No. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2013

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 RESPONDENT

QUESTIONS PRESENTED

I. Does Federal Rule of Evidence 404(b) bar evidence of a third party's propensity to commit an offense with which the defendant is charged?

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

III. Should *Williamson v. United States* be overruled with respect to the standard it provides 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. At a joint trial, is the statement of a non-testifying co-defendant, which implicates the defendant, 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 Facts

Anastasia Zelasko ("Ms. Zelasko") was a member of the United States women's Snowman team, along with Jessica Lane ("Ms. Lane"), and Casey Short ("Ms. Short"). (R. at 8.) The Snowman competition is comprised of two events, dogsledding and rifle-shooting. (R. at 8.) On February 3, 2012, while attending the World Winter Games in Remsen National Park, Ms. Zelasko practiced for the rifle-shooting event alone on a rifle range. (R. at 8.) At the same time as Ms. Zelasko was practicing on the rifle range, Hunter Riley ("Mr. Riley"), a member of the United States men's Snowman team, was competing on a dogsled course that was adjacent to the rifle range. (R. at 8.) A stray bullet from Ms. Zelasko's rifle inadvertently entered the dogsled course, killing Mr. Riley. (R. at 8.)

As a result of Mr. Riley's death, a search warrant was executed that night on Ms. Zelasko's house, where two 50-milligram doses of the steroid known as "ThunderSnow" were found along with approximately five thousand dollars in cash. (R. at 8.) Subsequently, a search warrant was executed on the United States women's Snowman team's training facility where an additional 12,500 milligrams of ThunderSnow were found. (R. at 8.) Additionally, a search of Ms. Lane's apartment yielded twenty doses of ThunderSnow and approximately ten thousand dollars in cash. (R. at 8.)

On December 10, 2011, before Mr. Riley's death, Peter Billings ("Mr. Billings"), the U.S. women's Snowman team's coach and Lane's boyfriend, heard Lane state to Ms. Zelasko, "[s]top bragging to everyone about all the money you're making!" (R. at 9.) Mr. Billings confronted Ms. Lane on December 19, 2011, with his suspicion that she was distributing steroids to the female Snowman Team and Ms. Lane denied the accusations. (R. at 9.) On January 16, 2012,

Ms. Lane sent an email to Mr. Billings implicating an anonymous "partner" in a "business." (R. at 29.) On January 28, 2012, several team members witnessed Ms. Zelasko in what they described as a "heated argument" with Riley. (R. at 9.)

Additionally, Mr. Riley, who was cooperating with the DEA and acted as an informant in 2011 and 2012, attempted to purchase steroids several times from Ms. Lane during that time. (R. at 9.) Each time Mr. Riley attempted to purchase steroids from Ms. Lane, she declined him. (R. at 9.) It is "uncontested that only to people were involved in the conspiracy," where the government posits the two are Ms. Lane and Ms. Zelasko and the defense argues the two coconspirators are Ms. Lane and Ms. Short. (R. at 11.) There is also evidence that Ms. Short had recently sold a strikingly similar steroid to ThunderSnow to Canadian Snowman team members, including Miranda Morris ("Ms. Morris"), a mere two months before she transferred to the U.S. Women's Snowman Team. (R. at 11-12.)

Procedural History

Following the investigation that took place after Mr. Riley's death, Ms. Zelasko was charged with five different crimes: (1) conspiracy to distribute and possess with the intent to distribute anabolic steroids under 21 U.S.C. §§ 841(a)(1), (b)(1)(E) and 846; (2) distribution of and possession with intent to distribute anabolic steroids under 21 U.S.C. §§ 841(a)(1) and b(1)(E); (3) simple possession of anabolic steroids under 21 U.S.C. § 844; (4) conspiracy to murder in the first degree under 18 U.S.C. §§ 371 and 1111(a); and (5) murder in the first degree under 18 U.S.C. § 1111(a). (R. at 4-5.)

The government and Ms. Zelasko each filed a pretrial motion in the United States District Court for the Southern District of Boerum, both of which were heard by Judge Nicholas Crawford on July 16, 2012. (R. at 6.) At the outset of oral arguments, both parties stipulated

that only two people were involved in the conspiracy to sell ThunderSnow. (R. at 11.) The first pretrial motion at issue was the defense's motion to admit the testimony of Ms. Morris. (R. at 10.) Ms. Morris' testimony reveals that Ms. Short sold her strikingly similar steroids when the two were teammates on the Canadian Snowman team, a mere two months prior to Ms. Short's transfer to the U.S. Snowman team. (R. at 10.) The District Court granted the defense's pretrial motion and deemed Ms. Morris' testimony to be admissible propensity evidence under Federal Rule of Evidence 404(b). (R. at 21.) The United States filed a pretrial motion to admit an email sent from Ms. Lane to Mr. Billings. (R. at 15.) The email from Ms. Lane expressed a desire to take care of raised suspicions regarding her "business." (R. at 15.) The District Court ruled in favor of the defense, deeming the email impermissible, because the email did not qualify as an admission against penal interest under Federal Rule of Evidence 804(b)(3). (R. at 22.)

On appeal, in an opinion written by Judge Richardson, the United States Court of Appeals for the Fourteenth Circuit affirmed the decision of the District Court for the Southern District of Boerum. (R. at 38, 45.) In response, the Government filed a petition for a writ of certiorari, and the Supreme Court of the United States granted certiorari for the October 2013 term.

SUMMARY OF THE ARGUMENT

Both the District Court and the Court of Appeals correctly ruled that Ms. Morris' testimony is admissible pursuant to Federal Rule of Evidence ("FRE") 404(b), and that the email sent by Ms. Lane to Mr. Billings was not admissible pursuant to FRE 804(b)(3). First, Ms. Morris' testimony was correctly admitted because FRE 404(b) only precludes character evidence about the defendant. It does not preclude character evidence about a third party intended to prove the defendant's innocence.

Second, due process requires the admission of Ms. Morris' testimony to uphold Ms. Zelasko's right to present a full defense. The Supreme Court has consistently held that certain evidentiary rules should not be enforced when doing so contravenes a defendant's constitutional right to due process. Ms. Morris' testimony demonstrates the likelihood that Ms. Short was the second member of the two-person conspiracy to sell ThunderSnow to the U.S. Snowman team. Therefore, it is character evidence regarding a third party, which is also necessary to Ms. Zelasko's defense.

Third, *Williamson v. United States* was correctly affirmed as binding precedent that bars the admission of statements collateral to declarations against penal interest under Federal Rule of Evidence 804(b)(3). The email is inadmissible as a statement against penal interest under Federal Rule of Evidence 804(b)(3) because "statement" was interpreted narrowly to mean a single declaration or remark, and none of the individual statements in Ms. Lane's email were directly against her penal interest. Statements not directly against the declarant's penal interest are not sufficiently reliable to overcome the general rule against hearsay, and therefore the email was correctly found to be inadmissible.

Finally, even if the email is admissible hearsay, the *Bruton* doctrine bars its admission as a violation of Ms. Zelasko's rights under the Confrontation Clause. The *Bruton* doctrine, which remains fully intact after *Crawford*, bars the admission of inculpatory statements of a non-testifying co-defendant against the defendant. Because Ms. Lane will not be testifying, Ms. Zelasko will not be afforded her right to Confrontation under the Sixth Amendment and *Bruton*. Even though the email is a non-testimonial statement, *Bruton* still bars its admission against Ms. Zelasko because she will likely be prejudiced in the eyes of the jury as a result. Additionally, statements of a non-testifying co-defendant are particularly untrustworthy. Therefore, the email

was correctly found to be inadmissible as a violation of the Confrontation Clause. Accordingly, this Court should affirm the ruling of the United States Court of Appeals for the Fourteenth Circuit.

ARGUMENT

I. MS. MORRIS' TESTIMONY SHOULD BE ADMITTED BECAUSE FEDERAL RULE OF EVIDENCE 404(b) DOES NOT APPLY TO CHARACTER EVIDENCE OF THIRD PARTIES.

Federal Rule of Evidence ("FRE") 404(b)(1) provides that, "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." Fed. R. Evid. 404(b)(1). However, this rule was enacted to protect a defendant from the introduction of prejudicial evidence that suggests the defendant's likelihood to commit a crime based on his or her prior misconduct. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). This prohibition does not apply in the instant case because Miranda Morris' ("Ms. Morris") testimony is being offered to show her likelihood to act in a particular way, rather than the defendant's. *Id*. This type of evidence, referred to as 'reverse 404(b) evidence,' is meant to negate the defendant's guilt of the crime charged against him, by showing the likelihood of a third party to have committed the crime in his stead. *Id*. Admitting the testimony of Ms. Morris does not contravene the underlying purpose of FRE 404(b). *Id.*

A. The Circuit Courts Have Held that Reverse 404(b) Evidence Is Admissible When Offered to Negate a Defendant's Guilt, Pursuant to Certain Conditions.

Ms. Morris' testimony of the sale that took place between her and Ms. Short may not be precluded because multiple circuits recognize the admissibility of reverse 404(b) evidence, pursuant to certain conditions. The condition placed on admitting ordinary evidence under FRE

404(b) is that the court must balance "the evidence's probative value under FRE 401 against considerations such as prejudice, undue waste of time, and confusion of the issues under Rule 403." *Id*. In other words, the standard for admitting ordinary 404(b) evidence is to weigh its "tendency to make a fact more or less probable than it would be without the evidence," against the danger of "confusing issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence." Fed. R. Evid. 401; Fed. R. Evid. 403.

However, this standard is modified with respect to character evidence regarding a third party. Multiple circuits have noted that, "a lower standard of similarity should govern reverse 404(b) evidence because prejudice to the defendant is not a factor." *Seals*, 419 F.3d at 606 (*citing United States v. Stevens*, 935 F.2d 1380, 1404 (3rd Cir. 1991)). In fact, although the reverse 404(b) evidence in *Seals* was not admitted due to its irrelevance, the Seventh Circuit specified that it is a blatant error to apply such a rigorous standard to admitting reverse 404(b) evidence, as it is ordinary 404(b) evidence. *Id*. at 607.

In *Seals*, the defendant was charged with aggravated bank robbery. He sought to admit testimony regarding a bank robbery conducted in a similar manner by another party approximately thirty (30) miles away. *Id*. at 603. Ultimately, the court made clear that while reverse 404(b) evidence is generally permissible pursuant to the standard above, the evidence of the robberies did not meet the necessary standard. *Id.* at 607. While prejudice to the defendant was not a factor, the evidence's probative value was limited because the similarities between the two robberies were too generic, and largely irrelevant. *Id*. at 607.

Contrary to the facts in *Seals*, the details of Ms. Short's sale of ThunderSnow to Ms. Morris are significantly similar to the alleged sale of ThunderSnow that Ms. Zelasko has been accused of. Specifically, the evidence sought to be introduced shows that Ms. Lane made a sale

of the same exclusive drug that Ms. Zelasko is accused of selling, to a member of the same elite international Snowman community that Ms. Zelasko is accused of targeting. (R. at 11-12.) The evidence will also reflect the proximate time period of Ms. Lane's sale to Ms. Zelasko's alleged sale. (R. at 11.) These noticeable similarities reflect the probative value of Ms. Morris' testimony, which outweighs the risk of prejudice or confusion. Thus, the testimony must be admitted because it meets the standard for reverse 404(b) evidence. Furthermore, it is undisputed in the record that there were only two participants in the drug distribution conspiracy involving the U.S. Snowman relay team. (R. at 11.) Ms. Morris' testimony will reflect that Ms. Lane was more likely to be one of those two participants than Ms. Zelasko. (R. at 11.)

The Third Circuit in *United States v. Stevens* demonstrates further clarification into what may be admitted as reverse 404(b) evidence. The court held that evidence of a third party crime need not reflect a "signature crime." *Stevens*, 935 F.2d at 1384. Rather, "it only needs to be sufficiently similar to the crime at bar so that it is relevant under FRE 401 and 402, and that its probative value is not substantially outweighed by FRE 403 considerations." *Id*. Like the Seventh Circuit, the Third Circuit noted that this is a less stringent standard than the admission of ordinary 404(b) evidence, because prejudice to the defendant is not an issue with reverse 404(b) evidence, given that it is being used to exonerate the defendant. *Id.* at 1404-05.

Ms. Lane's sale and Ms. Zelasko's alleged sale of ThunderSnow demonstrate common similarities to those that existed in *Stevens*; similarities that qualified for admission as reverse 404(b) evidence. In *Stevens*, the defendant was charged with aggravated sexual assault and robbery of two military officers at a local bus stop. *Id*. at 1385. The defendant wanted to introduce evidence of a similar robbery that had occurred within a few days of the robbery of which he was accused. *Id*. at 1401. Like the robbery he was accused of, the other robbery

occurred in the same area, and both robberies resulted in the theft of military personnel's identification card and money order checks. *Id*. Furthermore, the money order checks and the stolen identifications from both crimes surfaced near Fort Meade, Maryland. *Id*.

Such similarities exist between the instant crime and the crime to which Morris will testify. First, Ms. Short sold Ms. Morris this performance-enhancing drug merely two months prior to Ms. Zelasko's supposed sale. (R. at 10.) Additionally, the time of this sale was immediately prior to Ms. Short's transfer to the U.S. Snowman team. (R. at 10.) Like the drug Ms. Zelasko is accused of selling, the drug sold by Ms. Short is a chemical derivative that has the same ability to go undetected by drug tests. (R. at 11-12.) Furthermore, Ms. Short was offering the drug to the "insular winter sports community." (R. at 12.) This is the same small community that Ms. Zelasko is accused of selling to. (R. at 12.)

Pursuant to *Stevens*, this reverse 404(b) evidence should be deemed admissible to negate Ms. Zelasko's guilt. The sale executed by Ms. Short is sufficiently similar so as to deem it relevant under FRE 401 and FRE 402, which provide that only relevant evidence is admissible. Relevant evidence is that which makes a material fact more or less probable. Fed. R. Evid. 401; Fed. R. Evid. 402. Ms. Short's sale demonstrates the likelihood of another member of the team to have been part of the two-person conspiracy as opposed to Ms. Zelasko. The facts of Ms. Short's sale to Ms. Morris are sufficiently similar to make this more probable. Furthermore, the similarities between the two crimes substantially outweigh the danger of unfair prejudice, because they show the likelihood of Ms. Short to have been part of the two-person conspiracy in place of Ms. Zelasko.

With respect to reverse 404(b) evidence, the Seventh Circuit has held on numerous occasions that "evidence regarding other 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." *United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001) (*citing Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999)). In *Reed*, reverse 404(b) evidence was precluded because it did not negate the defendant's likelihood to commit the crime. Specifically, the court held that evidence of a prior visitor's production of methamphetamine in the defendant's home did not negate the potential for the defendant to have also produced methamphetamine in his own home. *Id*. at 634-35.

Contrary to these facts, in the instant action the reverse 404(b) evidence *does* tend to negate the defendant's guilt. The record confirms that there were only two potential conspirators selling ThunderSnow on the U.S. Snowman team. (R. at 11.) In other words, Ms. Short's role as a dealer of the drug does, in fact, minimize the likelihood that Ms. Zelasko might have filled one of these two roles.

Another example that guides the analysis of reverse 404(b) evidence comes from *United States v. Savage*. Like *Reed*, the Seventh Circuit again cites to the fact that reverse 404(b) evidence must alone or with other evidence, tend to "negate the defendant's guilt of the crime charged against him." *Savage*, 505 F.3d 754, 761 (7th Cir. 2007). In *Savage,* a defendant charged with conspiracy to sell drugs cooperated with the government for a period of time following his arrest, after which he changed his mind and refused to work with law enforcement officials. *Id*. at 757. Subsequently, at his trial he sought to introduce evidence of threatening letters that were sent to him by a gang leader during the time that he was cooperating with federal officials. *Id*. at 760. The court determined that these letters did not tend to negate the defendant's guilt because it was unclear whether the threats were made due to the defendant's

cooperation with the government or due to a prior conspiracy to sell drugs between the defendant and gang leader. *Id*. at 761.

There is no risk of such confusion in the instant case. The testimony in this case would clearly negate Ms. Zelasko's guilt, unlike the evidence in *Savage*. The testimony reflects a very similar sale to that of which Ms. Zelasko was accused. (R. at 11.) Furthermore, the stipulation in the record that there were only two co-conspirators selling Thunderstorm makes evidence of one person's participation in the drug selling conspiracy indicative of a lesser likelihood of another person to have participated in the conspiracy. (R. at 11.)

B. The Legislative Purpose of Rule 404(b) is Not Contravened by Admitting Reverse 404(b) Evidence, as is Clear by the Advisory Committee Notes.

The standard application of FRE 404(b) is to limit prejudicial evidence that the prosecution can use against a defendant at trial. *Seals*, 419 F.3d at 606. Although the language of FRE 404(b) states that "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," the word "person" refers to the defendant, as demonstrated by the case law discussed above and the advisory committee notes. Fed. R. Evid. 404(b). Specifically, the advisory committee notes state that 404(b) evidence "… is viewed as an important asset in the *prosecution's case against the accused*." Advisory Committee's Note, Fed. R. Evid. 404(b) (emphasis added). Hence, the intent behind the rule was to not preclude character evidence regarding a third party that could negate a defendant's guilt.

Furthermore, the text of FRE 404(b) is not absolute; demonstrating that not all evidence of prior bad acts should be omitted. FRE 404(b)(1) excludes evidence of prior bad acts in order to show the likelihood that a defendant acted in accordance with such acts. Fed. R. Evid. 404(b)(1). Subsequently, FRE 404(b)(2) provides exceptions where such evidence is permissible.

Fed. R. Evid. 404(b)(2). This demonstrates that the legislators did not write the rule intending for it to be a complete prohibition on "propensity" evidence. Hence, Ms. Morris' testimony, which serves as reverse 404(b) evidence, is appropriate based on the legislative intent and subsequent common law decisions analyzing this evidentiary rule.

C. Ms. Morris' Testimony is Still Admissible, Even Under the Stricter Standard Set Forth in the Sixth Circuit's Analysis in *United States v. Lucas*.

The Court of Appeals for the Fourteenth Circuit cites to *United States v. Lucas* as the only case that adamantly opposes the admission of reverse 404(b) evidence. (R. at 34.) However, such description is a mischaracterization. In *Lucas*, the Sixth Circuit specifies that the standard that applies to ordinary 404(b) evidence also applies to reverse 404(b) evidence; stating, "[t]he standard analysis of Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party, not charged with a crime." 357 F.3d 599, 606 (2004). In other words, the Sixth Circuit has not held that reverse 404(b) evidence is impermissible, merely that the more stringent standard applies. *Id*. The *Lucas* court validated this distinction by precluding the reverse 404(b) evidence at issue on grounds of prejudice, rather than its classification as character evidence. *Id*.

Operating under this standard, where prejudice is again factored into the evaluation of admissibility of reverse 404(b) evidence, Ms. Morris' testimony should still be admitted. The specific details of the sale between Ms. Short and Ms. Lane, such as the time period of the sale, the drug that was sold, and the community in which it was sold, outweigh the unfair prejudice of admitting this evidence. (R. at 11.) Unlike *Lucas*, where the evidence sought to be admitted was more generic evidence of a previous drug sale by the third party, the specific elements of the drug sale in this case is imperative to disproving Ms. Zelasko's guilt. Therefore, even under the higher threshold set forth by *Lucas*, the reverse 404(b) evidence must be admitted in this case.

II. MS. MORRIS' TESTIMONY MUST BE ADMITTED UNDER THE *CHAMBERS* ANALYSIS, AS TO ADHERE TO DUE PROCESS AND ALLOW MS. ZELASKO TO PRESENT A FULL AND COMPLETE DEFENSE TO THE CHARGES AGAINST HER.

Admitting Ms. Morris' testimony is necessary for Ms. Zelasko to present a complete defense. This Court has stated that, "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Supreme Court has consistently espoused this principle in the face of many evidentiary preclusion issues, discussed below. For that reason, it is essential that Ms. Morris' testimony be admitted into evidence so that this fundamental right can be upheld.

While the Federal Rules of Evidence represent an essential set of regulations to the judicial process, this Court has shown that the right of due process often supersedes these regulations, by setting them aside in certain cases to provide the defendant with a fair opportunity to present a defense. *Chambers,* 410 U.S. at 302. In fact, the Court in *Chambers* set aside the normal application of evidentiary hearsay rules in order to afford the defendant with a complete opportunity to defend him through the use of certain testimony. In doing so the Court stated, "[i]n 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*.

The Court also cited this principle more broadly, rather than just in the context of hearsay, by reasoning:

> [t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Id. at 294.

Similar to the application of this principle in *Chambers*, the normal confines of FRE 404(b) must not apply in the instant case so that Ms. Zelasko has the opportunity to present a complete defense. Although the plain text of FRE 404(b) indicates that evidence is not generally admissible to show that on a particular occasion the person acted in accordance with a certain character trait, the exception for reverse 404(b) evidence is imperative to presenting a complete defense in this case. Fed. R. Evid. 404(b). Such as the exemption for hearsay testimony, this evidence is vital to showing the strong likelihood that Ms. Short was selling ThunderSnow in place of Ms. Zelasko. Since it has already been definitively established that only two people were involved in the conspiracy to sell ThunderSnow on the women's U.S. Snowman team, the most effective way for Ms. Zelasko to prove that she was not one of these parties is to put forth evidence that another person is. (R. at 11.) The testimony of Ms. Morris is thus necessary for Ms. Zelasko to exercise her fundamental right of presenting a complete defense according to the *Chambers* Court. 410 U.S. at 302.

The Supreme Court further solidified this principle in *Michigan v. Lucas*, when it determined that a *per se* restriction either preventing or ensuring admission of certain evidence potentially violated a defendant's sixth amendment right to due process. 500 U.S. 145, 153 (1991). The Court determined that "restrictions on a criminal defendant's rights…to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id*. at 151 (citations omitted). In *Michigan v. Lucas*, the evidence being precluded was that of a prior sexual relationship between the defendant and the victim. *Id*. at 148. The defendant's failure to comply with a notice requirement barred him from presenting this evidence in his defense. *Id*. On appeal, the Michigan Court of Appeals adopted a *per se* rule that preclusion of evidence is unconstitutional in all cases where the victim and defendant had a prior sexual

relationship. *Id*. at 153. While this Court held that it was a mistake to deem preclusion *per se* unconstitutional, they also remanded the case, stating that the preclusion in question may have violated the defendant's Sixth Amendment right to due process by not allowing the defendant to present his full defense. *Id*.

As the Court in *Michigan v. Lucas* cautioned against, precluding Ms. Morris' testimony based on the plain text of FRE 404(b) would be disadvantageous in comparison to the value of admitting the evidence. Ms. Morris' testimony does not prejudice "the accused," as the purpose of the rule seeks to guard against. Fed. R. Evid. 404(b) (Advisory Committee Notes). Upholding the plain meaning of the text of the rule, when it prevents a defendant from exercising his or her Sixth Amendment right, would thus be "arbitrary," under the *Michigan v. Lucas* analysis. 500 U.S. at 151. Thus, Ms. Morris' testimony must be admitted.

This Court has further cited the adversarial system of justice as a critical reason that a defendant must be allowed to present a full defense. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). In *Taylor* a discovery sanction prohibited the defendant from introducing witness testimony at trial. The Court, in its evaluation of preclusion of evidence, stated, "the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all facts." *Id*. at 409.

Despite the *Taylor* Court's conclusion that the full spectrum of evidence is necessary to a complete defense, the Court held that the sanction prohibiting a witness' testimony was justified because the defense had purposely withheld the witness' name from the prosecution, constituting a willful and blatant discovery violation. *Id*. at 416.

In the instant case, the record is void of any evidence of similar bad faith as that in *Taylor*. Hence, the fundamental considerations iterated in *Taylor* mandate that Ms. Morris' testimony be included into the evidentiary record in this case as to ensure a "full disclosure of all facts." *Id*. at 409. In order to uphold Ms. Zelasko's constitutional right to due process and to present a full defense, Ms. Morris' testimony must be allowed. Furthermore, the adversarial process in the United States justice system requires that a full examination of all the evidence, such as Ms. Morris' testimony be presented at trial.

III. *WILLIAMSON v. UNITED STATES* SHOULD BE REAFFIRMED AS THE STANDARD FOR THE APPLICATION OF FEDERAL RULE OF EVIDENCE 804(b)(3), AND WAS CORRECTLY APPLIED TO EXCLUDE THE EMAIL, BECAUSE A NARROW READING OF "STATEMENT" IN FEDERAL RULE OF EVIDENCE 804(b)(3) IS PROPER.

Williamson v. United States should be reaffirmed as the standard for the application of the hearsay exception for statements against penal interest, because a narrow reading of "statement" is proper based on the principles behind the exception. The courts below found the email to be inadmissible hearsay, because they applied this standard correctly and none of the statements, analyzed independently, were sufficiently against Ms. Lane's penal interest.

FRE 802 provides that hearsay is generally not admissible unless the rules, a federal statute, or other rules proscribed by this Court provide otherwise. Fed. R. Evid. 802. The Federal Rules provide an exception to this general exclusion of hearsay with Rule 804(b)(3), which states that a statement "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 expose[d] the declarant to civil or criminal liability" is not excluded by the rule against hearsay if the declarant is unavailable as a witness. Fed. R. Evid.

804(b)(3). Ms. Lane, as a co-defendant in this case, is unavailable because she will be exercising her Fifth Amendment privilege not to testify. (R. at 39.)

This Court held that the word "statement" in FRE 804(b)(3), the exception to the hearsay rule for statements against the interest of the declarant, should be read narrowly to mean a single declaration or remark as opposed to a whole narrative. *See Williamson v. United Sates*, 512 U.S. 594, 599 (1994). This narrow reading of the word statement is proper because it follows from the principle that only statements directly against penal interest are reliable enough to justify an exception to the general rule excluding hearsay. Therefore, Ms. Lane's email was correctly excluded from evidence because none of the statements, analyzed independently as required by *Williamson*, were sufficiently against her penal interest.

A. A Narrow Reading of "Statement" in Federal Rule of Evidence 804(b)(3) is Proper Because Only Statements That are Directly Against Penal Interest are Reliable Enough to Justify an Exception to the General Rule Excluding Hearsay.

This Court's holding in *Williamson*, finding the narrow definition of statement to be proper, should be reaffirmed because only statements that are directly against penal interest are reliable enough to admit. Statements that are collateral to inculpatory statements should be excluded, as they are not reliable or trustworthy enough to overcome the general rule barring hearsay. Although the Court does acknowledge the possibility of a differing definition of statement, they concluded that the proper approach is "to define statement as a single declaration or remark." *Williamson*, 512 U.S. at 599.

In holding that the word statement should be defined narrowly, this Court relied on the principle behind the exception for statements against penal interest. *See id.* at 598. The general hazards which resulted in hearsay being deemed inadmissible include, "[t]he declarant might be lying; he might have misperceived the events in which he relates; he might have a faulty

memory; his words might be misunderstood or taken out of context by the listener." *Id.* But, the drafters of the Federal Rules of Evidence also "recognized that some kinds of statements are less subject to these hearsay dangers, and therefore except them from the general rule that hearsay is inadmissible." *Id.* The idea that people tend not to make self-inculpatory statements unless they are true resulted in a finding that statements against penal interest are less subject to the hearsay dangers, and therefore should be admissible. *See id.* at 599. But, as this Court noted, "this notion simply does not extend to the broader definition of 'statement'." *Id.* Therefore, this Court adopted the definition of statement to mean a single declaration or remark, "cover[ing] only those declarations or remarks within the confession that are individually self-inculpatory." *Id.*

Relying on this principle and the narrow definition of the word statement, Justice O'Connor wrote, "[i]n our view, 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.* at 600-01. Further, this Court found "no reason why collateral statements, even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded." *Id.* at 600. Following this decision, the Seventh Circuit held that statements that may, or possibly could lead to criminal liability are not sufficiently against interest to "provide the guarantee of reliability or truthfulness the 804(b)(3) exception is based on." *United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995). *See also Silverstein v. Chase*, 260 F.3d 142, 146 (2d Cir. 2001) (finding statements collateral to statements against pecuniary interest not sufficiently reliable to admit under FRE 804(b)(3)).

Directly in opposition to this Court's decision in *Williamson*, the government contends in this case that the context of the narrative and the generally self-inculpatory nature of the entire email as a whole should be considered in determining admissibility under 804(b)(3). (R. at 42-43.) This Court in *Williamson* recognized the possibility of a narrative that is generally inculpatory and found "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Williamson*, 512 U.S. at 599. In fact, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id.* at 599-600. Therefore, this Court has considered the assertion that the broader definition of statement is proper, where the context of the case is used to determine if the narrative is against penal interest, but has rejected it as being incompatible with the principles behind the exception. *See id.*

Additionally, the government relies on *United States v. Barone*, arguing that the court should admit all related statements unless the statement is self-serving or under circumstances where the declarant is seeking favorable treatment. (R. at 53.) But, the First Circuit in that case, finding that the statements were sufficiently against penal interest, analyzed each statement individually to determine its admissibility. *See United States v. Barone*, 114 F.3d 1284, 1297 (1st Cir. 1997). Although the First Circuit in *Barone* looked to the context of the case, they found the statements to individually inculpate the declarant based on the nature of the crimes where mere association was inculpatory. *Id.* The Court also relied on other hearsay exceptions and personal knowledge to admit more of the narrative into evidence, options that are not available to the government regarding the email in this case. *Id.*

Finally, this Court in *Payne v. Tennessee* noted that courts should not cripple themselves by following unworkable precedent, but that stare decisis is the "preferred course" to bolster the

integrity of the judicial process, consistently develop legal principles, and to further reliance on judicial decisions. 501 U.S. 808, 827 (1991). Following *Payne* and the principle of stare decisis, the standard set forth by this Court in *Williamson* should not be rejected merely because it is sometimes difficult to apply. This Court's opinion in *Williamson* should be reaffirmed as the standard for the application of FRE 804(b)(3), because only statements that are directly against penal interest, as opposed to general narratives with a self-inculpatory nature, are reliable enough to be consistent with the principle behind the exception.

B. The Email is Not Sufficiently Against Ms. Lane's Penal Interest, and Therefore Should Not be Admissible Under Federal Rule of Evidence 804(b)(3), Because None of the Statements, Analyzed Independently, Subject Her to Criminal Liability or Inculpate Her.

Using the narrow definition of statement, Ms. Lane's email contains five separate statements, none of which expose her to criminal liability or is sufficiently against her penal interests to be admissible under FRE 804(b)(3). Relying on binding precedent, "a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Williamson*, 512 U.S. at 601.

In *Williamson*, the court dissected the parts of the statement that implicated the codefendant Williamson and did little to subject the declarant to criminal liability. *See id*. at 604. They found these statements to be unreliable and likely inadmissible under the exception for statements against penal interest. *See id.* The declarant may have a motive to decrease his or her criminal liability by implicating another person in the crime, which makes a statement that implicates another person unreliable. *See id*. Although this Court has found "[w]hether a statement is in fact against interest must be determined from the circumstances of each case," even with many corroborating facts connecting the declarant to the defendant, the statements were still found to be likely inadmissible. *Williamson*, 512 U.S. at 596, 601.

Additionally, the Seventh Circuit found statements that may have subjected the declarant to criminal liability, to be inadmissible and not sufficiently against the declarant's penal interest when viewed in light of all the circumstances. *See Butler*, 71 F.3d at 252-53. Although the declarant put himself in the room of the crime, and based on the context this may have subjected him to criminal liability, nowhere in his statement did "he so far tend to subject himself to criminal liability such that we can be confident in the veracity of his comments." *Id.* at 253.

Here, the government claims that the surrounding circumstances and context of the case make Ms. Lane's email as a whole inculpatory and admissible. (R. at 17.) But, the email contains no statements that so far subject her to criminal liability that allow the court to be confident in its veracity. Like in *Williamson*, there are circumstances surrounding the email that may tend to lead the reader to assume criminal liability could result from the activities alluded to in the statements. But, this Court found that the statements analyzed individually must be sufficiently against the declarant's penal interest to be admissible. Here, none of the statements are sufficiently against Ms. Lane's interests to be reliable and therefore, should not be admitted.

The government also argues that because the statement was not made to a government actor and instead was made to a friend, the fear of reliability is less. (R. at 17.) The government improperly argues that Ms. Lane could not have been trying to "curry favor" with the officers by implicating her "partner" because the statement was made only to be read by her boyfriend. (R. at 17.) But, whether or not the statements were made to a police officer, the hearsay statements were not sufficiently against Ms. Lane's penal interest to be admissible under FRE 804(b)(3). Even looking to the context of the statements, and corroboration for possible criminal liability, as was done in *Williamson*, none of the statements in the email subject Ms. Lane to criminal liability and are therefore unreliable and inadmissible. Therefore, even though these statements

were not made to a police officer and are therefore less likely to be made with the intent of currying favor, they lack the reliability that is presumed for statements against penal interest.

IV. EVEN IF THE EMAIL IS ADMISSIBLE HEARSAY, THE *BRUTON* DOCTRINE MANDATES ITS EXCLUSION AS A VIOLATION OF MS. ZELASKO'S RIGHTS UNDER THE CONFRONTATION CLAUSE.

Ms. Lane's email is inadmissible as a violation of Ms. Zelasko's rights under the Confrontation Clause because they are the statements of a non-testifying co-defendant, where Ms. Zelasko will not be afforded the opportunity to cross-examine her. The Confrontation Clause of the Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI. The admission of inculpatory statements made by a non-testifying co-defendant against a defendant at trial is a violation of the co-defendant's rights under the Confrontation Clause. *See Bruton v. United States*, 391 U.S. 123, 136-37 (1968). Exclusion was found to be the necessary remedy for the prejudice a defendant suffers when presented with an inculpatory statement by a non-testifying co-defendant, where a limiting instruction was found to be insufficient. *See id.* at 135.

In *Bruton*, this Court held "the introduction of [a co-defendant's] confession posed a substantial threat to petitioner's right to confront the witness against him, and this is a hazard we cannot ignore." *Id*. at 137. In fact, the threat of prejudice in admitting such evidence without the opportunity for cross-examination of the witness is so strong that it cannot be dispelled even by a limiting instruction to the jury. *See id*. at 132. Concurring, Justice Stewart noted that "an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth." *Id*. at 138 (Stewart, J., concurring). Additionally, in finding a violation of the Confrontation Clause, this Court noted in *Cruz v. New*

York that "a codefendant's out-of-court statements implicating the defendant are not only hearsay but also have traditionally been viewed with special suspicion." 481 U.S. 186, 195 (1986).

Subsequently, some courts have found that the *Bruton* doctrine, holding statements made by non-testifying co-defendants to be a violation of the defendant's rights under the Confrontation Clause, only applies to testimonial hearsay. *See, e.g., United States v. Dale*, 614 F.3d 942, 949 (8th Cir. 2010). *See also, Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011). The distinction between statements of a non-testifying co-defendant that are testimonial and those that are non-testimonial came from this Court's decision in *Crawford v. Washington*. *See*, 541 U.S. 36, 51 (2004). In *Crawford*, this Court found that "not all hearsay implicates the Sixth Amendment's core concerns." *Id.* Only the hearsay statements of those who bear testimony against the accused implicate the Sixth Amendment's core concerns of confrontation. *See id.*

Although the statements at issue in *Bruton* were testimonial, the holding was not limited to testimonial out of court statements made by a non-testifying co-defendant. *See Bruton*, 391 U.S. at 137. This Court found "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination." *Id.* at 136. This reasoning, that an out of court statement made by a co-defendant is unreliable and therefore must be subject to cross-examination, applies to non-testimonial statements as well as testimonial statements. Additionally, the threat of prejudice to the defendant, as stated in *Bruton*, is just as present with non-testimonial statements as with testimonial statements.

Here, the main concern of *Bruton* exists fully, where Ms. Zelasko will likely be prejudiced in the eyes of the jury when presented with an inculpatory statement of a non-testifying co-defendant where she is not afforded the opportunity to cross-examine her. Although Ms. Lane's email is non-testimonial because she wrote it to her boyfriend at the time,

and did not make the statements in anticipation of litigation, *Crawford* did not inject a requirement that the statement be testimonial to be inadmissible under the *Bruton* doctrine. The right to confrontation does not apply to only testimonial hearsay, as *Bruton* remains intact even after this Court's decision in *Crawford*. The reasoning behind the imposition of the *Bruton* doctrine, that the defendant will be prejudiced and such statements are notoriously unreliable, are applicable whether the statements are testimonial or non-testimonial. Non-testimonial statements are not beyond the scope of *Bruton* because the testimonial statements in *Crawford* are distinct from *Bruton* statements of a non-testifying co-defendant. Therefore, because the *Bruton* doctrine remains intact, and directly applies to Ms. Lane's email, the email is inadmissible as a violation of Ms. Zelasko's rights under the Confrontation Clause.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) FRE 404(b) does not bar evidence of a third party's propensity to commit an offense with which the defendant is charged; (2) Defendant Zelasko's right to present a full defense would be violated by exclusion of evidence of a third party's propensity to distribute illegal drugs; (3) Lane's email is inadmissible under *Williamson*, which is reaffirmed as the standard of FRE 804(b)(3); and (4) Lane's email is also inadmissible as statements of a non-testifying co-defendant implicating the defendant, which violates the defendant's rights under the Confrontation Clause under *Bruton*.

Respectfully Submitted,

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Counsel for Respondent

Date: February 12, 2014