No. 20-1790

In The

Supreme Court of the United States

ALSTON CAMPBELL, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE DUE PROCESS INSTITUTE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
50 California Street, Suite 1500
San Francisco, CA 94111
(415) 662-2260
cline@johndclinelaw.com

QUESTIONS PRESENTED

1. Whether a trial court violates a defendant's rights under the Confrontation Clause by prohibiting cross-examination of accomplice witnesses about sentencing benefits they hope to receive in exchange for their cooperation with the government.

2. Whether appellate courts should review violations of the Confrontation Clause de novo or for abuse of discretion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, AND RULES

INTEREST OF AMICUS CURIAE[1]

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system because due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty." U.S. Const., pmbl. This case concerns the Institute because the constitutional right to cross-examination is fundamental to the fairness of a criminal trial.

SUMMARY OF ARGUMENT

Several courts of appeals, including the Eighth Circuit here, authorize district courts to bar cross-examination about the specifics of mandatory minimum sentences cooperating co-defendants avoid through deals with the prosecution. Under this rule, a defendant may elicit that a cooperating witness avoided "substantial" prison time but cannot show that the witness avoided (to use an example drawn from this case) a 20-year mandatory minimum sentence. Courts generally base this restriction on the defendant's right of confrontation on the fear that jurors will infer the defendant's potential sentence from the sentence the witness avoided and will be so

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of amicus' intention to file this brief ten days before the due date. Petitioner has filed a blanket consent to amicus filings. A letter of consent from counsel for respondent has been received by undersigned counsel.

troubled that they will vote to acquit even though they believe the evidence proves the defendant guilty beyond a reasonable doubt. In other words, these cases rest on the fear that jurors will nullify if they learn how much prison time the defendant faces.

These decisions are profoundly flawed. They conflict with this Court's decisions in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), *Davis v. Alaska*, 415 U.S. 308 (1974), and other cases emphasizing the importance of the Sixth Amendment right to cross-examine a prosecution witness for bias. They rest on assumptions about juror behavior that lack any empirical support. And they ignore the "almost invariable assumption of the law that jurors follow their instructions," including the instruction--given in this and virtually every other criminal case--not to consider punishment in reaching their verdict. *Shannon v. United States*, 512 U.S. 573, 585 (1994) (quotation omitted).

The Court should grant the writ to restore the criminal defendant's Sixth Amendment right to expose the full extent of a prosecution witness' motivation to curry favor with the prosecution.

ARGUMENT

I. CASES BARRING THE DEFENDANT FROM EXPOSING THE FULL EXTENT OF A WITNESS' MOTIVE TO FAVOR THE PROSECUTION GIVE INSUFFICIENT WEIGHT TO THE RIGHT TO CROSS-EXAMINE FOR BIAS.

The Sixth Amendment guarantees a defendant the "fundamental right" to cross-examine prosecution witnesses. *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965). Cross-examination is essential to the fairness of a criminal trial; it is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316. This Court has declared that the "denial or significant diminution" of the right to cross-examine calls into question the "integrity of the fact-finding process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quotation omitted). Of particular significance here, the right to cross-examine includes the right to cross-examine *for bias*. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Van Arsdall*, 475 U.S. at 678-79 (quotation omitted).

In *Davis*, the Court observed that one means of attacking a witness' credibility on cross-examination is to "reveal[] possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." 415 U.S. at 316. The Court added: "The partiality of a witness

is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id*. at 316-17. Because the state court had precluded the defense in *Davis* from exploring a prosecution witness' possible bias arising from the fact that he was on juvenile probation when he assisted police by identifying the defendant--from which the defense would argue that the witness "acted out of fear or concern of possible jeopardy to his probation," *id.* at 311--this Court found that the defendant's Confrontation Clause rights had been violated, *id*. at 318; *see United States v. Abel*, 469 U.S. 45, 52 (1984); *Alford v. United States*, 282 U.S. 687, 693 (1931).

As the Court recognized in *Van Arsdall*, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination," based on the traditional Fed. R. Evid. 403 concerns. 475 U.S. at 679; *see Holmes v. South Carolina*, 547 U.S. 319, 327 (2006); *Olden v. Kentucky*, 488 U.S. 227, 231-32 (1988) (per curiam). But that "latitude" has limits; courts applying Rule 403 to limit a criminal defendant's cross-examination must give "special consideration to the defendant's constitutional right to confront witnesses against him." *Rhodes v. Dittmann*, 903 F.3d 646, 659 (7th Cir. 2018); *see, e.g., Hoover v. Maryland*, 714 F.2d 301, 306 (4th Cir. 1983) (exercise of discretion to limit cross-examination "must be informed by the utmost caution and solicitude for the defendant's Sixth Amendment rights") (quotation

omitted). The restriction on cross-examination the district court imposed in this case and the Eighth Circuit upheld violates these principles.

As this case demonstrates, that restriction keeps from the jury vital information concerning the benefits the cooperators obtained through their deals with the prosecution. Petitioner's jury knew that the cooperating witnesses avoided "substantial" prison time, but it had no way of knowing what that term meant. Some jurors might consider six months in prison a "substantial" period of incarceration. Some might consider a year a "substantial" period.[2] If the jurors had known that the witnesses' deals had spared them a mandatory minimum ten or twenty years of imprisonment, they certainly would have "received a significantly different impression of [the witnesses'] credibility." *Van Arsdall*, 475 U.S. at 680. As the Third Circuit observed in reversing a conviction where the defendant was barred from exposing the precise extent of a cooperating witness' benefit, "the limited nature of [the witness'] acknowledgment that he had benefitted from his cooperation made that acknowledgment insufficient

---

[2] Even some federal judges consider a year or two in prison "substantial." This Court, for example, has described any sentence of more than two years as a "substantial term of imprisonment." *Logan v. United States*, 552 U.S. 23, 37 (2007). Other federal courts have described a sentence of as little as a year and a day as a "substantial prison sentence." *United States v. Moguel*, 2011 U.S. Dist. LEXIS 51211, at *5, *7 (E.D. Wis. May 12, 2011); *see also, e.g., United States v. Campbell*, 2017 U.S. Dist. LEXIS 142130, at *8, *12 (E.D. Ky. May 30, 2017) (10 months a "substantial term of incarceration"); *United States v. Concepcion*, 795 F. Supp. 1262, 1296 (E.D.N.Y. 1992) (one year in community treatment center a "substantial period of incarceration").

for a jury to appreciate the strength of his incentive to provide testimony that was satisfactory to the prosecution." *United States v. Chandler*, 326 F.3d 210, 222 (3d Cir. 2003). As in *Chandler*, a full exploration of the witnesses' benefits in this case "would have underscored dramatically their interest in satisfying the government's expectations of their testimony." *Id*.

II. THE RESTRICTION ON CROSS-EXAMINATION IMPOSED BELOW HAS NO EMPIRICAL SUPPORT AND IGNORES THE PRESUMPTION THAT JURORS FOLLOW THE INSTRUCTION NOT TO CONSIDER PUNISHMENT.

This much is beyond dispute: under *Van Arsdall* and *Davis*, evidence of the specific benefits a cooperator obtained through a deal with the prosecution is directly relevant to his credibility. That evidence is unquestionably admissible, absent a strong showing by the government that its probative value is "substantially outweighed by a danger of . . . unfair prejudice [or] confusing the issues." Fed. R. Evid. 403. But no such danger justifies the categorical rule adopted by the Eighth Circuit and several other courts of appeals.

These courts restrict cross-examination based on the following assumptions: (1) If jurors learn the potential sentence that a cooperator avoided by cutting a deal with the prosecution, they will infer that the defendant faces a similar sentence, and (2) the jurors will be so troubled by the defendant's potential sentence that they will acquit him even

though they believe the evidence establishes his guilt beyond a reasonable doubt. *See, e.g., United States v. Trent,* 863 F.3d 699, 705 (7th Cir. 2017) ("We have thus permitted district courts to prevent juries from learning information from which they could infer defendants' potential sentences, holding that inclusion of this information might confuse or mislead the juries in their true task: deciding defendants' guilt or innocence."), *cert. denied,* 138 S. Ct. 2025 (2018); *United States v. Rushin*, 844 F.3d 933, 939 (11th Cir. 2016) (restriction on cross-examination justified because eliciting sentence that cooperator avoided would "invite jury nullification"); *United States v. Cropp*, 127 F.3d 354, 358 (4th Cir. 1997) (crediting district court's "concern that the jury might 'nullify' its verdict if it knew the extreme penalties faced by the appellants").

Trent, *Rushin*, *Cropp*, and similar cases cite no evidence to support these assumptions--no studies of juror behavior, or even anecdotal instances of juries nullifying after they learn that the defendant faces harsh punishment. Nor do these cases tie their restriction on cross-examination to the specifics of the particular case. They do not require any concrete indication, such as a jury note or statements during voir dire, that the jurors in a given case are inclined to nullify. This lack of *any* empirical basis is reason enough to overturn the rule these cases have adopted. Significant restrictions on cross-examination must rest on something more than judges' generalized, non-empirical assumptions about juror behavior--assumptions that may be shaped by subconscious and unexamined stereotypes about how jurors reach their verdicts. *See, e.g., Rhodes*, 903 F.3d at 659.

But these cases have a further, fatal flaw. Their linchpin--a generalized fear that jurors will nullify if they know the punishment the defendant faces--overlooks a fundamental principle of criminal law: the "almost invariable assumption of the law that jurors follow their instructions," including the instruction not to consider punishment in reaching their verdict. *Shannon*, 512 U.S. at 585 (quotation omitted); *see, e.g., Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (recognizing presumption that "jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them").

Here, the district court instructed the jurors in the strongest possible terms that they could not consider a defendant's potential punishment: "[I]f you find a defendant guilty, the sentence to be imposed is my responsibility. *You may not consider punishment in any way when deciding whether the government has proved its case beyond a reasonable doubt*." R.276 at 5 (emphasis added). To buttress this unequivocal directive, the court instructed the jurors that they must "not allow sympathy or prejudice to influence you," R.260 at 5; that the jury instructions are "binding on you and must be followed," R.260 at 1; that the jurors "must follow the law as stated in my instructions, whether you agree with it or not," R.260 at 5; and that the verdict "must be based solely on the

evidence and on the law I have given to you in my instructions," R.276 at 5.[3]

These instructions made it perfectly clear that the jurors could not under any circumstances consider petitioner's potential punishment in reaching their verdict. No juror could have been "confused" or "misled" about the role petitioner's potential punishment played in the jury's deliberative process, *Trent*, 863 F.3d at 705; it was to play no role whatsoever.

Federal courts presume that the jury follows the district court's instructions "absent evidence of an overwhelming probability that it was unable to do so." *United States v. Corley*, 519 F.3d 716, 728 (7th Cir. 2008) (quotation omitted). The government offered no evidence that the jurors in this case (or jurors generally) could not follow the district court's instructions quoted above. It certainly did not establish an "overwhelming probability" that the jury would be unable to follow the instruction that it "may not consider punishment in any way when deciding whether the government has proved its case beyond a reasonable doubt." R.276 at 5. Nor did the district court or the court of appeals cite any such evidence. The district court's instructions, and the presumption

[3] These instructions come directly from the Eighth Circuit's pattern instructions. These instructions, or instructions like them, are given in virtually every federal criminal case. As discussed, these instructions eliminate any risk of prejudice to the government from cross-examination about a cooperating witness' specific benefits. But if the government thought more was needed, it could request a limiting instruction directing the jurors to consider the witness' potential punishment only in evaluating his credibility and for no other purpose.

that the jurors would follow them, eliminated any possibility that the jurors would be "confused" or "misled" by evidence of the mandatory minimum sentences the cooperators had avoided.

Shannon (which the Eighth Circuit, like every other court to address this issue, ignored) is squarely on point. In that case, the defendant contended that the district court should have instructed the jury on the consequences of a not guilty by reason of insanity (NGI) verdict. Absent such an instruction, according to the defendant, the jurors might speculate that an NGI verdict would lead to the defendant's immediate release. *See* 512 U.S. at 584-85. This Court rejected that argument by relying on the presumption that jurors follow instructions, including the instruction that they should not consider punishment in reaching their verdict:

> Even assuming Shannon is correct that some jurors will harbor the mistaken belief that defendants found NGI will be released into society immediately, the jury in his case was instructed "to apply the law as [instructed] regardless of the consequence," and that "punishment should not enter your consideration or discussion." That an NGI verdict was an option here gives us no reason to depart from the almost invariable assumption of the law that jurors follow their instructions. Indeed, although it may take effort on a juror's part to ignore the potential consequences of the verdict, the effort required in a case in which an

> NGI defense is raised is no different from that required in many other situations.

Id. (quotation, citation, and ellipses omitted). If the instruction that jurors must not consider punishment in reaching their verdict protects a defendant from a juror's misapprehension of an NGI verdict, as the Court held in *Shannon*, that same instruction surely protects the government from a juror's ability to infer the defendant's potential sentence from evidence of the years in prison a cooperator avoided.

In short: Decisions endorsing restrictions on a defendant's Sixth Amendment right to expose the full extent of cooperating witnesses' motive to favor the prosecution rest on assumptions about juror behavior that lack any empirical support. Those decisions ignore the "almost invariable assumption of the law" that jurors follow the court's instructions. And they assign far too little weight to the impeachment value of evidence concerning specific mandatory minimum sentences that cooperating witnesses avoid. Any minimal interest the government has in preventing the jurors from inferring a defendant's potential sentence must "yield to [the defendant's] constitutional right to probe the 'possible biases, prejudices, or ulterior motives of the witnesses' against [them].'" *Chandler*, 326 F.3d at 223 (quoting *Davis*, 415 U.S. at 316).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Law Office of John D. Cline
50 California Street
Suite 1500
San Francisco, CA 94111
(415) 662-2260

Counsel for Amicus Curiae Due Process Institute

July 2021