23R

No. 12-13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2013

UNITED STATES OF AMERICA,

Petitioner,

-- against --

ANASTASIA ZELASKO,

Respondent

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether, Federal Rule of Evidence 404(b) bars a defendant from presenting evidence of a third party's prior offenses, similar to the offenses, with which the defendant is charged, when that evidence is proffered to exculpate herself, or alternatively, whether, under *Chambers v. Mississippi*, Zelasko's constitutional right to a complete defense would be violated by the exclusion of evidence of a third party's distribution of anabolic steroids to sports teams?
2. Does the *Williamson* standard continue to provide the formula by which courts are most likely to ensure statements offered under Federal Rule of Evidence 804(b)(3)'s 'against penal interest' exception are truly self-inculpatory as to the declarant, and, if so, was it proper for the lower courts to find Co-Defendant Lane's email, within which she makes no statement which subjects her to criminal liability but where she does incriminate an accomplice, does not meet the exception?
3. Whether a non-testifying co-defendant's statement, powerfully incriminating on its face and sufficient to provoke a spillover effect on the defendant to whom it is inadmissible, is still barred by *Bruton* in light of *Crawford*?

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STATEMENT OF FACTS

Defendant Anastasia Zelasko became a member of the women's United States Snowman Pentathlon Team ("Snowman Team") on September 6, 2010. (R. 1.) Co-Defendant Jessica Lane joined the Snowman Team on August 5 , 2011, roughly a year after Ms. Zelasko joined. (*Id*.) Unbeknownst to Ms. Zelasko and Lane, Hunter Riley, a member of the U.S. men's Snowman Team was an informant for the DEA. (*Id*.) Lane's boyfriend of several years, Peter Billings, was the coach of the women's Snowman Team. (*Id*.) Casey Short, a non-party to this action, is also a member of the women's Snowman Team. (R. 8.) The women's Snowman Team competed in a number of physically challenging sports such as dogsledding, ice dancing, aerial skiing, rifle shooting and curling. (*Id*, 2.) The Snowman Team's main competition is the Winter World Games. (R. 1.)

Soon after Co-Defendant Lane joined the Snowman Team, the DEA directed Mr. Riley to approach Lane to purchase ThundersSnow, an anabolic steroid. (R. 2.) On or about October 1, 2011, Mr. Riley approached Lane and inquired about the purchase of ThunderSnow; Lane declined to sell Mr. Riley ThunderSnow at that time. (*Id*.) About a month later, Mr. Riley attempted to purchase ThunderSnow again from Lane; she again declined to sell Mr. Riley ThunderSnow. (*Id*.) Again, on December 9, 2011, Mr. Riley inquired about purchasing the steroid, Lane again declined to sell him the steroids. (R. 3.)

On December 10, 2011, Co-Defendant Lane's boyfriend and coach overheard a confrontation between Ms. Zelasko and Lane. (*Id*.) Mr. Billings believes he overheard Lane shout, "Stop bragging to everyone about all the money you're making!" (*Id*.) A few days after this confrontation, Mr. Billings expressed to Lane his suspicions that she was distributing performance-enhancing steroids to the female members of the Snowman Team. (*Id*.) Co-

Defendant Lane denied the accusation. (*Id.*) Subsequently, on January 16, 2012, Lane sent an email to her boyfriend stated that she really needed his help, and that she knew he

> "…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." (*Id.*)[1]

A few days later, on January 28, 2012 several members of the Snowman Team believe they overheard an argument between Ms. Zelasko and Mr. Riley. (*Id.*) On February 3, 2012, while Ms. Zelasko was at rifle shooting practice, Mr. Riley was killed by Ms. Zelasko's rifle on the Team's training grounds located in the Southern District of Boerum. (R. 8.) The rifle training range is adjacent to a portion of the dogsled course where members of the men's team were competing. (*Id.*) Ms. Zelasko was subsequently arrested. (*Id.*) Later that day, the DEA seized only $5,000 in cash and two 50-milligram doses of ThunderSnow during the execution of a search warrant. (*Id.*) On February 4, 2012, during the execution of a search warrant of Lane's home, the DEA seized double the amount of cash they seized from Ms. Zelasko's residence and twenty 50-milligram doses of Thundersnow, as well as Lane's laptop. (R. 4.) Lane was promptly arrested after this seizure. (*Id.*) On the same day, during the execution of a search warrant of the Snowman Team's training facilities, the DEA recovered 12,500 milligrams of ThunderSnow (worth about $50,000) from the Team's equipment storage room. (R. 3.) All female members of the Snowman team as well as the staff had access to the equipment storage room. (R. 8.)

Miranda Morris is a retired winter sport athlete and former member of the Canadian Snowman Team. (R.24.) Ms. Morris was a member from February 2009 until December 2011. (*Id.*) Casey Short was also a member of the Canadian Snowman and Ms. Morris's teammate until June 2011, when she transferred to the U.S. Snowman Team. (R.24.) On March 27, 2011,

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[1] Co-Defendant Lane will not be testifying at trial. (R. 18.)

Ms. Short approached Ms. Morris after practice and informed her that she sold White Lightning, an anabolic steroid that is undetectable by drug tests used in the national competitions. (R. 25.) Ms. Short informed Ms. Morris that most of her teammates use the steroid and had not been caught. (*Id*.) Although Ms. Morris didn't purchase the White Lightning at that moment, on April 4, 2011 Ms. Morris purchased twenty doses of White Lightning for $4,000 (Canadian dollars). (*Id*.) Ms. Short instructed Ms. Morris how to inject the steroids and provided her with dosage information and informed her of the possible side effects. (*Id*.)

Dr. Henry Wallace is a chemical biologist who wrote his doctoral thesis on methods of detection of performing enhancing drugs, which includes anabolic steroids. (R. 26.) Dr. Wallace is a former drug-testing consultant to the National Basketball League as well as the America Baseball League. (*Id*, 28.) Dr. Wallace examined samples of ThunderSnow collected from Ms. Zelasko's residence and Co-Defendant Lane's residence. (R. 28.) Dr. Wallace concluded that ThunderSnow is a chemical derivative of White Lightning. (R. 28, 32.)

PROCEDURAL HISTORY

Respondent, Anastasia Zelasko, was taken into federal custody on February 3, 2012, and Co-Defendant Jessica Lane was taken into federal custody the following day. (R. 31.) On April 10, 2012, the Defendants were indicted, charged with conspiracy to distribute and possess with intent to distribute anabolic steroids, distribution and possession with intent to distribute anabolic steroids, simple possession of anabolic steroids, conspiracy to murder in the first degree, and murder in the first degree. (*Id*.) On July 16, 2012, the District Court conducted a pre-trial hearing concerning the following evidentiary motions: Ms. Zelasko's motion to introduce the testimony of Miranda Morris to show the prior acts of a third party to sell performance-enhancing drugs, and the Government's motion to introduce an email sent by Co-Defendant

Lane. (*Id*-R. 32.) On July 18, 2012, the District Court ruled in favor of Defendant Zelasko to admit Morris's testimony and to exclude the email. (*Id*.)

Pursuant to 18 U.S.C. § 3731 and 3731(a), the United States filed an interlocutory appeal on both motions with the United States Court of Appeals for the Fourteenth Circuit on all issues presented to the District Court. (R. 32.) The Fourteenth Circuit affirmed the District Court's judgments on all issues. (R. 31.) Specifically on (1) whether the Federal Rule of Evidence ("FRE") 404(b) bars a defendant's use of evidence to show the criminal propensity of a third party; (2) whether regardless of FRE 404(b), a defendant's constitutional right to a full defense entitles her to present such evidence; (3) whether the email sent by Co-Defendant Lane to her boyfriend allegedly suggesting a conspiracy to distribute steroids is admissible as a statement against penal interest under *Williamson v. United States*; and (4) whether *Crawford v. Washington*, restricts the *Bruton* doctrine to the testimonial statements of non-testifying co-defendant. (*Id*-R.31.) The Government subsequently filed a petition for writ of certiorari, and on December 3, 2013 the United States Supreme Court granted certiorari for its October 2013 term. (R.55)

SUMMARY OF THE ARGUMENT

There is one theme that permeates through each and every issue presently before this Honorable Court: a defendant's constitutional right to present a complete defense inclusive of relevant and admissible evidence. The draftsmen of the Rule's of Evidence expressly stated "the basic approach of the [federal] rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles" and instead left this authority to the courts.

As to the matters presently before the Court: First, with regard to Federal Rule of Evidence 404(b), were this Court to preclude a criminal defendant from admitting exculpatory evidence, it would violate the defendant's right to present a complete defense. Furthermore, the

standard that this Court should adopt for admitting "reverse 404(b)" evidence, is to admit relevant evidence that has the tendency to negate the defendant's guilt, and its probative value outweighs Federal Rule of Evidence 403 concerns. This standard is consistently applied in Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits as this standard correctly addresses the issues present in "reverse 404(b)" evidence.

Second, this Court should affirm that the *Williamson* standard, which provides the inferior courts with a straightforward commonsensical approach to assessing statements offered under the 'against penal interest' exception, remains the surest way to assess an unavailable declarant's perception at the time they made a declaration and therefore best serves to safeguard the Rule.

Finally this Court should affirm the District Court's finding that "contrary to the Government's contentions, *Crawford v. Washington*, did not inject a "testimonial statement" requirement into the *Bruton* rule, because *Bruton* contemplates evidence being admissible against the declarant and then spilling over against the defendant, whereas *Crawford* contemplates evidence being admissible against the defendant and not the declarant at all.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 404(b) DOES NOT BAR A DEFENDANT FROM PRESENTING EVIDENCE OF PREVIOUS OFFENSES OF A THIRD PARTY ESPECIALLY WHEN THAT OFFENSE IS THE SAME OFFENSE WITH WHICH THE DEFENDANT, MS. ZELASKO, IS CHARGED WITH, AND THE EVIDENCE PROFFERED BY MS. ZELASKO IS RELEVANT IN PROVING HER INNOCENCE.

This Court should affirm the decision of the Fourteenth Circuit and find that Federal Rule of Evidence 404(b)'s prohibition of propensity evidence does not apply when a defendant is offering evidence of a third party's propensity in order to exculpate herself. The Fourteenth Circuit's decision finds support from the Second, Third, Fifth, Seventh, Tenth and Eleventh Circuits in holding that 404(b) does not prevent a defendant from presenting evidence that a third party has the propensity to commit the same or similar crime with which the defendant has been

charged with, provided that the evidence is relevant to proving her innocence and does not outweigh a Rule 403 concern. *See United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *United States. v. Stevens*, 935 F.2d 1380, (3d Cir. 1991); *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977); *United States. v. Seals*, 419 F.3d 600 (7th Cir. 2005); *United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005); *United States v. Cohen*, 888 F.2d 770 (11th Cir. 1989). The evidence that the defendant, Ms. Zelasko wishes to present into evidence, the testimony of Miranda Morris swearing under oath that Casey Short (a third party and non-defendant in this case) sold her White Lightning, a drug similar to ThunderSnow with which Ms. Zelasko has been charged with possession and distribution. (R.25.) The evidence regarding Ms. Short's sale of drugs similar to the drugs Ms. Zelasko is being charged with distributing is relevant to the issue of motive, opportunity, plan, and identity; mainly that Ms. Short is Ms. Lane's coconspirator and partner in selling anabolic steroids to the members of the US women's Snowman Team and not Ms. Zelasko. (R.11.)

Federal Rule of Evidence 404(b) provides "evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Fed. R. Evid. 404(b). "Reverse 404(b)", which is at issue before this Court is evidence of a third party's prior bad acts, proffered to exonerate or negate the defendant's guilt. *Stevens*, 935 F.2d at 1402. In *Huddleston v. United States*, this Court held that extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue. 485 U.S. 681, 685 (1988). This Court further held that the threshold inquiry a court must make before admitting similar acts evidence under 404(b) is whether that evidence is probative of a material issue other than character. *Id* at 686. If 404(b)

evidence is offered for a proper purpose, the evidence is subject only to general structures limiting admissibility such as Federal Rule of Evidence 403. *Id*. The determination of whether this type of evidence is admissible turns on whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions under 403. *Id* at 688. However, in *Huddleston*, this Court was dealing with traditional 404(b) evidence, evidence offered by the prosecution against a criminal defendant, and not the current "reverse 404(b)" issue presented before this Court today. *Id* at 686. Moreover, a standard 404(b) analysis is not appropriate in determining whether or not "reverse 404(b)" evidence should be admitted because there is no risk to the of prejudice to the defendant. *Seals*, 419 F.3d at 606.

A. The appropriate standard for determining whether to admit "reverse 404(b)" evidence is whether that evidence has a tendency to negate the defendant's guilt, the evidence is relevant under Federal Rule of Evidence 401, and its probative value outweighs any Federal Rule of Evidence 403 concern.

In determining whether to admit, "reverse 404(b)" this Court should adopt the ruling from the majority of Circuits and hold that the evidence of other crimes offered by the defendant, should be admitted into evidence if offered for a proper purpose and after balancing 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. *See Id*. This Court should further hold that a lower standard of similarity between the crimes proffered by the defendant, and the crime the defendant is charged with, should govern "reverse 404(b)" evidence because prejudice to the defendant is not a factor in this type of evidence. *Id* (*quoting Stevens*, 935 F.2d at 1404). In *Seals*, the court ultimately held that the "reverse 404(b)" evidence was inadmissible because it was irrelevant under Rule 402[2] (the evidence of a robbery proffered by defendants were not similar to the robbery that defendants were charged with) and therefore inadmissible. *Id* at 607.

[2] Federal Rule of Evidence 402 provides that irrelevant evidence is not admissible. Fed. R. Evid. 402.

However, the court explicitly addressed the "reverse 404(b)" issue and found that the District Court applied the *wrong* legal standard by applying *Huddleston*'s 404(b)'s standard. *Id*. Therefore, it follows that *Huddleston's* standard for 404(b) evidence is inappropriate for "reverse 404(b)" issues as the same concerns are not present in "reverse 404(b)" circumstances.

Rule 401 states that relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. Fed.R.Evid. 401. Here, the evidence proffered by Ms. Zelasko has a tendency to make the third party's involvement as a coconspirator in this case more probable than it would without the evidence, and therefore satisfies Rule 401's relevancy requirement. Ms. Zelasko's purpose for introducing the testimony of Ms. Morris is to show that Ms. Short, and not Ms. Zelasko had the intent, opportunity and plan to distribute anabolic steroids to members of the Snowman Team. (R. 12.)

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Fed. R. Evid. 403. However, the major concern of unfair prejudice to the defendant is not present in "reverse 404(b)" evidence because the defendant is presenting evidence of crimes of a third party and not herself. *Aboumoussallem*, 726 at 912; *Cohen, 888* F.2d at 777. The evidence that Ms. Zelasko proffered is relevant because it has the tendency to negate her guilt in that she presents evidence that Ms. Short is Co-Defendant Lane's coconspirator in the sale of anabolic steroids. (R. 11-12.) This evidence is not substantially outweighed by any Rule 403 concern because there is no risk of prejudice to Ms. Zelasko. Furthermore the evidence will not mislead or confuse the jury because it can be thoroughly explained and illustrates clearly to the jury that Ms. Short, a third party, may in fact

be the culprit of the crimes Ms. Zelasko is accused of. *See Stevens*, 935 F.2d at 1405 (the court found that "reverse 404(b)" evidence would not confuse the jury because it only requires a simple explanation of why the evidence was being presented).

The Second Circuit has consistently held that the standard of admissibility when a criminal defendant offers similar acts evidence as a means to disprove his/her guilt, does not need to be as restrictive as when a prosecutor uses such evidence to prove propensity of a defendant. *Aboumoussallem*, 726 F.2d at 911. The Second Circuit recognizes the common law tradition and purpose of prohibiting the prosecution from offering evidence of a defendant's prior wrongdoing for the purpose of prejudicing the defendant's case and persuading the jury that the defendant has a propensity for crime and is therefore likely to have committed the currently charged offense. *Id*. However, the Second Circuit also recognizes that the concerns of the risks of prejudice are not present when the defendant offers similar acts of evidence of a third party to prove some fact pertinent to the defense. *Id*; *United States v. Blum*, 62 F.3d 63, 68 (2d Cir. 1995). In cases where the defendant is proffering propensity evidence, the only issue is whether the evidence is relevant to the existence or non-existence of some fact important to the defense. *Aboumousallem*, 726 F.2d at 911. And if that evidence is relevant, it must survive 403's balancing test in that its probative value must substantially outweigh the danger of unfair prejudice, confusion of the issues, misleading the jury, or causing undue delay. *Id*; Fed. R. Evid. 403.

Here, the defendant, Ms. Zelasko proffers evidence of similar crimes committed by Ms. Short in order to prove the means, motive, and opportunity that Ms. Short had to commit the same offenses she was charged with. (R. 11-12.) In *United States v. Montelongo*, the defendants were also charged with distribution of and intent to distribute illegal drugs pursuant to 21 U.S.C.

§ 841(a)(1), just as Ms. Zelasko is. 420 F.3d at 1171. The court allowed evidence of similar crimes of third parties under a "reverse 404(b)" relaxed standard. *Id* at 1173. The evidence of a similar crime committed within close temporal proximity of the crimes the defendants were charged with because the evidence was relevant to their defense. *Id* at 1174. The court also noted that the standard of similarity between the two crimes is lower than that of a traditional 404(b) analysis. *Id*. The evidence that Ms. Zelasko proffers is relevant to her defense in that it has a tendency to negate the material fact that she is Lane's coconspirator, but rather Ms. Short is the coconspirator. The court in *Montelongo* also found that the "reverse 404(b)" evidence was not substantially outweighed by the risk of confusing the jury or waste of time, but rather it would highlight the central issue of the trial of who was responsible for the crime. *Id* at 1175. Similarly, the "reverse 404(b)" evidence here will not confuse the jury or waste time, but rather provide the jury with relevant evidence of who is responsible for the sale of anabolic steroids to members of the US Snowman Team.

The Third Circuit in *United States v. Stevens*, to which many other Circuits rely upon because it correctly applies the "reverse 404(b)" standard, held that when a defendant proffers evidence under Rule 404(b), there is no possibility of prejudice to the defendant; therefore all that a defendant needs to show is that the "reverse 404(b)" evidence has a tendency to negate his guilt, that the evidence is relevant under 401, and that it passes Rule 403's balancing test. 935 F.2d at 1405. In *Stevens*, the court stated that due to the many similarities and parallels of the two crimes, it was very likely that one person committed both crimes. *Id*. In *Stevens*, the defendant was charged with aggravated sexual assault and robbery in the first degree. This defendant presented evidence of similar crimes of which he was charged through the testimony of the victim of those crimes. *Id* at 1404. The court upheld the admissibility of Steven's "reverse

404(b)" evidence, because the crimes were so similar in the manner in which they were committed, the weapons used, the type of crime committed (assault and armed robbery), the time and location of the crimes, and the similarities in the physical appearances of the alleged perpetrators. The *Stevens* court found support in Wigmore's treatise,

> "it should be noted that ["other crimes"] evidence may be also available to negative the accused guilt. E.g. if A is charged with forgery and denies it, and if B can be shown to have done a series of similar forgeries connected by a plan, the plan of B is evidence that B and not A committed the forgery charged. This mode of reasoning may become the most important when A alleges that he is a victim of mistaken identity"

Wigmore, *Wigmore on Evidence* § 304, at 252 (J. Chadbourn rev. ed. 1979); *Stevens*, 935 F.2d at 1402.

The *Stevens* court concluded that a criminal defendant should be able to advance, any evidence, that first rationally tends to disprove his guilt, and second, passes the Rule 403 balancing test . *Id* at 1406. Here, Ms. Zelasko's evidence of Ms. Short's sale of White Lightning satisfies the standard of similarity in that drugs in her case is a chemical derivative of the anabolic steroids Ms. Short has sold in the past; and furthermore, Ms. Short's sale of anabolic steroids is within close temporal proximity of the alleged sale of ThunderSnow. (R. 25.) Similarly, the Seventh Circuit has held that a criminal defendant can seek to admit evidence of other crimes under 404(b) so long as it tends to negate the defendant's guilt of the crimes charged against him. *Seals*, 419 F.3d at 606. Ms. Zelasko's evidence will help to negate the guilt of the charges against her by proving that Ms. Short is the coconspirator in the steroid scheme.

B. <u>The evidence Ms. Zelasko offers into evidence even satisfies the Sixth Circuit's application of the traditional 404(b) standard of evidence of prior bad acts, therefore the evidence undoubtedly should be admitted.</u>

Contrary to the majority of its Sister Circuits, the Sixth Circuit has explicitly held that propensity evidence of *any* person should demonstrate something more than a person's

propensity to commit a crime. *United States v. Lucas*, 347 F.3d 599, 605 (6th Cir. 2004).[3] The Sixth Circuit applies the standard analysis of 404(b) evidence with respect to absent third parties. *Id*. However, even under the Sixth Circuit's standard for 404(b) evidence, Ms. Zelasko's proffer of evidence of Ms. Short's prior sale of White Lightning to Snowman Teams, would be admissible because Ms. Zelasko is offering the evidence of Ms. Short's sale of anabolic steroid to show that Ms. Short is actually Lane's coconspirator, that Ms. Short has the means, motive and opportunity to sell anabolic steroids, and that Ms. Short had the plan to sell anabolic steroids. (R. 11-12.) Ms. Zelasko's evidence is proffered to prove *something more*, as required by the Sixth Circuit, and would be admitted even under their standards. In *Lucas*, the court stated that the defendant's information of a third party's prior convictions should have been admitted on the basis that it could have been used to prove knowledge and intent, which are exceptions under 404(b). *Lucas*, 347 F.3d at 606. This is exactly why Ms. Zelasko is offering evidence of Ms. Short's prior sale of anabolic steroids. Not simply to show that Ms. Short has a propensity to sell anabolic steroids, but that Ms. Short sold the same anabolic steroids that Ms. Zelasko is charged with distributing and possessing. However, due to the fact that the traditional 404(b) concerns are not present in "reverse 404(b)" evidence, this Court should find that the standard applied by the Fourteenth Circuit is correct and appropriate for "reverse 404(b)" situations.

C. <u>The policy of underlying the common law rule of evidence that character evidence is inadmissible to prove that a criminal defendant acting in accordance with that character, is only meant to protect a criminal defendant and not a third party</u>.

The common law rule from which Rule 404(b) finds its basis, was that the doing of a criminal act, not part of the issue, is not admissible evidence of the doing of the criminal act the defendant is currently charged. *See Wigmore*, Code of Evidence, 3d ed., p 81. The policy behind common law prohibition of this type of evidence was meant only for the protection of a criminal

[3] The Sixth Circuit is the only Circuit that the Government relies upon for its challenge to Ms. Zelasko's "reverse 404(b)" evidence. (R. 24.)

defendant; not a third party. *See* Wright & Graham, Federal Practice and Procedure: Evidence § 5239, pp 436-439. Allowing evidence of a third party, specifically the evidence that Ms. Short is Lane's co-conspirator and not Ms. Zelasko, is aligned with the policy of preventing prejudice against a criminal defendant based on the character or prior bad acts of that defendant. Here, Ms. Zelasko is not offering evidence of her prior bad acts or her propensity to commit an act; rather she is offering evidence to negate her guilt and offer into evidence that someone else had the means, motive and opportunity to commit the offenses with she is charged. This evidence does not violate rule 404(b) or the policy considerations behind the rule.

1. IF 404(B) IS FOUND TO PROHIBIT MS. ZELASKO FROM PRESENTING EVIDENCE OF A THIRD PARTY'S PROPENSITY TO DISTRIBUTE WHITE LIGHTNING, A SIMILAR DRUG TO THUNDERSNOW, MS. ZELASKO'S CONSTITUTIONAL RIGHT TO A COMPLETE DEFENSE WILL BE VIOLATED.

The Due Process Clause of the Fourteenth Amendment, the Compulsory Process and the Confrontation Clause of the Constitution protect a defendant's right to have a meaningful opportunity to present a defense. *Crane v Kentucky*, 476 U.S. 683, 690 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). However, a defendant's right to present evidence is not limitless; it does not permit a defendant to present any and all evidence he believes might work in his favor. *Montana v Egelhoff*, 518 U.S. 37, 63 (2013). Defendants, at a minimum, are limited to presenting relevant evidence, which is evidence having, any tendancy to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. *United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004). The "reverse 404(b)" evidence proffered by Ms. Zelasko, satisfies this standard and if this evidence is excluded it will violate her constitutional right to present a complete defense as the evidence of Ms. Short's sale of anabolic steroids to Snowman Teams is the only evidence that can prove her innocence. (R. 14.)

In *Chambers v Mississippi*, this Court held that evidentiary rules may not be applied mechanistically to defeat the ends of justice. 410 U.S. at 302. In *Chambers,* while there were some evidentiary issues with the evidence the defendant proffered, this Court nonetheless found that the exclusion of critical evidence that tended to exculpate the defendant denied the defendant the traditional and fundamental standards of due process. *Id* at 301. Similarly here, if the Government is allowed to use evidentiary rules to defeat the opportunity for Ms. Zelasko to defend herself against the charges against her she will be denied the fundamental standards of due process.

In *Holmes v. South Carolina*, this Court held that certain rules excluding a defendant's evidence of a third party's guilt were arbitrary (because the State could not offer legitimate goals served by the rule) and that the rule violated the defendant's right to have a meaningful opportunity to present a complete defense. 547 U.S. 319, 320 (2006). Similarly here, the Government-petitioner has not offered any legitimate interest or policy interests furthered by the denial of the defendant's evidence that a third party is the guilty party. As stated previously, there is no risk of prejudice to the defendant, nor would it mislead or confuse the jury. The Fourteenth Circuit correctly stated that there is nothing on the record to suggest that the policy goals of judicial expediency and reducing prejudice will be violated by the defendant presenting evidence of a third party's guilt. (R. 37-8.)

If this Court finds that rule 404(b) prevents a defendant from presenting evidence that will help negate her guilt, evidence that is offered for a proper, is relevant, and its probative value substantially outweighs any prejudicial or misleading effect, Ms. Zelasko's constitutional rights will be violated because she will be unable to present a complete defense. The testimony of Ms. Morris describing her purchase of anabolic steroids from Ms. Short is central to Ms.

Zelasko's defense against the drug charges as well as the murder charge. (R. 13.) If Ms. Zelasko is denied the ability to present this evidence she will have an incomplete defense. Furthermore, the testimony of Ms. Morris is Ms. Zelasko's *only* defense to the drug charges, and if she is barred from presenting evidence of Ms. Short's prior sale of anabolic steroids she will be denied the right to present a complete defense. In the interest of, at a minimum, allowing Ms. Zelasko the opportunity to present a complete defense, this Court should provide her with the ability to present "reverse 404(b)" evidence of Ms. Short's prior sale of White Lightning as it will help to negate her guilt.

II. THE WILLIAMSON STANDARD REMAINS THE MOST EFFECTIVE WAY FOR COURTS TO DETERMINE WHETHER THE PERSPECTIVE OF AN UNAVAILABLE DECLARANT WAS SUCH THAT STATEMENTS WHICH APPEAR SELF-INCULPATORY IN A BROAD NARRATIVE TRULY MEET THE AGAINST PENAL INTEREST EXCEPTION TO HEARSAY.

Though the Government indicted Lane and Ms. Zelasko for their alleged roles as coconspirators, it neglected to offer Lane's email – which it alleges is generally inculpatory as to Lane and Ms. Zelasko – under the coconspirator exception to hearsay. (R. 38.) Now, bereft of sufficient evidence to meet its charges, the Government desperately urges this Court to abandon the standard it adopted in *Williamson v. United States*, in the hopes that a court can somehow mold Lane's statements to fit into the narrow 'against penal interest' exception to hearsay. 512 U.S. 594 (1994); (R. 38.) What the Government cannot overcome is the fact that Lane's email, within which she references an anonymous "partner" and makes no statements which subject either party to criminal liability, simply doesn't equate in any way, shape, or form, to even one statement against her penal interest such that it may be admitted against Ms. Zelasko.

Federal Rule of Evidence 804(b)(3) provides an exception for hearsay statements which tend to subject a declarant to criminal liability. Fed. R. Evid. 804(b)(3). Known as the 'against

penal interest' exception, it is premised on the theory that reasonable people don't make such statements unless they are true. *Id*. There are other exceptions for statements made by coconspirators, but many times, as here, 804(b)(3) is used as a vehicle to offer an accomplice's statement as evidence incriminating a codefendant. *See e.g.* Fed. R. Evid. 801(d)(2)(E). These types of statements pose special difficulties for a court, which must attempt to discern the true intention of the speaker from circumstances that reflect a significant possibility that the declarant's perception is not that of the reasonable person contemplated by 804(b)(3)'s drafters. *Bruton v. United States,* 391 U.S. 123, 136, (1968). In these situations, a declarant may perceive the opportunity to downplay their own liability, attempt to curry favor, or otherwise falsify their statements out of sheer survival instinct. *Lee v. Illinois,* 476 U.S. 530, 541 (1986); *see also Bruton v. United States,* 391 U.S. 123, 136, (1968); *Dutton v. Evans,* 400 U.S. 74, 98, (1970) (Harlan, J., concurring in result).

The *Williamson* standard provides courts with a workable standard to assess statements proffered as 'against penal interest' exceptions. Its simplicity is demonstrated by the ease with which the District Court applied it, and its accuracy is demonstrated by that court's subsequent finding that Co-Defendant Lane's email does not meet the exception. (R. 38.) Moreover, a Majority of the Fourteenth Circuit Justices, who reviewed the Government's initial appeal, affirmed the application of *Williamson* and precluded Lane's narrative. (R. 43.)

The Majority opined, in an apparent retort to Justice Marino, the sole dissenter, that "as an intermediate appellate court, it is not our role to revisit recent and binding precedent of the Supreme Court of the United States based on *stare decisis*."(R. 43.) Notably, in her dissent, Justice Marino scolded the Majority arguing that the standard the District Court seamlessly applied was unworkable. (R. 22, 53.) Justice Marino questions *Williamson's* utility, and yet, her

substitute was previously rejected by a plurality of this Court. *Williamson*, 512 U.S. at 600; (R. 53.) Her argument, in essence, that lower court application of *Williamson* has generated inconsistent holdings, overlooks the fact that *Crawford v. Washington* eliminated statements made during testimonial confessions from 804(b)(3) analysis. 541 U.S. 36 (2004). Now that judges will only have to apply *Williamson* to situations to non-testimonial statements, by which they can more readily discern the perception of a declarant, holdings will become more consistent than ever before. Moreover, the Federal Rules require that judges engage in judicial fact finding to some degree so it is inevitable that there will be some level of inconsistency across the country. *See, e.g.* Fed. R. Evid. 403 (requiring a judicial determination that statements are relevant and that their relevance is not substantially outweighed by potential prejudice to the adverse party).

Justice Marino opined that the 'totality of the circumstances' approach adopted in *Williamson* is manipulable, and that, because it does not afford the trial judge the opportunity to view individual statements within context of its greater narrative, judges applying Williamson do not reveal the perception of the declarant. (R. 51.) Yet, were this Court to adopt her proposed standard, the courts would essentially be adopting a duplicate of Federal Rule of Evidence 403 which requires significant judicial interpretation Fed. R. Evid. 403. Under her proposal, courts should first look to whether the declarant made a statement that contains a *fact* against penal interest. (R. 53.) If so, the court should admit all related statements unless the related statement is "so self serving as to render it unreliable" or made "under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment. *Id*. at 620 (Kennedy, J., concurring in judgment); *See also United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997) (R. 53.) Notably, the plurality of this Court rejected that approach in *Williamson*, noting that "the

fact that a statement is collateral to a self-inculpatory statement says nothing about the collateral statements reliability." *Williamson*, 594 U.S. at 601. Thus, the Court concluded that "We therefore cannot agree with Justice Kennedy's suggestion that the Rule can be read as expressing a policy that collateral statements—even ones that are not in any way against the declarant's interest—are admissible." *Id*. at 600.

Although the level of judicial interpreting Justice Marino's proposal requires a court to undertake might result in the lower courts generating more consistent holdings, those holdings would not be consistent with 804(b)(3) which contemplates assessing the perception of the declarant at the time they make their declaration. Fed. R. Evid. 804(b)(3); (R. 48.) In stark contrast, *Williamson* requires a reviewing court, first separate each statement from declarant's choreographed narrative, and then review its context – the circumstances present at the time the declaration was made – in order to reveal the perception of the declarant as he made his statements. *Williamson*, 599-601. Thus, it should be affirmed by this Court as the proper standard by which to assess statements offered under 804(b)(3).

A. *Williamson* is the best way to filter truly self-inculpatory statements from others.

In *Williamson v. United States*, the Justices wanted to adopt the proper standard for approaching narratives offered as statements 'against penal interest', which, under various situations might be tainted by the perception of the declarant. 541 U.S. 36. The Court noted that the bedrock principle on which Rule 804(b)(3) rests is the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. *Williamson*, 512 U.S. at 596. There, the central issue the Court faced was how to approach a narrative which appeared generally inculpatory but which might not actually meet the exception either in part or in whole. *Williamson*, 512 U.S. 594, 596-98.

In *Williamson*, a co-defendant confessed to a police officer that he was involved in criminal activity and subsequently gave details about Williamson's separate criminal activity. *Id*. The confession, consisting of a narrative, implicated the declarant in a joint criminal endeavor with the co-defendant, as well as criminal acts in which he claimed to have acted alone. *Id*. Thus, the court determined that the declarant made discrete non self-inculpatory statements within a "broader narrative" that was only "generally self-inculpatory." *Id*., *accord United States v. Wexler*, 522 F.3d 194, 203 (2d Cir. 2008). There, the declarant implicated the codefendant after he confessed to the crime, and thus, the Court concluded that the naming of the defendant in the latter part of the narrative did little to further implicate the declarant and "may have been made in an effort to secure a lesser punishment through cooperation." *See* 512 U.S. at 604 (opinion of O'Connor, J., in which Scalia, J. joined); *id.* at 607–08, (opinion of Ginsburg, J., in which Blackmun, Stevens, and Souter, J.J., joined) *accord United States v. Rogers*, 549 F.2d 490, at 498 n.8 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977).

The Court, adopting the approach truest to the Rule's underlying principle, first set out to assess how to interpret 'statement' in order to identify how best to approach a narrative under the Rule. *Williamson*, 512 U.S. 594, at 598. After a thorough analysis of 804(b)(3)'s drafting history, Advisory Committee Notes, and the Federal Rules of Evidence's plain language, Justice O'Connor, opined: "the fact that a person is making broadly self-inculpatory [statements] does not make more reliable the [declaration's] non-inculpatory parts." Id. at 599-600. She continued: "[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. Therefore Justice O'Connor concluded that the rationale underlying the rule was not served by admitting broadly self-inculpatory statements which generally subject the declarant to liability. *Id*. at 601, 606, 607

(Scalia, A., concurring in judgment; Ginsburg, R., joined by Blackmun, Stevens, and Souter concurring in part and in judgment).

Justice O'Connor next addressed what analysis a court should apply to each assertion, and, joined by the same panoply of Justices, determined that because the rationale of the rule rests on the premise the declarant was acting as the proverbial "reasonable person", the true perception of the declarant can only be discerned by placing the assertion in context of the surrounding circumstances. *Id*. at 603. Thus, the Court concluded that, in order to accurately assess the perception of a declarant and simultaneously the spirit of a statement, a Court must separate each assertion from the potentially choreographed narrative and then assess it in light of the circumstances surrounding its making. *United States ex rel Caffey v. Harrington*, 728 A.2d 466 (N.D. Ill. 2013)

B. The hearsay landscape has changed such that the *Williamson* standard will produce even more consistent results than it has in the past.

Justice Kennedy perceived *Williamson* as rendering the Rule moot with regard to custodialized accomplice confessions and suggested a standard which, contrary to Justice Marino's contentions, would require significantly more judicial activism and thus result in vagaries amongst the jurisdictions implementing it. *Williams*, at 16; (R. 53). That is so because Justice Kennedy's standard requires an upfront judicial determination of an entire narrative in order to discern if it bears out a fact against penal interest. *Id*. at 620. Notably, and at first glance, this approach requires at least the same level of judicial opinion as the *Williamson* standard does. Upon closer inspection, by taking each clause independent of the narrative which the declarant chose to form, and then assessing it, *Williamson* produces results which are more likely to reflect the declarant's true perception as opposed to the latter which more readily reflects the reviewing justice's sentiment. Furthermore, Justice Kennedy's rejected approach

reflects an 804(b)(3) analysis which was in existence at the time this Court elected to adopt *Williamson*, a clear indication of its inferiority. See, e.g. *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978).

Significantly, the concerns that Justice Kennedy evinced were mooted by this Court's holding in *Crawford v. Washington*, which narrowed the applicability of the Rule such that custodialized statements are testimonial and thus, procedurally barred by the Sixth Amendment. 541 U.S. 36. Thus, *Williamson* and 804(b)(3) no longer require a court to assess the perception of custodialized defendants, a scenario which most sitting judges pray they will never face and therefore are ill-equipped to respond to with any discernible uniformity. In direct contrast, Judges are themselves products of society with layperson experiences such that they are more apt to respond to non-testimonial narratives made by persons under circumstances to which a Judge may identify more readily with.

Therefore, post-*Crawford*, application of *Williamson* will produce consistent holdings by the lower courts. Notably, because Williamson is a rigid step-by-step approach, now conducted under circumstances more akin to everyday life, if a lower court did depart from the standard, admitting a statement erroneously, a defendant may still respond with a FRE 403 objection, and, were that unsuccessful, would likely prevail on appellate review. Moreover, it should be noted, that each justice around the country implementing the Federal Rules must exercise her judgment in making evidentiary determinations. Since *Crawford* eliminated the toughest scenarios and the Court's have already been using *Williamson* for two decades, the consistency of results under the standard will continue increasing.

C. <u>Precedent interpreting *Williamson* reflects that it is the appropriate analysis</u>.

Justice Marino opined that precedent interpreting *Williamson* does not provide clear guidance on how to interpret the standard in an ill-fated effort to garner support for her contention that it is an unworkable one. As adopted by a plurality of this Court, *Williamson*, when applied correctly, produces the results Justice Marino contemplates as the appropriate outcome in the cases she references. For example, *United States v. Hadja* wherein a court admitted a statement clearly not 'against penal interest' came in the form of trial testimony and would thus now be procedurally barred. 135 F.3d 439, 444 (7th Cir. 1998). There, the court simply neglected to apply *Williamson* and instead applied an old standard which directed a court to corroborate a statements reliability with other evidence, a clear departure from *Williamson*. *United States v. Hajda, 135 F.3d 439*, 444 (7th Cir. 1998) *compare Williamson,* 512 U.S. 594, at 604. There, had *Williamson* been properly applied and the corroborating evidence disregarded for purposes of identifying the statements reliability, the statement would clearly have failed to meet the exception because it simply did not subject the declarant to penal liability. Fed. R. Evid. 804(b)(3).

The other case to which Justice Marino cites actually demonstrates the utility of *Williams* with relation to non-testimonial hearsay statements offered under 804(b)(3) to either inculpate or exculpate an accused. See *United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995). Justice Marino characterized that case as follows: "a declarant's statement that he was in the same room where police found illegal firearms was not an admissible declaration against penal interest because of the speculative nature of any criminal prosecution based on the statement." (R. 52.) After a closer inspection, one can only question why she came to this conclusion because that holding is absolutely symmetrical with the outcome *Williamson* would produce.

There, the Seventh Circuit offered the following factors as relevant to determine the statement's status, the relationship between the confessing party and its recipient, whether the

confessor made a voluntary statement after being advised of his Miranda rights, and, whether the statement was made in order to curry favor with the authorities. *United States v. Butler*, 71 F.3d 243, 253. Contrary to Justice Marino's depiction, no charges were filed against the declarant indicating that the prosecution itself did not believe he had subjected himself to criminal liability. *Id*. at 253. Thus, the Court opined, "nowhere in [the declarant's] statement did he so far tend to subject himself to criminal liability such that we can be confident in the veracity of his comments, and therefore we cannot justify the admission of his statement under the exception." *Butler*, 71 F.3d 243, 252-53. Therefore, the Court dismissed the defendant's tenuous suggestion that, because there was a chance the statements could subject the declarant to liability, it met 804(b)(3). *Id*. Notably, in its assessment of the declarations, the Court addressed the circumstances surrounding their making and noted that the declarant and the defendant were members of the same gang, the leader of which the defendant was a nephew of. *Id*. at 53. The Court concluded that the statement may have been made to curry favor from the gang leader, demonstrating the utility of the "curry favor" analysis outside of the context of law enforcement; providing a clear precedent for other courts to utilize in the future. *Id*.

D. Co-Defendant Lane's email does not contain any statements which subject her to criminal liability and therefore do not meet the exception.

Here, application of the present facts to both the *Williamson* standard and Justice Kennedy's broader proposed standard, demonstrates the utility of the former and the futility of the latter. Under Justice Kennedy's analysis, because Co-Defendant Lane has been charged with the broad crime of conspiracy, and because her email generally indicates she conspired with someone about a business venture, clearly the narrative bears a fact against penal interest with regard to the charge. *Williamson*, at 621 (Kennedy, J., concurring in judgment). Thus, here, based on the breadth of the charge and the generality of the narrative, anyone of meager

competence could manipulate Lane's statements to bear a fact in consequence out. Thus, these circumstances demonstrate that, under Justice Kennedy's approach, statements which do not meet the Rule's rationale will be deemed admissible. The Rule was certainly not intended to bend to the whims of the State's choice of charges.

Significantly, when *Williamson* is properly applied to the facts of this case, the only appropriate finding is what both the District Court and the Majority of Circuit Court Justices found: that Lane's email simply does not subject her to criminal liability and cannot therefore meet the 'against penal interest' exception. (R. 38.) Not one of the statements, when viewed in context of the circumstances present at the time Lane drafted them, could seriously be considered to subject Lane to criminal liability. (R. 29.) When she wrote the email, no circumstances has presented such that she would believe she was under a DEA investigation. Nothing in the email refers to any illicit activities or controlled substances. Although one interpretation of the narrative in its entirety, when viewed against the backdrop of her criminal charges, could support that she perceived a threat to her penal interest, upon further inspection, it could just as likely demonstrate Lane was contemplating professional sanctions, or simply wasn't worried about sanctions at all. Without the fair opportunity to cross-examine Lane, Ms. Zelasko is bereft of the means of establishing what Lane perceived at the time she wrote the email, let alone to clarify its meaning. Moreover, by characterizing herself at the outset as a victim, and subsequently characterizing her unnamed partner as unstable, "to the extent that that some of these statements incriminate Lane, "they project an image of a person not acting against her penal interest, but striving mightily to shift principle responsibility to someone else." *Williams*, at 609; *accord*, *United States v. Sarmiento-Perez,* 633 F.2d 1092, 1101 (5th Cir. 1981). Thus, under *Williamson*,

were a court to determine the statements in Lane's email meet the 'against penal exception', if a reviewing court properly applied Williamson, the only legitimate outcome would be a reversal.

It is respectfully submitted that this Court should affirm the *Williamson* standard as it remains the appropriate tool by which courts should assess statements offered under Rule 804(b)(3). It provides a workable standard which, post-*Crawford* is now likely to generate even more consistent holdings across the jurisdictions. *Supra.* Significantly, this Court adopted *Williamson* after a thorough review of 804(b)(3) and its relevant history. Congress has been privy to twenty years of the standards application and has evinced no qualms about it. Notably, the rationale Justice O'Connor and her fellow Justices evinced in *Williamson*, remains wholly applicable to the Rule today: "[i]n our view, the most faithful reading of Rule 804(b)(3) is that is does not allow admission of non-self-inculpatory statements, even if they were made in a broader narrative that is generally self-inculpatory." *Williamson*, at 600-601 Thus, Co-Defendant Lane's email is clearly inadmissible hearsay; in no way do any statements within the email subject her to criminal liability and, when each statement is viewed in context, the depiction suggests a clear motive to blame shift to her unidentified partner, and/or curry favor with her head coach and lover. (R. 29.)

III. SINCE CRAWFORD NEVER CONSIDERED, ADDRESSED OR EVEN MENTIONED THE SPILLOVER EFFECT AND THE COURT NEVER PROVIDED THE LOWER COURTS WITH ALTERNATE RULES TO COVER NON-TESTIMONIAL STATEMENTS, BRUTON STILL CONTROLS WHERE THE SPILL-OVER EFFECT IS IMPLICATED.

This Court should affirm the District Court's finding that, contrary to the government's assertion, *Crawford* has not overturned *Bruton* since *Bruton* contemplates hearsay statements only admissible against the declarant yet still having the effect of spilling over to the defendant in the minds of the jury; *Crawford* contemplates hearsay statements admissible against the defendant but inadmissible as to the declarant.

A. Crawford only addresses testimonial statements leaving lower courts to existing precedent to decide cases regarding non-testimonial hearsay.

"The problem with this argument [that Crawford has overruled Bruton], begins with the fact that the Crawford Court *explicitly* declined to limit the Confrontation Clause only to testimonial statements." *United States v. Williams*, No.1:09cr414, *2 (E.D. Va. 2010). "This did not change in [Davis]…two years after Crawford." *Id*. "[N]owhere did the court speak of an absolute confrontation clause bar against all non-testimonial statements." *Id*. at *3.

In *Crawford*, Justice Scalia explicitly stated that "where non-testimonial hearsay is at issue, it is wholly consistent with the framers design to afford states flexibility…as does *Roberts*…" *Crawford*, 541 U.S. at 67. *Roberts* was the case controlling all Confrontation Clause cases prior to *Crawford*. *Ohio v. Roberts*, 448 U.S. 56 (1980). Accordingly, in *Crawford*, the majority only abrogated *Roberts* as to testimonial statements, but not as to non-testimonial statements. *Saget*, 377 F.3d at 226-28.

Similarly, *Bruton* originally applied to all out of court *statements*, not just to out of court *confessions* and therefore now only applies to non-testimonial statements since any testimonial statements that present a *Bruton* issue would be barred by Crawford. *See Id*. at *3. *Bruton* particularly extends to *out of court statements* by non-testifying co-defendants when the statement is only admissible as to the declarant. *Williams*, No.1:09cr414, at *3 (*citing United States v. Truslow*, 530 F.2d 257, 263 (4th Cir. 1975)).

"Thus the analysis of whether the admission of [an accomplice's] statements violated the Confrontation Clause begins with the question of whether the statements are testimonial, triggering Crawford's per se rule against admission. (internal citations omitted)." *United States v. Saget*, 377 F.3d 223, 227 (2d. Cir. 2004) (cert. denied 2005).

If the statement is not testimonial, that is not the end of the analysis, Id., because barring certain types of codefendant testimony prevents a particularly distinct evil, the spillover effect. This occurs when a non-testifying co-defendant's statement that is powerfully incriminating as to the other defendant is admitted as to the declarant (non-testifying co-defendant). The problem this presents is that the judge has already ruled that the evidence is inadmissible as to the other defendant yet once it is admitted as to the declarant, it spills over to the defendant in the minds of the jury. It is this spillover effect, in addition to the particular facts, that distinguishes *Bruton* from *Crawford* and which helps explain the reason that *Crawford* was never intended to undo *Bruton*.

B. The facts and issues of *Crawford* and *Bruton* are readily distinguishable.

Looking to *Crawford* itself, there is a more immediately apparent difference between *Crawford* cases and *Bruton* cases: the person to whom the out of court statement was admissible. The declarant, Mrs. Crawford, was not a defendant at the trial. *Crawford*, 541 U.S. at 40. She made statements to police about her husband that tended to inculpate him in attempted murder. *Crawford*, 541 U.S. at 39. Ultimately, the Court determined that the government could not use Mrs. Crawford's statements against her husband, even though they arguable fit in a hearsay exception because the Confrontation Clause procedurally bars the use of testimonial statements of witnesses that the defendant will not have the opportunity to cross examine. *Id*. at 68. Notice *Mrs. Crawford was not a defendant* at the trial. She was merely a declarant for the purposes of the hearsay statement that she made to police. Even looking to *Davis* which further defined the term testimonial, both cases determined by that opinion concerned statements by victims to police at varying points in time after a domestic violence incident had occurred. *Davis*, 547 U.S. at 817- 21. The two victims *were not defendants* at trial but had made statements that the Government attempted to have admitted under hearsay exceptions against the defendant. *Id*.

But in *Bruton*, the issue was completely different: Evans, *the co-defendant*, made two confessions to the postal inspector which were deemed to be inadmissible as it pertained to the defendant and *only admissible against the co-defendant* Evans. *Bruton*, 391 U.S. at 136. The statements were accompanied by a limiting instruction to the jury to only use the statement against Evans. *Id*. The Court held that due to the inculpatory nature of Evan's statement towards Bruton, limiting instructions were insufficient to prevent the effects of the statements, *admissible only against the Evans*, from spilling over, in the minds of the jury, to the defendant Bruton to whom they were wholly inadmissible. *Bruton*, 391 U.S. at 136.

The *Crawford* Court, although stating its holding in broad terms, never contemplated such a co-defendant's statement, inadmissible as to the defendant, but spilling over to the defendant in the minds of the jury and therefore having the same effect as if it were admissible as against the defendant. Essentially, this maneuver circumvents the rules of evidence altogether; allowing hearsay to be used against someone whom the court has ruled it is inadmissible against.

Even if Crawford had sought to confine the scope of the Confrontation Clause to testimonial statements only, it said nothing whatsoever about what rules should be applied to non-testimonial statements. *Saget*, 377 F.3d at 227. Since neither *Crawford*, nor its progeny, ever concerned or even mentioned the spillover effect, the lower courts must deal with spill-over effect cases as they have for the last half-century: by using the *Bruton* line of cases to ensure that powerfully incriminating statements, admissible against a codefendant, are not allowed to a spill-over to the defendant without such defendant having the right to cross examine the declarant. *See United States v. Williams*, No. 1:09cr414 (E.D. V.A 2010) (applying *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("This court is bound like all other lower courts to apply Supreme Court precedent until the Supreme Court *explicitly* overrules that precedent").

This view is not one created by Defendant Zelasko. In fact, many circuits share this view. *Onenese*, a 5th Circuit case from 2013, applied a *Bruton* analysis when faced with a potential spillover effect, correctly ignoring Crawford altogether since the statement at issue was not testimonial. *United States v. Onenese*, 2013 U.S. App. LEXIS 21669 (5th Cir. 2013). *Schwartz*, an 11th Circuit case from 2008, found that *Crawford* notwithstanding, "a defendant's confrontation rights are violated when the court admits a co-defendant statement that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt." *United States v. Schwartz*, 541 F.3d 1131, 1351 (11th Cir. 2008). *Williams*, a District Court of Virginia case from 2010, held that "because *Bruton* can apply to non-confessional statements (internal citation omitted), and because Crawford did not limit the Confrontation Clause to testimonial statements," *Bruton* still applies. *Williams*, No. 1:09cr414 at *3.

While some courts have considered the *Davis* dicta, asserting that confrontation clause jurisprudence only extends to testimonial statements, to be controlling, *Davis*, 547 U.S. at. 824, those courts ignore the spillover effect altogether as if the effect is any less damaging or irreparable than it was pre-Davis.

In order to protect the defendant from the devastating spillover effect and to force prosecutors to go through the rigors of hearsay law, *Crawford* left *Bruton* wholly untouched as it pertains to non-testimonial statements that are inadmissible hearsay as to the defendant but admissible non-hearsay as to the non-testifying co-defendant/declarant. Such hearsay must remain wholly inadmissible, even as to the declarant, to protect the defendant's right to confront where the declarant refuses to testify.

Concededly, this would be a non-issue if the declarant was required to testify. An issue arises because the judge has declared that in order for the statement to be used against the

defendant, the declarant *would* have to testify in court. That judgment notwithstanding, the prosecution still seeks to have this admitted anyway, in a way that they know will be equivalent to it being admitted against the defendant.

The damage that the spillover effect would wreak to the defendant "creates a special and vital need for cross-examination – a need that would be more immediately obvious had the co-defendant pointed directly to the defendant in the courtroom itself." *Gray v. Maryland*, 523 U.S. 185, 194 (1998). Therefore, the only way to protect the still presumed innocent defendant from the spillover effect and prevent prosecutors from effectively disregarding judicial rulings as to hearsay is to continue applying *Bruton* to spillover effect cases until this Court says otherwise.

1. LANE'S EMAIL, IN LIGHT OF THE GOVERNMENT'S WHOLE CASE, CREATES A POWERFULLY INCRIMINATING INFERENCE OF ZELASKO'S GUILT ON ITS FACE AND THEREFORE SHOULD BE WHOLLY INADMISSIBLE.

Lane's email remains inadmissible hearsay as to Zelasko since it has not qualified as a statement against interest, FRE 804(b)(3), hearsay exception as explained above, *supra*, or any other hearsay exception. The email is therefore only admissible as against Lane, yet it remains powerfully incriminating on its face as to Zelasko since it inculpates her in a drug conspiracy and even suggests that she intended to commit murder. Furthermore, Lane will not be testifying and therefore Zelasko will have no chance to cross examine and thereby clarify what is meant by terms like "my partner" and "keep him quiet" in the email. Thus the email must be inadmissible, even as to Lane, in its current form, so as to protect Zelasko from the inevitable spill-over effect that would occur in the minds of the jury. The trial judge ruled on this statement's admissibility as to Zelasko, finding it inadmissible. (R. 23.) The prosecution cannot circumvent that ruling.

The admission of "powerfully incriminating extrajudicial statements of a co-defendant" violates the Sixth Amendment's Confrontation Clause, *Bruton*, 391 U.S. at 135, even if the court instructs the jury not to consider the statement as evidence against the defendant. *United States v.*

Schwartz, 541 F.3d 1331, 1348 (11th Cir. 2008). However, the statement must be "incriminating on its face" to be afforded Confrontation Clause protection. *Richardson v. Marsh*, 481 U.S. 200, 207 (limiting *Bruton* to cases where the statement was incriminating on its face and required no link to additional evidence introduced later in trial before it becomes incriminating).

In *Bruton*, this Court held that co-defendant Evan's confessions were "powerfully incriminating" where he stated that he and Bruton had both committed the robbery. *Bruton*, 391 U.S. at 124. In *Richardson*, this Court held that a confession that was redacted to omit "all reference" to the "existence of the defendant" and accompanied by a limiting instruction could not be powerfully incriminating unless linked with other evidence and therefore the statement was not sufficiently incriminating on its face. *Richardson*, 481 U.S. at 203, 205-208. Further, in *Gray*, this Court limited *Richardson* by holding that a statement may still be incriminating on its face even where the statement had been redacted if such redactions lead to the "direct inference of defendant's guilt." *Gray v. Maryland*, 523 U.S. 185,196 (1998) (distinguishing a direct inference from an inference that requires other evidence to be introduced later).

Thus, under *Bruton* and its progeny, the proper standard is that "a defendant's confrontation right is violated when the court admits a co-defendant statement that, in light of the [G]overnment's whole case, compels a reasonable person to infer the defendant's guilt." *Schwartz*, 541 F.3d at 1351. The court in *Schwartz* reasoned that a court must take into account the Government's whole case as it was presented up to that point." *Id*. at 1351, note 62. This allows trial judges to see what direct inference a reasonable juror would draw about the defendant's guilt.

Here, Lane's letter is powerfully incriminating on its face as to Zelasko – arguably, it is *only* incriminating to Zelasko – casting Lane as a concerned bystander. (R. 29.) This

incrimination would be immediately obvious were Lane to point directly to the defendant in the court room when she says "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. 29.) These inculpatory statements coupled with the fact that the Zelasko is sitting next to Lane when the "my partner" and "keep him quiet" remarks are read, in light of the government's charge of conspiracy to commit murder impressed in the minds of the jury, would lead a reasonable person to infer the defendant's guilt without requiring any links to additional evidence.

Thus unless the email is redacted to remove "all reference to the existence of the defendant," it is barred by *Bruton*. Notably, if the email was so redacted, it would retain no inculpatory value as to anyone and would cease to be relevant to proving any fact.[4] This highlights the real reason the Government wants to use this email – to present as credible an unchecked accusation of Ms. Zelasko – even though the email remains hearsay as it pertains to her. The Government attempts to circumvent the judge's ruling as to the statement's admissibility and rely instead on the well-known inability of the jury to view powerfully inculpatory statements as applying only to the declarant and not the defendant.

Moreover, this spillover effect tactic is more of a last ditch effort for the prosecution since they have no other good evidence to inculpate Ms. Zelasko. The facts show that Ms. Zelasko was on the team for 11 months before Lane showed up. (R. 1.) During that time there were no improvements in performance amongst the team members. (R. 2.) But after Lane's arrival, the team became surprisingly better. (R. 2.) Ms. Zelasko was found with an amount of

[4] Properly redacted, the email would read "I really need to talk to you. I know you have suspected before about the business I have been running with the female team. One of the members of the male team found out and threatened to report [me] if [I] don't come clean." *See* (R. 29.)

ThunderSnow consistent with personal use[5] and a relatively small sum of money. (R. 3.) Lane on the other hand was found to have 10 times the amount of ThunderSnow and double the cash on hand. (R. 4.)

In light of these facts it is clear why the prosecution would want to somehow connect her to Lane, whose facts are much more colorful: it is the only way for the government to actually tie Zelasko to any actual criminal activity, even if only by inference.

Therefore, since the email remains inadmissible hearsay as to Zelasko, it is powerfully incriminating on its face it must be redacted to comply with *Gray* and subsequently loses all of its potential inculpatory value, the email must be barred by *Bruton* as a violation of the Confrontation Clause since Zelasko will not have the chance to cross examine Lane to simply ask her who she was referring to in the email. Furthermore, the government cannot be allowed to side-step the judge's hearsay decision and take advantage of the jury's inability to weigh this incriminating statement only against Lane and not against Zelasko. The only way to carry out both of these goals is to affirm the District Court's judgment that *Bruton* controls and bars this statement's admission, even as to Lane.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests this Honorable Court affirm the decision of the Fourteenth Circuit on all issues.

Respectfully Submitted,

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Counsel for Respondent

February 12, 2014

[5] Dr. Henry Wallace, expert for Zelasko, stated in his affidavit that "a quantity of two 50-milligram doses is consistent with personal use and not sale." (R. 28.)