No. 13-452

IN THE
SUPREME COURT OF THE UNITED STATES

_____

UNITED STATES OF AMERICA,

Petitioner,

-against-

ANASTASIA ZELASKO,

Respondent.

_____

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

PETITIONER'S BRIEF

Respectfully Submitted
Team: 24
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Questions Presented

I. Whether, as a matter of law, Federal Rule of Evidence 404(b) bars evidence of a third party's propensity to commit an offense with which the defendant is charged and whether, Defendant Anastasia Zelasko's constitutional right to present a complete defense was violated by the exclusion of evidence of a third party's propensity to distribute illegal drugs at a different time to different persons in a different country.

II. Whether *Williamson v. United States* should be overruled insofar as it provides a standard for the application of Federal Rule of Evidence 804(b)(3), governing declaration against penal interest, and if so, what standard should replace it.

III. Whether, at a joint trial, the statement of a non-testifying co-defendant implicating the defendant is barred as violative of Confrontational Clause under *Bruton v. United States*, even though the statement was made to a friend and thus would qualify as a non-testimonial statement within the meaning of the Court's subsequent decision in *Crawford v. Washington*.

Statement of the Case

The Drug Enforcement Administration is a Federal Agency in charge of the enforcement of the controlled substances laws and regulations of the United States. (R. at 1.) Defendant-Respondent, Anastasia Zelasko ("Defendant") and her co-defendant below, Jessica Lane (Ms. Lane) are members of the United States women's Snowman Team. (R. at 1.) Each were charged with one count of conspiracy to distribute and possess with intent to distribute anabolic steroids known ThunderSnow, one count of distribution of and possession with intent to

distribute ThunderSnow, one count of simple possession of ThunderSnow, one count of conspiracy to murder in the first degree, and one count of murder in the first degree. (R. at 4–5).

Defendant Zelasko attempted to defend her innocence by shifting the blame to Casey Short, another teammate who recently transferred from the Canadian Snowman team. Defendant relied upon testimony from Miranda Morris, an ex-member of the Canadian team, that Ms. Short sold steroids in Canada. (R. at 10.) According to the Defendant, this evidence should be admitted to show Short's propensity to sell performance enhancing drugs, thus implying that it must be Short who conspired and acted in concert with Co-Defendant Lane. (R. at 10–11.) The court ruled that the Morris Testimony was not barred by the Federal Rules of Evidence ("FRE") 404(b). The 14th Circuit further ruled that any exclusion of this evidence would deny the Defendant of a complete defense under *Chambers*. (R. at 33–38.) Petitioner respectfully asks for a reversal both on the grounds that 404(b) does bar this evidence as a matter of law and that the exclusion would not be in violation of the defendant's Constitutional rights.

Aside from the drug charges, Defendants were also charged with conspiracy to murder and murder in the first degree. (R. at 5). Defendant Zelasko shot and killed a teammate on the men's team, Hunter Riley, on or about February 3, 2012 on a closed range. (R. at 3, 8.) No less than two months before the shooting, witnesses observed an argument between the Defendants and an argument between Defendant Zelasko and Hunter Riley. (R. at 3.) Defendant claimed that the shooting was an accident that occurred due to the inherently dangerous nature of the sport. (R. at 8.) She moved to suppress an e-mail that Co-Defendant Lane wrote to her boyfriend and the team's coach after Riley confronted Defendant about selling drugs. (R. at 3.) The e-mail, in its entirety, states:

> Peter,

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

(R. at 3.) The court, citing *Williamson*, ruled that this e-mail is inadmissible under FRE 804(b)(3) and that a defendant would be prejudiced by such an admission under *Crawford* and the Confrontational Clause. (R. at 38–46.) Once more, Petitioner respectfully asks for a reversal.

Summary of the Argument

The court below erred in admitting character evidence offered by the defendant for the sole purpose of showing that as a third party has the propensity to sell a similar drug she was charged of sell, this third party and not the defendant was a part of the conspiracy. It is the stance of the United States of America that this type of evidence is barred as a matter of law under Federal Rule of Evidence 404(b) and as such should not have been admitted when offered by the defendant.

The court below also incorrectly applied the facts of this case to the holding in *Chambers v. Mississippi* when they found that any exclusion of the offered character evidence would be in violation of the defendants Constitutional right to present a complete defense. It is the position of the United States of America that the right to present a defense may be limited in situations where the evidence offered is in violation of the standard rules of evidence and the excluded evidence is not the only way in which the defendant may explore the theory of her innocence.

The policy reasons behind excluding this type of evidence are such that the dangers of allowing it to meet the various circuit tests for excluding evidence that lends to show the innocence of the criminal defendant.

It is also inconceivable that the drafters intended the courts to apply a narrow reading of *Williamson*. Only admitting independently self-incupatory statements produces an under-inclusive result that excludes many statements that are against penal interest in the whole context and just as reliable as other admitted evidence. An alternative approach, as suggested by Justice Kennedy in *Williamson's* concurring opinion, should be used and all factual declarations against penal interest that are not so self-serving to be untrue should be admitted under the FRE 804(b)(3) exception.

ARGUMENT

POINT I

THE PROPENSITY EVIDENCE OFFERED BY DEFENDANT ZELASKO SHOULD BE EXCLUDED AS A MATTER OF LAW AS ADMITTING IT IS IN DIRECT VIOLATION OF FEDERAL RULE OF EVIDENCE 404(B) AND SUCH EXCLUSION CANNOT BE SAID AS TO VIOLATE HER RIGHT TO PRESENT A FULL DEFENSE.

A. Federal Rule of Evidence 404(b) explicitly prohibits admitting, "evidence of crimes, wrongs or other acts when such evidence is offered to prove a person's character and further to support the argument that a person acted in accordance with that character on a particular occasion."

Under Federal Rules of Evidence ("FRE") 404(b), the testimony offered by Defendant Zelasko, through Ms. Morris, suggesting that as Ms. Casey had previously sold a performance enhancing substance to winter athletes it is more likely that Ms. Casey, and not Defendant Zelasko was the co-conspirator in the present Thundersnow conspiracy should have been

excluded. Typically, Rule 404(b) is applied to prosecutorial evidence seeking to enter prior bad acts of criminal defendants to show their propensity to commit the crime they currently are charged with. Evidence exculpatory in nature of an absent parties bad acts offered by a criminal defendant is commonly referred to as "reverse 404(b)" evidence. *See United States v. Lucas*, 357 F.3d 599 (6th Cir. 2004); *United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991); *see also United States v. Seals*, 419 F.3d 600 (7th Cir. 2005). The Seventh Circuit articulated a standard in *Seals* that the burden upon a defendant is less "rigorous of a standard" in comparison to that applied to the government however the evidence must still pass the balancing test between Rules 401 and 403. *U.S. v. Seals*, 419 F.3d at 606–07. This test pits, "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*." *Id.* at 606 (quoting *United States v. Reed*, 259 F.3d 631, 634 (7th Cir. 2001) (emphasis in original)).

The Sixth Circuit, in *Lucas* dealt with a similar set of facts as those present here and found the propensity evidence offered, "the simple fact that [the third party] sold cocaine before is only minimally relevant" and due to that ruled, "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." *United States v. Lucas*, 357 F. 3d 599, 606 (6th Cir. 2004) (emphasis in original). When faced again with propensity evidence offered from the defendant, the Sixth Circuit, in *Wynne v. Renico*, reaffirmed their holding from *Lucas* and added a note that as the evidence offered was not the only evidence available to the defendant to pursue the theory of innocence the offered evidence was not necessary. *Wynne v. Renico*, 606 F.3d 867, 871 (6th Cir. 2010).

The defendant here wants, as did Mr. Lucas, to admit evidence with the hope that the jury will take the connection that because a third party [Ms. Casey] previously sold similar drugs [White Lightening], she is likely to have done so again after joining the U.S. team. *Lucas*, 357 F. 3d at 606.

B. The Fourteenth Circuit Erred in ruling the exclusion of the offered propensity evidence would violate Defendant Zelasko's constitutional right to offer a complete defense.

This Court has ruled, "whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontational Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citation omitted). This right however, is not without limitation and must yield to reasonable restrictions and policies in the interest of justice. *See Rock v. Arkansas*, 483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Rules handed down by federal rule makers limiting the admissibility of evidence in criminal trials, "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). Further, "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

In *Chambers*, this Court was charged with deciding if evidence of the guilt of a third party need be admitted in a situation where the third party had repeatedly admitted to committing the exact murder that defendant was accused of. *Chambers*, 410 U.S. at 287–90. There the

defendant was unable to fully explore these confessions due to the Mississippi voucher rule as it applied to witnesses. *Id.* at 290–93. The clear difference in the case at bar is that the evidence offered is not that of a third parties confession to selling to the U.S. team but that from a third party offered to show a fourth party at a different time, in a different country, sold a similar drug to a similar, but different, group of athletes. The *Chambers* Court effectively ruled that in instances where the offered testimony accepts persuasive guarantees of reliability and that testimony is exculpatory in nature, rules [specifically the hearsay rule] should "not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

As argued above, any character evidence offered to prove that a person has the propensity to act in a certain way is inadmissible under the Federal Rules of Evidence, specifically Rule 404(b)(2), therefore this testimony falls within that of the rule in *Taylor* and should not be admitted as necessary under the Due Process clause. The rule, if applied here, could not be seen as being; arbitrarily applied, disproportionate to its purpose, or mechanistically applied in a way that defeats the ends of justice. Thus it cannot be that excluding the propensity evidence under Rule 404(b) would violate the defendant's Constitutional rights.

Lastly, should this Court advance the ruling of the Fourteenth Circuit, it would impose a burden upon prosecutors nation-wide requiring not only that they prove the defendant guilty beyond a reasonable doubt, but also that they prove some absent third party *innocent* beyond a reasonable doubt. CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE, 1 FEDERAL EVIDENCE §4:37 (4th ed. 2009). Allowing the defendant to wantonly point the finger at a third party through evidence gained from yet another and entirely different party cannot be said to violate the same rights as those in *Chambers* when here the evidence offered is not that of absolute guilt on the part of Ms. Casey for the Thundersnow conspiracy rather

evidence of Ms. Casey's participation in a prior bad act in a different time and country. This type of evidence poses an additional problem in that a criminal defendant in any case would easily be able to find a person who has a longer criminal record than she that would therefore have a higher propensity to commit the charged crime. *Id.*

If the Defendant wishes to offer evidence that she is innocent, she is free to take the stand and offer her testimony allowing the jury to make their decision based upon their perception of her credibility. The court below erred when it demanded that to preserve her rights, the defendant be able to offer this pure propensity evidence in direct violation of FRE 404(b). It is undisputed that she was the shooter and will therefore need to explain the situation surrounding the death of Hunter Riley.

POINT II

WILLIAMSON V. UNITED STATES SHOULD NOT BAR THE ADMISSION OF CO-DEFENDANT JESSIE LANE'S E-MAIL AS DECLARACTION AGAINST PENAL INTEREST BECAUSE THAT STANDARD PRODUCES UNREALISTIC OUTCOMES IN THE REAL WORLD AND A BETTER APPROACH FOUND IN JUSTICE KENNEDY'S CONCURRING OPINION IS TO ADMITALL STATEMENTS CONTAINING A FACT AGAINST PENAL INTEREST UNLESS IT IS "SO SELF SERVING AS TO RENDER IT UNRELIABLE."

FRE 802 excludes hearsay statements unless otherwise provided by a federal statute, Federal Rules of Evidence, or other rules prescribed by the Supreme Court. Fed. R. Evid. 802. FRE 804 contains exceptions to the general prohibition on admitting hearsay statements made by unavailable declarants, which is applicable here when Co-Defendant Jessie Lane will unavailable by exercising her Fifth Amendment privilege not to testify. The relevant subparts of the rule in dispute is specifically FRE 804(b)(3) which states that a statement is admissible if:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability. . . .

Williamson v. United States traditionally governed whether statements qualified under this exception. *Williamson v. United States*, 512 U.S. 594 (1994).

In *Williamson*, Reginald Harris was arrested after a traffic stop revealed that he stowed nineteen kilograms of cocaine in two suitcases in the trunk of his rental car. *Id.* at 596. While being investigated by a Drug Enforcement Administration special agent, Harris gave varying testimony, some implicating Williamson. *Id.* at 596–97. Eventually, Williamson was convicted but Harris refused to testify at Williamson's trial. *Id.* at 597. The takeaway is "the most faith reading of Rule 804(b)(3) . . . does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Id.* at 597. The special agent was able to relay what Harris has said under Rule 804(b)(3) because the statements were against Harris's penal interest, Harris was unavailable, and there were sufficient corroborating circumstances to make the testimony trustworthy. *Id.* at 598 (citing *United States v. Harrell*, 788 F.2d 1524, 1526 (11th Cir. 1986)). Williamson appealed from this admission.

The Court had to first decide whether Harris's confession qualified as a statement, or "an oral or written assertion." *Id.* at 599 (citing Fed. R. Evid. 801(a)(1)). After testing out various definitions, the Court settled on a narrow reading that only self-inculpatory confessions qualify. *See id.* This echoes the "commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id.* Thus, self-exculpatory statements are likely to be false and thus should be excluded from admission. *Id.* at 600.

Justice Kennedy disagreed with this approach in his concurring opinion. *Id.* at 611–21 (Kennedy, J., concurring). His criticism is rooted in the impossibility of applying the majority's test evenly. *Id.* at 616–17. For example, defendants are unlikely to make isolated self-inculpatory confessions, e.g., "I robbed the store", that fit perfectly within the majority's interpretation of admission statements. *Id.* at 617. In the real world when defendants do not speak this way, collateral statements should be admitted and the entire context must be considered. *See id.* at 611–17. Instead, Justice Kennedy proposed an approach where all facts in the same statement would be admitted then statements that tend to be self-serving are excluded for unreliability. *Id.* at 617–19. This approach is better than the majority approach because it balances the desire not to be too under-inclusive with admission of statements with the need to weed out self-serving statements.

In the present case, the flaws of the majority approach are apparent. Defendant argues that the individual statements in Co-Defendant's e-mail are not self-inculpatory. As Justice Kennedy suggests, Co-Defendant Lane is unrealistically going to write "I am selling illegal steroids." However, taken as a whole, the e-mail conveys facts that are self-inculpatory and supported by corroborating circumstances. Co-Defendant Lane confessed that she was running a business with a partner, they ran into some trouble, and they need to silence a troublemaker. (R. at 3.) This confession was corroborated by the witnesses' observations of arguments between the Defendants and Defendant Zelasko and the deceased, Hunter Riley, within two months of the shooting. (R. at 3.) Given the nature of this e-mail, from Co-Defendant Lane to her lover and not an authority figure who can penalize her, these statements are unlikely to be self-serving.

For those reasons, the *Williamson* majority approach should not apply here. It should be replaced by the better approach as suggested by Justice Kennedy in his concurring opinion. It

gives better context to Co-Defendant Lane's e-mail while preserving the trustworthiness of the statements. It is also a more realistic approach because it considers how defendants speak in the real world. Ruling this e-mail inadmissible because the statements individually are not self-inculpatory although the e-mail as a whole is self-inculpatory would be erroneous. The Circuit Court should be reversed and the e-mail should be admitted under Rule 804(b)(3) as declaration against penal interest.

POINT III

THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT IMPLICATING THE DEFENDANT SHOULD NOT BE BARRED AS VIOLATIVE OF THE CONFRONTATIONAL CLAUSE UNDER *BRUTON V. UNITED STATES* BECAUSE THE STATEMENT WAS MADE TO A FRIEND AND THUS WOULD QUALIFY AS A NON-TESTIMONIAL STATEMENT WITHIN THE MEANING OF THE COURT'S SUBSEQUENT DECISION IN *CRAWFORD V. WASHINGTON*.

The People would seek to introduce the email of Co-Defendant Lane as evidence of both Co-Defendant Lane's guilt and it may be used to implicate Defendant Zelasko in the conspiracy and to prove intent for the murder of Hunter Riley. In *Bruton v. United States* this court held that using a co-defendant's self-incriminating statement without the ability to cross examine that person is a violation of the Confrontational Clause of the Sixth Amendment. *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* was decided on a distinct set of facts where one of the co-defendants (Evans) in that case had given a statement to a postal inspector. *Id.* at 124. The statement in *Bruton* was not simply a statement but a confession given to a government agent during an interrogation, it also contained an admission that there was an accomplice. *Id.* At trial the statement was introduced against as evidence against Defendant Evans and a jury instruction

was given to disregard the statement as it pertained to Defendant Bruton. This Court held that the jury instruction was not sufficient to protect Defendant Bruton from the statement, and that because the statement was simply read into the evidence it was a violation of the Confrontational Clause. *Id.* at 131.

The Confrontational Clause is invoked when there is the inability to cross-examine a witness who is testifying against you. However this position is clarified in *Crawford v. Washington* wherein this Court held in sum that testimonial statements would be precluded under the Confrontational Clause, and non-testimonial statements could be allowed. *Crawford v. Washington*, 541 U.S. 36 (2004). This limited but did not over rule the holding in *Ohio v. Roberts* which allows evidence "if the statement bears 'adequate indicia of reliability.'" *Ohio v. Roberts*, 448 U.S. 56 (1980). The *Crawford* court held that while statements could harbor "indicia of reliability" the statement could have the "functional equivalent" of being testimony and as such would require cross examination. *Crawford*, 541 U.S. at 51. One segment of this testimonial statement would include "statements taken by police officers in the course of interrogations". *Id.* at 52. With this criterion to look at in deciding whether a statement is testimonial we see that the statement in *Bruton* given to a postal inspector during interrogation falls within that category, as does the statement of Crawford's wife during an interrogation by police officers.

In the case at bar, there is a statement made to a significant other looking for advice. (R. at 2, 26.) The friend is not a police officer, and is not acting under color of law. Furthermore the email was not made during or as part of an interrogation, as it was in fact an unsolicited email. (R. at 9, 26.) Unlike the statements in *Bruton* the statement is not a confession but simply an allusion to the events alleged by the people. Here unlike *Bruton* we have a statement that is

going to be used as evidence against both defendants. In *Bruton* the trial court attempted to protect defendant Bruton against the prejudice of the statements of Evans by giving a limiting instruction to the jury. However in the case at bar this is not the case, the statement would be introduced by the people as evidence against both defendants.

The majority asserts that *Crawford* did nothing to modify *Bruton*, they did not rely on a single case to back that position up. To the contrary, both *Michigan v. Bryant* and *United States v. Polidore* stand to show that *Crawford* simply limited and defined the underlying principles behind *Bruton*. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012). In *Polidore* there was a 911 call which was used as evidence against the defendant which was deemed to be non-testimonial and not covered by the Confrontational Clause. *Polidore*, 690 F.3d at 718–19. That is consistent with *Crawford* applying and modifying *Bruton*. In *Bryant* a man gave directions to police to the defendants whereabouts and identity as he lay dying. These statements to the police were held to be non-testimonial like the statements in *Polidore* because the man in *Bryant* was simply trying to give information in the exigency of the situation. *Bryant*, 131 S. Ct. at 1147–48. The theory is that the statements are not ones where the speaker is contemplating them being used in a trial against the person they are speaking about. See *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Crawford v. Washington*, 541 U.S. 36 (2004).

While judge's adherence to *Bruton* is understandable, disregarding further decisions under the guise of stare decisis is misguided. The judge in writing for the majority utilized language from *Cruz v. New York* which in sum states we as a nation are bound by the consequences of *Bruton* which as a factual assertion is correct, however we are also bound by the

cases which modify the decision in *Bruton* which namely is *Crawford*. *Cruz v. New York*, 481 U.S. 186, 188 (1987); (R. at 45–46).

Bruton was further restricted in *Richardson v. Marsh* in which case the court held that "that the Confrontational Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). While in *Richardson* the redactions were a bit extreme as they removed the name of the defendant and reference to the person who confessed being with the defendant. However in *Richardson* the statement contained an explicit confession and specific names. The understanding that *Bruton* is not triggered when there is sufficient redaction, or other indicia of protection from undue prejudice. In *Richardson*, the confession was allowed in as evidence and then it was evidence added by the defendant that implicated themselves in the crimes confessed to. *Richardson*, 481 U.S. at 205. In *United States v. Onenese* the court of appeals distills the holding in *Richardson* into one eloquent statement "Richardson … cabined *Bruton* to facially incrimination confessions – that is, confessions naming the non-confessing defendant." 2013 WL 5755324, at 5. It should be noted that a "confession" as defined in *Black's Law Dictionary* as a "criminal suspect's oral or written acknowledgment of guilt, often including details about the crime". This definition is supplemented further with an excerpt from Wigmore's *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States* which states "A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it" JOHN HENRY WIGMORE, A TREATISE OF THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW:

INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES § 821 (2010).

In the case at bar we can compare the statements allowed in under theories explained in *Richardson* and discussed in *Onenese* and the email sent by Co-Defendant Lane. First we would reiterate that this is not a confession like any of the other statements that *Bruton* was designed to protect against. This email only alludes to a "business" with a "partner" it is never stated explicitly that the business is an illicit one, it is only alluded to the fact that it is illegal due to the threatened reporting of that business. (R. at 3, 9, 26.) However that is a question of fact for a jury to decide. With that said, the statement is not one that would be considered a confession. The statement does include language that is inculpatory enough to rise to the level of a declaration against penal interest for purposes of Rule 804(b)(3). *Supra* Point II. While a statement may include inculpatory language it may not be a confession in the traditional sense. There is not a single line in the statement that pointed to an explicit wrongdoing, in a confession there would be a particularized statement to point to a date or actual experience here there is nothing of the sort.

To hold that all statements made by a codefendant shall be barred under the Confrontational Clause would undoubtedly be an overbroad assertion, one which is not based in this Courts decisions. What the lower court is attempting to do is to disallow the use of all prejudicial statements made by codefendants, regardless of the use or purpose of its creation. This would unfortunately create a problem in all joint trials which are utilizing any nontestimonial statements by a co-defendant. While it has been warned that as a society we should not attempt to curtail rights for the sake of procedural choices, this is not a case where rights are going to be curtailed. In the case at bar, two people can be tried at the same time using

a statement from one co-defendant as evidence against both defendants. Therefore as a matter of policy this Court should not preclude all co-defendant statements.

Conclusion

Based on the foregoing, the opinion appealed from should be reversed.

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