No. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

-against-

ANASTASIA ZELASKO,

Respondent,

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether evidence of a third party's propensity to commit a future act that has a tendency to exculpate the defendant and that does not prejudice any parties in the trial, "reverse 404(b)" evidence, must be held to the same standard as evidence of a defendant's prior bad act under Federal Rule of Evidence 404(b).

2. Whether the Government's interest in efficient trials and the threat of prejudice to a third party outweighs Ms. Zelasko's constitutional due process right to present a complete defense, which includes evidence that another person may have had a motive to commit the crime.

3. Whether the *Williamson v. United States* interpretation of Federal Rule of Evidence 804(b)(3) is a standard that can be uniformly applied and if so whether the email written by co-defendant Lane is inadmissible because it is not sufficiently against her interest as to expose her to criminal liability.

4. Whether the holding in *Bruton v. United States*, which bars statements of a non-testifying co-defendant that implicate the defendant, applies irrespective of the Court's decision in *Crawford v. Washington* under the Confrontation Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS

CONSTITUTIONAL AMENDMENTS

FEDERAL RULES OF EVIDENCE

OTHER AUTHORITIES

STANDARD OF REVIEW

Questions of law are reviewed *de novo*. *United States v. Barone*, 114 F.3d 1284, 1296 (1st Cir. 1997).

STATEMENT OF THE CASE

Anastasia Zelasko (Ms. Zelasko) joined the United States women's Snowman Pentathlon Team (Snowman Team) in September 2010. R. at 1. Casey Short (Short) and Jessica Lane (Lane) joined the team in June 2011 and August 2011, respectively. R. at 1, 10. The Snowman Pentathlon is a physically demanding event that consists of dogsledding, ice dancing, aerial skiing, rifle shooting, and curling. R. at 1-2. The Snowman Team recently improved, getting better practice times than it ever had before. R. at 2. In February 2012 the Snowman Team competed in the World Winter Games. R. at 8. To get in extra practice during the games, Ms. Zelasko went to a shooting range that had been closed for the games. R. at 8. During her practice, a bullet accidently went into the adjacent dogsled course where the men's U.S. Snowman Team was practicing. R. at 8. Tragically, the bullet killed Hunter Riley (Riley), a member of the men's U.S. Snowman Team. R. at 8.

The Drug Enforcement Agency (DEA) investigated Riley's death because he had been an informant for them. R. at 1, 3. The DEA suspected that the women's Snowman Team was using and selling an anabolic steroid, ThunderSnow. R. at 2. The DEA began investigating the team in August 2011, shortly after Short joined the team. R. at 2, 10. Short transferred to the U.S. Snowman Team from the Canadian Snowman Team. R. at 24. While on the Canadian Snowman Team, Short sold an anabolic steroid similar to ThunderSnow, White Lightening, to teammates. R. at 25, 28. Short sold White Lightening to a teammate, Miranda Morris (Morris), just two

months before she transferred to the U.S. team. R. at 25. Short told Morris that she had "connections with a lab that designed White Lightning to be undetectable." R. at 25.

During the DEA's investigation of the women's U.S. Snowman Team, the agency instructed Riley to purchase ThunderSnow from Lane. R. at 2. On three separate occasions Riley approached Lane and asked to purchase ThunderSnow, each time she refused to sell him ThunderSnow. R. at 2-3. The day after Riley's third attempt, Lane's boyfriend and men's U.S. Snowman Team coach, Peter Billings (Billings), saw Ms. Zelasko and Lane fighting. R. at 3, 9. During this encounter, Lane yelled, "[s]top bragging to everyone about all the money you're making!" R. at 3, 9. Over a week after the argument, Billings approached Lane and accused her of selling steroids to the women's Snowman Team, Lane denied the allegation. R. at 3. A month later, Lane sent an email to Billings that said:

> 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.

R. at 29. Over a week after the email was sent, teammates saw Riley and Ms. Zelasko involved in a heated argument. R. at 3, 9.

After Riley's death, both Lane and Ms. Zelasko were arrested. R. at 3-4. The DEA discovered $5,000 in cash and two fifty-milligram doses of ThunderSnow in Ms. Zelasko's apartment. R. at 3. The amount of ThunderSnow found in Ms. Zelasko's apartment, two fifty-milligram doses, is "consistent with personal use and not sale." R. at 28. In Lane's apartment, the DEA discovered ten times the amount of ThunderSnow, twenty fifty-milligram doses, and $10,000 in cash. R. at 4. Additionally, the DEA found 12,500 milligrams of ThunderSnow in the Team's equipment storage room. R. at 3.This amount of ThunderSnow is enough for 250

personal doses, which is "consistent with sale and not personal use." R. at 28. The Government asserts that no contraband was found at Short's residence, but there is no information in the record regarding when and if that search occurred. R. at 21.

The Government charged Lane and Ms. Zelasko with five counts: conspiracy to distribute anabolic steroids, distribution of anabolic steroids, possession of anabolic steroids, conspiracy to murder, and murder in the first degree. R. at 4-5. The United States District Court for the Southern District Of Boerum held a motion in limine to hear two pre-trial motions: the Defense's motion to admit Morris's testimony regarding Short's prior drug sales and the Government's motion to admit Lane's email. R. at 7-19.

On July 18, 2012, the District Court ruled in favor of the defense on both motions, holding that Morris's testimony is admissible and that Lane's email is inadmissible. R. at 21-23. The District Court found Morris's testimony admissible on two separate grounds. R. at 21. First, because it is admissible as "reverse 404(b)" evidence and second, because excluding the testimony from the trial would violate Ms. Zelasko's constitutional right to present a complete defense. R. at 21-22. The District Court refused to admit Lane's email into evidence because it was not sufficiently against Lane's interest as to qualify for the declaration against interest exception. R. at 22-23. Alternatively, the court held that the email could not be admitted because its admission would violate Ms. Zelasko's constitutional right to confrontation. R. at 23.

On February 14, 2013, on an interlocutory appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed the District Court's holding. R. at 30-31. This Court granted the Government a writ of certiorari on October 1, 2013. R. at 55.

SUMMARY OF THE ARGUMENT

The lower courts' rulings ensure that Ms. Zelasko's constitutional rights will not be infringed, despite the Government's overzealous attempt to create a criminal motive for a death that was a tragic accident. The courts were adamant about admitting Morris's testimony and denying Lane's email; they decided each issue on two separate grounds.

First, the lower courts' decision to admit Morris's testimony must be upheld because Ms. Zelasko has the right to present the defense that she did not commit the crime, it was someone else. Precluding admission of this evidence from trial defeats the purpose of the adversarial judicial system by not requiring the Government to prove their case beyond a reasonable doubt. There is no dispute that the conspiracy involved two members, Lane and another, but there is little evidence identifying the second member. Morris's testimony of Short's prior drug dealing makes it possible that Short could be the second member of the conspiracy. Federal Rule of Evidence 404(b) cannot be used to prevent the admission of Morris's testimony regarding a third party's prior bad acts. Numerous circuits recognize that using evidence of third party prior bad acts to demonstrate propensity, reverse 404(b) evidence, does not create prejudice towards any parties of a trial. Accordingly, many circuits do not hold reverse 404(b) evidence to the same stringent standard of regular 404(b) evidence. Rather, they only require that the evidence has a tendency to exculpate the defendant and that its probative value is not outweighed by its risk of prejudice.

Furthermore, the Government fails to articulate a legitimate interest to justify preventing Ms. Zelasko from introducing the testimony. Ms. Zelasko's weighty interest in identifying the second member of the conspiracy demands that Morris's testimony be admitted. A failure to admit the testimony denies Ms. Zelasko her due process right to present a complete defense.

Second, the lower courts' decisions, rejecting the Government's motion to introduce Lane's self serving email, ensures that the Federal Rules of Evidence are applied in accordance with their intent, so that harmful hearsay statements will not be admitted in co-trials. The exception allowing for the admission of declarations against interest was not intended to admit statements that are collateral or exculpatory, simply because of their proximity to inculpatory statements. These statements carry a high risk of untrustworthiness, especially when they shift the blame, as the statements in Lane's email do. Not only does the language and intent of the rule support the admission of truly inculpatory statements, but also this Court explicitly stated that only inculpatory statements should be admitted.

Moreover, admitting Lane's email ignores the inherent danger in statements made by a non-testifying co-defendant. This Court's holding in *Bruton v. United States* carves out a specific category of cases in which hearsay statements are particularly harmful and inadmissible. Statements made by a non-testifying co-defendant that implicate the other co-defendant are inherently dangerous and prejudicial. They are often self-serving and can highly influence the jury. The inherent harm in these statements violates the Confrontation Clause. These statements cannot be admitted.

ARGUMENT

I. This Court Should Affirm The Fourteenth Circuit's Decision Admitting Testimony That Exculpates The Defendant As Reverse 404(b) Evidence Because Failing To Do So Misconstrues The Federal Rules And Violates The Defendant's Constitutional Right To Present A Complete Defense.

The Constitution protects the rights of criminal defendants by requiring "that [they] be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment

. . . ” defendants are entitled to present evidence that is relevant and material to their defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citations omitted). Only the established rules of evidence can limit this right. Although the rules do create certain limitations, they were “designed to assure both fairness and reliability.” *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). The rules cannot be “applied mechanistically to defeat the ends of justice” by depriving defendants of their fundamental right to present a complete defense. *Id*.

The Fourteenth Circuit’s decision to admit Morris’s relevant and meaningful testimony is correct for two reasons: this Court’s prior interpretations of how the rules of evidence should be applied and Ms. Zelasko’s constitutional rights. Fairness and reliability mandate that this Court follow the loose application of 404(b), the reverse 404(b) rule, and admit evidence of a third party’s prior bad acts. Even if this Court declines to follow the reverse 404(b) rule, it should affirm the appellate court’s alternative holding that Morris’s testimony must be admitted because it is essential to Ms. Zelasko’s defense. Suppressing this evidence violates Ms. Zelasko’s constitutional rights under the Due Process Clause.

A. Evidence Of A Third Party’s Propensity To Sell Steroids Must Be Admitted Because It Comports With The Common Law Rule That 404(b) Was Adapted From, The Drafter’s Intent, And Creates No Risk Of Prejudice.

The purpose of rule 404(b) is to protect defendants from prejudicial evidence that could mislead a jury, not to prevent defendants from presenting exculpatory evidence. *United States v. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005). Rule 404(b) prohibits the prosecution from introducing “evidence of a crime, wrong, or other act . . . 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). The rule creates rigid exceptions for when evidence of a prior bad act can be admitted. It can only be used to prove “motive, opportunity, intent, preparation, plan, knowledge,

identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). To be admissible, the court does not need to make a preliminary finding that the past similar act actually happened. *Huddleston v. United States,* 485 U.S. 681, 687 (1988). Rather, the court decides, "whether the *jury* could reasonably find" that the past bad act occurred by "a preponderance of the evidence." *Id*. at 690 (emphasis added). Noting that this evidence can be very prejudicial to the defendant, this Court created four factors to decide its admissibility: (1) the evidence must fall into one of the admissible categories under 404(b); (2) the evidence must be relevant; (3) the probative value of the evidence cannot be outweighed by the danger of prejudice; and (4) if requested, the jury can be instructed that the evidence be considered only for its proper purpose. *Id*. at 690-91. These factors clearly apply to the *defendant's* prior bad acts and to protect the *defendant* from prejudice. *See id.* (creating and applying the four part 404(b) test to analyze the defendant's, Huddleston, prior bad acts).

The Government attempts to exploit this rule and apply it to cases in which defendants have proof of a third party's prior bad acts, which prevents defendants from introducing evidence that is relevant, meaningful, and exculpatory. To thwart this injustice, circuits interpret a reverse 404(b) rule, which allows defendants to present propensity evidence of a third party's prior bad acts. *United States v. Cohen*, 888 F.2d 770, 776-77 (11th Cir. 1989); *United States v. Hamilton*, 48 F.3d 149, 155 (5th Cir. 1995); *United States v. Montelongo*, 420 F.3d 1169, 1174-76 (10th Cir. 2005); *United States v. Myers,* 589 F.3d 117, 124 (4th Cir. 2009); *United States v. Seals,* 419 F.3d 600, 606 (7th Cir. 2005); *United States v. Stevens,* 935 F.2d 1380, 1401-03 (3d Cir. 1991).

1. Reverse 404(b) Evidence Is Admissible And Should Not Be Held To The Same Standard As Regular 404(b) Evidence Because Of Its High Probative Value And Lack Of Prejudice.

The loose interpretation of 404(b), the reverse 404(b) rule, allows the admission of evidence of prior bad acts of a third party to show propensity. *Seals*, 419 F.3d at 606. This loose interpretation is consistent with the drafter's intent and the common law because of its high probative value and its lack of prejudice. *Id*. The traditional application of rule 404(b) limits evidence of prior bad acts because they can be prejudicial, "distract[ing] the trier of fact from the main question . . . ." Fed. R. Evid. 404 advisory committee's notes. The drafters worried that defendants would be punished for a crime simply because of a past bad act. *See id*. Similarly, the common law rule, which the federal rule developed from, recognized that while this evidence can be very probative it can "weigh too much with the jury and to so overpersuade them as to prejudge one . . . and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 476 (1948).

Reverse 404(b) evidence does not carry this risk of prejudice because the third party is not involved in the case. *Seals*, 419 F.3d at 606 (quoting *Stevens*, 935 F.2d at 1404). Moreover, reverse 404(b) evidence inherently carries substantial probative value because this evidence demonstrates that the government may be prosecuting the wrong person. *See Stevens,* 935 F.2d at 1406. The reverse 404(b) method is an essential tool for defendants to present evidence that creates doubt among the jury; sometimes it is their only means to do so. Further, since it is the prosecution's role to prove the crime beyond a reasonable doubt, the defendant must be afforded a practical opportunity to "plant in the jury's mind a reasonable doubt." *Id*. The common law principles, coupled with the lack of prejudice, prove that the defense should not be "held to as

rigorous of a standard as the government in introducing reverse 404(b) evidence." *Agushi v. Duerr,* 196 F.3d 754, 760 (7th Cir. 1999) (quoting *Stevens*, 935 F.2d at 1404).

2. The Testimony Regarding Another Person's Propensity To Sell Steroids Negates The Defendant's Guilt, Is Probative Of Her Defense, And Was Properly Admitted Under The Loose Test For Reverse 404(b) Evidence.

Circuits that allow propensity evidence of a third party under the reverse 404(b) rule apply a two-part test to determine whether third party propensity evidence is admissible. *Seals*, 419 F.3d at 606. First, the evidence must have a tendency "to negate the defendant's guilt of the crime charged against [her]." *Id*. Second, courts perform a balancing test under Federal Rule of Evidence 403, weighing the "evidence's probative value against considerations such as undue waste of time and confusion of the issues." *Montelongo*, 420 F.3d at 1174 (quoting *Stevens*, 935 F.2d at 1404-05). *See* Fed. R. Evid. 403. Factors considered when weighing the probative value include the similarity of the acts, the centrality of the issue the evidence relates to, and the temporal proximity of the crimes. *Montelongo*, 420 F.3d at 1174. While these standards guide courts, the test remains flexible and these standards should not be applied as "hard and fast preconditions on the admission of 'reverse 404(b) evidence.'" *Stevens,* 935 F.2d at 1405.

Reverse 404(b) evidence that is probative to the central issue of a case is more likely to be admitted than evidence that relates to subsidiary issues. *Montelongo*, 420 F.3d at 1175. In *United States v. Montelongo*, the Tenth Circuit held that the district court erred when refusing to admit evidence that exculpated the defendant. *Id*. at 1173-74. In *Montelongo*, Gomez hired the defendant, Montelongo, to drive a semi-truck across the country. *Montelongo*, 1172. Border Patrol agents pulled Montelongo over and found contraband in the truck. *Id*. Montelongo sought to introduce evidence of a prior similar event where authorities found contraband in one of Gomez's trucks. *Id*. In the prior incident, the drivers did not implicate Gomez, but claimed they

found the contraband on the side of the road. *Id*. Despite the discrepancies regarding how the contraband got into the truck, the court found that the two events appeared similar enough to be relevant to the defense. *Id*. The type of truck, the location of the contraband in the truck, the temporal proximity between the two incidents, and the fact that Gomez owned both trucks were enough similarities to meet the lessened standard of similarity needed for reverse 404(b) evidence. *Id*. at 1175-76. This evidence addressed the primary issue in the case: how the contraband got in the truck. *Id*. at 1175. Finally, the court found that the evidence had the tendency to exculpate the defendants because it created a plausible explanation of how the contraband got into the truck. *Id*.

Even if the evidence has a slight tendency to exculpate the defendant, if the government has a strong case against the defendant it is less likely the third party propensity evidence will be admitted. *Seals*, 419 F.3d at 608. In *United States v. Seals,* the evidence of a prior bank robbery by a third party, while somewhat similar, was irrelevant due to the strength of the government's case. *Id*. The government presented numerous eyewitness testimonies detailing all aspects of the bank robbery. *Id*. The defendants sought to introduce evidence of another bank robbery, two weeks later in a town thirty-one miles away, to show that they did not commit the crime but that the other robbers did. *Id*. at 607. The court held that because of the strength of the government's case, evidence of the other robbery did not make it less likely that the defendants committed the crime. *Id*. Furthermore, the similarities between the two robberies were generic and not indicative of the same perpetrators. *Id*. The defendants wanted to present evidence that in both robberies the robbers wore disguises, drove stolen cars, and carried weapons. *Id*. This is not telling of a similar bad act because most robberies involve the aforementioned elements. *Id*.

However, in the instant case, there are remarkable similarities between the crime Ms. Zelasko is accused of and the prior bad acts of Short. Unlike in *Seals*, where the similarities were typical of all robberies, the similarities between Short's prior acts and the accusations against Ms. Zelasko are more than generic elements of drug distribution. Morris offered testimony that her former teammate, Short, sold a steroid almost identical to ThunderSnow, White Lightening, to teammates while on the Canadian Snowman Team. R. at 24-25. Short's drug distribution scheme continued up until two months before Short transferred to the U.S. Snowman Team. *Id*. The Government accuses Ms. Zelasko of committing a crime nearly identical to the scheme Short operated. The Government claims Ms. Zelasko distributed ThunderSnow to U.S. Snowman teammates beginning the exact same time that Short became a member of the team. R. at 2, 25. The type of drug, the timing of the sales, and the targeting of female winter sports teammates are strong similarities between Short's prior bad acts of distributing White Lightening and of what Ms. Zelasko is wrongfully accused. While Short was never charged for the prior bad acts, *Montelongo* makes it clear that a third party need not be convicted of the prior act for them to be admissible.

Further, the identity of the second member of the conspiracy is central to the case, highly relevant, and exculpates Ms. Zelasko because it creates substantial doubt that she had a motive to kill Riley. The Government contends that Ms. Zelasko intentionally shot Riley because she knew about the conspiracy and wanted to cover it up, R. at 9, when in fact the shooting was an accident. R. at 8. It is undisputed that the conspiracy only involved two members, Lane and another. R. at 11. The Government mistakenly relies on Ms. Zelasko being a member of the conspiracy. R. at 11. As in *Montelongo* where determining how the contraband got into the truck was essential to determining the defendant's guilt or innocence, here, proving that Ms. Zelasko

was not a member of the conspiracy to sell ThunderSnow is essential to proving the murder was accidental. R. at 8. This information has a tendency to negate Ms. Zelasko's guilt; the reverse 404(b) evidence speaks to the central issue of the case, creating the possibility that Ms. Zelasko was not a member of the conspiracy and had no motive to kill Riley.

Moreover, there is little evidence implicating Ms. Zelasko. Unlike in *Seals,* where the government had a very strong case with ample evidence and several eyewitnesses, here the Government presents little evidence against Ms. Zelasko. In *Seals*, the case was so strong that the third party propensity evidence did little to exculpate the defendant. In the instant case, the lack of evidence implicitly creates doubt regarding Ms. Zelasko's participation in the conspiracy. The third party propensity evidence is necessary to explicitly inform the jury of this doubt. Further, presenting this evidence will not create undue delay or confuse the issues. The evidence consists of a single testimony, which will not be burdensome at trial. R. at 38. Morris's single testimony will not confuse the issues as it relates to a central component of the case. *Id*. The testimony satisfies the reverse 404(b) requirements and must be admitted.

The Government relies on a minority of circuits that interpret rule 404(b) mechanistically to exclude evidence of a third party's prior bad acts to show propensity to commit future acts. *See Wynne v. Renico*, 606 F. 3d 867, 873 (6th Cir. 2010) (Martin, J., concurring). This interpretation relies on only one word in the rule, the use of *person* instead of *defendant*, to make the broad assertion that 404(b) excludes all propensity evidence, whether of a defendant or a third party. *Id*. The Government's technical application of the rule strips away its intent and purpose as there is no risk of prejudice to the third party. *United States v. Aboumoussallem,* 726 F.2d 906, 911 (2d Cir. 1984). Rather than serve its intended purpose as a shield to the defendant, under the Government's interpretation, 404(b) acts as a shield to determining the truth, making it

easier for the Government to prove its case. *Id*. at 911-12. This prevents the defendant from presenting a complete defense. *Id*. Interpreting 404(b) in this manner is inconsistent with the intent and policy of the rule and should not be followed.

The Government attempts to treat evidence of a third party's prior bad acts in the same manner as evidence of a defendant's prior bad acts. Instead, this Court should treat reverse 404(b) evidence the same as evidence of a defendant's positive character traits, which is admissible under Federal Rule of Evidence 404(a)(1)(A). Fed. R. Evid. 404(a)(1)(A). Defendants can introduce pertinent traits to prove good character in an attempt to create a reasonable doubt that they could have committed the crime. *Edgington v. United States*, 164 U.S. 361, 366 (1896). This is permissible because like introducing the prior bad acts of a third party there is no risk of prejudice to the defendant or any other party to the trial. Zachary El-Sawaf, *Incomplete Justice: Plugging the Hole Left by the Reverse 404(b) Problem*, 80 U. Cin. L. Rev. 1049, 1066 (2012). The test for positive character evidence simply weighs the probative value of the evidence against its risk of prejudice to the defendant. *Id*. Reverse 404(b) evidence, like positive character evidence of the defendant, bears little to no risk of prejudice and should be admitted under the same standard, a 403 balancing test.

3. <u>If This Court Finds That The Evidence Must Comply With The Strict 404(b) Requirements, The Testimony Is Still Admissible Because Evidence Of Third Party Prior Bad Acts Proves Identity.</u>

Evidence of Short's prior drug dealing scheme is probative of the identity of Lane's accomplice in the conspiracy and is admissible under the general application of 404(b). Even when courts strictly interpret 404(b), evidence of third party bad acts is admissible if it meets one of the delineated exceptions. *United States v. Williams*, 458 F.3d 312, 317 (3d Cir. 2006). One exception in 404(b)(2) allows the defendant to introduce propensity evidence to show the

identity of the person who committed the crime. Fed. R. Evid. 404(b)(2). When the evidence qualifies under a 404(b)(2) exception, admission simply depends on whether the evidence is relevant and if it survives a simple rule 403 balancing test. *Seals*, 419 F.3d at 612 (Posner, J., concurring). The balancing test favors the defendant as it requires the probative value of the evidence be "substantially outweighed" by risk of prejudice, such as confusion to the jury. *Id*. When there is relevant evidence that the identity of the person who committed the crime is someone other than the accused, the probative value of the evidence is difficult to overcome. *Id*. at 610. Essentially, this type of evidence functions as an alibi. *Id*. at 612. Just as a judge must do a 403 balancing test when defendants present evidence that they were somewhere else when the crime occurred, a judge must perform the same test when defendants claim someone else committed the crime. *Id.* In cases of wrong identity, it is not the judge's role to decide the strength of the evidence, it is the jury's role. *Id*. at 614.

When the identity of the actual criminal is in question, preventing the admission of evidence that speaks to identity "on the basis of vague and implausible concerns with jury confusion . . . violates Rule 403." *Id*. at 613. In *Seals*, Justice Posner argues, in concurrence, that because the evidence is probative of the identity of the bank robbers it should have been admitted and not barred by rule 404(b). *Id*. at 610-11. If the evidence is relevant and non-prejudicial the court should admit it despite the strength of the government's case. *Id*. at 611. Although the similarities were generic, Judge Posner determined that this evidence is still admissible because the similarities are proof that the identity of the robbers could be people other than those accused. *Id*. at 610-12.

Analogous to the evidence of the similarities between the robberies that created a question of identity in *Seals*, the evidence of the similarities between the drug operations creates

a question of identity in the instant case. Ms. Zelasko argues that Short had more than just a propensity to sell drugs and that Short is the second member of the conspiracy. The evidence is relevant because it creates an issue of identity, the core issue in the case. Further, the evidence's substantial probative value outweighs what little prejudice may come from it, as previously addressed. Proving the identity of the co-conspirator is central to the trial and is permitted even though it is prior bad act evidence. A jury cannot make a reasoned decision without this evidence; therefore, it must be admitted.

B. Even If This Court Finds Reverse 404(b) Evidence Inadmissible, The Testimony Is Essential To The Defense And Must Be Admitted To Ensure The Defendant's Right To Present A Complete Defense.

The lower court correctly granted Ms. Zelasko one of her fundamental constitutional rights, the "opportunity to be heard in [her] defense," by admitting evidence that indicates someone else committed the crime. *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973) (quoting *In re Oliver*, 333 U.S. 257, 272 (1947)). This basic right, while "undeniably strong," must be balanced with the state's interest in "reliable and efficient trials." *Perry v. Rushen*, 713 F.2d 1447, 1451 (9th Cir. 1983). Evidentiary rules that are "arbitrary or disproportionate to the purposes they are designed to serve" violate the defendant's right to present a complete defense. *Rock v. Arkansas,* 483 U.S. 44, 56 (1987). Evidence is improperly excluded by arbitrary or disproportionate rules when the exclusion "has infringed upon a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). Preventing a defendant from introducing exculpatory evidence for arbitrary or unjust reasons destroys the adversarial component of the judicial system. *United States v. Cronic*, 466 U.S. 648, 656 (1984). This precludes a defendant from meaningfully challenging the prosecution's case. *Id*.

1. Exclusion Of The Testimony Does Not Serve A Legitimate Government Interest.

Strictly applying 404(b) creates an arbitrary ban on probative evidence that does not serve a legitimate state purpose. *Rock*, 483 U.S. at 54-55. A balancing test is necessary to determine if there is a legitimate state interest in precluding 404(b) evidence that outweighs the defendant's right to a complete defense. *Michigan v. Lucas,* 500 U.S. 145, 151 (1991). For example, in *Michigan v. Lucas*, this Court determined that states have a legitimate interest in shielding rape victims. *Id.* at 149-52 (holding that, in this specific case, excluding evidence of the victim's prior sexual relationships, when the defendant failed to comply with the notice requirements of the statute, was not a due process violation). Even when a state presents a legitimate purpose for the exclusion of evidence, the evidence may still be admissible if the purpose does not outweigh the infringement of the defendant's constitutional rights. *Rock*, 483 U.S. at 61. For instance, a legitimate interest in barring unreliable evidence was not enough to create a *per se* exclusion of all hypnotically refreshed testimony. *Rock*, 483 U.S. at 61 (finding that a broad exclusion, without considering the reliability or importance of the testimony to the defendant, violated the defendants due process right). When weighing the state's interests, courts cannot ignore a fundamental principle of the judicial system, "sorting out truthful from untruthful testimony is the essence of the *jury's* function." *Harris v. Thompson*, 698 F.3d 609, 638 (7th Cir. 2012) (citing *Scheffer*, 523 U.S. at 313).

As the Fourteenth Circuit determined in the instant case, the state's interests in promoting judicial efficiency and reducing prejudice are not persuasive policy reasons. Admitting this evidence does not create a risk of either of the Government's concerns. Ms. Zelasko is presenting a "modest defense," one testimony. R. at 38. If one testimony per defendant is a burden to the judicial system, defendants could never present witnesses. This clearly violates constitutional

principals. Further, admitting Morris's testimony does not create a risk of prejudice. R. at 37-38. In *Lucas,* this Court found protecting sexual crime victims to be a legitimate interest. The individual the state sought to protect was the victim in the ongoing trial. Allowing the jury to hear about the victim's prior sexual relationships could harm her credibility and be humiliating. This humiliation dissuades future victims from seeking justice against their perpetrators. In the instant case, the third party is the only person that could possibly be prejudiced. The third party is not a part of the current trial, so there is no risk of harm from the testimony. R. at 37-38. The Government is essentially trying to protect someone who is not in danger. Protecting someone from prejudice, who is not exposed to prejudice, is not a legitimate government interest.

Further, the Government argues for a *per se* ban on all third party propensity evidence, which creates a broad category that is excluded without any consideration to other indications of reliability. R. at 13-14. This approach fails to take into consideration other indicia of reliability. In *Rock v. Arkansas,* this Court overturned a state law that prohibited any hypnotically refreshed testimony because it was a *per se* ban that did not consider the facts of individual cases. The law against hypnotically refreshed testimony was so broad that it violated the defendant's right to present a complete defense. Similarly, in this case the Government is trying to make a sweeping rule regarding all third party propensity evidence. Applied in the manner the Government advocates for, the ban on third party propensity evidence fails to consider the circumstances of each case and would violate Ms. Zelasko's due process right under the Constitution.

2. Introducing The Testimony Protects A Weighty Interest Of The Defendant Because It Is The Only Evidence Showing That Someone Else Was The Second Member of The Conspiracy.

The importance of evidence demonstrating that someone else was possibly the co-conspirator outweighs the Government's feeble interests and must be admitted. This Court

recognized that arbitrary rules should not prevent defendants from introducing evidence that someone else committed the crime. *Holmes v. S. Carolina,* 547 U.S. 319, 319-20 (2006). The standards in weighing the importance of this evidence are not entirely clear. However, one of the most common tests requires only that the evidence be more than speculative and "tend to prove or disprove a material fact at issue." *Holmes,* 547 U.S. at 327 (citing 40A Am. Jur. 2d Homicide § 286 (1999)). Any evidence that the government may be prosecuting the wrong person is highly persuasive due to the practical difficulties of obtaining this evidence. Lissa Griffin, *Avoiding Wrongful Convictions: Re-Examining the "Wrong-Person" Defense*, 39 Seton Hall L. Rev. 129, 131-32 (2009). A typical defendant does not have the resources or knowledge to investigate a crime. *Id.* When the government fails to properly investigate a crime and accuses the wrong person, the fundamental principals of the criminal justice system must determine guilt and innocence. *Id*. This determination can only be legitimate when there are "powerful statements on both sides of the question." *Cronic*, 466 U.S. at 655.

In *Holmes v. South Carolina*, an arbitrary rule prevented the defendant from sharing his powerful side of the case, which was evidence of third party guilt. *Holmes,* 547 U.S. at 329. The rule prevented third party evidence simply because the judge determined that the government had a very strong case based on forensic evidence. *Id*. at 331. This Court concluded that the rule violated the defendant's constitutional right because the judge did not consider the evidence on its own, but only in light of the government's case. *Id.* at 329. Further, the defendant's case theory attacked the heart of the prosecution's case, that the government mishandled the forensic evidence causing it to be unreliable. *Id.* at 322. Preventing the defendant from introducing evidence that corroborated his side of the story violated his right to present a complete defense. *Id*. at 331.

Here, the evidence of Short's prior drug sales attacks the central theory of the Government's case, that Ms. Zelasko was the second co-conspirator. The Government has minimal evidence to prove that the murder was not an accident and that Ms. Zelasko actually had a motive to kill Riley. Motive is a material issue in this case. As in *Holmes*, Morris's testimony attacks the Government's central theory of the case. The Government's whole theory is centered on the idea that Ms. Zelasko conspired with Lane and killed Riley to protect the conspiracy. R. at 11. Evidence that Short sold steroids to the Canadian Snowman Team creates significant doubt that Ms. Zelasko was in the conspiracy at all. R. at 24-25. Short sold a very similar drug, R. at 28, for the same purpose, and to the same population of people. R. at 25. Morris's testimony confirms that Short sold the steroid to Snowman Team members to improve performance. R. at 25. Further, ThunderSnow surfaced and the team improved shortly after Short joined the team. R. at 2, 10. Ms. Zelasko does not have to investigate this situation on her own to produce more evidence of Short's involvement; she only has to create a reasonable doubt for the jury.

Contrary to what the Government contends, the evidence excluded does not need to be a "smoking gun" to violate the defendant's constitutional rights. *See Holmes,* 547 U.S. at 330-31. Due to many obstacles, it is unlikely that defendants can unearth smoking guns on their own. As this Court said, the evidence just needs to be more than speculative and tend to disprove a material issue in the case, as the evidence did in *Holmes*. *Id*. at 327. Preventing this specific and probative evidence from being admitted violates Ms. Zelasko's constitutional right and would be a windfall for the Government. The Third Circuit acknowledged, "there might be cases in which an application of [r]ule 404(b)'s prohibition against propensity evidence arguably encroaches on a defendant's right to present a full defense." *United States v. Williams*, 458 F.3d 312, 317 n.5 (3d Cir. 2006). Ms. Zelasko's case confirms the Third Circuit's forewarning. To prevent this

encroachment on Ms. Zelasko's rights, this Court must affirm the Fourteenth Circuit's decision and allow this evidence into trial.

II. The Fourteenth Circuit Properly Held That The Email Is Inadmissible On Two Separate Grounds: It Is Hearsay That Does Not Qualify As A Declaration Against Interest Under *Williamson* And It Violates The Confrontation Clause.

The Federal Rules of Evidence strictly limit the use of hearsay, a statement made out of court, because of its strong tendency to be unreliable. *Williamson v. United States,* 512 U.S. 594, 589 (1994). There are specific exceptions to the general ban on hearsay that apply when the risk of unreliability is overcome by an "indicia of reliability and trustworthiness." *Barone,* 114 F.3d at 1292. One exception, a statement against interest, admits an out of court statement that "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made . . . [it] had so great a tendency to . . . expose the declarant to civil or criminal liability." Fed. R. Evid. 804(b)(3). In addition, there must be circumstances corroborating the reliability of the statement and the declarant must be unavailable. Fed. R. Evid. 804(b)(3). The trustworthiness of these statements relies on the commonsense notion that people do not make incriminating statements about themselves "unless they believe them to be true." *Williamson,* 512 U.S. 594 at 599.

Reliability is not the only concern when admitting hearsay statements; harm is also a concern. The Confrontation Clause ensures the defendant's right "to be confronted with the witnesses against [her]," to prevent harmful statements from being admitted. U.S. Const. amend. VI. By excluding the untrustworthy and harmful email, the Fourteenth Circuit properly applied both doctrines. This Court should affirm the Fourteenth Circuit's holding, which applied Rule 804(b)(3) consistently with this Court's interpretation of "statement" in *Williamson.* Further, this

holding ensures that the Confrontation Clause retains one of its essential functions, protecting defendants from harm.

A. This Court Must Uphold The *Williamson* Doctrine To Maintain The Indicia Of Reliability Inherent In 804(b)(3) Statements And To Ensure That Harmful Evidence Is Not Admitted.

In *Williamson*, this Court resolved a circuit split regarding whether the word "statement" in 804(b)(3) should have a loose or narrow interpretation, holding that the narrow interpretation must be applied. *Williamson,* 512 U.S. 594 at 599. Circuits applying the loose interpretation of statement advocated for admitting entire narratives. *See United States v. Garris*, 616 F.2d 626, 630 (2d Cir. 1980). In contrast, circuits relying on the narrow interpretation of statement admitted only single remarks and excluded other parts of the narrative that were not against interest. *United States v. Lilley*, 581 F.2d 182, 188 (8th Cir. 1978). In resolving this split, this Court looked to the plain language and purpose of the statute. *Williamson,* 512 U.S. 594 at 599. The rule intends for the admission of hearsay statements that are clearly against the declarant's interest because people are unlikely to make damaging statements unless they are true. Fed. R. Evid. 804(b)(3) advisory committee's note.

The loose definition of statement is inconsistent with the purpose of 804(b)(3) because it allows statements that are not damaging to the declarant to be admitted based on their proximity to damaging statements. *Williamson,* 512 U.S. 594 at 600. Interpreting statement broadly could potentially admit an entire narrative, including exculpatory and collateral portions, if they are in aggregate to the inculpatory portions. *Id.* at 599. This application disregards the plain language of 804(b)(3), admitting statements that do not expose the declarant to criminal liability. *Id*. 600-01. Further, admitting non-inculpatory statements discounts the reliability inherent in statements against interest under 804(b)(3). *Id*.

The narrow definition of statement allows 804(b)(3) to keep its indicia of reliability, ensuring that only truly inculpatory statements are admitted. *Id*. at 596. Treating statement narrowly as "a single declaration or remark" prevents non-inculpatory statements that are part of a larger text from being admitted. *Id*. at 599 (internal citations omitted). The narrow interpretation allows the rule to retain its implied notion of trustworthiness, restricting the rule to only allow statements that were unmistakably against the declarant's interest. *Id.* at 599. In contrast, the broad interpretation allows collateral or even exculpatory statements to be admitted, simply based on their proximity to an inculpatory statement. *Id*. at 601.

The Government's argument is void of any policy to support the notion that a statement's proximity to an inculpatory statement makes it more credible. In fact, "one of the most effective ways to lie is to mix falsehoods with the truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id*. at 599-600. Not only is the broad interpretation inconsistent with the underlying policy of 804(b)(3), it is also inconsistent with the general ban against hearsay. Admitting statements that do not expressly meet the exception, essentially, allows "garden variety hearsay" into evidence. *Carson v. Peters,* 42 F.3d 384, 386 (7th Cir.1994). The *Williamson* interpretation allows for declarations against interest, which carry a high evidentiary value, to be admitted while preventing a loophole that the Government could use to introduce inadmissible hearsay.

1. This Court Must Uphold The *Williamson* Doctrine Because It Is A Clear Standard That Can Be Uniformly Applied.

The *Williamson* doctrine is properly applied to determine whether a statement is sufficiently against interest when courts first, break down the narrative into individual statements; second, determine which statements are against interest; and third, determine whether each statement remains against the declarant's interest in light of corroborating

circumstances. *See Williamson,* 512 U.S. at 594. To correctly apply this doctrine, the focus must be on the *veracity of the statement* and not the veracity of the declarant. *See Barone,* 114 F.3d at 1300 (explaining that the focus of 804(b)(3) is "not concerned with the veracity of the in court witness but with the trustworthiness of the out of court statement . . . "). Courts misapply this test when they admit collateral statements because of their proximity to inculpatory statements. *United States v. Castelan*, 219 F.3d 690, 694 (7th Cir. 2000). This application is incorrect because it focuses on the veracity of the declarant, not the veracity of the individual statement. The statement must be sufficiently inculpatory on its own to meet the requirements of 804(b)(3). *Williamson*, 512 U.S. at 600-01. After determining that the statement is against interest, looking at the totality of the circumstances serves as a second test to ensure that the statement is sufficiently against penal interest. *Barone*, 114 F.3d at 1295-96. The circumstances surrounding the statement are necessary to determine if the declarant made the statement to curry favor or shift blame. *Id*.

Collateral and exculpatory statements that shift blame or attempt to curry favor lack reliability. *Williamson*, 512 U.S. at 601. In *Williamson*, an alleged co-conspirator, Harris, made a detailed statement that partially implicated him and partially implicated the defendant, Williamson. *Id*. at 596-98. Police stopped Harris and found cocaine in his vehicle. *Id*. at 596. Harris told police who he worked with and revealed the location of the next "drop" where they could catch Williamson in the act. *Id*. Shortly after making this statement, the defendant admitted that part of his statement was a lie. *Id*. at 597. Williamson was actually driving behind Harris, saw him get pulled over, and would likely be anticipating the police to show up at the "drop." *Id*. Ignoring the fact that all of the statements were not self-inculpatory or even true, the prosecution attempted to get the statements admitted because there were several statements that were clearly

inculpatory. *Id*. This Court found the narrative inadmissible, as a whole, because all of the statements were not against the declarant's interest. *Id*. at 604. Not only were many of the statements collateral, but they also served to "shift the blame" to Williamson. *Id*. at 604-05. While statements that shift the blame may be admitted if the statement's reliability can be established, this Court noted that they can be very dangerous. *Id*. at 603. This Court decided that Harris's statements had a high risk of danger and reversed the lower court's decision to admit them. *Id*. at 604-05.

The Government does not claim that the lower court misapplied *Williamson*, rather, that this analysis cannot be uniformly applied. To support this position, the Fourteenth Circuit's dissent offered two cases they claim have inconsistent holdings. R. at 51-52. The dissent misconstrues these cases, attempting to shift the focus from the veracity of the statement to the veracity of the declarant. *Compare United States v. Butler*, 71 F.3d 243, 252-54 (7th Cir. 1995) (holding that a statement admitting to being in a room with illegal weapons was not inculpatory because the declarant was merely placed in constructive possession of a weapon) *with United States v. Hajda*, 135 F.3d 439, 441-44 (7th Cir. 1998) (holding that a statement made in 1946 Poland that the declarant's "son Bronislaw went to Germany to join in the SS" was against his interest because at the time of the statement it exposed Hajda to criminal liability). These results are not inconsistent. In *Hajda,* the statement was made in 1946 Poland, just after Germany lost the war. While today the statement does not expose Hajda to criminal liability, the dangers of guilt by association were much greater then, than they are today. Claiming that the statement was not against Hajda's interest simplifies the time and context of which it was made. This over simplification is overcome because of the totality of the circumstances requirement. In contrast, Butler's statement did not expose him to criminal liability at the time that it was made. The

totality of the circumstances shows that the statement merely put Butler in constructive possession of the weapon. Looking at the facts of each case, it is clear that the *Williamson* doctrine can be uniformly applied.

2. The *Williamson* Doctrine Should Be Upheld Because This Court Reaffirmed It, Congress Implicitly Approved It, And *Stare Decisis* Mandates Its Continued Application.

The principal of *stare decisis* ensures stability amongst courts and should only be departed from when there is a special justification. *Payne v. Tennessee,* 501 U.S. 808, 843 (1991) (quoting *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984)). To determine whether precedent should be overturned, this Court looks at how unanimous the decision was, how spirited the dissents were, and if lower courts have questioned the ruling. *Payne,* 501 U.S. at 829. For over twenty years, the *Williamson* application of 804(b)(3) has remained effective. Citizens preparing cases expect that *Williamson* will be applied and depend on it because it is the current law. Although in *Williamson*, there were concurring opinions, there were no dissents. Additionally, while some lower courts struggled have with applying the proper test, many lower courts do not question the ruling. *Silverstein v. Chase*, 260 F.3d 142, 146 (2d Cir. 2001); *United States v. Moses,* 148 F.3d 277, 280 (3d Cir. 1998); *Vincent v. Seabold*, 226 F.3d 681, 688 (6th Cir. 2000).

Congress's implicit acceptance of the *Williamson* doctrine and this Court's continued reliance on *Williamson* buttresses the principals of *stare decisis*. The legislature made multiple modifications to 804(b)(3) and refrained from making any changes to the rule that would make it inconsistent with the *Williamson* holding. *See* Fed. R. Evid. 804(b)(3) advisory committee's notes. If the legislature found the holding inconsistent with the proper application of 804(b)(3) it could have modified the rule accordingly, but it has not. *Id*. Keeping the rule consistent with the *Williamson* holding indirectly embraces it. Further, this Court reiterated its commitment to

Williamson in a subsequent holding. *Lilly v. Virginia*, 527 U.S. 116, 139 (1999) (plurality opinion). In *Lilly v. Virginia*, this Court restated the principle underlying *Williamson*, stating that a "broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id*. (quoting *Williamson*, 512 U.S. at 599).

Finally, this Court has said that overruling a law should be the last resort. *Payne*, 501 U.S. at 839-40 (Souter, J., concurring). Even when an unworkable standard exists, the proper remedy is to address its application, not to change the standard. *Id*. This Court should affirm *Williamson,* respecting its prior decisions, legislative intent, and the fundamental principles of *stare decisis*.

3. The Co-Defendant's Email Does Not Contain Statements That Are On Their Own Inculpatory And Is Inadmissible Under The *Williamson* Doctrine.

The Fourteenth Circuit correctly applied *Williamson* by breaking down the email into separate statements, determining whether they were against defendant Lane's interests, and then determining their reliability in context of the whole email. R. at 41-42. The email from Lane to U.S. Snowman Team coach Billings did not contain any individual statements that were directly against Lane's interest. R. at 42. As a whole, the email could possibly be seen as against Lane's interest, but as *Williamson* established, the narrative cannot be considered in its entirety. *Id*. Upon breaking down the email, the Fourteenth Circuit could not find any individual statements that were against Lane's interest. *Id*. The individual statements are similar to the statement in *Butler* that was not inculpatory. The statement in *Butler* placed the declarant in a room with an illegal gun, it did not expose the declarant to criminal liability. Here, the statements may insinuate that Lane was in a business, that she had a disagreement with her partner, or that someone did not like what Lane and her unidentified partner were doing. R. at 32. None of these

inferences amount to criminal liability. Further, when Lane said that she needed help, she spoke to Billings, with whom she had a personal relationship. R. at 32. This does not expose Lane to any liability, as it is common that people involved in relationships often ask each other for help.

Further, because some of the statements shift the blame, they are the most dangerous types of statements and should not be admitted under 804(b)(3). Lane's statement, "my partner really thinks we need to figure out how to keep him quiet," R. at 3, implies that the co-conspirator, not Lane, advocated "silencing" Riley. The statement continues to shift the blame by explaining that Lane did not yet know what the co-conspirator had in mind. R. at 32. These statements serve to make Lane appear less culpable and make Ms. Zelasko seem like the mastermind of the operation. These statements are entirely self-serving and cannot be admitted under 804(b)(3). Further, they are exculpatory towards Lane because she is seeking help, suggesting she has a guilty conscious. This statement could curry favor with a jury. These statements are not against the declarant's interest, are self-serving, bear no indicia of reliability, and cannot be admitted under 804(b)(3).

While the email clearly does not meet the basic requirements for admission as a declaration against interest, the requirements are even more stringent because Ms. Zelasko is in a co-trial. This Court held that declarations against penal interest are too broad to be limited to one category and should be more restricted in co-trials. *See Lilly,* 527 U.S. at 138-39 (plurality opinion).

B. Even If This Court Finds The Statements Admissible Under *Williamson*, The Statements Must Still Be Excluded Because They Violate The Defendant's Constitutional Right To Confrontation Under The *Bruton* Doctrine.

Co-defendant Lane's email inculpates Ms. Zelasko in the conspiracy. Its admission violates Ms. Zelasko's Sixth Amendment right to confront her accuser. To ensure that defendants have the right to confront their accusers the Confrontation Clause prevents harmful and

unreliable evidence. *Bruton v. United States*, 391 U.S. 123, 126 (1968). In *Bruton v. United States,* this Court applied the Confrontation Clause to a narrow and specific situation, prohibiting statements against a co-defendant in a joint trial where the co-defendant declarant was not testifying. *Id*. at 131. To be prohibited, the statements must implicate and be harmful to the co-defendant. *Id*. at 141. These statements are inadmissible under the Confrontation Clause because they can be so "devastating to the defendant" that they destroy the defendant's right to a fair trial. *Id*. at 136.

Bruton held that in co-trials, even a limiting instruction to the jury is not enough to prevent prejudice against a defendant implicated by the statement. *Id*. at 128. While in theory a jury instruction could prevent the Confrontation Clause issue, in practice the harm to the co-defendant is unavoidable. *Id*. at 126. Even with the limiting instruction telling the jury to disregard the evidence, admitting statements implicating the co-defendant would be a "windfall" for the government. *Id*. at 129 (quoting *Jackson v. Denno,* 378 U.S. 368 at 388 n.15 (1964)). This is a windfall because the government would not be required to prove their case beyond a reasonable doubt; rather, the defendant is prevented from raising reasonable doubts because the jury has already made its decision. A jury instruction does not remedy the prejudice associated with this evidence and is not a substitute "for petitioner's constitutional right of cross-examination." *Bruton,* 391 U.S. at 137.

1. The *Bruton* Doctrine Is Concerned With Constitutional Harm And Is Not Affected By The *Crawford* Decision, Which Is Concerned With Constitutional Reliability.

The *Bruton* doctrine applies to a narrow category of statements excluded by the Confrontation Clause due to their devastating effects on the defendant and not because of their reliability. *See Cruz v. New York*, 481 U.S. 186, 191-92 (1987). After deciding *Bruton*, this Court

held that when analyzing a statement's reliability the confrontation clause only applies to testimonial statements. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). The concern of this Court in *Crawfor*d was not the constitutional harm to the defendant, but the constitutional reliability of the statement. 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, 627-28 (2012). This Court's intent to keep the two doctrines separate is clear when looking to the history of Confrontation Clause decisions. *Id*. *Bruton,* the first of these cases, clearly sought to prevent constitutional harm to the defendant in a co-trial. *See Ohio v. Roberts,* 448 U.S. 56, 63-64 (1980). Subsequently, this Court in *Ohio v. Roberts,* created a two-part test to determine when hearsay statements are reliable. *Id*. at 66. The test looked at whether the hearsay statement was firmly rooted and if not, if the statement had a guarantee of trustworthiness. *Id*. Following *Roberts*, this Court reiterated its commitment to *Bruton* by applying it *even in light* of the *Roberts* decision. *Cruz,* 481 U.S. at 191-92. *Cruz v. New York* clearly illustrates that *Roberts* did not overrule *Bruton*. *Id*. Additionally, the *Cruz* decision highlighted that constitutional reliability and constitutional harm are two distinct ways to violate the Confrontation Clause. *Id*. at 192-93. The two respective doctrines coexist and apply in their respective domains. *See Id*.

This Court's decision in *Crawford* changed the test for constitutional reliability and expressly modified how testimonial statements are analyzed, which overruled *Roberts* and left *Bruton* and *Cruz* unscathed. *See Crawford*, 541 U.S. at 57. The test under *Crawford* focuses on the reliability of testimonial statements, determining that reliability is not an issue in non-testimonial statements; therefore, non-testimonial statements are unprotected by the Confrontation Clause when reliability is the only concern. *Id*. at 53, 57. *Crawford* and its progeny struggle to distinguish non-testimonial statements from testimonial statements. *Id.* at 68;

Michigan v. Bryant, 131 S. Ct. 1143, 1160 (2011). However, these decisions do not struggle with their focus on reliability. *See Bryant*, 131 S. Ct. at 1161 (analyzing the declarant's motives to determine reliability). None of the subsequent cases have addressed the constitutional harm of a statement made by a non-testifying co-defendant in a co-trial since *Cruz*. Therefore, the *Burton* doctrine is still alive. This Court expressly held in *Crawford* that *Cruz* "addresses [an] entirely different question." *Crawford*, 541 U.S. at 36, 59. The history of this Court's decisions regarding the Confrontation Clause demonstrates that the decisions regarding constitutional harm and constitutional reliability were clearly intended to coexist.

While this Court's decisions have been fairly explicit regarding the continued application of *Bruton,* there is some confusion resulting in a circuit split. Some circuits disregard the differences between constitutional harm and constitutional reliability, refusing to apply *Bruton* in light of Crawford. *United States v. Dale*, 614 F.3d 942, 957 (8th Cir. 2010). These circuits apply a uniform rule that differentiates between non-testimonial and testimonial hearsay, excluding all testimonial statements regardless of the situation. *Id*. This application oversimplifies a complicated issue that involves constitutional rights. Given the broad nature of hearsay and the numerous exceptions, blanket exclusions are haplessly idealistic and imprudent. Circuits that apply the Confrontation Clause in this manner allow the harm, which *Bruton* intended to remedy, to continue. To prevent this oversimplification of the Confrontation Clause from infringing on the constitutional rights of more people, this Court should affirm the lower court's exclusion of the email from evidence.

2. The Statements In Co-Defendant Lane's Email Implicate Ms. Zelasko In The Conspiracy, Are Devastating To Her Defense, And Were Properly Excluded Under The *Bruton* Doctrine.

This Court established three factors to determine if a co-defendant's statement should be excluded under *Bruton*: "the likelihood that the instruction will be disregarded, ... the probability that such disregard will have a devastating effect, ... and the determinability of these facts in advance of trial." *United States v. Harper*, 527 F.3d 396, 403-04 (5th Cir. 2008) (quoting *Cruz,* 481 U.S. at 193). In *Bruton*, the declarant and co-defendant, Evans, made a statement admitting to armed robbery with an unnamed accomplice. *Bruton*, 391 U.S. at 124. During the joint trial, the Court admitted this statement and Evans refused to testify. *Id*. When the jury deliberated, the statement that implicated not only Evans, but also Bruton, was in front of the jury. *Id*. at 127. This Court said that an instruction to disregard the evidence was not enough to overcome the "substantial, perhaps even critical, weight [the statement added] to the Government's case . . . ." *Id*. at 128. Even though the statement did not directly implicate the defendant, it referred to an unnamed accomplice. *See Gray v. Maryland*, 523 U.S. 185, 193 (1998). It only takes a simple inference for the jury to determine that the unnamed accomplice was the other man on trial. *Id*. *Bruton* clearly bars statements that plainly incriminate a defendant, including statements that require the jury to make an obvious inference. *Harper*, 527 F.3d at 403.

The statements in Lane's email easily lead the jury to infer that Ms. Zelasko was a member of the conspiracy and that she was the one who wanted to keep the victim quiet. This misleading evidence is detrimental to Ms. Zelasko's defense. Lane's email undoubtedly suggests that there was a co-conspirator in the drug operation. R. at 29. Lane wrote to Billings that she and a partner ran a business "with the female team." R. at 32. This statement not only identifies a co-conspirator, but it also makes it likely that the partner is "on the female team" with Lane. *Id*.

This creates an opportunity for the jury to incorrectly infer that the co-conspirator is likely the other person on trial. This inference is seemingly reaffirmed because Ms. Zelasko is also on the female Snowman Team. R. at 1. As *Harper* made clear, it does not matter that the accomplice was unnamed in the statement because the statement still creates an inference that the co-defendant is guilty. This evidence devastates Ms. Zelasko's defense because she does not have the opportunity to cross-examine Lane, who refuses to testify at trial. Further, by the time Ms. Zelasko could rebut this strong inference, the jury would be dissuadable, giving the Government a windfall in this case. Admitting these statements prevents confrontation and destroys Ms. Zelasko's constitutional right to confront her accuser.

CONCLUSION

This Court should affirm the decisions of the United States Court of Appeals for the Fourteenth Circuit on both pre-trial motions.

Respectfully Submitted,

/s/

7R
Counsel for Respondent

Date: February 12, 2014

APPENDIX I

The Constitution of the United States

Amendment 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 defence.

Amendment 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.

APPENDIX II

The Federal Rules of Evidence

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

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.

Rule 404. Character Evidence; Crimes or Other Acts

(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.

Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

(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.