ms. Short in order to show that on a particular occasion she acted in accordance with that propensity to sell anabolic steroids, the application of the Rule is firmly rooted in common law policy serving as a shield to unfair prejudice to a criminal defendant. The majority of circuits render Rule 404(b) inapplicable when a defendant attempts to offer propensity evidence of an absent third party relevant to the crimes alleged-- commonly referred to as "reverse 404(b)" evidence. Although the testimony pertains to prior acts of a person for propensity purposes, its admission complies with the purpose of the rule where no danger of prejudice exists against the accused. Furthermore, the context and structure of Rule 404(b) suggests the drafters intended to allow admission of "reverse 404(b)" evidence under Rule 403 where its probative value as exculpatory evidence substantially outweighs any concerns therein. Rule 404(b) only applies to evidence offered against a criminal defendant.

Second, Ms. Morris's testimony is nevertheless admissible pursuant to Ms. Zelasko's constitutional right under *Chambers v. Mississippi* to present a complete defense. The testimony is highly relevant to the ultimate factual issue of Ms. Zelasko's guilt or innocence, and serves as exculpatory evidence creating a strong inference that Ms. Short, rather than Ms. Zelasko, was the second member of the conspiracy. The mechanical operation of the Federal Rules of Evidence must yield where the legitimate interests behind the rule is outweighed by the interests of justice to a defendant. The crux of Ms. Zelasko's defense requires admission of Ms. Morris's confession as evidence which casts significant doubt on the prosecution's theory of the case. Furthermore, the testimony should be admitted in order to comply with a criminal defendant's rights under Due Process where there is no concern whatsoever for prejudice to the defendant, and the risk of

any jury confusion or waste of time is insignificant.

Third, Ms. Lane's email to her boyfriend Peter Billings is inadmissible hearsay as to Ms. Zelasko. In order to be admissible, the email must be a statement against penal interest under Rule 804(b)(3). In *Williamson v. United States,* this Court held that each individual declaration or statement must be analyzed to determine whether it is sufficient to subject the declarant to criminal liability, and that any statements which are found to be non-self-inculpatory must be excluded, even if they are part of a broader self-inculpatory narrative. None of the statements in the email, even when viewed in context, subjected Ms. Lane to criminal liability, and therefore cannot be deemed as against her penal interest.

Fourth, admitting the email against Ms. Zelasko would violate her Sixth Amendment right to confrontation and would unduly prejudice her because Ms. Lane is a non-testifying co-defendant. Under *Bruton v. United States* and its progeny, statements made by defendants who will not take the stand are inadmissible as to their co-defendants. The Supreme Court's more recent holding in *Crawford v. Washington* did not alter the *Bruton* doctrine in any way because they dealt with two different issues in two completely different scenarios. As such, the rule from *Bruton* stands, and Ms. Lane's email is inadmissible against her co-defendant, Ms. Zelasko.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 404(B) PERMITS THE ADMISSION OF CHARACTER EVIDENCE OF A THIRD PERSON WHEN OFFERED BY THE DEFENDANT BECAUSE THE POLICY CONSIDERATIONS BEHIND THE RULE'S PROHIBITION SUGGEST THE RULES OF EVIDENCE WERE DESIGNED TO ALLOW ADMISSION OF SUCH EVIDENCE.

Federal Rule of Evidence 404(b)(1) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion

the person acted in accordance with the character." Fed. R. Evid. 404. While the plain language of the Rule initially suggests character evidence of *any* "person" is prohibited for propensity purposes, the Rule is firmly rooted in common law policy serving as a shield to unfair prejudice against the accused in a criminal case where a jury may improperly infer guilt based solely upon the prosecution's submission of a defendant's propensity to act in conformity with the crime presently accused. *See* Charles Wigmore, *Wigmore's Code of the Rule of Evidence in Trials at Law* §§ 355-56, p. 81 (3d ed. 1942). In accordance with such policy, when a defendant attempts to offer propensity evidence of an absent third-party relevant for the purpose of adequately defending the crimes alleged by prosecution, this version of the Rule's shield has commonly been referred to as "reverse 404(b)" evidence. *See United States v. Stevens*, 935 F.2d 1380, 1401-06 (3rd Cir. 1991).

"Other-crimes evidence submitted by the prosecution has the distinct capacity of prejudicing the accused." *Stevens*, 935 F.2d at 1404; *State v. Garfole*, 76 N.J. 445, 452-53. Indeed, the plain text approach serves as an initial point of reference, but the majority of circuits follow the common law tradition of application and have all determined Rule 404(b) is not applicable to evidence of acts of third parties.[1] Admissibility is determined under a diminished standard based on whether the extrinsic act is sufficiently similar to the case at bar so that it is relevant under Rules 401 and 402, and whether the probative value of such evidence substantially outweighs possible dangers and considerations of Rule 403.[2] *See Stevens*, 935 F.2d at 1384.

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[1] *See United States v. Gonzalez-Sanchez*, 825 F.2d 572, 582 (1st Cir. 1987); *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2nd Cir. 1984); *United States v. Stevens*, 935 F.3d 1380 (3rd Cir. 1991); *United States v. Krezdorn*, 639 F.2d 1327, 1332-33 (5th Cir. 1981); *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983).

[2] The test for relevance under Rule 401 is whether an item of evidence possesses sufficient probative value to justify admission at trial; Relevant evidence is admissible under Rule 402, subject to Rule 403 considerations. Fed. R. Evid. 401 and 402.

Proffered evidence satisfies the liberal relevancy standard under the Rules if it tends to make the existence of a consequential fact "less probable." Nonetheless, evidence may otherwise be excluded under Rule 403 if its probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay…" Fed. R. Evid. 403. These considerations apply when the prosecution seeks to introduce 404(b)(2) evidence against the defendant – the party most at risk for unfair prejudice – for purposes other than propensity. Such alternative purposes include: "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). The trial judge must balance the benefit of introduction against the cost of unfair prejudice to the defendant. *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 580 (1st Cir. 1987). Indeed, where the extrinsic act offered will not impugn the defendant's character, the policies underlying the rule are inapplicable. *United States v. Krezdorn*, 639 F.2d 1327, 1332-33 (5th Cir. 1981). Even where prosecution offers extrinsic evidence against a criminal defendant under an accepted purpose, "there must be an allegation that the extrinsic offense was committed by the defendant" in order to render policy-driven Rule 404(b) applicable. *Id.* at 1333.

In order to fully serve the firmly-rooted common law policies and uphold the longstanding tradition, Rule 404(b) should be construed to allow the admission of "reverse 404(b)" evidence when offered by a defendant for defensive purposes. This Court should hold the evidence offered under 404(b) is only governed by a Rule 403 analysis allowing the trial judge to admit evidence of probative value that substantially outweighs any unfair prejudice to the defendant. Accordingly, the District Court judge properly admitted the Morris testimony because: (1) excluding this evidence as a matter of law conflicts with the policy-driven purpose of Rule 404(b) to protect the defendant; and (2) the context and structure of Rule 404(b) suggests

that the drafters intended to allow admission of such evidence under Rule 403 despite its inadmissibility on other grounds.

A. **The Testimony of Morris Was Properly Admitted Because The Drafters Did Not Intend Rule 404(b) To Preclude Character Evidence Offered Against A Non-Party Person.**

The government contends the text of Rule 404(b)(1) plainly bars the admission Ms. Morris' testimony based solely on the use of the word "person" in the Rule's prohibition of evidence offered for propensity purposes. In absence of any expressed legislative intent to the effect of "person", this Court in *Huddleston v. United States* stated Rule 404(b) "applies in both civil and criminal cases" and, more specifically, "[e]xtrinsic acts evidence may be critical to establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind . . . ." 485 U.S. 681, 685 (1988). By evaluating admissibility of extrinsic-act evidence based upon the specific "actor" as it pertains to the instant case, this Court clarified the analysis is not limited to such circumstances of a defendant's prior acts in order to apply in the civil context. *Id*.

The Anglo-American tradition of preventing the prosecution from offering evidence against the defendant under Rule 404(b) is best described by the Second Circuit, quoting Charles Wigmore, "evidence is objectionable not because it has no appreciable probative value but because it has too much." *United States v. Aboumoussallem*, 726 F.2d 906, 911 (1984). The court interpreted the "too much" argument to mean a guilty person, and more importantly an innocent person, may be convicted solely because of the jury's willingness to assume present guilt from the prosecution's use of Rule 404(b) evidence. *Id.* However, the risks of unfair prejudice are normally absent when a criminal defendant offers similar acts evidence of a third party to prove

some fact pertinent to the defense.[3] *Id.*

Although the Advisory Committee Notes following Rule 404 remain silent on the issue, the mere use of "person" in subsections (a) and (b) of Rule 404 does not trigger a per se rule of exclusion of relevant evidence. The Committee Notes regarding the use of "person" in Rule 404(a) explained the difference in semantics in Rule 404 merely reflects the intent for the prohibition against character evidence to apply in the context of both civil and criminal proceedings. Fed. R. Evid. 404 committee notes on 2006 amendment. Furthermore, the Committee explained the narrow exceptions to admissibility under Rule 404(a)(1) and (2) intentionally refer to a "defendant" in a criminal proceeding, rather than "person", to give emphasis to the Rule's policy-driven application because the accused, whose liberty is at stake, may need a "counterweight against the strong investigative and prosecutorial resources of the government." *Id.* (quoting C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999).[4]

While the government points to the notice provision's use of "defendant" in Rule 404(b) as proof of intent to proscribe any use of character evidence, the legislative history of the Rule specifically emphasized the concern of such evidence having prejudicial effect against a defendant in a criminal context. In further support of Rule 404(b)'s traditional, asymmetric approach due to the inherent prejudicial effects to the criminal defendant, such construction is

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[3] The Second Circuit noticed such risk might well arise if the similar acts evidence concerned prior acts of a co-defendant in a joint trial or a party opponent in a civil case. 726 F.2d 906, 911 n. 4 (2nd Cir. 1984); *See also People v. Flowers,* 644 P.2d 916 (Colo.); *State v. Garfole*, 76 N.J. 445, 388 A.2d 587 (1978).

[4] See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is").

"consistent with other provisions of the rules of evidence" that adopt a similar application.[5] Thus, the plain language of Rule 404(b) does not bar, as a matter of law, the testimony of Ms. Morris regarding the propensity of a third party, Ms. Short, to sell drugs when offered by Ms. Zelasko for defensive purposes because the inherent policy of the Rule in protecting the accused from an inference of guilt does not exist for non-party persons. In fact, Rule 404(b) does not apply

B. <u>The Context and Structure of the Rules of Evidence Suggest the Drafters Intended to Allow Admission of Otherwise Inadmissible Character Evidence Under Rule 403.</u>

"In contrast to ordinary 'other crimes' evidence, which is used to incriminate criminal defendants, 'reverse 404(b)' evidence is utilized to exonerate defendants." *Stevens*, 935 F.2d at 1402. Admission of "reverse 404(b)" simply requires a defendant to demonstrate that such evidence is relevant under Rule 401 by tending to negate his guilt – a lower hurdle than required for the prosecution – and that it passes Rule 403's "straightforward balancing of the evidence's probate value against considerations such as undue waste of time and confusion of the issues." *Id.* at 1404-05.

In *Stevens*, the defendant sought to introduce as evidence a victim's testimony concerning a crime occurring under very similar circumstances for which the defendant was accused, in order to support the defense's theory of misidentification. *Id.* at 1401. The defendant reasoned that the second victim's failure to identify him tends to establish that he did not assault the alleged victims for the similar crime presently charged. *Id.* The Court of Appeals for the Third Circuit determined, after reviewing "*in extenso*" past federal and state treatment, "[i]n view of many parallels between the two crimes, one person very likely committed both… [t]he critical

[5] *See Aboumoussallem,* 726 F.2d at 912, n. 5 ("For example, Rule 609 permits impeachment of witnesses by evidence of conviction of crime provided the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.")

question is, of course, one degree of similarity." [6] *Id.* The Third Circuit determined the lower relevancy standard under "reverse 404(b)" should govern because prejudice to the defendant is not a factor. *Id.* at 1404. Furthermore, a lower standard "is additionally justified by the consideration that the defendant need only engender reasonable doubt of his guilt whereas the State must prove guilt beyond a reasonable doubt." *Id.* at 1403, n.4 (citing *State v. Garfole*, 76 N.J. 445, 453 (1978)).

Here, the lower courts appropriately determined the testimony of Ms. Morris satisfies the diminished standard under the relevance/prejudice approach in *Stevens*, tending to negate Ms. Zelasko as the second coconspirator in the prosecution's case. (R. 21, 37). The substance of Ms. Morris' affidavit describes a prior act occurring on April 4, 2011, where Ms. Morris purchased steroids from Ms. Short while the two were teammates on the female Canadian Snowman team. (R. 24). In addition to the fact that both the prior and present act occurred in an identical and insular sport within a country of close proximity, the drug Ms. Short sold to Ms. Morris was also a bolasterone ester, an anabolic steroid named "White Lightning" aimed to promote performance while remaining undetectable by the drug tests used in all national competitions. (R. 25). To further demonstrate the similarity, the expert testimony of Dr. Henry Wallace contends the ThunderSnow found in this case is in fact only a chemical derivative of "White Lightning." (R. 28). Although the acts of Ms. Short occurred nine months before the present events in question, Ms. Morris notes Ms. Short transferred to the U.S. Snowman team in or around June 2011 – nine months after Ms. Zelasko joined – which is significant since the U.S. Snowman team had never ranked above sixth place in competitions prior to about August 2011. (R. 1-2, 24). After Ms. Short's arrival, the overall performance of the team markedly improved. (R. 2).

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[6] *See generally Commonwealth v. Murphy*, 282 Mass. 593, 185 N.E. 486 (1933); *State v. Bock,* 229 Minn. 449, 39 N.W.2d 887 (1949); *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965); *State v. Garfole*, 76 N.J. 445, 388 A.2d 587 (1978); *State v. Williams*, 214 N.J. Super. 12, 518 A.2d 234 (1986).

Given the facts of the present case, this Court should recognize the approach taken by the majority of circuits in evaluating "reverse 404(b)" evidence where the policy considerations of unfair prejudice to the defendant do not exist. Additionally, the Court should consider the evidence offered under "reverse Rule 404(b)" is relevant to negate an inference of guilt by asserting Ms. Short, rather than Ms. Zelasko, is the second coconspirator. If accepted, this extrinsic act of a third party tends to negate Ms. Zelasko's guilt by supporting her defense against "knowledge" and involvement in the conspiracy of which the prosecution's entire theory of the case rests upon, including motive to commit murder. In following the *Stevens* relevance/prejudice approach, there is no concern for inferential guilt from the jury against Ms. Short, a non-party to this proceeding, and the evidence does little to prejudice the Government by confusing the jury of the issues at trial or unduly delaying time.

The government relies on the minority plain-view approach of Rule 404(b) as stated by the Sixth Circuit Court in *United States v. Lucas* to assert the use of "person" acts as a complete bar to evidence of *any* person's likelihood to commit bad acts in the future. 357 F.3d 599 (2004). Nevertheless, the Court acknowledged the majority contention that "such evidence, when presented by the defense, requires us to reconsider our standard analysis" absent the primary concern for prejudicing the defendant. *Lucas*, 357 F.3d at 599. Instead of assessing the probative value in accordance with the acknowledged policy behind the rule, the court relied on the Advisory Committee Notes following Rule 401 explaining that rules such as Rule 404 and those that follow it are meant to preclude clearly relevant evidence inherent in creating more prejudice and confusion than justified in probative value. *Id.* at 605. Therefore, as required in Rule 404(b)(2) the party offering prior bad acts as proof for likelihood to commit future acts should demonstrate that the evidence tends to show something more than propensity. *Id.*

Even if the heightened approach of the Sixth Circuit is applied, the nature of Ms. Morris' testimony should nevertheless be admitted under Rule 404(b)(2) as proof to defend against elements of knowledge and intent related to the crimes alleged, which are among the many permissive uses of propensity evidence in Rule 404(b). The Court of Appeals for the First Circuit in *Gonzales-Sanchez* describes the nature of evidence required for permissible uses by the defendant as "special" – "that is, whether the evidence is offered to establish some material issue as intent or knowledge" – and not solely offered for impermissible propensity purposes. 825 F.2d 572, 579-80 (1987). Symmetrical to the prosecution's proffer, the probative value of the permissible evidence must be weighed by the trial judge against the same considerations of Rule 403 that would apply to otherwise relevant evidence under either approach. Indeed, there is no unfair prejudice to be inferred against the Ms. Zelasko, or any party for that matter, by admission of Ms. Morris' testimony. Likewise any confusion of the issues or concern for delay is not tantamount to require preclusion in this case. Rather, the evidence is of the utmost value in light of its tendency to negate the guilt of the offense, and therefore admissible under Rule 404(b) regardless of the approach.

II. EXCLUSION OF EXCULPATORY EVIDENCE OFFERED BY DEFENDANT TO SHOW A THIRD PERSON'S PROPENSITY TO DISTRIBUTE DRUGS VIOLATES DEFENDANT'S CONSTITUTIONAL RIGHT UNDER *CHAMBERS V. MISSISSIPPI* TO PRESENT A COMPLETE DEFENSE TO CRIMES ACCUSED.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). "Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process Clause . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations omitted). This Court emphasized that a complete defense is "[t]he right of an accused in a criminal trial to due process is, in essence, the

right to a fair opportunity to defend against the State's accusations." *Chambers,* 410 U.S. at 294, 302-03. To deny the admission of a defendant's vital evidence undermines the central truth-seeking aim of our criminal justice system. *See United States v. Nixon*, 418 U.S. 683, 709 (1974). Thus, in circumstances where inadmissible evidence contravenes a defendant's fundamental right to a complete defense, evidentiary rules must at times yield to the ends of justice.

In *Chambers*, because of a state evidentiary rule, the defendant was barred from presenting certain witnesses who could have testified that another person admitted or confessed to the crime for which the defendant was charged. *Chambers,* 410 U.S. at 291-92. In exercise of this right to defend, the accused, as well as the State, "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* at 313. The Court determined that the testimony precluded by the well-respected hearsay rule was essential to the defendant's defense, in addition to the fact that the evidence fell well within the "basic rationale of the exception" of the rule. *Id*. Furthermore, the Court established that in circumstances, "where constitutional rights directly affecting the ascertainment of guilty are implicated, the hearsay rule may not be implied mechanistically to defeat the ends of justice." *Id*. at 302. Indeed, the State did not seek to defend the rule and despite the Court's recognition of the valid purpose behind the rule that untrustworthy evidence should not be presented to the triers of fact, the mechanical application must yield where the legitimate state interest is outweighed by the interests of justice to the defendant. *Id.* at 310-11.

The government asserts that Ms. Morris's testimony does not trigger *Chamber's* constitutional right because it is considered "weaker" than necessary and inadmissible under the Rules of Evidence (R. 15). Specifically, the government emphasizes that Ms. Morris's testimony merely shows that Ms. Short sold a different drug, in a different country, to different people, thus inviting speculation over one possible motive for the killing. (R. 15). Of course, the defendant's

ability to present relevant evidence, and therefore a defense, is diminished if excluded; however, "the right to present relevant testimony is not without limitation" and *may*, in appropriate cases, "bow to accommodate other legitimate interests of the criminal trial process. *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers,* 410 U.S. at 295).

Admissibility of evidence favors a stronger inference in comparison to a mere speculation. Absent prejudice to the defendant, the sufficient standard of admissibility requires simple relevance to guilt or innocence where an accused is ordinarily entitled to "advance any evidence which may rationally tend to refuse his guilt or buttress his innocence of the charge made."[7] Ms. Morris's testimony creates a strong inference and is further supplemented by Doctor Henry Wallace's affidavit, regarding the almost identical chemical composition between the drugs sold and information on the undetectable drug's general use. (R. 26-28). Essentially, Ms. Zelasko 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. (R. 37).

Due Process grants the accused not only access to material evidence in her favor, but an option to present it on her behalf. *Crane,* 476 U.S. at 690. Ms. Morris's testimony is highly relevant to the ultimate factual issue of the defendant's guilt or innocence. Further, this exculpatory evidence is critical to showing that Ms. Zelasko was not involved in the conspiracy. (R. 13). This is especially material in a case such as this where there apparently was no physical evidence to link Ms. Zelasko to the conspiracy, and the Government's position is that Ms. Zelasko intentionally murdered Mr. Riley to conceal her role in a conspiracy to distribute drugs within the U.S. Snowman relay team. (R. 11). Conversely to the prosecution's strategy and similar to the subject testimony in *Chambers*, Ms. Morris's statement corroborates with other items of evidence in the case. *See Chambers,* 410 U.S. at 301-302. The affidavit shows that Ms.

[7] *See Stevens*, 935 F.2d at 1404; *State v. Garfole*, 76 N.J. at 452-53.

Short, not the petitioner, was the second coconspirator to sell or distribute the banned substance, thus eliminating any motive for Ms. Zelasko to kill Mr. Riley.

Admittedly, the Compulsory Clause does not simply validate any request for admission of irrelevant evidence. On close calls of relevance, the trial court must supervise a substantive inquiry. *Crane*, 476 U.S. at 688. According to *Crane*, the trial judge conducts a "common sense" based legal and factual inquiry. *Id*. The legal inquiry encompasses admissibility under rules, while the factual inquiry involves substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. *Id.* at 689. In example, this Court has explained that "trial judges retain wide latitude" to reasonably limit a criminal defendant's Sixth Amendment right to cross-examine a witness "based on certain concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Thus, the sole question presented for review is whether the legitimate interests served by Rule 404(b) justify precluding evidence probative to the issue of innocence or guilt.

When weighing procedure rules to a defendant's constitutional right, history has convincingly displayed that there must be a "compelling" interest to overcome a defendant's constitutional rights. In fact, this Court articulated, that "an essential component of procedural fairness is an opportunity to be heard." *Crane,* 476 U.S. at 690. The government asserts that the admission of Ms. Morris's testimony will undermine the courts' policy interest in judicial expediency. (R. 38). The defense admits the offering of Ms. Morris's testimony will only contribute to the defendant's "modest" defense. (R. 38). However, in light of the prosecution's arguably moderate evidence, Ms. Morris's testimony is extremely probative and cast significant doubt on the Ms. Zelasko's guilt and participation in the drug-selling conspiracy. (R. 47). If Ms. Morris's testimony is excluded, this will automatically trigger the *Chambers's* fundamental right

where the prior bad acts are so similar to the alleged drug sales to create a strong inference of Ms. Short being the second coconspirator. Most importantly, there are no other avenues to present this defense to the jury in accordance with the Government's theory of the case.[8]

Even if this Court declines to recognize the evidence as permissible under Rule 404(b), Ms. Morris's testimony should nonetheless be admitted to comply with the requirements of the Due Process Clause. This is especially warranted given lack of unfair prejudice to the defendant, in addition to no significant risk of confusing the jury or potentially wasting time. Indeed, Ms. Zelasko only seeks to offer the testimony as it pertains to this one discrete issue of conspiracy involvement, and the similarities between the crimes in actuality highlights the central issue at trial—namely, which person is responsible for the drug-selling conspiracy leading up to the killing. Additionally, the defendant argues this affidavit is the only available evidence linking Ms. Short to the drug selling conspiracy. (R. 37). The defendant's innocence is entirely based on the evidence of Ms. Morris's confession. In order to ensure the defendant's rights comply with Due Process, this Court should admit Ms. Morris's testimony regarding Ms. Short.

III. THE EMAIL FROM MS. LANE IS INADMISSIBLE HEARSAY BECAUSE IT WAS NOT A STATEMENT AGAINST HER PENAL INTEREST AS REQUIRED BY *WILLIAMSON v. UNITED STATES*.

The government sought to introduce an email from defendant Jessica Lane to Peter Billings, the coach of the Women's Snowman Team and Ms. Lane's romantic interest. In the email, Ms. Lane informed Mr. Billings that she and a "partner" were involved in a "business," and that a member of the Men's Snowman Team had discovered that business. (R. 29). Ms. Lane stated her partner thought they needed to "keep him quiet," though Ms. Lane did not know what the partner meant by that. (R. 29). The government believed Ms. Zelasko to be the unnamed

[8] *See, e.g., United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005) (noting that although evidence of a non-party's prior acts did not tend to show a person acted alone in defense of defendants' conspiracy charges, the argument for exclusion is underscored by the Government's theory of the case proceeding on the premise that such third person had nothing whatsoever to do with the crimes alleged.)

partner and sought to introduce the email under FRE 804(b)(3) as being a statement against Ms. Lane's penal interest. (R. 17-18). However, as the district court and the Fourteenth Circuit correctly found, the email does not fit that exception based on this Court's holding in *Williamson v. United States* because the statements, when looked at individually, do not expose Ms. Lane to criminal liability and therefore are not against her penal interest.

A. **Rule 804(b)(3) and *Williamson* show that only those individual statements which expose the declarant to criminal liability are admissible.**

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.

This Court in *Williamson v. United States* analyzed the two competing interpretations of that rule and held that the narrower interpretation was correct. *Williamson v. United States*, 512 U.S. 594, 599 (1994). Under that interpretation, "statement" is viewed as a "single declaration or remark" that is individually self-inculpatory. *Id.* The Court specifically stated that collateral statements which are not self-inculpatory on their own are *not* admissible, even if they are part of a generally-self-inculpatory narrative. *Id.* at 499-500. The majority opinion specifically declined to adopt the broader interpretation set forth by Justice Kennedy in his concurrence and followed by several circuits prior to *Williamson*. Under that interpretation, once a single, self-inculpatory statement was found, all of the collateral statements would have been allowed in except for those that were overtly self-exculpatory. *Id.* at 599. The majority clearly stated that this is not the correct approach, and that only those *individual* statements which are self-inculpatory standing alone are admissible under Rule 804(b)(3). *Id.* at 599-600. Therefore, courts "must separate the

incriminating portions of statements from other portions of the statements." *United States v. Mendoza,* 85 F.3d 1347, 1352 (8th Cir. 1996) (internal citations omitted).

To be deemed "incriminating" under the plain language of Rule 804(b)(3), each statement "must be examined to determine whether it tended to subject the declarant to criminal liability." *United States v. Westmoreland,* 240 F.3d 618, 626 (7th Cir. 2001). It is not enough that a statement "could possibly subject the declarant to criminal prosecution . . . [r]ather, the statement itself, taken as is, must basically admit to criminal behavior." *United States v. Leahy*, 464 F.3d 773, 798 (7th Cir. 2006); *see also United States v. Butler,* 71 F.3d 243, 253 (7th Cir.1995) ("The hearsay exception does not provide that any statement which 'possibly could' or 'maybe might' lead to criminal liability is admissible"); *United States v. Bonty,* 383 F.3d 575, 579 (7th Cir. 2004) ("It is simply not enough that . . . Bonty admitted to some facts . . . that 'possibly could' lead to criminal liability; to be inculpatory he must admit to criminal behavior."). The rationale behind this approach was shown in *Williamson* when this Court found that 804(b)(3) exists because a reasonable person would not make self-inculpatory statements unless they were true, giving sufficient credibility to the statements to overcome the fact that the statements are hearsay. *Williamson,* 512 U.S. at 603. Statements that are not so specifically self-inculpatory, or which "pose no risk to the declarant," are not statements against penal interest, but rather "garden-variety hearsay," and they are of no use to prosecutors against anyone other than the declarant. *Mendoza*, 85 F.3d at 1352.

B. <u>None of the statements in the email equated to Ms. Lane admitting criminal activity and therefore were not against her penal interest.</u>

Using the *Williamson* approach, the Fourteenth Circuit divided the email into five individual statements. (R. 42). Each of these statements must be analyzed to determine which, if any, exposed Ms. Lane to criminal liability. None of the five statements is particularized enough

to expose Ms. Lane to any type of liability. The third statement, as labeled by the Fourteenth Circuit, says that a member of the male team found out about her business and threatened to "expose her." (R. 42). This statement does not admit any criminal activity of any kind. As an international sporting competition, the Snowman teams were undoubtedly subject to several governing bodies, each with different rules and standards. The male team member could have been threatening to "expose her" to any of these governing bodies, which does not make the alleged activity criminal. Neither this statement nor any of the other statements gave details on what the business was or how it was operated. The only other statement that could even possibly be viewed as self-inculpatory is the fourth statement, where Ms. Lane said her partner wanted to keep the male team member quiet. Again, standing on its own, this statement in no way exposes Ms. Lane to criminal liability. She gave no details on what "keeping him quiet" could possibly mean; she even went so far as to say she did not know what her partner might be thinking. These are precisely the types of statements that *Williamson, Leahy,* and *Butler* show should not be admissible; at best, they "possibly could" or "maybe might" lead to criminal liability, and that is simply not enough to prove the statements are reliable enough to overcome the bar on hearsay. *Butler*, 71 F.3d at 253.

These statements stand in stark contrast to non-custodial statements that have been admitted under Rule 804(b)(3). In *United States v. Johnson,* 581 F.3d 320 (6th Cir. 2009), the declarant gave extensive details to a confidential informant about a bank robbery and murder in which he was an accomplice, including the full names of the other participants and what roles each person performed; the Sixth Circuit found that this exposed the declarant to prosecution and was therefore admissible. *Id.* at 327. In *United States v. Moses,* 148 F.3d 277 (3rd Cir. 1998), the declarant made statements to a friend at lunch years before he was arrested giving specific details

on how he was "taking care of [the defendant] . . . moneywise," including giving the locations of meeting places and drop-off points. *Id.* at 280-81. The court found that these particular details were sufficient to expose the declarant to liability and admit the testimony. *Id.* at 281. Again, the statements in the present case are far less specific than in any of these cases. Ms. Lane did not give any details about the business, her partner, or their future intentions; she made only vague references to an unnamed business and an unnamed partner. None of the statements, taken on their own, can be seen as subjecting her to criminal liability, meaning the email does not meet the Rule 804(b)(3) exception.

The government asserted that the court should apply a "totality of the circumstances" analysis to determine whether a statement is self-inculpatory. *See United States v. Barone,* 114 F.3d 1284, 1295 (1st Cir. 1997). This type of analysis would view each statement in context and in the light of the surrounding circumstances. *Id. See also Williamson,* 512 U.S. at 603-604. However, even when doing this, the outcome of the analysis doesn't change. When read as a whole, the email only shows that Ms. Lane was involved in some business with an unnamed partner, and that she was concerned about being exposed to someone. Again, even if it could be said that these statements *might* subject her to criminal liability, they are not particular enough to meet the standard required by the rule.

Finally, the government asserted that the *Williamson* standard should be relaxed because the email was sent to a personal acquaintance and was not made to law enforcement. However, as the Fourteenth Circuit observed, the government could point to no authority for this proposition. (R. 43). In fact, many of the cases following *Williamson* deal with statements made to undercover officers or confidential informants, people who the declarants did not know were government agents, which should be analytically similar to statement made to acquaintances. In

Johnson, for instance, the declarant was speaking to a jailhouse informant who was secretly recording the conversation; it was a non-custodial setting with a person the declarant did not know to be a government agent, and the court gave it the full *Williamson* analysis. *Johnson,* 581 F.3d at 327. Even in a case where the declarant is speaking to a friend instead of a government agent, the Court still looks at the full *Williamson* standard and requires that the statements actually subject the declarant to criminal liability. *Moses,* 148 F.3d 280-81. The government did not point to any authority supporting the position that *Williamson* should be relaxed in such a scenario, and the current case law shows that courts do not in fact relax the standard.

Williamson, though difficult to apply in some situations, comports directly with the rationale of Rule 804(b)(3) by admitting only those statements which are truly against the declarant's penal interest, meaning they must actually subject the declarant to criminal liability. The Fourteenth Circuit correctly found that none of the statements in Ms. Lane's email, when taken on their own or even viewed in the totality of the circumstances, could actually subject her to criminal liability. This Court should affirm the *Williamson* standard and the Fourteenth Circuit's application of it in this case.

IV. ADMITTING THE EMAIL WOULD VIOLATE MS. ZELASKO'S RIGHTS UNDER THE CONFRONTATION CLAUSE BECAUSE MS. LANE IS A NON-TESTIFYING CO-DEFENDANT.

Finally, admitting the email into evidence against Ms. Zelasko would violate her Sixth Amendment right to confrontation. Ms. Lane will not testify at trial, and admission of her out-of-court statements against Ms. Zelasko would cause significant and undue prejudice, which is exactly the outcome that *Bruton v. United States* prohibited.

A. ***Bruton* and *Crawford* dealt with two separate legal issues, meaning *Bruton* was unaffected by *Crawford.***

The Sixth Amendment guarantees criminal defendants the right to cross-examine witnesses who speak against them. But when the prosecution seeks to admit an out-of-court statement of a non-testifying co-defendant against a defendant, that right to confrontation is stripped away. *Bruton v. United States*, 391 U.S. 123 (1968). Before *Bruton,* courts tended to allow the statements and would simply give limiting instructions to the jury. *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). In *Bruton,* this Court recognized that such limiting instructions are basically useless; it is illogical to believe juries can hear a confession by one defendant implicating their co-defendants (who are sitting at counsel table with them) and will not take that statement into account when deliberating the case simply because the judge told them not to. *Bruton*, 391 U.S. at 1627-28. In the years following *Bruton,* this Court and the circuit courts recognized a nearly-automatic proscription on allowing out-of-court statements of co-defendants to be used at a joint trial unless the declarant took the stand. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) ("[W]here two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand"); *Cruz v. New York,* 481 U.S. 186, 188 (1987).

The government asserted that this Court's more recent holding in *Crawford v. Washington* somehow abrogated the *Bruton* doctrine. However, the two cases dealt with entirely separate legal issues and factual scenarios. In *Crawford,* the trial court admitted an out-of-court confession by the defendant's wife, who was not charged with the crime. *Crawford v. Washington*, 541 U.S. 36, 40-43 (2004). This Court issued a landmark decision holding that all statements which are "testimonial" are inadmissible under the Sixth Amendment unless the

defendant has had a prior opportunity to cross-examine the declarant. *Id.* at 68. The Court further stated that non-testimonial statements are generally not subject to the Confrontation Clause. *Id.*

Since *Crawford,* many circuit courts have held that *Bruton* no longer applies to non-testimonial statements by co-defendants. *See United States v. Dale,* 614 F.3d 942 (8th Cir. 2010); *United States v. Sutton*, 387 F. App'x 595, 602-03 (6th Cir. 2010). However, these courts have missed a crucial distinction that this Court has reiterated in several cases, including *Crawford*: *Bruton* deals with protection from undue prejudice, while *Crawford* deals with protection from unreliable statements. *Bruton* came two years before the Court even dealt with the reliability of statements under the Confrontation Clause. *See California v. Green,* 399 U.S. 149 (1970). The rule was settled ten years later in *Ohio v. Roberts,* which is the case *Crawford* explicitly addressed and overruled. *Ohio v. Roberts,* 448 U.S. 56 (1980); *Crawford*, 541 U.S. at 68. In *Cruz v. New York,* this Court recognized that dichotomy clearly, recognizing the main holding of *Bruton* deals not with the reliability of a statement, but the "devastating effect" it would have on the defense. *Cruz v. New York,* 481 U.S. 186, 192-93 (1987). The holding of *Bruton* dealt with three specific issues: "the likelihood that the [jury] instruction will be disregarded, the probability that such disregard will have a devastating effect, and the determinability of these facts in advance of trial." *Id.* This distinction was recognized by the circuit courts in the years before *Crawford*, such as the Sixth Circuit in *Rogers v. McMackin*, 884 F.2d 252, 253 (6th Cir. 1989) (noting that *Bruton* is inapplicable in bench trials because judges do not have the same issues separating evidence admitted against one defendant from use against a co-defendant). In *Crawford,* this Court again acknowledged this distinction, recognizing that "[*Cruz*] addressed the *entirely different question* whether a limiting instruction cured prejudice to codefendants from

admitting a defendant's *own* confession against him in a joint trial." *Crawford*, 541 U.S. at 59 (emphasis added).

In essence, *Bruton* and its progeny are entirely separate from the line of cases leading from *Roberts* to *Crawford. Bruton* was concerned with the damage and prejudice that befalls a defendant when the out-of-court statements of his co-defendants are admitted at a joint trial. The reliability of those statements was a concern among the Justices, but it did not play into the holding, and would not even be addressed by the Court until years after *Bruton*. *Crawford* was undoubtedly a monumental shift in Sixth Amendment jurisprudence, but it in no way affected *Bruton*. The *Crawford* court gave significant discussion to the historical background behind the Confrontation Clause and the *Roberts* line of cases, but only mentioned *Bruton* in passing. As Justice Scalia intimated, the Court would not have overruled such an important and long-standing rule in "such an oblique manner." *Id.* at 59.

B. The email is inadmissible under the *Bruton* doctrine.

Since *Crawford* did not affect *Bruton,* the *Bruton* doctrine still applies. Ms. Lane will not testify at trial, and Ms. Zelasko will have no other opportunity to cross-examine her. As the Court reasoned in *Bruton*, admitting the supposedly self-inculpatory statements she made out of court in a joint trial would severely damage Ms. Zelasko's defense. *See also Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *Cruz v. New York,* 481 U.S. 186, 188 (1987). Jury instructions will not work; the court must either sever the trials or deny the admission of the evidence. Therefore, the district court properly excluded the evidence, and this Court should affirm the district court's ruling.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court AFFIRM the judgment of the Fourteenth Circuit Court of Appeals and hold that Ms. Morris's testimony was admissible under Rule 404(b) and *Chambers v. Mississippi,* and that the email from Ms. Lane is inadmissible under Rule 804(b)(3) and the Confrontation Clause.

Respectfully submitted this 12th Day of February, 2014.

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Respondent

BY: Team 16
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