IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

--against--

ANASTASIA ZELASKO,

Respondent.

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

BRIEF FOR RESPONDENT

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the privileges uniquely afforded to criminal defendants under the common law rule against propensity evidence, codified as Rule 404(b), extend broadly to non-party third persons, when the evidence is proffered to corroborate the accused's defense and the third person suffers no prejudice.
- II. Whether a defendant's fundamental right to present a complete defense, as set forth in *Chambers v. Mississippi*, requires the admission of third-party propensity evidence, when the similarities between the third party's acts and the offenses with which the defendant is charged are so striking that it is equally likely that the third party committed those offenses.
- III. Whether this Court should overturn precedent by expanding the Rule 804(b)(3) declaration against interest hearsay exception to admit otherwise inadmissible collateral statements, when a series of statements individually do not rise to the requisite level of self-inculpation.
- IV. Whether interpreting *Crawford v. Washington* as eradicating the constitutional protection against prejudice afforded to a defendant in *Bruton v. United States* provides adequate Confrontation Clause protection, when a non-testifying co-defendant implicates the accused by a confession in a joint jury trial.

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APPLICABLE PROVISIONS AND RULES

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 404: Character Evidence; Crimes or Other Acts

- (b) Crimes, Wrongs, or Other Acts.
- (1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident

Fed. R. Evid. 804: Exceptions to the Rule Against Hearsay – When the Declarant Is Unavailable as a Witness

(b)(3) Statement Against Interest. A statement that: (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

STATEMENT OF THE CASE

Statement of Facts

Respondent Anastasia Zelasko is a member of the prestigious United States women's Snowman Pentathlon Team ("Snowman Team"). (R. 1). The Snowman Team participates in a physically demanding competition consisting of dogsledding, ice dancing, aerial skiing, rifle shooting, and curling at the renowned World Winter Games. (R. 1-2). After Ms. Zelasko joined the women's Snowman Team, Jessica Lane, the co-defendant, and Casey Short also became members of the team. (R. 1, 24). Casey Short was a member of the Canadian women's Snowman Team before joining the U.S. team in June 2011. (R. 24). As a member of the Canadian Snowman Team, Short widely distributed the illicit anabolic steroid bolasterone known as "White Lightning" to members of that team, as she had instant access to the steroid from her connections with a lab that designed the drug. (R. 25). White Lightning has been discovered in the possession of several national teams competing in the World Winter Games. (R. 28).

After Short and Lane joined the women's Snowman Team, Hunter Riley, a U.S. men's Snowman Team member approached Lane on three separate occasions to purchase an anabolic steroid known as "ThunderSnow." (R. 2-3). ThunderSnow is a bolasterone ester—a direct chemical derivative of bolasterone—and was developed through chemical modification of White Lightning. (R. 28). On all three occasions, Lane refused to give Riley any ThunderSnow. (R. 2-3). In late 2011, Peter Billings, the coach of the U.S. women's Snowman Team, confronted Lane with his suspicion that she was distributing performance-enhancing drugs to her teammates, but Lane denied this accusation. (R. 3). On January 16, 2012, Lane sent Billings the following email:

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. 28). Ms. Zelasko's name was never cited in relation to the steroid distribution. See (R. 2-3).

On February 3, 2013, Hunter Riley was tragically killed during a training accident at Remsen National Park. (R. 8). Ms. Zelasko was practicing alone on a rifle range that was adjacent to the dogsled course upon which the male Snowman team was competing when one of her bullets inadvertently struck Riley, resulting in his death. (R. 8). Ms. Zelasko was arrested for murder and a host of drug-related offenses after this accident and a search warrant was executed at her residence. (R. 3-5). At Ms. Zelasko's apartment, the DEA seized two 50-milligram doses of ThunderSnow, an amount consistent with personal use and not with distribution. (R. 3, 28).

Search warrants were also executed for the Snowman Team's training facilities and Lane's residence. (R. 3-4). Authorities recovered 12,500 milligrams of ThunderSnow from the equipment storage room of the Snowman Team's training facilities to which all staff and members of the women's Snowman Team, including Lane and Casey Short, had access. (R. 3, 8). Twenty doses of ThunderSnow were recovered from Lane's apartment along with \$10,000 in cash, an amount suggestive of drug sale (R. 4, 28). Prior to the tragic circumstances that led to Riley's death, Ms. Zelasko was not implicated whatsoever in any scheme to distribute performance-enhancing drugs to the women's Snowman Team. (R. 1-5).

Procedural History

Ms. Zelasko was nonetheless indicted on the following charges: conspiracy to distribute anabolic steroids in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and 846; distribution of and possession with intent to distribute anabolic steroids in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(E); simple possession of anabolic steroids under 21 U.S.C. § 844; conspiracy to commit

first-degree murder in violation of 18 U.S.C. §§ 371 and 1111(a); and first-degree murder under 18 U.S.C. § 1111(a). (R. 4-5). Before the United States District Court for the Southern District of Boerum, Ms. Zelasko sought to introduce testimony regarding Casey Short's history of illicit bolasterone sale. (R. 7). Similarly, Petitioner argued for the admission of the email Lane sent to Peter Billings. (R. 7). After argument from both sides, the District Court ruled that Federal Rule of Evidence 404(b) does not bar the admission of third-party propensity evidence. (R. 21-22). Furthermore, even if such evidence was barred by the Rule, the court found that Ms. Zelasko's constitutional right to present a complete defense required the evidence's admission. (R. 21-22). Relying on *Williamson v. United States*, the court further held that the statements in the Lane's email to Billings are not so contrary to Lane's penal interest to justify admission under Federal Rule of Evidence 804(b)(3). (R. 22). Because Lane will not be testifying at trial, (R. 18), the court found that the Confrontation Clause prohibits admission of the email as well. (R. 23).

On appeal, the Court of Appeals for the Fourteenth Circuit affirmed the District Court's decision that evidence of Short's propensity should be admitted while the contents of the email should be excluded. (R. 30-46). On October 1, 2013, this Court granted the United States' petition for writ of certiorari, certifying four issues. (R. 55).

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly affirmed the District Court's ruling on all four evidentiary issues presented for review. First, Rule 404(b) does not apply to Ms. Morris' testimony where propensity evidence is being offered against Casey Short by Ms. Zelasko to corroborate her defense. Rule 404(b) is a continuation of the common law rule against propensity evidence in substance, form, and policy. It was originally designed to protect criminal defendants from unfair prejudice; courts feared that a jury may misestimate the probative value of the

defendant's prior bad acts, thereby depriving the accused of a fair opportunity to defend against the alleged conduct. To extend it to third parties, where the defendant is not being prejudiced, drastically frustrates the Rule's original scope and underlying purpose. Moreover, Rules 401 and 403 safeguard against the meritless defendant "finger-pointing" against third persons.

Second, in *Chambers v. Mississippi*, this Court made clear that rules of evidence must not be applied in a way that prevents a defendant from presenting a complete defense. When the policy concerns of a specific rule are not implicated, strict adherence to the rule violates a defendant's constitutional rights. Ms. Zelasko seeks to introduce evidence of Casey Short's propensity to commit acts strikingly similar to those with which Ms. Zelasko is charged. Because Short is not a party to this case, such evidence does not implicate the policy concerns of Rule 404(b). Moreover, because Rule 403 adequately protects against the remote risk of unfair prejudice, excluding evidence of Short's prior bad acts is unconstitutionally arbitrary and disproportionate to the governmental interest that Rule 404(b) serves.

Third, the Lane email constitutes inadmissible hearsay because it does not qualify under the statement against penal interest codified as Rule 804(b)(3). *Williamson v. United States* interpreted the term "statement" in Rule 804(b)(3) to mean a single declaration or remark; thus parties may not aggregate collateral hearsay statements, but instead must establish that each statement is individually self-inculpatory. Here, none of the individual declarations at issue are inculpatory even when considered in light of the surrounding circumstances as they existed at the time Lane sent the email. Even if this Court is persuaded to reverse its decision in *Williamson*, aggregating these cryptic, vague statements merely compounds the statements' several possible meanings, and does nothing to inculpate Ms. Zelasko.

Finally, should this Court determine that the Lane email rises to a statement against her interest, the Confrontation Clause flatly prohibits its admission. *Bruton v. United States* made clear that the Confrontation Clause protects a defendant from the substantial constitutional harm suffered whenever a co-defendant offers an implicating confession in a joint trial. In contrast, *Crawford v. Washington* decided a question of constitutional reliability by establishing the testimonial standard, leaving *Bruton* undisturbed. Here, the Lane email is a nontestimonial confession, but it will be offered by a co-defendant in a joint jury trial, and will therefore constitute devastating constitutional prejudice to Ms. Zelasko, even if paired with a limiting instruction.

ARGUMENT

I. AS A MATTER OF LAW, FEDERAL RULE OF EVIDENCE 404(B) PERMITS A DEFENDANT TO INTRODUCE EVIDENCE OF A THIRD PARTY'S PRIOR BAD ACTS, ESPECIALLY WHEN THE INTRODUCTION OF SUCH EVIDENCE TENDS TO NEGATE THE DEFENDANT'S GUILT.

It is impermissible for the government to introduce evidence of "other crimes, wrongs, or acts" (ordinarily referred to as "other crimes evidence") offered solely to prove that on a given occasion, an individual acted in conformity with prior acts. Fed. R. Evid. 404(b)(1). Defendants frequently invoke Rule 404(b) to prevent the prosecution from introducing evidence of the defendant's prior bad acts for the purposes of showing criminal propensity. Because propensity evidence is likely to prejudice a jury against the defendant, such evidence is generally inadmissible at trial. *See United States v. Murray*, 474 F.3d 938, 939 (7th Cir. 2007) (citation omitted). In order to introduce evidence otherwise inadmissible under Rule 404(b), the government must show that: (i) there is a permissible purpose for admitting the evidence; (ii) the evidence is relevant; (iii) the evidence has probative value which is not substantially outweighed by the potential for undue delay or jury confusion; and (iv) the purpose for which the evidence is

being offered is precisely articulated and easily identifiable. *United States v. Hardwell*, 80 F.3d 1471, 1488 (10th Cir. 1996) (citing *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988)).

Other crimes evidence is not used solely by prosecutors; it may be an even more valuable tool for the defendant. *See Wigmore on Evidence* § 304, at 252 (J. Chadbourn rev. ed. 1979). In stark contrast to "ordinary other crimes evidence," defendants often seek to introduce evidence of a third party's prior bad acts, or "reverse 404(b) evidence," in order to raise reasonable doubt with regard to the accused's alleged guilt. *See United States v. Puckett*, 692 F.2d 663, 671 (10th Cir. 1982). *Cf. United States v. Myers*, 589 F.3d 117, 124 (4th Cir. 2009) ("A defendant may use similar other crimes evidence for defensive purposes if it tends, alone or with other evidence, to negate the defendant's guilt of the crime charged against him.") (citation and internal quotation marks omitted).

Presently, there is a split of authority regarding the admission of reverse 404(b) evidence. Some courts have adopted a standard that most closely parallels the common law rule, often called the "policy approach." *See, e.g., United States v. Lucas*, 357 F.3d 599 (6th Cir. 2004). Under the policy approach, courts should admit reverse 404(b) evidence as long as it survives the rigors of the Rule 403 balancing test. *See United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001) (noting that in deciding whether to admit reverse 404(b) evidence, courts should balance the evidence's probative value under Rule 401 against applicable Rule 403 considerations). The First, Second, Fifth, Seventh, and Eleventh Circuit Courts have all expressly or impliedly adopted some variation of the policy approach as it relates to the admission of 404(b) evidence offered against third parties. The opposite of the policy approach, often called the "plain language" approach, applies Rule 404(b) to third persons by requiring courts to treat all 404(b) evidence the same no matter which party seeks to offer it. *See Lucas*, 357 F.3d at 611 (Rosen, J.,

concurring) (coining the terms "policy approach" and "plain language" to identify the courts' contrasting interpretations of Rule 404(b)).

A. Since Rule 404(b) arose from common law and was originally designed to protect criminal defendants, extending it to non-party third persons grossly broadens it beyond its originally intended scope.

As this Court previously noted, the common law remains a valuable source of guidance and should "serve as an aid" to the court's application of statutory law. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 587-88 (1993). Because "Rule 404(b)[] merely codified the common law" rule against propensity evidence, it is imperative to determine exactly what kind of evidence was excluded under the common law rule. *United States v. Johnson*, 27 F.3d 1186, 1191 (6th Cir. 1994).

Rule 404(b) is the "direct, lineal descendant of a single leading case, *People v. Molineux.*" Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 Temp. L. Rev. 201, 201 (2005) (citing 168 N.Y. 264 (1901)). The prohibition against propensity evidence "finds its source in the common law protection of the criminal defendant from risking conviction on the basis of evidence of his character." *Montoya v. Village of Cuba*, No. CIV 11–0814 JB/SMV, 2013 WL 6503702, at *12 (D.N.M. Nov. 30, 2013). In *People v. Molineux*, the defendant was accused of murder by poison. 168 N.Y. at 270. At trial, the prosecution introduced propensity evidence suggesting that the defendant had similarly poisoned another individual with the same drug. *Id.* at 281-84. In finding the evidence inadmissible, the court declared it "universally recognized and . . . firmly established in all English-speaking lands" that "the general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment." *Id* at 286. The court in *Molineux* additionally observed that the common law standard forbidding propensity evidence "is an

elementary principle of law that the commission of one crime is not admissible in evidence upon the trial for another, where its sole purpose is to show that the defendant has been guilty of other crimes, and would, consequently, be more liable to commit the offense charged." *Id.* at 344-45; see also 22 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5239, at 436-39 (1978).

Molineux is a leading American decision in the realm of propensity evidence, because although the evidence was inadmissible, the court set forth detailed exceptions to the general rule against propensity evidence. United States v. Ring, 513 F.2d 1001, 1004 (6th Cir. 1975). When offered against a defendant, propensity evidence may be admissible to show proof of motive, common scheme, or intent. Molineux, 168 N.Y. at 286. These exceptions were later codified as permissible purposes for offering propensity evidence under Rule 404(b)(2). See Jones v. Stinson, 229 F.3d 112, 120 (2d Cir. 2000) (noting that Rule 404(b) essentially codified Molineux). But the Molineux court never contemplated the Rule's use as applied to third parties.

Similarly, Rule 404(b) echoes the common law policy primarily aimed at protecting defendants against unfair prejudice. *Lucas*, 357 F.3d at 611 (Rosen, J., concurring) (citations omitted). The policy concerns are two-fold. *See United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979) (citation omitted). First, the introduction of propensity evidence creates a substantial risk that a defendant will be punished on the basis of past or subsequent misdeeds rather than because of actual guilt. *Id.* Second, a jury may misestimate the weight of the other crimes evidence and allow it to bear too strongly on the present charge. *Id.* The drafters of Rule 404(b) shared this serious danger of prejudice and misestimation. The Advisory Committee Notes to Rule 404(b) reference *Michelson v. United States*, a case decided by this Court prior to the passage of Rule 404(b). 335 U.S. 469 (1948). According to *Michelson*, character evidence is

generally prohibited because it risks overpersuading the jury as to "prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.* at 476 (emphasis added). "The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Id.*

Despite its usage of the word "person," Rule 404(b) is not concerned with reverse 404(b) evidence offered against third parties, because "[c]oncern with the poisonous effect on the jury of propensity evidence is minimal. Since the jury is not being asked to judge that other person, the primary evil that may result from admitting such evidence against a defendant – by tainting his character – is not present." *Murray*, 478 F.3d 939 (internal quotations and citations omitted). Even where "the evidence causes the defendant to be acquitted, and the other person is put on trial, his guilt or innocence will be determined on the basis of the evidence in his case, and not on the basis of the other crimes he committed." *Id.*; *see United States v. Krezdorn*, 639 F.2d 1327 (5th Cir. 1981), *cert. denied*, 465 U.S. 1066 (1984) ("When the evidence will not impugn the defendant's character, the policies underlying 404(b) are inapplicable."). *Cf. United States v. Gonzalez-Sanchez*, 825 F.2d 572, 582 n.25 (1st Cir. 1987) ("Inasmuch as this evidence does not concern past criminal activity of [the defendant], Rule 404(b) is inapplicable."), *cert. denied*, 484 U.S. 989 (1987); *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983).

In the case at bar, the Fourteenth Circuit correctly held that Rule 404(b) does not apply to reverse 404(b) evidence. (R. 34). Ms. Zelasko seeks to introduce testimony showing that Short, a non-party, has previously distributed anabolic steroids. Because Short is not a party to the instant case, she enjoys no common law protection from evidence introduced against her. Furthermore, Short will suffer no prejudice from the introduction of Ms. Morris' testimony. In fact, Short will

be protected from any adverse consequences of the evidence because she will still receive all the evidentiary and constitutional protections afforded to her in any separate criminal proceeding.

Therefore, the policy concerns of Rule 404(b) only apply to Ms. Zelasko.

B. Even if evidence of a third party's prior acts is of little probative value or unjustly prejudicial, such evidence will be excluded under Rule 401 and the balancing test of Rule 403.

Under both the plain language and the policy approaches, when a party seeks to introduce evidence of a third party's prior bad acts, the evidence must still pass muster under Federal Rules of Evidence 401 and 403. Under Rule 401, relevant evidence¹ is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Under Rule 403, the evidence's probative value cannot be substantially outweighed by unfair prejudice, confusion of the issues, undue delay, misleading the jury, or be overly cumulative. Fed. R. Evid. 403. Unlike relevance, probative value is not considered in isolation; it signifies the evidence's incremental value relative to other admissible evidence in the case. *See Old Chief v. United States*, 519 U.S. 172, 184-85 (1997). Although Rule 404(b) is not controlling for reverse 404(b) situations, the enumerated exceptions listed in the Rule are taken into consideration under the Rule 403(b) balancing test. *See Morano*, 697 F.2d at 926.

Advocates of the plain language approach argue that propensity evidence is of slight probative value and, when offered by the defendant, amounts to nothing more than "finger-pointing." *Murray*, 474 F.3d at 939. This argument is meritless. Already wary of the dangers of finger-pointing, courts use Rules 401 and 403 to impose varied similarity requirements and hold

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¹ Evidence is relevant where it tends to negate the defendant's guilt by corroborating the accused's defense to the conduct charged. *See Lucas*, 357 F.3d at 614 (J. Rosen concurrence) ("there seems little doubt that [a third party's] prior conviction for cocaine distribution would tend to negate [the defendant's] guilt by corroborating her defense that the drugs were [the third party's], not hers, albeit through propensity inference, and there can be no serious questions such evidence is relevant.")

that the third party's other acts must sufficiently resemble the conduct at issue in order to be admitted. *See, e.g., Myers*, 589 F.3d 117. Typically, "[i]f the characteristics of both the prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant," then the evidence will likely not be admissible." *United States v. Williams*, 458 F.3d 312, 319 (3d Cir. 2006) (quoting *United States v. Perkins*, 937 F.2d 1397, 1400 (9th Cir. 1991)). Additionally:

[a] jury is unlikely to acquit a defendant [merely because] there's someone else out there who has a propensity to commit such crimes, so that in such a case Rule 403's balancing test is all one needs to keep "other crimes" evidence within bounds.. [U]nless the other crime and the present crime are sufficiently alike to make it likely that the same person committed both crimes...the evidence will flunk Rule 403's test.

United States v. Murray, 474 F.3d 939 (parentheticals omitted)).

United States v. Montelongo is instructive in determining the interplay between Rules 403 and 404(b). 420 F.3d 1169 (10th Cir. 2005). At trial, the defendants offered reverse 404(b) evidence to prove they had been tricked into trafficking drugs by a third party, the owner of the truck in which the drugs were smuggled. Id. at 1175. The defendants proffered evidence of a similar past incident involving two other drivers who were hired by the same third party and charged with trafficking large amounts of marijuana hidden in the same part of the truck. Id. The court determined that Rule 404 was inapplicable because the evidence was offered by the defendants against a third party and that the evidence was relevant because it tended to negate the defendants' guilt. Id. Applying Rule 403, the court found that the similarities between the two crimes enhanced the evidence's probative value and presented no danger of distracting the jurors from the real issues in the case. Id. "To the contrary, the [reverse 404(b)] evidence would have highlighted the central issue at trial—namely which man was responsible for the contraband." Id. at 1175. On the basis of these similarities, the court admitted the evidence. Id.

Conversely, in *United States v. Williams*, the court would have allowed admission of reverse 404(b) evidence for purposes of intent and opportunity, had the considerations of Rule 403 not substantially outweighed the evidence's probative value. 458 F.3d at 318-19. The court held that the two offenses, although both involving firearms and robbery, were not sufficiently similar. *Id* at 319. There only real similarity between the third party's past crimes and the offense with which the defendant was charged was that they both involved guns. *Id.* at 318-19. In this manner, the propensity evidence failed the Rule 403 test. *Id.* at 319.

In the instant case, the Fourteenth Circuit correctly held the evidence admissible based on the strength of its probative value and the noted absence of 403 concerns. (R 35). Short's past misconduct is distinctly similar to the offenses with which Ms. Zelasko is charged. Only months prior to Ms. Zelasko's arrest, Short sold anabolic steroids with almost the exact chemical composition as the steroids Ms. Zelasko is alleged to have sold. (R. 35). Moreover, Short exclusively sold these illicit substances to a winter sports team, which is consistent with the charges against Ms. Zelasko. (R. 25). This evidence of Short's propensity to distribute steroids to members of winter sports teams negates Ms. Zelasko's guilt, or at the very least makes it equally likely that Short was the second co-conspirator rather than Ms. Zelasko.

With respect to the balancing test of Rule 403, this case more closely parallels the facts of *Montelongo* than *Williams* because of the striking similarities between Short's past conduct and Ms. Zelasko's alleged conduct. The evidence exhibits great probative value. There is no danger of confusing the issues because the central question of this case concerns the identity of the second co-conspirator. Similarly, admitting this evidence will not burden the judicial system or unreasonably delay adjudication of the trial. The proximity and the resemblance of the two crimes are sufficiently close that a jury will be capable to weigh its probative value rationally.

II. UNDER CHAMBERS V. MISSISSIPPI, DUE PROCESS REQUIRES THE ADMISSION OF REVERSE 404(B) PROPENSITY EVIDENCE OFFERED BY THE DEFENDANT TO SHOW THAT IT IS EQUALLY LIKELY THAT ANOTHER PARTY COMMITTED THE OFFENSES WITH WHICH THE DEFENDANT IS CHARGED.

At common law criminal defendants found themselves subject to a number of restrictions as to the types of evidence they could offer at trial. *See Washington v. Texas*, 388 U.S. 14, 20-21 (1967). The Sixth Amendment was crafted, in part, to give defendants a greater ability to defend themselves against criminal charges. *Id.* at 21-22. Under the Sixth Amendment's Compulsory Process Clause, defendants are afforded the right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *see* U.S. Const. amend. VI. On a number of occasions, this Court has addressed a defendant's rights under the Compulsory Process Clause, stating that:

[a] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine witnesses against him, to offer testimony, and to be represented by counsel.

In re Oliver, 333 U.S. 257, 273 (1948) (footnote omitted) (emphasis added). A "fundamental element" of due process is the defendant's right to present witnesses in order to establish an adequate defense to the charged crimes. *Washington*, 388 U.S. at 19.

At its core, the right to a complete defense requires that criminal prosecutions be conducted in a manner that "comport[s] with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Although the full scope of the right has eluded the courts, this Court has made clear that offering witnesses testimony is a key component of a complete defense. *See, e.g., In re Oliver*, 333 U.S. at 273. Just as the prosecution is given the opportunity to offer its version of the facts, a defendant is likewise entitled to present his or her version of the facts. *Washington*, 388 U.S. at 19. Only when presented with both sides of a case can a jury truly determine where the truth lies. *See id.* In spite of this fundamental right to present

a complete defense, the Federal Rules of Evidence and other statutory enactments sometimes limit the types of evidence a defendant is allowed to offer at trial. *See, e.g.*, Fed. R. Evid. 404(b). However, such rules must not unreasonably infringe upon a defendant's constitutional rights. *See United States v. Scheffer*, 523 U.S. 303 (1998). Between these polar extremes—an accused's right to present a legitimate defense and the right of the government to further its interests—courts are tasked with establishing the limits of legislative enactments and the restrictions placed on individual liberties. *See id*.

A. When the policy implications addressed by a specific rule of evidence are not present in a criminal case, strict adherence to the rule violates due process and prevents the defendant from presenting a complete defense.

It is possible to apply the Rules of Evidence in such a manner as to violate a criminal defendant's Compulsory Process rights, specifically the right to present a complete defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973). When the right to adequately defend oneself against the State's charges outweighs the public policy concerns underlying a particular rule or legislative enactment, due process is offended and the rule should not be strictly enforced. *See id.*

In *Chambers v. Mississippi*, this Court held that the Rules of Evidence must not be applied in such a way as to violate a criminal defendant's due process rights. *Id.* at 301. Following the defendant's arrest for murder, another individual signed a sworn confession stating that he, not the defendant, was the killer. *Id.* at 287. The third party later recanted his confession. *Id.* at 288. At trial, the defendant called the third-party confessor as a witness in order to present evidence of the third party's confession. *Id.* at 291. This defense strategy was thwarted, however, by the application of both Mississippi's voucher rule and the rule against hearsay, which excluded the proffered evidence. *Id.* at 294.

On appeal from the defendant's conviction for murder, this Court reiterated that "[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." *Id.* at 294. The Court looked to the cumulative effect of the trial court's actions to determine that the defendant was not afforded an opportunity to present a complete defense, in violation of his due process rights. *Id.* at 302. This Court based its decision upon an examination of the policy advanced by the rule against hearsay, namely that unreliable evidence should not be presented to the jury. *Id.* at 299-300.

Notwithstanding the blanket prohibition on hearsay statements, courts and rule drafters have carved out a number of exceptions for hearsay statements that are generally deemed to be reliable. Id. at 298-99; see Fed. R. Evid. 803; Fed. R. Evid. 804. In *Chambers*, even though the third party's statement did not fall into any of these exceptions, the Court was satisfied that the statements at issue did not implicate any policy concerns and bore sufficient indicia of reliability to justify their admission. 410 U.S. at 300-02. Because the defendant's fundamental right to present a complete defense outweighed the policy concerns underlying the rules, an accused due process was offended by the strict application of such rules. See id. at 302. Although the Court stated that its decision did not espouse any new tenets of constitutional law, it made clear that the Rules of Evidence must not be applied in such a manner as to deprive a defendant of due process. Id. at 302-03.

In the instant case, the strict application of Rule 404(b) will prevent Ms. Zelasko from presenting a complete defense. Excluding Ms. Morris' testimony that Ms. Short previously distributed anabolic steroids to members of a winter sports team would deprive Ms. Zelasko of

² At the time *Chambers* was decided, neither Mississippi nor the Federal Rules of Evidence recognized a hearsay exception for statements against penal interest. 410 U.S. at 299. It is interesting to note that soon after the decision in *Chambers*, both Mississippi and the Federal Rules of Evidence carved out a hearsay exception for such statements when the declarant is unavailable. Fed. R. Evid. 804(b)(3)(A) (2013); Miss. R. Evid. 804(b)(3) (2013).

the ability to present her version of the facts, including the possibility that Ms. Short was the second co-conspirator and not Ms. Zelasko. Ms. Zelasko's right to present a complete defense includes the right to present witnesses in her favor so that the jury may hear her version of the facts. Rule 404(b) arose from the common law concern that defendants would be prejudiced by evidence of their prior bad acts. Should this Court decide that the admission of Ms. Morris' statement would violate the plain language of Rule 404(b), strict adherence to the rule in the absence of policy concerns—prejudice to defendants—will deprive Ms. Zelasko of due process. The Court of Appeals for the Fourteenth Circuit appropriately determined that excluding Ms. Morris' statement would not further the governmental interests served by Rule 404(b) because Short is not a party to this litigation and would therefore suffer no prejudice from introduction of evidence showing that it is equally likely that Short was the second co-conspirator. (R. 37-38). Because Petitioner does not have a legitimate interest in excluding the evidence, Ms. Zelasko's right to present a complete defense requires its admission.

B. Because Rule 403 adequately protects the jury from considering unduly prejudicial information, excluding third-party propensity evidence under Rule 404(b) is unconstitutionally arbitrary and disproportionate to the governmental interest the rule seeks to further.

Although a defendant enjoys a right to present his or her version of the facts at trial, this fundamental right must at times be balanced against legislative enactments that further legitimate governmental interests. *See Scheffer*, 523 U.S. at 308. If the government promulgates rules that compromise individual liberties, such rules must be reasonable and must not restrict a defendant's rights in a way that is "arbitrary or disproportionate to the interests served by a rule." *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987). Where the exclusion of evidence unreasonably infringes upon a weighty interest of the accused, such as the right to present a complete defense, courts should find the rules excluding that evidence to be unconstitutionally arbitrary or

disproportionate. *See Scheffer*, 523 U.S. at 308. When a rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental[,]" due process will not allow the rule to stand. *See Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

To determine the government's interest with respect to a particular rule, courts should look to the common law justifications for the rule. *See id.* at 46 (plurality opinion). This Court's decisions provide several illustrations of "arbitrary or disproportionate" rules that do not serve legitimate governmental interests. *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006); *see also Scheffer*, 523 U.S. at 315-16. In *Washington v. Texas*, a Texas rule barring individuals charged as participants in a crime from testifying in defense of one another was found not to serve the State's legitimate interest in securing reliable testimony. 388 U.S. at 23. As previously discussed, this Court in *Chambers* found that Mississippi's interest in securing reliable testimony at trial was not legitimately served by application of the State's voucher and hearsay rules. 410 U.S. at 302. In *Rock v. Arkansas*, the State unsuccessfully sought to exclude hypnotically refreshed testimony based on its interest in presenting competent evidence to the jury. 483 U.S. at 61.

Because Rule 403 more than compensates for the remote risk of prejudice associated with the admission of third-party propensity evidence, application of Rule 404(b) is unnecessarily duplicative and thus arbitrary and disproportionate to any governmental interest served by the exclusion of such evidence.³ Interestingly, when a defendant seeks to admit evidence of a third party's prior acts for the purpose of negating the defendant's guilt, courts engage in an inquiry that exhibits the significant overlap between Rule 404(b) and Rule 403. *See, e.g., Lucas*, 357

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³ This is not to say that the overlap of Rule 403 and Rule 404 makes the application of Rule 404 arbitrary or disproportionate in all circumstances. But for Ms. Zelasko's constitutional right to present a defense, the prohibition of third-party propensity evidence would be a perfectly legitimate exercise of governmental authority. For this reason, the application of Rule 404 when the government seeks to introduce evidence of a defendant's prior acts is appropriate because there is no Compulsory Process right for the prosecution.

F.3d 599. Assuming, *arguendo*, that there is a risk a third party will be unfairly prejudiced by the admission of third-party propensity evidence, the balancing test of Rule 403 provides a safeguard against such prejudice. Fed. R. Evid. 403.

Moreover, even if a rule is found to be unconstitutionally arbitrary or disproportionate because it serves no legitimate government interest, the evidence in question may still be excluded under Rule 403. *Holmes*, 547 U.S. at 326. In determining whether to admit third-party propensity evidence, circuit courts allowing the evidence have generally deferred to the balancing test of Rule 403 regardless of whether the evidence should be admitted under Rule 404(b), especially when the third party's prior acts are similar to the offense with which the defendant is accused. *See United States v. Sanders*, 708 F.3d 976 (7th Cir. 2013) ("When deciding the admissibility of reverse 404(b) evidence, the district court must determine whether the information's probative value is outweighed by other considerations, such as undue prejudice, confusion of the issues, or delay.") (citation omitted); *Montelongo*, 420 F.3d at 1169 (similarities between crimes made the evidence sufficiently probative and the probative value was not substantially outweighed by risk of confusing the jury or wasting time); *Lucas*, 357 F.3d at 599 (noting that if the third party's previous conviction had been similar to the case at bar, such similarities may have warranted inclusion under Rule 403).

In the case at bar, Ms. Zelasko has a weighty interest in presenting Ms. Morris testimony concerning Short's propensity to distribute anabolic steroids to members of winter sports teams. Short's prior drug distribution is so similar to the offenses with which Ms. Zelasko is charged that it is just as likely that Short was the second co-conspirator: both involve substantially the same undetectable drug circulated to members of a small women's athletic team in the same

sport. (R. 37). Moreover, the amount of ThunderSnow found in Ms. Zelasko's possession is consistent with personal use rather than distribution. (R. 26-28).

In support of its argument to exclude the evidence under Rule 404(b), Petitioner cites only considerations of judicial expediency and reducing prejudice. (R. 37-38). If deemed valid, any concerns implicated by the introduction of Ms. Morris' testimony, are addressed by Rule 403 and Rule 404(b) need not be considered. Furthermore, as previously discussed, the policy concerns that led to the creation of 404(b) are not present in the facts of Ms. Zelasko's case. The Court of Appeals for the Fourteenth Circuit properly held Ms. Zelasko's constitutional right to present a complete defense requires the admission of Ms. Morris' testimony because Ms. Zelasko's interest in offering this compelling evidence greatly outweighs whatever interest the government has in excluding the evidence under Rule 404. (R. 37-38).

III. THE WILLIAMSON STANDARD SHOULD BE RE-AFFIRMED BECAUSE IT IS FAITHFULTO THE INTENT OF RULE 804()(3), AND IT WAS PROPERLY APPLIED HERE BECAUSE THE STATEMENTS IN THE EMAIL ARE NOT SELF-INCULPATORY.

Federal Rule of Evidence 802 provides the familiar rule that all hearsay statements are inadmissible. Excepted from the rule against hearsay, however, are statements against the declarant's interest, defined as:

a statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it 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. . .

Fed. R. Evid. 804(b)(3)(A). When a statement against interest "is offered in a criminal case as one that tends to expose the declarant to criminal liability," the statement must be "supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3)(B).

Rule 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." *Williamson v. United States*, 512 U.S. 594, 599 (1994). Thus, non-incriminating collateral statements do not provide the same "circumstantial guaranty of reliability" against the dangers of hearsay as do self-inculpatory statements. Fed. R. Evid. 804(b)(3)(B) advisory committee's notes. It is therefore no surprise that the proponent of the against-interest statement bears the burden of showing that it qualifies under Rule 804(b)(3). *Am. Accessories, Inc. v. Fishman*, 175, F.3d 534, 540 (7th Cir. 1999).

In *Williamson*, the seminal case interpreting this hearsay exception, this Court interpreted Rule 804(b)(3)'s use of the term "statement" as "a single declaration or remark" that is "individually self-inculpatory." 512 U.S. at 599. A narrative containing *some* inculpatory statements, however, does not make the non-inculpatory portions more credible. *Id.* This Court astutely 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, a broad view of "statement" such as an "extended declaration" or "entire narrative" would run afoul of Rule 804(b)(3). *See id.* at 599. The proper inquiry under Rule 804(b)(3) is whether, in light of the surrounding circumstances, "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" *Id.* at 603-04.

A. The *Williamson* rule should be reaffirmed as it provides the standard that is most faithful to the intent of Rule 804(b)(3).

Williamson's narrow definition of the term "statement" as a "single declaration or remark" most securely protects against the inherent dangers of hearsay. Courts are highly skeptical of hearsay statements because they are not exposed to the "credibility safeguards of

oath, presence at trial, and cross-examination," therefore the declarant's trustworthiness cannot be evaluated and the statement is deemed unreliable. *United States. v. Reynolds*, 715 F.2d 99, 102 (3d Cir. 1983). To this end, the plain language of Rule 804(b)(3)(A) strictly requires that the statement be the kind that a reasonable person in the declarant's position would have made *only if* it was believed true because it was *so contrary* to the declarant's interest. Fed. R. Evid. 804(b)(3)(A). The phrases "so contrary" and "made only if" require the satisfaction of an extremely high threshold of self-incrimination. *See Williamson*, 512 at 600-01. Moreover, because the rule requires the satisfaction of a number of criteria, statements that qualify are likely to be short and direct, since longer text or speech often combines multiple (perhaps divergent) ideas, reasoning, and detail.

After *Williamson*, not even those collateral statements closely related to against-interest statements warrant 804(b)(3) admissibility. *United States v. Sims*, 879 F. Supp. 828, 832 (N.D. Ill. 1995). Rather, the fact that a statement is in close proximity to a self-inculpatory statement "says nothing at all" about the collateral statement's reliability; therefore each specific admitted statement or part of a statement⁴ must be found to be against the penal interests of the declarant. *Williamson*, 512 U.S. at 600. This seemingly strict requirement for individual assessment of against-interest statements is merely a reflection of the rule's demanding language as well as courts' exacting intolerance towards the inherent unreliability of hearsay statements. *See Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1003 (3d Cir. 1988). As declarants often pair self-inculpatory remarks with falsehoods, the danger of a party subverting the rule under a more liberal interpretation of the rule is immense. *See Williamson*, 512 U.S. at 599-600. By affirming a

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⁴ Williamson's narrow definition of "statement" remains consistent with the Federal Rules of Evidence and revised dictionaries. See Fed. R. Evid. 801(a) (defining statement as an "oral assertion"); Blacks Law Dictionary 133, 1539 (9th ed. 2009) (providing that a "statement" is "[a] verbal assertion or nonverbal conduct intended as an assertion," and that an "assertion" is "a declaration or allegation"); Merriam-Webster's Collegiate Dictionary 1219 (11th ed. 2003) (mirroring the definition used in Williamson).

more expansive interpretation of "statement," this Court would establish a standard that falls woefully short of the protections against hearsay offered by the *Williamson* rule which is backed by the strong preference for the predictability afforded by *stare decisis*.

Other proposed standards, such as Justice Kennedy's concurrence in *Williamson*, for which Circuit Judge Marino advocated below, contravene the mandate that evidence is improper if it is furnished, in any respect, by an undercurrent of hearsay statements. *See Carden*, 850 F.2d at 1003. The inclusion of all relevant surrounding evidence would surely be a judicial luxury, but the rule against hearsay was established to ensure reliability and judicial fairness, no matter how "redacted" or "choppy" the resulting statements. (R. 51); *see Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945). Furthermore, the alternative approach bifurcates a simple totality standard into two nebulous inquiries. The *Williamson* standard, although at times difficult to apply, is less complicated and provides more appropriate safeguards against hearsay.

B. The courts below properly applied *Williamson* because the statements in the email, when considered both individually and in narrative form, do not rise to the level of self-inculpation.

The lower courts properly applied the *Williamson* standard in barring the admission of the email, even when examined under the circumstances that existed when the email was sent. The email's individual statements do not rise to the level of self-inculpation, and thus do not satisfy the rigors of Rule 804(b)(3). Furthermore, while aggregation of collateral statements is improper under *Williamson*, the statements here would still fail to expose Ms. Lane to criminal liability even under a more liberal standard that allows the admission of collateral statements.

1. The *Williamson* totality of the circumstances test only permits consideration of contemporaneous conditions at the time the statement was made.

The *Williamson* totality of circumstances test is an entirely separate inquiry from the relatively relaxed Rule 804(b)(3)(B) corroborating circumstances analysis. *See Harrison v*.

Chandler, Nos. 97-5511, 97-5544, 1998 WL 786900, at *5 (6th Cir. Oct. 26, 1998) (citation omitted) (concluding that the subsection (B) corroboration test is a preliminary question of admissibility, "not an ultimate determination as to the weight to be given to that statement"). Instead, in the wake of Williamson, courts only look to the contemporaneous circumstances that "surround the making of the statement." Id. at *8; see also United States v. Moses, 148 F.3d 277, 280 (3d Cir. 1998) (courts must "examine the circumstances in which the statements are made in order to determine whether they are self-inculpatory or self-serving").

Since Rule 804(b)(3) is premised on the reliability of the statement, the harm to the declarant's interest must exist at the time the statement was made, and the relevant surrounding circumstances are only those that existed at that moment. *See McCormick on Evidence* § 319, at 381 (6th ed. 2006). "That the statement later proves to be damaging—or, for that matter, beneficial—is without significance." *Id.* In this case, the later-revealed facts of contraband seizure from Ms. Zelasko's residence and of Mr. Riley's murder are subsequent incidents outside the purview of *Williamson*'s totality of the circumstances inquiry.

Moreover, applying subsection (B) of Rule 804(b)(3) to the email admittedly reveals that there are sufficient corroborating circumstances to indicate potential truthfulness. Rule 804(b)(3)(B) sets a low bar that is easily met in criminal cases when the statements generally mesh with the overarching alleged criminal conduct. *See, e.g., United States v. Nagib*, 56 F.3d 798, 895 (7th Cir. 1995) (the "trial judge has considerable discretion"); *United States v. Mackey*, 117 F.3d 24, 29 (1st Cir. 1997) (the threshold is not "unrealistically severe"). Here, the statements about Billings' suspicions, a second conspirator, and "coming clean" seem to match the alleged doping scandal. Nonetheless, the satisfaction of Rule 804(b)(3)(B) has no bearing on

whether or not statements rise to the level of being so against one's penal interest under subsection (A), which is not the case here.

2. The individual statements do not rise to the level of self-inculpation.

Courts have provided specific instruction as to the nature of statements that exhibit a sufficient degree of self-incrimination. To illustrate, in a racketeering case a confession that the declarant "kicked [the victim] in the head; and that [they] placed [him] in a chair and set the chair and the club on fire" was held admissible under Rule 804(b)(3). *United States v. Barone*, 114 F.3d 1284, 1289, 1297 (1st Cir. 1997). The First Circuit determined that this statement was adequately detailed and reflected an insider's knowledge of the crime at issue. *Id.* at 1297, 1301. Conversely, a court found an admission that the declarant dealt his gun to a cousin who later "got caught with it" insufficient under Rule 804(b)(3). *Smith v. Lusk*, No. 3:10-0781, 2012 WL 1806817, at *1, (S.D.W.V. May 17, 2012). Although the admission of this statement could conceivably give rise to several criminal possession charges, the court found that the basis for criminal liability was too hypothetical and attenuated to rise to the requisite level of incrimination. *Id.* at *3.

As the trial court understood, Petitioner conceded that the individual statements are not inculpatory on their own. (R. 22). Each statement in Lane's email is intentionally cryptic and safely skirts around clear admission of guilt. The mysterious statements at issue regarding an unspecified business are more like the attenuated admission in *Smith* than a detailed, direct statement of one's involvement in a murder as in *Barone*. In fact, the there is less self-incrimination in this matter than even in *Smith*, because here Lane's email is completely void of any discrete admission of conduct that could potentially lead to criminal liability. Conversely,

the *Smith* statements admitted to certain conduct that *could* (but ultimately did not) rise to self-inculpation, and the Court there still ruled against admissibility.

The most damning statement in the Lane email reads, "I know you've suspected before about the business my partner and I have been running with the female team." (R. 29). This statement pertains only to Billings' suspicions, and cannot be twisted to rise to the level of exposure to criminal liability. If, for example, this statement concluded with a phrase such as "and you were right" or "I'm sorry for breaking your trust," then the statement would be sufficiently adverse to Lane's interest. Similarly, the statements about the male team member and Lane's partner trying to "keep him quiet" lack the precision required to genuinely inculpate Lane. Lane neither endorses nor even tacitly agrees to this course of action. (R. 29). A vague statement regarding a third party's potential conduct does not rise to disclosure of a fact against penal interest.

3. When combined and considered in context, the statements do not rise to the level of self-inculpation.

Even if this Court is prepared to reverse settled precedent and consider collateral statements in the 804(b)(3) analysis, the result in this case will not change. When the "I know you've suspected" statement is paired with the subsequent statement, "[o]ne of the members of the male team found out and threatened to report us if we don't come clean" (R. 29), the result still falls outside Rule 804(b)(3). Lane does not make clear what the male team member "found out." In fact, it is unconfirmed whether Billings still believed that the women were engaging in criminal activity at the time of the email; therefore, this narrative could plausibly amount to nothing more than an innocent plea for help. Additionally, Lane admitting her lack of knowledge as to what her unnamed partner "has in mind," (R. 29), reflects that the statements pertaining to quieting the male teammate are not the kind that she would have made only if she believed them

to be true. Without clarification, these statements are not "so contrary" to Lane's interest, as to provide any indicia of trustworthiness.

When combined, the email's statements do not present a strong case for admission of guilt, but rather complicate and multiply the statements' possible meanings. *Williamson* examined much more specific admissions of guilt that provided precise details of a crime, and even then this Court still denied the statement's admissibility. Petitioner, who bears the burden under Rule 804(b)(3), cannot combine multiple collateral statements to enjoy sweeping hearsay-annulling results while ignoring the consequences of compounding the statements' potential meanings. Even in the aggregate, these statements do not so clearly demonstrate self-inculpation, calling into question whether this case is properly ripe for a reexamination of *Williamson*. Even if this case presented an occasion where the aggregated statements gave rise to sufficient self-incrimination, the *Williamson* standard still provides the most faithful understanding of Rule 804(b)(3) and must be reaffirmed.

IV. CRAWFORD V. WASHINGTON ADDRESSED THE CONSTITUTIONAL RELIABILITY OF HEARSAY SATEMENTS AND THEREFORE LEFT UNDISTURBED THE HOLDING IN BRUTON V. UNITED STATES, WHICH ADDRESSED THE SEPARATE ISSUE OF CONSTITUTIONAL HARM.

The Confrontation Clause affords the defendant the right to be confronted with the witnesses who will testify for the prosecution. U.S. Const. amend. VI. This Court interpreted this constitutional protection to include the right to cross-examination. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). With respect to joint trials, this Court held that a non-testifying co-defendant's confession that implicates a defendant violates the Confrontation Clause, even with a limiting jury instruction. *Bruton v. United States*, 391 U.S. 123, 145 (1968). Whenever a co-defendant makes a confession that incriminates another defendant, it creates a context "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so

vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. The resulting *Bruton* doctrine became a well-recognized protection against the devastating effect—constitutional harmfulness or prejudice—inflicted on the accused in these scenarios. *See Cruz v. New York*, 481 U.S. 186, 193 (1987).

This Court later sought to clarify general Confrontation Clause jurisprudence in its momentous *Crawford v. Washington* decision. 541 U.S. 36 (2004). There, this Court 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. *Id.* at 53-54. *Crawford* explained that testimonial statements are those made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. *Id.* at 52.

A. The *Bruton* doctrine involved a test of constitutional harmfulness.

This Court's development of the *Bruton* doctrine reveals that *Bruton*'s focus is to ensure that the accused is not unconstitutionally prejudiced, an objective wholly distinct from *Crawford*'s goal of securing reliable testimony. For instance, a line of cases dealing with confessions containing redacted references to co-defendants illustrates *Bruton*'s harmfulness framework. In *Gray v. Maryland*, the trial court allowed the introduction of a written confession with the names of two co-conspirators "omitted, leaving in their place blank white spaces separated by commas." 523 U.S. 185, 189 (1998). This Court ruled these omissions so obvious and congruous to *Bruton*'s unredacted statements that they amounted to a Confrontation Clause violation. *Id.* at 192. In contrast, *Richardson v. Marsh* presented a situation where the co-defendant Williams' murder confession was admitted into evidence with a redaction to any indication that other co-defendants participated in the crime, accompanied by a jury

admonishment not to use the confession in any way against the defendant. 481 U.S. 200, 203 (1987). This Court ruled that the confession, unlike that in *Bruton*, was not facially incriminating and held that *Bruton* can be complied with by redaction. *Id.* at 209.

In short, a confession modified with a blatant sign of redaction violates *Bruton* because the other defendant sitting nearby in a joint trial suffers substantial harm by admitting of a suggestive confession. *See* 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, 647 (2012). Conversely, a confession that in no way references the co-defendant is permissible under the *Bruton* doctrine not because it is "any more reliable than that same confession before redaction, but because, it is less harmful to the other defendant." *Id*.

Moreover, in a case involving multiple defendants' confessions, each corroborating—or interlocking—with the others, this Court found a *Bruton* violation. *Cruz*, 481 U.S. at 191. In *Cruz*, this Court reasoned that the fact that a defendant's confession buttressed another codefendant's admission spoke to that statement's reliability, rather than its harmfulness. *Id.* at 192-93. The statement's reliability cannot be relevant to whether the jury is likely to obey an instruction to, or if the jury's failure to obey is likely to be inconsequential. *Id.* Thus, *Cruz* is "indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, the probability that such disregard will have a devastating effect, and the determinability of these factors in advance of trial." *Id.* at 193. This Court firmly reasserted the *Bruton* doctrine and prophetically declared, "having decided *Bruton*, we must face the honest consequences of what it holds." *Id.* at 192-93. If this Court had classified the danger of co-defendant confessions as a matter of the statements' *reliability*, the interlocking confessions in *Cruz* would have easily been ruled admissible.

Lower courts have similarly decided *Bruton* cases in a way that illuminates the proper harm-based analysis. For example, courts have consistently found that the *Bruton* doctrine is inapplicable to joint bench trials. *Rogers v. McMackin*, 884 F.2d 252, 257 (6th Cir. 1989); *West v. Jones*, No. 04-CV-40199-FL, 2006 WL 508652, at *3 (E.D. Mich. Feb. 28, 2006). That is, since the *Bruton* rule seeks to remedy the constitutional harm thrust upon the co-defendant when the *jury* hears a damaging co-defendant confession, the doctrine should not apply in non-jury settings. *See Rogers*, 884 F.2d at 257. As the Sixth Circuit explained, there is no reason to conclude that judges, like jurors are "incapable of separating evidence properly admitted against one defendant from evidence admitted against another." *Id*.

Even after *Crawford*, the inapplicability of *Bruton* in bench trials continued. In *West v. Jones*, the court found a joint bench trial confession constitutional, reasoning that "[t]rial courts are presumed to consider only properly admitted and relevant evidence in rendering its decision and to give no weight to improper testimonial evidence" 2006 WL 508652, at *3. The fact that co-defendants are subjected to a joint bench trial clearly does not affect the reliability of a prior confession; thus *Bruton*'s inapplicability is due to an absence of prejudice, rather than an absence of reliability, when a judge considers a damning confession instead of a jury. *See* Miller, 77 Brook. L. Rev. at 670.

Additionally, after *Crawford*, lower courts have continuously decided redacted confession cases, permitting the use of non-suggestive neutral pronouns—such as confessing to committing a crime with "another individual"—in the place of the names of other co-defendants. *See, e.g., United States v. Akefe*, No. 09 CR 196(RPP), 2010 WL 2899805, at *25 (S.D.N.Y. July 21, 2010). In *Akefe*, the court used Second Circuit precedent to determine that when a co-defendant includes a neutral pronoun to acknowledge the involvement of another, the confession

may be admitted against the defendant. *Id.* The court reasoned that since the confession, although testimonial, was only offered against the co-defendant and not against defendant Akefe, *Crawford* afforded no protection to the defendant, and the confession was "only violative of Akefe's confrontation clause rights if it violates the rules set out in *Bruton* . . ." *Id.* (citation omitted). *Akefe* reveals that the *Crawford* analysis may be inapplicable in situations where a *Bruton* violation could still exist. Cumulatively, these cases shatter the notion that *Crawford* injected a reliability inquiry into the *Bruton* rule; rather they reveal that the testimonial hearsay analysis is wholly distinct from the *Bruton* doctrine.

The court below properly found that the admission of Lane's email in the joint jury trial at bar violates Ms. Zelasko's constitutional right to confrontation. In terms of the Confrontation Clause, the facts of this matter are undisputed and straightforward. Since this issue arises only if Ms. Zelasko loses on the *Williamson* hearsay issue, (R. 23), this Court will have concluded that the email at issue rises to a confession and that the *Bruton* doctrine attaches to this co-defendant confession. Here, in the case of a pending joint jury trial, the Lane email constitutes the type of legitimate harm to Ms. Zelakso that *Bruton* explicitly forbids—harm even beyond the curative force of a limiting jury instruction.

B. *Crawford* addressed constitutional reliability, and thereby left *Bruton*'s constitutional harmfulness inquiry undisturbed.

Before *Crawford*, *Ohio v. Roberts* was the leading Confrontation Clause decision. 448 U.S. 56 (1980). *Roberts* handed down the standard that hearsay statements offered by the State must bear adequate indicia of reliability to comply with a defendant's constitutional rights. *Id.* at 66. This Court added that "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.*

Seeking a test more faithful to the Framer's intent, *Crawford v. Washington* replaced the indicia of reliability standard with its testimonial vs. nontestimonial dichotomy. 541 U.S. at 68-69. In modifying *Roberts*, *Crawford* furnished a test that was similarly based on reliability, evidenced by the oft-cited declaration, "where testimonial statements are at issue, the only indicium of *reliability* sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* (emphasis added). This standard provided constitutional protection separate and distinct from the safeguard against prejudice provided by *Bruton*. *Crawford* said as much when it acknowledged that this Court's prior opinions in cases like *Cruz* did not address testimonial hearsay but rather "addressed the *entirely different question* whether a limiting instruction cured prejudice to co-defendants" *Id.* at 59 (emphasis added).

Furthermore, even if this Court is persuaded that *Crawford* wrote *Bruton*'s protections out of the Confrontation Clause, the use of co-defendant confessions is still violative of the Rules of Evidence. Rule 403 operates to exclude evidence when its probative value is substantially outweighed by unfair prejudice or other procedural injustices. Fed. R. Evid. 403. In joint trials, a finding of unfair prejudice as to one defendant "resolves only the Rule 403 balancing as to him." *United States v. Figueroa*, 618 F.2d 934, 944 (2nd Cir. 1980). But "[w]hen that evidence also creates a significant risk of prejudice to the co-defendants, a further issue arises as to whether the evidence is admissible in a joint trial." *Id.* The Second Circuit justified this conclusion by explaining that confessions implicating other defendants are at the "extreme" of a sliding scale of constitutional harm because of the high likelihood of prejudice towards co-defendants in a jury trial. *Id.* at 946. Even if *Bruton* does not extend to nontestimonial statements after *Crawford*, a confession incriminating another defendant, regardless of the issuance of a jury instruction, constitutes severe evidentiary error. *Id.*

Several circuit decisions such as *United States v. Dale*, have incorrectly ruled that the *Bruton* doctrine, post-*Crawford*, is inapplicable to nontestimonial statements. 614 F.3d 942 (8th Cir. 2010). The Eighth Circuit attempted to distinguish the nontestimonial confession in *Dale* from *Bruton*'s testimonial confession, reasoning that the protection against prejudice is not triggered when the statement is made with *Crawford*'s reliability guarantee. *Id.* at 956. However, nontestimonial confessions, like interlocking admissions, are indistinguishable from *Bruton*-type confessions in a constitutional sense. *See Cruz*, 481 U.S. at 193. While this Court has concluded that both nontestimonial confessions and interlocking confessions are reliable, neither provide sufficient protection against the entirely separate issue of the devastating practical effect on the co-defendant's defense posed by incriminating co-defendant confessions. *See Crawford*, 541 U.S. at 53-54; *Id.* Prejudice and reliability present different constitutional interests and, where prejudice exists, the reliability of a confession cannot salvage its admissibility.

In attempting to show deference the recently-decided *Crawford* opinion, these lower courts overextended its holding to apply to the narrow circumstances of *Bruton*, an application neither contemplated nor intended by *Crawford*. The presence of only one citation to *Bruton* in the *Crawford* decision is anything but mysterious, but rather reflects that *Crawford* simply did not consider the narrow issue of co-defendant confessions in a joint trial. *See Crawford*, 541 U.S. at 59 (exempting cases like *Cruz* from its reliability analysis). Furthermore, while the majority of circuits have admittedly marginalized *Bruton* in the wake of *Crawford*, there is no unanimity. *See United States v. Jones*, 381 Fed. App'x 148 (3d Cir. 2010). In fact, the Third Circuit has recently pushed back against this trend, holding that "[w]e have interpreted *Bruton*'s rule broadly, applying it not only to custodial confessions but also to informal statements . . . " *Id*.

In the case at bar, Ms. Zelasko concedes that the email was crafted privately by Lane to her boyfriend Peter Billings and was not communicated to further a criminal prosecution; thus the statements therein are nontestimonial under *Crawford* and its progeny. (R. 1, 29). Moreover, Lane is unavailable as a witness because she will exercise her Fifth Amendment right not to testify at trial. (R. 45, n.1). The increased reliability of the email due to its nontestimonial nature, however, does not reduce its constitutional prejudice against Ms. Zelasko. The *Bruton* doctrine remains in full effect as a protective measure against the devastating effects of co-defendant confessions whether testimonial or nontestimonial. The courts below correctly ruled that the *Bruton* holding addressed the constitutional *harm* that Ms. Zelasko suffers when Lane implicates her by confession, whereas the *Crawford* decision was decided merely as a matter of constitutional *reliability*. (R. 44-45). This Court must continue to face the honest consequences of what *Bruton* holds and should therefore affirm the lower court's exclusion of this constitutionally violative piece of evidence.

CONCLUSION

Based on the foregoing, Respondent Anastasia Zelasko respectfully requests that the Judgment of the Fourteenth Circuit be AFFIRMED, and this case be remanded to the District Court for a fair and impartial trial by jury.

Respectfully submitted:

/s/ Team 3R

Team 3R

Counsel for Respondent, Ms. Anastasia Zelasko

CERTIFICATE OF SERVICE

We, Team 3R, hereby certify that one copy of the foregoing brief was submitted electronically by email to prince.competition@brooklaw.edu, and that five copies of the foregoing brief were sent certified mail, this 12th day of February, 2014 to:

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