No. 12–13

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANASTASIA ZELASKO,

Respondent.

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

Federal Rule of Evidence 404(b) renders inadmissible evidence of a crime, wrong, or other bad act to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character.

Federal Rule of Evidence 804(b)(3) provides an exception to the hearsay rule for declarations against penal interest. This Court's decision in *Williamson v. United States*, 512 U.S. 594 (1994) narrowed 804(b)(3) to encompass only those portions of a narrative which directly inculpated the declarant and rendered all surrounding statements inadmissible.

The questions presented are:

I. Did the court of appeals err by holding, contrary to the language of 404(b), that the prohibition on criminal propensity evidence applies only to evidence showing the propensity of a defendant and not to all "persons" as the text of the rule mandates?

II. Did the court of appeals err by holding that an evidentiary ruling under 404(b) prohibiting Respondent from offering evidence of a third party's prior criminal history to show that third-party's criminal propensity violated Respondent's constitutional right to present a complete defense?

III. Should the per se bar from *Williamson* on statements providing context to a declaration against penal interest be overruled? If so, what standard should replace *Williamson*?

IV. Did the court of appeals err by holding, contrary to this Court's holdings in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006), that the admission of a nontestimonial statement can trigger a violation of the Confrontation Clause?

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS BELOW

The Fourteenth Circuit's opinion affirming the District Court's granting of Respondent's motion and the denial of Petitioner's motion is reproduced in the Record at page 30. The District Court of Boerum's opinion granting Respondent's motion to introduce the affidavit of Ms. Morris under FED. R. EVID. 404(b) and denying Petitioner's motion to introduce the email correspondence between Ms. Lane and Mr. Billings under FED. R. EVID. 804(b)(3) is reproduced in the Record at page 20.

RELEVANT STATUTES

The provisions of the Sixth and Fourteenth Amendments to the United States Constitution, Rules 403, 404, and 804 of the Federal Rules of Evidence, and Rule 804 of the Michigan Rules of Evidence are reproduced in the Appendices to this brief.

STATEMENT OF THE CASE

This case is about an opportunistic individual who went to murderous measures to conceal her role in a drug trafficking scheme. As a result of her desperate actions, a Drug Enforcement Administration informant, a United States Men's Snowman Team member, is dead.

On September 6, 2010 the defendant in question, Anastasia Zelasko, ("Respondent") joined the United States Women's Snowman Pentathlon Team ("Snowman Team.") (Record 1). The Snowman Team was primarily dedicated to participating in the World Winter Games; a challenging competition consisting of aerial skiing, curling, dogsledding, ice dancing, and most uniquely, rifle shooting. (R. 1). Prior to August 2011, the U.S. Women's Snowman Team had been unable to earn a ranking above sixth place in the World Winter Games and other similar competitions. (R. 2).

On August 5, 2011, Defendant Jessica Lane joined the Snowman Team. (R. 1). Shortly after Defendant Lane joined the team, she and Respondent went into the illicit-drug business together, selling a performance-enhancing anabolic steroid dubbed "ThunderSnow" to team members. (R. 2). Within a few months, the team experienced a significant improvement in practice times. (R. 2). Word of the duo's operation spread. On October 1, 2011, Hunter Riley (Men's Snowman Team member and D.E.A. informant) approached Defendant Lane for the purpose of purchasing ThunderSnow. (R. 2). Defendant Lane declined. Mr. Riley was persistent and sought out Defendant Lane again on November 3, 2011 and December 9, 2011, to no avail each time. (R. 2-3).

Women's Snowman Team coach, Peter Billings, who is also the boyfriend of Defendant Lane, began to suspect that Defendant Lane was involved in the sale of illegal performance-enhancing drugs to the Snowman Team. (R. 3). On December 10, 2011, Mr. Billings witnessed his girlfriend, Defendant Lane, engaged in a heated argument with Respondent. The argument concluded with Defendant Lane shouting at Respondent, "Stop bragging to everyone about all the money you're making!" (R. 3). Mr. Billings approached Defendant Lane with his suspicions that she was selling steroids to the U.S. Women's Snowman Team on December 19, 2011. However, Defendant Lane denied that anything untoward was occurring. (R. 3).

A few weeks later, on January 16, 2012, Mr. Billings received a panicked email from Defendant Lane asking for his help. (R. 29). Defendant Lane acknowledged Billings' prior suspicions about "the business" she and her "partner" had been "running with the female team." (R. 29). The email divulged that their operation had been discovered by a member of the male team and that if Defendant Lane and her partner did not "come clean," the male member would report them. (R. 29). Defendant Lane concluded that her "partner" thought they should figure out

how to "keep him quiet." (R. 29). The situation quickly escalated and on January 28, 2012, multiple Snowman Team members witnessed Respondent and Hunter Riley, a male member of the team, in heated argument. Five days later, on February 3, 2012, Respondent shot and killed Riley, the DEA informant. Respondent was quickly arrested. (R. 3).

In a search of Respondent's home, executed pursuant to a warrant, conducted same day as Mr. Riley's death, the DEA found two 50-miligram doses of ThunderSnow, along with $5,000 in cash. (R. 3). The following day, February 4, 2012, another search warrant was executed at the U.S. Snowman Team's training facilities. The search uncovered 12,500 milligrams of ThunderSnow, worth approximately $50,000, located in the equipment storage room. (R. 3). A search warrant was also executed at the home of Defendant Lane. The search uncovered $10,000 and twenty 50-miligram doses of ThunderSnow. The DEA also recovered the laptop used to send the email between Defendant Lane and Mr. Billings. Defendant Lane was thereafter arrested. (R. 4). Defendants Zelasko and Lane were charged with: (1) Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids, (2) Distribution of and Possession with Intent to Distribute Anabolic Steroids, (3) Simple Possession of Anabolic Steroids, (4) Conspiracy to Murder in the First Degree, and (5) Murder in the First Degree. (R. 4-5).

On July 16, 2012 Respondent appeared in the United States District Court for the Southern District of Boerum for a pre-trial motion hearing. (R. 7). Respondent moved to introduce an affidavit from former Canadian Snowman Team member, Miranda Morris, stating that in the previous year, while a member of the Canadian team, she (Morris) purchased a different performance-enhancing drug from another former Canadian team member, Casey Short. (R. 10-11). Respondent contended that this evidence was highly exculpatory for her because at the time of the events in question, Ms. Short was a member on the U.S. Snowman

Team, and therefore Ms. Short was more likely than she to have been the "partner" involved in the drug scheme with Defendant Lane. (R. 10-11). Respondent also argued that exclusion of Ms. Morris' testimony, as mildly relevant and exculpatory as it was, would violate her constitutional right to present a complete defense. (R. 14). Petitioner introduced its own motion to enter into evidence, against both Defendants, the January 16, 2012 email between Defendant Lane and Mr. Billings in which Defendant Lane mentions her "partner." (R. 15-16).

On July 18, 2012, the District Court Judge issued his decision on the pre-trial motions submitted by each party. The District Court approved the admission of Ms. Morris' testimony for third-party propensity purposes and found Defendant Lane's email inadmissible. (R. 21-22). Upon appeal to the United States Court of Appeals for the Fourteenth Circuit, the Boerum District Court rulings were affirmed. (R. 31). The United States of America now appeals.

SUMMARY OF THE ARGUMENT

The first question before this Court requires little more than a straightforward application of the text of the Federal Rules of Evidence. Rule 404(b) prohibits the introduction, by any party, of prior bad-acts by an individual in order to show that individual's propensity to commit similar bad-acts in the future. The Fourteenth Circuit and District Court below erred by allowing the introduction of "reverse 404(b) evidence" for propensity purposes. "Reverse 404(b) evidence" is evidence of bad acts committed by a third party to show that the third-party, rather than the defendant, had the propensity to commit the charged offense(s). Admitting "reverse 404(b) evidence" for propensity purposes finds no support in the text or purpose of Rule 404(b) which prohibits propensity evidence about any "person" in order to show conformity therewith.

The second question effectively asks this Court to establish an unprecedented rule that criminal defendants are immune from the Rules of Evidence when introducing evidence.

Respondent has asked this Court to declare that when a defendant is prevented from introducing evidence by an established rule of evidence, a constitutional violation has occurred based on the theory that such an exclusion deprives a defendant of the opportunity to present a complete defense. However, the right to present a complete defense is not unbounded and does not entitle a defendant to introduce whatever evidence the defendant pleases. Rather, the right is limited and violated only when the unfavorable ruling is arbitrary, disproportionate, and against a weighty interest of the accused. The ruling must furthermore have excluded evidence central to the defendant's claim of innocence. The exclusion of "reverse 404(b) evidence" is directly supported by the language of Rule 404(b), exclusion results in a rule on propensity evidence which is uniform on all parties to a case, and the right asserted by Respondent does not rise to the level of interests previously found by this Court to be sufficiently strong to trigger constitutional protection. Even then, the proffered evidence is not central to Respondent's claim of innocence.

Third, this Court is presented with the question of whether to overrule *Williamson v. United States*, 512 U.S. 594 (1994), and, if so, what standard should replace it. *Williamson*'s per se bar on statements collateral to a declaration against penal interest admittedly functions to keep out some unreliable statements. However, its indiscriminate treatment of contextual statements also functions to bar statements which have plentiful indicia of reliability. This Court should overrule *Williamson* and replace it with a flexible standard modeled after Michigan's application of 404(b) which utilizes a totality of the circumstances approach to assess whether the declarant had any motive to curry favor or otherwise obfuscate their role during the conversation. If the circumstances of the declaration pass Michigan's test, the entire statement should be admitted. If the circumstances fail Michigan's test, only those statements which directly inculpate the defendant's interests ought to be admitted.

The final question calls on this Court to affirm what it has repeatedly held over the last decade– the Confrontation Clause is limited to testimonial statements. This Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006) establish that only the introduction of statements "testimonial" in nature trigger Confrontation Clause protections. *Bruton v. United States*, 391 U.S. 123 (1968) found a Confrontation Clause violation present when a statement of a non-testifying co-defendant was admitted against the defendant. However, as the circuit courts have unanimously held, *Crawford* and *Davis* narrowed the application of *Bruton* solely to testimonial statements. Since the Confrontation Clause has been so narrowed, if *Bruton* remains as a viable principle, it is contained within either the Due Process Clause of the Fifth and Fourteenth Amendments or Federal Rule of Evidence 403.

ARGUMENT

I. THE FOURTEENTH CIRCUIT'S OPINION SHOULD BE REVERSED BECAUSE, AS EVIDENCED BY THE TEXT OF THE RULE, F.R.E. 404(b) PROHIBITS THE USE OF PROPENSITY EVIDENCE AGAINST ANY "PERSON."

The ruling of the Fourteenth Circuit Court of Appeals that F.R.E. 404(b)'s prohibition on propensity evidence does not apply to evidence of a third-party's propensity should be reversed. First, the opinion of the Fourteenth Circuit is not supported by the text of F.R.E. 404(b). Second, evidence of a third-party's propensity is not admissible for a "proper purpose" under Rule 404(b) and consequently should be excluded. Current decisions, including *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991), support a finding that the third-party propensity evidence offered by Respondent is inadmissible under 404(b).

A. THE TEXT OF F.R.E. 404(b) MAKES CLEAR THAT THE PROHIBITION ON EVIDENCE INTENDED STRICTLY FOR PROPENSITY PURPOSES EXTENDS BEYOND "THE ACCUSED" AND APPLIES TO ANY "PERSON."

Congress made clear it intended to extend 404(b)'s bar on the use of propensity evidence to more than just "the accused," as it had been at common law, by purposefully using the word "person" in the pertinent part of the Rule. The specific issue now before the Court pertains to the admissibility of "reverse 404(b) evidence." "Under what has come to be known as 'reverse 404(b) evidence,' a defendant can introduce evidence of someone else's conduct if it tends to negate the defendant's guilt." *United States v. Della Rose*, 403 F.3d 891, 901 (7th Cir. 2005) (citing *United States v. Wilson*, 307 F.3d 596, 601 (7th Cir. 2002)).

Respondent seeks to introduce "reverse 404(b) evidence" in the form of an affidavit written by a former Canadian Snowman Team member, Miranda Morris. The evidence is classified as "reverse 404(b)" because it is being provided by a defendant as evidence of a third party's prior wrongdoing to show that it is likely the third-party acted in the same manner as before, and therefore, it is the third-party that is likely responsible for the crimes with which Respondent is charged. Third-party propensity evidence is expressly prohibited by F.R.E. 404(b).

This Court has stressed, "In interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means what it says." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Federal Rule of Evidence 404(b) states: "Evidence of a crime, wrong, or other act is not admissible to prove *a person's* character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1) (emphasis added).

The text of the Rule mandates that Respondent's evidence be excluded. The Rule says evidence is not permissible to prove "a person's" character. Rule 404(b) does not say "a defendant's" or "an accused's." There is not an exemption that voids the command of the Rule if

the evidence is offered to exculpate the defendant. Rule 404(b) was drafted in such a way as to extend the exclusion of propensity evidence to cover all individuals.

The Ninth Circuit agreed. "As a whole, the rules on character evidence use explicit language in defining to whom they refer." *United States v. McCourt*, 925 F.2d 1229, 1231 (9th Cir. 1991). Analyzing the drafting process of the Federal Rules of Evidence, the Ninth Circuit pointed out that in other sub-sections of F.R.E. 404, such as F.R.E. 404(a)(1), F.R.E. 404(a)(2), and F.R.E. 404(a)(3), Congress limited the applicability of those sections to an "accused," a "victim," and a "witness," respectively. *Id.* at 1232. The Court concluded that Congress "knew how to delineate subsets of 'persons' when it wanted to, and that it intended 'a person' and 'an accused' to have different meanings when the Rules speak of one rather than the other." *Id.*

That Congress explicitly exempted only the defendant in other sections and left all "persons" subject to 404(b) necessitates that the Court acknowledge the legislature's intentional distinction. "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Nat'l. Fed'n. of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2583 (2012).

This Court should resist the urge to look beyond the words chosen by Congress and faithfully apply the text of the Rule promulgated by the legislature. "If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

B. ADMITTING EVIDENCE OF A THIRD-PARTY'S CRIMINAL PROPENSITY IS NOT A PROPER PURPOSE UNDER RULE 404(b) AND

CONSEQUENTLY THE AFFADAVIT OF MS. MORRIS SHOULD HAVE BEEN EXCLUDED.

The District Court relied heavily on *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991), in coming to the determination that F.R.E. 404(b) did not apply to "reverse 404(b) evidence." (R. 21). However, the District Court misapplied *Stevens* and both lower courts misapplied and misinterpreted the text and purpose of Rule 404(b).

Many circuits, including the Third Circuit, have implemented a standard for admitting "reverse 404(b) evidence" that requires not only that the evidence pass a F.R.E. 403 balancing test, but also that the evidence be introduced for a proper, non-propensity, purpose. Proper purposes are listed in the rule and include "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2). "To be admissible under Rule 404(b), other acts evidence must be offered for a proper purpose, *i.e.*, a purpose other than showing that an individual has a propensity or disposition for certain activity." *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 520 (3d Cir. 2003).

Even then, "Proponents of Rule 404(b) evidence must do more than conjure up a proper purpose– they must also establish a chain of inferences no link of which is based on a propensity inference." *United States v. Smith*, 725 F.3d 340, 345 (3d Cir. 2013). *See also*, *United States v. Echeverri*, 854 F.2d 638, 644 (3d Cir. 1988) ("In order to admit evidence under Rule 404(b), a court must be able to articulate a way in which the tendered evidence logically tends to establish or refute a material fact in issue, and that chain of logic must include no link involving an inference that a bad person is disposed to do bad acts."). Offering "reverse 404(b) evidence" to prove third-party *propensity* does not constitute a proper purpose and is inadmissible regardless of the results of the F.R.E. 403 balancing test.

In deciding *Stevens*, the Third Circuit Court of Appeals led the way towards a more unified approach. In *Stevens*, the Court remanded the case for a new trial after finding Defendant's "reverse 404(b) evidence" was improperly excluded. 935 F.2d at 1404-05. The Court acknowledged that although there may not be prejudice against a defendant when evidence is offered against a third party, the evidence must still be relevant and have a probative value that outweighs F.R.E. 403 considerations. *Id*. at 1384. In *Stevens*, the Third Circuit found that the evidence the defendant wished to introduce (evidence that a short time after a robbery/sexual assault he was charged with was committed, another very similar attack occurred nearby and the victim of that attack did not identify Stevens as his attacker) met the relevancy requirement and that the probative value substantially outweighed the F.R.E. 403 considerations. *Id*.

While the Third Circuit's approach in *Stevens* became an often employed test for determining the admission of "reverse 404(b) evidence," confusion remained with regard to the *Stevens*' effect on the admissibility of "reverse 404(b) evidence" offered purely for *propensity* purposes. (R. 21). However, in 2006 the Third Circuit clarified *Stevens* in *Williams*, which held, "We…affirm that the prohibition against the introduction of bad acts evidence to show *propensity* applies regardless of whether the evidence is offered against the defendant or a third party." *United States v*. *Williams*, 458 F.3d 312, 317 (3d Cir. 2006) (emphasis added).

In *Williams*, the defendant sought to introduce "reverse 404(b) evidence" for the sole purpose of showing that a third party, and not Williams, had the propensity to be the individual responsible for a gun found in the defendant's room. Williams contended that, based on *Stevens*, "reverse 404(b) evidence" was admissible, for whatever reason, as long as the probative value was not substantially outweighed by F.R.E. 403 concerns. *Id*. at 316. The Court dismissed Williams' reading of *Stevens*, reasoning, "Williams misreads *Stevens*. This Court has never held

that Rule 404(b)'s prohibition against propensity evidence is inapplicable where the evidence is offered by the defendant." *Id*. at 317. The Court continued, "Rather than restricting itself to barring evidence that tends to prove 'the character of the accused' to show conformity therewith, Rule 404(b) bars evidence that tends to prove the character of any 'person' to show conformity therewith." *Id*. The Third Circuit further distinguished *Stevens* from *Williams*, explaining, "In *Stevens*, it was indisputable that the evidence was being offered to show identity." *Id*. The *Williams* Court concluded the opinion by clarifying that this holding was not to "narrow or restrict the scope of our holding in *Stevens*," because "*Stevens* did not even discuss propensity evidence." *Id*. at 321.

Based on this more enlightened reading of *Stevens*, informed by the holding of *Williams*, the District Court's findings and rationale as applied to the facts of this case are fundamentally flawed and can no longer be relied upon, as they were based on an incorrect application of *Stevens*. Furthermore, both the District Court and Fourteenth Circuit misapplied Rule 404(b) in declining to apply the rule to third-party propensity evidence. *See*, *United States v*. *Lucas*, 357 F.3d 599, 605-07 (6th Cir. 2004) (holding that "the 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 any crime."); *United States v*. *Puckett*, 692 F.2d 663, 671 (10th Cir. 1982) (Rejecting the argument that "404(b) was not intended to apply to situations in which a defendant wishes to introduce evidence of wrongdoing by another to establish his own innocence" by holding, "We are not inclined to interpret the rule so narrowly.").

Respondent seeks to introduce the testimony of Ms. Morris alleging that nearly a year prior to the date in question, Ms. Morris, then a member of the Canadian Snowman Team, purchased a different performance-enhancing drug from another member of the Canadian

Snowman Team, Ms. Short, who is now a member of the U.S. Women's Snowman Team. Respondent has stipulated that she seeks to introduce this evidence only for propensity purposes; to show that Ms. Short is more likely to have been the "partner" engaging in the drug scheme with Defendant Lane because Short previously sold controlled substances in Canada. (R. 12). Under 404(b), explained by *Williams*, *Lucas*, and *Puckett*, the evidence is inadmissible for propensity purposes. It therefore is barred by F.R.E. 404(b).

C. THE RATIONALE UNDERLYING THE PROHBITION OF PROPENSITY EVIDENCE IN 404(b) DOES NOT CHANGE WHEN THE EVIDENCE PROFFERED IS OF A THIRD-PARTY'S PROPENSITY.

Even though Rule 404(b) is phrased in a manner prohibiting the introduction of any "person's" propensity, some "circuit courts addressing the issue hold that the admissibility of reverse 404(b) evidence depends on a 'straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues.'" *United States v. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005) (quoting *Stevens*, 935 F.2d at 1404-05). *See also*, *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 583 (1st Cir. 1987) ("Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant."); *United States v. Krezdorn*, 639 F.2d 1327, 1333 (5th Cir. 1981) ("When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable."); *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983) ("Rule 404(b) does not specifically apply to exclude this evidence because it involves an extraneous offense committed by someone other than the defendant.").

However, Circuits allowing "reverse 404(b) evidence" are not only directly contravening the language of the Rule, they are using a rationale directly in conflict with the Rule's purpose.

That third-party propensity evidence has probative value without prejudice to the defendant is immaterial. The Sixth Circuit explained:

> However, in assessing the probative value of such evidence, we must also recall that the Advisory Committee Notes following Rule 401 explain that rules such as Rule 404 and those that follow it are meant to prohibit certain types of evidence that are otherwise clearly "relevant evidence," but that nevertheless create more prejudice and confusion than is justified by their probative value. In other words, we affirm that prior bad acts are generally not considered proof of *any* person's likelihood to commit bad acts in the future and that such evidence should demonstrate something more than propensity.

Lucas, 357 F.3d at 605 (citing Federal Rule of Evidence 401).

Circuits allowing third-party propensity evidence are correct that admission does not carry with it the danger of prejudicing the defendant. However, as the Sixth Circuit noted in *Lucas*, the underlying rationale behind rules such as 404(b) was a *categorical* prohibition on certain *types* of evidence. The evidence is undoubtedly probative; however the drawbacks of allowing propensity evidence, in any form, outweigh the benefits of admission.

Consider, for example, a hypothetical situation of a defendant charged with larceny of a child's bicycle. Further suppose the defendant has numerous prior convictions for larceny of children's bicycles. If the defendant exercises his or her right Fifth Amendment to remain silent and not testify, not only will the defendant not be subject to questioning, but his or her prior convictions will not come in (at least for propensity purposes.) However, allowing "reverse 404(b) evidence," for propensity purposes, would allow the defendant to point the finger at any other individual with a record of stealing children's bicycles in the area. The admission of propensity evidence causes substantial confusion, it is unreliable, and its probative value, though present, is therefore outweighed by other concerns. It was these same concerns that led to a

categorical prohibition in the Rule rather than a prohibition on propensity evidence in certain circumstances. The Fourteenth Circuit's holding to the contrary should be reversed.

II. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT BECAUSE THE PROPER EXCLUSION OF PROPENSITY EVIDENCE UNDER F.R.E. 404(b) WAS NOT "ARBITRARY OR DISPROPORTIONATE," DID NOT INFRINGE UPON A "WEIGHTY INTEREST OF THE ACCUSED," AND THEREFORE THE EXCLUSION DID NOT RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION OF A DEFENDANT'S RIGHT TO PRESENT A COMPLETE DEFENSE UNDER *CHAMBERS v. MISSISSIPPI*.

The Court's opinion in *Chambers* acknowledged a constitutional right to present a complete defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973). However, Respondent has asked this Court for an unprecedented expansion of *Chambers* which would effectively eviscerate the rules of evidence as they apply to criminal defendants.

Over the last four decades, this Court has seldom invoked *Chambers*. *Chambers* has been used by the Court to rectify only the most egregious deprivations of due process and the Court has established a rigid framework for when *Chambers* relief is appropriate. Using that standard, a constitutional violation did not occur here because Respondent's evidence was properly excluded, the exclusion was not "arbitrary or disproportionate," the exclusion did not infringe upon a "weighty interest of the accused," and the evidence excluded was not central to Respondent's claim of innocence.

A. *CHAMBERS* WAS INTENDED TO BE APPLIED SPARINGLY IN INSTANCES OF EGREGIOUS DEPRIVATIONS OF DUE PROCESS, NOT AS A "GET OUT OF JAIL FREE CARD" FOR DEFENDANTS AFTER AN UNFRIENDLY EVIDENTIARY RULING.

Chambers centered on whether the exclusion of "critical evidence" denied Mr. Chambers "a trial in accord with traditional and fundamental standards of due process." *Id*. at 302. The defendant, Leon Chambers, was tried and convicted of murdering a policeman. *Id*. at 285. Not long after Chambers was arrested, another man, McDonald, admitted to committing the murder.

McDonald made a sworn confession to that effect to Chambers' attorney. *Id*. at 287. A month later, at the preliminary hearing, McDonald repudiated his sworn confession. The trial court accepted the repudiation without any further investigation into McDonald's possible involvement. *Id*. at 288. At trial, Chambers attempted to introduce the testimony of three of McDonald's friends to whom McDonald had confessed. Chambers also sought to cross-examine McDonald as an adverse witness at trial. *Id*. at 290. Due to the trial court's strict application of two Mississippi evidentiary rules, Chambers was prevented from offering any of this exculpatory evidence. *Id*.

In ruling that Chambers had been denied due process of law in violation of the 14th Amendment, this Court explained, "the 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," and "the rights to confront and cross-examine witnesses and to call witnesses on one's own behalf have long been recognized as essential to due process." *Id*. at 294. The Court found both of those requirements absent in Chambers' trial.

The first concern centered on Mississippi's outdated "voucher rule," which prevented defendants from cross-examining witnesses they called to the stand. The second concern was the trial court's error in barring the testimony of Chambers' witnesses by applying a strict hearsay exclusion without contemplating the applicability of hearsay exceptions. *Id*. at 295-98. The Court did state that, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id*. at 295. However, the Court found that Mississippi had not established its legitimate interest in maintaining the rule, noting that Mississippi had done nothing to defend its rule or explain its rationale. *Id*. at 297.

Although the Court felt action was necessary to rectify the injustice present in Chambers' trial, the intention was not to create new law or undermine the States' ability to establish and implement their own evidentiary rules and procedures. *Id*. at 302. To limit the effect of the ruling, the Court stated, "We hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." *Id*. *Chambers* was intended to be a narrow remedy to fix only the most egregious violations of due process.

The Second Circuit, for example, has taken a very narrow approach to applying *Chambers*. It invokes *Chambers* only in cases that bear an extreme *factual* similarity to *Chambers* in that a witness on the stand at trial had previously confessed to the crime and then retracted that former statement. *See*, *e.g*., *Welcome v*. *Vincent*, 549 F.2d 853, 858 (2d Cir. 1977) ("Our holding is narrowly confined to rare situations of this sort, where another person, present on the witness stand, has previously confessed that he, rather than the defendant on trial, has perpetrated the crime."); *Grochulski v*. *Henderson*, 637 F.2d 50, 55 (2d Cir. 1980) (holding that Defendant did not suffer a constitutional violation under *Chambers* because *Chambers* is limited to situations "in which a witness admitted in the presence of the jury that he had previously made a retracted confessional.").

B. EXCLUSION OF "REVERSE 404(b) EVIDENCE" DOES NOT VIOLATE *CHAMBERS* BECAUSE THE RULE IS NOT ARBITRARY OR DISPROPORTIONATE TO ITS INTENDED PURPOSE AND THE RULE DOES NOT INFRINGE ON A "WEIGHTY INTEREST" OF THE ACCUSED.

A workable and sustainable *Chambers* standard emerged with help from *United States v*. *Scheffer*, 523 U.S. 303 (1998). There, the Court stated, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," and "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." *Id*. at 308 (quoting *Rock*

v. *Arkansas*, 483 U.S. 44, 56 (1987)). The "arbitrary" and "disproportionate" language was drawn from the Court's decision in *Rock*. *Scheffer* clarified the standard when it identified the process for determining whether a rule was in fact "arbitrary or disproportionate." *Scheffer* stated, "We have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id*. at 308.

This Court applied the *Chambers* standard in *Holmes*, a dispute with very similar facts to the *Chambers* case. *Holmes v*. *South Carolina*, 547 U.S. 319 (2006). In *Holmes*, the defendant was charged and convicted of murder after allegedly robbing, brutally beating, and raping an elderly woman who fell into a coma and died several weeks later. As in *Chambers*, a third party admitted to others that he committed the crimes with which the defendant was charged. *Id*. at 508. At trial, Holmes was prevented from rebutting the validity of forensic evidence offered against him, and from offering his own evidence of the third party's confessions. *Id*. This Court found the South Carolina rule to be arbitrary and disproportionate as it prevented the defendant from presenting evidence that, "if believed, squarely proved that [the third party], not [defendant], was the perpetrator." *Id*. at 513. The Court noted that South Carolina had not identified any legitimate end to which the rule served. *Id*. Still, the Court reaffirmed the earlier proclamation in *Scheffer* that federal and state lawmakers have broad authority under the Constitution to make rules that exclude evidence from criminal trials. *Id*. at 324 (citing *Scheffer*, 523 U.S. at 308). The *Holmes* Court also opined that while the Constitution does not permit defense evidence to be excluded under rules that are disproportionate to the legitimate purpose they serve, or in fact serve no legitimate purpose, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors, such as…confusion on the issues or potential to mislead the jury." *Id*. at 327 (citing F.R.E. 403).

As for what qualifies as a "weighty interest," the *Scheffer* Court identified three cornerstone cases in which the defendant was found to have been denied the right to present a complete defense: *Rock*, *Washington*, and *Chambers*. *Id*. (citing *Rock*, 483 U.S. 44 (1987) (finding the state's rule restricting hypnotically refreshed testimony infringed upon a weighty interest by depriving Defendant of her opportunity to testify in her own defense); *Washington v. Texas*, 388 U.S. 14 (1967) (finding a State's prohibition on the admissibility of co-defendant testimony arbitrarily interfered with the defendant's right to call witnesses who are physically and mentally capable of testifying); *Chambers*, 410 U.S. 284 (1973) (finding particular state evidentiary rules that prohibit defendant's ability to cross examine his own witness, or call witnesses in his defense are arbitrary because they heavily restrict important rights of the defendant and no explanation or reasoning is offered by the state)).

Applying the standard from *Scheffer*, along with the additional support from *Holmes*, to the case at hand, makes clear that exclusion of Respondent's evidence will not lead to a constitutional violation. The exclusionary rule relied upon in this case, that of prohibiting the introduction of evidence of a third party's propensity, is neither arbitrary nor disproportionate to the purpose it serves, and there has been no infringement upon any recognized "weighty interest." *See, e.g.*, *Wynne v. Renico*, 606 F.3d 867, 870-71 (6th Cir. 2010) (holding that the prohibition on third-party propensity evidence was not arbitrary or disproportionate); *State v. Donald*, _ P.3d _; 2013 WL 6410340 *6 (Wash. Ct. App. 2013) (Rule 404(b)'s "prohibition on the admissibility of third party propensity evidence is neither arbitrary nor unreasonably related or disproportionate to the ends it is designed to serve.") *Cf. Harding v. Sternes*, 380 F.3d 1034, 1042 (7th Cir. 2004) (Rule 404(b) "does not violate this principle"). Rather, prohibiting the use of "reverse 404(b) evidence" for propensity purposes would reduce arbitrariness because the

prohibition would be applied uniformly. No individual's character could be impugned by criminal propensity evidence.

Respondent has made an unprecedented request and asked this Court to ignore the applicability of a governing evidentiary rule. Respondent seeks to introduce evidence that, nearly a year prior to the time in question, a third party sold a different, albeit similar, drug, in a different county, to different people. By excluding this evidence, Respondent will not be prevented from testifying on her own behalf or from presenting competent witnesses to testify on her behalf, thus not meeting either of the previously established "weighty interests" identified by this Court. Respondent would simply be prevented from offering a particular type of evidence that is barred by a controlling evidentiary rule. This is the same exclusion that has applied to every party before a court in the United States since the Rule's enactment in 1975.

Respondent identifies no "weighty interest" aside from the underlying right to present a complete defense. However, that interest is not unique to 404(b) and would imply the existence of an unconstrained "weighty interest" mandating that the defendant is immune from any rule which impairs his or her ability to present a defense exactly how they choose. This Court has not and should not make the unprecedented finding that the Due Process Clause insulates criminal defendants from the Rules of Evidence governing admissibility.

The right to present a complete defense in *Chambers* certainly did not create such an all-encompassing right. The Court stated directly in *Scheffer* that *Chambers* did "not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence," 523 U.S. at 316. Such an unprecedented rule would eviscerate rules of evidence specifically constraining the type of evidence a defendant may offer such as Federal Rule of Evidence 412. This Court should stay true to its holding in *Taylor* that,

"The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

C. EVEN IF THE RULE WAS ARBITRARY OR DISPROPORTIONATE, RESPONDENT'S 404(b) EVIDENCE DOES NOT QUALIFY FOR *CHAMBERS* RELIEF BECAUSE IT IS NOT CENTRAL TO RESPONDENT'S CLAIM OF INNOCENCE.

The fact that Morris' statement is the only evidence Respondent is able to muster is immaterial to the *Chambers* analysis. Rather, it is only when the proffered evidence is "central to the defendant's claim of innocence," the evidentiary rule barring the evidence has no "valid state justification," and exclusion of the evidence would "deprive[] a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing'" that the right to present a complete defense has been violated. *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)).

The evidence proffered is not central to Respondent's claim of innocence. It seeks only to show that a third party, participating in the same sport as Respondent, previously sold banned substances. The evidence is not central to Respondent's defense because, even if the proffered evidence is believed by a jury, it does not prove the innocence of Respondent. *Cf. United States v. Ogden*, 685 F.3d 600, 605 (6th Cir. 2012) (Holding inadmissible, against a *Chambers*/*Crane* challenge, evidence that a child also sent explicit images to other adult men because "chat-log evidence that the victim sent images to other men would not impeach the victim's testimony as to this specific incident.").

In accordance with the standard from *Scheffer*, and guidance from *Crane*, the Court should find there will be no violation of Respondent's right to present a complete defense if evidence of a third party's prior criminal history is properly excluded under Rule 404(b).

III. *WILLIAMSON*'S STANDARD FOR DECLARATIONS AGAINST PENAL INTEREST UNDER F.R.E. 804(b)(3) SHOULD BE OVERRULED AND REPLACED WITH A "TOTALITY OF THE CIRCUMSTANCES" TEST MODELED ON MICHIGAN'S APPLICATION OF M.R.E. 804(b)(3).

Federal Rule of Evidence Rule 804(b)(3) provides an exception to the hearsay rule for a statement that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Rule 804(b)(3) "is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States*, 512 U.S. 594, 599 (1994).

However, the Supreme Court in *Williamson* limited the scope of the word "statement" for 804(b)(3) purposes. The Court held that the Rule "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. The Court reasoned, "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One 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.

A. DISPENSING WITH *WILLIAMSON*'S PER SE BAR ON CONTEXTUAL STATEMENTS WITHIN A SELF-INCULPATORY NARRATIVE IN FAVOR OF A TOTALITY OF THE CIRCUMSTANCES ANALYSIS ALLOWS FOR A MORE ACCURATE ASSESSMENT OF THE STATEMENT'S RELIABILITY.

Prior to *Williamson*, the Court explained that, "The arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate

the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Lee v. Illlinois*, 476 U.S. 530 (1986). However, decontextualizing a declaration against penal interest leads to inconsistent results often at odds with the purpose of hearsay exceptions of ensuring reliability. *See*, *e.g.*, *United States v. Farhane*, 634 F.3d 127, 171 (2d Cir. 2011) (Raggi, J., concurring in part) ("All hearsay exceptions are rooted in one or more conditions thought to ensure sufficient reliability to permit a factfinder to forego the law's preferred means for testing evidence: cross-examination."); *United States v. Orm Hieng*, 679 F.3d 1131, 1142 (9th Cir. 2012) ("Reliability is the touchstone of all the hearsay exceptions."); *People v. LaLone*, 437 N.W.2d 611, 615 (Mich. 1989) ("The purpose of hearsay exceptions is to permit the introduction of such statements where they possess a sufficient inherent degree of reliability.").

While the *Williamson* and *Lee* Courts were certainly correct that in the context of a confession to police that statements collateral to a declaration against penal interest which shift blame are of questionable reliability, the Court's holding bars the collateral statements even if made to a trusted confidant of the declarant.

The rationale present for excluding the neutral or exculpatory statements in the context of a statement to law enforcement, that of self-interest in reducing culpability, is not present when the declarant is speaking with someone whom they believe will not disclose the contents of the conversation. *See, e.g.*, *United States v. Hamilton*, 19 F.3d 350, 357 (7th Cir. 1994) (Upholding admission of a confession under 804(b)(3) when made to cellmate because it was "not a case in which [declarant] made his statements to gain favor with law enforcement officials; rather, he made them to a cellmate with whom he was on friendly terms."); *Walter v. State*, 267 S.W.3d 883, 898 (Tx. Crim. App. 2008) ("Statements to friends, loved ones, or family members

normally do not raise the same trustworthiness concerns as those made to investigating officers because there the declarant has an obvious motive to minimize his own role in a crime and shift the blame to others."); *Cf. Anthony v. DeWitt*, 295 F.3d 554, 564 (6th Cir. 2002) ("Such statements made to a family member or perceived ally, in confidence, have previously been deemed sufficiently trustworthy.").

B. *WILLIAMSON*'S PER SE BAR ON NON-SELF-INCULPATORY STATEMENTS WITHIN SELF-INCULPATORY NARRATIVES IMPROPERLY SHIFTED THE FOCUS AWAY FROM THE CONTEXTUAL RELIABILITY OF THE DECLARATION.

The 804(b)(3) test called for in *Williamson*, that of parsing out and admitting only those phrases which are themselves self-inculpatory and barring the remainder of the narrative, has had the practical effect of depriving even the admissible statements of needed context. Simply because an inculpating statement is made, it cannot be automatically assumed that all preceding and following statements are inherently designed to lessen the "impact" of the inculpating portion. Rather, whether the surrounding statements are reliable depends on the circumstances.

In declining to adopt the *Williamson* inculpatory/collateral test, the Colorado Supreme Court explained, "the surgical precision called for by *Williamson* is highly artificial and nearly impossible to apply." *People v. Newton*, 966 P.2d 563, 578 (Colo. 1998). The Colorado Court reasoned that "severing collaterally neutral statements from each precise self-inculpatory remark deprives the jury of important context surrounding that self-inculpatory remark." *Id*.

The Supreme Court of Connecticut reached a similar conclusion to that of Colorado in deciding that admitting the entire statement provides the fact-finding jury crucial context in assessing reliability. "Under our evidentiary law, 'where the disserving parts of a statement are intertwined with self-serving parts, it is more prudential to admit the entire statement and let the

trier of fact assess its evidentiary quality in the complete context.'" *State v. Rivera*, 844 A.2d 191, 206 n.18 (Conn. 2004) (quoting *State v. Bryant*, 523 A.2d 451, 462 (Conn. 1987)).

The Supreme Court of New Hampshire similarly rejected *Williamson*'s per se approach. The Court refused to bar statements in a declarant's confession which inculpated the defendant, Mr. Kiewert. Kiewert argued that only those statements which directly inculpated the declarant were admissible. The Court responded, "To adopt the defendant's argument that statements implicating the defendant in criminal activity must be excluded at trial is directly contrary to the object of admitting necessary, reliable hearsay evidence." *State v. Kiewert*, 605 A.2d 1031, 1036 (N.H. 1992) (internal citations omitted). *See*, *State v. Sonthikoummane*, 769 A.2d 330, 334 (N.H. 2000) (applying *Kiewert* post-*Williamson*).

Multiple other states have followed suit and rejected *Williamson*'s per se bar on statements collateral to a declaration against penal interest. *See, e.g.*, *State v. Yarbrough*, 767 N.E.2d 216, 228 (Ohio 2002); *State v. Hills*, 957 P.2d 496, 503 (Kan. 1998) (rejecting *Williamson* and holding, "It is simply not permissible to admit an incriminating hearsay statement by the defendant while denying the admission of exculpatory portions of the same hearsay statement through the use of the hearsay rule."); *Chandler v. Com.*, 455 S.E.2d 219 (Va. 1995) (rejecting *Williamson* and allowing for the admission of the statement if sufficient indicia of reliability were present).

C. *WILLIAMSON*'S PER SE BAR SHOULD BE REPLACED WITH A TOTALITY OF THE CIRCUMSTANCES TEST MODELED ON MICHIGAN'S APPLICATION OF M.R.E. 804(b)(3).

In declining to adopt a rigid, *Williamson*-style bar on all attendant statements to a declaration against penal interest, the Michigan Supreme Court cited to the Advisory Committee

Notes on F.R.E. 804(b)(3).[1] "The principle concern of the rule barring the admission of hearsay, together with all the exceptions, is the reliability of the unsworn, out-of-court statement considering its content *and the circumstances in which it was made*." *People v. Poole*, 506 N.W.2d 505, 510 (Mich. 1993), *abrogated on other grounds by*, *People v. Taylor*, 759 N.W.2d 361 (Mich. 2008) (emphasis added).

The Michigan Supreme Court's decision in *Poole* centered on a murder committed by three individuals: Poole, Dhue, and Downer. After attempting to rob the owner of an east Detroit warehouse in the early morning hours, Downer shot and killed the owner in a struggle while the trio was trying to escape. Later that day, Downer told his close friend, Andre Berry, about what had happened. Downer also mentioned the others who were involved in the robbery, including someone that Berry knew.

The Michigan Supreme Court was thereafter faced with the issue of "whether a declarant's [Downer's] non-custodial, out-of-court, unsworn-to statement, voluntarily made at the declarant's initiation to someone other than a law enforcement officer, inculpating the declarant and an accomplice in criminal activity, can be introduced as substantive evidence at trial pursuant to [Michigan Rule of Evidence 804(b)(3)]." *Id*. at 507.

After elaborating on the purpose of the hearsay exceptions– to allow statements with certain inherent indicia of reliability to be admissible at trial to prove the truth of the matter asserted, the Court reasoned that the attendant circumstances of the statement rendered the statement admissible. The Court rejected the "construction of [804(b)(3)] that would allow only those portions of a statement that directly inculpate the defendant to be admitted as substantive evidence." *Id*. at 510. The Court held:

[1] "The only difference between M.R.E. 804(b)(3) and F.R.E. 804(b)(3) is that the Michigan rule refers to a 'reasonable person' while the federal rule refers to a 'reasonable man.'" *People v. Poole*, 506 N.W.2d 505, 510 n.16 (Mich. 1993).

> We conclude, however, that where, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement – including portions that inculpate another – is admissible as substantive evidence at trial pursuant to MRE 804(b)(3).

Id.; *See*, *Taylor*, 759 N.W.2d at 367 (Mich. 2008) ("*Poole* remains valid, however, and provides the applicable standard for determining the admissibility of a codefendant's statement under the hearsay exception for statements against a declarant's penal interest."); *People v*. *Beasley*, 609 N.W.2d 581, 583 (Mich. App. 2000) (applying the *Poole* test post-*Williamson*).

In assessing the reliability of the statement, the *Poole* Court provided the following factors to be considered in a "totality of the circumstances" approach:

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates, that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3), was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.

Poole, 506 N.W.2d at 512.

The Michigan Supreme Court concluded that, in addition to the enumerated factors, "Courts should also consider any other circumstances bearing on the reliability of the statement at issue." *Id*. (citing, *United States v*. *Layton*, 855 F.2d 1388, 1404-06 (9th Cir. 1988), *overruling on other grounds recognized by*, *People of the Territory of Guam v*. *Ignacio*, 10 F.3d 608, 612 n.2 (9th Cir. 1993)). "While the foregoing factors are not exclusive" the *Poole* Court explained, "and the presence or absence of a particular factor is not decisive, the totality of the

circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant." *Id*. at 512.

Adopting Michigan's totality of the circumstances test would be in accord with other states that have declined to adopt *Williamson*'s rigid rule. *See, e.g*., *Walker v*. *State*, 6 P.3d 477, 480 (Nev. 2000) ("reiterating that the statutory test for determining the admissibility of statements against penal interest … is whether the totality of the circumstances indicates the trustworthiness of the statement or corroborates the notion that the statement was not fabricated to exculpate the defendant."); *Skakel v*. *State*, 991 A.2d 414, 436 (Conn. 2010) ("We have instructed the trial courts to consider the totality of the circumstances rather than to view each factor as necessarily conclusive.").

Utilizing a totality of the circumstances test in conjunction with the factors provided by the Michigan Supreme Court in *Poole* will lead to an 804(b)(3) standard which is more faithful to the purpose of hearsay exceptions– reliability. The *Williamson* rationale for excluding statements collateral to a declaration against penal interest is sound in the context of most statements to law enforcement. There, the declarant has numerous incentives to inculpate others and lessen his or her own liability. Because of the incentives inherent in speaking to law enforcement, collateral statements do not have sufficient indicia of reliability warranting admissibility.

However, the incentives that reduce the reliability of statements collateral to a declaration against penal interest made to law enforcement officials are not present if the declarant is speaking to a trusted confidant. Put simply, *Williamson*'s per se bar does exclude collateral statements from situations where there are inadequate assurances of reliability, but it also excludes statements in instances in which plentiful indicia of reliability are present.

If the concern at the core of *Williamson*, that of collateral statements made to curry favor and lessen the negative impact on the declarant, is not present, then there is not a logically tenable reason for excluding them under 804(b)(3). Accordingly, *Williamson* should be overruled and replaced with a totality of the circumstances test modeled after Michigan's approach in *Poole* reaffirmed post-*Williamson* in *Taylor*.

D. BECAUSE LANE'S EMAIL TO BILLINGS WAS UNPROMPTED, SPONTANEOUS, AND NOT MADE TO CURRY FAVOR, THE STATEMENT HAS SUFFICIENT INDICIA OF RELIABILITY AND CONSEQUENTLY SATISFIES *POOLE*'S TOTALITY OF THE CIRCUMSTANCES TEST FOR DECLARATIONS AGAINST PENAL INTEREST.

Ms. Lane's email to Billings meets Michigan's 804(b)(3) test, has sufficient indicia of reliability, and consequently is admissible against Respondent. The mention of a team-mate came within a narrative of events to Billings that was unprompted. While Billings was in a position of authority, Lane was seeking Billings' help in covering up the unlawful activity rather than seeking to downplay her own involvement. Furthermore, Lane and Billings were in a romantic relationship which indicates a strong likelihood of trustworthiness for a declaration against penal interest. *Poole*, 506 N.W.2d at 512. That Lane initiated the conversation on her own volition is critical in that it was her choice to open up to Billings rather than Billings raising the issue and Lane seeking to reduce the appearance of her role. The statement was squarely against Lane's penal interest because it inculpated her in participation in a drug trafficking ring.

The statement meets all four factors in the *Poole* test. The statement was voluntary, made contemporaneously to a colleague and lover, and spontaneously at the initiation of Lane, the declarant. Additionally, the statement does not fall under any of *Poole*'s negative factors. Lane's statement was not made to law enforcement. It did not minimize her role. Rather, Lane sought Billings' assistance so that Lane could continue her course of action. (R. 29). Lane was not seeking to curry favor or avenge herself because she did not differentiate her role from that of

her "partner." Furthermore, Lane did not have an impetus to distort the truth as Billings would only be able to help if given a full picture of the predicament. Consequently, Lane's entire email to Billings passes *Poole*'s 804(b)(3) test and is admissible as a declaration against penal interest.

IV. THE FOURTEENTH CIRCUIT ERRED IN HOLDING THAT THE ADMISSION OF A NONTESTIMONIAL STATEMENT BY A NON-TESTIFYING CO-DEFENDANT IMPLICATING THE DEFENDANT VIOLATED THE CONFRONTATION CLAUSE UNDER *BRUTON* IN THE AFTERMATH OF *CRAWFORD v. WASHINGTON*.

The Sixth Amendment to the United States Constitution provides in relevant part that "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend VI.

In 1968, the United States Supreme Court held in *Bruton* that it was a violation of the Confrontation Clause for a non-testifying co-defendant's statement inculpating the defendant to be admitted against the defendant. *Bruton v. United States*, 391 U.S. 123 (1968).

A. *CRAWFORD* MODIFIES *BRUTON* TO THE EXTENT THAT *BRUTON* NO-LONGER APPLIES TO NONTESTIMONIAL STATEMENTS.

Until 2004, hearsay evidence against a criminal defendant would violate the Confrontation Clause if the statement sought to be admitted lacked sufficient "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by*, *Crawford v. Washington*, 541 U.S. 36 (2004). In 2004, however, *Roberts* was overturned by this Court's decision in *Crawford*. The *Crawford* Court reasoned that *Roberts* "depart[ed] from the historical principles" of the Confrontation Clause by applying a "general reliability exception." 541 U.S. at 60, 62.

Crawford dispensed with the *Roberts* "indicia of reliability" standard for Confrontation Clause violations. In its place, *Crawford* explained that only "testimonial" hearsay directly triggers a Confrontation Clause issue.

> Where 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*. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Id. at 68 (emphasis added).

Two years later, this Court directly addressed the issue of "whether the Confrontation Clause applies only to testimonial hearsay." *Davis v. Washington*, 547 U.S. 813, 823 (2006). This Court held that the Confrontation Clause dealt exclusively with testimonial hearsay. "Only statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. *Id*. at 821.

The effect *Crawford* had on *Bruton* is clear. *Crawford*, as explained in *Davis*, constricted the sphere of the Confrontation Clause solely to testimonial statements. The Sixth Circuit explained, "Because it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements." *United States v. Johnson*, 582 F.3d 320, 326 (6th Cir. 2009).

B. THE CIRCUITS ARE UNANIMOUS THAT *BRUTON* NO LONGER APPLIES TO NONTESTIMONIAL STATEMENTS.

In the aftermath of *Crawford*, Circuits that have addressed the issue have unanimously held that *Bruton*'s scope is now limited to testimonial statements made by a non-testifying co-defendant. The First Circuit reasoned, "It is thus necessary to view *Bruton* through the lens of *Crawford* and *Davis*. The threshold question in every case is whether the challenged statement is

testimonial. If it is not, the Confrontation Clause 'has no application.'" *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010) (quoting *Whorton v. Bockting*, 549 U.S. 406, 420 (2007)). The Second Circuit similarly held that the admission of a nontestimonial statement against a non-testifying co-defendant did not violate the Confrontation Clause because "the Confrontation Clause simply has no application to nontestimonial statements." *United States v. Williams*, 506 F.3d 151, 156 (2d Cir. 2007).

The Third Circuit reached the same conclusion. "Because *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements." *United States v. Berrios*, 676 F.3d 118, 128 (3d Cir. 2012). The Fourth Circuit in *Udeozor* allowed admission of a nontestimonial statement against a non-testifying co-defendant. The Court reasoned, "As *Crawford* and later Supreme Court cases make clear, a statement must be 'testimonial' to be excludable under the Confrontation Clause." *United States v. Udeozor*, 515 F.3d 260, 268 (4th Cir. 2008).

The Sixth Circuit explicitly limited the reach of *Bruton* to testimonial statements. *See, e.g.*, *Johnson*, 582 F.3d at 325-27 (6th Cir. 2009). In rejecting a *Bruton* claim, the Eighth Circuit explained that, in the aftermath of *Crawford*, "It is now clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant." *United States v. Dale*, 614 F.3d 942, 955 (8th Cir. 2010). The Tenth Circuit concurred and cited the First Circuit's opinion with approval. "The '*Bruton* rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements.' Thus, we are obliged to 'view *Bruton* through the lens of *Crawford*' and, in doing so, we consider 'whether the challenged statement is testimonial.'" *United States v. Clark*, 717 F.3d 790, 816 (10th Cir. 2013) (quoting *United States v. Smalls*, 605 F.3d 765, 768 n.2 (10th Cir. 2010); *Figueroa-Cartagena*, 612 F.3d at 85)). The

District of Columbia Circuit reached the same conclusion as the other Circuits. "Appellants do not have a *Bruton* claim because no testimonial statement by [co-defendant] was ever admitted into evidence." *United States v. Wilson*, 605 F.3d 985, 1017 (D.C. Cir. 2010).

The Fifth, Seventh, Ninth, and Eleventh Circuits have yet to directly address the issue.

C. THE FOURTEENTH CIRCUIT'S REASONING FOR SEPARATING *BRUTON* FROM *CRAWFORD* IMPLICATES DUE PROCESS CONCERNS RATHER THAN THE CONFRONTATION CLAUSE.

The Fourteenth Circuit asserted that *Crawford* and *Bruton* dealt with two similar yet constitutionally distinct issues. The lower court asserted "*Crawford* is concerned with the reliability of hearsay (as tested by cross-examination) admitted against an accused, whereas *Bruton* deals with the prejudice a defendant suffers when presented with her non-testifying co-defendant's inculpatory statement." (R. 44).

Crawford narrowed the scope of the Confrontation Clause to testimonial statements. *See*, *e.g.*, *United States v. Feliz*, 467 F.3d 227, 229 (2d Cir. 2006) (reasoning that when evidence is "not testimonial within the meaning of *Crawford*," it "do[es] not come within the ambit of the Confrontation Clause."). The *Crawford* test replaced the *Ohio v. Roberts* "indicia of reliability" standard for assessing Confrontation Clause violations.

The Fourteenth Circuit cited a law review article (R. 45) and a 1987 Supreme Court case for the proposition that, "Having decided *Bruton*, we must face the honest consequences of what it holds." Colin Miller, Avoiding A Confrontation? How Courts Have Erred in Finding That Nontestimonial Hearsay Is Beyond The Scope of the Bruton Doctrine, 77 BROOK. L. REV. 625 (2012) (quoting *Cruz v. New York*, 481 U.S. 186, 192-93 (1987)). However, now that the Court has decided *Crawford* and *Davis*, courts must face the honest consequences of what *they* hold.

In the era of *Roberts*, a testimonial statement with sufficient indicia of reliability could be admitted without triggering the Confrontation Clause right of cross-examination. *Bruton* acted as

a stop-gap. *Bruton* mandated that when the declarant was a co-defendant, and the statement inculpated the defendant, the Confrontation Clause barred its admission against the defendant regardless of the statement's apparent reliability.

However, *Crawford* and *Davis* narrowed the scope of the Confrontation Clause to testimonial statements. *Feliz*, 467 F.3d at 229. Consequently, if a right does exist in a joint trial to bar nontestimonial statements inculpating a defendant if the declarant is a non-testifying co-defendant, it exists within the ambit of the Due Process Clause or F.R.E. 403 rather than the Confrontation Clause. *Cf*. Avoiding A Confrontation 77 BROOK. L. REV. at 662 (If *Crawford* is found to nullify *Bruton*, "courts should still readily find that such nontestimonial codefendant statements violate Federal Rule of Evidence 403.").

The Fourteenth Circuit and Colin Miller were primarily concerned with prejudice– a matter squarely dealt with by F.R.E. 403 along with the Due Process Clause as a constitutional safety valve. It would be entirely consistent with *Crawford* to leave to the states the decision as to whether the admission of a nontestimonial statement against a defendant by a non-testifying co-defendant should be permitted. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Crawford*, 541 U.S. at 68. The Fourteenth Circuit should be reversed because if a right under *Bruton* remains after *Crawford* and *Davis*, the right now resides within the Due Process Clause or Rule 403 rather than the Confrontation Clause.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

19P

STATUTORY APPENDIX A

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTORY APPENDIX B

U.S. Const. amend. XIV

SECTION 1.

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

SECTION 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY APPENDIX C

FED. R. EVID. 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

STATUTORY APPENDIX D

FED. R. EVID. 404

(a) Character Evidence.

(1) *Prohibited Uses*. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case*. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

STATUTORY APPENDIX E

FED. R. EVID. 804

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

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

(1) *Former Testimony*. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death*. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest*. A statement that:

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

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History*. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [*Other Exceptions*.] [Transferred to Rule 807.]

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability*. A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

STATUTORY APPENDIX F

MICH. R. EVID. 804.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant-

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) has a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

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

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Deposition Testimony. Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, "unavailability of a witness" also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(6) Statement by declarant made unavailable by opponent. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(7) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any otherevidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.