No. 17-1059

In The

Supreme Court of the United States

MAX JULIAN WRIGHT,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF

BEAU B. BRINDLEY
LAW OFFICES OF BEAU B. BRINDLEY
53 West Jackson Blvd., Suite 1410
Chicago, IL 60604
Telephone: (312) 765-8878
bbrindley@brindleylaw.com
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

ARGUMENT 3

I. PREVENTING THE DEFENDANT-PETITIONER FROM CONFRONTING A COOPERATING WITNESS WITH THE MANDATORY LIFE SENTENCE HE FACED IN THE ABSENCE OF COOPERATION VIOLATED THE DEFENDANT-PETITIONER'S SIXTH AMENDMENT CONFRONTATION CLAUSE RIGHTS 3

II. THIS CASE ALLOWS THE COURT TO ADDRESS CONFLICT BETWEEN THE LOWER COURTS 7

III. FACTS OF THIS CASE ARE PARTICULARLY SUITABLE FOR REVIEW BY THIS COURT 9

IV. RESTRICTION ON CROSS-EXAMINATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Alford v. United States, 282 U.S. 687 (1931) 6

Coy v. Iowa, 487 U.S. 1012 (1988).....7

Davis v. Alaska, 415 U.S. 308 (1974) 3, 6

Delaware v. Van Arsdall, 475 U.S. 673 (1986) .....*passim*

Hurst v. Fla., ___ U.S. ___, 136 S. Ct. 616 (2016) 12

Kingsley v. Hendrickson, ___ U.S. ___, 135 S. Ct. 2466 (2015) 12

Maslenjak v. United States, ___ U.S. ___, 137 S. Ct. 1918 (2017) 12

McFadden v. United States, ___ U.S. ___, 135 S. Ct. 2298 (2015) 12

Richardson v. Marsh, 481 U.S. 200 (1987) 7

Shannon v. United States, 512 U.S. 573 (1994) 6, 7

United States v. Chandler, 326 F.3d 210 (3d Cir. 2003) 8

United States v. Larson, 495 F.3d 1094 (9th Cir. 2007) 4, 8, 9

United States v. Luciano-Mosquera, 63 F.3d 1142 (1st Cir. 1995) 8

United States v. Roan Eagle, 867 F.2d 436 (8th Cir. 1989) 8

United States v. Rushin, 844 F.3d 933 (11th Cir. 2016) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Wright, 866 F.3d 899 (8th Cir. 2017) 9

United States v. Anderson, No. 15 CR 46 (IAND) 4, 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 1, 6

STATUTES

18 USC §851 1

This case presents an unambiguous opportunity for this Court to clarify the appropriate balance between a defendant's Sixth Amendment interest in confronting cooperating witnesses with the statutory mandatory minimum sentences they would have faced absent cooperation, and the government's interest in preventing a jury from gaining sufficient information to infer the defendant's likely sentence. Contrary to the government's Brief in Opposition, the circuit courts have unquestionably issued conflicting opinions on this question.

By preventing trial counsel for Defendant-petitioner from cross-examining the lead cooperating witness at trial on the mandatory minimum life sentence he would have faced absent cooperation, the district court prevented the Defendant-petitioner from exposing to the jury information that could leave the jury with a "significantly different impression of [the witness's] credibility." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Federal prosecutors have the sole discretion to determine whether a defendant will be subjected to enhanced sentences due to a prior conviction. 18 USC §851. District courts have absolutely no discretion in deciding whether a statutory minimum should apply. In order to effectively expose a cooperating witness's motivation to testify, defendants must be allowed to confront a witness with the mandatory sentence he faced in the absence of cooperation and the fact that representatives of the party adverse to the defendant are the sole decision-makers as to whether the cooperating witness will suffer that punishment.

This case presents facts that are uniquely suitable for this Court's review. The cooperating witness in this case faced a mandatory life sentence without cooperation. Substitution of a more ambiguous iteration of this mandatory penalty cannot accurately convey the jeopardy faced by a cooperating witness who has avoided a mandatory *life* sentence. Furthermore, as the government's Brief in Opposition correctly points out, the district court indicated that it would have allowed trial counsel to confront the cooperating witness with the fact that, prior to cooperation, he faced a mandatory life sentence were it not for the fact that trial counsel asked the question in the context of the cooperating witness's previous conviction. BIO at 4 (*citing* Trial Tr. 1240). The district court explicitly determined that the government's interest in preventing the jury from discovering sufficient information to infer the defendant's likely sentence was sufficient to justify preventing the defendant from asking a question that the defendant would otherwise have been allowed to ask about the nature of a mandatory penalty faced by the cooperating witness. Thus, this case provides the ideal vehicle for this Court to explicitly weigh the government's interest in preventing a jury from inferring a defendant's likely sentence against a defendant's interest in confronting a cooperating witness with the fact that he faced a mandatory life sentence prior to cooperation. It is this very conflict of interest that creates the circuit split that gives rise to this petition. This case provides an unambiguous and unequivocal opportunity to resolve that conflict once and for all.

ARGUMENT

I. PREVENTING THE DEFENDANT-PETITIONER FROM CONFRONTING A COOPERATING WITNESS WITH THE MANDATORY LIFE SENTENCE HE FACED IN THE ABSENCE OF COOPERATION VIOLATED THE DEFENDANT-PETITIONER'S SIXTH AMENDMENT CONFRONTATION CLAUSE RIGHTS.

The Brief in Opposition argues that this Court should not grant review because the district court's limitation on cross-examination did not violate the Confrontation Clause. BIO at 8. Limitations on cross-examination violate a defendant's Confrontation Clause rights where "he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Van Arsdall*, 475 U.S. at 680 (*quoting Davis v. Alaska*, 415 U.S. 308, 318 (1974)). Cooperation agreements constitute a prototypical form of bias. *Id*. The Brief in Opposition argues that the district court acted within its discretion by prohibiting Defendant-petitioner from confronting the witness with the specific mandatory life sentence he faced prior to cooperation, but allowing him to confront the witness with the fact that he faced a mandatory prison sentence of "decades" in prison in the absence of cooperation. BIO at 9-10 (*citing* Trial Tr. 1242-3). "Decades" conveys to the jury a significantly

different and, in fact, inaccurate impression of the cooperating witness's motivation than does a full statement of the benefit he actually gained from his testimony for the government (the avoidance of a mandatory life sentence). As the Ninth Circuit has held, a mandatory life sentence provides a singular, unique, and powerful incentive to compel a cooperating witness to do everything he can to avoid that outcome. *United States v. Larson*, 495 F.3d 1094, 1104 (9th Cir. 2007). Furthermore, the substitution of "decades" was misleading because the cooperating witness in this case faced the potential of decades in prison even after cooperation.[1] Hence, the permitted question did not even accurately convey the situation to the jurors. The limitations imposed on Defendant-petitioner's cross-examination prevented him from exposing to the jury the truly dire consequences Anderson faced prior to cooperation and the actual benefit he received because of his cooperation – not spending every remaining day of his natural life in custody. The jury was denied that vital information.

Defendant-petitioner presents a relatively narrow question concerning whether the Confrontation Clause grants him the right to confront a cooperating witness with the mandatory minimum sentence, the imposition of which rests solely at the discretion of the prosecution. This is not a case where the district court exercised its discretion to prevent a defense attorney

---

[1] Anderson was sentenced to 20 years after cooperation. *United States v. Anderson*, No. 15 CR 46 (IAND) Dkt. 164 (Judgment for Deshaun Anderson).

from, for example, endlessly analyzing each and every potential Guidelines enhancement a cooperating witness might avoid depending on what decision a judge might make on various enhancements. In this case, the decision on whether the cooperating witness will receive a mandatory life sentence rests in the sole discretion of the prosecuting attorneys that decide whether to file a §851 notice of enhanced punishment. The term "decades" suggests that there is no hard and fast minimum sentence faced by the Defendant-petitioner and no indication that the minimum would be the remainder of his natural life. Therefore, the limitation on cross-examination prevented the Defendant-petitioner from effectively communicating that the prosecuting attorneys had the sole discretion to determine whether the cooperating witness would spend every remaining day of his life in prison.

The government argues that holding that a defendant has the right to confront a cooperating witness with the mandatory minimum term he would have faced absent cooperation would constitute a "rigid rule" that is inconsistent with the discretion afforded by this Court in *Van Arsdall*. BIO at 10-11. A ruling that the government's interest in preventing the jury from gaining sufficient information to infer the defendant's likely sentence does not justify limiting the defendant's right to confront a cooperating witness with the mandatory minimum he faced prior to cooperation is no more a "rigid rule" than was this Court's holding in *Van Arsdall* that a defendant's right to cross-examine a witness regarding the dismissal of a pending case in

exchange for his testimony violates the Sixth Amendment regardless of countervailing government interests. *Van Arsdall*, 475 U.S. at 679. Nor is it a more rigid rule than this Court's ruling in *Davis*, 415 U.S. at 320, that the state's interest in protecting juvenile criminal records cannot prevent a defendant from cross-examining a witness regarding his status as a juvenile parolee. *Id*. Nor is it a more rigid rule than this Court's holding in *Alford v. United States*, 282 U.S. 687, 690 (1931) that defendants have an absolute right to confront witnesses on the fact that they are incarcerated at the time of their testimony regardless of contrary government interests. *Id*.

The Brief in Opposition argues that the government has a strong interest in preventing the jury from gaining sufficient information to infer a defendant's likely sentence. BIO at 9. The risk is that, were jurors to figure out a defendant's sentence, they might decide to nullify. *Id.* Speculation as to the existential possibility of jury nullification does not justify abrogation of a defendant's right to confront the witness against him with the mandatory penalty he faced without cooperation. Even where "it may take effort on a juror's part to ignore the potential consequences of the verdict," jurors are expected to follow jury instructions. *Shannon v. United States*, 512 U.S. 573, 585 (1994). The jurors in this case were instructed: "Do not consider punishment in any way in deciding whether the defendant is not guilty or guilty. If the defendant is guilty of one or more offenses, I will decide what his sentence should be." *United States v. Anderson*, No. 15 CR 46 (IAND)

Dkt.149 at 34. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (recognizing "the almost invariable assumption of the law that jurors follow their instructions"). In *Shannon*, 512 U.S. at 576, this Court found that the risk of a jury finding a defendant who is innocent by reason of insanity guilty out of fear is cured by instructing the jury not to consider punishment. *Id.* There is no reason that same cure does not apply to the government's interest in preventing the jury from inferring the defendant's punishment and possibly nullifying in this case. Here, the district court did not make any special finding as to why the jury in this case would be somehow more likely to nullify than in the above-noted situation. In restricting a defendant's Confrontation Clause rights "something more than [a] generalized finding . . . is needed when the exception is not 'firmly . . . rooted in [the Court's] jurisprudence.'" *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988).

II. THIS CASE ALLOWS THE COURT TO ADDRESS CONFLICT BETWEEN THE LOWER COURTS.

The government argues that the decisions of the lower courts do not represent a circuit split, but rather different lower courts applying their discretion to different factual scenarios. BIO at 11-14. This is false. The circuits are directly split on whether the need to protect the jury from inferring a defendant's sentencing information and the supposed risk of nullification justifies restricting the cross-examination of cooperating informants about mandatory life sentences they face

absent cooperation. *Larson*, 495 F.3d at 1105 ("However, while the Government has an interest in preventing a jury from inferring a defendant's potential sentence, any such interest is outweighed by a defendant's right to explore the bias of a cooperating witness who is facing a mandatory life sentence."); *United States v. Chandler*, 326 F.3d 210, 223 (3d Cir. 2003), *as amended* (July 18, 2003) ("[W]e find that such an interest is outweighed by [the defendant's] constitutional right to confront [cooperating witnesses]"); *United States v. Roan Eagle*, 867 F.2d 436, 443 (8th Cir. 1989) (finding Confrontation Clause violation despite "the probable certainty – that the jury, learning that . . . [co-defendant] who was by all counts as guilty as [the defendant], would get a maximum of a ten-year sentence while [the defendant] faced the specter of a Judge-imposed sentence up to life"). Other appellate courts directly find that the need to protect the jury from inferring sentencing information regarding the defendant does justify prohibiting otherwise appropriate cross-examination questions regarding penalties faced by a cooperator absent cooperation. *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995), *amended* (Sept. 28, 1995) ("The district court properly decided that the value of the information was outweighed by the potential for prejudice created by having the jury learn what penalties the defendants were facing."); *United States v. Rushin*, 844 F.3d 933, 939 (11th Cir. 2016) ("Due to the fact that the sentence range applicable to these witnesses would reveal the sentence range for defendants, the proposed additional examination could invite jury nullification.").

Further, Defendant-petitioner's case presents the question of whether a defendant has the absolute right to confront a cooperating witness with the fact that his cooperation has allowed him to avoid a mandatory life sentence. On this issue, there is a direct conflict between the Eighth Circuit's Decision below and that of the Ninth Circuit in *Larson*, 495 F.3d at 1107 (9th Cir. 2007); *United States v. Wright*, 866 F.3d 899, 907 (8th Cir. 2017) ("Thus, the Ninth Circuit seems to have adopted a *per se* rule that prohibits district courts from ever limiting cross-examination regarding the fact that a witness faces a potential mandatory life sentence.").

III. FACTS OF THIS CASE ARE PARTICULARLY SUITABLE FOR REVIEW BY THIS COURT.

The Brief in Opposition argues that because trial counsel asked the cooperating witness about his mandatory minimum sentence in the context of his prior conviction, the case is unsuitable for review. This argument fails. The jury was informed on direct examination that the cooperating witness had a previous conviction. Trial Tr. at 1044. At the time trial counsel attempted to ask the cooperating witness about the mandatory life sentence he faced prior to cooperation, the defendant's own prior conviction had not yet been admitted into evidence. Furthermore, it is unclear how mentioning the cooperator's prior conviction would make it easier for the jury to infer the defendant's likely sentence. The defendants were charged in the same conspiracy. Under the government's theory, the

Defendant-petitioner had the leadership position in that conspiracy. If the jury were not told that the cooperating witness had a previous conviction, the fact that he was facing a mandatory life sentence in the absence of cooperation would have provided the jury with equally strong reason to infer that defendant-petitioner, his superior, faced the same sentence. Counsel's preliminary questions regarding the prior conviction made no appreciable difference.

More importantly, contrary to the argument in the Brief in Opposition, the district court's comments in this case provide this Court with a uniquely clear vehicle through which to explicitly determine whether a defendant's right to confront a witness with the mandatory life sentence he faced without cooperation overcomes the government's interest in preventing the jury from inferring the penalty faced by the defendant and the speculative possibility of nullification. The district court indicated that it would have allowed the question but for the fact it referenced the cooperator's prior conviction. Trial Tr. at 1240. The district court's express concern was preventing the jury from inferring the defendant's possible sentence. *Id*. The district court was, therefore, directly and explicitly balancing the defendant's right to confrontation regarding the mandatory life sentence the cooperator faced absent cooperation against the government's interest in preventing the jury from inferring the defendant's punishment. In the absence of this concern, the district court indicated that it would have allowed the question. The district court was not concerned with the "harassment,

prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant" that *Van Arsdall* allows courts to consider when determining the appropriate scope and form of cross-examination. *Van Arsdall*, 475 U.S. at 679. The district court's explicitly-stated concern about the jury inferring the penalty faced by the defendant, which was decisive on the ruling to limit cross-examination, provides an unambiguous opportunity for this Court to decide, once and for all, whether a defendant's right to cross-examine on a mandatory minimum life sentence faced by a cooperator can ever be outweighed by the government's interest in preventing the jury from inferring the penalty faced by a defendant and preventing the speculative possibility of nullification.

IV. RESTRICTION ON CROSS-EXAMINATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The Brief in Opposition argues that the error in this case is harmless and therefore this Court should not grant review. BIO at 16-17. Because the Eighth Circuit found no error, they did not reach the question of harmlessness. A violation of the Confrontation Clause is subject to harmless error review. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 673 (1986).

Defendant-petitioner vehemently contends that the error was not harmless. The Defendant-petitioner argued that the heroin that led to various overdoses was not sold in furtherance of or as part of the charged conspiracy. The customer witnesses cited by the Brief in Opposition were not able to provide any real insight into what, if any, kind of agreement existed between Anderson and Defendant-petitioner. The only witness who was able to provide such information was Anderson, the cooperating witness at issue in this petition. If the full damaging potential of the error were realized, Anderson's testimony would have to be disregarded. If that happened, there is no way to find harmlessness beyond a reasonable doubt.

More importantly, this Court's case law is replete with instances where a case is remanded for a consideration of harmlessness. *See, e.g.*, *Hurst v. Fla.*, ___ U.S. ___, 136 S. Ct. 616, 624 (2016) ("This Court normally leaves it to state courts to consider whether an error is harmless. . . ."); *Van Arsdall*, 475 U.S. at 684; *Kingsley v. Hendrickson*, ___ U.S. ___, 135 S. Ct. 2466, 2477 (2015); *McFadden v. United States*, ___ U.S. ___, 135 S. Ct. 2298, 2307 (2015); *Maslenjak v. United States*, ___ U.S. ___, 137 S. Ct. 1918, 1922 (2017). That is appropriate in this case.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Certiorari, the petition should be granted.

Respectfully submitted,

April 17, 2018

BEAU B. BRINDLEY
LAW OFFICES OF BEAU B. BRINDLEY
53 West Jackson Blvd., Suite 1410
Chicago, IL 60604
Telephone: (312) 765-8878
bbrindley@brindleylaw.com
Counsel for Petitioner