

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 UNITED STATES

QUESTIONS PRESENTED

1. Whether Federal Rule of Evidence 404(b) permits the introduction of reverse 404(b) evidence of a third party's propensity to commit an offense with which the defendant has been charged, although the plain text of the rule does not explicitly state that it does.
2. Whether the Court of Appeals erred in allowing Respondent to admit third party propensity evidence to distribute illegal drugs under her constitutional right to present a complete defense as per *Chambers v. Mississippi*, where *Chambers* does not control, and there is no direct connection between the third party's actions and the crime alleged.
3. Whether *Williamson v. United States* should be overruled insofar as it provides a flawed standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest, and should the new standard incorporate *Crawford v. Washington* and indicia of reliability to ensure uniform and fair application of 804(b)(3).
4. Whether, at a joint trial, an informal statement of a non-testifying co-defendant to a trusted friend or loved one, implicating the defendant, is barred by the Confrontation Clause under *Bruton v. United States*, even though the statement qualifies as a non-testimonial statement within the meaning of this Court's decision in *Crawford v. Washington*.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit, R. at 30-54, is not printed in the *Federal Reporter*. The decision of the United States District Court for the Southern District of Boerum, *id.* at 20-23, was delivered from the bench, and therefore is also not printed in the *Federal Reporter*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourteenth Circuit was entered on February 14, 2013. *Id.* at 30. The petition for a writ of *certiorari* was granted on October 1, 2013. *Id.* at 55. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The pertinent constitutional provisions and rules are reproduced in the appendix to this brief. App., *infra*, at A1.

STATEMENT OF THE CASE

Factual Background

By August 2011, Hunter Riley (“Riley”), an informant for the Drug Enforcement Administration (“DEA”), was a member of the United States Men’s Snowman Team, and Respondent Anastasio Zelasko (“Respondent”) and co-defendant Jessica Lane (“Lane”) (collectively, “the defendants”) were both members of the United States Women’s Snowman Team. R. at 1. At that time, the defendants formed a conspiracy to sell anabolic steroids to their teammates. *Id.* at 2. At the DEA’s direction, Riley attempted to buy steroids from Lane on at least three occasions; she rebuffed him each time. *Id.* at 2-3. In December 2011, Peter Billings (“Billings”) – Lane’s boyfriend – observed the defendants arguing, during which he heard Lane yell, “Stop bragging to everyone about all the money you’re making!” *Id.* at 3 (internal quotation

marks omitted). He later confronted Lane with his suspicions that she was selling steroids to her team. *Id.* Nearly one month later, Lane emailed Billings asking for his help, claiming that “[o]ne of the members of the male team [had] found out and [was] threaten[ing] to report [her and her accomplice] if [they] d[id]n’t come clean.” *Id.* “[Lane’s] partner,” she said, “really th[ought] that they] need[ed] to figure out how to keep him quiet.” *Id.* On January 28, 2012, Respondent and Riley were seen together “in a heated argument,” and almost one week later, Riley’s body was found on the Snowman Team training grounds. *Id.* Respondent was arrested shortly thereafter.¹

The subsequent execution of search warrants uncovered \$5,000 in cash and two 50-milligram doses of steroids at Respondent’s home. \$10,000 in cash and twenty 50-milligram doses of steroids at Lane’s home, and 12,5000 milligrams of steroids at the team’s equipment storage room. *Id.* at 3-4. Lane was arrested shortly thereafter.

Procedural Posture

The defendants were indicted on April 10, 2012. *Id.* at 5. On July 16, 2012, Respondent moved to admit the testimony of Miranda Morris (“Morris”), a former member of the Canadian Snowman Team, who averred that she had purchased drugs from Casey Short (“Short”), also a former member of the Canadian Snowman Team and another current member of the United States Women’s Snowman Team. *Id.* at 6-7; *see id.* at 24-25. Respondent believes that Morris’s testimony identifies the co-conspirators as Short and Lane, and exculpates Respondent. *Id.* at 11.

That same day, the government also moved to admit an email from Lane to Billings in which Lane discussed “keep[ing] . . . quiet” a “member of the male team [who] found out and threatened to report [her and her partner].” *Id.* at 29. In the context of the facts of this case, the

¹ “[T]he Snowman Team’s primary competition was the Snowman Pentathlon at the World Winter Games. This competition is a physically demanding game consisting of dogsledding, ice dancing, aerial skiing, *rifle shooting*, and curling.” *Id.* at 1-2 (Emphasis added). The government argues that Respondent shot and killed Riley and attempted to make the murder seem like an accident. Respondent, of course, argues that the shooting was, in fact, accidental.

government argues that this email implicates Lane not only in the sale of drugs, but also in Riley's death at Respondent's hands. *See id.* at 17.

On July 18, 2012, the District Court decided both motions in Respondent's favor. The Morris affidavit was held admissible in light of "the common law basis for . . . Rule" 404(b), R. at 21, and not according to a plain reading of the Rule. In the alternative, the court held that Respondent's constitutional rights would be at issue were the evidence not admitted, given that "[t]here is no other evidence" supporting her theory and the "strong inference" that it raised. *Id.* at 21. Meanwhile, the court excluded the Lane email because "[n]one of the statements contained in the email . . . when considered independently . . . admit any wrongdoing or expose Lane to criminal liability." *Id.* at 22. The court declined to read the email's statements in the context of the events that transpired, *id.* at 22-23, and also held that Respondent's Sixth Amendment rights would be violated if the evidence were admitted, *id.* at 23.

On February 14, 2013, the Court of Appeals affirmed. First, the court held that Rule "404(b) does not apply when the defendant is offering evidence of the propensity of a third party in order to exculpate herself." R. at 34. The court was persuaded by the majority of circuits that have found reverse 404(b) evidence admissible and that the silence of both the text of the rule and the Advisory Committee Notes were indicia of such evidence's admissibility. *Id.* at 35. As a constitutional matter, the court also ruled that Morris's testimony: was "specific enough and probative enough to cast doubt on [Respondent]'s guilt;"] did not advance the usual policy goals that justify excluding such testimony; and, that excluding that testimony would violate her constitutional right to present a complete defense under *Chambers v. Mississippi*, 410 U.S. 284 (1973). R. at 36-38.

The court also ruled that Lane's email to Billings was inadmissible under Rule 804(b)(3). It first held that *Williamson v. United States*, 512 U.S. 594 (1994), endorsed the narrow reading of the rule, and that, taken individually, none of the statements in the email exposed Lane to criminal liability. R. at 40-42. The court also decided that *Crawford v. Washington*, 541 U.S. 36 (2004) did not confine *Bruton v. United States*, 391 U.S. 123 (1968), to testimonial statements, and therefore that Respondent's rights under the Confrontation Clause would be violated if the email were admitted and Lane did not testify. *See id.* at 44-46.

The government timely petitioned this Court for a writ of *certiorari*, which was granted on October 1, 2013. *Id.* at 55.

STANDARD OF REVIEW

“While evidentiary rulings often require an exercise of discretion that calls for [an abuse of discretion] standard of review, they may also require legal and factual determinations that call for different standards.” *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013). “Specifically, ‘[t]he factual findings underlying [evidentiary] rulings are reviewed for clear error.’” *Id.* (alterations in original) (quoting *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir. 2012)). “[Q]uestions of law underlying evidentiary rulings are reviewed *de novo*.” *Id.* *Accord, e.g., Muniz v. United Parcel Service, Inc.*, No. 11-17282, 2013 WL 6284357 (9th Cir. Dec. 5, 2013); *Rockies Express Pipeline, LLC v. 4.895 Acres of Land, More or Less*, 734 F.3d 424 (6th Cir. 2013). *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011) (“Questions of law are reviewed *de novo* . . .”).

SUMMARY OF THE ARGUMENT

First, Federal Rule of Evidence 404(b)(1)-(2) does not explicitly state that defendants may admit evidence of a third party's propensity to commit an offense charged to the defendant.

Respondent should not be able to introduce evidence of Short's propensity to sell a drug similar to the one she is charged with selling, in order to cast doubt on the likelihood that Respondent is Lane's coconspirator. Even if reverse 404(b) evidence is allowed under Rule 404(b), *United States v. Lucas*, 357 F.3d 599 (6th Cir. 2004), controls, and it categorically bars a defendant's use of propensity evidence to cast doubt on her culpability in a crime. Alternatively, if this court balances Rule 401 relevancy considerations with Rule 403 prejudice/jury confusion considerations as delineated in *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991), then the Respondent's reverse 404(b) evidence should not be allowed, because "[*Stevens*] did not afford defendants more leeway in admitting propensity evidence in violation of the prohibition of Rule 404(b)." *United States v. Williams*, 458 F.3d 312, 314 (3d Cir. 2006).

Second, the lower court also erred in allowing Respondent to admit third party propensity evidence to distribute illegal drugs under her constitutional right to present a complete defense as per *Chambers*. First, a defendant's right to present a complete defense is not violated by the exclusion of evidence of a third party's propensities. Moreover, *Chambers* does not control this case; but, even if it does, third party propensity evidence only falls under the right to present a complete defense if it shows a direct connection between the third party's actions and the crime alleged. Absent such a showing, the evidence is inadmissible.

Third, the Court of Appeals incorrectly held that Lane's email is not admissible under the statement against interest exception to the hearsay rule because of the inherent flaws in *Williamson*. That case attempted to establish a bright-line standard for Rule 804(b)(3), but in doing so inadvertently undermined the new standard by indicating that a declarant's statements must *also* be reviewed in the broader context in which they were made. Simply put, to require courts to parse statements into categories in order to determine admissibility is impossible, and

runs the risk of depriving parties of a fair trial. This contradictory standard has resulted in lower courts' inability to correctly apply, and disregard, its instruction, especially in situations that are not similar to *Williamson*. It has also lead to erroneous decisions and the issue at the case at bar.

Finally, because *Crawford* codified that nontestimonial statements are admissible under Rule 804(b)(3) without any inquiry into the reliability of the statement, and their admissibility is also constitutional, this Court must abandon the *Williamson* standard and craft a new rule that is faithful to the Federal Rules of Evidence and applies the necessary – but not excessive – level of protection.

Furthermore, admitting Lane's email does not violate the Confrontation Clause of the Sixth Amendment because *Crawford* distinguished between testimonial and non-testimonial statements and cabined *Bruton* to solely testimonial statements. Thus, based on this Court's jurisprudence, an informal email sent from Lane to her boyfriend is admissible because it is factually dissimilar to testimonial statements made to law enforcement personnel and thus does not violate the Confrontation Clause under *Bruton*.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 404(b) DOES NOT ALLOW THE ADMISSION OF EVIDENCE OF A THIRD PARTY'S PROPENSITY TO COMMIT AN OFFENSE WITH WHICH THE DEFENDANT HAS BEEN CHARGED.

A. **Rule 404(b) does not allow evidence of a third party's propensity to commit an offense with which the defendant has been charged to be admitted by a defendant.**

The lower court erred in allowing Respondent to use Federal Rule of Evidence 404(b) to introduce evidence of Short's alleged propensity to sell drugs. The rule plainly states:

. . . 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.

. . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Fed. R. Evid. 404(b)(1)-(2). Prosecutors typically use this rule to admit evidence of a defendant's prior bad acts in order to demonstrate that he has the propensity to commit the crime with which he is charged. Jessica Broderick, Comment, *Reverse 404(b) Evidence: Exploring Standards when Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U. Colo. L. Rev. 587, 590 (2008). In this context, such evidence ought to not always be allowed because the goal of the criminal justice system is to convict specific individuals for specific crimes, and not generally on the basis of their morality. *Id.* at 588. Thus, third party evidence offered by the defendant, also known as reverse 404(b) evidence, should not be allowed.

The Court of Appeals ignored the plain meaning of Rule 404(b) and ruled contrary to the Advisory Committee's intention behind the rule. *See R.* at 46. The Advisory Committee did not intend to allow a defendant to use evidence of a third party's actions in order to exonerate himself; instead, they indicate that prosecutors are intended to use the rule as an evidentiary tool. Fed. R. Evid. 404 advisory committee's note.

“[A]s long as a statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989). Adhering to the plain meaning of rules and statutes ensures both predictability and fealty to the original intent of the text. When a statute's language is plain, “the sole function of the courts is to enforce it according to its terms.” *Id.* at 241. *Accord Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“when the statutory language is plain, we must enforce it according to its terms”). In statutory construction cases, it is assumed “that the

ordinary meaning of the [statutory] language accurately expresses the legislative purpose.” *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013).

There are several reasons as to why reverse 404(b) evidence should not be allowed. First, the prosecution’s burden to prove its case beyond a reasonable doubt is already high. *See In re Winship*, 397 U.S. 358, 364 (1970) (noting that, in criminal proceedings, “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”). Allowing third party propensity evidence creates an additional burden under which prosecutors must absolve others of a crime before they may convict a defendant. Broderick, 79 U. Colo. L. Rev. at 604. Second, third parties implicated by reverse 404(b) evidence are not parties to the action, and therefore are not positioned to adequately defend themselves – a positioning that is counterintuitive to our legal jurisprudence. *Id.* Third, defendants should not be able to “easily blame a third person [for a crime] despite other relevant evidence to the contrary.” *Id.*

In this case, Respondent seeks to cast doubt on her culpability by alleging that Short had a propensity to sell the same type drug that Respondent is accused of having sold. R. at 11. This use of reverse 404(b) evidence would result in such negative consequences as: other defendants avoiding punishment for their crimes; and, prosecutors facing an increased burden of proof to secure convictions. “[T]he admission of third party guilt evidence would cause the trial to degenerate into confusing mini-trials of collateral issues related to the third party and divert the jury’s attention from the case at hand.” John H. Blume *et al.*, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt And The Right To Present a Complete Defense*, 44 Am. Crim. L. Rev. 1069, 1084 (2007). Further, “admission of third party guilt evidence would ‘open the door to the most fraudulent contrivances to procure the acquittal of parties accused of

crime.”” *Id.* at 1085 (citation omitted). Therefore, this Court should reverse the Court of Appeals and prevent the Respondent from introducing evidence regarding Short’s supposed propensity to sell drugs.

B. If third party propensity evidence is admissible under Rule 404(b), this Court should adopt the Sixth Circuit’s rule-based approach.

If this Court construes Rule 404(b) so as to permit the introduction of evidence going towards a third party’s propensity, then it should adopt the Sixth Circuit’s rule-based approach in *United States v. Lucas*, 357 F.3d 599 (6th Cir. 2004). There, the court held reverse 404(b) evidence “should demonstrate *more* than propensity.” *Id.* at 605 (emphasis added). Thus, the court in that case denied the introduction of third party character evidence under Rule 404(b) if it merely indicated an individual’s propensity to act a certain way. *Id.* This Court should adopt *Lucas* because it martials against defendants introducing evidence to, without merit, point their finger at as many third parties as possible. Other Courts of Appeal have adopted similar approaches. *See United States v. McCourt*, 925 F.2d 1229, 1232-33 (9th Cir. 1991) (footnote omitted) (“[b]ecause Rule 404(b) plainly proscribes other crimes evidence of ‘a person,’ it cannot reasonably be construed as extending only to ‘an accused’”). *Compare Agushi v. Duerr*, 196 F.3d 754, 759-61 (7th Cir. 1999) (affirming the admission of reverse 404(b) evidence of a defendant’s abuse of his child, and stating as matter of first impression that “other acts” under 404(b) applies to third parties) *with United States v. Wilson*, 307 F.3d 596, 601 (7th Cir. 2002) (holding the trial court’s exclusion of reverse 404(b) evidence was not unconstitutional because the “evidence that [the defendant] wished to offer would not have played a major role in disproving his guilt . . .”).

The standards offered in the First, Second, Third, Fifth, Tenth, and Eleventh Circuits are insufficient because they do not account for the potential errors that are undesirable in high-

stakes criminal trials. These courts use some combination of Rules 401 and 403 to weigh the probative value of the evidence versus its potential to: confuse jurors; prejudice the third party who is not present in the case; and, confuse the issues. See *United States vs. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005) (quoting *Agushi*, 196 F.3d at 760) (internal quotation marks omitted) (stating that evidence of a witness' prior wrongs, acts, or crimes is admissible "for defensive purposes if it tends, alone or with other evidence, to negate the defendant's guilt of the crime charged against him"); *Stevens*, 935 F.2d 1380 (holding that a defendant may introduce reverse 404(b) evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations); *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 582 n.25 (1st Cir. 1987) (citation omitted) ("[i]nasmuch as this evidence does not concern past criminal activity of the [defendant], Rule 404(b) is inapplicable"); *United States v. Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984) (footnote omitted) (noting that "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) ("although Rule 404(b) does not control . . . [its] exceptions . . . should be considered in weighing the balance between the relevancy of this evidence and its prejudice under Rule 403"); *United States v. Krezdorn*, 639 F.2d 1327, 1333 (5th Cir. 1981) (stating that a defendant can introduce third party evidence under Rule 404(b) as long as his character is not impugned). A standards-based approach ignores the plain language of Rule 404(b) and can also confuse jurors and the issues. Broderick, 79 U. Colo. L. Rev. at 604.

In line with *Lucas*, this Court should adopt a rule-based approach if it decides to allow reverse 404 evidence, meaning that reverse 404(b) evidence that is merely propensity evidence would be categorically inadmissible. *Lucas*, 357 F.3d at 605. Such an approach increases

predictability and allows less room for error. Under this approach, Respondent's evidence of Short's alleged sale of anabolic steroids would be inadmissible because it merely goes towards a third party's propensity to commit the same *type* of crime, but not the *specific* crime, of which she is accused. R. at 11 -12.

C. Even if the Court adopts a standards based approach regarding third party propensity evidence à la *Stevens*, the factors weigh against the admission of such evidence in this case.

If the Court decides to adopt a standards based approach towards reverse 404(b) evidence under *Stevens*, that evidence should still be barred in this case. In *Stevens*, the court held that reverse 404(b) evidence *may* be admitted as long as it tends to negate the defendant's guilt and passes the Rule 401/403 balancing test. *See id.* at 1384. Under that balancing test, third party evidence, if deemed relevant under Federal Rule of Evidence 401, is examined for its value and weighed against the risks of prejudice to the third party and potential jury confusion.² If those risks outweigh the evidence's value, then it ought not to be admitted. *Id.* at 1405.

Although the *Stevens* court ultimately allowed the admission of third party evidence, that case is distinguishable from this case on the facts. In *Stevens*, the defendant offered *other crimes* evidence of a third party committing the same crime of which he was accused, as well as similar crimes against other victims. *Id.* at 1405. He was identified by the victims of one crime as the assailant, but also offered a witness who identified someone else as the perpetrator of a similar crime. *Id.* The defendant's theory was that the same person committed both crimes, and it was not him in either case. *Id.* The district court refused to allow his evidence in under Rule 404(b)(2). *Id.* at 1383. However, the Third Circuit reversed the refusal to admit the evidence, stating, "[w]hen a defendant proffers 'other crimes' evidence under Rule 404(b), there is no

² In *Stevens*, the reverse 404(b) evidence was admissible, and the court arrived at the Rule 403 balancing test, *only after* it was first found relevant under Rule 401. *See id.* at 1405.

possibility of prejudice to the defendant; therefore, the other crime need not be a ‘signature’ crime.” *Id.* at 1384. The court also stated “a defendant *must* demonstrate that the reverse 404(b) evidence has a tendency to negate his guilt, and that it passes the Rule 403 balancing test.” *Id.* at 1405 (emphasis added) (internal quotation marks omitted). Here, Respondent does not seek to introduce *other crimes* evidence showing a tendency to negate her guilt. R. at 11. Instead, she brings forth an allegation that because a third party sold a different drug, she therefore had the propensity to conspire with others to sell other drugs. *Id.* Because the facts here are substantially different, *Stevens* ought not to control the outcome of this case.

Instead, this case is factually analogous to several Third Circuit decisions, which did not allow the admission of reverse 404(b) evidence. For example, in *Williams*, the court affirmed the exclusion of evidence of a third party’s past gun conviction when he was arrested in proximity of a firearm and the defendant was charged with gun possession. 458 F.3d at 314. The court in essence held:

. . . *Stevens* did not afford defendants more leeway in admitting propensity evidence in violation of the prohibition of Rule 404(b). Because the only purpose for which [the defendant] sought to introduce [the third party]’s prior conviction was to show that he has a propensity to carry firearms, the District Court correctly excluded the evidence.

Id. at 314.

Here, Respondent seeks to introduce evidence of Short’s propensity to sell drugs solely for the purpose of showing her propensity to do so, unrelated to the current charges the defendant herself is facing. R. at 11. Therefore, even under the Third Circuit’s standards based approach, such evidence ought not to be allowed.

II. THE COURT OF APPEALS ERRED IN ALLOWING RESPONDENT TO ADMIT THIRD PARTY PROPENSITY EVIDENCE TO DISTRIBUTE ILLEGAL DRUGS UNDER HER CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE AS PER *CHAMBERS V. MISSISSIPPI*.

A. **A defendant's constitutional right to present a complete defense under *Chambers* is not violated by the exclusion of evidence of a third party's propensities.**

In *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the Sixth Amendment's Compulsory Process Clause was incorporated against the state by the Due Process Clause of the Fourteenth Amendment. The Court explained that

[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms *the right to present a defense*, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, *he has the right to present his own witnesses to establish a defense.*

Id. at. 19 (emphases added). This sentiment was echoed in *Crane v. Kentucky*: “the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). It is unclear how far these affirmative rights extend, but the Court of Appeals’s dissent below correctly notes that this does not necessarily include third-party propensity evidence. R. at 48-49. While “the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense[.]” *Crane*, 476 U.S. at 690 (citation omitted) (internal quotation marks omitted), it is well established that the constitutional right to “a complete defense does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence.” *Lucas*, 357 F.3d at 606 (citation omitted). Thus, a defendant’s right to present a complete defense does not entail the right to introduce evidence of third party propensities if it violates an evidentiary rule, such as Rule 404(b).

The dissent below correctly notes that “there is nothing preventing the Respondent from arguing that she was not a participant in the ThunderSnow conspiracy, and that the shooting was accidental.” R. at 48. Even in light of *Washington*, *Chambers*, and *Crane*, courts are still permitted to employ well-established rules of evidence in order to exclude evidence that’s probative value is outweighed by other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *See Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006) (discussing the government’s broad power to craft rules of evidence). The probative value of the evidence that Short allegedly sold a different anabolic steroid – one that Respondent is not charged with having sold – is low, and could mislead the jury into thinking that the case turns on Short’s guilt instead of Respondent’s. Therefore, this Court should overturn the decision below allowing Respondent to introduce third party propensity evidence under *Chambers* as part of her right to present a complete defense. To exclude this evidence will not impact her constitutional right because third party evidence that is not closely connected to a defendant’s guilt or innocence, if excluded, does not violate her rights to due process or compulsory process. *See Perry v. Rushen*, 713 F.2d 1447, 1455 (9th Cir. 1983) (affirming the exclusion of third party propensity evidence offered by a defendant because it was not “critical and reliable”).

B. *Chambers* does not control this case.

Chambers does not control the outcome of this case because Respondent’s situation is far different from the defendant’s in that case. In *Chambers*, the declarant confessed – on three different occasions to three different witnesses – to committing the murder of a sheriff with which the defendant was charged. These witnesses were each willing to state in court that the declarant had confessed to them. *Chambers*, 410 U.S. at 298. The defendant could not call the declarant as a witness, however because of state evidence rules, *id.* at. 293, nor could he call the

three witnesses who all stated that the declarant had confessed to them because their statements were ruled hearsay, *id.* at 292. This Court ruled that the witness' statements should have been admitted, holding that, "in these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302. In explaining its holding, the Court further

conclude[d] that the exclusion of this critical evidence, coupled with the State's refusal to permit [the defendant] to cross-examine [the third party], denied him a trial in accord with traditional and fundamental standards of due process. . . . [W]e hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived [the defendant] of a fair trial.

Id. at 302-03.

The facts here are very different, such that *Chambers* is inapposite. First, Short has not confessed to anyone regarding any crime. Second, the record does not indicate that she was directly connected to the specific crimes charged to Respondent. Respondent seeks to introduce evidence of Short's supposed propensity to sell an anabolic steroid, different than the one she is accused of selling. R. at 11-12. In *Chambers*, it was erroneous to disallow the declarant's sworn confessions into evidence because "to the extent that [his] sworn confession tended to incriminate him, it tended also to exculpate [the defendant]." 410 U.S. at 297. Here, Respondent seeks to use propensity evidence in an attempt to cast doubt on a possible motive she had such that it should disregard the Federal Rules of Evidence's plain language disallowing such evidence to be admitted. R. at 48. Although this evidence is weaker than the exculpatory evidence in *Chambers*, that decision cannot be tortured to such an extent as to allow such evidence in this case, and it is therefore inapplicable to this case.

The *Chambers* Court intended to limit its holding to analogous cases, and this case is not factually similar. "In reaching this judgment," the Court held, "we establish no new principles of

constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their criminal trial rules and procedures.” *Chambers*, 410 U.S. at 302. This indicates the Court’s concern about extending it’s holding too far, which is effectively what the lower court has done.

The Court of Appeals in this case correctly cited *Chambers* for the proposition that evidentiary rules “may not be applied mechanistically to defeat the ends of justice.” *Id.* at 302, *cited in R.* at 38. However, its statement that, “[i]n finding the evidence sufficiently probative to outweigh the government’s policy-driven interests in excluding it, we hold that admitting . . . Morris’s testimony falls within [Respondent]’s constitutional right to offer a complete defense” incorrectly construes the government’s interpretation of *Chambers* of being motivated by policy considerations, such as promoting judicial expediency and reducing prejudice. *R.* at 37- 38. The only issue here is preventing the misapplication of *Chambers*’s holding. If *Washington* and *Chambers* “mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury.” *Rushen*, 713 F.2d at 1454 (quoting *Pettijohn v. Hall*, 599 F.2d 476, 481 (1st Cir. 1979)) (internal quotation marks omitted). The *Rushen* court was clear to note that cases like *Chambers* and *Pettijohn* stand for the proposition that critical evidence, such as third party confessions or witness misidentifications, should not be excluded from trial. *Id.* at 1455.

Respondent’s offer of propensity evidence does not rise to this level such that *Chambers* applies.

Because the parameters of *Chambers*’ holding are unclear, care should be taken in applying it under the guise of protecting a defendant’s right to present a complete defense. Blume *et al.*, 44 Am. Crim. L. Rev. at 1095.

Several legal commentators have attempted to delineate the holding of *Chambers*, and their perspectives are instructive. Professor Churchwell states:

The minimal evidentiary criteria which must be met before any declaration can be considered as rising to constitutional stature are these: (1) the declarant's testimony is otherwise unavailable; (2) the declaration is an admission of an unlawful act; (3) the declaration is inherently inconsistent with the guilt of the accused; and (4) there are such corroborating facts and circumstances surrounding the making of the declaration as to clearly indicate that it has a high probability of trustworthiness.

Id. at 1094 (quoting Steven G. Churchwell, *The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi*, 19 Crim. L. Bull. 131, 138 (1983)). Professor Nagared commented that *Chambers* established that “the accused in a criminal proceeding has a constitutional right to introduce *any* exculpatory evidence, unless the State can demonstrate that it is so inherently unreliable as to leave the trier of fact with no rational basis for evaluating its truth.” *Id.* (quoting Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 Mich. L. Rev. 1063, 1084 (1999)) (internal quotation marks omitted). Professor Westen added “that *Chambers* established a criminal defendant’s ‘constitutional right to introduce exculpatory evidence at trial if it possesses sufficient ‘assurances of reliability to be capable of rational evaluation by a properly instructed jury.’”” *Id.* (quoting Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 627 n.167 (1977)). Professor Clinton argued that “the defendant's evidence should be evaluated by a ‘totality of the circumstances’ approach in light of its importance in the defendant's overall case.” *Id.* (quoting Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 800 (1976)). All of these commentators state, in some fashion, that *Chambers* ought to be limited. “[T]he Court itself seemed confused about *Chambers*’s implications[,] [but] made a point to state that its holding was limited strictly to the facts of that case[.]” *Id.* at 1095

Thus, because the facts of this case are not analogous to *Chambers* and the evidence at issue does not involve a third party's confessions to the specific crime charged, excluding that evidence has no bearing on Respondent's right to present a complete defense. She offers none of the factual allegations that were present in *Chambers* and instead is merely pointing the finger at someone else to say that they sold drugs and, as a result, murdered the victim in this case. *See R.* at 11. Therefore, the decision below, which allowed the admission of third party propensity evidence, should be reversed because *inter alia Chambers* does not apply.

C. Even if *Chambers* does apply, third party propensity evidence only falls under the right to present a complete defense if it shows a direct connection between the third party's actions and the crime alleged; absent such a showing, the evidence is inadmissible.

Even if this Court decides that *Chambers* applies to this case, the specific type of evidence offered by Respondent should not be admissible because it is not the same type of *smoking gun* evidence offered by the defendant in *Chambers*. *See R.* at 11. Courts have interpreted the *Chambers* Court's holding to mean that some direct connection between the third party evidence and the crime charged to the defendant is necessary for the evidence to be admitted. Blume *et al.*, 44 Am. Crim. L. Rev. at 1080. Seventeen states "require a defendant to proffer evidence of some sort of 'direct link' or connection between a specific third party and the crime." *Id.*³

This direct connection test should be used to gauge whether third party evidence, if barred, would inhibit a defendant's right to put on a complete defense. "To be admissible, the third party evidence . . . must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime[.]" David McCord, "*But Perry Mason Made It Look So Easy!*": *The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else is*

³ These states are Alaska, Alabama, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Minnesota, Missouri, Nevada, North Carolina, South Carolina, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Id.* at 1080 n.77.

Guilty, 63 Tenn. L. Rev. 917, 935 (1996) (quoting *People v. Hall*, 718 P.2d 99, 103-05 (Cal. 1986)). Under the direct connection doctrine, “evidence offered by a defendant to show that another person committed the crime is only admissible if the evidence *directly connects* that person to the commission of the crime.” *Id.* at 919. There are

four issues of evidence law raised by the direct connection doctrine: (1) probative value versus countervailing considerations; (2) the general ban on character evidence; (3) the hearsay exception for statements against penal interest; and (4) the standards for determining preliminary questions of fact, together with possible constitutional problems presented by strict adherence to the dictates of the rules of evidence.

Id. at 920. Some direct connection states, such as Idaho, mandate that a defendant present a “train of facts or circumstances, as tend clearly to point out some one besides the accused as the guilty party.” *State v. Caviness*, 235 P. 890, 892 (Idaho 1925), *quoted in* Blume *et al.*, 44 Am. Crim. L. Rev. at 1081.

To the first consideration, the probative value of the evidence of Short’s sale of anabolic drugs is low, considering it does not even involve the same type of drugs Respondent is accused of selling. R. at 11-12. To the second consideration, there is generally a ban on character evidence under Federal Rule of Evidence 404(b) such that evidence of Short’s character, as an individual who has a propensity to sell drugs, ought not to be allowed without more facts. The third consideration is inapplicable because Ms. Short herself has not made a statement against her own penal interest. A statement qualifies under this prong if a person makes a statement that could subject them to prosecution. *See* Fed. R. Evid. 804. The fourth consideration, standard for determining preliminary questions of fact, is also inapplicable and asks whether the judge or jury has the power to decide what evidence should be considered by the jury. McCord, 63 Tenn. L. Rev. at 982-83.

Respondent's third party propensity evidence, without more, is weak and should not be allowed into evidence under the guise of presenting a complete defense. Something more, like the confession in *Chambers* or evidence of an opportunity to commit the crime, is necessary before such evidence may be admitted. Here, none of the direct connection prongs are satisfied such that excluding the evidence would violate Respondent's constitutional right to present a complete defense under *Chambers*. Therefore, even if the Court is unpersuaded that *Chambers* does not allow the admission of this type of third party propensity evidence where it is unrelated to the crimes with which the defendant is charged, it should still nevertheless be disallowed in this case because it fails the direct connection test followed by a number of jurisdictions. Therefore, with regard to the Court of Appeals's decision to allow the admission of reverse 404(b) evidence, this Court should reverse.

III. DUE TO INHERENT FLAWS WITH *WILLIAMSON*, THE COURT OF APPEALS INCORRECTLY HELD THAT LANE'S EMAIL IS NOT ADMISSIBLE UNDER THE STATEMENT AGAINST INTEREST EXCEPTION TO THE HEARSAY RULE.

A. **Courts cannot effectively apply *Williamson* because, in its effort to establish a bright-line rule, it also calls for courts to use increased discretion and evaluate statements in the context in which they were made.**

The declaration against interest exception to the hearsay rule first requires that the declarant be unavailable and their statement be one that,

a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability[.]

Fed. R. Evid. 804(b)(3)(A). It further requires that the statement be "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." Fed. R. Evid. 804(b)(3)(B). Thus, this

particular exception allows reliable hearsay statements to be admitted at trial, so long as such statements are: self-inculpatory; not self-serving, such as to curry favor with law enforcement or shift blame to the defendant; and, are trustworthy.

However, the exception does not address the situation of a prosecutor offering a declarant's statement that inculcates the accused. Courts have struggled with this question and reached different conclusions as to what protections should apply. *See, e.g., United States v. Williams*, 989 F.2d 1061, 1068 (9th Cir. 1993) (admitting a self-inculpatory statement made to a friend that also implicated the accused); *United States v. Alvarez*, 584 F.2d 694, 699 (5th Cir. 1978) (“[n]o express provision [of Fed. R. Evid. 804(b)(3)] safeguards declarations against a defendant . . .”). The rule is also silent on the admission of the declarant's collateral statements.

The result is the issue in this case, in which courts are left to decide how to treat collateral statements made in an informal setting. Because informal inculpatory statements to friends and loved ones usually contain collateral remarks that inculcate a defendant, courts have applied varying and contradictory standards. However, evidence experts have long held that, “[f]rom the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement.” Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 58 (1944).

In *Williamson*, this Court attempted to narrow the scope of Rule 804(b)(3) by establishing a bright-line rule. However, that decision undermined the rule by instructing that statements also be reviewed in the broader context in which they were made. In *Williamson*, the defendant argued that admitting his codefendant's confession, which inculcated the defendant as well, violated Rule 804(b)(3) and his rights under the Confrontation Clause. The Court held that an

accomplice's statement made to law enforcement was *not* admissible under Rule 804(b)(3) if the declarant directly identified the accused because such a statement was not sufficiently against the accomplice's interest. *Williamson* 512 U.S. at 599. The Court voiced concern that statements made to law enforcement are not trustworthy, as they may be made to "curry favor" with law enforcement or "shift blame." *Id.* It further opined that, "the 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.* The Court instructed that each statement made by a declarant must be scrutinized individually, and only those statements that are independently self-inculpatory may be admitted.

However, in response to Justices Kennedy's claim that the narrow interpretation of the rule would deprive Rule 804(b)(3) of any "meaningful effect," *id.* at 616 (Kennedy, J., concurring), Justice O'Connor, in writing for the majority, self-contradictorily asserts that "[e]ven [collateral] statements that are on their face neutral may actually be against the declarant's interest," *id.* at 603 (majority opinion), and thus may be admitted. For instance, the statement, "Sam and I went to Joe's house" is inherently neutral. *Id.* (internal quotation marks omitted). However, if Sam hid a murder weapon at Joe's house, then the same statement might be inculpatory, and therefore admissible. *Id.* Justice O'Connor put it thusly: "'Sam and I went to Joe's house' might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy." *Id.* But this example contradicts the Court's requirement that courts must analyze each individual statement. *See id.* at 600. Justice O'Connor further discredits the bright-line rule by stating "whether a statement is self-inculpatory . . . can only be determined by viewing it in context," *id.* at 603; "whether the statement was sufficiently against the declarant's

penal interest . . . can only be answered in light of all the surrounding circumstances,” *id.* at 604 (footnote omitted).

In the case at bar, the lower court was faced with the challenge of applying a contradictory rule to a situation that is not similar to the facts of *Williamson*, which lead to erroneous results. First the lower court applied the bright-line rule to statements that, unlike the codefendant’s confession to law enforcement in *Williamson*, were made in an informal setting to a loved one. Two, because the lower court ignored *Williamson*’s directive to review the statements within the context in which they were made, they held that each statement was not self-inculpatory on their own. Albeit challenging, had the lower court applied *Williamson* in its totality, codefendant Lane’s statements would have been reviewed in the overall context of the case and held admissible because it would help the jury determine that Lane and Zelasko are guilty of conspiracy to sell drugs to the United States Women’s Snowman Team.

Williamson’s contradictory nature has resulted in varying and discordant applications of Rule 804(b)(3) among the lower courts. Although the *Williamson* standard is easy to apply to similar fact patterns – *see, e.g., United States v. Mendoza*, 85 F.3d 1347 (8th Cir. 1996) (ruling methamphetamine dealer’s confession to authorities inadmissible because she may have been trying to curry favor with authorities to lessen her punishment); *United States v. Hazelett*, 32 F.3d 1313 (8th Cir. 1994) (ruling drug smuggler’s confession to a DEA agent inadmissible against her codefendant because she may be trying to shift blame or curry favor) – it is difficult to apply when the declarant’s collateral statement inculcates the accused and it is not obviously self-serving.

The Seventh Circuit is among those lower courts whose decisions evince difficulty applying *Williamson*. In 1995, the court first applied the narrow interpretation of *Williamson* and held that a declarant's statement that the police had planted a gun on the defendant inadmissible:

The hearsay exception does not provide that any statement which "possibly could" or "maybe might" lead to criminal liability is admissible; on the contrary, only those statements that "so far tend to subject" the declarant to criminal liability, such that "a reasonable person would not have made it unless it were true" are admissible.

United States v. Butler, 71 F.3d 243 (7th Cir. 1995) (quoting Fed. R. Evid. 804(b)(3)). Three years later, however, the court applied the broad interpretation of *Williamson* and held that a declarant's statement that his son collaborated with the Nazis was contrary to a father's interest when made at a Nazi collaboration trial, and that the statement was therefore admissible in a denaturalization proceeding against the son. See *United States v. Hajda*, 135 F.3d 439 (7th Cir. 1998). "These divergent interpretations of the Rule's breadth, decided in the same circuit within three years, demonstrate the unworkability of the penal interest exception jurisprudence." R. at 52.

Furthermore, the First and Second Circuits have disregarded the bright-line rule, and adopted the totality of the circumstances test, which employs the *Williamson* Court's instruction "that each particular assertion in a narrative should be interpreted within the context of the circumstances under which it was made to determine if that assertion is in fact sufficiently against interest." *Silverstein v. Chase*, 260 F.3d 142, 148 (2d Cir. 2001). For instance, the First Circuit admitted a codefendant's collateral hearsay statements made to his cousin and sister because "the force of the argument [that the statements were intended to shift blame from the declarant] is blunted by the fact that the statements were not made to law enforcement officials in a custodial setting . . . but to close relatives of the declarant." *United States v. Barone*, 114 F.3d

1284, 1296 (1st Cir. 1997). *See id.* at 1295 (quoting *Williamson*, 512 U.S. at 606 (Scalia, J., concurring) (“A statement against penal interest is not rendered inadmissible ‘merely because the declarant names another person or implicates a possible codefendant’”). Similarly, the Second Circuit has admitted statements that a codefendant made to his girlfriend inculcating the defendant in a gun running conspiracy because the statements equally inculpated both defendants and there was no reason for the declarant to falsely bring the defendant into the picture; as the court said, there were “particularized guarantees of trustworthiness surrounding the statements.” *United States v. Sasso*, 59 F.3d 341, 349 (2d Cir. 1995) (citation omitted) (internal quotation marks omitted).

Courts’ inconsistent application of *Williamson* is a direct result of its inherent flaws. When Courts’ fail to admit reliable self-inculpatory statements criminal defendants may be wrongly convicted or, equally injurious, mistakenly acquitted. It is because of *Williamson*’s intrinsic problems that the lower court, and many other courts, could not correctly perform an 804(b)(3) analysis. In this case, and failure to admit Lane’s email may result in a false acquittal of an alleged drug conspirator and murderer. In others past and future, failure to impart a rule that enables courts to adhere to the crux of 804(b)(3) may have catastrophic results.

B. This Court must jettison *Williamson* and craft a new rule that is faithful to the Federal Rules of Evidence and applies the necessary – but not excessive – level of protection.

Requiring the court to parse statements into *inculpatory*, *collaterally neutral*, and *blame-shifting* categories is impossible, and runs the risk of depriving parties of a fair trial. To ensure accurate application of Rule 804(b)(3), the Court should jettison *Williamson* and institute a new rule that incorporates *Crawford* and an instructional aspect of *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36. In *Crawford*, this Court decided that the

defendant's wife's statement to law enforcement was testimonial and thus inadmissible unless she was willing to testify at trial. 541 U.S. at 51. This court further distinguished testimonial statements from nontestimonial,⁴ stating, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* As a result, *Crawford* abrogated the courts ability to apply the *Roberts* "particularized guarantees of trustworthiness" test to testimonial statements. *Roberts*, 448 U.S. at 66.

Under *Crawford*, testimonial statements are only admissible if the declarant testifies; however, nontestimonial hearsay is admissible under Rule 804(b)(3) without any inquiry into the reliability of the statement, and admission of a nontestimonial statement is also constitutional. Therefore, "rulemaking is necessary to provide for evidentiary protections where the Constitution does not apply." Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 Colum. L. Rev. 2409, 2412 (2005). Although "the *Crawford* Court implies . . . that[,] [if the statement is nontestimonial,] there will be no constitutional regulation at all[,]" *id.* at 2417, statements should not be admitted without some scrutiny as to their reliability. To address the impacts to the declaration against interest exception post-*Crawford*, the Evidence Rules Committee proposed an amendment that includes the requirement of showing an additional reliability factor before a declaration against penal interest can be offered against an accused. *See id.* at 2438 (discussing the committee's proposal). The *Roberts* trustworthiness factor is well established in evidence jurisprudence, and would

⁴ Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (emphases added).

protect against the admission of unreliable statements. Using this requirement would further assure that an accused will not be convicted by an unavailable and unreliable source. Adopting the reliability test would also protect against the government's attempt to evade the admissibility requirements of the coconspirator exception, *see* Fed. R. Evid. 801(d)(2)(E), by offering a statement under Rule 804(b)(3). Because coconspirator statements require independent evidence that the defendant and the declarant are both members of the same conspiracy, in the absence of some test as to the evidence's reliability, the government could skirt the independent evidence requirement of Rule 801(d)(2)(E) by offering the statement under the declaration against interest exception. Thus, this standard not only ensures reliability, but also closes a loophole in Rule 804. Capra, 105 Colum. L. Rev at 2446.

Therefore, in light of *Crawford*, and given the inherent problems with *Williamson*, it is in the best interests of the Court to replace the fallible *Williamson* standard with a new tripartite test to ensure uniform and fair application of Rule 804(b)(3). The proposed standard would require courts to: first, apply the plain meaning of Rule 804(b)(3) to determine if the inculpatory statement adheres to the explicit requirements; second, determine whether the inculpatory statement is testimonial or nontestimonial; and, third, if the statement is testimonial, then rule it inadmissible unless the declarant testifies, but if nontestimonial, determine whether the statement is self-inculpatory by evaluating the circumstances in which the statement was made if it bears "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66. This approach is consistent with both the current version of 804(b)(3) and the Supreme Court's Confrontation Clause jurisprudence, and also avoids fairness problems that have existed since the rule's inception. In the event that this Court rules that *Crawford* overruled *Roberts* in its entirety, and is therefore inapplicable to nontestimonial hearsay, the Court should still adopt the proposed rule

requiring the government to provide corroborating evidence under a similar standard of “trustworthiness” to indicate the declaration against interest statement is true.

Transitioning to the new rule would be smooth, as most courts have rejected the option to exempt nontestimonial statements from Confrontation Clause scrutiny and are already applying a version of the proposed rule. *See, e.g., United States v. Savoca*, 335 F. Supp. 2d 385 (S.D.N.Y. 2004) (where the accomplice’s statement implicated the defendant and was made in informal, noncustodial circumstances to a friend, ruling the statement admissible as a declaration against interest under *Williamson*); *accord United States v. Smalls*, 605 F.3d 765 (10th Cir. 2010); *Alvarez*, 584 F.2d at 700-01; *United States v. Manfre*, 368 F.3d 832, 840-42 (8th Cir. 2004).

IV. ADMITTING LANE’S EMAIL DOES NOT VIOLATE THE CONFRONTATION CLAUSE BECAUSE *CRAWFORD* DISTINGUISHED BETWEEN TESTIMONIAL AND NON-TESTIMONIAL STATEMENTS AND CABINED *BRUTON* TO SOLELY TESTIMONIAL STATEMENTS.

A. **The Court of Appeals erred in applying *Bruton* to a nontestimonial statement by a nontestifying codefendant, as *Crawford* and its progeny make clear that the Confrontation Clause only applies to testimonial statements.**

“In all criminal prosecutions, the accused . . . enjoy[s] the right . . . to be confronted with the witnesses against him[.]” U.S. Const. amend. VI. However, “the Confrontation Clause . . . is ‘solely concerned with testimonial hearsay,’ meaning that the only admissibility question . . . is whether the statement satisfies the Federal (or State) Rules of Evidence.” *United States v. Arnold*, 486 F.3d 177, 192 (6th Cir. 2007) (quoting *Davis*, 547 U.S. at 823). The out-of-court statements at issue in *Bruton* and *Crawford* were testimonial, and thus inadmissible, because they violated the criminal defendant’s rights under the Confrontation Clause. In *Bruton*, the Court held that admitting a nontestifying codefendant’s confession to law enforcement that would implicate a criminal defendant at a joint trial, even with limiting instructions to the jury, violates the defendant’s rights under the Confrontation Clause. In *Crawford*, this Court held that

“[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” 541 U.S. at 51.

Both *Bruton* and *Crawford* were concerned about prejudicing a defendant with unreliable confessions made to law enforcement. Just as Bruton’s codefendant confessed to a postal inspector who was investigating the charged robbery, *Bruton*, 391 U.S. at 124-25, Crawford’s wife confessed to police officers during a police interrogation, *Crawford*, 541 U.S. at 38-40. Therefore, when *Crawford* formed the rule against admitting nontestifying codefendant statements at joint trials, the Court was concerned about the prejudicial effects that admitting statements to law enforcement could have on criminal defendants without providing an ability to cross-examine the declarant. Especially because the circumstances by which the statements were given “would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” *id.* at 52 (citation omitted) (internal quotation marks omitted), and thus may mix truth with false statements to “shift blame or curry favor,” *Williamson*, 512 U.S. at 595, with authorities.

While lower courts have erroneously applied *Bruton* and *Crawford* to nontestimonial statements – *see, e.g., United States v. Ruff*, 717 F.2d 855, 857-58 (3d Cir. 1983) (finding a *Bruton* violation based upon the admission of a non-testifying codefendant's incriminatory statements to several family members) – that decision explicitly created a dichotomy between testimonial and nontestimonial statements and held that the Confrontation Clause only applies to the former. “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Crawford*, 541 U.S. at 68-69. This Court indicated that testimonial statements take the form of in-court testimony, statements contained in formalized testimonial materials such as affidavits,

depositions, prior testimony, or confessions and, “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[.]” *Id.* at 52 (citation omitted) (internal quotation marks omitted). *See generally id.* at 51-52 (discussing various formulations of what constitutes a *testimonial* statement).

A majority of the Courts of Appeal have also held that *Crawford* confined the applicability of the Confrontation Clause, and therefore *Bruton*, to nontestimonial statements. *See United States v. Dale*, 614 F.3d 942, 956 (8th Cir. 2010) (ruling defendant's statements to fellow inmate were nontestimonial and their admission into evidence did not violate the Confrontation Clause), *cited in United States v. Williams*, No. 1:09cr414 (JCC), 2010 WL 3909480, at *2 (E.D. Va. Sept. 23, 2010); *Smalls*, 605 F.3d at 768 n.2 (10th Cir. 2010) (“the *Bruton* rule, like the Confrontation Clause on which it is premised, does not apply to nontestimonial hearsay statements”), *cited in Williams*, 2010 WL 3909480, at *2; *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir. 2009) (“the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements”), *cited in Williams*, 2010 WL 3909480, at *2; *accord United States v. Pike*, 292 F. App'x 108, 112 (2d Cir. 2008) (“because the statement was not testimonial, its admission does not violate either *Crawford* or *Bruton*”), *cited in Williams*, 2010 WL 3909480, at *2. Based on the majority of the lower courts’ application of *Crawford*, Lane’s statement ought to be admitted because, having allegedly been made by her to her boyfriend, they are nontestimonial. *See United States v. Castro–Davis*, 612 F.3d 53, 65 (1st Cir. 2010) (finding defendant's recorded telephone statements to his mother non-testimonial).

On the other hand, those cases in which courts have ruled oppositely are plainly distinguishable. For instance, in *United States v. Jones*, 381 F. App'x 148, 151 (3d Cir. 2010),

the Third Circuit interpreted *Bruton* broadly, “applying it not only to custodial but also informal statements,” such as those made, in that case, by the defendant’s wife. However, *Jones* was ultimately decided under the coconspirator exception provided in Rule 801(d)(2)(E), and therefore has no bearing on this case.⁵ The Eastern District of Virginia also held that *Bruton* applies to both testimonial and nontestimonial statements, but based its decision on the Fourth Circuit’s rationale in *United States v. Truslow*, 530 F.2d 257, 263 (4th Cir. 1975), which applied *Bruton* to any out-of-court statement. See *Williams*, 2010 WL 3909480, at *1, *4. But *Truslow* has not been adopted by this Court, or any other district court, and thus is not persuasive. Furthermore, the Washington Court of Appeals, referring to the First Circuit in *Figueroa-Cartagena*, declined to extend *Williams*’ erroneous decision, stating, “It is thus necessary to view *Bruton* through the lens of *Crawford* and *Davis*.... The threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause “has no application.” *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010) (quoting *Whorton v. Bockting*, 549 U.S. 406, 420 (2007)).

B. Under this Court’s holding in *Crawford*, an informal email sent from Lane to her boyfriend is factually dissimilar to testimonial statements made to law enforcement personnel, and thus does not violate the Confrontation Clause under *Bruton*.

“Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made.” *Crawford*, 541 U.S. at 1377. In this case, Lane’s personal email to her boyfriend is inherently reliable. It was not sent in anticipation of being used as evidence at trial, but rather in an informal setting to a loved one. Unlike a confession made to law enforcement, Lane’s email is a cry for help to her boyfriend. In an effort to come clean, she

⁵ The issue of whether the email is admissible as a coconspirator statement under Fed. R. Evid. 801(d)(2)(E) was waived by both parties in the Court of Appeal, and therefore is not preserved for review by this Court. R. at 38 n.c.

admits to her boyfriend that she has been selling drugs with Respondent, stating, “I know you’ve suspected before about the business my partner and I have been running with the female team.” R. at 29. She is reaching out because “[o]ne of the members of the male team found out and threatened to report us if we don’t come clean[,]” and her partner “really thinks we need to figure out how to keep him quiet.” *Id.* When read in the context of a conspiracy, it is clear that Lane’s statements were not made for any reason other than to request her boyfriend’s help.

Respondent’s Sixth Amendment rights are not violated by admitting Lane’s email because the email is not testimonial. “Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination.” *Crawford*, 541 U.S. at 68. Therefore, if Lane had provided testimonial evidence to law enforcement, then her testimony would be inadmissible unless Respondent had a prior opportunity to cross-examine Lane. In this case, however, the evidence that the government seeks to admit is nontestimonial. The proper inquiry is “whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime.” *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004). To our knowledge, no court has extended protection to nontestimonial statements made by a declarant to friends or trusted associates. *See United States v. Jordan*, 509 F.3d 191, 201 (4th Cir. 2007) (alteration in original) (quoting *Manfre*, 368 F.3d at 838 n.1) (“[Declarant]’s comments were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks”); *United States v. Franklin*, 415 F.3d 537, 545 (6th Cir. 2005) (concluding statements were non-testimonial because witness “was privy to [declarant]’s statements only as his friend and confidant”); *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004) (“Thus, we conclude that a declarant’s statements to a confidential

informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*").

As this Court has stated, an “accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford*, 541 U.S. at 51. Unlike testimonial statements that may be false because the declarant was trying to curry favor with law enforcement or shift blame, Lane did not believe that her personal email would later be used at trial. When she sent that email to her boyfriend, “[s]he . . . was not acting as a witness; she was not testifying.” *Davis*, 547 U.S. at 828 (emphases omitted). Based on the record, none of the circumstances presented in this case justify the lower court’s decision. Lane’s email is admissible as a nontestimonial statement under *Crawford*, which this Court holds, and most Courts of Appeal hold, limits *Bruton* to testimonial statements. Any reliability concerns are quelled by the circumstances in which the email was written.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Fourteenth Circuit should be reversed.

Respectfully Submitted,

/s/

TEAM 25-P

February 12, 2014

APPENDIX

The Fifth Amendment to the United States Constitution provides, in pertinent part, “No person shall . . . be deprived of life, liberty, or property, without due process of law[.]”

The Sixth Amendment to the United States Constitution provides, in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]”

Rule 404(b) of the Federal Rules of Evidence provides:

(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.

Rule 804(b)(3) of the Federal Rules of Evidence defines the *Statement Against Interest* exception to the hearsay rule as follows:

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.