No. 12-13

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANASTASIA ZELASKO,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by ruling that Miranda Morris's testimony is admissible under Federal Rule of Evidence 404(b) when that testimony makes it more likely that Casey Short – not Defendant Zelasko – is the unnamed coconspirator because Ms. Short sold a nearly identical steroid to another snowman team just five months before the alleged steroid conspiracy in this case began.

2. Whether under this Court's holding in *Chambers v. Mississippi*, Defendant Zelasko has a constitutionally protected right to present Miranda Morris's testimony to show that Casey Short was most likely the unnamed coconspirator, even though a textual application of Rule 404(b) could bar this evidence.

3. Whether *Williamson v. United States* should be overruled as the standard for determining the admission of hearsay statements under Federal Rule of Evidence 804(b)(3) when it is neither unworkable nor badly reasoned, and whether the district court abused its discretion by excluding Defendant Lane's email under 804(b)(3) when none of the individual statements were self-inculpatory in light of the surrounding circumstances.

4. Whether *Crawford v. Washington* restricted the application of *Bruton v. United States* to testimonial statements, even though *Crawford* and *Bruton* protect separate and distinct interests, and whether the non-testimonial statement of a non-testifying co-defendant implicating the defendant at a joint trial is excluded under *Bruton*.

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The decision of the United States District Court for the Southern District of Boerum (Crawford, District Judge) on the pre-trial motions in Zelasko and Lane's joint trial is printed at page 20 of the record. The district court ruled that Ms. Morris's testimony is not barred by Federal Rule of Evidence 404(b) and is admissible at trial – and alternatively, is admissible under Defendant Zelasko's constitutional right to present a complete defense under *Chambers v. Mississippi*. The district court also ruled that Defendant Lane's email is not admissible because it did not qualify as a statement against penal interest under Federal Rule of Evidence 804(b)(3), and additionally *Bruton v. United States* independently bars the email's admission to protect Defendant Zelasko's Confrontation Clause rights.

The decision of the United States Court of Appeals for the Fourteenth Circuit (Richardson, Circuit Judge) is printed at page 30 of the record. The Fourteenth Circuit affirmed the decision of the district court in its entirety.

CONSTITUTIONAL PROVISIONS

Two provisions of the United States Constitution are at issue in this case. The first provision is the Fifth Amendment's guarantee of Due Process, which provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V.

The second constitutional provision at issue in this case is the Sixth Amendment's Confrontation Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI.

STANDARD OF REVIEW

"[A]buse of discretion is the proper standard of review of a district court's evidentiary rulings." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-42 (1997) (citations omitted). "[T]he appellate court will not reverse in such a case, unless the ruling is manifestly erroneous." *Id.* at 142. (internal quotations and citation omitted).

STATEMENT OF THE CASE

The United States Snowman Pentathlon Team ("US Team") consists of a group of male and female athletes that compete at the World Winter Games. R. p. 1. At the games, each team competes in dogsledding, rifle shooting, ice dancing, aerial skiing, and curling. R. p. 2. The women's US Team had never performed well in the World Winter Games until the fall of 2011, when the team began to show marked improvement. *Id.*

At about the same time that the women's US Team began showing noticeable improvement, Casey Short ("Ms. Short"), a former member of the Canadian Snowman Team, joined the US Team. R. p. 25. During her stint on the Canadian Team, Ms. Short sold an anabolic steroid known as "White Lightning" (supposedly undetectable by drug tests) to nearly all of her teammates. *Id.* Ms. Short joined the US Team in June of 2011. R. p. 24. Suspecting that members of the US Team were using steroids, the Drug Enforcement Agency ("DEA") began investigating the US Team in August 2011 – just two months after Ms. Short joined the US Team. R. pp. 2; 24.

Also in August of 2011, Jessica Lane ("Defendant Lane") joined the US Team. R. p. 1. Almost immediately thereafter, DEA informant and team member Hunter Riley ("Mr. Riley") grew suspicious that Defendant Lane was selling steroids to her teammates. Mr. Riley attempted to purchase steroids from Defendant Lane in October, November, and December of 2011. R. pp.

2-3. Even the US Team coach, Peter Billings ("Coach Billings"), who was also Defendant Lane's longtime boyfriend, suspected her of selling steroids. In December 2011, Coach Billings confronted Defendant Lane. R. p. 3. Although she initially denied any involvement, a month later Defendant Lane sent Coach Billings the following email:

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

R. p. 29.[1] The email implies that Defendant Lane and another person were conspiring to sell steroids to the US Team.

On February 4, 2012, the DEA searched Defendant Lane's home and found $10,000 in cash, twenty 50-milligram doses of a steroid know as "ThunderSnow," and the laptop from which the email was sent. R. p. 4. The DEA also found 250 separately packaged 50-milligram doses of ThunderSnow and $50,000 in cash in the US Team's equipment storage room. R. p. 3. After chemically analyzing ThunderSnow, the DEA learned that it is a chemical ester of bolasterone (known as White Lightning). R. p. 28. ThunderSnow is made from the same steroid that Ms. Short was selling to her Canadian teammates just a few months earlier. *Id.*

Even with this mounting evidence identifying Defendant Lane and Ms. Short as the two coconspirators selling steroids to the US Team, the government instead targeted Anastasia Zelasko ("Defendant Zelasko") as the unnamed coconspirator. Defendant Zelasko joined the US

[1] All cites to Defendant Lane's email are to the copy in Exhibit C. R. p. 29.

Team on September 6, 2010, nearly a year before the government suspected any steroid use on the team. R. p. 1. The government contends that on December 10, 2011, Coach Billings saw Defendant Lane say to Defendant Zelasko during an argument, "Stop bragging to everyone about all the money you're making!" R. p. 3. The government further asserts that on January 28, 2012, several teammates saw Mr. Riley arguing with Defendant Zelasko, but the substance of that argument is unknown. *Id.*

On February 3, 2012, Mr. Riley was tragically killed while training on the dogsledding course. Defendant Zelasko was practicing her rifle skills on the US Team's shooting range, which was built dangerously close to the dogsledding course. An errant bullet escaped from the range and fatally injured Mr. Riley. R. p. 3. Despite the accidental nature of Mr. Riley's death, the government used it to link Defendant Zelasko to the steroid conspiracy. The DEA immediately took Defendant Zelasko into custody and searched her residence, seizing approximately $5,000 in cash and two 50-milligram doses of ThunderSnow. *Id.* However, a quantity of two 50-milligram doses of ThunderSnow is consistent with personal use – not sale. R. p. 28.

At Lane and Zelasko's joint trial for selling steroids and first-degree murder,[2] the government attempted to exclude the only evidence linking someone other than Defendant Zelasko to the conspiracy with Defendant Lane. R. p. 12. Miranda Morris ("Ms. Morris") will testify that Ms. Short was selling a nearly identical steroid to her Canadian teammates shortly before joining the US Team. R. p. 25. Because Ms. Short was already involved in selling the steroid used to make ThunderSnow within this insular sports community, it is more likely that she was the unnamed coconspirator – not Defendant Zelasko. Further, the government's only

[2] Including related conspiracy charges.

evidence of the conspiracy is Defendant Lane's email to Coach Billings – which is ambiguous at best. If Defendant Zelasko was not involved in the conspiracy, then she had no motive to kill Mr. Riley, and cannot be guilty of first-degree murder.

SUMMARY OF THE ARGUMENT

At the preliminary hearing, the government argued to exclude Ms. Morris's testimony, even though it is the only evidence linking Ms. Short to the steroid conspiracy. Aside from the pure necessity of Ms. Morris's testimony to Defendant Zelasko's constitutional right to put on a complete defense, the testimony is also admissible under both the majority interpretation of Federal Rule of Evidence 404(b) and the minority's more narrow approach. Judge Crawford did not abuse his discretion by ruling that Ms. Morris's testimony is admissible.

Under the majority rule, evidence of a third person's other acts can be offered to show that on the occasion in question that person acted in conformity with those acts. This tracks 404(b)'s core justifications, which protect the criminal defendant from being convicted based on her unrelated past bad acts. When this evidence is instead offered against a third party who is not on trial, those same justifications are not present. Because Ms. Morris's testimony shows only Ms. Short's propensity to sell illegal steroids, and not Defendant Zelasko's, neither party will be improperly prejudiced by the testimony. Further, under the minority application of 404(b), which excludes other-act evidence offered against third parties to prove propensity alone, Ms. Morris's testimony is admissible because it is offered for three proper purposes – identity, intent, and motive. Ms. Morris's testimony reveals that the true identity of the unnamed coconspirator is likely Ms. Short, because she was selling a nearly identical steroid within the same sports community just months before the DEA exposed the alleged steroid conspiracy. Because Ms. Short was likely the unnamed coconspirator – not Defendant Zelasko – the

testimony also properly shows that Defendant Zelasko had no intent or motive to kill Mr. Riley.

In addition to the admissibility of Ms. Morris's testimony under 404(b), the testimony is also admissible due to Defendant Zelasko's constitutional right to put on a complete defense grounded in *Chambers v. Mississippi*. This Court has consistently recognized that evidentiary rules must be considered within the context of each case. A mechanical application of those rules cannot defeat a defendant's right to tell her side of the story. Thus, even if this Court finds that Ms. Morris's testimony is barred by 404(b), Defendant Zelasko's constitutional right to present a complete defense requires its admission.

The government next attempted to introduce the email Defendant Lane sent to Coach Billings to prove that there were two conspirators, implying that the unnamed coconspirator was Defendant Zelasko.[3] However, under *Williamson v. United States*, none of the individual statements were self-inculpatory as to Defendant Lane. Thus, the email did not meet the statement against penal interest exception to the rule against hearsay in Federal Rule of Evidence 804(b)(3). Because Coach Billings had already confronted Defendant Lane, suspecting that she was selling steroids to her teammates, the email was sent by Defendant Lane to curry favor with Coach Billings and was not self-inculpatory. Therefore, the district court did not abuse its discretion by excluding the email. *Williamson* continues to provide the correct analysis under 804(b)(3) and should be reaffirmed by this court – *Williamson* is neither badly reasoned nor unworkable, and lower courts are able to correctly apply its analysis, as demonstrated by Judge Crawford's decision in the instant case.

Further, *Crawford v. Washington* does not restrict the rule from *Bruton v. United States* to testimonial statements. While *Crawford* and *Bruton* both deal with a defendant's right to

[3] Defendant Lane will be exercising her Fifth Amendment privilege not to testify at trial, and it is not disputed that Defendant Lane's email is non-testimonial. R. p. 43; 45.

confrontation under the Sixth Amendment, the two doctrines are separate and distinct and they protect different interests. *Crawford* provides that a criminal defendant's right to confrontation allows her to test the reliability of testimonial hearsay statements offered against her through cross-examination. In contrast to *Crawford*'s focus on reliability, *Bruton* protects a criminal defendant from the incurable prejudice that occurs when a non-testifying co-defendant's statement implicates the defendant and is admitted at trial. Even with a limiting instruction, the risk that the jury will consider the statement against the defendant is simply too high to admit the statement at a joint trial. *Crawford*'s test for reliability thus should not be used to restrict the *Bruton* doctrine, which focuses on prejudice, to testimonial statements.

ARGUMENT

I. The district court did not abuse its discretion by ruling that Ms. Morris's testimony is admissible under Federal Rule of Evidence 404(b), because it shows that Ms. Short is likely the unnamed coconspirator where she sold a nearly identical steroid to another team within the same small sports community just five months before the alleged steroid conspiracy in this case began.

The government is attempting to prevent Defendant Zelasko from putting on a complete defense. Despite the government's argument, Judge Crawford did not abuse his discretion by ruling that Ms. Morris's testimony is admissible to prove that someone other than Defendant Zelasko was selling steroids to the US Team. Ms. Morris's testimony shows that the unnamed coconspirator was more likely Ms. Short – not Defendant Zelasko. If Defendant Zelasko was not involved in the steroid conspiracy, she simply had no motive to kill Mr. Riley. Although the government does not challenge the veracity or necessity of Ms. Morris's testimony to Defendant Zelasko's defense, the government still insists that the court should exclude this evidence. However, the majority of circuit courts admit similar evidence when offered against someone other than the defendant.

Federal Rule of Evidence 404(b) protects a defendant from being improperly convicted for her past crimes, wrongs, or other bad acts. This evidence "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Notwithstanding 404(b)(1)'s prohibition against "other-act" evidence, 404(b)(2) provides an exception. The prosecution can offer evidence of the defendant's other acts to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Simply put, in order for other-act evidence to be admitted against a criminal defendant, the prosecution must show that the evidence proves something more than the defendant's propensity to commit bad acts.

In the seminal case addressing 404(b), this Court promulgated four safeguards to ensure that admitting other-act evidence does not prevent the defendant from receiving a fair trial: (1) the prosecutor must show the evidence is offered for a proper purpose under 404(b)(2); (2) the evidence must be relevant under Rule 401, with conditional facts determined by the jury under Rule 104(b); (3) the trial court must weigh the probative value of the proffered evidence against the danger of unfair prejudice to the defendant under Rule 403; and (4) the court must, upon request, instruct the jury to consider the evidence only for its proper purpose under Rule 105. *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988). These four safeguards provide the guidelines for admitting other-act evidence against a criminal defendant, *United States v. Mares*, 441 F.3d 1152, 1156 (10th Cir. 2006), but not all of these criteria are necessary when the evidence is offered against someone other than the defendant.[4] *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984).

In drafting 404(b)(2), Congress's main concern was "ensuring that restrictions would not

[4] Other-act evidence offered against a third party (not the defendant) is known as "reverse 404(b) evidence."

be placed on the admission of such [other-act] evidence." *Huddleston*, 485 U.S. at 688-89. As such, the first *Huddleston* factor requiring a prosecutor to show that other-act evidence is offered for a 404(b)(2) proper purpose is superfluous when the evidence is instead offered to show a third party's propensity to commit the charged crime. *United States v. Sepulveda*, 710 F.2d 188, 189 (5th Cir. 1983) (holding that 404(b) only prohibits "acts committed by the defendant himself"). Indeed, the First, Second, Third, Fifth, and Eleventh Circuits have all "determined that Rule 404(b) is not applicable to evidence of acts of third parties." *United States v. Lucas*, 357 F.3d 599, 612 (6th Cir. 2004) (Rosen, J., concurring). *Accord United States v. Stevens*, 935 F.2d 1380, 1401-06 (3d Cir. 1991) (allowing a defendant to introduce other-act evidence against a third party to show the third party's propensity to commit the crime charged); *United States v. Gonzalez*, 825 F.2d 572, 583 (1st Cir. 1987), *cert. denied*, 484 U.S. 989 (1987) (holding that "Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant"); *Aboumoussallem*, 726 F.2d at 911-12 (when a defendant offers evidence of a third party's other acts, "the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense"); *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983) (holding that "Rule 404(b) does not specifically apply to exclude . . . evidence [that] involves an extraneous offense committed by someone other than the defendant [because] the evidence was not introduced to show that the defendant has a criminal disposition . . . so the policies underlying Rule 404(b) are inapplicable"); *United States v. Krezdorn*, 639 F.2d 1327, 1331-33 (5th Cir. 1981), *cert. denied*, 465 U.S. 1066 (1984) (extrinsic offense evidence must be relevant and pass Rule 403's balancing test to be admissible at trial). "These courts were persuaded by the policy underpinnings of Rule 404(b)" to protect the defendant. *Id.* Under this majority rule, the defendant can offer evidence of a third party's other

acts to prove that the third party acted in conformity with that past conduct. *See Aboumoussallem*, 726 F.2d at 911-12. Because there is no possibility that other-act evidence will prejudice the defendant's case, the majority rule allows the defendant to introduce such evidence to show propensity alone.

A. Where Ms. Morris's testimony is relevant and not unduly prejudicial, it is admissible under the majority's application of Rule 404(b).

The district court and the Fourteenth Circuit adhere to the majority rule of admitting other-act evidence to prove that a third party acted in conformity with her past bad acts. Both courts first considered the relevancy of Ms. Morris's testimony and then determined that its probative value was not substantially outweighed by potential prejudice to the case. Because Ms. Morris's testimony is relevant to prove that someone other than Defendant Zelasko was the unnamed coconspirator, thereby discrediting the only potential motive for Defendant Zelasko to murder Mr. Riley, both courts agreed that Ms. Morris's testimony makes it more likely that Defendant Zelasko is not guilty of the crimes charged. Moreover, since the other-act evidence is not offered against Defendant Zelasko, both courts found that there is little chance that its probative value is substantially outweighed by unfair prejudice. The Fourteenth Circuit's analysis makes it the sixth circuit court to apply a more flexible standard of admissibility when other-act evidence is offered against a third party.

The circuit majority correctly recognizes that 404(b) protects the defendant, not third parties. Rule 404(b) has two primary purposes: (1) preventing the jury from punishing the defendant for her prior or subsequent misdeeds, not the crime charged, and (2) preventing the jury from inferring that "because the accused committed other crimes," she is likely guilty in this case. *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979); *accord* Glen Weissenberger & James J. Duane, Weissenberger's Federal Evidence § 404.12 (3d. ed. 1998). The first

justification simply does not apply when other-act evidence is offered against a third party – that third party cannot be punished for her other misdeeds, as she is not on trial. Similarly, 404(b)'s second justification – preventing the jury from putting too much weight on the other-act evidence – can be resolved with a single jury instruction. The underlying policy behind 404(b) is thus considerably weakened when other-act evidence is offered against a third party. *See Aboumoussallem*, 726 F.2d at 911-12.

In accord with 404(b)'s core justifications, the majority of circuit courts applying the *Huddleston* safeguards to reverse 404(b) evidence do not require a showing that the evidence is offered for a proper purpose. Instead, the majority requires the trial court to first consider the relevancy of the evidence and then determine whether Rule 403 would exclude the evidence. *E.g., Krezdorn*, 639 F.2d at 1331. For example, in *Stevens*, the Third Circuit admitted reverse 404(b) evidence when it tended to negate the defendant's guilt and passed Rule 403's balancing test. 935 F.2d at 1404-05. The court did not require a proper purpose under 404(b)(2), rejecting "the government's attempt to impose hard and fast preconditions on the admission of reverse 404(b) evidence." *Id.* at 1405. Instead, the court admitted a third party's other bad acts to prove propensity alone. *See id.*

In the instant case, Ms. Morris's testimony is admissible because it is relevant to Defendant Zelasko's defense and its probative value is not substantially outweighed by a danger of unfair prejudice. On April 4, 2011, Ms. Short sold White Lightning to Ms. Morris. ThunderSnow, the steroid involved in this case, is made from White Lightning. Furthermore, Ms. Short joined the US Team in June 2011 – just two months before the alleged steroid conspiracy began. Evidence demonstrating "Ms. Short's propensity to sell a very similar drug within this insular winter sports community" shows "that it was more likely that Ms. Short, not Defendant

Zelasko, was the [unnamed] coconspirator." R. p. 12. This also eliminates any alleged motive that Defendant Zelasko would have to kill Mr. Riley and bolsters her accidental death defense. The testimony is therefore relevant to prove the identity of the unnamed coconspirator and to determine whether Defendant Zelasko had intent and a motive to murder Mr. Riley.

The probative value of Ms. Morris's testimony is not substantially outweighed by a danger of unfair prejudice. Ms. Morris's testimony is highly probative to show that the unnamed coconspirator is Ms. Short, not Defendant Zelasko, and that Defendant Zelasko had no intent or motive to murder Mr. Riley. The testimony is prejudicial to the government's case because it disproves the theory that Defendant Zelasko was involved in the steroid conspiracy, further discrediting her alleged motive for murder. This is not the type of unfair prejudice that Rule 403 is designed to prevent. Because Ms. Morris's testimony is relevant to Defendant Zelasko's defense and its high probative value far outweighs any chance of unfair prejudice, the testimony is admissible under the majority's interpretation of Rule 404(b). However, even if this Court follows the minority's textual interpretation of 404(b), Ms. Morris's testimony is still admissible to prove the identity of the unnamed coconspirator and Defendant Zelasko's lack of intent and motive to murder Mr. Riley.

B. Where Ms. Morris's testimony is offered to prove both the identity of the unnamed coconspirator and Defendant Zelasko's lack of intent and motive to commit first-degree murder, it is admissible under the minority application of Rule 404(b).

Because Ms. Morris's testimony is being offered for the proper purposes of proving identity and lack of intent and motive, her testimony is admissible even under the minority understanding of 404(b). The testimony proves that Ms. Short, not Defendant Zelasko, is likely the unnamed coconspirator and discredits Defendant Zelasko's alleged intent and motive to murder Mr. Riley. The testimony is therefore admissible under the "plain meaning" of 404(b).

A strict application of 404(b) bars character evidence offered to show that on a particular occasion a third party acted in accordance with her character. Only three circuits have adopted the government's textual interpretation of 404(b), which bars the admission of other-act evidence unless it is offered for one of 404(b)(2)'s proper purposes. *Lucas*, 357 F.3d at 606; *Agushi v. Duerr*, 196 F.3d 754, 759-61 (7th Cir. 1999); *United States v. McCourt*, 925 F.2d 1229, 1232 (9th Cir. 1991). This minority position disregards 404(b)'s justifications and ignores the fact-specific context needed for the Rule's proper application. Under this view, in order to offer evidence of a third party's other acts, the evidence must be admissible for some purpose other than to prove propensity. *See United States v. Toro*, 359 F.3d 879, 884 (7th Cir. 2004).

Even with this added layer of judicial oversight, most reverse 404(b) evidence offered by a defendant is admissible. The two most common defense uses of other-act evidence are (1) to prove that someone other than the defendant committed the crime charged (identity), *see generally Stevens*, 935 F.2d at 1401, and (2) to prove that the defendant was under the influence of duress or coercion when committing the crime (intent and motive), *see generally United States v. McClure*, 546 F.2d 670, 672 (5th Cir. 1977). Identity, intent, and motive are all proper purposes for offering other-act evidence under 404(b)(2).

Where the other-act evidence is not offered for a proper purpose, and instead is used to show that the third party acted in conformity with her past bad acts, the minority rule bars its admission. For example, in *Lucas*, the court denied the defendant her right to offer propensity evidence to show a third party committed the crime with which she was charged. 357 F.3d 599, 606-07. There, Defendant Lucas was arrested for knowingly and intentionally possessing cocaine with intent to distribute. *Id.* at 601. She claimed the cocaine found in her car actually belonged to a third party who was using her car to transport the drugs without her knowledge. *Id.*

at 603. The third party had recently been convicted of possessing cocaine with intent to distribute. *Id.* at 601. Lucas contended that because the third party had a past conviction for selling cocaine, the cocaine found in her car belonged to him. *Id.* at 603. The court excluded evidence of the third party's prior conviction because it was offered for propensity alone. *Id.* at 606. The court recognized, however, that if there was some connection between the third party's prior bad act of selling drugs and the specific crime charged *aside* from propensity, the other-act evidence could have sufficient probative value to be admitted. *Id.*

Unlike in *Lucas*, where other-act evidence was offered only to show propensity, here, Defendant Zelasko offers Ms. Morris's testimony to prove the *identity* of the unnamed coconspirator and Defendant Zelasko's lack of *intent* and *motive* to murder Mr. Riley – all proper purposes under 404(b)(2). The testimony shows that the unnamed coconspirator is likely Ms. Short, not Defendant Zelasko. If Defendant Zelasko was not involved in the conspiracy, she had no motive or intent to kill Mr. Riley. The other-act evidence is therefore offered to show more than merely Ms. Short's propensity to sell steroids.

Moreover, the Sixth Circuit acknowledged in *Lucas* that if the crime charged is sufficiently similar to the third party's past bad act, evidence of that bad act may be admitted to show identity. There, the circumstances surrounding Defendant Lucas's arrest shared no unique identifying qualities with the third party's past conviction, but here, Defendant Zelasko's alleged involvement in the steroid conspiracy parallels the actual steroid sales Ms. Short had previously made to the Canadian Team. Ms. Short was selling a nearly identical steroid within the same small sports community just months before the alleged conspiracy began. The close relationship between the types of steroids sold and the link between the two sports teams make these two events nearly indistinguishable. These substantial similarities identify Ms. Short as the unnamed

coconspirator, so that even under *Lucas*'s narrow holding, the other-act evidence has enough probative value to be admitted. Therefore, even if this Court follows the minority interpretation of 404(b), Ms. Morris's testimony is admissible to prove the identity of the unnamed coconspirator and Defendant Zelasko's lack of intent and motive to murder Mr. Riley.

II. Under this Court's holding in *Chambers v. Mississippi*, Defendant Zelasko has a constitutionally protected right to offer Ms. Morris's testimony to present a complete defense, because the testimony is reliable and necessary to establish that someone other than Defendant Zelasko is the unnamed coconspirator.

Even if this Court excludes Ms. Morris's testimony under the minority application of 404(b) by finding that it is only offered to show Ms. Short's propensity to sell steroids, Ms. Morris's testimony is still admissible under Defendant Zelasko's constitutionally-protected right to present a complete defense. The government does not deny that Ms. Morris's testimony is the only evidence that identifies Ms. Short as the unnamed coconspirator. This Court's recognition of a defendant's constitutional right to present exculpatory evidence coupled with the necessity of Ms. Morris's testimony weighs heavily in favor of admission.

"Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted). "Restrictions on a criminal defendant's right[] . . . to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (citations omitted). When evidentiary rules obstruct a defendant's ability to put on a complete defense, constitutional rights may be violated. *See Holmes v. South Carolina*, 547 U.S. 319, 331 (2006); *Rock v. Arkansas*, 483 U.S. 44, 61-62 (1987); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam). For instance, unconstitutional exclusions of evidence can significantly undermine fundamental elements of the

accused's defense. *See e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). However, this Court does not allow a strict application of evidentiary rules to bar the defendant's constitutional right to put on a defense. *See e.g., Washington v. Texas*, 388 U.S. 14, 23 (1967).

The defendant's constitutional right to present a complete defense is a fundamental element of due process and includes "[t]he right to offer the testimony of witnesses, . . . [and] the right to present the defendant's version of the facts[.]" *Id.* at 19. These core principles of law also include the right to offer evidence that a third party committed the crime. For example, in *Chambers*, the trial court excluded the testimony of three witnesses who would testify that a third party had confessed to them of the murder for which Defendant Chambers was being tried. 410 U.S. at 292-93. The trial court's ruling was erroneous because the statements "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability," *id.* at 300, and were "well within the basic rationale of the exception for declarations against interest." *Id.* at 302. First, the statements were reliable because an innocent man is not usually compelled to implicate himself in a murder. *See id.* at 301. Second, although Mississippi had not adopted Federal Rule of Evidence 804(b)(3)'s exception to the rule against hearsay, that Rule would have admitted the witnesses' testimony. *Id.* at 299. Rule 804(b)(3) allows a party to offer a declarant's statements that were against the declarant's penal interest when made. Even though Mississippi's evidentiary rules barred the three witnesses' testimony, this Court did not follow the rules' plain meaning. *Id.* at 302. Instead, this Court explained that denying Defendant Chambers the right to offer such testimony would deny "him a trial in accord with traditional and fundamental standards of due process." *Id.* Thus, *Chambers* stands for the proposition that in order for evidentiary rules to be applied properly, they must be considered within the context of each case. Sometimes a rule's plain meaning must give way to a

defendant's constitutionally protected right to offer his side of the story.

The facts in *Chambers* are remarkably similar to the facts in this case. There, this Court ruled that Chambers's defense witnesses could testify even though Mississippi's evidentiary rules prohibited the testimony. This Court should similarly hold in this case that Ms. Morris can testify even though the plain meaning of Rule 404(b) could exclude her testimony. First, Ms. Morris's testimony is reliable. Her statements reveal "her desire to come clean" because she does not want "the sentence of an innocent person on her conscience." R. p. 10. Moreover, Ms. Morris's admission that she took steroids during her athletic career could expose her to criminal or civil liability. Rule 804(b)(3)'s exception to the rule against hearsay recognizes the reliability of such statements as against the declarant's penal interest. Therefore, just as the declarant in *Crawford* gave testimony under circumstances showing that his statements were reliable, the circumstances surrounding Ms. Morris's statements also demonstrate considerable assurances of reliability.

Following this Court's logic in *Chambers*, Defendant Zelasko should be afforded the opportunity to offer Ms. Morris's testimony to prove the identity of the unnamed coconspirator. There, this Court recognized that an overarching constitutional right to present a complete defense could not be thwarted, even by a straightforward application of Mississippi's evidentiary rules. If this Court bars Ms. Morris's testimony under 404(b), then the rules of evidence would once again be mechanically applied to strip the defendant of her constitutional rights. But this Court has consistently prohibited evidentiary rules from serving such injustice. Ms. Morris's testimony is therefore admissible as part of Defendant Zelasko's constitutionally protected right to present a complete defense.

III. *Williamson* provides the correct standard for determining whether a statement is against a declarant's penal interest such that it is admissible under Federal Rule of Evidence 804(b)(3), and the trial court did not abuse its discretion in excluding Defendant Lane's email when none of the individual statements, considered in light of the totality of the circumstances, were self-inculpatory.

When a hearsay declarant is unavailable, as defined by Federal Rule of Evidence 804(a), 804(b) provides several exceptions to the general inadmissibility of hearsay statements. Fed. R. Evid. 804. Rule 804(b)(3) contains an exception for statements against penal interest – they are admissible if

> a reasonable person in the declarant's position would have made [the statement] 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 . . . expose the declarant to civil or criminal liability[.]

Id. This Court ruled in *Williamson v. United States* that a court must review each individual statement within a larger narrative and admit only those statements under 804(b)(3) that are self-inculpatory standing alone. 512 U.S. 594, 600-01 (1994). The court relied on the general premise that it is easier for declarants to make a narrative as a whole more credible by mixing true self-inculpatory statements and self-serving false statements together. *Id.* at 599-600. This same justification for the *Williamson* rule holds true today. While *Williamson* may be difficult to apply at times, lower courts are able to correctly use its rule to determine whether statements are admissible under 804(b)(3).

In the instant case, Judge Crawford did not abuse his discretion in excluding Defendant Lane's email to Coach Billings under 804(b)(3). Judge Crawford properly applied the *Williamson* rule and found that none of the individual statements within the email were self-inculpatory in light of the surrounding circumstances.

A. *Williamson*'s rule should be reaffirmed by this Court – it is neither unworkable nor badly reasoned.

When discussing the importance of adhering to its own precedent, this Court has explained that "[t]he doctrine of *stare decisis* is . . . 'essential to the respect accorded to the judgments of the Court and to the stability of law.'" *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). However, *stare decisis* does not compel this Court "to follow a past decision when its rationale no longer withstands 'careful analysis.'" *Gant*, 556 U.S. at 348. "[T]his Court has never felt constrained" to adhere to *stare decisis* "when governing decisions are unworkable or are badly reasoned." *Payne*, 501 U.S. at 827 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

1. The rationale behind *Williamson*'s rule – that mixing true self-inculpatory statements with false statements renders a larger narrative more believable – remains true today.

Williamson's rule governing the admission of statements against penal interest is grounded in a general understanding that remains true today. This is not a case that is badly reasoned, which would support this Court overruling its previous decision. In *Williamson*, this Court adopted a narrow reading of the statement against penal interest exception to the rule against hearsay. 512 U.S. at 600-01. The Court first defined a statement as a "single declaration or remark." *Id.* at 599 (quoting Webster's Third New International Dictionary 2229, defn. 2(a) (1961)). Only statements that are individually self-inculpatory in light of the surrounding circumstances are admissible. *Id.* at 600-01. "[T]he most faithful reading of Rule 804(b)(3) . . . does not allow admission of non-self-inculpatory statements, even if they are made within a

broader narrative that is generally self-inculpatory." *Id.* Such "collateral statements" are inadmissible. *Id*. at 600. The rationale behind 804(b)(3) is "the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id.* at 599. "The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the *collateral statement's reliability*." *Id.* at 600 (emphasis added). This is because "*[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 600-01 (emphasis added).

Unlike this Court's rule in *Williamson*, where the underlying rationale remains true today, in *Gant*, this Court recognized that a previous decision relied on a justification that was badly reasoned. *Gant*, 556 U.S. at 350-51. In *Gant*, this Court narrowed its earlier holding in *Belton*, explaining that *stare decisis* did not require it to adhere to a broad reading of its earlier decision. *Id.* In making this determination, this Court emphasized that "[t]he experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded." *Id*. at 350. The court had previously held in *Belton* "that when an officer lawfully arrests 'the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile' and any containers therein." *Id.* at 340-41 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)). The court assumed that an arrestee could reach the passenger compartment of an automobile to remove a weapon or to destroy evidence. *Id.*

In narrowing *Belton*'s rule, the court correctly noted that in many instances the defendant has already been removed from the vehicle and secured elsewhere before a search begins. *Id.* at

342-43. Despite the potentially broad language of *Belton*, the court ultimately held that a narrow reading was proper – *Gant* held that police can "search a vehicle incident to a recent occupant's arrest *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343.

Even though *Gant* deals with this Court narrowing a previously broad rule as opposed to overturning past precedent, its rationale for adopting a narrow reading of *Belton* is informative on whether to overrule *Williamson*. In *Gant*, this Court realized that the generalization supporting a broad reading of *Belton*'s rule was not applicable in many situations and adopted a narrow reading of that rule. In contrast, the rationale supporting the *Williamson* rule – that mixing false self-serving statements with true self-inculpatory statements makes a larger narrative more credible – remains true today. Hiding false statements among true facts is still an effective way to make a larger narrative seem more believable. Further, in arguing against the application of *Williamson*, the government in this case never claimed that this justification for *Williamson*'s rule was unfounded. As such, this Court should reaffirm *Williamson* and continue to apply its rule to determine the admissibility of hearsay statements under 804(b)(3).

2. Lower courts are able to correctly apply *Williamson*'s rule. The trial court in the instant case correctly applied *Williamson* and did not abuse its discretion in excluding Defendant Lane's email when none of the statements considered individually were self-inculpatory.

In the instant case, Judge Crawford properly applied *Williamson* and did not abuse his discretion in excluding Defendant Lane's email. This demonstrates that *Williamson*'s rule has not become "unworkable," such that lower courts struggle to apply it with any regularity or precision. *Payne*, 501 U.S. at 827. This Court in the past has justified overruling precedent based on unworkability. *Id.* Here, Judge Crawford properly excluded Defendant Lane's email, because none of the individual statements were so against Defendant Lane's penal interest "that a

reasonable person in [her] position would not have made the statement unless believing it to be true." *Williamson*, 512 U.S. at 603-04 (internal quotations omitted).

Defendant Lane's statements were actually made in an attempt to curry favor with an authority figure – they were not self-inculpatory. Defendant Lane's email contains the following statements:

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

R. p. 29. None of these statements, taken individually, inculpate Defendant Lane in any criminal activity. Rule 804(b)(3) is generally suspicious of statements that "were made under circumstances in which the declarant had a 'strong motivation to implicate the defendant and exonerate himself,' thereby raising the concern that the statements were made in order to shift blame to another or to curry favor[.]" *United States v. Barone*, 114 F.3d 1284, 1302 (1st Cir. 1997). When the declarant seeks to curry favor with authority figures, such as law enforcement, and shift blame to another by implicating the defendant, those statements should not be admitted under 804(b)(3). *Id.*

While Defendant Lane's email was not sent to the police, the surrounding circumstances show that she sent the email to Coach Billings – a significant authority figure both in her personal and professional life – in an attempt to curry favor with him. On December 19, 2011, Coach Billings confronted Defendant Lane, suspecting that she was selling steroids to the female members of the US Team. Not only was Coach Billings responsible for Defendant Lane as one of his team members, the two had been involved romantically for several years. When confronted, Defendant Lane denied any involvement with selling steroids. She then sent this

email to Coach Billings nearly one month later, on January 16, 2012. These circumstances show that Defendant Lane was attempting to curry favor with Coach Billings to get back in his good graces after he had already confronted her with his suspicions – she was displacing the blame on an unnamed third party. In this situation, Defendant Lane's email is actually self-serving and not self-inculpatory. This is exactly the kind of statement that courts are suspicious of admitting under 804(b)(3)'s exception to the rule against hearsay.

Judge Crawford did not abuse his discretion in applying *Williamson*'s rule to find that under these circumstances, none of the statements within Defendant Lane's email were self-inculpatory. He correctly ruled that the entire email was inadmissible under 804(b)(3). This proper application of *Williamson* shows that its rule is not unworkable, and lower courts are able to apply it to reach correct results.[5] As such, unworkability is not sufficient grounds to overrule *Williamson* and this Court should affirm its holding.

IV. *Crawford* did not limit the application of the *Bruton* doctrine to testimonial statements, because the two doctrines protect separate interests.

Even though *Crawford* and *Bruton* both protect criminal defendants' rights under the Confrontation Clause, they deal with separate constitutional concerns. In *Crawford v. Washington*, this Court determined that when an unavailable declarant's testimonial hearsay statement is admitted against a defendant, her Sixth Amendment right to confrontation is violated unless she had a prior opportunity to cross examine the declarant. 541 U.S. 36, 68 (2004). In so holding, this Court overruled the previous test for determining reliability stated in *Ohio v. Roberts*, which allowed similar hearsay statements to be admitted as long as they had "adequate

[5] Judge Marino's dissent in the Fourteenth Circuit mischaracterizes *United States v. Hajda*, 135 F.3d 439 (7th Cir. 1998). Although Judge Marino claims that *Hajda* shows the rule's unpredictability, this case actually demonstrates a correct application of *Williamson*. *Id.* at 444 (admitting a father's statement under 804(b)(3) against his son in denaturalization proceedings implicating the son as a Nazi, where the father's statement was made during a collaboration trial in Poland after WWII to determine whether the father aided Nazi forces during the war).

'indicia of reliability[,]'" such as if "the evidence [fell] within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." 448 U.S. 56, 66 (1980). Later decisions explicitly limited the *Crawford* rule to testimonial statements. *Davis v. Washington*, 547 U.S. 813, 821 (2006). Thus, the clear focus of the *Crawford* rule is the reliability of the hearsay statement at issue.

In contrast, the *Bruton* doctrine deals with prejudice, not reliability. This Court in *Bruton* held that admitting a non-testifying co-defendant's statement implicating the defendant in a joint trial violated the defendant's Confrontation Clause rights. *Bruton v. United States*, 391 U.S. 123, 137 (1968). Admitting such a statement, even with a limiting jury instruction, is simply too prejudicial because of the risk of jury misuse – and thus violates the defendant's Sixth Amendment right to confrontation. *Id.* Because *Crawford* and *Bruton* are two distinct doctrines that deal with separate constitutional concerns, *Crawford* should not be applied to limit *Bruton* only to testimonial statements.

A. *Crawford* provides that testimonial statements made by an unavailable declarant cannot be admitted against a defendant unless he has the opportunity to prove their reliability through cross-examination.

The *Crawford* rule ensures that criminal defendants are able to test the reliability of hearsay statements offered against them through cross examination – a right guaranteed by the Sixth Amendment's Confrontation Clause. 541 U.S. at 61. In *Crawford*, the defendant stabbed Kenneth Lee, who allegedly had tried to rape the defendant's wife, Sylvia. *Id.* at 38. Defendant Crawford claimed that he acted in self-defense. *Id.* at 40. Police arrested both Crawford and Sylvia, *Mirandized* them, and interrogated them separately about the attack. *Id.* at 38. At trial, Sylvia invoked the spousal privilege and did not testify. *Id.* at 40. The State offered Sylvia's recorded interrogation (through the exception for statements against penal interest) to prove that

Crawford was not acting in self-defense when he stabbed Lee. *Id.* The trial court applied the then-applicable rule in *Roberts*, admitting the interrogation against Crawford because it was reliable. *Id.* at 40-41.

In determining that Crawford's Sixth Amendment rights had been violated by the admission of Sylvia's interrogation, this Court undertook a thorough discussion of the historical purposes of the Confrontation Clause. *Id.* at 42-43. Based on that history, the Court arrived at two inferences about the Sixth Amendment's meaning. *Id.* at 50. "First, the Court found that 'the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused' – that is, examinations of accusers conducted before trial and without the defendant present." 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, 648 (2012) (quoting *Crawford*, 541 U.S. at 50). The Confrontation Clause applies to witnesses against the accused – "those who 'bear testimony'" – regardless of whether that testimony comes through live examination in court or through the admission of a testimonial hearsay statement. *Crawford*, 541 U.S. at 50-51 (citing 2 N. Webster, An American Dictionary of the English Language (1828)). While failing to define testimonial statements with certainty, the court articulated that "at minimum" testimonial statements include prior testimony given at a preliminary hearing, before a grand jury, at a former trial, or in police interrogations. *Id.* at 68.

The second inference based on the Confrontation Clause's history was "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. The history of the Confrontation Clause suggested that the

requirement of cross-examination was "dispositive, and not merely one of several ways to establish reliability" of out-of-court statements. *Id.* at 55-56. Thus, the "ultimate goal" of the Confrontation Clause "is to ensure *reliability* of evidence[.] . . . It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61 (emphasis added).

In *Crawford*, this Court dismissed the earlier *Roberts* approach, which allowed a judge to determine the reliability of hearsay statements based on their perceived trustworthiness. *Id.* at 62. The *Roberts* approach did not fulfill the defendant's Confrontation Clause rights – the court held that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62. This Court announced a new test to determine whether hearsay offered against a criminal defendant was reliable and thus admissible against him under the Confrontation Clause: "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. Because Sylvia's statement given during police interrogation was clearly testimonial, Crawford's Sixth Amendment rights had been violated when Sylvia was unavailable to testify at trial and he was not able to cross examine her. *Id.* at 68-69.

B. *Bruton* protects a defendant in a joint trial from the substantial prejudice that occurs when a statement given by a non-testifying co-defendant implicating the defendant is admitted.

While *Crawford* is concerned with testing the reliability of testimonial hearsay statements, *Bruton* is concerned with the prejudice a defendant suffers in a joint trial when a non-testifying co-defendant's statement implicating the defendant is admitted. *Bruton*, 391 U.S. at 137. In *Bruton*, defendants Bruton and Evans were tried together for armed postal robbery. *Id.* at 124.

At trial, "[a] postal inspector testified that Evans orally confessed to him that Evans and [Bruton] committed the armed robbery." *Id.* "[T]he trial judge instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against [Bruton] and therefore had to be disregarded in determining [Bruton's] guilt or innocence." *Id.* at 125 (citation omitted). Bruton and Evans were both convicted, but this Court reversed Bruton's conviction by overruling its previous decision in *Delli Paoli v. United States*, 352 U.S. 232 (1957), holding that "because of the *substantial risk* that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt," admitting Evans' confession in this joint trial violated Bruton's Sixth Amendment rights. *Id.* at 126 (emphasis added).

This Court was skeptical that a jury would truly be able to disregard such a statement when considering the defendant's guilt or innocence. *Id.* at 131. The Court went so far as to state that "when the admissible confession of one defendant inculpates another defendant . . . the jury is expected to perform the *overwhelming task* of considering it in determining the guilt or innocence of the declarant and then ignoring it in determining the guilt or innocence of any codefendants[.]" *Id.* (emphasis added). The court noted that "there are some contexts 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. Regardless of the reliability of these statements, the risk of prejudice to the defendant stemming from their admission is simply too great, and admitting such statements in a joint trial violates the defendant's Confrontation Clause rights.

C. This Court explicitly recognized in *Cruz* that prejudice to the defendant – not reliability – is the focus of the *Bruton* analysis.

In *Cruz*, this Court confirmed that the *Bruton* doctrine is focused on prejudice to the defendant, and not on the reliability of the non-testifying co-defendant's statement. *Cruz v. New York*, 481 U.S. 186 (1987). There, the State sought to admit a statement by a non-testifying co-defendant that implicated Cruz in a felony murder. *Id.* at 188-89. However, Cruz had allegedly confessed to the crime – and that confession corroborated, or "interlocked" with the non-testifying co-defendant's statement.[6] *Id.* at 189. This Court's previous rulings suggested that such interlocking confessions could be admitted because the defendant had already confessed to the crime, and thus had already prejudiced himself such that the non-testifying co-defendant's statement could do no further damage to his defense. *Parker v. Randolph*, 442 U.S. 62, 74-75 (1979) (holding that *Bruton* does not exclude such statements).

This Court disagreed with its previous rule and noted that interlocking statements, in the usual case, would not simply corroborate the defendant's own confession, as most defendants are trying to discredit a previous confession at trial. *Cruz*, 481 U.S. at 192.

> A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession . . . in the real world of criminal litigation, the defendant is seeking to *avoid* his confession – on the ground that it was not accurately reported, or that it was not really true when made.

Id. In fact, Cruz himself argued that a third party had fabricated his confession and it was not credible. *Id.* Thus in *Cruz*, the admission of the interlocking statement actually harmed the defense – it did not simply corroborate the defendant's confession. *Id.* The Court then noted that "what the 'interlocking' nature of the codefendant's confession pertains to is not its

[6] Cruz's confession was admitted through the testimony of a third party, whom Cruz claimed had a motive to "fabricate[] his testimony to gain revenge." *Id.* at 189. At the end of the trial, the third party's testimony recounting Cruz's confession "stood as the only evidence admissible against [Cruz] that directly linked him to the crime." *Id.*

harmfulness but rather its *reliability*: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true." *Id.* at 192-93. However, the "reliability [of the statement] . . . cannot conceivably be relevant to whether, assuming it can be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential." *Id.* Those same factors – the likelihood that the jury would disregard the limiting instruction and the prejudice that would likely arise – were decisive for this Court in deciding to exclude the statement in *Bruton*. *Id.* at 193. The Court declined to consider whether the statement was reliable under *Roberts*, after determining that *Bruton* would bar the statement on prejudice grounds. *Id.* at 193-94.

This Court in *Cruz* ultimately held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant . . . the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193. Thus, this Court explicitly determined that reliability was not the focus of the *Bruton* doctrine – the focus of *Bruton* is on prejudice to the defendant, regardless of how reliable the statement appears to be. Just as the court in *Cruz* refused to apply the reliability test under *Roberts* to determine whether the statement was admissible under *Bruton*, *Crawford*'s new test for reliability should not be applied to limit the *Bruton* doctrine to testimonial statements.

D. The *Crawford* rule is not absolute even in cases of testimonial hearsay.

Even though *Crawford* is limited to testimonial hearsay, later decisions illustrate that *Crawford*'s rule is not absolute when the issue focuses on something other than the reliability of the statement. *Davis*, 547 U.S. at 821. For example, in *Giles v. California*, this Court discussed two forms of testimonial statements that may be admitted against a defendant even if he did not

have a prior opportunity to cross examine the declarant. 554 U.S. 353, 358 (2008). Both forms were admissible at common law. *Id.* These testimonial statements are admitted based on other doctrines, "which hinge on entirely different questions" other than the reliability of the statement at issue. Miller, 77 Brook. L. Rev. at 670. The first is the dying declaration exception to hearsay – "declarations made by a speaker who was both on the brink of death and aware that he was dying." *Giles*, 554 U.S. at 358. The second is the "forfeiture by wrongdoing" exception, where the "defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 359. This Court noted that the purpose of the forfeiture rule was to "remov[e] the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them – in other words, it is grounded in 'the ability of the courts to protect the integrity of their proceedings.'" *Id.* at 374 (quoting *Davis*, 547 U.S. at 834).

In *Giles*, the lower court admitted testimonial statements of a deceased witness through a California version of the forfeiture by wrongdoing exception. *Id.* at 357-58. This Court decided that such statements could be admitted as long as there was "a showing that the defendant *intended* to prevent [the] witness from testifying." *Id.* at 361 (emphasis added). Ultimately, this Court remanded the case for the California courts to determine whether the defendant had such intent. *Id.* at 377. If the lower courts on remand found that the defendant had the requisite intent, the statement was admissible even though the defendant was unable to cross examine the declarant. This Court's decision turned on a concern other than reliability – the concern was allowing "courts to protect the integrity of their proceedings." 554 U.S. at 374 (quoting *Davis*, 547 U.S. at 834). Because the forfeiture by wrongdoing rule turned on a different concern aside from reliability, *Crawford*'s rule did not exclude the statement, even though it was testimonial.

1. Because the *Bruton* doctrine focuses on prejudice to defendants, not reliability, *Crawford* should not limit *Bruton*'s application to testimonial statements.

Similarly, the *Bruton* doctrine protects defendants from prejudice, not unreliable hearsay statements. The *Bruton* doctrine is similar to the forfeiture by wrongdoing rule from *Giles*, in that they both are grounded in concerns other than reliability of the hearsay statement. Just as *Giles* provided that *Crawford* would not exclude unconfronted testimonial statements in the case of forfeiture by wrongdoing, *Crawford* should not be used to limit the *Bruton* doctrine to testimonial statements. Further, this Court has explicitly declined to consider a reliability analysis when determining whether a *Bruton* violation has occurred, because *Bruton* simply focuses on a different constitutional concern. Just as this Court declined to apply a reliability analysis in *Cruz* to determine whether there was a *Bruton* violation, it should similarly decline to use *Crawford*'s new reliability test to limit the *Bruton* doctrine to testimonial statements. Even though several circuits have used *Crawford* to limit *Bruton* to testimonial statements, those circuits have failed to address the different constitutional concerns at the heart of each doctrine. *See, e.g., United States v. Dale*, 614 F.3d 942 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011). Because the focus of *Bruton* is prejudice to the defendant, and not reliability of the hearsay statement, *Crawford* should not be used to limit the *Bruton* doctrine to testimonial statements. As such, the non-testimonial statement of a non-testifying co-defendant implicating the defendant at a joint trial should be excluded under *Bruton*.

In the instant case, *Bruton*'s safeguards would exclude Defendant Lane's email to prevent undue prejudice against Defendant Zelasko. Even though the email is only admissible against Defendant Lane, admitting the email would simply create too great of a risk that the jury would consider it against Defendant Zelasko. Because Defendant Lane is exercising a privilege not to

testify, Defendant Zelasko would have no opportunity to cross examine her and challenge the identity of the unnamed coconspirator. Thus, there would be no safeguard against the danger that the jury would improperly consider the email against Defendant Zelasko. A limiting jury instruction is simply an insufficient constitutional safeguard against undue prejudice in this situation. *Bruton* thus excludes Defendant Lane's email, even though it is non-testimonial under *Crawford*.

CONCLUSION

Respondent Zelasko respectfully requests that this Court affirm the Court of Appeals for the Fourteenth Circuit by holding that the district court did not abuse its discretion in ruling that Ms. Morris's testimony is admissible under both Federal Rule of Evidence 404(b) and Defendant Zelasko's constitutional right to present a complete defense. Further, Respondent Zelasko requests that this Court hold that *Williamson* is the correct standard for determining the admissibility of hearsay under Federal Rule of Evidence 804(b)(3) and that the district court did not abuse its discretion by excluding Defendant Lane's email under 804(b)(3). And finally, Respondent Zelasko requests that this Court hold that *Crawford* did not limit the *Bruton* doctrine to testimonial statements.