Team 34
Counsel for Respondent

No. 12 - 13

In the
Supreme Court of the United States

MARCH TERM, 2014

UNITED STATES OF AMERICA,
Petitioner,

-VERSUS-

ANASTASIA ZELASKO,
Respondent.

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

BRIEF FOR RESPONDENT

STATEMENT OF ISSUES

The issues presented to this Honorable Court are:

I. Whether Federal Rule of Evidence 404(b) allows an accused party to introduce evidence of a third party's propensity to commit an offense when such evidence would not prejudice the accused party.

II. Whether the exclusion of evidence showing Ms. Casey Lane's propensity to sell steroids to her teammates violates Ms. Anastasia Zelasko's constitutional right to present a full defense under *Chambers v. Mississippi*.

III. Whether Defendant Casey Lane's non-self-inculpatory and uncorroborated hearsay statements were properly excluded under *Williamson v. United States'* application of Federal Rule of Evidence 804(b)(3).

IV. Whether the *Bruton* Doctrine survived *Crawford v. Washington*, making Defendant Lane's hearsay statements inadmissible, because Ms. Zelasko will be unfairly prejudiced by not having an opportunity to cross-examine her unavailable adversarial codefendant.

PARTIES TO THE PROCEEDING

Petitioner is Ms. Anastasia Zelasko, appellant below. Respondent is the United States, appellee below.

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Statement of the Facts

The United States Snowman Penthalon Team (hereinafter "Snowman Team") competes annually at the World Winter Games. (R. 1–2, 8.) In 2011, Hunter Riley, a member of the U.S. men's Snowman Team, began acting as an informant for the Drug Enforcement Agency ("DEA"). (R. 2, 8.) Riley was shot and killed at the 2012 World Winter Games.

Background

Snowman Penthalon is a physically demanding game that consists of dogsledding, ice dancing, aerial skiing, rifle shooting, and curling. (R. 1–2.) For years, the women's Snowman Team, coached by Peter Billings, struggled to rise above sixth place. (R. 1, 2.)

Anastasia Zelasko joined the Snowman Team in September 2010, a year and a half before Casey Short or Defendant Jessica Lane joined the team. Casey Short sold steroids to her teammates on the Canadian Snowman Team, one of whom was Miranda Morris. (R. 24–25.) Ms. Short then transferred to the U.S. Snowman Team in June of 2011. (R. 10.)

In August 2011, two major changes occurred for Coach Billings' team. First, long-time lover and penthalon player, Jessica Lane ("Defendant Lane"), joined the Snowman Team roster. (R. 1.) Second, shortly after Defendant Lane's arrival, the U.S. women's Snowman Team's practice times markedly improved. (R. 2.)

It was not long before the DEA became highly suspicious of Defendant Lane. The DEA directed Riley to approach her on three separate occasions to attempt to buy illegal anabolic steroids. (R. 2.) Each attempt was unsuccessful. (R. 2–3.)

In December 2011, Coach Billings confronted his girlfriend with his suspicion that she was distributing performance-enhancing steroids to the female members of the U.S. Snowman

Team. (R. 3.) Days later, teammates overheard a verbal altercation between Defendant Lane and Ms. Zelasko about the money she was making. (R. 3.) A few days later, DEA informant Riley was seen arguing with Ms. Zelasko. (R. 3.)

The Accident

In February 2012, the United States Snowman teams participated in trials for the World Winter Games in Remsen National Park. (R. 8.) On February 3, 2012, Riley was practicing on the dogsled course. (R. 3, 8.) Ms. Zelasko was practicing for the shooting event on an adjacent rifle range. (R. 8.) One of her stray bullets struck Riley, killing him. (R. 8.) She was arrested shortly thereafter. (R. 3.)

The Investigation

Twenty-four hours after the death of Mr. Riley, the DEA searched the residences of Ms. Zelasko, Defendant Lane, and Ms. Short. (R. 3–4.) They discovered Ms. Zelasko had one day's worth of steroids (two 50 milligram doses) in her residence, while Defendant Lane possessed ten-times that amount. (R. 3–4.) The DEA was unsuccessful in their search of Ms. Short's home, but they did discover 12,500 milligrams of steroids, worth approximately $50,000, in the equipment room that Ms. Short, Coach Billings, and Defendant Lane had access to. (R. 3, 8.)

The DEA also seized a laptop from Defendant Lane's residence. It contained an email addressed from Defendant Lane to her boyfriend, Coach Billings, dated January 16, 2013. The email stated that a male competitor "found out" about her "business" and that her "partner really thinks we need to figure out how to keep him quiet." (R. 3.)

Procedural History

On July 16, 2012, Ms. Anastasia Zelasko and Ms. Jessica Lane were indicted for: (1) Conspiracy to Distribute and Possession with Intent to Distribute Anabolic Steroids pursuant to 21 U.S.C. §§ 841(a), 841(b)(1)(E) and 846; (2) Distribution of and Possession with Intent to Distribute Anabolic Steroids pursuant to 21 U.S.C. §§ 841(a)(1) and (b)(1)(E); (3) Simple Possession of Anabolic Steroids pursuant to 21 U.S.C. §844; (4) Conspiracy to Murder in the First Degree pursuant to 18 U.S.C. §§ 371, and 1111(a); and (5) Murder in the First Degree pursuant to 18 § 1111(a). (R. 4–5.)

That same day, the United States District Court for the Southern District of Boerum heard arguments regarding pre-trial motions filed by both parties. The Defense moved to have former Canadian Snowman Relay team member Miranda Morris' affidavit admitted into evidence. (R. 10.) The government moved to have Defendant Lane's email to her boyfriend, Coach Billings, admitted as an exception to the Rule Against Hearsay under Federal Rule of Evidence 804(b)(3). (R. 15.)

On July 18, 2012, the District Court granted the Defense's motion and admitted the testimony of Ms. Morris, but denied the government's motion to admit Defendant Lane's e-mail. (R. 21, 23.)

The government appealed to the United States Court of Appeals for the Fourteenth Circuit. On February 14, 2013, the Fourteenth Circuit affirmed the District Court's holdings. (R. 34, 38, 43, 45.)

On October 1, 2013, this Court granted *certiorari*.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Fourteenth Circuit Court of Appeals for four reasons.

First, third party propensity evidence is not barred by Federal Rule of Evidence 404(b) because Rule 404(b) does not apply when the defendant is offering evidence of a third party's propensity in order to exculpate herself. Rule 404(b) is derived from the common law principle of protecting defendants from unfair conviction based on prior acts. There is no risk of a jury unfairly convicting an accused party when they introduce third party propensity evidence. Ms. Zelasko does not face any prejudice that Rule 404(b) was designed to prevent. By introducing evidence of Ms. Short's propensity to sell steroids to her teammates, Ms. Zelasko does not face an unfair conviction based on prejudice.

Additionally, judicial discretion is undermined by strictly prohibiting evidence of a third party's propensity to commit a crime. Third party propensity evidence *may* be more prejudicial than probative—but it also *may not* be. Deciding what is or is not probative should be left to a judge who can carefully analyze the specific facts of each case. Creating an overly-broad rule that strictly prohibits third party propensity evidence will eliminate the ability of courts to admit perfectly probative evidence that has a minimal chance of prejudice. Such a generalized rule will unnecessarily restrict an accused party in attempting to prove his or her innocence.

Second, Ms. Zelasko has a constitutional right to offer a complete defense absent a legitimate state interest prohibiting certain evidence. Her complete defense includes evidence of Ms. Short's propensity to sell steroids to teammates. Evidence of Ms. Short's propensity to sell steroids to her teammates is crucial to proving that Ms. Zelasko was not the coconspirator with Defendant Lane. Rather, given Ms. Short's propensity to sell illegal steroids to her Snowman

teammates for the Winter Games, it is reasonable to believe that Ms. Short was the coconspirator with Defendant Lane. Ms. Zelasko has a right to a fair opportunity to defend against the State's accusations. Ms. Zelasko has a constitutional right to defend herself against the accusation of being a coconspirator with Defendant Lane. Thus, Ms. Zelasko has a constitutional right to offer evidence of Ms. Short's propensity to defend against the State's accusations.

Also, the record is void of any legitimate State interest that validates the exclusion of Ms. Morris' testimony. The Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose. The government asserts no legitimate interest in excluding Ms. Morris' testimony. Therefore, Ms. Zelasko has a constitutional right to admit such testimony to prove her innocence.

Third, only self-inculpatory statements against interest should be admissible under Federal Rule of Evidence 804(b)(3). This rule allows courts to admit hearsay statements against interest as an exception to the Rule Against Hearsay because of their trustworthy nature. Reasonable people tend not to make self-inculpatory statements unless they believe them to be true. However, collateral statements, or statements surrounding a self-inculpatory statement, are not more truthful because they are adjacent to a self-inculpatory statement. Admitting collateral statements with self-inculpatory statements provide declarants the opportunity to mix falsehood with truth. Because it is highly unlikely that self-inculpatory statements are false, only these declarations, and not surrounding statements, should be admissible. Defendant Lane made no self-inculpatory statements admissible under Rule 804(b)(3). At most, she inculpated a coconspirator in an effort to protect herself from criminal liability and therefore, her statements are inadmissible

Fourth, Defendant Lane's hearsay statements are inadmissible under the *Bruton* Doctrine,

which remains unaffected by this Court's decision in *Crawford v. Washington*. The *Bruton* Doctrine protects defendants in a joint trial against unfair prejudice. It ensures that an out-of-court confession made by a defendant's unavailable codefendant is inadmissible. *Crawford* established the proper Confrontation Clause test for examining the reliability of evidence. In sum, the *Bruton* Doctrine prevents prejudice against a particular type of defendant, whereas *Crawford* established the test to examine the reliability of hearsay statements. The government seeks to admit Defendant Lane's hearsay statements to imply that Ms. Zelasko is her drug-dealing "partner." This unfairly prejudices Ms. Zelasko because a jury would not be able to apply the truthfulness of such statement against Defendant Lane and disregard the same statement's truthfulness against Ms. Zelasko.

ARGUMENT

I. LONG ESTABLISHED COMMON LAW AND POLICY ILLUSTRATE THAT FEDERAL RULE OF EVIDENCE 404(B) ALLOWS A DEFENDANT TO ADMIT EVIDENCE OF A THIRD PARTY'S PROPENSITY TO COMMIT AN OFFENSE TO PROVE HIS OR HER INNOCENCE.

The Federal Rules of Evidence "shall be construed so as to administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination." Fed. R. Evid. 102; *see also Ohler v. United States*, 529 U.S. 753, 763 (2000). To protect defendants from unfair prejudice, Rule 404(b)(1) prohibits evidence of "a person's character in order to show that on particular occasion the person acted in accordance with [that] character." Fed. R. Evid. 404(b)(1); *see e.g.*, *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). It protects defendants from unfair prejudice by prohibiting admittance of propensity character evidence to be used against them. Fed. R. Evid. 404(b)(1). Evidence of a defendant's prior act is not admissible to prove his or her propensity to repeat such an act. *Id.*

However, Rule 404(b) does not prohibit a defendant from introducing propensity character evidence of a third party. *See, e.g.*, *United States v. Della Rose*, 403 F.3d 891, 901 (7th Cir. 2005); *see also, e.g.*, *United States v. Montelongo*, 420 F.3d 1169, 1174–75 (10th Cir. 2005). An accused party faces the "unacceptable risk that a jury will convict for crimes other than those charged . . . ." *United States v. Frankhauser*, 80 F.3d 641, 648 (1st Cir. 1996). A third party faces no such risk. *See Montelongo*, 420 F.3d at 1174–75. Unlike the accused, a third party's fate is not subject to the mercy of jurors. *See id.* And while an accused party may offer third party propensity evidence, they cannot side-step the Federal Rules of Evidence. Such evidence can still be excluded by a judge for being unfairly prejudicial, confusing, or for a number of other reasons. Fed. R. Evid. 403; *see, e.g.*, *Huddleston v. United States*, 495 U.S. 685, 687 (1990).

A. Rule 404(b) Is Rooted In Common Law Policy To Protect A Defendant Against Unfair Prejudice, While A Third Party Faces No Such Prejudice.

The primary concern with admitting propensity evidence to prove a character trait is the risk of unfair prejudice a trier of fact may have towards the accused. *See Frankhauser*, 80 F.3d at 648. Introducing propensity evidence against a defendant unfairly implies that because he or she did something once, they will do it again. However, circuit courts have recognized that character evidence does not prejudice third parties because they do not face conviction.[1] The 2006 Advisory Committee's Note to Rule 404(b) further supports such a notion. Fed. R. Evid. 404 advisory committee's note ("The overriding policy of excluding [propensity] evidence, despite its admitted probative value, is . . . to prevent . . . undue prejudice." quoting *Michelson v. United States*, 335 U.S. 469, 476 (1946)). The Advisory Committee's Note only discusses the

[1] The First, Second, Third, Fifth, Seventh, and Tenth Circuits permitted an accused party to introduce evidence for the sole purpose of proving a "person's" propensity. *See Della Rose*, 403 F.3d 891; *Montelongo*, 420 F.3d 1169; *Frankhauser*, 80 F.3d at 648; *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965).to introduce evidence for the sole purpose of proving a "person's" propensity. *See Della Rose*, 403 F.3d 891; *Montelongo*, 420 F.3d 1169; *Frankhauser*, 80 F.3d at 648; *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965).

prevention of unfair prejudice against an accused, which further illustrates that the purpose of Rule 404(b) is to formalize the common law principle of preventing unfair prejudice against a defendant. *See id.* Thus, Rule 404(b) does not prevent third party propensity evidence from being admitted.

Petitioner assumes that the use of the word "person," and not "defendant," in Rule 404(b) is enough to show that the drafters intended the Rule to apply universally, and not just to the individual on trial. (R. 13.) This textual argument implies that the drafters wanted to move away from this common law idea of protecting the defendant against unfair prejudice, making Rule 404(b) generally applicable to all "persons."

Reading the word "person" so broadly oversimplifies the issue in its entirety. The Advisory Committee's Note explains that Rule 404(b) is to protect against unfair prejudice, which applies only to defendants facing a conviction, and not third parties. Fed. R. Evid. 404 advisory committee's note; *see, e.g.*, *Montelongo*, 420 F.3d at 1174–75. Additionally, the textual structure of Rule 404(b) supports that it was designed to afford special protections only to criminal defendants. Rule 404(b)(2) requires the prosecution to give notice to a defendant when introducing evidence under Rule 404(b). *See* Fed. R. Evid. 404(b)(2). Requiring notice only for the criminal defendant further supports the idea that Rule 404(b) is a safeguard intended only to protect "persons" accused. *See United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984) ("risks of prejudice are normally absent when the defendant offers [404(b)] evidence of a third party to prove some fact pertinent to the defense.").

Equally meritless is petitioner's contention that the policy behind Rule 404(b) is "to prohibit certain types of evidence that are otherwise clearly 'relevant evidence,' but that nevertheless create more prejudice and confusion than is justified by their probative value." *See*

United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004). Essentially, petitioner is asking for a bright-line rule prohibiting all third party propensity evidence. Under this approach, all relevant, highly probative, and non-prejudicial propensity evidence will be excluded from trial. Nothing can be gained from ignoring relevant, highly probative evidence that has no prejudicial effect. Interpreting Rule 404(b) in this strict manner contradicts the Federal Rules of Evidence's express policy of construction because it inhibits the court from ascertaining the whole truth and securing a just determination. *See* Fed. R. Evid.102.

B. Strictly Prohibiting Propensity Evidence Eliminates Judicial Discretion.

Trial courts are in the best position to analyze the facts of each case and balance the prejudicial effect of introducing propensity evidence in comparison to the probative value. Admitting third party propensity evidence under Rule 404(b) does not circumvent other Federal Rules of Evidence. Rule 404(b) evidence may still be deemed inadmissible if its probative value is outweighed by unfair prejudice, confusion, or misleads the jury. *See* Fed. R. Evid. 403; *Aboumoussallem*, 726 F.2d at 912. A judge still has discretion when it comes to admitting or prohibiting such evidence. *Aboumoussallem*, 726 F.2d at 912.

Petitioner argues that Rule 404(b) should be read to exclude all propensity evidence because its probative value is outweighed by the prejudice and confusion it creates, and prior bad acts are not generally indicative of any person's likelihood to commit bad acts in the future. (R. 46–47.) This would create a *per se* rule eliminating the court's discretion in considering all third party propensity evidence.

Allowing Rule 404(b) to prevent the admission of all propensity evidence, regardless of who it is used against, would destroy judicial discretion in these complicated matters. An individual who commits a bad act *may not* commit the same act again—but they also *may* be

more inclined to repeat the offense under certain circumstances. Such probative evidence of a third party should not be barred as a matter of law because it *might* be more prejudicial than probative. *See, e.g.*, *United States v. Stevens*, 935 F.2d 1380, 1404 (3d Cir. 1991). This should be a decision left up to the trial judge when he or she is deciding the probative value of evidence in relation to unfair prejudice, confusion, and potential for misleading the jury. *See id*. No two cases are the same, and difficult issues of prejudice in relation to probative value should be handled by the trier of fact. Judges have the ability to carefully analyze issues of unfair prejudice, confusion, or misleading the jury; this assessment of truth is impossible under a *per se* rule. Eliminating judicial discretion because something *may* be prejudicial or confusing undermines the competency of the trial judge and creates an unnecessarily over-broad rule. Because something *may* be more prejudicial than probative in one case does not imply that it is true in all cases. Under such a strict standard, probative evidence that far outweighs any prejudicial effect would be inadmissible without any consideration given the facts of the case at hand.

II. UNDER *CHAMBERS V. MISSISSIPPI*, MS. ANASTASIA ZELASKO HAS A CONSTITUTIONAL RIGHT TO OFFER THIRD PARTY PROPENSITY EVIDENCE TO PROVE HER INNOCENCE.

Even if this Court decides that the Rules of Evidence prohibit the use of third party propensity evidence, Ms. Anastasia Zelasko still has a constitutional right to admit Ms. Morris' testimony. An accused has a "right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (2012). Since the State proposes no legitimate purpose to exclude Ms. Morris' testimony, the Constitution forbids such an exclusion. *See Holmes v. South Carolina*, 547 U.S. 319, 325 (2006) ("[T]he Constitution . . . prohibits the exclusion of defensive evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote."). Ms. Zelasko has a constitutional

right to offer Ms. Morris' testimony into evidence, in order to present a complete defense and secure a fair trial. *See, e.g.*, *id.*

A. Ms. Zelasko Has A Constitutional Right To Present A Full Defense.

This Court, in *Chambers v. Washington*, established that the "exclusion of trustworthy and necessary exculpatory testimony at trial violates a defendant's due process right to present a defense." *Cudjo v. Ayers*, 698 F.3d 752, 754 (9th Cir. 2012) (citing *Chambers*, 410 U.S. at 284). The record does not reflect any reason to doubt the trustworthiness of Ms. Morris' testimony. Rather, her testimony is self-incriminating, and credibility is not at issue. (R. 10.) Ms. Morris' testimony is necessary for Ms. Zelasko to present a full defense in accord with her Due Process rights under the Constitution. U.S. CONST. amend. XIV. It is alleged that Ms. Zelasko committed murder to conceal her role in a conspiracy to sell drugs. (R. 11.) Ms. Morris' testimony sheds serious doubt on these allegations, and implicates Ms. Casey Short—not Ms. Zelasko—as the second person in the conspiracy. *Id.* The government's accusation hinges on the theory that there were only two conspirators, Defendant Jessica Lane and Ms. Zelasko. *Id.* The testimony being offered contradicts this questionable theory and reasonably establishes Ms. Zelasko's innocence.

Petitioner believes this case is analogous to *Lucas*, which held that a complete defense does not guarantee "a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." *Lucas*, 357 F.3d at 606. A party cannot circumvent the Federal Rules of Evidence in order to present a "complete" defense. *See id.* In *Lucas*, the defendant was prohibited from admitting third party propensity evidence to implicate her own innocence. *See id.* The court ruled that the defendant was still able "to explore her theory" that a third party was the culprit. *Id.* Relying on *Lucas*, the government suggests that Ms. Zelasko still has an opportunity to offer the theory that she was not a conspirator with Defendant Lane, regardless of the

admittance of Ms. Morris' testimony. This is incorrect.

Ms. Zelasko's defense relies on establishing that Ms. Short may have been the conspirator with Defendant Lane. If Ms. Zelasko cannot introduce third party propensity evidence, she is unable to establish this reasonable defense. *Lucas* is noticeably distinguishable from Ms. Zelasko's situation for two reasons. *First*, the defendant in *Lucas* was still able to offer eyewitness evidence to establish a third party's guilt. *Lucas*, 357 F.3d at 606. And *second*, the defendant earned credibility with the jury because she was able to support her theory with such evidence. *See id.* Ms. Zelasko does not have these luxuries. Apart from Ms. Morris' testimony, there is no alternative evidence to show that Ms. Short and Defendant Lane were in a conspiracy to sell drugs. Without the third party propensity evidence to support her defense, Ms. Zelasko will be unable to adequately present her defense to a jury and be deprived of a fair opportunity to be heard. She will gain no credibility with a jury by simply pointing at third parties through unsupported accusations. Ms. Zelasko has a constitutional right to a fair trial, and accordingly, must be allowed to offer third party propensity evidence to protect her "right to a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294.

Regardless of how "weak" the prosecutor claims Ms. Zelasko's third party propensity evidence is, she nonetheless has a constitutional right to admit it. (R. 15.) In *Holmes v. South Carolina*, this Court admitted evidence that implied a third party's guilt, despite strong contradictory forensic evidence. 547 U.S. at 325–26. The defendant in *Holmes* was charged with murder and rape. *Id.* at 322. His fingerprints were found at the scene of the crime, his DNA was found mixed with that of the victim, his clothes were splattered with blood of the victim, and fibers of his clothes were found all over the victim's house. *Id.* Even though the forensic evidence was very strong against the defendant, he was still able to offer counter-evidence to

attempt to show a third person's guilt and have a fair opportunity to prove his theory that the police framed him. *Id.* at 329. This "weak" defense theory was still admitted because the Court recognized the defendant's constitutional right to present a full defense. *See id.* at 326. Similarly, Ms. Zelasko has a right to assert her defense irrespective of how "weak" the prosecution believes it to be. "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered . . . [to] cast doubt." *Id.* at 331. A fair conclusion cannot be reached by only considering the government's offered evidence and dismissing Ms. Zelasko's.

B. The Government Presents No Legitimate Reason To Bar Ms. Morris' Testimony.

Rules cannot be read to exclude defense evidence unless it would serve a legitimate purpose. *See Holmes*, 547 U.S. at 326. Rule 404(b) serves the legitimate interest of protecting a defendant from unfair prejudice that may arise from admitting propensity evidence, but no such legitimate interest exists when the evidence is admitted *by* the defendant to prove his or her innocence. *See, e.g.*, *Frankhauser*, 80 F.3d at 648. Since the government has no legitimate interest in excluding Ms. Zelasko's third party propensity defense evidence, it constitutionally must be admitted.

In certain circumstances, a legitimate state interest can limit the rights of an accused to present evidence in his or her defense within the Sixth Amendment of the Constitution. *See Michigan v. Lucas*, 500 U.S. 145, 152 (1991). For example, in *Michigan v. Lucas*, the defendant was on trial for rape and was not guaranteed the right to present evidence of prior acts of consensual sex with the victim because he did not comply with Michigan's notice requirement. *Id.* at 153. Michigan required that the defendant give notice of proof within 10 days after arraignment if he intended to introduce evidence of past consensual sex with the victim. *Id.* at

147. Defendant did not give such notice. *Id.* at 146. This Court held that preclusion of the defendant's evidence might be justified because the State had a legitimate interest in protecting a rape victim against "surprise, harassment, and unnecessary invasion of privacy." *Id.* at 150.

In another instance, the defendant in *Taylor v. Illinois* intentionally did not disclose a known witness during discovery for purposes of catching the prosecution off-guard by introducing a "surprise" witness at trial. 484 U.S. 400, 403 (1988). This Court ruled that the defendant was not guaranteed a right to introduce "surprise" evidence during trial because the state had a legitimate interest in protecting the prosecution's ability to effectively cross-examine and obtain rebuttal evidence. *Id.* at 415. The Sixth Amendment does not guarantee a defendant the right to introduce evidence when it conflicts with a legitimate state interest. The State of Boerum proposes no legitimate governmental interest to justify a restriction on Ms. Zelasko's constitutional right to present evidence in her defense. There is no victim faced with further harassment, nor is an unfair burden placed on the prosecution.

While the state may have an interest in preventing a prejudicial effect against Ms. Short, it is far outweighed by Ms. Zelasko's right to a full defense. Testimony in a public forum that Ms. Short once sold drugs may label her a drug dealer and harm her reputation. However, this is a marginal concern compared to Ms. Zelasko's constitutional right to present crucial evidence in her defense. *See Holmes,* 547 U.S. at 326. Additionally, Ms. Short may have the opportunity to rebut such accusations in court, therefore further minimizing any prejudice that may occur against her. Fed. R. Evid. 607. Ms. Zelasko's constitutional right to present evidence in her defense is a far superior interest compared to avoiding any prejudice that may arise against Ms. Short. This is especially true because Ms. Zelasko stands to lose her freedom if she is unsuccessful in her defense. *See, e.g.*, *Montelongo*, 420 F.3d at 1174–75 (concluding that no

unfair prejudice exists when propensity evidence is used against third parties because they do not face conviction).

Moreover, the state's interest in judicial efficiency is not affected by the introduction of Ms. Morris' testimony. Third party propensity evidence that runs the risk of bogging down the courts, creating jury confusion, or resulting in a waste of time may be deemed inadmissible. *See Aboumoussallem*, 726 F.2d at 912. However, this is not an issue in this case. There is no risk of jury confusion or waste of time in presenting evidence of Ms. Short's propensity to sell drugs. Ms. Zelasko is not offering a convoluted defense. She is simply trying to prove that because Ms. Short previously sold steroids to her Snowman teammates, she is capable of doing it again several months later. It does not take much time to admit Ms. Morris' testimony into evidence and there is little risk of confusing the jury with this basic defense—Ms. Short is actually the coconspirator because she has a tendency to sell steroids to her Snowman teammates during the Winter Games.

Ms. Zelasko has a constitutional "right to a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 293. The State of Boerum's interests reflected in the record are only those of unfair prejudice and judicial expediency. (R. 37–38.) These are valid interests, but are not relevant to this case. Any unfair prejudice that may arise against Ms. Short is minimal in comparison to Ms. Zelako's constitutional rights. Additionally, the evidence Ms. Zelasko wishes to introduce is very simple and is by no means a waste of time. Since the government proposes no legitimate interest justifying the exclusion of Ms. Zelasko's evidence, the Constitution prohibits its exclusion at trial. *See Holmes*, 547 U.S. at 326.

III. DEFENDANT LANE'S HEARSAY STATEMENTS ARE NOT SELF-INCULPATORY AND WERE ACCURATELY EXCLUDED UNDER *WILLIAMSON V. UNITED STATES* AS THE STANDARD FOR THE APPLICATION OF FEDERAL RULE OF EVIDENCE 804(B)(3).

Williamson v. United States correctly interpreted Federal Rule of Evidence 804(b)(3) to include only those hearsay statements within a confession that are self-inculpatory. *Williamson's* ruling remained true to the central purpose of Rule 804(b)(3), ensuring the trustworthiness of hearsay statements made by unavailable declarants who were not cross-examined. Defendant Lane's confession does not contain any trustworthy hearsay statements because none of her statements subject her to any criminal liability. The surrounding circumstances also do not corroborate the truthfulness of her statements.

A. *Williamson v. United States* Was Correctly Upheld Because It Established Limits That Reflect The Purpose Of The Rule Against Hearsay.

Hearsay statements are out-of-court statements offered by a party to prove the truth of the matter asserted, but these statements are typically not admissible at trial. Fed. R. Evid. 801; Fed. R. Evid. 802. The Rule Against Hearsay excludes out-of court statements due to certain risks associated with these statements, such as dishonesty, misperception, misunderstanding, or faulty memory on the part of the declarant. *See Williamson v. United States*, 512 U.S. 594, 598 (1994). However, under Rule 804(b)(3), statements against interest are exempt from the Rule Against Hearsay. Fed. R. Evid. 804. "The hearsay exception for [statements] against interest is firmly established; it rests upon 'the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect.'" *Lee v. Illinois*, 476 U.S. 530, 551 (1986) (internal citation omitted). Simply put, a statement that harms a declarant's self-interest is unlikely to be false.

In *Williamson*, this Court clarified the exception in Rule 804(b)(3) by defining the term

"statement" as a "single declaration or remark." 512 U.S. at 594. This narrowed the exception to "cover only those declarations or remarks within the confession that are individually self-inculpatory." *Id.* at 599. The Court based this narrower interpretation of Rule 804(b)(3) on the 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.* Even when there is a broadly self-inculpatory confession, it does not make the collateral, non-self-inculpatory statements more credible. *Id.* at 599. This Court opined 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. Simply because a statement is collateral to a self-inculpatory statement does not make that collateral statement any more reliable. *Id.* at 600; *United States v. Barrone*, 114 F.3d 1284 (1997). Accordingly, this Court held that only self-inculpatory statements are admissible under Rule 804(b)(3). *Williamson*, 512 U.S. at 600. "[T]he most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Id.* at 600–01; *see also Lily v. Virginia*. 527 U.S. 116, 132–33 (1999) (reinforcing *Williamson v. United States*).

B. Defendant Lane's Hearsay Statements are Inadmissible Because They Are Neither Self-Inculpatory Nor Corroborated In Light Of All The Surrounding Circumstances.

A hearsay statement offered to show the truth of the matter asserted is admissible if it is self-inculpatory and is corroborated by circumstances that clearly indicate its trustworthiness as one that tends to expose the declarant to criminal liability. Fed. R. Evid. 804. A court "may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else."

Williamson, 512 U.S. at 601. The corroboration requirement serves to "circumvent[] fabrication" by the declarant. Fed. R. Evid. 804 advisory committee notes. Defendant Lane's hearsay statements are not self-inculpatory statements and are not supported by corroborating circumstances.

Courts utilize a two-part test in determining whether a statement is self-inculpatory. *First*, "each particular hearsay statement offered under Rule 804(b)(3) must be separately parsed and must, itself, be self-inculpatory." *United States v. Jackson*, 335 F.3d 170, 179 (2d Cir. 2003). *Second*, a statement must be viewed in context "in light of all the surrounding circumstances." *Williamson*, 512 U.S. at 603.

Viewing each of the statements in Defendant Lane's email separately, the only three that petitioner can attempt to argue as self-inculpatory are the second, third, and fourth statements. (R. 29.) The first and last statements are non-inclupatory because neither mentions an act committed by Defendant Lane that would subject her to any form of liability. (R. 29.) Defendant Lane's email reads:

> 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. 29.)

The second statement mentioned a business that Defendant Lane and her "partner" were

involved in. This statement is not self-inculpatory because Defendant Lane did not expose herself to criminal liability. *See Jackson*, 335 F.3d at 179. She does not mention any crime that she has committed. She merely mentions a "business" that another person, and herself, have been suspected of running. (R. 29.) In addition, the term "suspected" also diminishes the self-inculpatory nature of that statement because the Defendant Lane does not explicitly state that *she* is involved in the "business." With respect to context, the circumstances surrounding this neutral statement do not render it self-inculpatory. *See Jackson*, 335 F.3d at 179. Coach Billings confronted Defendant Lane in person nearly a month before she wrote this statement. It is unreasonable to infer that someone would respond to an oral statement via electronic mail after so much time had passed. Moreover, Coach Billings and Defendant Lane had been romantically involved for several years. (R. 1.) Given their intimate personal relationship and the highly-sensitive nature of her boyfriend's concerns, it is peculiar that Defendant Lane would choose to respond with a formal writing.

Similarly, the third statement is not in the realm of self-inculpation. Although Defendant Lane admits that someone had "found out" what she and her partner did, she still does not mention any crime that would make her criminally liable. (R. 29.) Viewing Defendant Lane's statement in context, it is too general to be considered inculpatory. There are countless possibilities as to what this broad statement means. Defendant Lane could have been concerned with the male teammate "reporting" her relationship with Coach Billings, or, something as innocent as drinking alcohol after practice. Again, four weeks had passed since Coach Billings initially voiced his concerns about anabolic steroids to his girlfriend; therefore, her statement is likely unrelated.

Finally, the fourth statement is not self-inculpatory because it inculpates only her alleged

"partner." Defendant Lane does not explicitly mention any crime, but instead, implies that her "partner" has proposed that someone should be harmed. *Id.* "Portions of inculpatory statements that pose no risk to the declarant[] are not particularly reliable." *United States v. Mendoza*, 85 F.3d 1347, 1352 (8th Cir. 1996). This statement only poses a threat to the Defendant Lane's alleged "partner," but none to herself. Thus, it is not self-inculpatory on its face. Likewise, the surrounding circumstances do not link Defendant Lane's statement to Hunter Riley's murder. She had no reason to "keep him quiet." Defendant Lane never sold him drugs. (R. 2–3.) In addition, the record does not indicate that she even knew Riley was a DEA informant. The fourth statement is therefore not self-inculpatory.

Even if these statements were deemed self-inculpatory, they lack corroborating circumstances that indicate their truthfulness. The government has provided no corroborating evidence that demonstrates Defendant Lane ever had a business partner. No communications or financial documents linking her to a partner were ever retrieved. There is also no corroborating evidence showing that either Ms. Zelasko or Defendant Lane were distributing anabolic steroids to anyone. Rather, the record demonstrates that Defendant Lane repeatedly refused to sell steroids to a DEA informant. (R. 2–3.) The government has the duty to obtain corroborating evidence to substantiate its theory regarding Defendant Lane's out-of-court statement, but it failed to provide any in accordance with Rule 804(b)(3) and should not be admitted.

The DEA's seizure of 10 days worth of anabolic steroids and $10,000 from Defendant Lane's residence does not corroborate the government's theory that Defendant Lane is a drug dealer.[2] The government's own expert testified that "250 50-milligram doses is consistent with [the] sale and not personal use[]" of steroids. (R. 28). Defendant Lane only had 20 50-milligram

[2] A daily dose of this particular steroid is between 50-100 milligrams. Defendant Lane was discovered with 1000 milligrams. (R. 4, 27.)

doses, less than twelve times of what is consistent with the sale of steroids. Additionally, $10,000 is only enough to buy four days worth of steroids.[3] This supply of steroids and money is in no way consistent with that of a drug dealer. Even if these drugs are for an individual's personal use, this does not imply that he or she also sells them.

It could also be argued that Mr. Riley's death took place only a few days after Defendant Lane sent an email stating that her partner wanted to keep an individual quiet. This might imply that she was involved in the murder of Mr. Riley. However, before analyzing whether a hearsay statement is supported by corroborating circumstances, Rule 804(b)(3) requires the hearsay statement at issue "to expose the declarant to criminal liability." Fed. R. Evid. 804. Defendant Lane's fourth statement only exposes her "partner" to criminal liability, and thus, it is not a statement against interest where corroborating circumstances can be considered.

Petitioner argues that the *Williamson* standard should be relaxed in this case because Defendant Lane's statements were not made to law enforcement officers. (R. 42.) They contend that she had less incentive to lie because she was not motivated by a desire to curry favor with the authorities for her own self interest and thus, her entire statement should be admitted. *Williamson*, 512 U.S. at 619. However, Defendant Lane had as much reason to lie in collateral statements to her coach as she did to the police. First of all, Coach Billings, like a police officer, is in a position of authority. Second, she sent him an email minimizing her involvement in a "business" he previously confronted her about and implying her "partner" wanted to keep someone quiet. This is analogous to declarants who confess to police in order to protect their own self-interest and shift blame to others, which is why her collateral statements must be excluded. It follows that the *Williamson* standard should not be relaxed and only Defendant

[3] 50,000 milligrams of this particular steroid is worth approximately $12,500. (R. 3). This is roughly $200 per 50-milligram dose.

Lane's self-inculpatory statements--not the entire statement--should be admitted.

IV. THE *BRUTON* DOCTRINE SURVIVED *CRAWFORD*, MAKING DEFENDANT LANE'S EMAIL INADMISSIBLE.

The Sixth Amendment's Confrontation Clause 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. This guarantees a defendant the opportunity to cross-examine adversarial witnesses' in-court testimony and out-of-court statements. *See Crawford v. Washington*, 541 U.S. 36, 50-51 (2004); *Bruton v. United States*, 391 U.S. 123, 126 (1968). The primary objective of the Confrontation Clause "was to prevent depositions or ex parte affidavits [from] being used against the [defendant] in lieu of a personal examination and cross-examination of the witness." *Douglas v. State of Ala.*, 380 U.S. 415, 419 (1965). Cross-examination gives jurors the opportunity to observe the demeanor and manner of a witness and judge whether their testimony is credible. *See id.* It is crucial for juries to evaluate witnesses because they are the triers of fact, making the ultimate determination of guilt or innocence.

This Court established two separate and distinct protections secured by the Confrontation Clause of the Sixth Amendment. In *Bruton v. United States*, the Court examined the admissibility in a joint trial of a codefendant's hearsay statement that implicates the other defendant. *Bruton* stands for the proposition that without the opportunity to cross-examine the codefendant, the defendant would suffer unfair prejudice. Therefore, the Confrontation Clause renders his codefendant's testimony inadmissible. *Bruton, 391 U.S.* at 135-36. In *Crawford v. Washington*, the Court established that under the Confrontation Clause, cross-examination is the proper test to determine the reliability of testimonial statements made by an unavailable witness. *Crawford*, 541 U.S. at 61. This ruling had no impact on the *Bruton* Doctrine. Accordingly, the *Bruton* Doctrine applies to this case. Defendant Lane's email is inadmissible because it causes

unfair prejudice against Ms. Zelasko.

Defendant Lane's email implies that an unknown "partner" was involved in selling anabolic steroids and was considering harming a member of the U.S. men's Snowman team by "keep[ing] him quiet." These statements coupled with the joint trial of defendants imply that Ms. Zelasko is guilty of these crimes. Since Ms. Zelasko cannot exercise her constitutional right to cross-examine Defendant Lane, the Court must deem this e-mail inadmissible for creating an unfair prejudice.

A. The *Bruton* Doctrine And The Holding In *Crawford* Grant Separate And Distinct Protections Under The Sixth Amendment's Confrontation Clause.

The holding of *Bruton v. U.S.* was not restricted by *Crawford v. Washington* because each case dealt with unique issues. In *Bruton,* codefendants Bruton and Evans were tried jointly and convicted of armed robbery by a jury. *Bruton*, 391 U.S. at 124. At trial, the judge admitted an oral confession made by Defendant Evans indicating that he had a partner in the armed robbery. *Id*. at 124–25. Defendant Evans never took the stand. *Id.* at 128. Finding that Defendant Evans' confession was competent evidence against Evans but inadmissible hearsay against Bruton, the trial judge instructed the jury to disregard it in deliberating Bruton's fate. *Id.* at 125. The Eighth Circuit Court of Appeals affirmed that the limiting instruction prevented unfair prejudice against Bruton.

On *certiorari*, this Court discussed the importance of cross-examination in joint trials where the state intends to use one codefendant's hearsay statements against another. *Bruton, 391 U.S.* at 135–36. In these situations, denying a defendant the right to cross-examination would violate the Confrontation Clause. *Id.* at 128. Admitting the statements, however, would be unfairly prejudicial because the jury will be asked to consider the hearsay statements for one codefendant and not other. *Id.* at 135–36. It is "naive" to think that such a prejudicial effect can

be overcome by a jury instruction. *Id.* at 129. "A jury cannot segregate evidence into separate intellectual boxes." *Id.* at 131 (internal quotation omitted). It cannot determine that a confession is true for the criminal acts of A with B, and at the same time ignore the conclusion that B committed those same criminal acts with A. *Id*. Limiting jury instructions are not an adequate substitute for a defendant's constitutional right to cross-examine the witnesses against him. *Id.* at 137. "The effect is the same as if there had been no instruction at all." *Id.*

In *Crawford*, this Court determined that under Confrontation Clause, cross-examination is the appropriate test to determine the reliability of out-of-court testimonial statements. *Crawford*, 541 U.S. at 61. There, Defendant Crawford stabbed Kenneth Lee, a man who allegedly tried to rape Crawford's wife. *Id.* at 38. At Crawford's trial, his wife could not testify due to spousal privilege. Still, the trial judge admitted the statement she made to police, acknowledging that she lured Lee to her apartment to instigate the assault. *Id.* at 40. This Court reversed that ruling. The Confrontation Clause, it held, was directed at "*ex parte* examinations as evidence against the accused" and therefore, applies to in-court and out-of-court "testimonial" statements. *Id.* at 50–51 (defining testimonial statements as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."). This Court continued, "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. In its conclusion, the Court stated, "[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.

Unquestionably, *Bruton* dealt with a Confrontation Clause issue distinct from the one in

Crawford. In the *Bruton* joint trial, the confession made by one non-testifying codefendant was inadmissible because it unfairly prejudiced Bruton, the other codefendant who, had the statement been admitted, could not cross-examine his accuser as guaranteed by the Confrontation Clause. *Bruton*, 391 U.S. at 127–128 n.3. Unfair prejudice was not the key concern in *Crawford*. Instead, the *Crawford* Court determined that the defendant's wife's out-of-court confession was reliable because it was made to a police officer and therefore, testimonial in nature. Testimonial evidence offered against a defendant, the Court concluded, evokes a defendant's right to cross-examination. Such evidence is inadmissible in its entirety whereas with Crawford's wife, the witness is unavailable and was not subjected to prior cross examination. In sum, *Bruton* protects defendants from the unfairly prejudicial testimony of codefendants, whereas *Crawford* guarantees defendants the right to cross-examine reliable testimonial evidence entered against them.

For the same reason, it cannot be argued that *Crawford* impacted the *Bruton* Doctrine in any manner. This is consistent with this Court's analysis in *Cruz v. New York*, which was decided in the interim between *Bruton* and *Crawford*. 481 U.S. 186 (1987). *Cruz* held that the *Roberts'* test of reliability, which *Crawford* replaced, did not have any effect on *Bruton*. 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, 663 (2012). The *Bruton* Doctrine, the Court reasoned, deals with the harmfulness of a hearsay statement rather than its reliability. *Cruz v. New York*, 481 U.S. 186 (1987). Reliability might be relevant to determine whether a confession may be admitted as evidence, but is not relevant to whether a jury is likely to obey an instruction or disregard it. *Cruz*, 481 U.S. at 192-93. In other words, the reliability of evidence has no bearing on its prejudicial nature. Accordingly, in analyzing

reliability, *Crawford* in no way restricts the *Bruton* Doctrine on unfair prejudice.

Though Petitioner may suggest *Crawford* rendered *Bruton* inapplicable to non-testimonial statements like the one in this case, it is apparent that this is untrue. *Crawford* cited *Lee v. Illinois* to illustrate a case which stayed "faithful" to the principal that testimonial hearsay is admissible only if a declarant is unavailable and the defendant previously had an opportunity to cross-examine him. *See Crawford*, 541 U.S. at 59; *Lee*, 476 U.S. at 545. The *Lee* Court expressly stated that the matter before it did not involve a *Bruton* issue. *Lee,* 476 U.S. at 542. *Lee* looked at the substantive use of a confession rather than its prejudicial effect. *Id. Crawford* distinguished *Lee* from cases such as *Parker v. Randolph* and *Cruz v. New York*, which both involved the precise issue resolved by *Bruton*; that is, "whether a limiting instruction cured prejudice to codefendants from admitting a defendant's *own* confession against him in a joint trial." *Crawford*, 541 U.S. at 59 [emphasis in original]. In making this comparison, the *Crawford* Court made a clear distinction between the question it intended to resolve and the one resolved by the *Bruton* Doctrine.

Crawford does not extend itself universally to all instances where the Confrontation Clause applies**.** For example, under the Rule of Forfeiture by Wrongdoing, testimonial evidence can still be admitted, without the opportunity to cross-examine an unavailable declarant, against a defendant who plans or causes a potential witness against him to be unavailable at trial. *Giles v. California*, 554 U.S. 353, 358 (2008). In *Davis v. Washington*, testimonial evidence was admitted even though the defendant did not have an opportunity to cross-examine the unavailable declarant. Accordingly, a witness' testimonial hearsay could be admitted against him in spite of *Crawford's* rule. *Davis v. Washington*, 547 U.S. 813, 823–26 (2006). Rule of Forfeiture exists to promote the policy of preventing a defendant from harming an adversarial

witness. While, the *Bruton* Doctrine is concerned with protecting a codefendant from unfair prejudice. These two policies are distinguishable from each other, but they both demonstrate that policy interests can outweigh the Confrontation Clause's concerns regarding reliability.

In conclusion, *Crawford* did not limit the applicability of *Bruton*. The two cases resolved entirely different questions regarding the Sixth Amendment; reliability of testimonial statements and unfair prejudice in joint trials, respectively. The *Bruton* Doctrine is still applicable in non-testimonial hearsay settings because a codefendant's hearsay statement is susceptible to improper use by a jury. *See* Miller, *supra*, at 673. Preventing the jury from hearing such statement protects a defendant against unfair prejudice.

B. Defendant Lane's Email Is Inadmissible Under The *Bruton* Doctrine Because It Creates Unfair Prejudice Against Ms. Zelasko.

The Fourteenth Circuit correctly held that Ms. Zelasko would be unconstitutionally prejudiced by Defendant Lane's inculpatory statements. (R. 45.) These statements inculpate another individual as being her "partner" in a "business" "[they] have been running with the female team." (R. 29.) Defendant Lane also states that a member of the male team has "found out and threatened to report [them]," implying that her "partner" is involved in whatever "business" the recipient of the email, Coach Billings, "suspected" they were running. (R. 29.) Most significantly, she states, "[m]y partner really thinks we need to figure out how to keep him quiet." *Id.* These are the very statements that the *Bruton* Doctrine was designed to protect against.

No jury will be able to accept Defendant Lane's confession as true as it applies to her, but false as it applies to Ms. Zelasko. It is highly likely that a jury will assume that defendants in a joint trial are equally culpable. A limiting instruction to the jury would be severely inadequate to cure the unfair prejudice bound to result from Defendant Lane's statement inculpating her "partner." "A juror who…wonders to whom ["partner"] might refer need only lift his eyes to

[Ms. Zelasko], sitting at counsel table, to find what will seem the obvious answer . . . ."). *Gray v. Maryland*, 523 U.S. 185, 193 (1998). The effect would be the same as if no jury instruction were given. *Bruton*, 391 U.S. at 124.

The non-testimonial nature of Defendant Lane's statement does not make it automatically admissible under *Crawford*. *Crawford* sought to ensure that the reliability of testimonial statements "be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. It may be true that a witness' non-testimonial hearsay statement inculpating the defendant is reliable and not worthy of Confrontation Clause protection under *Crawford*. *See Davis*, 547 U.S. at 823–26. However, in joint trials, *Bruton* used the Confrontation Clause to protect against a different injustice. Therefore, the non-testimonial statement can still be excluded under the *Bruton* Doctrine. The reliability of Defendant Lane's statements under *Crawford* does not eliminate the unfairly prejudicial effect it would have on Ms. Zelasko.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that the judgment of the Court of Appeals for the Fourteenth Circuit be affirmed.

Dated: February 12, 2014

Respectfully submitted,

Team 34
Counsel for Respondent

CONSTITUTIONAL AND STATUTORY ADDENDUM

United States Constitution 6th Amendment Provides:

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 defense.

United States Constitution 14th Amendment Provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Evidence §102 Provides:

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Federal Rule of Evidence §403 Provides:
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.

Federal Rule of Evidence §404 Provides:

(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; Notice in a Criminal Case. 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. On request by a defendant in a criminal case, the prosecutor must:
(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

Federal Rule of Evidence §801 Provides:

(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Federal Rule of Evidence §802 Provides:

Hearsay is not admissible unless any of the following provides otherwise:
• a federal statute;
• these rules; or
• other rules prescribed by the Supreme Court.

Federal Rule of Evidence §804 Provides:

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
. . .
(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.