#### No. 12-13

#### IN THE

#### SUPREME COURT OF THE UNITED STATES

#### UNITED STATES OF AMERICA.

Petitioner.

--against--

### ANASTASIA ZELASKO,

Respondent.

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

BRIFF FOR PETITIONER

### **QUESTIONS PRESENTED**

- I. Whether Federal Rule of Evidence 404(b) bars Zelasko's use of evidence to show a third party's criminal propensity to commit the offenses with which Zelasko is charged?
- II. Whether Zelasko's constitutional right to present a complete defense as contemplated in *Chambers v. Mississippi* would be violated by the exclusion of a third party's propensity to distribute illegal drugs?
- III. Whether *Williamson v. United States* should be overruled insofar as it provides the standard of application for statements against penal interest under Federal Rule of Evidence 804(b)(3), and if so, what standard would best replace it, and is Lane's email as a whole sufficiently against her penal interest under the new standard?
- IV. Whether the Confrontation Clause bars admission of Lane's email under *Bruton v. United States*, even though her email was sent to her boyfriend, and was therefore nontestimonial within the meaning of *Crawford v. Washington*?

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#### STATEMENT OF THE CASE

Respondent Anastasia Zelasko ("Zelasko") and her co-defendant Jessica Lane ("Lane") (collectively "Defendants") are members of the women's United States Snowman Pentathlon team ("Snowman Team"). (R. 1). Zelasko joined on September 6, 2010, and Lane joined on August 5, 2011. (R. 1). Prior to August 2011, the women's Snowman Team had never ranked above sixth place in the Winter Games. (R. 2). However, after Lane joined in fall 2011, the team's practice times "markedly improved." (T. 2).

The victim in this case, Hunter Riley ("Riley") was a member of the men's Snowman Team. (R. 1). In 2011 and 2012, Riley was acting as an informant for the Drug Enforcement Administration ("DEA"). (R. 1, 9). At the instruction of the DEA, Riley approached Lane on October 1, 2011, November 3, 2011, and December 9, 2011 and sought to purchase "ThunderSnow," seemingly for his personal use. (R. 2, 3). Lane declined each time. (R. 2, 3). However, on December 10, 2011, Lane's boyfriend, Peter Billings, ("Billings") who is the coach of the women's Snowman Team, witnessed the Defendants consumed in a heated argument, during which Billings heard Lane shout at Zelasko to "stop bragging to everyone about all the money [Zelasko] was making." (R. 1). A few days after Billings witnessed the argument, he confronted Lane with his suspicion that she was distributing performance-enhancing steroids to the female team members. (R. 3). Although Lane initially denied Billings' accusations, she sent him the following email about a month later, seeking his help:

I really need your help. I know you've suspected before about the business my partner and I have been running with the female team. One of the members of the

<sup>&</sup>lt;sup>1</sup> "ThunderSnow" is the substance at issue in this case. As defined by 21 U.S.C. § 802(41)(A), the substance is a bolasterone ester; it is more commonly known as an anabolic steroid. (R. 2).

<sup>&</sup>lt;sup>2</sup> Lane and Billings were romantically involved for several years at the time of the alleged drug distributions and murder in this case. (R. 1).

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. 3). A few days after Lane sent the email, several team members observed Zelasko and Riley engaged in a heated argument. (R. 3). Then, a week later, Zelasko shot and killed Riley on the team training grounds. (R. 3). Shortly after the shooting, Zelasko was arrested after the DEA executed a search warrant at Zelasko's residence, and seized approximately \$5,000 in cash, and two fifty-milligram doses of ThunderSnow. (R. 3). The next day, the DEA executed a search warrant at the Snowman Team's training facility and recovered 12,500 milligrams of ThunderSnow hidden in the team's equipment storage room. (R. 3). All female team members and staff had access to the equipment room. (R. 8). Also that same day, the DEA executed a search warrant at Lane's residence, and seized \$10,000 in cash, twenty fifty-milligram doses of ThunderSnow, and a laptop from which the above email was sent. (R. 4). Lane was then arrested. (R. 4). No evidence was found at the apartment of Casey Short ("Short"), a third party whom Zelasko argues was Lane's co-conspirator in this case. (R. 8). Short joined the U.S. women's Snowman Team in June of 2011, after transferring from the Canadian Snowman team. (R. 24).

Zelasko and Lane were indicted and charged with conspiracy to distribute and possess with intent to distribute steroids, distribution of and possession with intent to distribute steroids, simple possession of steroids, conspiracy to murder in the first degree, and murder in the first degree. (R. 4–5).<sup>3</sup> The parties filed pre-trial evidentiary motions. Zelasko moved to introduce the testimony of Miranda Morris ("Morris") to show the propensity of a third party to sell performance-enhancing drugs under Federal Rule of Evidence 404(b)(1), and the government moved to introduce Lane's email as a statement against Lane's penal interest under Rule

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 $<sup>^3</sup>$  Lane and Zelasko were charged under 21 U.S.C. §§ 841(a)(1), (b)(1)(E) and 846; 21 U.S.C. §§ 841(a)(1) and (b)(1)(E); 21 U.S.C. § 844; 18 U.S.C. §§ 371 and 1111(a); and 18 U.S.C. § 1111(a). (R. 4–5).

804(b)(3). After hearing oral arguments on the motions, the United States District Court for the Southern District of Boerum ruled in favor of Zelasko on both motions. (R. 21). Pursuant to 18 U.S.C. §§ 3731 and 3731-(a), the United States filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. 30). The circuit court affirmed the decision of the district court on all issues, holding that: (1) Morris's testimony is admissible under Rule 404(b) because 404(b) does not apply when a defendant is offering evidence of the propensity of a third party in order to exculpate herself; (2) Zelasko's constitutional right to present a full defense encompasses the propensity evidence under *Chambers v. Mississippi*; (3) *Williamson v. United States* bars admission of statements collateral to declarations against penal interest; and (4) *Bruton v. United States* applies to testimonial and nontestimonial evidence. (R. 31). This Court granted the Government's subsequent petition for certiorari. (R. 55).

#### **SUMMARY OF THE ARGUMENT**

In the present case, the lower courts both incorrectly ruled that: (1) Morris's testimony is not barred by Federal Rule of Evidence 404(b) as propensity evidence; and (2) Lane's email is inadmissible as a statement against penal interest under Rule 804(b)(3). First, Morris's testimony was improperly admitted as evidence. The plain language of Rule 404(b)(1) requires the exclusion of evidence brought only to prove a person's propensity to act in accordance with a prior act. In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, this Court offered a method of statutory interpretation, requiring courts to first determine if Congress has unambiguously expressed its intent through the plain language of a particular statute. Applying *Chevron's* test here, the drafter's intent in Rule 404(b)(1) is clear by the plain language of the statute. The rule explicitly distinguishes a "person" in Rule 404(b)(1), from a "defendant" in rule 404(b)(2). By its plain language, the drafters have clarified that certain provisions apply to a defendant, while

others apply to all "persons." Because the drafters explicitly delineated between categories of individuals within the same rule, the drafters intent to exclude propensity evidence *of any person* under 404(b)(1) is clear. Therefore, because Short falls into the category of a "person," as contemplated in Rule 404(b)(1), Morris's testimony offered to prove her propensity to distribute illegal drugs is inadmissible.

Additionally, the exclusion of Morris's testimony does not hinder Zelasko's ability to present her defense to the jury. The lower courts relied on *Chambers v. Mississippi* for the proposition that a defendant's constitutional right to present a complete defense may, in certain circumstances, outweigh evidentiary rules. However, in *Chambers*, this Court allowed admission of strong, probative evidence. Unlike in *Chambers*, the evidence at issue in this case is so speculative in nature that it merely casts doubt on one possible motive Zelasko may have had to commit Riley's murder. The evidence in *Chambers* was a third party's sworn admission to the crime, while here, the evidence is merely that Short sold a different drug, to a different person, in a different country, almost a year prior to the crime for which Zelasko is charged. In sum, because of the weak and speculative nature of Morris's testimony, Zelasko's ability to present a complete defense would not be hindered by its exclusion.

Second, Lane's email was improperly excluded from evidence. The lower courts relied on *Williamson v. United States*, which requires an individual examination of statements within a narrative to determine if the statements, standing alone, are sufficiently against one's penal interest. This standard fails to balance the need for reliable evidence against the interest in excluding unreliable hearsay, and is inconsistently applied. This Court should adopt Justice Kennedy's test as presented in his concurring opinion in *Williamson* to replace the majority's standard, as his approach is most faithful to the purpose behind rule 803(b)(3). Pursuant to that

test, courts must consider the context in which statements are made in determining whether they are against the declarant's interest. Here, considering context and the considerable evidence presented against the Defendants, Lane's email as a whole is sufficiently against her penal interest.

Additionally, admission of Lane's email does not violate the Confrontation Clause. In *Bruton v. United States*, this Court recognized the inevitably suspect nature of statements made during police investigations, and found that such statements cannot be admitted unless the declarant is available to testify, subject to cross examination. Although *Bruton* did not expressly distinguish between testimonial and nontestimonial statements, in *Crawford v. Washington*, this Court held that Confrontation Clause protections only apply to testimonial statements. Therefore, because Lane's email was nontestimonial, the Confrontation Clause does not apply, and her email is admissible as a statement against penal interest. Accordingly, this Court should reverse the ruling of the circuit court on all issues.

#### **ARGUMENT**

### I. MORRIS'S TESTIMONY IS BARRED BY FEDERAL RULE OF EVIDENCE 404(b) AS PROPENSITY EVIDENCE.<sup>4</sup>

Evidence of prior bad acts is inadmissible to show that a person has a propensity to conform to such acts. *See* Fed. R. Evid. 404(b)(1). Although Federal Rule of Evidence 404(b) bars the admission of evidence offered purely for propensity, it does allow for such evidence to be admitted for a proper purpose. *See* Fed. R. Evid. 404(b)(2). Under Rule 404(b)(2), proper purpose includes: "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." *Id.* Here, Zelasko offered the testimony of Morris only to prove a third party's propensity to act in a certain manner. (R. 10, 12, 13). Specifically, Morris's testimony

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<sup>&</sup>lt;sup>4</sup> In reviewing evidentiary rulings, this Court reviews a district court's rulings for an abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).

will describe her prior drug purchase from a third party, Short. Zelasko admits that this evidence is being brought "to demonstrate Short's propensity to sell performance enhancing drugs." (R. 10). This type of exculpatory evidence, being offered by a defendant to show a third party's propensity to act in a certain manner, is often referred to as "reverse 404(b)" evidence. *See United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). Zelasko does not contend that this evidence is offered for anything more than to prove Short's propensity to conform therewith. (R. 10). Instead, Zelasko argues that Rule 404(b) was created only for the purpose of preventing prejudice to a criminal *defendant*.

Although circuit courts are split as to the applicable standard for admitting reverse 404(b) evidence, it is clear that no circuit has ever allowed evidence purely for propensity. *See United States v. Williams*, 458 F.3d 312, 317 (3d Cir. 2006) (explaining that the court's decision in *United States v. Stevens*, 935 F.2d 1404 (3d Cir. 2006) "never held that Rule 404(b)'s prohibition against propensity evidence is inapplicable where the evidence is offered by the defendant."). Furthermore, the plain language of Rule 404(b)(1) bars evidence being introduced to prove a *person's* propensity. This Court set the standard to be applied when interpreting a statute in *Chevron. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. Chevron*, 467 U.S. 837, 843 (1984). We maintain that the correct statutory interpretation of 404(b) provides that prior bad acts are not admissible to prove an individual's likelihood to commit bad acts, no matter whom the evidence is offered against.

### A. A plain reading of Rule 404(b) as required by *Chevron* exemplifies Congress's intent to exclude propensity evidence offered by any "person."

In *Chevron*, this Court offered the standard for statutory interpretation. *Chevron*, 467 U.S. at 843. Specifically, when confronted with a legal question of statutory interpretation, a court must first determine if Congress has directly addressed the question at issue. *Id.* "If the intent of

Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Further, in *United States v. McCourt*, the Ninth Circuit squarely addressed the issue of statutory interpretation as it applies to reverse 404(b) evidence. *United States v. McCourt*, 925 F.2d 1229, 1236 (9th Cir. 1991). Specifically, the Ninth Circuit explained:

Although it may well be that courts should indulge the accused when the defendant seeks to offer prior crimes evidence of a third person for an issue pertinent to the defense *other than propensity*, in the case of evidence offered *purely for propensity*, Congress has resolved the balance in favor of exclusion.

*Id.* (emphasis added). On its face, the clear language of Rule 404(b)'s prohibition of propensity evidence applies to "a person" and thus is not limited to only the accused. *Williams*, 458 F.3d at 317 (3d Cir. 2006). Although evidence offered to prove propensity or conforming conduct may be admissible for a relevant purpose, both prongs of Rule 404(b) apply to any person and any proponent. *McCourt*, 925 F.2d at 1235.

Moreover, the drafters used different language in Rules 404(b)(1) and 404(b)(2). While Rule 404(b)(1) bars propensity evidence of any "person," the permitted uses<sup>5</sup> and notice provision of 404(b)(2) provides for notice to a "defendant" by a "prosecutor." Fed. R. Evid. 404(b). (emphasis added). The Third Circuit in McCourt found that Congress's use of these explicit categorizations was intentional. McCourt, 925 F.2d at 1232. Specifically, the court explained:

Congress knew how to delineate subsets of "persons" when it wanted to, and that it intended "a person" and "an accused" to have different meanings when the Rules speak of one rather than the other. Because Rule 404(b) plainly proscribes other crimes evidence of "a person," it cannot reasonably be construed as extending only to "an accused."

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<sup>&</sup>lt;sup>5</sup> The issue before this Court is solely whether Rule 404(b) bars the admission Morris's testimony to show the propensity of a third party to possess and distribute anabolic steroids; Zelasko has waived all other potential exceptions under Rule 404(b)(2), as they were not raised in the courts below.

Id.

Here, Zelasko attempts to elicit the testimony of Morris to show that on a prior date, Morris purchased the drug "White Lightning" from third party Short. (R. 25). As a third party to this suit, Short falls plainly into the category of "person" as expressed in Rule 404(b). Because Zelasko admits that this testimony is offered purely to show Short's propensity to conform to a prior bad act, Congress has made clear such testimony is barred as "character evidence not admissible to prove conduct." Fed. R. Evid. 404. Further, merely because a criminal defendant is offering the propensity evidence does not mean that the rules of evidence should not apply. This is demonstrated by the fact that the language of Rule 404(b) specifically delineates whom the evidence is being offered against rather than who is offering the evidence. In fact, Rule 404(b)(1) is silent as to who can or cannot offer such evidence. To allow barred propensity evidence simply because a criminal defendant is offering it would effectively restrict the application of Rule 404(b) only to situations where it is offered by prosecutors or plaintiffs. In short, if Congress intended to exclude propensity evidence only when offered against the accused, it could have done so. This is clear by Congress's use of different subsets in Rules 404(b)(1) and 404(b)(2) in order to illustrate to whom each rule is applicable.

### B. Morris's testimony should be excluded because its probative value is substantially outweighed by its prejudicial effect.

Federal Rule of Evidence 403 requires the exclusion of even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. The advisory committee's note to Rule 403 explain that "[u]nfair prejudice within its context means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 404(b), advisory committee's note.

In a *United States v. Lucas*, the Sixth Circuit addressed the issue of unfair prejudice as it relates to Rule 404(b) barred evidence. *United States v. Lucas*, 357 F.3d 599, 606 (6th Cir. 2004). In *Lucas*, the defendant was convicted of possession of cocaine with intent to distribute, and attempted to introduce exculpatory evidence of an absent third party's criminal conviction. *Id.* at 601. After concluding that the evidence was barred by Rule 404(b), the court opined that even if the convictions fell within one of the exceptions, the evidence would have been prejudicial because it "would have made it easier for the jury to lay blame on [the third party] despite the evidence presented at trial." *Id.* at 607. Similar to the evidence in *Lucas*, the admission of Morris's testimony regarding Short's prior bad act would allow a jury to make the inferential leap that, because Short had sold drugs once, she was likely to do so again. *See, e.g., Lucas* 357 F.3d at 606. Instead of considering the complete lack of evidence linking Short to the drug distribution, a potential jury would be presented with this testimony on the improper basis that she is likely to repeat her past bad act.

Further, the overwhelming evidence linking Zelasko to the crime, coupled with the lack of evidence implicating Short aggravates the likelihood that a jury would make the inferential leap, which Rule 404(b)(1) is meant to prohibit. Specifically, the undisputed evidence in this case is: 1) the DEA seized \$5,000 in cash and 100 milligrams of ThunderSnow from Zelasko's residence; 2) Morris's testimony imputes that Short sold a different drug (White Lighting); 3) this sale occurred in a different country (Canada); 4) this sale transpired almost a year before the murder of Riley; and 5) there is absolutely no evidence linking Short to the crime other than Morris's testimony. (R. 11, 13, 16, 18). Accordingly, the strong evidence against Zelasko heightens the possibility of a jury making the aforementioned inferential leap that Rule 404(b) guards against.

### C. United States v. Stevens does not stand for the proposition that reverse 404(b) evidence is admissible regardless of the purpose for which it is introduced.

The lower courts rely on the holdings of *Stevens* in determining the admissibility of Morris's testimony. (R. 21, 35). However, the lower courts misinterpret *Stevens* to suggest that propensity evidence of bad acts involving a third party is always admissible because there is no danger of prejudice to the defendant. *Id.* A close reading of *Stevens* shows the court in that case admitted third party evidence of bad acts because the crimes at issue were very similar and the evidence was admissible under Rule 404(b)(2) to prove identity.

Moreover, in *Stevens*, the trial court found inadmissible evidence of an assault occurring to a victim in the same area, three days after the assault for which the defendant was charged. *Stevens*, 935 F.2d at 1401. There, the defendant sought to admit the exculpatory testimony of the assault victim who failed to identify Stevens as the assailant. *Id.* The Third Circuit reversed the trial court's exclusion of the testimony, holding that the critical question in the admissibility of this type of evidence rests on the degree of similarity. *Id.* The similarities the court found were:

Both crimes: (1) took place within a few hundred yards of one another; (2) were armed robberies; (3) involved a handgun; (4) occurred between 9:30 p.m. and 10:30 p.m.; (5) were perpetrated on military personnel; and (6) involved a black assailant who was described similarly by his victims. Indeed, based on these similarities, the United States Army Criminal Investigation Division came to believe, initially, that the same person had committed both crimes.

Id.

Unlike in *Stevens*, here, there are very few similarities between Short's alleged act and the crimes Zelasko is charged with. Specifically, Short is alleged to have sold the drug White Lightening to a member of her Canadian snowman team almost a year before the DEA seized 100 milligrams of ThunderSnow from Zelasko's apartment, along with \$5,000 cash. (R. 12). Although ThunderSnow is a chemical derivative of White Lightning, we maintain this evidence is speculative at best. It is common knowledge that the nature of drugs generally allows for the

continuous manipulation and modification of their chemical compounds. In other words, almost all drugs, whether legal or otherwise, are chemical derivatives of prior drugs. Also, because 12,500 milligrams of ThunderSnow was seized, it seems that the sale and use of these drugs in the winter sports community is perhaps commonplace. Therefore, the fact that Short was alleged to have sold similar performance enhancing drug does not rise to the level of admissibility contemplated under *Stevens*.

Furthermore, the Third Circuit clarified the holding in *Stevens* fifteen years later in *United States v. Williams*. *Williams*, 458 F.3d. at 312. In *Williams*, the defendant appealed the exclusion of a third party's prior bad acts, specifically, a criminal conviction. *Id.* at 314. There, the defendant relied on the holding in *Stevens* that, "a defendant may introduce reverse 404(b) evidence so long as its probative value under 401 is not substantially outweighed by Rule 403." *Id.* at 317 (citing *Stevens*, 935 F.2d at 1405). The court in *Williams* sought to quash any further misinterpretations by clarifying that in *Stevens*, "[t]his court has never held that Rule 404(b)'s prohibition against propensity evidence is inapplicable where the evidence is offered by the defendant." *Id.* Rather, a court must not balance the probative value under Rule 401 against Rule 403 considerations until the evidence is offered as a Rule 404(b) exception. *Id.* 

In the present case, Zelasko admits on numerous occasions that the testimony of Morris is meant to show nothing more than Short's propensity to sell drugs. (R. 10, 12, 13). Zelasko never attempted to introduce this evidence under any of the seven permitted uses of Rule 404(b) character evidence. Zelasko erroneously relies on *Stevens*, which implicitly forbids the admission

<sup>&</sup>lt;sup>6</sup> In *Stevens*, the evidence, "was not being used to show that the perpetrator of the first robbery committed the second simply because he had a general propensity to commit robberies." *Williams*, 458 F.3d at 317. Rather, "[i]n *Stevens*, it was indisputable that the evidence was being offered to show identity, i.e., that the perpetrator of the second robbery was the same as the perpetrator of the first because of the similarity of the crimes." *Id.* Thus, the *Stevens* court deemed the evidence admissible under Rule 404(b)(2)'s permitted use. *See* Fed. R. Evid. 404(b) (other wrong acts evidence may be admissible to show "motive, opportunity, intent, preparation, knowledge, identity, or absence of mistake.").

of propensity evidence unless it falls into one the Rule 404(b)(2) exceptions. *Williams*, 458 F.3d at 317. Fifteen years later, the same circuit opined, "that the prohibition against propensity evidence applies regardless of by whom—and against whom—it is offered is evident from Rule 404(b)'s plain language." *Id.* Thus, Rule 404(b)'s prohibition against other acts as evidence to show propensity is applicable regardless of whether it is offered against a defendant or a third party. *Id.* 

In sum, the underlying rationale behind Rule 404(b) is to exclude evidence that shows because a person acted one way in the past, they could have acted that way again. To allow such evidence undermines the State and Federal Government's legitimate interest in presenting reliable and non-prejudicial evidence by suggesting a person will follow in the footsteps of their past actions. Because the evidence of Short is offered for nothing more than showing propensity, it is barred by the clear language of Rule 404(b).

II. ZELASKO'S SIXTH AMENDMENT RIGHT TO PRESENT A COMPLETE DEFENSE IS NOT INFRINGED UPON BY EXCLUDING MORRIS'S TESTIMONY BECAUSE THE TESTIMONY IS SO SPECULATIVE IN NATURE THAT IT DOES NOT DOES NOT QUALIFY FOR THE SIXTH AMENDMENT PROTECTIONS THIS COURT CONTEMPLATED IN CHAMBERS, ROCK, AND WASHINGTON.

Generally, the Constitution guarantees criminal defendants the right to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986). However, "a complete defense does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." *Lucas*, 357 F.3d at 606. A defendant's right to present relevant evidence is subject to reasonable restrictions, and the exclusion of unreliable evidence is the premier object of many Federal evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

Here, Zelasko argues that even if the evidence in dispute is barred by the Federal Rules of Evidence, it should nevertheless be admitted as she has no other way of linking Short to the

conspiracy. (R. 14). Following this rationale, a defendant could admit evidence barred under an evidentiary rule so long as it is the only exculpatory evidence available. The opposite application of this proposition would allow prosecutors to introduce barred propensity evidence so long as no other evidence was available. Although extreme, this analogy shows the important interest in upholding the exclusion of improper evidence.

While the right to introduce relevant testimony is not absolute, the right may "in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). We maintain, "State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." *Scheffer*, 523 U.S. at 305. In this case, the Federal Government has an interest in excluding evidence that is expressly barred by the Federal Rules of Evidence in order to prevent the jury from making a decision on the improper basis of propensity. Significantly, the Rules were established for the purpose of excluding evidence that could unfairly persuade the trier of fact into making a decision based on emotion and not fact. *See* Fed. R. Evid. 404(b), advisory committee's note. To that end, Congress has made clear that the exclusion of propensity evidence is essential to ensure reliable evidence is presented to the jury, and the court system has a strong interest in upholding the Rules on that basis.

Four Supreme Court decisions have addressed the issue of whether a defendant's right to present a full defense is inhibited by an evidentiary rule. In three of the cases, this Court held that the exclusion of the evidence infringed upon a significant or fundamental element of the defense. However, the most recently decided case found the Federal Rules' exclusion proper where it

shows "a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." *Scheffer*, 523 U.S. at 312.

First, in *Chambers v. Mississippi*, this Court addressed the constitutionality of an evidentiary rule that effectively excluded the cross examination of a third party who repudiated an earlier sworn confession to the murder. *Chambers v. Mississippi*, 410 U.S. 284, 291–94 (1973). In *Chambers*, the evidentiary rule at issue prohibited a party from impeaching its own witness. *Id.* at 291. In finding that the rule violated the defendant's Sixth Amendment rights, this Court cautioned that its holding did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.* at 302–03.

Additionally, in *Rock v. Arkansas*, this Court dealt with an evidentiary rule that excluded all hypothetically refreshed testimony. *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). This rule prevented the defendant in *Rock* from testifying about relevant facts that suggested the murder for which she was charged was accidental. This Court found the rule to be unconstitutional because it prevented the defendant the fundamental right to testify on her own behalf. *Id.* at 62.

Moreover, in *Washington v. Texas*, this Court examined the constitutional implications of a rule that prohibited defendants charged for the same crime from testifying on behalf of the other defendant, unless the prior had been acquitted. *Washington v. Texas*, 388 U.S. 14, 16–17 (1967). This Court found that the laws application prevented an entire class of defense witnesses from testifying, and thus severely restricted the ability to present a defense. *Id.* at 22–23.

Most recently, in *United States v. Scheffer*, this Court distinguished *Rock, Washington*, and *Chambers* because "the exclusion of evidence … declared unconstitutional in those cases significantly undermined fundamental elements of the defendants defense." *Scheffer*, 523 U.S. at

315. This Court found that a defendants right to present a defense is not infringed upon merely because evidence sought to be admitted runs counter to the rules. *See Scheffer* 523 U.S. at 308. In *Scheffer*, a defendant sought to elicit scores from a polygraph test as evidence that would tend to show he knowingly consumed drugs. *Id.* at 305. In holding that the evidence was inadmissible, this Court put the onus on presenting reliable evidence to the jury. *Id.* at 309. This court opined that the *Chambers* decision was confined to the "facts and circumstances presented in that case." *Scheffer*, 523 U.S. at 316 (quoting *Chambers*, 410 U.S. at 303). Although the rules are different, the rationale for excluding Morris's testimony runs parallel to that in *Scheffer*.

Similar to the aforementioned cases, Zelasko attempts to elicit testimony that is barred by a valid evidentiary rule. However, unlike in *Chambers*, where the evidence excluded was a third parties sworn admission to the crime, Morris's testimony does nothing more than allege a third party sold different steroids, in another country, to another person. This is not the type of evidence that triggers Sixth Amendment protection as contemplated in *Chambers*. To admit Morris's attenuated evidence on constitutional grounds would open the door, especially in drug related offenses, to a flood of third party propensity evidence. This vein of evidence does not take into account the proximity of the alleged actions, the similarity of the drugs, and ultimately allows jurors to make an inferential leap: because a person allegedly did something once, they likely did it again. Moreover, the facts here are distinguishable from *Rock*, where the defendant's right to testify on her own behalf was at issue. Here, Zelasko is free to testify that any other person was responsible for the conspiracy. Zelasko is unrestrained to explore her defense and elicit testimony from coaches, friends, or teammates, who had access to the same facility where the majority of the steroids were found. Also, there is no implication that Zelasko is restrained from cross examining or confronting any governmental witnesses that are presented against her.

Also distinct from *Washington*, in this case, no categories of defense witnesses are being prohibited from testifying on behalf of Zelasko. Instead, we maintain that the speculative testimony alleging a third party's propensity should be excluded because of the probability that it would prejudice the case. To that end, Rule 403 states that even relevant evidence may be excluded if its probative value is outweighed by the danger of misleading the jury. *See.* Fed. R. Evid. 403. Here, Morris's testimony is offered merely to cast doubt on one possible motive for the killing of Riley. The possibility that jurors would unjustly implicate Short based solely on an allegation of prior actions far outweighs any probative value this testimony may have.

Furthermore, the government has a significant interest in upholding the rules of evidence because of the effect the rules have on our court systems. Perhaps the most important interest of the legal system in our country is to conduct fair trials where jurors are not influenced by unreliable information. In *Crane v. Kentucky*, this Court explained the importance and esteem afforded to evidentiary rules. *Crane*, 476 U.S. at 690. Specifically, this court stated:

[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted.

Crane, 476 U.S. at 690

In short, because Morris's testimony qualifies as propensity evidence under 404(b)(1), and does not trigger the protection of the Sixth Amendment, the testimony must be excluded. Therefore, the Fourteenth Circuit Court of Appeals erred in finding the testimony admissible as evidence.

### III. LANE'S EMAIL IS ADMISSIBLE UNDER RULE 804(b)(3) AS A STATEMENT AGAINST PENAL INTEREST.

Generally, hearsay is inadmissible unless a federal statute, the Federal Rules of Evidence, or the Supreme Court provides otherwise. Fed. R. Evid. 802. Rule 804 provides exceptions to the

general bar on hearsay for unavailable declarants. *See* Fed. R. Evid. 804. Under Rule 804, a declarant is deemed unavailable if she is "exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies." Fed. R. Evid. 804(a)(1). Here, Lane will exercise her Fifth Amendment privilege not to testify; she is therefore "unavailable" to testify within the meaning of Rule 804(a)(1). Under 804(b), if Lane's email qualifies for one of the delineated exceptions, the email may be admitted into evidence. Fed. R. Evid. 804(b). In this case, the exception<sup>7</sup> at issue falls under 804(b)(3), which provides that a statement against interest is admissible if:

- (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.<sup>8</sup>

### Fed. R. Evid. 804(b)(3).

In *Williamson v. United States*, 512 U.S. 594 (1994), this Court offered a standard of application for evidence subject to 804(b)(3). We maintain that *Williamson* should be overruled insofar as it provides the standard for determining whether a statement is against a declarant's penal interest, and advocate for a different standard to replace it, as explained below.

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<sup>&</sup>lt;sup>7</sup> The issue before this Court is solely whether Lane's email is admissible as a statement against penal interest under Rule 804(b)(3); the defendant has waived all other potential exceptions, as they were not raised below.

<sup>&</sup>lt;sup>8</sup> The Fourteenth Circuit Court of Appeals did not address this prong in its opinion, and neither did the litigants in the proceedings below. As such, Petitioner's brief will only address prong (a). (*See* R. 39).

## A. Williamson's bright line rule overstates the policy against admitting hearsay while failing to acknowledge the need for reliable evidence, resulting in inconsistent application.

In Williamson v. United States, this Court opined that a "statement," for the purpose of 804(b)(3), could be interpreted as either an "extended declaration," or a "single declaration or remark." Id. at 594. As an extended declaration, a court could admit an entire statement, including self-inculpatory and non-self inculpatory parts, provided that "in the aggregate, the [statement] sufficiently inculpates [the individual]." Id. at 599. As a "single remark," Rule 804(b)(3) would cover those remarks within a statement that were individually self-inculpatory. Id. This Court adopted the latter approach, reasoning that while the text of the rule did not provide a clear answer to this inquiry, the text most pointed to a narrow reading of the exception because the rule "is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." Id. In short, this Court held that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-selfinculpatory parts," because "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." Id. at 599–600. Thus, Williamson requires judges to independently examine individual statements within a narrative, and admit them only if they are directly self-inculpatory. See id. at 600–01.

In opting for a narrow reading of "statement," this Court focused on the policy against admitting hearsay. However, this Court's assumption that people often mix falsehood with truth to lie is a mere assumption about human behavior. The opposite side of this assumption is viewing all statements within a generally inculpatory narrative as reliable because of the declarant's more general disserving state of mind. *See* 5 John H. Wigmore, *Evidence* § 1477

(James H. Chadbourn rev., 1974) (asserting that against-interest elements in a narrative indicated a trustworthy state of mind, which assured that the statement was trustworthy throughout). However, because these propositions are mere assumptions, they should not displace the need to balance a court's interest in admitting reliable evidence with the danger of admitting unreliable hearsay. The *Williamson* majority fails to acknowledge the broad policy behind the hearsay exceptions as a whole, that is, admitting less than ideal evidence is better than admitting no evidence at all. *See* Fed. R. Evid. 804(b), advisory committee's note ("[T]estimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant."); *see also* Jay L. Hack, Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U. L. REV. 148, 166 (1976) ("[E]xcluding all collateral statements can lead to the arbitrary rejection of valuable evidence.").

Moreover, the narrow test of *Williamson* has resulted in inconsistent application. In cases where it is clear that a declarant's statement is *not* against interest, the narrow application of *Williamson* is suitable. For instance, in *United States v. Hazelett*, an individual made statements inculpating a defendant after she was caught with drugs. *United States* v. *Hazelett*, 32 F.3d 1313, 1318 (8th Cir. 1994). The Eighth Circuit found that since she was already caught with the contraband, she had nothing to lose by confessing or implicating another person. *Id.* Therefore, the court found that her statements were not sufficiently against her interest. *Id.* at 1319; see also *United States v. Mendoza*, 85 F.3d 1347, 1348–52 (8th Cir. 1996) (finding that where a declarant agreed to cooperate with authorities *after* she was caught with drug money, the declarant likely implicated the defendant in the scheme in an effort to "curry favor" with law enforcement).

However, in situations such as the present case, where statements are not clearly

insufficient as against ones interest, the reasoning of *Williamson* is not easily applied. For example, in *United States v. Barone* 114 F.3d 1284 (1st Cir. 1997), the government sought to introduce statements made by a deceased declarant. *Id.* at 1289–91. The declarant's statements were generally self-inculpatory, but also contained many collateral statements implicating the defendant in two murders. *Id.* The defendant claimed that the statements were inadmissible under *Williamson* because they were not individually self-inculpatory. *Id.* at 1291.

The First Circuit, in supporting its decision to admit the statements, first noted that a "statement against penal interest is not rendered inadmissible merely because the declarant names another person or implicates a possible codefendant." *Id.* at 1295. The court then applied a totality of the circumstances test, and emphasized that none of the challenged statements attempted to shift blame or exculpate the declarant, and were therefore admissible as against the declarant's penal interest. *Id.* at 1296; *see also United States v. Saget*, 377 F.3d 223, 230 (2d Cir. 2004) (deviating from the bright line rule of *Williamson* by finding that "the bulk of [the coconspirator's statements] were self-inculpatory because they described acts that [he and the defendant] committed jointly, and were therefore sufficiently against the delcarant's interest); *United States v. In*, 111 F.3d 139 (9th Cir. 1997) (finding that a declarant's statement that contained self-inculpatory and non self-inculpatory statements was admissible as a whole because the declarant's own involvement in the crime "was so intertwined with defendant's involvement, that it would be impossible to parse out non-self-inculpatory statements.").

The above-cited examples illustrate the divergent application of *Williamson* across the lower courts, and emphasize the need for a flexible approach that incorporates the context in which statements against interest are made. By incorporating context into the analysis, courts can be sure they are balancing the need for reliable evidence with the interest in excluding unreliable

hearsay, without mechanically excluding seemingly neutral statements that are nevertheless reliable. Moreover, the unworkability of a mechanical approach is illustrated by the language of 804(b)(3), which exemplifies that the rule is discretionary in nature: determining whether a statement 'so far tended to subject a declarant to criminal liability, that a *reasonable person* in the declarant's position would not have made the statement unless he or she believed it to be true' is an inherently discretionary determination. As such, we maintain the inquiry should be resolved on a case-by-case basis, thereby affording courts the discretion to engage in such "fact-intensive" inquiries. *See Williamson*, 512 U.S. at 603–04.

### B. Courts must examine context when considering whether a statement is against one's penal interest.

### i. Williamson permits context-based inquiries.

In this case, Zelasko argues that *Williamson* does not permit a court to rule on the admissibility of each discrete statement based on the cumulative effect of all the statements contained in Lane's email. (*See* R. 41). While this is true based on the majority's holding, the *Williamson* majority also acknowledged that whether or not a statement is self-inculpatory can only be determined by viewing it in *context*. *Id.* at 603. Specifically, this Court explained:

Even statements that are on their face *neutral* may actually be against the declarant's interest. "I hid the gun in Joe's apartment" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. "Sam and I went to Joe's house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy . . . the question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light *of all the surrounding circumstances*.

*Id.* at 603–04 (emphasis added). This Court further reasoned that the proper examination of statements that are truly self-inculpatory "can be a fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved." *Id.* 

Despite this acknowledgment in the majority opinion, the Court nevertheless cautions that each statement should be examined independent of collateral statements. However, as dissenting Judge Marino of the Fourteenth Circuit surmises, the task of "examining all of the circumstances" is arguably impossible if only the individual statements should be considered when examining facially neutral statements. (*See* R. 50-51). Indeed, after *Williamson*, many courts applied the test by examining context. For instance, the Fourth Circuit's analysis in *United States v. Pabellon* demonstrates how the *Williamson* court "opened the door" for context-based inquiries. In *Pabellon*, the court examined the following narrative:

X came to me in March of 1996 and asked me if I knew anyone that could have Samuel killed. I said no, but I could see. I contacted Darrell Young and asked Young. Young got back to me in a couple of months and said he had someone for the job. I went back to X, got the money, and gave the money to Darrell Young.

United States v. Pabellon, 181 F.3d 93, 95 (4th Cir. 1999). Despite the obvious collateral nature of the first and last statements, the Fourth Circuit held the statement as a whole was contrary to the declarant's penal interest. *Id.* The court relied on the language of *Williamson* that "[e]ven statements that are on their face neutral may actually be against the declarant's interest" to make that determination. *Id.* Thus, despite this Court's desired narrow interpretation of *Williamson*, the Second Circuit used a single line in the opinion as a way to admit even those statements that shifted blame away from the declarant.

Similarly, in the recent case of *United States v. Dargan*, 738 F.3d 643, 649 (4th Cir. 2013), the Fourth Circuit examined all of the surrounding circumstances when it applied *Williamson* to a declarant's out-of-court, inculpatory statement. *Id.* The court acknowledged that

both the context and content of the statements at issue indicated their self-inculpatory nature. *Id.*First, the declarant made the statements to a cellmate, rather than law enforcement, and thus had no obvious motive to shift blame. *Id.* (citing *United States v. Jordan*, 509 F.3d 191, 203 (4th Cir. 2007)). Further, the declarant's admission that he committed the crime with the assistance of coconspirators "not only revealed his knowledge of the number of participants, but also potentially subjected him to conspiracy liability." *Id.* Here, similar to *Dargan*, Lane's email was sent to her boyfriend, not law enforcement, giving her "no obvious motive to shift blame." *See id.* at 4. Further, Lane's email references to "us," "we," and "my partner" revealed her knowledge of another participant, and clearly subjected her to potential conspiracy liability.

In short, because the *Williamson* test called for context-based inquiries, yet in nearly the same breath required evaluation of independent statements alone, it is clear that *Williamson* has created immense confusion on the proper test applicable to statements against penal interest.

### ii. This Court should adopt Justice Kennedy's concurrence in *Williamson* as the standard for determining whether a statement is against one's penal interest under Rule 803(b)(3).

In order to alleviate the confusion and inconsistency of the *Williamson* test, this Court should adopt Justice Kennedy's practical test. Under his approach, a court should first determine whether a declarant made a statement that contained a fact against penal interest; we maintain context and the surrounding circumstances of any particular case must be considered here. If the court determines that the declarant made such a statement, the court should then admit all statements related to the precise statement against penal interest, subject to two limitations. *Williamson*, 512 U.S. at 620. First, the court should exclude a collateral statement that is so self-serving as to render it unreliable. *Id.* Second, in circumstances where it is likely that the declarant had strong motivation to obtain favorable treatment, the entire statement should be inadmissible.

Id.

In support of this test, Justice Kennedy explained that because the text of 804(b)(3) is not clear, courts must look to the advisory committee notes for guidance. *Id.* at 614. The committee notes state that "ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating [the accused], and under the general theory of declarations against interest they would be *admissible as related statements*." *Id.* (emphasis added). Moreover, there is further support<sup>9</sup> in the advisory committee notes for Justice Kennedy's approach. The notes explain that "not all statements implicating another person need be excluded from the category of declarations against interest," and whether or not a statement is against interest must be determined from the circumstances of *each case*." *See* Fed. R. Evid. 804(b)(3), advisory committee's note (emphasis added). This language is clearly at odds with the majority's narrow interpretation of what constitutes a statement against interest.

Applying Justice Kennedy's standard to the facts of this case, we must first determine whether Lane's email includes a statement (or statements) that contain a fact against her penal interest. Because Lane's statements are all arguably "neutral," we look to the *Williamson* majority's example of a neutral, but self-inculpatory statement against a declarant's interest: "Sam and I went to Joe's house." *Williamson*, 512 U.S. at 603. The Court explains that this statement, although neutral on its face, "might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate

<sup>&</sup>lt;sup>9</sup> Justice Kennedy also looks to other sources in supporting application of his purported test. First, he argues that absent guidance from Congress, the Court should assume that Congress intended the Federal Rules of Evidence to be applied consistently with their application at common law. *Williamson*, 512 U.S. at 615. Second, he noted that generally, Congress would not enact a statute unless they intended it to have a meaningful effect. *Id.* at 616. He maintains that the majority approach would essentially deprive the exception of any meaning, because only in very limited circumstances would a declarant's directly self-inculpatory statement also inculpate a defendant. *Id.* at 617.

the declarant in Joe and Sam's conspiracy." *Id.* at 603–04. Here, Lane's email to Peter Billings states the following:

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

(R. 3).

Combining the standard offered by the *Williamson* majority's hypothetical statement, with application of the first prong of Justice Kennedy's test, we maintain that under the circumstances, Lane's statement, "I know you've suspected before about the business my partner and I have been running with the female team" contains a fact against her penal interest, and a reasonable person in Lane's position would know this statement linked her to the steroid distribution. The specific circumstances demonstrated that the DEA investigation uncovered ThunderSnow in Zelasko's residence, the team's storage room, as well as cash and additional amounts of ThunderSnow at Lane's residence. Moreover, on December 19, 2011, Billings witnessed Lane scream at the defendant to "stop bragging" about the money she was making. In light of this evidence, the "business" of which Lane refers to in her email logically refers to the illegal steroid distribution.

Second, the statement "one of the members of the male team found out and threatened to report us if we don't come clean" contains a fact against Lane's penal interest, because a reasonable person in her shoes would realize that this statement implicates her in the conspiracy to distribute the steroids, as well as the conspiracy to murder Hunter Riley, as it provides a motive for his murder. Specifically, that she and her co-conspirator are engaged in criminal conduct that is subject to report by another teammate—a snitch. If this conduct were not against

Lane's interest, then she would not need to "come clean." *See, e.g., United States v. Lieberman*, 637 F. 2d 95, 103 (2d Cir. 1980) (explaining that a declarant's statement directed at the defendant to "not open the door for anyone" in the context of a conspiracy to sell marijuana was against the declarant's penal interest because "it was probative of [the declarant's] knowledge of the *furtive nature of his activities*.") (emphasis added).

Finally, further taking into account the surrounding circumstances of this case: 1) the DEA investigation; 2) Zelasko's heated argument with Riley; and 3) the shooting just days after the argument, resulting in Riley's death, the statement, "my partner really thinks we need to figure out how to keep him quiet," clearly contains a fact against Lane's penal interest. The reference to "keeping him quiet" refers to the planning of Riley's murder, and any reasonable person in Lane's position would know this statement would implicate her in Riley's death.

Justice Kennedy's test next directs courts to admit all statements related to the precise statements against interest, excluding those self-serving statements that shift blame, and those that were made under circumstances where the declarant had significant motivation to obtain favorable treatment. The latter limitation is not at issue here, because Lane sent this email to her boyfriend and not to law enforcement. The first statement: "I really need your help," is related to the three self-inculpatory statements because Lane is seeking guidance regarding the exact conduct that is subject to report. Specifically, she needs help silencing her male teammate because the teammate will otherwise snitch on the illegal drug sales. The final statement, "I don't know what exactly she has in mind yet," on its face, appears to shift blame to Lane's "partner." However, the fact that Lane does not know what "she" has in mind yet merely means that Lane will seek out what methods of silencing the snitch her partner has in mind—a method that both Lane and her co-conspirator will implement ("my partner really thinks we need to figure out how

to keep him quiet."). Lane therefore implicated herself in this statement too. In short, it certainly cannot be said that this statement is so "self-serving as to render it unreliable." See Williamson, 512 U.S. at 620.

In sum, this Court should adopt Justice Kennedy's two-prong test, subject to the two limitations. This Court should also hold that the surrounding circumstances of individual cases must be considered when determining if a particular statement contains a fact against a declarant's penal interest, bearing in mind that those facially-neutral statements which a reasonable person would know linked him or her to criminal conduct, are admissible as against interest. As we have applied the test above, we submit that all of the statements in Lane's email are admissible as against her penal interest. Based on the foregoing, the Fourteenth Circuit Court of Appeals erred in finding the email inadmissible as evidence.

### C. Alternatively, the underlying reasoning of Williamson best applies to statements made to law enforcement.

While we maintain that this Court should adopt the test described above, if this Court rejects that standard, we submit in the alternative that statements that are not made to law enforcement do not carry the same threat of untruth and unreliability, and therefore the underlying reasoning of *Williamson* should not apply. 10

In the situation where a declarant mentions a third party in an otherwise self-inculpatory statement, the advisory committee notes make clear that a major concern is whether that person is trying to "curry favor" with the police to diminish his or her own criminal liability. The committee note, in relevant part, explains:

A statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest . . . [o]n the other hand, the same words

<sup>&</sup>lt;sup>10</sup> In Williamson, this Court was particularly concerned with "the arrest statements of a codefendant," which have typically been viewed with "special suspicion." See Williamson, 512 U.S. at 601.

spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying.

See Fed. R. Evid. 804(b)(3), advisory committee's note.

The Second Circuit dealt with this issue in *United States v. Sasso*. There, the court explained that "[a] statement incriminating both the declarant and the defendant may possess adequate reliability if . . . the statement was made to a person whom the declarant believes is an ally, and the circumstances indicate that those portions of the statement that inculpate the defendant are no less reliable than the self-inculpatory parts of the statement." *Sasso*, 59 F.3d at 349. The Second Circuit also acknowledged that the declarant's statements to his girlfriend were reliable because they were not made in response to questioning or in a coercive atmosphere. *Id.* at 349–50; *see also Saget*, 377 F.3d at 230 (holding that a declarant's statements were reliable because the declarant believed that he was speaking with a friend, and their conversations involved discussions of personal issues in a private setting); *United States v. Matthews* 20 F.3d 538, 546 (2d Cir. 1994) (finding that a declarant's statements to his girlfriend were sufficiently reliable to be introduced against the defendant, given the unofficial setting in which the remarks were made and the declarant's friendly relationship with the listener).

Here, similar to *Sasso*, *Saget*, and *Matthews*, Lane's email was privately sent to her boyfriend; she did not send it in response to questioning by law enforcement. The email was also very personal in nature, as Lane was seeking her boyfriend's help. Clearly, Lane viewed her boyfriend as her ally, as they had been romantically involved for several years. (R. 1). In short, because there was no attempt by Lane to "curry favor" with law enforcement, the concerns of the *Williamson* majority were not implicated, and Lane's email therefore contains sufficient reliability to warrant its admission into evidence.

# IV. CRAWFORD RESTRICTS BRUTON TO TESTIMONIAL STATEMENTS, AND THEREFORE ADMISSION OF LANE'S EMAIL DOES NOT VIOLATE THE CONFRONTATION CLAUSE BECAUSE THE EMAIL WAS NONTESTIMONIAL.

In this case, Zelasko also argues that admission of Lane's email would violate Zelasko's Confrontation Clause rights under *Bruton*. We maintain that *Crawford* restricts *Bruton* to testimonial statements. Accordingly, Lane's nontestimonial email is not barred by the Confrontation Clause.

### A. Bruton applies to testimonial statements.

In *Bruton v. United States*, Bruton and his co-defendant were charged with committing armed postal robbery. *Bruton v. United States*, 391 U.S. 123, 124 (1968). During a police interrogation, the co-defendant confessed to committing the robbery, and identified Bruton as his accomplice. *Id.* Despite the district court's limiting instruction that the confession could not apply to Bruton, this Court held that such an incriminating statement, by a non-testifying co-defendant, was inadmissible at a joint trial because it violated Bruton's Confrontation Clause rights. *Id.* at 126. In so holding, the *Bruton* Court was concerned with the "inevitably suspect" nature of these statements, and recognized the "strong motivation for a defendant to shift the blame onto others." *Id.* at 136. Significantly, Bruton's co-defendant confessed *during a police investigation*. As such, this was indeed a situation where the co-defendant would have a strong motivation to implicate Bruton in an attempt to "curry favor" with the police. *See* Fed. R. Evid. 804(b)(3).

The *Bruton* court was clearly concerned with the harm that comes from testimonial statements. *See Dargan*, 738 F.3d at 651 (4th Cir. 2013) ("*Bruton* espoused a prophylactic rule designed to prevent a specific type of Confrontation Clause violation."); *United States v. Figueroa*, 729 F.3d 267, 276 (3d Cir. 2013) (finding that the protections of the Confrontation

Clause and *Bruton* apply only to testimonial statements). However, because this critical distinction between testimonial and nontestimonial statements was not explicitly recognized in *Bruton*, many circuits that have examined pre-*Crawford* cases determined that *Bruton* applied to all incriminating statements made by non-testifying co-defendants, testimonial and nontestimonial alike.<sup>11</sup>

In this case, Zelasko argues that "Crawford presented additional concerns of allowing the government to use hearsay statements of non-defendants that police obtain during formal investigations into [evidence], and did not negate the concern in *Bruton* that using co-defendant statements without the opportunity for confrontation causes constitutional harm." (See T. 19, 23, 44, 45). This contention lacks merit because in *Bruton*, the co-defendant confessed during a police interrogation. *Bruton*, 391 U.S. at 123. Similarly, in *Crawford*, the defendant's wife implicated the defendant during a police interrogation. *Crawford v. Washington*, 541 U.S. 35, 36 (2004). Accordingly, there are no additional concerns as Zelasko claims; both *Bruton* and *Crawford* pertain to testimonial statements, *Crawford* merely recognized the distinction.

### B. Crawford clarifies that Confrontation Clause protections only apply to testimonial statements.

In *Crawford v. Washington*, 541 U.S. 35 (2004), this Court explained that Confrontation Clause protections are limited to testimonial statements. *See Crawford*, 541 U.S. at 51. Specifically, the Confrontation Clause bars out-of-court statements made by witnesses that are

<sup>&</sup>lt;sup>11</sup> See, e.g., United States v. Veltmann, 6 F.3d 1483, 1500, 1501 (11th Cir. 1993) (barring a co-defendant's statement to his cellmate that directly inculpated the defendant); Vincent v. Parke, 942 F.2d 989, 991 (6th Cir. 1991) (rendering inadmissible a defendant's statement to his sister implicating two co-defendants); United States v. Truslow, 530 F.2d 257, 263 (4th Cir. 1975) (barring admission of a defendant's statement to an acquaintance implicating a co-defendant).

testimonial, <sup>12</sup> unless the declarant is unavailable, and the defendant had a prior chance to cross-examine the witness. *Id.* at 53–56.

In *Crawford*, this Court explained "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." *Crawford*, 541 U.S. at 50. This Court further explained, with that focus in mind, not all hearsay necessarily implicates the Sixth Amendment. *Id.* at 51. Rather, "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Accordingly, the constitution is concerned with a *specific kind* of out-of-court statement. *Id.* Further, where nontestimonial hearsay is at issue, it is "wholly consistent with the Framers' design to . . . [allow] an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68. Thus, even if this Court accepts Zelasko's position that *Crawford* left *Bruton* untouched, the language in *Crawford* clearly allowed for an interpretation consistent with our position.

Given the unequivocal language of *Crawford*, many circuits have recognized this sense of the Confrontation Clause post-*Crawford*. For instance, in *United States v. Smalls*, three defendants, including one who took a plea deal, were convicted for killing a "snitch." *United States v. Smalls*, 605 F.3d 765, 768–79 (10th Cir. 2010). The inmates were in custody on unrelated charges. *Id.* at 767–68. While in custody, one co-defendant made a statement to a fellow inmate, who was acting as a confidential informant. *Id.* The statement implicated himself and the second co-defendant in the murder. *Id.* The district court ruled that the statements were

<sup>&</sup>lt;sup>12</sup> Testimonial statements include those statements made at a preliminary hearing, before a grand jury, at a former trial, and statements elicited during police investigations. *See Crawford*, 541 U.S. at 51. It is essentially those statements that declarants would reasonably expect to be used prosecutorially. *Id.* Here, the nontestimoninal nature of Lane's email is not at issue. Rather, this Court must determine whether the Confrontation Clause protections extend to nontestimonial statements. (*See* R, 43).

nontestimonial, but nevertheless found that they lacked reliability, and excluded the statements. *Id.* at 772–73. On appeal, the Tenth Circuit reversed, finding that if the statements had been testimonial, exclusion would have been proper. *Id.* at 776. However, the court determined that the statements were nontestimonial, and therefore the Confrontation Clause did not apply. *Id.* at 780. The Tenth Circuit relied on the language of *Crawford*, where this Court answered the question of whether the Confrontation Clause had any application to nontestimonial statements in the negative:

The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony. . .' [a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Id. at 774 (citing Crawford, 541 U.S. at 51).

Similarly, in *United States v. Johnson*, a defendant was accused of committing a bank robbery with numerous other people. *United States v. Johnson*, 581 F.3d 320, 323 (6th Cir. 2009). While in prison for an unrelated charge, a member of the conspiracy bragged to an inmate about the robbery. *Id.* The inmate then told the FBI of the information, and the FBI gave him a recording device. *Id.* The inmate later recorded the co-conspirator's confession, which implicated the defendant and others in the robbery. *Id.* at 323–24. The Sixth Circuit found the statements properly admissible, because "the Confrontation Clause has no bearing on nontestimonial out-of-court statements." (citing *Whorton v. Bockting*, 549 U.S. 406 (2007)). The court further explained that because of this Court's clarification in *Crawford* regarding the scope of the Confrontation Clause, *Bruton* does not apply to nontestimonial statements. *Id.* at 325; *see also United States v. Pike*, 292 Fed.Appx. 108, 102 (2d Cir. 2008) (finding that a nontestimonial statement violates neither *Crawford* nor *Bruton*).

Moreover, even in the most recent cases, courts have held that after *Crawford*, only testimonial statements are subject to the Confrontation Clause. *See Dargan*, 738 F.3d at 651 (finding that a statement must be testimonial to be excluded under the Confrontation Clause because "bruton is simply irrelevant in the context of nontestimonial statements."); *United States v. Green*, No. 13–2056, 2013 WL 6017425, at \*1, \*3 (3d Cir. Nov. 14, 2013) (explaining that the Confrontation Clause is not implicated if there is no testimonial statement); *Figueroa*, 729 F.3d at 276 (finding that the protections of the Confrontation Clause and *Bruton* apply only to testimonial statements). *Crawford* and its progeny clarify that Confrontation Clause protections only attach to testimonial statements, and Lane's statements were nontestimonial. By sending the email to her boyfriend, Lane was not testifying "for the purpose of establishing some fact." *See Crawford*, 541 U.S. at 51. She was simply seeking assistance from her boyfriend—akin to an acquaintance; she was not making a formal statement to law enforcement. *See id*. Accordingly, Zelasko's Sixth Amendment rights will not be violated by the admission of Lane's email.

In sum, because Lane's email qualifies as a statement against penal interest under 804(b)(3), and does not violate the Confrontation Clause, the email must be admitted into evidence. Therefore, the Fourteenth Circuit Court of Appeals erred in finding the email inadmissible as evidence, and the ruling must be reversed.

#### **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests this Court REVERSE the judgment of the Fourteenth Circuit.

Respectfully submitted,

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