No. 12-13

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

PETITIONER,

--against--

ANASTASIA ZELASKO,

RESPONDENT.

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

I. Whether, as a matter of law, Federal Rule of Evidence 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged?

II. Whether, under *Chambers v. Mississippi*, Defendant Anastasia Zelasko's constitutional right to present a complete defense would be violated by exclusion of evidence of a third party's propensity to distribute illegal drugs?

III. Whether *Williamson v. United States* should be overruled insofar as it provides a standard for the application of Federal Rule of Evidence 804(b)(3), governing declarations against penal interest, and if so, what standard should replace it?

IV. Whether, at a joint trial, the statement of a non-testifying co-defendant implicating the defendant is barred as violative of the Confrontation Clause under *Bruton v. United States*, even though the statement was made to a friend and thus would qualify as a non-testimonial statement within the meaning of the Court's subsequent decision in *Crawford v. Washington*?

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STATEMENT OF THE CASE

Defendants Anastasia Zelasko ("Defendant Zelasko") and Jessica Lane ("Defendant Lane") were members of the United States female Snowman team. R. at 1. Defendant Zelasko joined the team in 2010. *Id*. Defendant Lane joined the team in 2011. *Id*. Peter Billings ("Billings") was the coach of the women's Snowman team, as well as Defendant Lane's boyfriend. *Id*. Miranda Morris ("Morris") was a former member of the Canadian Snowman team, retiring in 2011. R. at 24. Casey Short ("Short") was a member of the Canadian Snowman team prior to transferring to the U.S. Snowman team in 2011. *Id*. Hunter Riley ("Riley") was a member of the United States men's Snowman team, as well as an informant for the Drug Enforcement Agency ("DEA"). R. at 1.

On October 1, 2011, Riley approached Defendant Lane and sought to buy the steroid, ThunderSnow. R. at 2. Defendant Lane declined. *Id*. Riley approached Defendant Lane again on November 3, 2011 and again on December 9, 2011. R. at 2-3. On each occasion, Defendant Lane declined his request. *Id*. On December 10, 2011, Billings observed Defendant Lane shout to Defendant Zelasko, "stop bragging to everyone about all the money you're making!" R. at 3. Billings then confronted Defendant Lane voicing both his suspicion and concern that she was distributing steroids to the other members of the female Snowman team. *Id*. Defendant Lane denied any involvement with steroids. *Id*. However, on January 16, 2011, Defendant Lane sent Billings a private email stating:

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

On January 28, 2012, several members of the U.S. Snowman team observed Defendant Zelasko and Hunter Riley engage in a heated verbal altercation. *Id*. On February 3, 2012, Defendant Zelasko shot and killed Riley at the Snowman Team training grounds. *Id*. Defendant Zelasko was placed under arrest soon thereafter. *Id*.

On Feberuary 3, 2012, the DEA executed a search warrant on Defendant Zelasko's residence. *Id*. The search uncovered approximately 5,000 dollars in cash as and two 50-milligram doses of the steroid, ThunderSnow. *Id*. On February 5, 2012, the DEA executed a search warrant on the U.S. Snowman team's training grounds. *Id*. The DEA seized 12,500 milligrams of the steroid ThunderSnow in the team's storage room. *Id*. The estimated street value of the ThunderSnow is approximately 50,000 dollars. *Id*. On that same day, the DEA executed a search warrant on Defendant Lane's residence. R. at 4. The search resulted in the seizure of approximately 10,000 dollars in cash and twenty 50-milligram doses of ThunderSnow. *Id*. Defendant lane was immediately arrested following the search. *Id*. The DEA also executed a search warrant on Short's residence, uncovering no evidence. R. at 8.

Subsequent to the Defendant Zelasko's arrest, Morris testified regarding Short's prior involvement with steroids. R. 24-25. Morris testified that Short was her teammate on the Canadian Snowman team. R. at 24. She further testified that she had observed Short occasionally meeting or leaving practice with members of the Canadian Snowman team. *Id*. Morris alleged that on March 27, 2011, that Short approached her after practice and attempted to sell her steroids. R. at 25. Morris further alleged that Short told her that she sold steroids to other members of the Canadian Snowman team. *Id*. Morris claimed that on April 4, 2011, she purchased twenty doses of the steroid from Short for 4000 Canadian Dollars. *Id*. The steroid Morris allegedly purchased from Short was called White Lightning. *Id*. Morris claimed that the

reason behind her sudden confession and testimony was her regret. She stated that she hoped that it may help atone for her mistakes by bringing the steroid problem to light. *Id*.

PROCEDURAL HISTORY

On April 10, 2012, Defendants Lane and Zelasko were indicted and charged with conspiracy to distribute and possess with intent to distribute anabolic steroids; distribution of and possession with intent to distribute anabolic steroids; simple possession of anabolic steroids; conspiracy to murder in the first degree; and murder in the first degree. R. at 4-5. Before trial, the Government moved to have the Affidavit of Miranda Morris barred by Federal Rule of Evidence 404(b), in response to Defendant Zelasko's motion to introduce the Affidavit to show a third party's propensity to sell steroids as exculpatory evidence. R. at 12. The Government also moved to introduce Defendant Lane's email to Peter Billings pursuant to Rule 804(b)(3) as a statement against penal interest admissible against both Defendants Lane and Zelasko. R. at 15-16. Defendant Zelasko moved to have the email barred under Rule 802 as inadmissible hearsay due this Court's ruling in *Williamson v. United States*. R. at 16.

On July 18, 2012, the United States District Court Southern District of Boerum held: (1) the testimony of Miranda Morris was not barred by Rule 404(b) and was thus admissible; (2) Miranda Morris' testimony was admissible as Defendant Zelasko's constitutional right to present a complete defense; (3) when considered independently, each statement within Defendant Lane's email does not admit any wrongdoing or expose Defendant Lane to criminal liability and thus inadmissible as a statement against interest ; and (4) the Confrontation Clause, as interpreted under *Bruton*, bars the admission of Defendant Lane's email from being used against Defendant Zelasko at trial. R. at 21-23. On October 1, 2013, the Government's petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit was granted. On February 14, 2013, the United States Court of Appeals for the Fourteenth Circuit upheld all four

holdings of the District Court. R. at 31. The United States subsequently filed a petition for writ of certiorari, and on December 3, 2012, the United States Supreme Court granted certiorari for its October 2013 term. R. at 55.

SUMMARY OF THE ARGUMENT

In the present case, the lower courts incorrectly ruled that: (1) Federal Rule of Evidence 404(b) did not apply to Defendant Zelasko's use of the Affidavit of Miranda Morris to show the criminal propensity of a third party; (2) Defendant Zelasko's right to present a full defense permits the use of such propensity evidence; (3) *Williamson*, as binding precedent, prohibits the admission of statements collateral to declarations against penal interest; and (4) the *Bruton* doctrine is applicable to both testimonial and nontestimonial evidence. First, the plain language of Rule 404(b) prohibits the admittance of propensity evidence in regards to regards to any person. Furthermore, the policy reasons behind Rule 404 present considerations that discourage the use of "reverse 404(b)" evidence by criminal defendants. Moreover, the third party actions alleged within the Affidavit are not distinctive enough to meet the Modus Operandi or Identity Theory exception to Rule 404(b). Therefore, this Court should hold that the Affidavit is inadmissible as propensity evidence under Rule 404(b).

Second, excluding the Affidavit of Miranda Morris from being proffered as evidence would not violate Defendant Zelasko's constitutional right to present a complete defense. The Affidavit is comprised of unsupported allegations that Short previously sold steroids while on the Canadian Snowman team. Furthermore, the Affidavit is not a strong enough piece of evidence that its exclusion would permit Defendant Zelasko to raise a constitutional right to present it. Lastly, to allow the Affidavit to be admitted on constitutional grounds would require a broad reading of *Chambers v. Mississippi*. Therefore, Defendant Zelasko's right to a complete defense would not be violated by the exclusion of the Affidavit from evidence.

Third, *Williamson v. United States*, 512 U.S. 594 (1994) should be overruled insofar as it provides an incorrect standard for the application of the statement against interest hearsay exception. This Court should alternatively adopt the common law extended declaration standard Under the common law extend declaration standard, the entire email is admissible as a statement against interest. Alternatively, if this Court were to determine the Williamson single declaration standard were correct, then the email would still be admissible at trial.

Fourth, this Court in *Crawford* ruled that non-testimonial statements made by a non-testifying co-defendant when made at trial do not violate the confrontation clause insofar as the *Bruton* doctrine solely applies to testimonial statements. This Court should rule this way because this Court's ruling in *Crawford* limited the *Bruton* doctrine to only testimonial statements. Therefore, under *Crawford*, the admittance of Defendant Lane's email does not violate Defendant Zelasko's right to confrontation. Alternatively, if this Court should determine that Bruton applies to non-testimonial statements, the admittance of Defendant Lane's email does not violate Defendant Zelasko's right to confrontation.

ARGUMENT

I. Federal Rule of Evidence 404(b) prohibits evidence of a third party's propensity to commit the offense for which Defendant Zelasko is charged.

Federal Rule of Evidence 404(b) bars the Defense from admitting into evidence the Affidavit of Miranda Morris, which offers alleged propensity evidence against Short, in order to exculpate Defendant Zelasko. Rule 404(b) provides in pertinent part that "(1) [e]vidence of a crime, wrong, or other act is *not admissible* to prove a *person's* character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b). (Emphasis added). First, the plain language of Rule 404(b) prohibits the admittance of propensity evidence in regards to not only criminal defendants, but in regards to any person.

Second, the policy reasons behind Rule 404 present considerations that disparage the use of "reverse 404(b)" evidence. Third, the third party actions discussed within the Affidavit are not distinctive enough to meet the modus operandi exception. Accordingly, the Defense's Affidavit of Miranda Morris is inadmissible as propensity evidence under Rule 404(b). Therefore, this Court should reverse the Court of Appeals decision to allow the Affidavit to be offered as evidence.

A. The Plain Language of Federal Rule 404 prohibits propensity evidence of any person from being admitted into evidence.

The plain language of Rule 404(b) is clear and unambiguous that evidence of prior bad acts, wrongs, or crimes is inadmissible to prove the propensity of not only criminal defendants, but of any person to act in accordance with that prior act. Within statutory interpretation, it is an accepted rule that "unless otherwise defined in the statue or understood to have a technical or peculiar meaning in the law, every word or phrase of a statute will be given its plain and ordinary meaning." *Van Reken v. Darden, Neef & Heitsch*, 674 N.W. 2d 731, 733 (Mich. Ct. App. 2008). Courts will look to dictionaries in order to obtain a word's ordinary meaning. *Patrie v. Area Coop. Educ. Serv.*, 37 Conn. L. Rptr. 470 (Conn. Super. Ct. 2004).

Congress clearly chose to use the word "person" instead of "defendant" in order to convey its intent to prohibit the use of all propensity evidence during criminal proceedings. The word "person" is only used once within Rule 404(b) and it neither has a technical nor peculiar meaning in the law. As defined in the dictionary, a person is "(1) an individual human being [.]" The Oxford American Dictionary of Current English, 586 (1999). Moreover, a person is understood within the context of law to mean "a human being.—Also termed natural person." Black's Law Dictionary (9th ed. 2009). Although the word "person" has a legal definition, this definition does not vary from the plain meaning given within a common English language dictionary.

Furthermore, the use of the word "defendant" instead of "person" within the text of Rule 404(b)(2) demonstrates that Congress purposely used the word "person" in Rule 404(b)(1). If Congress wanted Rule 404(b) to only prohibit propensity evidence of criminal defendants, then it could have easily inserted the word "defendant" instead of "person." However, this was not the case. Additionally, if Congress wanted to change the language of the Rule to only prohibit propensity evidence of criminal defendants, then it could amend the Rule. Nonetheless, Congress has not taken any initiative to change the language. Therefore, it logically follows that the use of the word "person" within Rule 404(b)(1) indicates that the Rule bans not only evidence of prior crimes, wrongs, or other acts of defendants, but also innocent third parties.

In the case at bar, the Court of Appeals for the Fourteenth District acknowledged that the plain language of Rule 404(b) bans the proffering of propensity evidence; however, the Court ignored the clear and obvious intent of the drafters. R. at 34. Instead, the Court chose to allow Defendant Zelasko to proffer the Affidavit of Miranda Morris as evidence by using the common law and the policy at common law behind Rule 404(b). R. at 35. The information contained within the Affidavit alleges that Short—the third party in the case at bar—sold a type of performance-enhancing drug known as White Lightning to her Canadian teammates, including Miranda Morris, between February and April of 2011. R. at 24-25. Defendant Zelasko plans to use the Affidavit as propensity evidence against Short. Defendant Zelasko's only purpose in proffering the Affidavit is to claim that since Short allegedly sold performance-enhancing drugs while on the Canadian Snowman team, then it must be inferred that she is Defendant Lane's co-conspirator in the case at bar. This type of conformity evidence is directly barred by the plain language of Rule 404(b)(1). Therefore, this Court should hold that the plain language of Rule 404(b) prohibits all propensity being admitted into evidence. Accordingly, this Court should

find that Rule 404(b) prohibits the Affidavit of Miranda Morris from being admitted as "reverse 404(b)" evidence.

B. The Policy Reasons behind Federal Rule of Evidence 404 present considerations which disapprove of the use of "reverse 404(b)" evidence in criminal proceedings.

This Court should find that the policy concerns behind Rule 404(b) outweigh the common law basis for the rule which the Court of Appeals relied upon to hold that the rule was not applicable to the case at bar. The common law basis for Rule 404(b) is concerned with protecting criminal defendants from the use of propensity evidence by prosecution to prove conformity. Jessica Broderick, *Reverse 404(B) Evidence: Exploring Standards When Defendants Want To Introduce Other Bad Acts Of Third Parties*, 79 U. Colo. L. Rev. 587, 610-611(2008). Although the common law basis of the Rule is concerned with the protection of criminal defendants, the plain language of the Rule indicates that Congress was concerned with the possible negative effects caused by the proffering of propensity evidence by either the prosecution or the defense. For the reasons listed below, this Court should find that the policy reasons behind Rule 404(b) exhibit considerations which disparage the use of "reverse 404(b)" evidence.

i. It is easy to find circumstances which suggest that someone other than the accused committed the crime.

First, it is fairly effortless for the defense to discover circumstances which would suggest that some party other than the accused committed the crime. 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:37(4th ed. 2013). Defendant Zelasko contends that she was not involved in the conspiracy to distribute steroids to members of the United States Snowman team. R. at 11. Furthermore, it is undisputed that there were only two participants within the conspiracy. *Id*. There are two circumstances which Defendant Zelasko discovered and is

looking to utilize to suggest that Short is Defendant Lane's co-conspirator. First, is the Affidavit of Miranda Morris, which merely makes uncorroborated allegations that Short sold performance-enhancing drugs to her teammates during her time on the Canadian Snowman team. R. at 25. Second, is the email Defendant Lane sent to her lover and coach, Peter Billings. In the email Defendant Lane never states the name of her co-conspirator, but refers to her as "my business partner." R. at 3. However, the majority of the evidence implicates Defendant Zelasko as Defendant Lane's co-conspirator. Namely, on February 3, 2012, Defendant Zelasko shot and killed Hunter Riley on the Snowman Team's training grounds. *Id*. Also, a subsequent lawfully executed search of Defendant Zelasko's residence resulted in the seizure of $5,000 in cash and two 50-milligram doses of ThunderSnow. R. at 3. Additionally, a lawfully executed search Short's residence by the DEA turned up zero evidence. R. at 8.

ii. The admittance of "reverse 404(b)" evidence creates an additional burden on the Government to prove the innocence of a third party who is not on trial.

Second, the admittance of "reverse 404(b)" evidence turns the Government's job into proving the innocence of a third party beyond a reasonable doubt, instead of performing its primary task of proving a defendant's guilt beyond a reasonable doubt. 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:37 (4th ed. 2013). If Defendant Zelasko is permitted to proffer the Affidavit of, then the Government will be overburdened with having to prove the innocence of the Short. This additional burden will cause the Government to detract from its primary focus of proving that, according to the evidence, Defendant Zelasko is guilty of all charges beyond a reasonable doubt.

iii. "Reverse 404(b)" evidence will prolong the trial and confuse the jury in regards to what the true issue is at trial.

Third, "reverse 404(b)" evidence has a tendency to needlessly prolong trials and confuse the jury about the issue at trial. 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:37(4th ed. 2013). If Defendant Zelasko is permitted to proffer the Affidavit of Miranda Morris under Rule 404(b), then it is likely that the trial will take longer than necessary. It would be a roadblock to the court's goal of judicial expediency because, as argued above, the Government will have the additional burden of proving Short's innocence, as well as, having to prove the Defendant Zelasko's guilt. Moreover, the proffering of the Affidavit will likely confuse the jury in regards to what the true issue is at trial. This is likely to happen because the Government will have to veer away from its main strategy by having to prove Short's innocence. Short is not the individual on trial, nor is she charged with any crime. The issue of the Defendant Zelasko's guilt will be lost within the issue of Short's innocence, causing the jury to become confused about the true issue at trial.

iv. "Reverse 404(b)" evidence can be overvalued by the jury and lead to a hasty acquittal of a guilty defendant.

Fourth, if "reverse 404(b)" evidence is admitted, it is likely that the jury may overvalue the evidence which would consequently lead them to quickly acquit a guilty defendant. 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:37(4th ed. 2013). Allowing for Defendant Zelasko to proffer the Affidavit will likely cause the jurors to put an enormous amount of value into Short's alleged history of selling performance-enhancing drugs. The Affidavit is essentially being proffered to prove conformity. Even if Defendant Zelasko does not intend to use the Affidavit to prove conformity, the jury is likely to understand or use the Affidavit as conformity evidence during its deliberation. The jury will be easily influenced by the allegations contained within the Affidavit and are likely to infer that because Short allegedly sold steroids before, then she is likely to be the co-conspirator in the case at bar. The

value which the jury places into this "reverse 404(b)" evidence will likely lead it to cut deliberation short and quickly acquit Defendant Zelasko. The Affidavit is exactly the type of evidence that Rule 404(b) was created to prohibit from being proffered at trial.

v. "Reverse 404(b)" evidence allows the Defense to attack the character of innocent third parties.

Fifth, permitting "reverse 404(b)" evidence to be admitted would open the proverbial door for defense attorneys to initiate and participate in needless attacks on innocent third parties, which could lead to irreversible damage to their public reputations. 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:37(4th ed. 2013). Here, the record is devoid as to whether Short was actually charged with or found guilty of distributing performance-enhancing drugs while on the Canadian Snowman team. The Affidavit which Defendant Zelasko wishes to proffer as evidence is only filled with unsupported allegations. R. at 25. Miranda Morris merely alleges that Short sold her White Lightning, told her how to administer the steroid, and gave her a brief explanation of the possible side effects. *Id*. These allegations have not been verified or corroborated by any other evidence. To allow Defendant Zelasko to proffer these unsupported allegations as part of her defense will adversely affect the public's perception of Short. The Defense attorney will essentially be able to drag Short's name through the mud in order to exculpate Defendant Zelasko.

Although the common law basis of the Rule is concerned with the protection of criminal defendants, the plain language of the Rule indicates that Congress was also concerned with the possible negative effects caused by the proffering of propensity evidence by defense attorneys. Accordingly, this Court should find that the policy reasons behind Rule 404(b) exhibit considerations which disapprove of the use of "reverse 404(b)" evidence. Therefore, this Court should hold that Rule 404(b) prohibits the Affidavit from being admitted.

C. The third party act contained within Affidavit of Miranda Morris is not distinctive enough to meet the modus operandi exception.

The allegation that Short sold an ester of ThunderSnow, known as White Lightning, to her Canadian Snowman teammates is not a distinctive enough characteristic to meet the modus operandi exception to Rule 404(b). The "identity" exception to Rule 404(b) "requires that the characteristics of the other crime or act be 'sufficiently distinctive to warrant an inference that the person who committed the act also committed the offense at issue.'" *United States v. Perkins*, 937 F.2d 1397, 1400 (9th Cir. 1991)(quoting *United States v. Andrini*, 685 F.2d 1094, 1097(9th Cir. 1982). Moreover, "[i]f the characteristics of both the prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise." *Id*. (quoting *United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978).

For example, in *United States v. Seals*, 419 F.3d 600, 602 (7th Cir. 2005), the defendants were convicted of aggravated bank robbery. During the robbery, the defendants disguised themselves by wearing army fatigues and masks. *Id*. The defendants moved to have evidence of another robbery 31 miles away involving disguised robbers in order to show modus operandi between the two bank robberies; however, the evidence was excluded from trial. *Id*. at 603. The court held that the evidence was properly excluded as irrelevant under Rule 402. *Id*. at 607. It found the similarities between the two robberies to be generic. *Id*. The court reasoned that many robbers use disguises, carry firearms, and use stolen vehicles for their getaway. *Id*. Furthermore, it found the underlying facts of the two robberies to be dissimilar because the number of robbers, their disguises, and the type of firearms used were different in each robbery. *Id*. Moreover, the court found the robbers' modus operandi to be different because in one robbery the robbers

waited on the customer side of the teller counter while in the other the robbers jumped over the teller counter to receive the money. *Id*.

Like the two bank robberies in *Seals*, the modus operandi between Defendant Zelasko's drug operation and Short's alleged prior drug dealing is different. Defendant Zelasko sold a steroid to her teammates called ThunderSnow. R. at 4. The drug that Short allegedly sold was called White Lightning, a chemical ester of ThunderSnow. R. at 25. Moreover, Defendant Zelasko had a co-conspirator, or a partner, in her drug operation; whereas, Short allegedly ran a solo operation. R. at 3, 25. Although the Defendants' operation and Short's alleged operation both centered on female Snowman teams and distributed steroids, the similarities between the two enterprises are generic. Steroids are used primarily by athletes to get a competitive edge on their competition. So it only makes sense that someone selling steroids will have athletes as their clientele. Accordingly, this Court should find that the allegations contained within the Affidavit of Miranda Morris are not distinctive enough characteristics to meet the modus operandi exception to Rule 404(b). Therefore, this Court should reverse the Court of Appeals decision to allow the Affidavit to be offered as evidence.

II. Defendant Zelasko's constitutional right to present a complete defense would not be violated by excluding evidence of Casey Short's alleged propensity to distribute performance-enhancing drugs.

Excluding the Affidavit of Miranda Morris from being proffered as evidence would not violate the Defendant Zelasko's constitutional right to present a complete defense. A defendant's right to due process in a criminal trial "is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The right to due process includes the defendant's right to a trial, to be represented by counsel, to cross-examine witnesses, to offer testimony, and the right to call witnesses on their behalf. *Id*.

See also *In re Oliver*, 333 U.S. 257, 273 (1948). First, the constitutional right to a complete defense is not violated if evidence is found inadmissible under the Federal Rules of Evidence. Second, the Affidavit is not strong enough evidence to raise a constitutional right if barred under the Federal Rules of Evidence. Third, allowing the Affidavit to be admitted on constitutional grounds would require a broad reading of *Chambers*. Therefore, this Court should reverse the Court of Appeals decision to allow the Affidavit to be admitted into evidence.

A. The right to a complete defense does not give Defendant Zelasko the right to introduce evidence which has been excluded under the Federal Rules of Evidence.

If the Affidavit of Miranda Morris is held to be excluded under Rule 404(b), then Defendant Zelasko's constitutional right to present a complete defense will not be violated. A defendant must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This Court has made it clear that "the right to present a complete defense is not 'an unlimited right to ride roughshod over reasonable evidentiary restrictions.'" *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003)(citing *Taylor v. Illinois*, 484 U.S. 400 (1988)). A defendant "does not have an unfettered right to offer testimony that is incompetent, privilege, or otherwise inadmissible under standard rules of evidence." *Taylor*, 484 U.S. 400, 410 (1988). For the reasons listed below, this Court should find that Defendant Zelasko cannot use the right to a complete defense as a shield to proffer otherwise inadmissible evidence.

i. To allow the Affidavit of Miranda Morris to be proffered as evidence would not promote or assure fairness at trial.

If this Court should find the Affidavit to be inadmissible under Rule 404(b), then it would not be fair to allow Defendant Zelasko to proffer it using her right to a complete defense as a

shield against following procedures outlined in the Federal Rules of Evidence. This Court has stated that "federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve." *United States v. Scheffer*, 523 U.S. 303, 308 (1998)(citations omitted). If the Affidavit is found to be inadmissible under Rule 404(b), and does not meet any of the Rule's exceptions, then Defendant Zelasko is thoroughly barred from proffering it as evidence.

Furthermore, as argued above, it is relatively easy for any criminal defendant to find circumstances in their case which suggest that some other person committed the charged crime. Moreover, as argued above, allowing the Affidavit to be proffered will create an additional burden on the government to prove the innocence of Short. Therefore, to allow the affidavit to be proffered as evidence would not promote nor assure fairness at trial.

ii. The allegations contained within the Affidavit of Miranda Morris are not reliable in ascertaining guilt or innocence.

The Affidavit is not reliable in ascertaining the guilt or innocence of Defendant Zelasko. The Affidavit is comprised of unsupported allegations that Short sold steroid to her teammates on the Canadian Snowman team for some time between February and April of 2011. R. at 25. The record is devoid as to whether these allegations were ever corroborated, supported, or verified. Furthermore, given the fact that Short is currently a member of the United States Snowman team, it's highly likely that she was never charged with any crime in connection with these allegations. R. at 8. If Short had been charged or found guilty of distributing White Lightning during the early part of 2011, then she would be either serving a prison sentence, or a lifetime ban by the International Olympics Committee, or both. This obviously cannot be case since Short is currently a member of the American Snowman team. *Id*.

Moreover, Miranda Morris' testimony is uncorroborated. She merely made these allegations because she "regret[s] having betrayed [her] own integrity and that of the sport by purchasing and using performance-enhancing drugs." R. at 25. These allegations have no bearing on the relevant facts in the case at bar. Accordingly, this Court should find that the Affidavit is not reliable in ascertaining the guilt or innocence of Defendant Zelasko. Therefore, this Court should find that Defendant Zelasko cannot use the right to a complete defense as a shield to proffer otherwise inadmissible evidence.

B. The Affidavit of Miranda Morris is not strong enough evidence to raise a constitutional right if it is excluded.

If this Court should find that the Affidavit is inadmissible under Rule 404(b), the information alleged within the Affidavit is not strong enough for Defendant Zelasko to raise a constitutional right to present it as evidence. A defendant "is entitled to introduce evidence which tends to prove someone else committed the crime." *United States v. Perkins*, 937 F.2d 1397, 1400 (9th Cir. 1991)(citing *United States v. Armstrong*, 621 F.2d 951, 953(9th Cir. 1980). However, a complete defense does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence. *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003). First, the probative value of the allegations contained within the Affidavit is substantially outweighed by the policy interests furthered by Rule 404(b). Second, the probative value of the Affidavit does not pass the standard analysis under Rule 403. Accordingly, this Court should find that the Affidavit is not the "smoking gun" Defendant Zelasko purports it to be, and therefore its exclusion does not permit Defendant Zelasko to raise the right to a complete defense.

i. The probative value of Miranda Morris's testimony is substantially outweighed by policy interests furthered by Rule 404(b).

The probative value of the allegations contained within the Affidavit is considerably outweighed by the policy interests furthered by Rule 404(b). For reasons stated above, allowing the Affidavit to be admitted into evidence would create an additional burden on the Government, prolong the trial, and confuse the jury about the true issue at trial. Accordingly, this Court should find that the probative value of the Affidavit is outweighed by the policy interests furthered by Rule 404(b).

ii. The Affidavit of Miranda Morris does not pass the standard analysis under Federal Rule of Evidence 403.

Alternatively, if the Affidavit is admissible as "reverse 404(b)" evidence, then this Court should find it to be prohibited from being proffered as evidence under Rule 403. The Rule states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

For example, in *Rockwell v. Yukins*, 341 F.3d 507, 510 (6th Cir. 2003), the defendant was convicted of conspiracy to commit murder and sentenced to life imprisonment. The trial court excluded evidence that the defendant's husband allegedly sexually abused their sons. *Id*. The United States Court of Appeals for the Sixth Circuit held that trial court's decision to exclude the evidence was not an unreasonable application of the Federal Rules of Evidence. *Id*. at 514. It found that the evidence of sexual abuse posed a substantial danger of unfair prejudice towards the victim. *Id*. at 513. It reasoned that if the evidence was to be admitted then the jury would have been tempted to acquit the defendant, not because of any sense that she was innocent, but as a form of punishment for the victim. *Id*. The Court also found that the evidence presented a risk of undue delay and confusion of the issues. *Id*. It reasoned that because the evidence of the

husband's sexual abuse was disputed, resolving the tangential dispute would complicate the trial and mislead the jury. *Id*.

Like the evidence of prior sexual abuse of the defendant's sons by her husband in *Rockwell*, the allegations contained in the Affidavit regarding Short's prior distribution of steroids should be excluded as both prejudicial and confusing the jury of the issues. Furthermore, it will prolong the trial by having the court waste time on the issue of whether or not Short actually sold steroids while on the Canadian Snowman team during 2011. Therefore, if the Affidavit is not prohibited under Rule 404(b), this Court should find that is excluded under Rule 403.

C. Allowing the Affidavit of Miranda Morris to be admitted on constitutional grounds requires an overly broad reading of *Chambers*.

The Affidavit is full of speculation and to allow it to be admitted on constitutional grounds would require an overly broad reading of *Chambers* by this Court. In *Chambers*, the petitioner was convicted of murdering a policeman and sentenced to life imprisonment. 410 U.S. 284, 285 (1973). A third party came forward and gave a sworn confession that he shot the policeman. *Id*. at 287. The third party also stated that he had also confessed to one of his friends. *Id*. However, at a preliminary hearing the third party repudiated his sworn confession. *Id*. At trial, the court excluded the testimony of three witnesses to whom the third party had admitted to shooting the policeman as hearsay. *Id*. at 292. This Court ruled that the exclusion of the testimonies deprived the defendant of a fair trial. *Id*. at 302. It reasoned that the hearsay statements in the case were offered at trial under circumstances that provided assurance of their reliability. *Id*. at 300. The court found that each of the third party's confessions was made spontaneously to close acquaintances. *Id*. Furthermore, each of the testimonies was corroborated by other evidence in the case. *Id*. Moreover, each confession was self-

incriminating and against penal interest. *Id*. at 301. Most importantly, the third party was in the courtroom, under oath, and could have been cross-examined in regards to the extrajudicial statements. *Id*.

Contrary to the testimonies in *Chambers*, the allegations within the Affidavit of Miranda Morris are unsupported and uncorroborated by other evidence. The record is devoid as to whether Short was ever indicted or charged with any crime in connection with dispensing steroids. Furthermore, Short did not come forward, make a confession, and then later repudiate that confession. The Affidavit does very little to exculpate Defendant Zelasko and merely shows that a third party sold allegedly different drug, to different people, in a different country.

Defendant Zelasko wants to proffer the Affidavit as character evidence against Short in order to suggest the inference that on this particular occasion she acted in conformity with her alleged character. This type of evidence is directly prohibited by Rule 404(b). Accordingly, this Court should hold that excluding the Affidavit of from being proffered as evidence would not violate the Defendant Zelasko's constitutional right to present a complete defense. Therefore, this Court should reverse the Court of Appeals decision to allow the Affidavit to be offered as evidence.

III. *Williamson v. United States* should be overruled insofar as it provides an incorrect standard for the application of Federal Rule of Evidence 804(b)(3).

This Court should overturn *Williamson* as the standard for the application of Federal Rule of Evidence 804(b)(3); instead replacing it with the common law standard. Rule 804(b)(3) governs the statement against interest exception, reading as follows:

> (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 . . . and;
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness[.]

Fed. R. Evid. 804(b)(3). With regard to what constitutes a statement, this Court should apply the common law extended declaration standard over the *Williamson* single declaration standard. Under the common law extended declaration standard it is clear that the entire email is admissible as statements against Defendant Lane's interest. Alternatively, if this Court should determine that the *Williamson* single declaration standard still applies, the majority of the email will still be admissible as statements against Defendant Lane's interest.

A. This Court should apply the common law Extended Declaration Standard Rather than the *Williamson* Single Declaration Standard.

This court should ultimately apply the common law extended declaration standard instead of the *Williamson* single declaration standard. As the court in *Williamson v. United States*, 512 U.S. 594, 602-603 (1994), pointed out, there are two definitions of what constitutes a statement. The first definition asks this Court to look broadly at the statement as a single extended declaration. *Id*. at 602. The second definition asks this Court to look at each sentence or single declaration as its own statement. *Id*. at 603. This Court should adopt the common law standard because; first, common law and common law policy clearly point toward the extended declaration standard to be the proper application of Rule 804(b)(3); second, the advisory committee's noted dictate that collateral statements are admissible at trial as statements against interest; and third, the *Williamson* standard severely shackles the practical application of Rule 804(b)(3). For the foregoing reasons, this Court should apply the common law extended declaration standard rather than the *Williamson* single declaration standard.

i. The common law rules and Advisory Committee's Notes dictate the use of the Extended Declaration Standard rather than the Single Declaration Standard.

Common law considerations dictate considering an extended declaration to constitute one statement under Rule 804(b)(3). Rule 804(b)(3) is based off the common sense notion that people do not make statements that are damaging to themselves unless they believe them to be

true. The text of 804(b)(3) does not shed any light on what constitutes a statement. Fed. R. Evid. 804. However, it is a long-standing provision that statutes in derogation of common law are to be narrowly construed. *Washington Metro. Area Transit Auth. v. Johnson,* 467 U.S. 925, 946 (1984). This presumption can only be overcome by the evident intent of Congress *Id*.

At common law, facts contained in collateral statements related to the facts against the declarant's interest were admissible at trial. Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 57 (1944). The reasoning behind the common law rule was that "the portion [of the statement] which is trustworthy, because against interest, imparts credit to the whole declaration." *Smith v. Moore*, 142 N.C. 277, 278 (1906). Common law dictated the use of the extended declaration standard allowing for collateral statements to be admissible at trial. Bernard S. Jefferson, *Declarations Against Interest* at 57.

This Court in *Williamson* severely limited the common law rule regarding what constitutes a statement against interest, holding that each sentence should be viewed independently. *Williamson*, 512 U.S. at 601. This holding is clearly in opposition to the common law rule. Moreover, there is no indication of intent on the part of Congress to limit the common law standard for what constitutes a statement. If Congress had intended to limit the definition of "statement" to each sentence within a larger statement, then Congress could have. *Silvers v. Sony Pictures Entm't, Inc.,* 402 F.3d 881, 899 (9th Cir. 2005). There is also no indication of an intent to limit what constitutes a statement within the text of Rule 804(b)(3). Furthermore, the advisory committee's notes fail to provide the Congressional intent to alter the common law extended declaration standard. Therefore, this Court's ruling in *Williamson* is in derogation of common law and should be overturned in favor of the common law standard.

The advisory committee's notes echo the Congressional intent to not alter the common law standard. Rather than being silent on the intent behind Rule 804(b)(3), Congress voiced its opinion as to whether collateral statements constitute statements against interest. Fed. R. Evid. 804 (advisory committee's note). The advisory committee notes state that "ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implication him, and under the general theory of declarations against interest they would be admissible as related statements." *Id*.

iii. Adhering to the *Williamson* standard severely limits the practical application of Rule 804(b)(3).

This Court should not adhere to the *Williamson* standard because the *Williamson* standard severely limits the practical application of 804(b)(3). The purpose behind 804(b)(3) is that statements that tend to subject the declarant to criminal liability are sufficiently truthful so as to be admissible at trial as a hearsay exception. *United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990). As Justice Kennedy feared in his dissent in *Williamson*, "it is likely to be the rare case where the precise self-inculpatory words of the declarant, without more, also inculpate the defendant." *Williamson*, 512 U.S. at 617 (Kennedy Dissent). Thus only statements such as "Joe and I stole the bike" would be admissible under this exception following the narrow *Williamson* standard. *Id*. Limiting the statement against interest exception solely to these narrow statements would go against the purpose behind Rule 804(b)(3).

B. Under the common law Extended Declaration Standard, the email is admissible as a statement against interest.

Under the common law standard, Defendant Lane's entire email is admissible at trial as a statement against interest. Under common law, the rule to determine admissibility was: "all parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest."

Smith v. Moore, 142 N.C. 277, 278 (1906). Furthermore, when a court is unsure whether or not something constitutes a statement, courts should air on the side of admissibility. Fed. R. Evid. 804 (advisory committee's note). Defendant Lane's email was sent as a whole from the safety of her home to her boyfriend. R. at 3-4. Sentence two and three reference her involvement in the sale of illegal steroids. R. at 29. Since aspects of the email are against Defendant Lane's interest, all the remaining related aspects of the email constitute against Defendant Lane's interest. Therefore, under the extended declaration standard, the entirety of Defendant Lane's email is admissible as evidence.

C. Alternatively, under the *Williamson* Single Declaration Standard, the email is admissible at trial.

Alternatively, if this Court should adhere to the standard set in *Williamson*, the email would still constitute statement against interest. Under the *Williamson* standard, statements should be viewed independently to determine whether the statement was against the declarant's interest. 512 U.S. at 602. However, this Court also opined that the only way to determine whether a statement is self-inculpatory with regard to a co-defendant is to view the statement in context. *Id*. at 603. Finally, this Court noted that statements that curry favor from law enforcement officers are not against the declarant's interest. *Id*. at 601.

For the purpose of this *Williamson* analysis, each sentence in Defendant Lane's email constitutes its own statement. First, statements two and three constitute statements against interest by referencing the Defendant's illegal steroid sales. Second, statement four constitutes a statement against interest by referencing the Defendant's ongoing conspiracy to commit murder. Finally, neither statement two, nor three, nor four attempt to curry favor with law enforcement officers. For the reasons listed above, this Court should determine that statements two, three, and four admissible at trial as statements against interest.

i. Statements two and three qualify as a statement against interest under *Williamson* by directly referencing the Defendants' drug operation.

Statements two and three constitute statements against interest. Determining whether a statement is against penal interest is a very fact sensitive inquiry that depends on the circumstances of the case. Fed. R. Evid. 804 (advisory committee's note). A court must determine whether the statement has particular guarantees of trustworthiness. *Williamson,* 512 U.S. at 605. A statement can be against the declarant's interest even if it is not explicitly illegal; instead asking whether a reasonable person in the declarant's shoes would realize that being linked to certain people would implicate the declarant in the others conspiracy. *Id*. at 603 .

For example, in *Matthews v. United States*, 20 F.3d 538, 544 (2nd Cir. 1994), after robbing a bank, the defendant returned home and stated to his girlfriend "him and [defendant two] had robbed a bank, him and [defendant three] and [third party] told me it was an out-of-town bank." *Id.* at 543. At the trial, the defendant refused to testify regarding the conversations with his girlfriend, citing the Fifth Amendment. *Id*. at 545. The court held that the statement was against the declarant's interest. *Id*. at 546. The court voiced that the statement was voluntarily made to his girlfriend, his "confidant, in the private recesses of their home," and in a non-coercive atmosphere. *Id*.

The facts presented to this Court mirror those facts presented to the court in *Matthews*. Like the defendant in *Matthews*, Defendant Lane was not speaking to a law enforcement officer, rather her significant other, Billings. R. at 3. Defendant Lane looked at Billings as an ally, a confidant that she could turn to when she was unsure of herself. There is no inclination that Defendant Lane feared that this email would be handed to the DEA. Like the confession in *Matthews*, there was no police action or coercion with regard to these questions by Billings.

Ultimately, there was no coercion that would call into question the truthfulness of Defendant Lane's email.

Statement two is against Defendant Lane's penal interest. Statement two says "I know you've suspected before about the business my partner and I have been running with the female team." R. at 29. Peter Billings had previously confronted Defendant Lane regarding her steroid operation with the female Snowman team one month prior to Defendant Lane seeking his help. R. at 3. There is no evidence presented that Billings ever suspected Defendant Lane of any other business with regard to the female team. Therefore, the "business" Defendant Lane references in her email is her sale of steroids. Since Defendant Lane confessed her involvement in the business of selling illegal steroids, it is clear that statement two is against Defendant Lane's interest.

The facts also point toward Defendant Zelasko being the "partner" referenced by Defendant Lane. Billings previously observed Defendant Lane shouting "[s]top bragging to everyone about all the money you're making" to Defendant Zelasko. R. at 3. Why would Defendant Lane yell at Defendant Zelasko to keep hidden all the money she was making if it did not adversely affect Defendant Lane? The only logical answer as to why Defendant Lane would care is that Defendant Lane and Defendant Zelasko were engaged in an illegal drug operation. Furthermore, bragging about the steroid sales would attract unwanted attention—something drug deals tend to try and avoid. There is no evidence presented that Defendant Lane had any other interactions with other members of the female team in any business capacity. Therefore, the "partner" Defendant Lane references in statement two can only be Defendant Zelasko.

Statement three is also against Defendant Lane's interest. Statement three reads as follows: "[o]ne of the members of the male team found out and threatened to report us if we

don't come clean." R. at 29. It is illogical to conclude that Defendant Lane is not referencing her illegal drug operation as what the male team member discovered. Defendant Lane refreshed Billings memory as to her illegal business in the sentence prior as a build up to sentence three. This is further evident by the fact that the male team member threatened to report Defendant Lane if she didn't come clean. R. at 29. There would be no logical reason to report someone unless they were doing something illegal. Therefore, statement three is against Defendant Lane's interest because it references her illegal steroid business.

Statement three is also against Defendant Zelasko's interest. Statement three specifically references a second person being reported in its use of "we." R. at 29. Since, Defendant Zelasko is the partner referenced in statement two, Defendant Zelasko must also be one-half of the "we" referenced in statement three. For the same conclusions as Defendant Lane, statement three is against Defendant Zelasko's interest. For these reasons, statements two and three inculpate both Defendant Lane and Defendant Zelasko.

ii. Statement four qualifies as statements against interest under *Williamson* by directly referencing Defendant Zelasko's conspiracy to commit murder.

Statement four directly references the Defendant Zelasko's conspiracy to commit murder and is thus against her interests. Statement four reads as follows "my partner really thinks we need to figure out how to keep him quiet." R. at 29. There are two elements to be charged with a conspiracy: (1) the intent to enter into the conspiracy, and (2) an overt act committed by one party in furtherance of that conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). The statement directly references Defendant Zelasko's attempts to discover a way to handle the male member discovering their business and threatening to expose their business referenced in statement three. Furthermore, the statement mentions the plan to "take care" of the male team member. R. at 29. It is common knowledge that to "take care" of someone denotes killing that

person. The Government is not using statement four as substantive proof of the actual murder, as the crime had not been committed at the time the statement was made. The Government is solely proffering statement four as substantive proof of the existence of a conspiracy between the Defendants. Since the statement directly references Defendant Lane's involvement in the conspiracy, then it is clearly against her interests.

iii. None of the Defendant Lane's statements attempt to curry favor with authorities.

Statements two, three, and four do not attempt to curry favor with law enforcement. The next aspect to determine whether the statements against interest will be admissible at trial is to determine whether the declarant attempted to curry favor with law enforcement officers with their inculpation of another. *Williamson*, 512 U.S. at 602. Statements made to a friend, rather than a law enforcement officer, which inculpate a co-defendant provide no reason to suspect an attempt to curry favor. *Id.* Since Defendant Lane's email was sent to her boyfriend, and not a law enforcement officer, it was not an attempt to curry favor. R. at 29. There is no question of Defendant Lane's motivation. Defendant Lane was reaching out to her boyfriend to help her present situation, not to curry favor. Therefore, statements two, three, and four clearly qualify as statements against interest admissible at trial under the *Williamson* standard. Accordingly, this Court should rule that Defendant Lane's email is admissible at trial under the statement against interest hearsay exception.

IV. At a joint trial, the statement of a non-testifying co-defendant implicating the defendant to a friend does not violate of the Confrontation Clause as a non-testimonial statement under *Crawford*

Defendant Lane's email does not violate Defendant Zelasko's constitutional right to confrontation because *Crawford* limited *Bruton* only to statements deemed to be testimonial. The Sixth Amendment of the Constitution provides, in pertinent part, 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 clause is commonly referred to as the confrontation clause. This Court should rule that the admission of Defendant Lane's email does not violate Defendant Zelasko's constitutional right to confrontation because; first, this Court's opinion in *Crawford* limited the *Bruton* doctrine to only testimonial statements; second, under the *Crawford* doctrine, the email admissible at trial; and third, alternatively, under the *Bruton* doctrine, the email is still admissible at trial.

A. This Court's ruling in *Crawford* limits *Bruton* only to statements determined to be testimonial.

This Court's ruling in *Crawford* limited the *Bruton* doctrine to applying only to testimonial statements. The vast majority of case law supports the conclusion that *Crawford* limits *Bruton* to only testimonial statements. The Tenth Circuit, Sixth Circuit, First Circuit, Second Circuit, Third Circuit, and Eighth Circuit have all ruled that *Crawford* limits *Bruton*. *United States v. Smalls*, 605 F. 3d 765 (10th Cir. 2010); *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009); *United States v. Figueroa-Cartagena*, 612 F.3d 69 (1st Cir. 2010); *United States v. Pike*, 292 F. App'x 108 (2nd Cir. 2008); *United States v. Berrios*, 676 F. 3d 118 (3rd Cir. 2012) *cert. denied*, 133 S. Ct. 982 (U.S. 2013); *United States v. Dale*, 614 F.3d 942 (8th Cir. 2010). In the post-*Crawford* world, only one case in the United States Court of Appeals, *United States v. Jones,* 381 F. App'x 148 (3rd Cir. 2010), has held that *Bruton* applies to non-testimonial statements. The Third Circuit soon after its ruling in *Jones* realized the fallacies in its decision and ultimately declining to follow its precedent in a subsequent case. *Berrios*, 376 F.3d at 118.

Furthermore, this Court in *Crawford* also stated how subsequent courts should handle non-testimonial hearsay, as is present in this case. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Specifically stating "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as

does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id*. By explicitly stating that a court should perform a *Roberts* analysis to determine the admissibility of non-testimonial statements, the court implied that *Bruton* would not apply to non-testimonial statements. For these reasons, this Court should conclude that its ruling in *Crawford* limited *Bruton* only to testimonial statements.

B. Under the *Crawford* ruling, Defendant Lane's email does not violate Defendant Zelasko's Constitutional Right to confrontation.

Upon adhering to the Crawford ruling, the admittance of Defendant Lane's email at trial does not violate the Defendant Zelasko's constitutional right to confrontation. This Court must first determine whether the statement is testimonial or not; and second, whether the statement passes the Robert's analysis for non-testimonial statements. *Crawford*, 541 U.S. at 51-52, 68. The facts of the case at bar clearly show that Defendant Lane's email was not testimonial. Furthermore, Defendant Lane's email bears adequate indicia of reliability to be admissible at trial. For these reasons, the Government prays that this court hold that Defendant Lane's email does not violate the confrontation clause and is thus admissible at trial.

i. Defendant Lane's email constitutes a non-testimonial statement.

Defendant Lane's email is clearly non-testimonial. Testimonial statements by a witness who is not available to testify at the present proceeding, and was not available to testify at a prior proceeding, violates the Confrontation Clause. *Crawford*, 541 U.S. at 53-54. At the same time, non-testimonial statements do not violate the Confrontation Clause. *Id*. at 56. However, it is unclear what constitutes testimonial statements. *Id*. at 51. In *Crawford*, this Court provided multiple definitions and categories for whether a statements is testimonial: (1) "ex parte in-court testimony or its functional equivalent"; (2) "statements taken by police officers in the course of interrogations"; and (3) "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 51-52. This Court noted that regardless of which definition was adopted, the first two categories will always constitute testimonial statements. *Id*. at 52, 68.

While statements made to law enforcement will always be testimonial, statements made to friends are non-testimonial. *Id*. at 51. This Court, in *Crawford*, specifically referenced that statements made to friends and acquaintances are non-testimonial. *Id*. Billings was not a law enforcement officer, but rather Defendant Lane's boyfriend and coach. R. at 1. These circumstances would not lead an objective witness to reasonably believe that the statement would be used later at trial. Thus, Defendant Lane's email is non-testimonial and its introduction does not violate Defendant Zelasko's constitutional right to confrontation.

ii. Defendant Lane's email bears sufficient indicia of reliability to pass the *Roberts* doctrine.

Defendant Lane's email has sufficient indications of reliability to be admissible at trial. In *Crawford*, this Court determined that the analysis did not stop with determining whether a statement is testimonial or not. 541 U.S. at 68. The *Crawford* Court noted that when a statement is deemed to be non-testimonial, a court has two options: (1) adhere to the ruling in, or (2) adhere to an approach that "exempted such statements from Confrontation Clause scrutiny altogether." *Id*. The *Roberts* court noted that a statement will only be allowed into evidence when it "bears adequate indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The court defined particularized guarantees of trustworthiness as a statement such that "adversarial testing would be expected to add little, if anything, to the statements reliability." *Lilly v. Virginia*, 527 U.S. 116, 125 (1999). To determine whether particularized guarantees of trustworthiness exist, a court should look at the totality of the circumstances surrounding the statement. *Idaho v. Wright*, 497 U.S. 805, 819 (1990). A court can analyze multiple factors to determine if the statement has

sufficient particularized guarantees of trustworthiness: (1) who did the declarant make the statement to; (2) where was the statement made; (3) was there any coercion in connection with the statement; (4) was the statement offered voluntarily or in response to interrogation; (5) did the declarant make the statement seeking a benefit; (6) did the declarant seek to minimize or maximize his or her culpability; (7) did the declarant attempt to blame-shift; (8) when was the statement made; and (9) how detailed was the statement. *United States v. Savoca*, 335 F. Supp. 2d 385, 399 (S.D.N.Y. 2004).

For example, in *Savoca*, after participating in a crime, the defendant made incriminating statements that not only incriminate himself, but also incriminated his co-defendant. *Id*. at 389. The court ruled that based on the totality of the circumstances, the statement had sufficient particularized guarantees of trustworthiness to be admissible at trial. *Id*. The court noted that the statement was made within the confines of the defendant's home to his girlfriend. *Id*. at 400. The court opined that there were no coercive pressures on the defendant when the statement was made and the statement was made voluntarily. *Id*. at 399. The court noted that the defendant's girlfriend was not in any position to offer the defendant anything in exchange for his statement and therefore the defendant was not attempting to gain any benefit. *Id*. The court found that each sentence of the defendant's statement inculpated him. *Id*. at 399-400. Furthermore, the court noted that the defendant's statement clearly spelled out the details of the crime. *Id*. Finally, the court observed that the statement was made at a time immediately after the execution of the crime. *Id.* at 400.

Similar to the girlfriend in *Savoca*, Billings could not offer Defendant Lane any legal benefit. Defendant Lane made the statement to her boyfriend, Billings, from the confines of her own home. R. at 4, 29. There is no evidence that Billings coerced Defendant Lane into sending

him the email. Billings only confronted Defendant Lane once regarding the possibility of her selling steroids. R. at 3. Defendant Lane denied this accusation and Billings dropped the subject. R. at 3. Defendant Lane was seeking a benefit from Billings, but not a legal benefit. Defendant Lane was solely seeking Billings advice, evidenced by her first sentence "I really need your help." R. at 29. As stated previously, Defendant Lane did not attempt to minimize her culpability nor attempt to shift blame toward Defendant Zelasko. Defendant Lane was found to be in possession of a considerable amount of steroids upon her arrest nearly a month after she sent the email. R. at 3. Therefore, Defendant Lane sent the email while participating in the crime. The only difference between the defendant's statement in *Savoca* and Defendant Lane's email is the detail of the statement. However, as the majority of factors point toward Defendant Lane's email having sufficient particularized guarantees of trustworthiness. Therefore, Defendant Lane's email should be admissible at trial as a non-testimonial statement.

C. Alternatively, if *Bruton* does apply to non-testimonial statements, the email still does not violate Defendant Zelasko's Constitutional Right to confrontation.

In the alternative, if this Court determines that the *Crawford* ruling does not limit the *Bruton* doctrine, then the email still does not violate Defendant Zelasko's constitutional right to confrontation. The evil this Court in *Bruton* sought to remedy was a confession by one defendant gaining such substantial weight that a jury would believe that it was also a confession by the co-defendant. *Bruton v. United States,* 391 U.S. 123, 127-128 (1968). Specifically, this Court looked not at the reliability of the statement, but rather at the harm the statement would cause if admitted. *Id*. In *Bruton*, this Court examined whether a statement made to a postal agent violated the Confrontation Clause as inadmissible hearsay when used against a co-defendant. *Id.* at 125. During an interrogation, the defendant confessed to the law enforcement officer that he and his co-defendant had committed the crime. *Evans v. United States*, 375 F. 2d

355, 359 (8th Cir. 1967) *rev'd Bruton v. United States,* 391 U.S. 123 (1968). The only other evidence present against the co-defendant was one of two witnesses picking him out of a lineup. *Id*. at 357. This Court noted that the defendant statement added critical weight to the government's case by likely swaying the jury to believe that it was a confession by both the defendant and the co-defendant. *Bruton*, 391 U.S. at 127-128.

The evils that *Bruton* sought to remedy are not present in this case. Unlike the confession in *Bruton*, Defendant Lane does not specifically name Defendant Zelasko in the email. R. at 29. Defendant Zelasko is linked to the email based on the overwhelming circumstantial evidence also present in the record. Defendant Lane's statement was also not offered to a law enforcement officer during an interrogation. Furthermore, unlike the co-defendant in *Bruton*, there is sufficient circumstantial evidence linking Defendant Lane and Defendant Zelasko to the conspiracy. Moreover, the admittance of the email would not likely sway a jury to believe it was an outright admission of guilt by Defendant Zelasko. Therefore, Defendant Lane's email would not violate Defendant Zelasko's constitutional right of confrontation if admitted at trial. Accordingly this Court should overturn the Appellate Court's decision and rule that Defendant Lane's email was a non-testimonial statement admissible at trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to REVERSE the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

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