No. 12-13

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2013

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 RESPONDENT

QUESTIONS PRESENTED

- I. Whether, under Federal Rule of Evidence 404(b), a criminal defendant may introduce exculpatory evidence of a third party's substantially similar criminal acts where the evidence causes no prejudice to any party to the case and the crimes relate in time and manner?
- II. Whether, under *Chambers v. Mississippi*, Respondent Anastasia Zelasko's constitutional right to a complete defense guarantees her the right to admit exculpatory evidence of a third party's substantially similar criminal acts where she has no other evidence in her defense and exclusion of the evidence furthers no legitimate government interest?
- III. Whether, under Federal Rule of Evidence 804(b)(3) as interpreted by *Williamson v*. *United States*, a criminal defendant may introduce ambiguous statements that do not confess to a crime as statements against interest?
- IV. Whether, under *Bruton v. United States* as it exists after the decision in *Crawford v. Washington*, Respondent Anastasia Zelasko's rights under the Sixth Amendment's Confrontation Clause are violated when her co-defendant's confessions are introduced against her and she is denied an opportunity to cross-examine?

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STATEMENT OF THE CASE

Statement of Facts

This case arises from the wrongful identification of Respondent Anastasia Zelasko ("Zelasko") as a co-conspirator in the distribution of anabolic steroids to the members of the United States women's Snowman team. R. at 1-5. This misidentification resulted in the government charging Zelasko with the murder of U.S. men's team member Hunter Riley ("Riley"). R. at 1-5. All persons involved in this case participated in the Snowman Pentathlon, a rigorous event in the World Winter Games in which team members compete in dog sledding, ice dancing, aerial skiing, rifle shooting, and curling. R. at 1-2.

Casey Short ("Short") was a member of the Canadian women's Snowman team until she transferred to the U.S. team in June of 2011. R. at 8, 24. For most of Short's time on the Canadian team, she kept to herself and did not interact with members of the team. R. at 24. Starting in February 2011, Short's teammate Miranda Morris ("Morris") observed Short meeting with individual teammates after practice. R. at 24. On March 27, 2011, Short approached Morris and offered to sell her a performance-enhancing steroid called "White Lightning." R. at 25, 27. Short told Morris that she had connections with a laboratory, which constructed White Lightning to be undetectable to modern drug tests. R. at 27. On April 4, 2011, Morris purchased twenty doses of White Lightning from Short for \$4,000 Canadian. R. at 26. Shortly after this exchange, Short transferred to the U.S. women's team. R. at 24.

While Zelasko joined the U.S. Snowman team in September 2010, both Zelasko's codefendant, Jessica Lane ("Lane"), and Short joined the team in the summer of 2011. R. at 1, 24-25. Prior to August 2011, the U.S. women's team never ranked higher than sixth place in the Winter World Games. R. at 2. The team's performance markedly improved around the fall of 2011. R. at 2.

Throughout October, November, and December of 2011, men's team member Riley acted as an informant for the Drug Enforcement Agency ("DEA"). R. at 2-3. During that period, Riley approached Lane on three separate occasions to inquire about purchasing an anabolic steroid known in the Snowman Pentathlon community as "ThunderSnow." R. at 2. ThunderSnow is a chemical derivative of White Lightning, the same drug that Short sold to Morris earlier that year. R. at 10-11, 28. Like White Lightning, ThunderSnow is undetectable to modern drug tests. R. at 25, 27. Lane declined Riley's requests each time. R. at 2-3.

On December 10, 2011, women's team coach Peter Billings ("Billings") overheard his girlfriend, Lane, yelling at Zelasko, "Stop bragging to everyone about all the money you're making!" R. at 3. Nine days later, Billings asked Lane whether she was distributing steroids to the team. R. at 3. Lane responded that she was not distributing the drugs. R. at 3. Finally, on January 16, 2012 at 10:57 p.m., Lane sent an email to Billings that read:

Peter,

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

Love, Jessie

R. at 29.

On February 3, 2012, Zelasko was practicing her rifle shooting on a closed shooting range at Remsen National Park. R. at 8. The range was located adjacent to the dogsled course

where the men's team was competing. R. at 8. While practicing her shot, Zelasko accidentally shot Riley on the training grounds, causing his death. R. at 3, 8.

Later that day, the DEA seized \$5,000 cash and two fifty-milligram doses of ThunderSnow from Zelasko's home. R. at 3. On February 4, 2012, the DEA seized 12,500 milligrams of ThunderSnow valued at approximately \$50,000 from the women's team equipment storage room, where all members of the team and the staff had access. R. at 3, 8. The same day, the DEA seized \$10,000 cash and twenty fifty-milligram doses of ThunderSnow from Lane's home. R. at 4. While a search warrant was executed at Short's apartment, nothing was found. R. at 8. A quantity of two fifty-milligram doses of ThunderSnow, like that found in Zelasko's home, is consistent with personal use and not sale. R. at 28. A quantity of 250 fifty-milligram doses of the steroid is consistent with sale and not personal use. R. at 28.

Procedural History

On April 10, 2012, Zelasko was indicted on charges of conspiracy to distribute, distribution, and simple possession of anabolic steroids under 21 U.S.C. §§ 841(a)(1), (b)(1)(E), 844, 846. R. at 4-5. She was also indicted for conspiracy to murder in the first degree and first-degree murder under 18 U.S.C. §§ 371 and 1111(a). R. at 4. According to the indictment, the government's theory of the case is that Zelasko was Lane's co-conspirator in the sale of ThunderSnow and, after Riley threatened to report them, Zelasko intentionally shot and killed Riley on the dogsled course. R. at 1-3.

On July 16, 2012, the Honorable Nicholas Crawford for the United States District Court for the Southern District of Boerum heard oral argument regarding pre-trial evidentiary motions.

R. at 6. Zelasko moved to admit testimony from Miranda Morris about Short's prior sale of a steroid similar to the one at issue because Federal Rule of Evidence 404(b) did not bar the

testimony. R. at 7-8. Because Lane will invoke the Fifth Amendment and will not testify against herself, the government sought to introduce Lane's email to Billings against Zelasko, claiming the email is an exception to hearsay as an admission against penal interest under Federal Rule of Evidence 804(b)(3). R. at 15-16.

On July 18, 2012, the District Court granted Zelasko's motion to admit the Morris testimony and denied the government's motion to admit Lane's email against Zelasko. R. at 20-22. Pursuant to 18 U.S.C. §§ 3731 and 3731-(a), the government filed an interlocutory appeal to the United States Court of Appeals for the Fourteenth Circuit. R. at 30. On February 14, 2013, the Fourteenth Circuit affirmed the decision of the District Court, holding that Federal Rule of Evidence 404(b) does not apply to a defendant's use of evidence to show the criminal propensity of a third party; that a defendant's right to present a full defense encompasses such propensity evidence; that *Williamson* remains binding precedent that bars the admission of statements collateral to declarations against penal interest; and that the *Bruton* doctrine applies to testimonial and nontestimonial evidence. R. at 31. The government filed a petition for certiorari to the United States Supreme Court and this Court granted its petition on October 1, 2013. R. at 55.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit properly admitted evidence of Short's prior sale of substantially similar steroids because Federal Rule of Evidence 404(b) permits evidence of third parties' prior criminal acts when criminal defendants present the evidence. The common law policy behind Rule 404(b) barred evidence of defendants' prior criminal acts to prevent convictions based on defendants' criminal pasts. However, criminal defendants do not suffer any prejudice when they seek to introduce character propensity evidence themselves. Thus, Rule 404(b) does not bar the

Morris testimony because it does not prejudice Zelasko. To the contrary, the evidence bolsters her defense because Short's prior sale of steroids is sufficiently related to the crime at issue here and tends to implicate Short as Lane's co-conspirator. Because the crimes were committed within months of each other, were committed within the same insular winter sports community, and involved drugs that were obscure chemical derivatives of each other, evidence of Short's prior criminal act tends to negate Zelasko's guilt in the distribution of the ThunderSnow and any motive in Riley's death.

Even if this Court finds that Rule 404(b) does not permit admission of the Morris testimony, the Fourteenth Circuit properly admitted the evidence in light of Zelasko's constitutional right to present a complete defense. This Court has steadfastly protected a criminal defendant's fundamental right to a fair trial. Under *Chambers v. Mississippi*, this Court determined that rigid application of evidentiary rules must sometimes bend to the greater interests of justice at stake when a criminal defendant faces trial. When, as here, the only exculpatory evidence available to a criminal defendant is barred by an evidentiary rule, this Court has required the evidence be admitted in congruence with the defendant's right to a fair trial. Because evidence of Short's prior sale of steroids is the only evidence available to exculpate Zelasko, the evidence must be admitted to serve the greater interest of justice. Exclusion of the Morris testimony does not serve any legitimate interest, particularly because the evidence does not prejudice any party to the case and does not waste judicial time or resources.

The Fourteenth Circuit also properly refused to admit the statements in Lane's email under Federal Rule of Evidence 804(b)(3) as the rule does not permit statements that are insufficiently self-inculpatory. In *Williamson v. United States*, this Court concluded that individual statements, as opposed to narratives, must each be self-inculpatory in context to

constitute statements against interest. Here, the statements contained in Lane's email are each insufficiently self-inculpatory to be admitted under the rule as the statements are ambiguous and not clearly incriminating.

Even if this Court finds that Lane's statements in her email qualify as statements against her interest under Rule 804(b)(3), the Fourteenth Circuit properly refused to admit the statements as doing so would violate Zelasko's Sixth Amendment rights. In *Bruton v. United States*, this Court expressly prohibited the admission of a co-defendant's confession against another defendant, absent an opportunity to cross-examine the co-defendant, as such a statement violates the defendant's right under the Confrontation Clause. Under *Bruton*, admitting the statements in Lane's email would violate Zelasko's Sixth Amendment rights as the statements would be admitted against her as confessions. Therefore, this Court should uphold both lower courts' decisions.

ARGUMENT

I. UNDER FEDERAL RULE OF EVIDENCE 404(B), EXCULPATORY EVIDENCE OF SHORT'S PRIOR SALE OF STEROIDS UNDER SUBSTANTIALLY SIMILAR CONDITIONS MUST BE ADMITTED BECAUSE THE BAR ON CHARACTER PROPENSITY WAS DESIGNED TO PREVENT PREJUDICE TO CRIMINAL DEFENDANTS AND NO SUCH PREJUDICE EXISTS WHEN A DEFENDANT SEEKS TO INTRODUCE THE EVIDENCE.

Federal Rule of Evidence 404(b)(1) 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." Based in the common law, the rule was enacted to protect defendants from the prejudicial effect of propensity evidence. *See Old Chief v. United States*, 519 U.S. 172, 182 (1997) ("There is . . . no question that propensity would be an 'improper basis' for conviction." (quoting 1 J. Strong, *McCormick on Evidence* 780 (4th ed. 1992))); *see also United State v. Lucas*, 357 F.3d 599, 611 (6th Cir. 2004) (Rosen, J., concurring)

("The common law rule was that 'the doing of the criminal act, not part of the issue, is not admissible as evidence of the doing of the criminal act charged." (quoting John Henry Wigmore, Wigmore's Code of the Rules of Evidence in Trials at Law 81 (3d ed. 1940)). Courts at common law feared that admission of a defendant's past crimes would lead juries to punish a "bad" person regardless of the strength of the government's evidence against him or her in the present trial. United States v. Krezdorn, 639 F.2d 1327, 1332-33 (5th Cir. 1981). The common law courts believed juries could be misled to find that a defendant more likely committed the present crime because he or she has a "criminal disposition." Id. In barring propensity evidence, the common law sought to protect criminal defendants from juries placing undue weight on prior misdeeds committed under discrete circumstances. Lucas, 357 F.3d at 611-12 (Rosen, J., concurring) (internal citations omitted).

While this Court has upheld a bar on defendant propensity evidence from the prosecution, it has never determined whether the same bar applies to a criminal defendant's introduction of propensity evidence. *See generally Old Chief*, 519 U.S. at 181; *Huddleston v. United States*, 485 U.S. 681, 686 (1988). Courts have applied a separate standard to propensity evidence from criminal defendants, a situation commonly referred to as "reverse 404(b)." *See United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005); *see also United States v. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005); *United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001); *United States v. Stevens*, 935 F.2d 1380, 1384 (3d Cir. 1991). Because the common law policy behind Rule 404(b) focuses on avoiding conviction based on defendant propensity evidence, the policy does not sensibly apply to reverse 404(b) evidence. *See Stevens*, 935 F.2d at 1384 ("When a defendant proffers 'other crimes' evidence under Rule 404(b), there is no possibility of prejudice to the defendant."). Based on the policy behind the prohibition, circuit court application of the

rule, and the screen on unrelated prior criminal acts, Rule 404(b) permits admission of evidence of a third party's prior acts when it is introduced by a criminal defendant.

A. The Fourteenth Circuit Is Aligned With The Majority Of Circuit Courts Of Appeals In Finding That Evidence Of Short's Prior Sale Of Steroids Should Be Admitted Under Rule 404(b) Because The Evidence Does Not Prejudice Any Party In The Case.

Barring evidence from a criminal defendant of a third party's prior acts does not further the policy behind Rule 404(b) because there is no risk of prejudice to a defendant as the common law sought to avoid. *See Krezdorn*, 639 F.2d at 1333 ("When . . . the extrinsic offense was not committed by the defendant, the evidence will not tend to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith."). While a defendant is prejudiced by admission of evidence of her criminal habits, a defendant suffers no such prejudice when she willingly seeks to introduce evidence of a non-party's prior criminal acts. *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984). Moreover, the third party suffers no prejudice because the third party is not on trial. *See, e.g., Montelongo*, 420 F.3d at 1174 (finding no prejudice to a third party who is not facing charges).

The majority of circuit courts have determined that Rule 404(b) does not apply to criminal defendants under these circumstances because admission causes no prejudice to the defendant. *See Montelongo*, 420 F.3d at 1174; *Stevens*, 935 F.2d at 1384; *Aboumoussallem*, 726 F.2d at 911; *United States v. Morano*, 697 F.2d 923, 928 (11th Cir. 1983); *Krezdorn*, 639 F.2d at 1333; *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 580 (1st Cir. 1981). Courts have applied separate standards to evidence presented by prosecutors under Rule 404(b) and reverse 404(b) evidence. Indeed, the majority of circuits merely screen reverse 404(b) evidence to avoid confusing the jury and causing undue prejudice to the opposing party. *See, e.g., Seals*, 419 F.3d at 606; *Montelongo*, 420 F.3d at 1174; *Stevens*, 935 F.2d at 1404. The Second Circuit in *United*

States v. Aboumoussallem justified this standard by noting that the government carries the burden of proof and "the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword." 729 F.2d at 911. "[W]hen a defendant is offering that kind of proof exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility." Stevens, 935 F.2d at 1403 (quoting State v. Garfole, 388 A.2d 587, 591 (N.J. 1978)).

The Fourteenth Circuit properly admitted evidence of Casey Short's prior sale of steroids because the policy behind Rule 404(b) does not warrant exclusion. *See Krezdorn*, 639 F.2d at 1333. While the common law sought to prevent convictions based on a defendant's perceived criminal disposition, Zelasko sought to introduce the evidence herself. *See Stevens*, 935 F.2d at 1384. As a defendant, Zelasko suffers no prejudice in introducing evidence to support her own theory that Short was the co-conspirator implicated in Lane's drug ring. R. at 7-8. Rather, the evidence bolsters her defense. Because 404(b) is grounded in excluding evidence that hurts rather than helps a defendant, the Fourteenth Circuit properly found Short's evidence admissible. R. at 31. Moreover, Short suffers no prejudice as a result of Morris's testimony because Short faces no criminal charges and is not on trial. *See Krezdorn*, 639 F.2d at 1333; *Montelongo*, 420 F.3d at 1174. Rule 404(b) favors admission of Short's prior acts because the policy behind the rule favors admission of exculpatory evidence.

Furthermore, the Fourteenth Circuit is aligned with the majority of circuit courts in finding that Rule 404(b) does not bar evidence of Short's prior wrong acts. *See Montelongo*, 420 F.3d at 1174; *Stevens*, 935 F.2d at 1384; *Aboumoussallem*, 726 F.2d at 911; *Morano*, 697 F.2d at 928; *Krezdorn*, 639 F.2d at 1333; *Gonzalez-Sanchez*, 825 F.2d at 580. Consistent with these

circuit courts, the Fourteenth Circuit properly permitted third party propensity evidence from Zelasko because, like the defendant in Aboumoussallem, Zelasko sought to introduce the propensity evidence as a "shield," while the policy behind Rule 404(b) limits evidence used "when a prosecutor uses such evidence as a sword." 792 F.2d at 911. Contrary to the government's argument that permitting this evidence to come in will result in admission of any propensity evidence, the courts below screened the third party propensity evidence prior to admission. See Montelongo, 420 F.3d at 1174 (admitting third party propensity evidence only when it does not confuse the jury or cause prejudice to the opposing party). Here, evidence of Short's sale of steroids mere months before Zelasko was charged with the crimes at issue would not cause jury confusion because Zelasko's defense of misidentification is a relatively modest defense that juries frequently see in criminal trials. R. at 24. Additionally, admission of this evidence does not prejudice the government because evidence of Short's involvement in the sale of drugs bolsters Zelasko's defense and causes no undue bias against the government's theory of the case. Accordingly, the Fourteenth Circuit properly found that admission of Short's prior criminal act was warranted by the policy behind Rule 404(b).

B. The Fourteenth Circuit Properly Found That Short's Prior Sale Of Steroids Warrants Admission Under Rule 404(b) Because The Crime Is Sufficiently Connected To Indicate Short's Propensity To Distribute Steroids Within The Insular Winter Sporting Community.

Courts permitting evidence of third party propensity merely require that the evidence of the third party's prior criminal act relate to the crime with which the criminal defendant is charged. *See Seals*, 419 F.3d at 606; *Montelongo*, 420 F.3d at 1174; *Reed*, 259 F.3d at 634; *Stevens*, 935 F.2d at 1384. For instance, in *United States v. Montelongo*, the Tenth Circuit found a third party's involvement in a similar crime should be admitted because it tends to negate a defendant's guilt by implicating the third party. 420 F.3d at 1173. In *Montelongo*, the

defendants were driving a third party's truck when they were stopped and found with marijuana. *Id.* at 1174. The Tenth Circuit determined that evidence of two separate drivers found with marijuana while driving the third party's truck only two months prior to the incident was "directly" as opposed to "marginally" relevant to the defendants' charges and therefore garnered admission. *Id.* In contrast, the Seventh Circuit in *United States v. Seals* refused to admit defendants' evidence of a robbery committed thirty-one miles away from the scene of the robbery for which defendants were charged. 419 F.3d at 602. While the robberies were both committed by teams of four or five African American men in costumes, the court determined that the similarities were "generic." *Id.* at 606. Because the culprits wore different costumes, the Seventh Circuit found the crimes were not sufficiently connected to warrant admission. *Id.* Thus, a crime merely committed in a similar manner does not support an inference of third party guilt without direct relation to the crime at issue.

The Fourteenth Circuit properly admitted evidence of Short's prior sale of White Lightning because it was sufficiently connected to the charges against Zelasko. *See Seals*, 419 F.3d at 606; *Montelongo*, 420 F.3d at 1174; *Reed*, 259 F.3d at 634; *Stevens*, 935 F.2d at 1384. Like the third party's involvement in a substantially similar crime only months before the defendants' arrest in *Montelongo*, 420 F.3d at 1174, Short sold White Lightning to Morris merely two months before she transferred to the U.S. women's team. R. at 24. In addition, the marked improvement in the U.S. women's team's athletic performance after Short's transfer implies Short's involvement in the distribution of steroids to her teammates. R. at 2. This, in turn, tends to negate Zelasko's involvement in the drug ring. Furthermore, the similarities between these crimes exceed the "generic" similarities found in *Seals*, where the defendants argued that costumed robberies supported an inference of third party guilt. 419 F.3d at 602.

Here, the similarities are direct and apparent. Zelasko is charged with distributing a chemical derivative of the very drug that Short previously sold. R. at 10-11, 28. Moreover, this unique steroid contains the same undetectable characteristics as Short's White Lightning. R. at 10-11, 28. Finally, Short claimed to have connections with the laboratory that designed White Lightning to be undetectable. R. at 27. This, along with the fact that Short previously sold this drug within the same insular winter sporting community, sufficiently demonstrates Short's connection to Zelasko's charges to warrant admission. R. at 24-27. Unlike the crimes in *Seals*, these crimes relate temporally and substantively. 419 F.3d at 606. Thus, the Fourteenth Circuit properly found the evidence admissible despite the Rule 404(b) bar on propensity evidence.

II. UNDER CHAMBERS V. MISSISSIPPI, EXCULPATORY EVIDENCE OF SHORT'S PRIOR SALE OF STEROIDS UNDER SUBSTANTIALLY SIMILAR CONDITIONS MUST BE ADMITTED IN LIGHT OF ZELASKO'S CONSTITUTIONAL RIGHT TO A COMPLETE DEFENSE BECAUSE SHE HAS NO OTHER EXCULPATORY EVIDENCE AND EXCLUSION OF THE EVIDENCE IS NOT WARRANTED BY ANY LEGITIMATE GOVERNMENTAL INTEREST.

"Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process Clause . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a compete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations omitted). "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). Because a criminal defendant need only plant a reasonable doubt in the jury's mind to warrant acquittal, *United States v. Stevens*, 935 F.2d at 1406, this Court has recognized the importance of admitting a defendant's evidence of a third party's guilt. *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006) (holding the exclusion of defense evidence of a third party's guilt denied defendant his right to a fair trial). When evidentiary rules exclude exculpatory evidence, a defendant's right to a fair trial may be obstructed. *See Chambers*, 410 U.S. at 302.

A. The Fourteenth Circuit Properly Held That Excluding Evidence Of Short's Prior Sale Of Steroids Would Undermine Zelasko's Right To A Fair Trial Because She Has No Other Evidence To Offer In Her Defense.

In *Chambers v. Mississippi*, this Court determined that "where constitutional rights directly affecting the ascertainment of guilt are implicated," evidentiary rules of exclusion "may not be applied mechanistically to defeat the ends of justice." *Id.* Under Mississippi's "voucher rule" of evidence, parties were barred from cross-examining witnesses that they called to the stand. *Id.* at 287. Thus, Chambers was prohibited from cross-examining his own witness who confessed three times to the murder for which Chambers was charged. *Id.* Moreover, Chambers could not address the third party's confession with the witnesses the third party confessed to because the statements were barred as hearsay. *Id.* at 292. As a result of rigid adherence to these evidentiary rules, Chambers was convicted for a crime virtually everyone knew he did not commit. *Id.* at 285. In reversing the decision of the Supreme Court of Mississippi, this Court found that exclusion of such exculpatory evidence violated Chambers's constitutional right to present a complete defense and, thus, his right to a fair trial. *Id.* at 294-95. In so holding, this Court recognized the danger of excluding evidence pursuant to evidentiary rules to the extent an innocent man is punished for crimes he did not commit. *Id.* at 302.

Under *Chambers*, criminal defendants may introduce evidence ordinarily excluded by evidentiary rules when no other exculpatory evidence is available. *Id.* at 302-03. Chambers's constitutional right to a complete defense required admission of evidence normally barred by the voucher and hearsay rules because no other exculpatory evidence was available in his defense. *Id.* ("We conclude that exclusion of this critical evidence . . . denied him a trial in accord with traditional and fundamental standards of due process."). While the Sixth Circuit in *United States v. Lucas* excluded third party propensity evidence and found the exclusion constitutional, the

court acknowledged Lucas had other opportunities to introduce admissible evidence in her defense. 357 F.3d at 606 ("Lucas was able to explore her theory that Presley was in fact the culprit and present it to the jury through Quinney's and Watts's testimony, as well as her own, describing his alleged strange behavior and his alleged access to the car."). Thus, even if exculpatory evidence violates evidentiary rules, it should be accepted unless the defendant has alternative means of defending herself.

Even if this Court finds that Rule 404(b) is a universal bar on character propensity evidence, the Fourteenth Circuit properly admitted Short's prior sale of steroids in light of Zelasko's constitutional right to present a complete defense under *Chambers v. Mississippi*. 410 U.S. at 302. If Rule 404(b) excludes evidence of a third party's propensity, the rule "may not be applied mechanistically to defeat ends of justice." *Id*. As the voucher and hearsay rules combined to prohibit crucial evidence to Chambers's defense, *id*. at 294-303, rigid application of Rule 404(b) would exclude Zelasko's primary theory of defense.

The Morris testimony must be admitted as it is the only evidence available in Zelasko's defense. R. at 8; *see Chambers*, 410 U.S. at 302-03. Failing to do so will deprive Zelasko of any opportunity to exculpate herself. Excluding the Morris testimony has widespread implications because it would not only damage Zelasko's defense to the distribution charges. It would also strip her defense against the government's theory that she had a motive in the accidental shooting of Riley. R. at 1-5. Like in *Chambers*, admission of this evidence could potentially determine the line between conviction and acquittal. 410 U.S. at 303. Furthermore, this case is not like *United States v. Lucas*, where the Sixth Circuit excluded evidence under Federal Rule of Evidence 404(b). 357 F.3d at 606. While Lucas was able to present testimony other than propensity evidence to implicate the third party, *id.*, Zelasko has no other opportunity to

introduce evidence of Short's prior sale of steroids R. at 8. Rather, Zelasko's entire defense rests on the testimony of Short's former teammate. R. at 8. Exclusion of this evidence would undermine Zelasko's constitutional right to present evidence to support her acquittal.

B. The Fourteenth Circuit Properly Found That Evidence Of Short's Prior Sale Of Steroids Must Be Admitted Because Zelasko's Right To Defend Herself Outweighs Any Governmental Interest.

The Constitution prohibits exclusion of exculpatory evidence when the exclusionary rule serves no legitimate purpose. *See Holmes*, 547 U.S. at 326; *see also Rock v. Arkansas*, 483 U.S. 44, 56 (1987) ("In applying its evidentiary rules [the government] must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right."). "[R]estrictions on a criminal defendant's right . . . to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (quoting *Rock v. Arkansas*, 483 U.S. at 56); *see also Crane*, 476 U.S. at 690-91 (requiring admission of exculpatory evidence in order to ensure a defendant's "basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)). In *Chambers*, this Court weighed Chambers's right to confront and cross-examine witnesses against the interests involved in the criminal trial process and determined that obstruction with Chambers's rights would interfere with the "integrity of the fact-finding process." 410 U.S. at 291. The right at stake was integral to Chambers's defense and outweighed any government interest. *Id.*

In light of a criminal defendant's right to a complete defense, legitimate interests warranting exclusion are limited to instances where the government's interest substantially outweighs admission. *See Holmes*, 547 U.S. at 326. For instance, in *Michigan v. Lucas*, this Court affirmed the exclusion of evidence of Lucas's prior sexual history with a rape victim,

despite a statute permitting evidence of consent from defendants charged with rape. 500 U.S. at 147. Rape shield laws traditionally include procedural safeguards to prevent prejudice to the victim, who may suffer embarrassment from exposure of her sexual history in the open court. *Id.* at 146-47. Thus, because Lucas failed to meet the notice-and-hearing requirement of Michigan's rape shield law, the legitimate interest of protecting the rape victim justified the exclusion of their sexual history. *Id.* at 149. Therefore, Lucas's right to a complete defense was not violated because he was given the opportunity to request admission and he did not. *Id.* at 151. Indeed, the interest of judicial expediency justified exclusion of the evidence because Lucas failed to comply with a rule in place to avoid wasted time. *Id.* Similarly, where the defense attorney in *Taylor v. Illinois* failed to comply with discovery rules, exclusion of defense evidence did not violate the defendant's right to a fair trial because the rule was in place to avoid wasted time. 484 U.S. 400, 411 (1988).

Exclusion of the Morris testimony serves no legitimate government interest. *See Rock*, 483 U.S. at 56. Under *Chambers*, Zelasko's right to a complete defense must be weighed against the government's interest in an expedient trial. 410 U.S. at 291. The government suffers no substantial burden at the presentation of Zelasko's defense. Admission of the Morris testimony does not inhibit judicial expediency or waste resources because it is the only piece of evidence available in Zelasko's defense. R. at 8. Indeed, Zelasko seeks a relatively modest defense of a third party's guilt. Excluding the Morris testimony would be "disproportionate to the purposes [Rule 404(b) was] designed to serve," *Michigan v. Lucas*, 500 U.S. at 151, and would interfere with the "integrity of the fact finding process." *Chambers*, 410 U.S. at 291. Without the Morris testimony, the government's theory would go uncontested and Zelasko could face unjust conviction as a result.

Admission of the Morris testimony would not conflict with the policy behind Rule 404(b). Contrary to *Michigan v. Lucas*, where the rape shield law placed procedural safeguards in the interest of protecting rape victims, 500 U.S. at 158, Rule 404(b) is not in place to protect third parties. *See Montelongo*, 420 F.3d at 1174; *Stevens*, 935 F.2d at 1384. Rather, the rule seeks to protect defendants like Zelasko from prejudicial evidence from the prosecution. Moreover, exclusion of Zelasko's evidence would not result from any failure of her own as it did in *Lucas* and *Taylor*. *Lucas*, 500 U.S. at 158; *Taylor*, 484 U.S. at 407. Rather, exclusion would be the result of the mechanistic application of evidentiary rules "to defeat the ends of justice" that *Chambers* sought to prohibit. 410 U.S. at 302. Therefore, this Court should affirm the decision of the Fourteenth Circuit and find the Morris testimony admissible under Zelasko's constitutional right to a complete defense.

III. UNDER FEDERAL RULE OF EVIDENCE 804(B)(3), THE STATEMENTS CONTAINED IN THE EMAIL SENT BY LANE SHOULD NOT BE ADMITTED AGAINST ZELASKO BECAUSE THEY ARE NOT SUFFICIENTLY AGAINST LANE'S INTEREST.

On January 16, 2012, Zelasko's co-defendant at trial, Jessica Lane, sent an email to her boyfriend, Peter Billings. R. at 29. While this email is likely admissible against Zelasko under Federal Rule of Evidence 801(d)(2)(E) as a co-conspirator's statement, neither party raised this issue before the trial court. Therefore, the argument was considered waived by the trial court and the appellate court did not address the argument. R. at 22, 28 n.c. Even though Lane will be exercising her Fifth Amendment privilege not to testify at trial, R. at 39, the email and its contents should not be admitted into evidence against Zelasko because the statements contained in the email are not statements against Lane's interest.

Where the declarant of an otherwise inadmissible hearsay statement is unavailable, such as where the declarant exercises his or her Fifth Amendment privilege, Federal Rule of Evidence

804(b)(3) permits the statement to be admitted into evidence at trial if the statement sufficiently incriminates the declarant. Fed. R. Evid. 804(b)(3). The rule defines a sufficiently self-inculpatory statement as one which "a reasonable person in the declarant's position would have made [the statement] 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 expose the declarant to civil or criminal liability." Fed. R. Evid. 804(b)(3)(A).

This Court interpreted Rule 804(b)(3) and provided guidance for applying the rule in Williamson v. United States. 512 U.S. 594 (1994). There, the Court examined the admissibility of a statement at trial in which the declarant "freely" admitted to transporting drugs for Williamson. Id. at 597. In parsing the declarant's statement, this Court determined that a "statement" under the rule is "a single declaration or remark," as opposed to "a report or narrative." Id. at 599. As credibility is the main concern for exceptions to the general rule against hearsay, the Court reasoned that non-self-inculpatory statements in a narrative are not made more credible by the presence of self-inculpatory statements in the same narrative. Id. This Court also concluded that examining a statement under the rule requires a court to view the statement in its proper context, as opposed to in isolation. Id. at 603. In light of Rule 804(b)(3) and the guidance this Court provided in Williamson, this Court should affirm both lower court decisions excluding Lane's email.

A. This Court's Decision In Williamson Should Be Reaffirmed.

The doctrine of *stare decisis* is a critical aspect of this Court's judicial function. *Stare decisis* promotes "the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). For those reasons, "precedent

is to be respected unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010). In *Citizens United*, this Court identified several factors pertinent to the decision of whether precedent should be overruled. Those relevant factors include "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned," as well as "[w]hether experience has pointed up the precedent's shortcomings." *Citizens United*, 558 U.S. at 363.

In light of these factors, the guidance this Court provided in *Williamson* regarding application of Federal Rule of Evidence 804(b)(3) should be re-affirmed. The *Williamson* decision was passed down in 1994. Rule 804(b)(3) remains largely identical to its form in 1994. In fact, since 1994, the rule has only been amended once. *See* Fed. R. Evid. 804 advisory committee's note. That amendment dealt with the corroborating circumstances requirement of Rule 804(b)(3)(b). *See id.* Not only was this Court's decision in *Williamson* not concerned with that portion of Rule 804(b)(3), but that portion of the rule is also not implicated in this case as neither lower court considered it. *See* R. at 39.

In addition to the fact that *Williamson* was decided recently based on a largely identical form of Rule 804(b)(3), the decision was well-reasoned and experience has not shown that the precedent is rife with shortcomings. The Court in *Williamson* considered alternatives when it decided to define the word "statement" as it did. 512 U.S. at 599. However, the Court found that alternative definitions deprived the rule of its purpose by admitting into evidence statements not truly against the declarant's interest. *See id.* Moreover, as noted above, the Court determined that those non-self-inculpatory statements permitted into evidence by an alternative definition of "statement" lacked the underlying credibility upon which the concept of statements

against interest is founded. *See id.* at 599-600. The Court also explicitly alerted Congress to its ability to alter the phrasing of Rule 804(b)(3) if Congress disagreed with the Court's conclusion. *Id.* at 600. Congress has not availed itself of that opportunity, indicating that it too agrees with the Court's treatment of Rule 804(b)(3) in *Williamson*. *See generally* Fed. R. Evid. 804. As evidenced below, lower courts have not struggled to follow this Court's guidance in *Williamson* regarding application of Rule 804(b)(3). Therefore, this Court should re-affirm the standard it set out in *Williamson* by upholding the lower courts' decisions in this case not to permit Lane's email into evidence.

B. The Fourteenth Circuit Properly Found That Lane's Statements Do Not Constitute Statements Against Interest Under Federal Rule Of Evidence 804(B)(3) As Interpreted By *Williamson* Because The Statements Are Ambiguous And Are Not Clearly Incriminating.

Following this Court's guidance in *Williamson*, the email sent by Zelasko's co-defendant, Jessica Lane, contains five separate statements. Those statements are as follows: (1) I really need to talk to you; (2) I know you've suspected before about the business my partner and I have been running with the female team; (3) One of the members of the male team found out and threatened to report us if we don't come clean; (4) My partner really thinks we need to figure out how to keep him quiet; and (5) I don't know what exactly she has in mind yet. R. at 29. None of those statements is admissible as evidence against Zelasko under Rule 804(b)(3) and *Williamson*.

Where ambiguity exists as to whether a statement is actually self-inculpatory, courts have been careful not to admit the statement. As the Seventh Circuit stated, "The hearsay exception does not provide that any statement which possibly could or maybe might lead to criminal liability is admissible." *United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995) (internal quotations omitted). In *Butler*, the court examined a statement admitting that the declarant was found during a raid in the same room as guns, which Butler could not lawfully possess because

he was a convicted felon. *Id.* at 247. The court held that the individual's statement was insufficiently self-inculpatory to be admitted against Butler under Rule 804(b)(3). *Id.* at 254. Specifically, the court noted that "at most, [the statement] placed him at risk of being in some type of 'constructive possession' of a weapon which . . . is not a risk sufficient to provide the guarantee of reliability or truthfulness the 804(b)(3) exception is based on." *Id.* at 253. Similarly, in *United States v. Cole*, the Ninth Circuit determined that statements made to police by the defendant's housemate that she and the defendant possessed a gun and ammunition were not sufficiently self-inculpatory as to the housemate because there was no evidence that her possession of the gun and ammunition, as opposed to the defendant's, was illegal. 214 F. App'x 687, 689 (9th Cir. 2006).

Courts have also refused to admit statements where the declarant explicitly engages in blame-shifting, or where there is a reason to suspect the declarant would engage in blame-shifting. In *United States v. Jackson*, for example, the Second Circuit addressed a co-defendant's guilty plea allocution in which Jackson's co-defendant stated that he "never supervised Jackson and never asked Jackson to go to Jamaica to smuggle drugs" for him. 335 F.3d 170, 179 (2d Cir. 2003). The court held that these statements were insufficiently self-inculpatory of Jackson's co-defendant under Rule 804(b)(3) because the statements engaged in blame-shifting. *Id.* Courts most commonly suspect a declarant of engaging in blame-shifting when the declarant is speaking with the police after having already been implicated in illegal activity. *See, e.g., United States v. Champan*, 345 F.3d 630 (8th Cir. 2003); *United States v. Tropeano*, 252 F.3d 653 (2d Cir. 2001); *United States v. Hall*, 113 F.3d 157 (9th Cir. 1997); *United States v. Mendoza*, 85 F.3d 1347 (8th Cir. 1996); *United States v. Hazelett*, 32 F.3d 1313 (8th Cir. 1994).

One circuit court of appeals has taken this suspicion a step further by limiting *Williamson*'s effect to situations where the declarant is speaking to law enforcement. In *United States v. Ebron*, the Fifth Circuit noted that, "while *Williamson* contains some broad language, its analysis is predicated on the assumption that the challenged statement was a post-arrest confession." 683 F.3d 105, 134 n.9 (5th Cir. 2012). By limiting *Williamson* to situations where statements are made to law enforcement, though, this court incorrectly treats an identification of the person to whom the statement was made as dispositive of the issue of whether the statement qualifies under the rule as a statement against interest.

Rather, consistent with this Court's guidance in Williamson, the person to whom the statement is made is only one factor in the analysis under Rule 804(b)(3). As this Court noted, "even the confessions of arrested accomplices may be admissible [as statements against interest] if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." Williamson, 512 U.S. at 603. In United States v. Dargan, for example, the Fourth Circuit determined that a co-defendant's confession to a fellow inmate was sufficiently self-inculpatory under the rule because there was "no obvious motive to shift blame or curry favor" given the circumstances of the statements and the statements were "intrinsically inculpatory" as to the codefendant. 738 F.3d 643, 648 (4th Cir. 2013); see also United States v. Smith, 175 F.3d 1021 (7th Cir. 1999). In *United States v. Moses*, the Third Circuit also concluded that a co-defendant's statements to a friend prior to Moses's arrest qualified as statements against interest because, under the circumstances, "there [was] no reason to believe that [the co-defendant] was trying to avoid criminal consequences by passing blame" and because the co-defendant provided selfinculpatory information. 148 F.3d 277, 281 (3d Cir. 1998). Similarly, in *United States v.* Jordan, the court held that a co-conspirator's statements were sufficient under Rule 804(b)(3) as

they were made "to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure" and as the statements subjected her to criminal liability. 509 F.3d 191, 203 (4th Cir. 2007).

In fact, there are only two situations in which courts consistently admit statements under Rule 804(b)(3). First, courts consistently admit statements which are outright, unambiguous confessions by the declarant. In *United States v. Barone*, for example, the First Circuit found that confessions by one of the defendant's crime family members to committing crimes with the defendant were plainly admissible. 114 F.3d 1284, 1296 (1st Cir. 1997). Similarly, in *United States v. Ebron*, the Fifth Circuit determined that statements in which a fellow participant in a murder confessed to killing the person with the defendant were sufficiently self-inculpatory for purposes of the rule. 683 F.3d 105, 133-34 (5th Cir. 2012). Also, in *United States v. Williams*, the court found sufficient under the rule a co-defendant's admission that he participated in a murder with Williams, concluding that the statement was "plainly self-inculpatory." 506 F.3d 151, 155 (2d Cir. 2007).

Second, courts consistently admit statements that demonstrate the declarant had an insider's knowledge of the inculpatory activity. The First Circuit in *Barone* permitted statements about a murder the declarant committed in part because they demonstrated "an insider's knowledge of a criminal enterprise and its criminal activities." *Barone*, 114 F.3d at 1297 (quotations omitted). Similarly, in *United States v. Watson*, the court admitted statements evidencing that the declarant had helped robbers, one of whom was the defendant, escape the police on the basis that the declarant demonstrated an insider's knowledge of the conspiracy and thereby opened himself up to charges. 525 F.3d 583, 587 (7th Cir. 2008). In *United States v. Tocco*, the Sixth Circuit also found sufficiently self-inculpatory statements that linked the

declarant to a racketeering conspiracy, citing *Barone* for the proposition that such statements "demonstrate an insider's knowledge." 200 F.3d 401, 415 (6th Cir. 2000). Likewise, in *Dargan*, the Fourth Circuit admitted statements made by a co-defendant to a cellmate implicating himself by demonstrating an insider's knowledge of the robbery of a jewelry store. 738 F.3d 643, 648 (4th Cir. 2013).

Given this Court's guidance in *Williamson* and the circuit courts' precedent, the lower courts correctly determined that the statements within the email sent by Zelasko's co-defendant, Jessica Lane, did not contain statements against Lane's interest under Rule 804(b)(3). The email's first statement, "I really need to talk to you" is plainly not self-inculpatory. R. at 29.

The email's second and third statements, "I know you've suspected before about the business my partner and I have been running with the female team" and "One of the members of the male team found out and threatened to report us if we don't come clean," are equally not self-inculpatory. R. at 29. Neither statement confesses to Lane's participation in a conspiracy to possess or distribute ThunderSnow as the courts confronted in *Barone*, 114 F.3d at 1296, *Ebron*, 683 F.3d at 133-34, and *Williams*, 506 F.3d at 155. Furthermore, neither statement evidences an insider's knowledge of a conspiracy to possess or distribute ThunderSnow as the courts examined in *Barone*, 114 F.3d at 1297, *Tocco*, 200 F.3d at 415, and *Dargan*, 738 F.3d at 648. Instead, these statements only repeat a narrative to Lane's boyfriend, Peter Billings. Specifically, the statements repeat that Billings suspected Lane's involvement in a business run through the female team, and one of the male team members discovered that business and threatened to report them. R. at 1-5. While potentially suspicious, these statements are exactly the kind of statements the Seventh Circuit cautioned against admitting in *Butler*, as they are

statements "which possibly could or maybe might lead to criminal liability." *Butler*, 71 F.3d at 253.

The email's fourth and fifth statements, "My partner really thinks we need to figure out how to keep him quiet" and "I don't know what exactly she has in mind yet," also are not inculpatory statements. R. at 29. Similar to Lane's previous two statements, these statements are ambiguous as there is nothing clearly incriminating about them. Moreover, these statements are examples of blame-shifting. *See Jackson*, 335 F.3d at 179. If there is anything incriminating to be found in these statements, Lane would not be incriminating herself but rather Zelasko. As this Court held in *Williamson*, and as the circuit courts have determined, such blame-shifting is impermissible for a statement to be admitted under Rule 804(b)(3).

To be sure, the statements contained in Lane's email were sent to her boyfriend and were not made to a law enforcement officer. R. at 29. However, not only is that not a dispositive factor in the analysis under *Williamson*, the statements in this case are sufficiently different from the statements at issue in *Williamson*, 512 U.S. at 596, *Dargan*, 738 F.3d at 648, *Moses*, 148 F.3d at 280, and *Smith*, 175 F.3d at 1025, so as to warrant a different result. As the statements contained in Lane's email are insufficiently self-inculpatory under Federal Rule of Evidence 804(b)(3) as interpreted by this Court in *Williamson*, this Court should affirm the lower courts' decisions to not admit the email into evidence.

IV. UNDER BRUTON V. UNITED STATES, THE STATEMENTS CONTAINED IN LANE'S EMAIL SHOULD NOT BE ADMITTED AGAINST ZELASKO BECAUSE THEIR ADMISSION WOULD VIOLATE HER RIGHTS UNDER THE CONFRONTATION CLAUSE.

In addition to being barred by Rule 804(b)(3), the statements contained in Lane's email are inadmissible against Zelasko at trial because admitting the statements would violate Zelasko's Sixth Amendment right to confront "witnesses against [her]." U.S. Const. amend. VI.

In *Bruton v. United States*, this Court established that admission of a co-defendant's confession against a defendant without an opportunity to cross-examine the confessor violates the defendant's Sixth Amendment rights. 391 U.S. 123, 126 (1968). There, in the absence of Bruton's co-defendant taking the stand, the lower court permitted the jury to hear testimony that Bruton's co-defendant confessed to committing armed robbery with Bruton. *Id.* at 124. Overruling precedent that permitted such testimony so long as the jury was given a proper limiting instruction, this Court held that "admission of [the co-defendant's] confession in this joint trial violated [Bruton's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126.

Nearly forty years later, this Court decided *Crawford v. Washington.* 541 U.S. 36 (2004). The *Crawford* decision clarified the Court's Sixth Amendment jurisprudence by overruling *Ohio v. Roberts*, a case which determined the admissibility of hearsay evidence under the Confrontation Clause based on whether it fell under a "a firmly rooted hearsay exception" or it bore "particularized guarantees of trustworthiness." 448 U.S. 56, 60, 66 (1980). Instead, in *Crawford*, this Court held that out-of-court testimonial statements trigger concerns under the Sixth Amendment and may only be admitted against the defendant when the defendant has had a prior opportunity to cross-examine. *Id.* at 59. The Court in *Crawford* defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51.

In one of *Crawford*'s progeny, *Davis v. Washington*, this Court refined the definition of a testimonial statement in the context of statements made to law enforcement, describing as testimonial statements where "the circumstances objectively indicate that there is no [] ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events

potentially relevant to later criminal prosecution." 547 U.S. 813, 822 (2006). In providing its definition, though, this Court noted:

This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation . . . And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

Id. at 822-23 n.1.

This Court's decision in *Bruton* undoubtedly survived the *Crawford* decision. The Court in *Crawford* based its decision on two historic principles underlying the Confrontation Clause: (1) "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," *id.* at 50, and (2) "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 54. The Court specifically cited to *Bruton* as a case conforming to those two principles by "exclud[ing] accomplice confessions where the defendant had no opportunity to cross-examine." *Id.* at 57.

However, there is currently a division among the circuits as to the degree to which *Crawford*'s holding affects *Bruton*. The Third Circuit views *Bruton* as being unaffected by *Crawford*. In *United States v. Jones*, the court wrote, "We have interpreted *Bruton's* rule broadly, applying it not only to custodial confessions but also to informal statements." 381 F. App'x 148, 151 (3d Cir. 2010). Other circuits view *Crawford* as providing a "lens" through which *Bruton* should be viewed. *See, e.g., United States v. Clark*, 717 F.3d 790 (10th Cir. 2013); *United States v. Figueroa-Cartagena*, 612 F.3d 69 (1st Cir. 2010); *United States v. Dale*, 614

F.3d 942 (8th Cir. 2010). Under this approach, *Crawford* limits the effect of *Bruton* to testimonial statements. *Crawford* therefore provides a threshold question to be answered prior to application of *Bruton*. If the statement at issue is testimonial, then the impact of *Bruton* is considered. If the statement is non-testimonial, then the impact of *Bruton* is moot.

Crawford's holding is properly constrained such that it does not affect Bruton. In Cruz v. New York, this Court distinguished between constitutional "harmfulness" and constitutional "reliability," tying the Bruton decision to constitutional harmfulness and the decision in Roberts to constitutional reliability. 481 U.S. 186, 193 (1980) (citing to one of Roberts's progeny, Lee v. Illinois, 476 U.S. 530 (1986), for the test established in Roberts). The Cruz decision turned on that distinction as it allowed the Court to conclude that Bruton, and not Roberts, applied to the constitutional dilemma presented by an interlocking confession made by co-defendants. Cruz, 481 U.S. at 193. As the Roberts decision and the Bruton decision addressed different constitutional dilemmas, the Roberts decision had no impact on the Bruton doctrine. Therefore, the Crawford decision, the main thrust of which was to overrule the Confrontation Clause analysis established in Roberts, did not impact Bruton.

Applying this logic, the lower courts correctly determined that admitting into evidence the statements contained in Lane's email would violate Zelasko's Sixth Amendment rights. These statements, if admitted, would be treated as confessions because Rule 804(b)(3) is the sole ground for entering them into evidence . *See* R. at 22, 28 n.c. Given that Lane will not be testifying at trial, R. at 39, admitting the statements contained in her email would constitute the exact action this Court in *Bruton* explicitly prohibited.

Additionally, even if this Court holds that *Crawford* did impact *Bruton* by inserting the threshold question of whether the statement at issue is testimonial hearsay, admitting the

statements contained in Lane's email would still violate Zelasko's Sixth Amendment rights.

Crawford and its progeny never limited the concept of testimonial hearsay to statements made to

law enforcement. While the cases certainly dealt primarily with statements made in such

settings, the Court in *Davis* specifically noted otherwise. See 547 U.S. at 822-23 n.1. The focus

when identifying testimonial hearsay is on the statements' "primary purpose." *Id.* at 822. That

purpose must be "to establish or prove past events potentially relevant to later criminal

prosecution." Id. Here, if allowed into evidence under Rule 804(b)(3), the statements contained

in Lane's email will be treated exactly in that way. The statements will be treated as

confessions, the contents of which "establish or prove" events that had previously taken place

and would be "relevant to later criminal prosecution." See Davis, 547 U.S. at 822. As a result,

this Court should uphold both lower courts' decisions to not admit Lane's email because doing

so would violate Zelasko's rights under the Confrontation Clause.

CONCLUSION

For the foregoing reasons, Respondent Anastasia Zelasko respectfully requests this Court

AFFIRM the decisions of the District Court for the Southern District of Boerem and the United

States Court of Appeals for the Fourteenth Circuit and hold that: (1) Federal Rule of Evidence

404(b) does not apply to a defendant's use of evidence to show the criminal propensity of a third

party; (2) a defendant's right to present a full defense encompasses such propensity evidence; (3)

Williamson remains binding precedent that bars the admission of statements collateral to

declarations against penal interest; and (4) the Bruton doctrine applies to testimonial and

nontestimonial evidence.

Date: February 12, 2014

Respectfully Submitted,

Team 10R

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