## No. 12-13

### IN THE

## SUPREME COURT OF THE UNITED STATES

# UNITED STATES OF AMERICA, Petitioner,

--against--

ANASTASIA ZELASKO, Respondent.

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

BRIEF FOR THE RESPONDENT

#### **QUESTIONS PRESENTED**

- I. Whether Federal Rule of Evidence 404(b) bars a defendant from introducing prior bad acts of a third party to support an alternate theory of the crime where the evidence demonstrates the criminal propensity of that third party and its admission is consistent with underlying rationale of the rule because it does not prejudice the defendant.
- II. Whether a defendant's constitutional right to present a complete defense allows that defendant to introduce evidence of a third party's criminal propensity when it is the only evidence available to present the defense's theory regardless of the admissibility of that evidence under Rule 404(b).
- III. Whether *Williamson v. United States*, should be reaffirmed insofar as it provides the standard for the application of Federal Rule of Evidence 804(b)(3) where it excludes inadmissible hearsay that is non-inculpatory and the standard is consistent with the rationale for the rule against hearsay permitting only reliable and trustworthy inculpatory statements.
- IV. Whether *Crawford v. Washington*, which provides that the reliability of testimonial statements must be tested by cross-examination, restricts the *Bruton* doctrine to testimonial statements, even though *Crawford* fails to negate *Bruton*'s concern that introducing a non-testifying co-defendant's statements implicating the defendant results in unconstitutional harm, regardless of whether such statements are testimonial or non-testimonial in nature.

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#### STATEMENT OF THE CASE

Respondent Anastasia Zelasko is a member of the United States women's Snowman Team. (R. at 1). The team competes in the Snowman Pentathlon at the World Winter Games, which consists, among other events, of dogsledding and rifle shooting. (R. at 1-2). On February 3, 2012, Ms. Zelasko was practicing for the rifle shooting event at the range. (R. at 8). At that same time, the men's team was competing on the dogsled course which is adjacent to the range. (R. at 8). That morning a bullet from Ms. Zelasko's rifle hit and killed a member of the United States men's Snowman Team, Hunter Riley. Hunter Riley was an informant for the Drug Enforcement Administration (DEA) who had been attempting to purchase a substance known as "Thundersnow" from a member of the women's team named Jessica Lane. (R. at 2-3). Thundersnow is an anabolic steroid. (R. at 4). It is an ester of bolasterone, another anabolic steroid with the street name of "White Lightening." (R. at 28).

After the shooting, search warrants were executed on Ms. Zelasko's house, the team's training facility, and the apartments of Ms. Lane and Casey Short. (R. at 8). Ms. Short has been on the United States team since she transferred from the Canadian women's Snowman Team in June of 2011. (R. at 24). Two 50-milligram doses of Thundersnow along with \$5,000 in cash were discovered at Ms. Zelasko's house. (R. at 8). According to expert witness Henry Wallace, a quantity of two 50-milligram doses is consistent with personal use and not sale. (R. at 28). Twenty doses of Thundersnow and approximately \$10,000 in cash were discovered at Ms. Lane's apartment. While the search of Ms. Short's apartment did not produce any evidence, a search of the team's training facility, to which all the female team members and staff have access, turned up 12,500 milligrams of Thundersnow, worth approximately \$50,000. (R. at 8). On April 10, 2012, Ms. Zelasko and Ms. Lane were indicted for murder, conspiracy to commit murder,

conspiracy to distribute and possess with intent to distribute steroids, possession of steroids, and distribution of and possession with intent to distribute steroids. (R. at 4-5). At the District Court, the government and Ms. Zelasko made cross-motions to admit evidence. (R. at 7). The government moved to introduce evidence of an email against Ms. Zelasko that was sent from Ms. Lane to her boyfriend, Peter Billings. (R. at 7). Ms. Lane sent this email to Mr. Billings on January 16, 2012:

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

(R. at 3).

Ms. Zelasko moved to introduce the testimony of Miranda Morris. (R. at 7). Miranda Morris was a member of the Canadian Snowman Team from February of 2009 to December of 2012. (R. at 24). During that time, Ms. Short was also a member of the Canadian team. On March 27, 2011, Ms. Short approached Ms. Morris about purchasing the steroid known as White Lightning from her. (R. at 25). Several days after Ms. Short approached Ms. Morris, Ms. Morris agreed to purchase White Lightening from her and the two decided on an amount and a price. (R. at 25).

The District Court determined that the testimony of Ms. Morris is admissible at trial because propensity evidence is not barred by Federal Rules of Evidence 404(b). (R. at 21). Additionally, because there is no other evidence to implicate Ms. Short as Ms. Lane's partner, Ms. Morris's testimony raises the constitutional issue of a defendant's right to present a complete defense. (R. at 21). The District Court held that Ms. Morris's testimony raises a strong inference that Ms. Short, and not Ms. Zelasko, was the second member of the conspiracy, and because

there is no other evidence to implicate Ms. Short, Ms. Morris's testimony is therefore admissible pursuant Ms. Zelasko's constitutional right to present a complete defense. (R. at 21-22).

The District Court further held that the email sought to be introduced against Ms. Zelasko is inadmissible. (R. at 22). It determined that none of the statements in the email, considered independently, inculpate Ms. Lane because they do not admit any wrongdoing or expose Ms. Lane to criminal liability, therefore the email cannot come in under Federal Rules of Evidence 804(b)(3). (R. at 22). Additionally, the Court held that even if the email were admissible as a statement against interest, the email would still be inadmissible against Ms. Zelasko as its admission would violate the Confrontation Clause. The Circuit Court affirmed all of the District Court's holdings, with one judge dissenting. (R. at 33-46).

#### SUMMARY OF THE ARGUMENT

Federal Rule of Evidence 404(b) states that evidence of other acts is not admissible against a person in order to show that the person acted in conformity therewith. The lower courts in this case, along with a majority of the circuits, have held that, though the plain language of the statute says "person" and not "defendant," when the defendant seeks to introduce other acts evidence of a third party to negate the defendant's guilt, such evidence should generally be admitted. Some circuits hold that the defendant should be allowed to introduce acts of third parties, even if the evidence does not rise above the level of propensity. Others circuits hold that the evidence the defendant seeks to introduce must be admitted for a proper purpose under Rule 404(b)(2), but there is a lower threshold for the introduction of this evidence than if the prosecution were introducing it.

The government argues that because the plain language of the statute bars propensity evidence from admission against any person, and not just the defendant, Ms. Zelasko should not

be allowed to introduce Ms. Morris's testimony implicating Ms. Short as the second member of the conspiracy. However, this is inconsistent with the rationale behind Rule 404(b). Therefore, under either the circuit standard admitting all propensity evidence offered by the defendant, or the more restrictive standard requiring the evidence to be offered for a proper purpose, Ms. Morris's testimony is admissible as it is highly probative, there is little to no risk of prejudice as Ms. Short is not a party to the action, and the testimony goes to the identity of the second member of the conspiracy.

Even if Ms. Morris's testimony is held to be inadmissible under Rule 404(b), it still must be admitted so as not to violate Ms. Zelasko's constitutional right to present a complete defense. A defendant's right to present a complete defense and to defend him or herself adequately against the charges brought are tenets of our criminal justice system. Such rights do not mean that any and all evidence that the defendant wishes to introduce may come in. However, in this case, the testimony Ms. Zelasko wishes to introduce is the only evidence the defense can introduce implicating Ms. Short. Without this evidence, Ms. Zelasko will not be able to defend herself to the extent which her rights guarantee. Additionally, the introduction of the evidence will not offend judicial expediency as it is the only evidence Ms. Zelasko is introducing regarding Ms. Short. Nor will it risk prejudicing the jury as Ms. Short is not a party to the action. Therefore, in the interest of preserving Ms. Zelasko's constitutional right to present a complete defense, Ms. Morris's testimony must be admitted.

The *Williamson* standard for the application of Federal Rule of Evidence 804(b)(3) should be re-affirmed as it admits only the individual statements that are against the declarant's interest, which is consistent with the rationale for Rule 804(b)(3) and the broader principles for excluding hearsay. Under *Williamson* a district court must ask 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. *Williamson* is consistent with the plain meaning of the term "statement" as used in Rule 804(b)(3) as the standard requires a court to look at each assertion and only admit self-inculpatory statements. A court cannot admit non self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.

Williamson should be reaffirmed as it is aligned with the broader rationale and principles for the rule against hearsay. The theory of the hearsay rule is that the many possible deficiencies, sources of error, and untrustworthiness which lie underneath the bare untested assertion of a witness may be best brought to light by the test of cross-examination. Self-inculpatory statements can circumvent the test of cross-examination where they have a circumstantial guarantee of reliability based on the assumption that people do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Furthermore, Williamson provides clear guidance and consistency for the lower courts when the rule is applied as this court intended where the standard is aligned with the rationale for 804(b)(3). Therefore, Co-Defendant Lane's email is impermissible hearsay and does not fall within Federal Rule of Evidence 804(b)(3). The lower courts per Williamson properly examined each assertion in the email rather than viewing the email as a whole to discern that none of the statements inculpated Co-Defendant Lane where she did not disclose the identity of her partner nor the nature of their business.

Finally, *Crawford v. Washington* does not restrict the *Bruton* doctrine to the testimonial statements of a non-testifying co-defendant where *Bruton v. United States* and *Crawford* address the legally distinct issues of constitutional harmfulness and constitutional reliability,

respectively. While *Crawford* stands for the proposition that the reliability of testimonial statements must be tested by cross-examination, it fails to negate the underlying concern in *Bruton* that, at a joint trial, introducing a co-defendant's statements that implicate the defendant results in constitutional harm, whether such statements are testimonial or non-testimonial in nature. In other words, whether a co-defendant's inculpatory statements are testimonial or non-testimonial is irrelevant to whether limiting instructions can cure the prejudice a defendant suffers from their introduction since both are equally susceptible to improper jury consideration.

Accordingly, where *Crawford* sets forth a test of constitutional reliability and the *Bruton* doctrine provides an unrelated test of constitutional harmfulness, *Crawford* does not limit the scope of the *Bruton* doctrine, which applies to both testimonial and non-testimonial evidence. Therefore, Co-Defendant Lane's non-testimonial e-mail incriminating Ms. Zelasko is inadmissible because it violates the *Bruton* doctrine and unconstitutionally deprives Ms. Zelasko of her Sixth Amendment right to confrontation.

#### **ARGUMENT**

I. FEDERAL RULE OF EVIDENCE 404(B) DOES NOT BAR DEFENDANT
ANASTASIA ZELASKO'S USE OF EVIDENCE OF THE PRIOR CRIMINAL
ACT OF CASEY SHORT, A THIRD PARTY, WHERE MS. SHORT
COMMITTED AN ACT VERY SIMILAR TO THE CRIME WITH WHICH MS.
ZELASKO IS CHARGED AND WHERE INTRODUCTION OF THE EVIDENCE
HAS SUBSTANTIAL PROBATIVE VALUE AND THE RISK OF PREJUDICE IS
VERY LOW.

Anastasia Zelasko seeks to introduce testimonial evidence regarding Casey Short under Federal Rule of Evidence 404(b) for the proper purpose of determining identity. Rule 404(b) states that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). It goes on to state that such "evidence may be admissible for

another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). When the defense is seeking to introduce this kind of evidence, it is referred to as "reverse 404(b)" evidence. *United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004). The Third Circuit in *United States v. Stevens* correctly and succinctly stated the rule which Ms. Zelasko argues is the appropriate rule under which to make reverse 404(b) evidence determinations. 935 F.2d 1380, 1384 (3rd Cir. 1991). There, the court held that:

[w]hen a *defendant* proffers "other crimes" evidence under Rule 404(b), there is no possibility of prejudice to the defendant; therefore, the other crime need not be a "signature" crime. Instead, it only need be sufficiently similar to the crime at bar so that it is relevant under Federal Rules of Evidence 401 and 402, and that its probative value is not substantially outweighed by Federal Rule of Evidence 403 considerations

*Id.* (emphasis in the original). While the circuits have developed different methods of analyzing reverse 404(b) evidence, the majority of circuits that have considered the issue hold that Rule 404(b) does not bar propensity evidence when it is offered by the defendant. *See*, *e.g.*, *United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005). The Third Circuit's approach can be easily and consistently applied, and stays true to the public policy behind the rule.

# A. Propensity Evidence Should Not Be Barred When the Defendant Is Seeking to Introduce It Because the Public Policy Rationale Is Not Offended By the Admission of Such Evidence.

Normally it is the prosecution that seeks to introduce "other crimes" evidence. *United States v. McClure*, 546 F.2d 670, 673 (5th Cir. 1977). In such cases, there is a strong public policy interest in protecting the defendant from prejudice resulting from the introduction of prior bad acts. As this Court has stated, the major rationale for disallowing similar acts evidence is that "the jury may choose to punish the defendant for the similar acts rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law." *Huddleston* 

v. United States, 485 U.S. 681, 686 (1988). These concerns are not present when the evidence introduced involves a third party and not the defendant. As the Circuit Court commented in this case, "the policy reasons behind FRE 404 apply here with much weaker force, if any force at all." (R. at 35). The District Court agreed with the Third Circuit's reasoning in United States v. Stevens, holding that "there is no danger of prejudice to the third party since she is not a defendant in this case." (R. at 21). The Fifth Circuit also addressed the issue of admission of third-party extrinsic evidence, stating

[w]hen . . . the extrinsic offense was not committed by the defendant, the evidence will not tend to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith. When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable.

*United States v. Krezdorn*, 639 F.2d 1327, 1333 (5th Cir. 1981). Therefore, although the plain language of Rule 404(b) says "person" and not "defendant," the lower courts properly held that the public policy reasons behind Rule 404(b) are not implicated and therefore, Rule 404(b) does not bar Ms. Morris's testimony.

# B. <u>Under Rule 404(b)</u>, <u>Admission of Other Acts of Third Parties Should Be Less</u> Restrictive Than Admission of Other Acts of the Defendant and Under the Appropriate Balancing Test Ms. Morris's Testimony is Admissible.

The Third Circuit further refines its test for analyzing reverse 404(b) evidence in *United States v. Williams*, 458 F.3d 312 (3rd Cir. 2006). There, the defendant wanted to introduce evidence that his friend had a prior conviction for possession of a firearm to suggest that the gun found by police, which resulted in the defendant's possession charge, was more likely to have belonged to that friend than to the defendant. *Id.* at 314-15. The court pointed out that Rule 404(b)'s proscription against propensity evidence "applies regardless of by whom, and against whom, it is offered." *Id.* at 314. It went on to state that "[u]nder *Stevens*, we grant defendants more leeway in introducing 'bad acts' evidence under one of the Rule 404(b) exceptions . . . [b]ut

Stevens did not afford defendants more leeway in admitting propensity evidence in violation of the prohibition of Rule 404(b)." *Id*.

The evidence of the prior bad act of Ms. Short proffered by Ms. Zelasko is not mere propensity evidence. The distinction is made clear by a comparison of the proffered evidence here with that of the proffered evidence in *Williams* and in *Stevens*. The evidence proffered in *Williams* merely showed that a third party had possessed a firearm on a prior occasion and was clearly propensity evidence that did not go to one of the proper purposes of Rule 404(b), such as identity. 458 F.3d at 316. Conversely, the evidence proffered in *Stevens* demonstrated that a third party committed a similar crime, in a similar area, in a similar manner. 935 F.2d at 1383. The evidence in *Stevens* was more detailed and specific, and more clearly went to establishing the identity of the person who was committing those crimes. *Id.* at 1401.

The proffered evidence here is very similar to the evidence proffered in *Stevens*. Here, the evidence shows that a very similar crime, under very similar circumstances, was committed by a person who had the opportunity to commit the crime of which Ms. Zelasko is accused. Furthermore, in *Williams*, the police witnessed the defendant with the gun, at which point the defendant ran into a bedroom with the gun where police found him crouching over the bed where the gun was found. 458 F.3d at 314. Here, the government has no evidence that Ms. Zelasko sold the steroids. The only evidence linking her to the Thundersnow is the two doses that were found in her house. (R. at 8). This amount is consistent with personal use and not sale. (R. at 28). When considering the totality of the circumstances, it is easy to see that the proffered evidence in *Williams* was propensity evidence with little probative value. On the other hand, the proffered evidence here goes directly to the identity of the person committing the crime, and has great probative value, similar to the evidence admitted in *Stevens*.

When the Second Circuit addressed the issue of other acts evidence of third parties, it held that "... the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword." *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2nd Cir. 1983). If Ms. Short were on trial, the evidence of her prior steroid dealing may not be strong enough to be admitted against her, although it goes to identity. However, here Ms. Short is not the defendant and the evidence should be admitted. The court in *Aboumoussallem* observed that "... the risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense." *Id.* It went on to say that "[i]n such cases the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense." *Id.* at 912. Ms. Short's history of selling a steroid very similar to Thundersnow to members of the Snowman team to which she belonged less than a year prior to the events surrounding Ms. Zelasko's arrest is extremely relevant to this case.

The Circuit Court cited to *United States v. Lucas* as a decision where the defendant was prohibited from introducing evidence of a third party's conviction. (R. at 34). The *Lucas* court held that "the standard analysis of Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party not charged with any crime." *Lucas*, 357 F.3d at 606. In that case the defendant sought to introduce evidence that a third party had a prior conviction for selling cocaine in order to demonstrate that it was that man, and not the defendant, who had put the cocaine in her car. *Id.* "The defense wants the jury to make the inferential leap that because [the third party] sold drugs before, he is likely to have done so again." *Id.* However, the Court goes on to say that,

If, instead, it was shown that [the third party] had borrowed someone else's car in which to do the prior drug deal or if he had packaged the cocaine in the same way and had left it under the passenger's seat in the same way, the evidence of his prior drug deal might have been sufficiently probative . . ..

*Id.* Here, the proffered evidence is not simply that Ms. Short previously sold steroids. It is far more similar to the hypothetical evidence the Sixth Circuit suggested may be sufficiently probative. Ms. Short sold White Lightening to members of another Snowman team shortly before being transferred to the United States team where an ester of White Lightening, Thundersnow, was sold by Ms. Lane and one other partner. (R. at 25, 11). This is a sufficiently similar situation to demonstrate a probative value.

When the Seventh Circuit addressed this issue it held that "... pursuant to Rule 404(b), evidence regarding other crimes is admissible for defensive purposes if it tends, alone or with other evidence, to negate the defendant's guilt of the crime charged against him." *United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001) (quotations omitted). Under this standard, the testimony of Ms. Morris is certainly admissible as it clearly tends to negate Ms. Zelasko's guilt. It is undisputed that only two parties are involved in the conspiracy, Ms. Lane and one other person. (R. at 11). Therefore, evidence demonstrating that Ms. Short was a member of the conspiracy necessarily negates the assertion that Ms. Zelasko was a member of the conspiracy. The Seventh Circuit went on to say, "[i]n deciding whether to admit such evidence, a district court should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time and confusion of the issues under Rule 403." *Reed*, 259 F.3d at 634 (quotations omitted). Not only does Ms. Morris's testimony negate Ms. Zelasko's guilt, when balanced under Rule 401 and Rule 403, it is certainly admissible. As discussed *supra*, there is no risk of prejudice, as discussed *infra* there will be no waste of time, and there will be

no confusion of the issues as this evidence is introduced for the straightforward purpose of determining the identity of the second member of the conspiracy.

Ms. Zelasko is seeking to introduce Ms. Morris's testimony not merely to demonstrate that Ms. Short has a propensity for selling steroids, but for the proper purpose of determining identity. This testimony is highly probative on the issue of the identity of the person in the conspiracy with Ms. Lane. Additionally there is no risk of prejudice to Ms. Short as she is not a party to the action. Therefore, it is proper to admit the evidence regarding Ms. Short even if Rule 404(b) applies to other acts of third parties.

II. MS. ZELASKO'S CONSTITUTIONAL RIGHT TO PRESENT A FULL AND COMPLETE DEFENSE ENTITLES HER TO PRESENT THE EVIDENCE REGARDING MS. SHORT WHERE THAT EVIDENCE IS THE ONLY AVAILABLE EVIDENCE TO CONTRADICT A KEY ASSUMPTION OF THE GOVERNMENT'S CASE AGAINST MS. ZELASKO, EVEN IF SUCH EVIDENCE IS DETERMINED TO BE INADMISSIBLE PROPENSITY EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 404(B).

Under the Due Process Clause of the Fourteenth Amendment and the Compulsory

Process and Confrontation Clauses of the Sixth Amendment, a defendant has a right to present a complete defense. U.S. Const. amend. VI; XIV. This Court has stated that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the [government's] accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

Ms. Zelasko's motion to admit the testimony must be granted in order to allow Ms. Zelasko to defend herself against the government's accusations and to protect her constitutional right to present a compete defense.

The government argues that this right is not so broad as to encompass any evidence that may potentially cast doubt on a defendant's guilt, and that the testimony offered here does not present strong enough evidence to trigger a constitutional right. (R. at 36). Though this

constitutional right does not encompass any and all possible evidence that might potentially cast doubt, this evidence is not so weak as the government would like this Court to believe. Rather, this evidence undermines the very lynchpin of the government's theory against the Ms. Zelasko. Furthermore, it is the only evidence available to support this argument. (R. at 14). If Ms. Zelasko is prohibited from presenting this evidence, she cannot adequately present her defense theory which undermines the entire case against her, and therefore cannot present a full defense, thus violating her constitutional rights.

The government characterizes the proffered evidence as merely being evidence of Ms. Short selling a "different drug, in a different country, to different people." (R. at 15). However, in reality, the evidence points to a possible suspect who "sold an extremely similar anabolic steroid in a nearly identical context, less than a year before Mr. Riley was shot," as the Circuit Court observed. (R. at 37). This Court stated in *Michigan v. Lucas* that "to the extent that [a Rule] operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to . . . present a complete defense is diminished." 500 U.S. 145, 149 (1991). If the proffered evidence is held to be propensity evidence that is inadmissible under Rule 404(b), the evidence should still be admitted so as not to diminish Ms. Zelasko's right to present a complete defense.

In determining that the admission of this evidence was necessary to protect the constitutional rights of Ms. Zelasko, the Circuit Court engaged in a balancing test. It weighed the government's stated interest in restricting the proffered evidence against Ms. Zelasko's strong interest in presenting a complete defense. The Circuit Court properly balanced the interests and gave the appropriate weight to each consideration when it held that the evidence must be allowed to come in. The Circuit Court found that the "evidence is certainly probative in that it casts

significant doubt on the Defendant's participation in the drug-selling conspiracy and thus calls into question the government's theory of the case." (R. at 37). It held furthermore that "it is not at all clear what policy goals would be furthered by excluding Ms. Morris's testimony." *Id.* The government cites the interests of judicial expediency and risk of prejudice as the rationale for excluding the defense's evidence. (R. at 37-38). The Circuit Court rightly held, however, that "[j]udicial expediency is not threatened here because the evidence would not bog down the courts." (R. at 38). This is the only evidence implicating Ms. Short, it is not repetitive, and it is part of a "relatively modest defense being presented." *Id.* Additionally, there is no risk of prejudice in admitting the testimony, as Ms. Short is not a party to this action.

The District and Circuit Courts properly considered the interests at issue in this case. They balanced the defendant's strong interest in her constitutional right to present a complete defense against the government's weak interests in this case of judicial expediency and risk of prejudice. In doing so, the lower courts properly determined that disallowing Ms. Morris's testimony would violate Ms. Zelasko's constitutional rights without significantly furthering any legitimate government interests. Therefore, Ms. Morris's testimony must not be excluded, notwithstanding the admissibility of the evidence under Rule 404(b).

III. THE WILLIAMSON V. UNITED STATES STANDARD FOR THE APPLICATION OF FEDERAL RULE OF EVIDENCE 804(B)(3) SHOULD BE REAFFIRMED BECAUSE IT PROPERLY EXCLUDES INADMISSIBLE HEARSAY THAT IS NOT AGAINST THE DECLARANT'S PENAL INTERST, AND THE STANDARD IS CONSISTENT WITH THE RATIONALE FOR THE RULE AGAINST HEARSAY.

Federal Rule of Evidence 802 provides that "[h]earsay is not admissible." Fed. R. Evid. 802.

The hearsay rule . . . is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he

might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements -- the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine -- are generally absent for things said out of court.

5 John Henry Wigmore, Evidence in Trials at Common Law § 1362 (James H. Chadbourn 1974). However, otherwise inadmissible out-of-court statements may be introduced at trial under an exception to the hearsay rule, such as Federal Rule of Evidence 804(b)(3). Rule 804(b)(3) provides, in pertinent part, that a statement against interest is "a 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 such a great tendency . . . to expose the declarant to . . . criminal liability . . . . " Fed. R. Evid. 804(b)(3). Statements that are admissible under Rule 804(b)(3) have a "circumstantial guaranty of reliability" based on "the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Fed. R. Evid. 804 advisory committee's note. In Williamson v. United States, this Court recognized that "the most faithful reading of Rule 804(b)(3) is that it does not allow the admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory" since the non self-inculpatory statements are not reliable where they are not against the declarant's interest. 512 U.S. 594, 600-01 (1994). Williamson properly requires a court to ask "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." *Id.* at 604-03 (quoting Fed. R. Evid. 804(b)(3)). Moreover, the question should be answered "in light of all the surrounding circumstances" because "whether a statement is self-inculpatory or not can only be determined by viewing it in context."

Williamson, 512 U.S. at 603-04. Accordingly, "courts should inquire into the factual circumstances surrounding the making of the larger statement, not merely the sentences surrounding the statement against interest itself." Emily F. Duck, *The Williamson Standard for the Exception to the Rule Against Hearsay for Statements Against Penal Interest*, 85 J. Crim. L. & Criminology 1084, 1112 (1995). Finally, the statement must be against the declarant's interest at the time the statement is made. 2 Kenneth S. Broun et al., *McCormick on Evidence* § 319 (6th ed. 2006). Thus, for the reasons discussed below, *Williamson* should be affirmed as it is rooted in the rationale for the rule against hearsay and Rule 804(b)(3), and permits only the assertions that are sufficiently reliable as they are against the declarant's interest.

A. The Williamson Standard Should Be Affirmed as It Is Consistent With the Rationale for the Rule Against Hearsay and the Exception to the Rule for Statements Against Interest, and It Provides Clear Guidance to Lower Courts on How to Ensure Only Reliable and Trustworthy Assertions are Admissible Thus Avoiding the Admission of Hearsay.

In reversing the circuit court's decision in *Williamson* this Court relied on the plain meaning of the term "statement" as used in Rule 804(b)(3), the principles for excluding hearsay and the rationale for permitting statements against interest which have a circumstantial guarantee of reliability. In *Williamson*, the district court judge impermissibly allowed inadmissible hearsay by the declarant who had confessed to police while in custody after initially lying to the officers about the narcotics found in the declarant's car during a routine traffic stop. *Williamson*, 512 U.S. at 596-97. The declarant made self-inculpatory as well as self-exculpatory assertions that shifted blame to the defendant Fredel Williamson. *Id. at* 596-98. Although the declarant refused to testify at Williamson's trial, the judge admitted all of the declarant's statements under Rule 804(b)(3) and Williamson was subsequently convicted. *Id*.

1. The Williamson standard for the application of Rule 804(b)(3) should be affirmed because it is consistent with the plain meaning of the term "statement," the principles behind the rule against hearsay and the exception to the rule for statements against interest, and this consistency provides clear guidance to lower courts.

This Court should affirm the Williamson standard where it is consistent with the plain meaning of the term "statement" as used in 804(b)(3). "A fundamental canon of statutory construction is that, unless otherwise defined words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 44 U.S. 37, 42 (1979) (citing Burns v. Alcala, 420 U.S. 575, 580-81 (1975)). Tasked with articulating a standard that determines what assertions fall within the 804(b)(3) exception, this Court in Williamson looked to the text of 804(b)(3) and excluded from the scope of the exception neutral and exculpatory collateral statements. Williamson, 512 U.S. at 600. As noted by Justice O'Connor in Williamson, the "Federal Rule of Evidence 801(a)(1) defines 'statement' as 'an oral or written assertion." Williamson, 512 U.S. at 599. Moreover, Webster's Third New International Dictionary defines "statement" as "a single declaration or remark," thereby limiting the exception's breadth to only those declarations or remarks within the confession that are individually self-inculpatory. *Id.* at 599. As a result, a narrow reading of the term "statement" is consistent with 804(b)(3), which is founded on the notion that reasonable people, honest or not, "tend to not make self-inculpatory statements unless they believe them to be true." *Id.* at 599.

The *Williamson* Court's narrow reading of the term "statement" as used in Rule 804(b)(3) is also consistent with the principles behind the rule against hearsay and the exception for statements against interest. The rationale underlying the rule against hearsay is statements that are admissible under Rule 804(b)(3) have a "circumstantial guaranty of reliability" based on "the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Fed. R. Evid. 804 advisory committee's note.

Williamson properly focuses on whether statements collateral to the specific statement against interest have sufficient guarantees of reliability. Duck, *supra*, at 1106. Specifically, it is "the self-inculpatory effect of the declarant's words" that "renders statements against interest reliable." Duck, *supra*, at 1107. Thus, where the Williamson standard focuses on the language of Rule 804(b)(3), it is consistent with the rationale of the exception because it limits admissible evidence to statements that are truly against the declarant's interest, and therefore as trustworthy and reliable as in-court testimony.

Furthermore, it is clear from the language of Rule 804(b)(3) that the exception does not logically extend to a broader definition of "statement" where "statement" means a "report or narrative." *See Williamson*, 512 U.S. at 599-600. The broader definition is inconsistent with the reasoning of the exception because the "fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id.* This definition would permit an extended declaration where non-self-inculpatory portions would be admissible "as long as in the aggregate the confession inculpates the declarant." *Williamson*, 512 U.S. at 599. Justice O'Connor astutely pointed out that "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially a truth that seems particularly persuasive because of its self-inculpatory nature." *Id.* at 599-600.

The text of Rule 804(b)(3) and the advisory committee's note that follow must be evaluated through the context and background of Rule 802 where hearsay is inadmissible because of its lack of trustworthiness and reliability. *See* Wigmore, *supra*, at § 1362 at 3 ("The theory of the hearsay rule is that the many possible deficiencies . . . sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light . . . by the test of cross examination . . . ."). The advisory committee's note states

that a 'third-party confession . . . may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements." Fed. R. Evid. 804(b)(3) advisory committee's note. To interpret this language to mean that 804(b)(3) permits hearsay would be inconsistent with the rule's underlying theory that only statements against interest can circumvent the test of cross-examination. *Williamson*, 512 U.S. at 600-02. As Professor Jefferson summarized, "the basis of this exception is not that a declarant is in a generally trustworthy frame of mind. The probability of trustworthiness comes from the facts asserted being disserving in character." Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 60 (1944). Self-serving and neutral collateral statement should not be admitted merely because they are within a larger statement that includes dissevering statements. *Id*.

When lower courts apply the *Williamson* standard as this Court intended, the standard provides clear guidance and consistency. For example, the Eighth Circuit in *United States v*. *Hazlett* stayed within the narrow confines of the *Williamson* standard by excluding statements made by the declarant. 32 F.3d 1313 (8th Cir. 1994). The statements were not "sufficiently against the declarant's penal interest" because the statements were made following the declarant's arrest, after illegal drugs had been discovered. *Id.* at 1318. The declarant had nothing to lose by confessing and implicating another person. *Id.* at 1318. Subsequently, in *United States v. Mendoza*, a drug conspiracy case, the Eighth Circuit again followed the rule articulated in *Williamson*. 85 F.3d 1347 (8th Cir. 1996). The Eighth Circuit affirmed the district court's conclusion that the declarant's statement that the defendant delivered methamphetamine was not sufficiently against her interest because the declarant made the statement only after police found drugs in her possession and they discovered her initial statement was a lie. *Id.* at

1352. At the time the statements were made she had "nothing to lose by implicating" the defendant. *Id*.

United States v. Smalls highlights the error some courts make when they lose sight of the narrow scope of the exception and erroneously broaden the reach by relying on an expanded totality of the circumstances approach, where merely mentioning the defendant's name will lead to the admission of collateral statements. 605 F.3d 765 (10th Cir. 2010). See, e.g., United States v. Barone, 114 F.3d 1284, 1296 (1st Cir. 1997). In Smalls, the Tenth Circuit reversed and remanded the lower court ruling because "[r]ather than carefully analyzing [the declarant's] statement in accordance with Rule 804(b)(3) and Williamson to separate [the declarant's] admissible from his inadmissible remarks, the district court ... simply concluded based on an erroneous view of the law" that the context of the statements made them inadmissible. 605 F.3d at 783. Finally, reaffirming Williamson provides consistency and guidance in and of itself as the doctrine of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

2. The Williamson standard for the application of Rule 804(b)(3) is most consistent with the underlying theory of the rule against hearsay and the exception for statements against interest and is best able to discern what hearsay is admissible and should therefore be affirmed.

A narrow application of Rule 804(b)(3) under the *Williamson* standard as articulated in Justice O' Connor's opinion and the standard advocated by Professor Jefferson ensures that hearsay will not be easy to admit. Professor Jefferson argued for a narrow application of Rule 804(b)(3) because the reliability of a statement against interest stems only from the disserving fact stated and so should be confined "to the proof of the fact which is against interest."

Jefferson, *supra*, at 62-63. "Under the Jefferson approach, neither collateral neutral nor collateral self-serving statements would be admissible." *Williamson*, 512 U.S. at 612.

As observed by Professor Jefferson, the common law rationale erroneously admits a declaration against interest where it is used not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement. Jefferson, *supra*, at 57. When a self-serving statement is made along with a disserving one, it is doubtful that when the declarant makes the self-serving statement she is in a trustworthy frame of mind. Jefferson, *supra*, at 60. The basis of the exception is not that the declarant is in a generally trustworthy frame of mind. *Id.* Rather, "[t]he probability of trustworthiness comes from the facts asserted being disserving in character." Jefferson, *supra*, at 60. On the other hand, Justice Kennedy's approach extends the scope of Rule 804(b)(3) beyond its underlying rationale where he would admit statements that are collateral to the statements against interest. *See Williamson*, 512 U.S. at 620, Duck, *supra*, at 1107-08. Therefore, Justice Kennedy's alternative cannot be justified by the exception's requirements or rationale for excluding hearsay when he would admit self-serving and neutral statements because they accompany disserving statements.

B. The Lower Courts Properly Excluded the Statements Made By Defendant Lane as Inadmissible Hearsay as the Assertions are Not Against Her Penal Interest Because She Does Not State the Nature of Her Business, She Lacks Knowledge of Her Partner's Plan and She Does Not Disclose the Identity of Her Partner, Thus None of the Statements Would Tend to Subject Her to Criminal Liability.

None of the five statements contained in the email Co-Defendant Lane sent to Mr. Billings, when analyzed individually as the *Williamson* standard requires, inculpates Co-Defendant Lane. The assertions are not "sufficiently against her penal interest" that a reasonable person in her position would not have made the statements unless she believed them to be true. *Williamson*, 512 U.S. at 603-04, Fed. R. Evid. 804(b)(3). The first statement "I need help," is neutral on its face as it does not specify the type of help she is seeking and therefore does not

expose her to criminal liability. (R. at 3). The second statement, "I know you've suspected before about the business my partner and I have been running with the female team," also does not expose her to criminal liability because she does not disclose that nature of the business. (R. at 3). This statement is in stark contrast to a statement that admits to murder, as in *Smalls*, "[w]e killed the [expletive]," or in *Barone* where the declarant "admitted . . . that he . . . had committed the robbery." *See Smalls*, 605 F.3d at 769; *Barone*, 114 F.3d at 1290. The third statement, "[o]ne of the members of the male team found out and threatened to report us if we don't come clean" viewed individually, on its face, is not an admission of wrong doing and could not expose Co-Defendant Lane to criminal liability as there is no confession of an illegal act. (R. at 3). The fourth statement "[m]y partner really thinks we need to figure out how to keep him quiet and I do not know exactly what she has in mind," definitely does not inculpate the declarant and states a defense of a lack of knowledge as to her partner's plan. (R. at 3). In contrast, in *Williamson*, the declarant gave up a defense of lack of knowledge by telling the police that he was transporting drugs, thus inculpating the declarant. *Williamson*, 512 U.S. at 604.

The context of statements cannot transform otherwise non-inculpatory statements into statements against a declarant's penal interest because the bedrock principle of 804(b)(3) is that each individual assertion must have "so great a tendency to expose the declarant to . . . criminal liability." Fed. R. Evid. 804(b)(3). The surrounding circumstances at the time Co-Defendant Lane's statements were made do not transform her statements from non-inculpatory to inculpatory. At the time Co-Defendant Lane sent the email law enforcement did not know the identity of her partner, and the email does not disclose the name of her partner. (R. at 3, 11-12).

In *United States v. Sasso*, the Second Circuit wrongfully expanded the breadth of *Williamson* by applying a totality of the circumstances analysis. 59 F.3d 341 (2d Cir. 1995). In

Sasso, the court erroneously admitted collateral statements because "even if the [declarant] was lying about the reason why he would not leave his wife, there would have been no reason to falsely bring the defendant into the picture." *Id.* at 349-50. In contrast, the Fourteenth Circuit properly excluded the statement, "[m]y partner really thinks we need to figure out how to keep him quiet and I do not know exactly what she has in mind." (R. at 3). The Circuit Court properly did not speculate as to whether Co-Defendant Lane had a reason to lie to Mr. Billings. Rather, the Court of Appeals properly focused on the fact that Co-Defendant "Lane does not express agreement with her partner and instead communicates a lack of knowledge as to what her partner 'has in mind,'" and concludes that this statement and all the other statements in the email are non-inculpatory. (R. at 42). Thus, where Rule 804(b)(3) is most faithfully interpreted as admitting only statements that are against interest, the lower courts made the proper determination in excluding Co-Defendant Lane's email.

# IV. ADMITTING THE NON-TESTIMONIAL STATEMENTS OF MS. LANE, A NON-TESTIFYING CO-DEFENDANT, THAT INCULPATE MS. ZELASKO VIOLATES THE CONFRONTATION CLAUSE WHERE CRAWFORD DOES NOT LIMIT THE BRUTON DOCTRINE TO TESTIMONIAL STATEMENTS.

Where *Bruton v. United States* and *Crawford v. Washington* address the entirely separate questions of constitutional harmfulness and constitutional reliability, respectively, *Crawford* does not limit the scope of the *Bruton* doctrine to testimonial statements. *Bruton v. United States*, 391 U.S. 123 (1968); *Crawford v. Washington*, 541 U.S. 36 (2004). Thus, where the *Bruton* doctrine governs the admission of a non-testifying co-defendant's inculpatory statements, whether such statements are testimonial or non-testimonial in nature, admitting Co-Defendant Lane's non-testimonial email incriminating Ms. Zelasko unconstitutionally harms Ms. Zelasko and therefore violates her right to confrontation under the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This procedural guarantee includes the right to cross-examine witnesses. Pointer v. Texas, 380 U.S. 400, 404 (1965). In Bruton v. United States, this Court held that the admission of a non-testifying co-defendant's confession at a joint trial, which implicates another defendant but is inadmissible against that defendant under the rules of evidence, violates the Confrontation Clause. *Bruton*, 391 U.S. at 126. Nearly forty years later, Crawford v. Washington held that the Confrontation Clause bars hearsay statements by a witness that are testimonial in nature, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. 36, 59 (2004). The Court explained that "[w]here testimonial statements are at issue, the only indicium of reliability . . . is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. On the other hand, the reliability of non-testimonial statements need not be tested by cross-examination. *Id.* at 68. Although this Court has yet to provide a definitive definition of "testimonial" statements, it has stated that "[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 51. This Court's "primary purpose" test provides additional guidance by categorizing statements taken or elicited primarily to "establish or prove past events potentially relevant to later criminal prosecution" as testimonial, and other statements as non-testimonial. Davis v. Washington, 547 U.S. 813, 822 (2006).

Although circuit courts have applied *Crawford*'s testimonial/non-testimonial dichotomy to the *Bruton* doctrine, thereby limiting the scope of the latter to testimonial statements, "[t]hese decisions miss the point of the *Bruton* doctrine" where *Crawford* and *Bruton* serve entirely

different objectives and thus have no affect on each other. (R. at 45). That is, *Bruton* reflects the Court's distrust in jurors' ability to disregard a co-defendant's statement implicating a defendant when determining the latter's guilt or innocence, and concludes that the prejudice the defendant suffers as a result of these human limitations rises to a level of unconstitutional harmfulness. *Bruton*, 391 U.S. at 126-36. On the other hand, *Crawford* focuses on the reliability of statements "produced with an eye toward trial" where the "[i]nvolvement of government officers... presents unique potential for prosecutorial abuse." *Crawford*, 541 U.S. at 56, fn. 7. It concludes that while the Confrontation Clause does not guarantee that such statements will be reliable, it does guarantee that their reliability will be tested by cross-examination. *Id.* at 61. Thus, although confrontation is the solution to both problems addressed in *Bruton* and *Crawford*, (e.g., the intractable prejudice a defendant suffers as a result of admitting a non-testifying co-defendant's confession, and the potential governmental abuses in introducing testimonial hearsay) these issues remain legally distinct.

Consequently, where *Bruton* and *Crawford* address the legally distinct issues of constitutional harmfulness and constitutional reliability, respectively, *Crawford* does not modify the *Bruton* doctrine to limit it to testimonial statements. Instead, the *Bruton* doctrine applies to both testimonial and non-testimonial hearsay of non-testifying co-defendants that implicate the defendant. Thus, where Co-Defendant Lane's email to her boyfriend implicating Ms. Zelasko was not produced under circumstances indicating it would be used at a later trial, it is a non-testimonial statement by a non-testifying co-defendant that falls squarely within *Bruton*'s scope. Accordingly, introduction of Co-Defendant Lane's email violates Ms. Zelasko's Sixth Amendment rights under the Confrontation Clause.

# A. The Bruton Doctrine is a Test of Constitutional Harmfulness Where the Prejudicial Harm a Defendant Suffers from Ineffective Limiting Jury Instructions Violates the Confrontation Clause.

Where the finding of a Confrontation Clause violation in *Bruton* and its progeny hinged on whether the defendant was sufficiently harmed by the admission of a non-testifying codefendant's inculpatory statements at a joint trial, the *Bruton* doctrine is a test of constitutional harmfulness. In *Bruton*, the Court addressed the admissibility of a co-defendant's confession that implicated both the defendant Bruton and himself. Bruton, 391 U.S. at 124. Although the confession was admitted against the non-testifying co-defendant, the trial court instructed the jurors not to consider it as evidence of Bruton's guilt where it was inadmissible against him under the rules of evidence. Id. However, this Court subsequently held that admitting the codefendant's confession violated Bruton's Sixth Amendment right under the Confrontation Clause where the limiting jury instruction was insufficient to cure any prejudice to him. *Id.* at 126. In other words, where introducing the confession created a substantial risk that the jury, despite instructions to the contrary, considered the incriminating statements against Bruton, it had a "devastating" effect on Bruton's case and unconstitutionally deprived him of his right of crossexamination. *Id.* at 136. *Bruton*'s holding thus relied on the harm to the defendant caused by admitting a non-testifying defendant's inculpatory statements.

The application of *Bruton* to interlocking confessions in *Cruz v. New York* similarly reveals that the *Bruton* doctrine is a test of constitutional harmfulness, and not of constitutional reliability, where the Court rejected as relevant to a finding of a Confrontation Clause violation the reliability of such confessions. 481 U.S. 186 (1986). As in *Bruton*, the admission of a non-testifying co-defendant's confession in *Cruz* was accompanied by a limiting instruction to the jury not to use the confession against the defendant. *Id.* at 189. Unlike the defendant in *Bruton*,

however, the defendant in *Cruz* gave a confession that "interlocked" (i.e. that was substantially the same as and consistent) with that of his co-defendant. Id. Relying on the plurality opinion of Parker v. Randolph, the lower court held that Bruton was inapplicable to interlocking confessions where it was the defendant's interlocking confession, and not his co-defendant's confession, that devastated the defendant's case as required by Bruton. Id. at 189-91 (citing Parker v. Randolph, 442 U.S. 62, 73-75 (1979)). This Court then rejected Parker, finding that "the 'interlocking' nature of a co-defendant's confession pertains not to its harmfulness but rather its *reliability*," since confessions that corroborate one another are more likely to be true. Cruz, 481 U.S. 192-93 (emphasis in original). The fact that a confession interlocks, while relevant to assessing its reliability in a harmless error analysis, is irrelevant to the question of whether there is a *Bruton* violation. *Id*. Consequently, the Court's analysis reveals that measures of reliability, such as the interlocking nature of confessions, are incongruent with the factors that are deemed relevant to the *Bruton* doctrine; namely, the likelihood that jury instructions will be disregarded, the probability of prejudicial harm to the defendant, and the determinability of these facts in advance of trial. *Id.* at 193.

The Court's treatment of a co-defendant's redacted statements under the *Bruton* doctrine similarly depends on whether the admission of such statements is sufficiently harmful to the defendant's case. Where a co-defendant's statement must facially implicate the defendant to raise a *Bruton* violation, the Court in *Richardson v. Marsh* held that admitting a co-defendant's confession that is redacted to eliminate any reference to the existence of other defendants does not violate the Confrontation Clause. 481 U.S. 200, 211 (1987). In other words, because the confession was not incriminating on its face and only became so when linked to evidence introduced later at trial, the inferential leap required of jurors eliminated *Bruton*'s concern that

the jurors would not be able to follow instructions to disregard the evidence against the defendant. *Id.* at 208. Thus, where the admission of the co-defendant's redacted statement was not sufficiently prejudicial or harmful to the defendant, the Court found no Confrontation Clause violation

Conversely, the admission of a redacted confession that merely replaces the defendant's name with an obvious indication of deletion, such as a blank space, symbol, or the word "deleted," violates the *Bruton* doctrine where it sufficiently harms the defendant. *Gray v. Maryland*, 523 U.S. 185, 192 (1998). Unlike the confession in *Richardson*, the confession in *Gray v. Maryland* involved inferences that a jury could make immediately and without reference to other evidence because a "redacted confession with the blank prominent on its face... 'facially incriminates' the codefendant." *Id.* at 196 (quoting *Richardson*, 481 U.S. at 209). As a result, *Bruton*'s concern that the jury's inability to disregard the confession would unconstitutionally harm the defendant as to deprive him of his right to cross-examination led the Court in *Gray* to hold that such obvious redactions violate the Confrontation Clause.

Thus, *Bruton* and its progeny reveal that the admissibility of a non-testifying codefendant's statements implicating the defendant depends on the likelihood that the jury will disregard limiting instructions and the resulting harm to the defendant. Regardless of whether such statements are testimonial or non-testimonial, a co-defendant's inculpatory statements are equally susceptible to improper consideration by the jury against the defendant. Consequently, *Crawford*'s testimonial/non-testimonial dichotomy is inapplicable to the *Bruton* doctrine, which continues to prohibit non-testimonial statements of a non-testifying co-defendant absent confrontation.

# B. <u>Crawford's Testimonial/Non-Testimonial Dichotomy Is Inapplicable to the Bruton</u> <u>Doctrine Where Crawford Sets Forth a Test of Constitutional Reliability and Fails to Negate Bruton's Concern Regarding Constitutional Harmfulness.</u>

Crawford's testimonial/non-testimonial dichotomy, which stands for the proposition that the reliability of testimonial statements must be tested by cross-examination, is unrelated and inapplicable to the *Bruton* doctrine. In *Crawford*, the Court explained that where government involvement in the production of testimonial statements presents unique potential for prosecutorial abuse, such testimony developed by the government ex parte must be subject to a heighted test of reliability, that is, cross-examination. *Crawford*, 541 U.S. at 56, fn. 7. Thus, while *Crawford*'s testimonial/non-testimonial dichotomy can be explained by the Court's distrust in the prosecution's use of hearsay statements made to government officials, such underlying concerns regarding reliability are wholly absent from, and therefore irrelevant to, the *Bruton* doctrine, which addresses constitutional harmfulness.

Although the Confrontation Clause does not guarantee that testimony will be reliable, it guarantees that its reliability will be tested in a particular manner, that is, by cross-examination. Further, while the Court has stated that the ultimate goal of the Confrontation Clause is to ensure the reliability of evidence, *Crawford* clarified that the Clause provided a procedural rather than a substantive guarantee of reliability when it overruled *Ohio v. Roberts*, 448 U.S. 56 (1980). *Id.* at 61. *Roberts* held that hearsay statements of an unavailable witness were admissible against the accused where the statements bore "adequate indicia of reliability." *Id.* at 40 (citing *Roberts*, 448 U.S. at 66). A hearsay statement was sufficiently reliable where it fell under a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness." *Id.* Rejecting the principle that hearsay statements, untested by an adversary, were admissible upon a mere judicial determination of reliability, *Crawford* interprets the Clause as reflecting more than a judgment

that reliable evidence is desirable, but that the reliability of evidence is best determined by cross-examination. *Crawford*, 541 U.S. at 61.

While *Crawford* expressly overruled *Roberts* as it applied to testimonial statements, it left unresolved the issue of whether *Roberts*' "adequate indicia of reliability" test still applied to nontestimonial statements. McCormick, *supra* at, § 252. Some circuit courts have answered the question in the affirmative. *See*, *e.g.*, *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2005) ("*Crawford* leaves the *Roberts* approach untouched with respect to nontestimonial statements."); *United States v. Gibson*, 409 F.3d 325, 338 (6th Cir. 2005) ("*Crawford* dealt only with testimonial statements and did not disturb the rule that nontestimonial statements are constitutionally admissible if they bear independent guarantees of trustworthiness."). Regardless of whether *Crawford* replaced the *Roberts*' reliability test as applied to non-testimonial statements, however, the fact that *Crawford* clearly supplants one reliability test with another reveals that *Crawford* is focused on the issue of constitutional reliability, and is unconcerned with constitutional harmfulness.

Moreover, *Crawford*'s holding is inapplicable to the *Bruton* doctrine where the circumstances that implicate the latter are absent from *Crawford* and its progeny. In *Crawford*, the Court expressly distinguished as "entirely different" from the issue before it the "question of whether a limiting instruction cured prejudice to codefendants from admitting a defendant's own confession against him in a joint trial." *Crawford*, 541 U.S. at 59. *Crawford*'s characterization of an inquiry that is imperative to the *Bruton* doctrine as unrelated to its principles indicates that *Crawford* and *Bruton* address wholly separate issues. Moreover, *Crawford* and its progeny did not involve joint trials or address the effectiveness of limiting jury instructions in curing prejudice to the defendant, the defining characteristics of *Bruton*, nor did they cite a single

Bruton doctrine case. For example, Davis and its consolidated companion case, Hammon v. Indiana, grappled with the admissibility of hearsay statements, made by unavailable witnesses to law enforcement officers, in single-defendant trials. Davis, 547 U.S. at 817-21. Whorton v. Bockting was similarly unrelated to Bruton where it failed to discuss Bruton at all and instead focused on whether Crawford could be applied retroactively in the sexual assault case before it, which consisted of one defendant. 549 U.S. 406, 418 (2007). Consequently, although Davis and Bockting expressed that the Confrontation Clause is only concerned with testimonial hearsay, their holdings are inapplicable to the Bruton doctrine and should have no affect on the admissibility of a co-defendant's inculpatory statements at a joint trial. Davis, 547 U.S. at 823; Bockting, 549 U.S. at 413-14.

Consequently, *Crawford* and its testimonial/non-testimonial dichotomy are inapplicable to the *Bruton* doctrine where *Crawford* and *Bruton* address distinct legal issues and are wholly unrelated. *Bruton* prescribes confrontation as a safeguard against the jury's inability to disregard limiting instructions and the resulting harm suffered by a defendant from admitting a non-testifying co-defendant's inculpatory statements. *Crawford*, on the other hand, prescribes confrontation as a test of reliability to safeguard against prosecutorial abuses in the use of testimonial statements at trial. Thus, where *Crawford* does not modify the *Bruton* doctrine to limit it to testimonial statements, admitting Co-Defendant Lane's non-testimonial, inculpatory statements violates the *Bruton* doctrine and deprives Ms. Zelasko of her Sixth Amendment right to confrontation.

#### CONCLUSION

For the foregoing reasons, Ms. Zelasko respectfully requests that this Honorable Court affirm the decision of the Fourteenth Circuit Court of Appeals and hold: (1) Ms. Morris's

testimony is admissible under Rule 404(b); (2) regardless of the admissibility of Ms. Morris's testimony under Rule 404(b), it must not be excluded in order to protect Ms. Zelasko's right to present a complete defense; (3) *Williamson* is reaffirmed as the standard for the application of Federal Rule of Evidence 804(b)(3) and the standard was correctly applied by the lower courts; and finally, (4) Ms. Lane's email must be excluded to protect Ms. Zelasko's rights under the Confrontation Clause.