No.

IN THE
SUPREME COURT OF THE UNITED STATES

OTIS HUNTER and DESHAWN EVANS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment Confrontation Clause is violated when a court bars a defendant from eliciting the mandatory minimum sentence a prosecution witness avoided by cooperating with the government, based solely on a generalized fear that jurors will infer the defendant's potential sentence, disregard the court's instruction not to consider punishment, and nullify--that is, acquit despite proof beyond a reasonable doubt.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were petitioners Otis Hunter and Deshawn Evans and respondent United States of America.

CORPORATE DISCLOSURE STATEMENT

No corporation was a party to the proceedings in the district court or the court of appeals.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Dominque Rollins, Case No. 17-CR-29 (E.D. Wis.) (judgment entered March 29, 2018).

United States v. Kelly Scott, Case No. 17-CR-29 (E.D. Wis.) (judgment entered March or April 2018).

United States v. Anthony Lindsey, Case No. 17-CR-29 (E.D. Wis.) (judgment entered April 6, 2018).

United States v. Otis Hunter, Case No. 17-CR-29 (E.D. Wis.) (judgment entered April 27, 2018).

United States v. Deshawn Evans, Case No. 17-CR-29 (E.D. Wis.) (judgment entered April 27, 2018).

United States v. Otis Hunter and Deshawn Evans, Nos. 18-2013, 18-2044 (7th Cir.) (decided August 5, 2019; rehearing denied September 18, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Otis Hunter and Deshawn Evans petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1-22) is reported at 932 F.3d 610. The district court's oral ruling granting the government's motion to limit cross-examination (App. 25) is unreported.[1]

JURISDICTION

The court of appeals rendered its decision on August 5, 2019 (App. 1) and denied a timely petition for rehearing on September 18, 2019 (App. 27). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Confrontation Clause of the Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

INTRODUCTION

In *United States v. Trent*, 863 F.3d 699 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2025 (2018), the Seventh Circuit authorized district courts to bar cross-

[1] The appendix to this petition is cited as "App." The trial transcript is cited as "Tr.," and pleadings and orders are cited as "R." followed by the district court docket number.

examination about the specifics of mandatory minimum sentences that cooperating co-defendants avoid through deals with the prosecution. Under the *Trent* 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 25-year, consecutive, mandatory minimum sentence. *Trent* permits this restriction on the defendant's Sixth Amendment right of confrontation based on the fear that jurors will infer the defendant's potential sentence from the sentence the witness avoided and will be so troubled that they will vote to acquit even though they believe the evidence proves the defendant guilty beyond a reasonable doubt. In other words, *Trent* rests on the fear that jurors will nullify if they learn how much prison time the defendant faces. The court of appeals in this case followed *Trent* and affirmed the district court's order barring petitioners from eliciting the specifics of the benefits that three cooperating prosecution witnesses had obtained through their deals with the government.

Trent suffers from profound flaws. It rests on assumptions about juror behavior that lack any empirical support. It ignores the presumption that jurors follow the district court's instructions, including the instruction--given in this and virtually every other criminal case--that they are not to consider potential punishment in reaching their verdict. And it assigns far too little weight to the

impeachment value of evidence concerning the specific mandatory minimum sentences that cooperating witnesses avoid.

In addition to these deficiencies, *Trent* and similar decisions from the First, Fourth, Eighth, and Eleventh Circuits[2] conflict with decisions from the Third and Ninth Circuits. *See United States v. Larson*, 495 F.3d 1094, 1105-07 (9th Cir. 2007) (en banc); *United States v. Chandler*, 326 F.3d 210, 222 (3d Cir. 2003). That conflict underscores the need for review by this Court.

STATEMENT OF THE CASE

Petitioners Hunter and Evans were charged with a series of offenses, including Hobbs Act robbery or attempted robbery, carjacking, and brandishing a firearm. The jury found them guilty. The district court sentenced Hunter to 107 years in prison and Evans to 32 years in prison. R. 178, 180.[3]

The three critical witnesses against petitioners--Kelly Scott, Dominique Rollins, and Anthony Lindsey--were codefendants who had made deals with the prosecution. Scott's deal saved him a mandatory minimum, consecutive 25 years in prison. Rollins' deal saved him a mandatory minimum, consecutive seven years in

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[2] *See, e.g., United States v. Wright*, 866 F.3d 899, 905-08 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2026 (2018); *United States v. Rushin*, 844 F.3d 933, 938-40 (11th Cir. 2016); *United States v. Cropp*, 127 F.3d 354, 360 (4th Cir. 1997); *United States v. Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995).

[3] The district court had jurisdiction under 18 U.S.C. § 3231.

prison and likely more. Lindsey's deal likewise saved him at least a mandatory minimum, consecutive seven years in prison.

Shortly before trial, the government moved to bar the defense from eliciting on cross-examination the mandatory minimum sentences the cooperating witnesses had faced before making their deals. R. 114. Citing *Trent*, the government argued that evidence of the witnesses' potential sentences would "confuse or mislead the [jurors] in their true task: deciding defendants' guilt or innocence." R. 114 at 2 (quotation omitted). Instead, the government argued, the defense should be permitted to elicit only that the witnesses faced "substantial" mandatory minimums.

The defense opposed the government motion. R. 118. It argued that the proposed restriction on cross-examination would violate the Sixth Amendment right to confront and cross-examine prosecution witnesses; that the evidence concerning mandatory minimum sentences "is . . . necessary for a jury to make an accurate appraisal of the co-defendants' motives and biases"; that the government's approach would invite juror speculation about the meaning of "substantial"; and that the government's purported concern that jurors informed of the witnesses' potential sentences might engage in nullification ignored the presumption that jurors follow instructions, including the instruction that jurors may not consider potential punishment in reaching their verdict. R. 118 at 2-4.

The district court granted the government's motion. App. 25. Invoking *Trent*, the court ruled that "these defendants are entitled to explore the fact that these cooperating defendants face, quote, substantial, close quote, penalties; and we are not going to get into the minutia of how many years and what's the impact of certain qualifiers that would otherwise excuse the applicability of those mandatory minimum penalties." *Id*. The district court did not mention either the instruction that jurors must not consider punishment in reaching their verdict or the presumption that the jurors would follow that instruction.

On cross-examination, Scott admitted that his freedom is more important to him than money. Tr. 286. Defense counsel elicited that, as part of his deal with the government, Scott pled guilty to two robberies and one firearm count under 18 U.S.C. § 924(c), but he did not have to plead to a conspiracy count and to a second firearm count. Counsel brought out that both firearm counts had "substantial" consecutive time and that, given the substantial sentence Scott was facing, he might "never see the light of day." Tr. 313-15. Under the district court's ruling, counsel could not elicit that the second brandishing count would have carried a 25-year mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(C)(i).[4]

[4] It appears from the district court docket sheet available on PACER that Scott was sentenced in March or April 2018, but the public docket sheet does not reflect what sentence he received.

On cross-examination, Rollins acknowledged that he had pled guilty to robbery and brandishing a firearm and that, under his plea agreement, the government would recommend a total sentence of no more than nine years. Tr. 461-62. He admitted that avoiding prison time was more important to him than money. Tr. 466. But under the district court's ruling, defense counsel could not elicit that, absent his agreement with the government, Rollins would have faced a mandatory minimum seven-year sentence under § 924(c), which would be consecutive to the sentence he received for the robbery.[5]

Lindsey acknowledged on direct that he had been charged with conspiracy, robbery, and brandishing a firearm and had pled guilty only to the robbery.[6] At the prosecutor's prompting, Lindsey claimed that he was cooperating because his dying grandmother had told him to tell the truth. Tr. 645-46.

On cross-examination, the defense elicited that the brandishing count involved substantial prison time that has to be consecutive; that Lindsey knew he would do a lot of prison time if he went down on brandishing; and that Lindsey

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[5] Rollins was sentenced after petitioners' trial to 60 months incarceration. R. 150.

[6] Lindsey initially testified on cross that the conspiracy and brandishing counts were dismissed under his plea agreement. After a government objection, the district court instructed the jury that those counts had not been dismissed, and Lindsey then claimed not to know whether they would be. Tr. 693-95. Lindsey was sentenced a few months after petitioners' trial to 42 months incarceration. The conspiracy and brandishing counts were dismissed. R. 158.

would do even more substantial time if he had a second brandishing count. Tr. 692-93. The district court's ruling barred the defense from showing that Lindsey had avoided a seven-year mandatory minimum sentence on the brandishing count.

On appeal, petitioners argued that the district court's restriction on their cross of the cooperators violated their Sixth Amendment right to confront the witnesses against them. Petitioners contended that *Trent* was wrongly decided because it understated the importance of presenting to the jury the extraordinary benefits that the cooperators had obtained in return for their testimony, and it overlooked the fundamental presumption that jurors follow the district court's instructions, including the instruction that jurors must not consider potential punishment in reaching their verdict. Petitioners pointed out as well that *Trent* conflicts with the decisions of at least two other circuits.

The court of appeals' panel, bound by *Trent*, rejected petitioners' arguments. It succinctly described the *Trent* rationale for restricting cross-examination about cooperators' benefits:

> This limitation is sometimes necessary when criminal defendants and government witnesses face the same criminal charges. We explained [in *Trent*] that if the jury learned about the precise sentence terms that government witnesses faced, then it could deduce or infer the sentences facing the similarly charged defendants. Consequently, the reality of a serious sentence could prejudice the jury and cause it to acquit the defendants of crimes they actually committed.

App. 15 (citations to *Trent* omitted). In other words, *Trent* (and the court of appeals' opinion) rests on the fear that if jurors can infer the potential punishment a defendant faces, they will take that punishment into account in reaching their verdict.

The court of appeals concluded that the restriction on cross-examining the cooperators about the benefits they received "did not significantly impact Hunter and Evans' ability to cross-examine adverse witnesses." App. 16. It ignored the district court's instruction on punishment and the presumption that the jurors would follow it. And it sought to distinguish cases from other circuits that have rejected restrictions on cross-examining cooperating witnesses about the specific benefits they expect to receive from deals with the prosecution. App. 15-16.

Petitioners filed a timely petition for rehearing en banc, asking the full Seventh Circuit to overrule *Trent*. The court of appeals denied the petition without comment. App. 27.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ (1) to correct the lower courts' widespread misapplication of this Court's decisions interpreting the Sixth Amendment Confrontation Clause and recognizing the presumption that jurors follow the district court's instructions, and (2) to resolve the deep and entrenched conflict in the circuits over the limits that can be placed on a defendant's right to elicit the specific benefits a government witness has obtained from the prosecution.

I. THE *TRENT* RULE CONFLICTS WITH THIS COURT'S DECISIONS IN *VAN ARSDALL* AND *SHANNON*.

Trent and its progeny conflict with this Court's decisions in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and other cases emphasizing the importance of the Sixth Amendment right to cross-examine a prosecution witness for bias. *Trent* also ignores the "almost invariable assumption of the law that jurors follow their instructions," including the instruction not to consider punishment in reaching their verdict. *Shannon v. United States*, 512 U.S. 573, 585 (1994) (quotation omitted).

A. *Trent* Gives 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 v. Alaska*, 415 U.S. 308, 316 (1974). 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," *Davis*, 415 U.S. 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 *Trent* rule violates these principles.

As this case demonstrates, *Trent* significantly undervalues the power of evidence concerning the specific benefits the cooperators obtained in exposing their bias and motive to favor the prosecution. For example, the jury knew that Scott avoided "substantial" consecutive 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.[7] If the jurors had

[7] 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,

known that Scott's deal had spared him at least a potential *25-year* mandatory minimum consecutive term, it certainly would have "received a significantly different impression of his 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 [Scott's] acknowledgment that he had benefitted from his cooperation made that acknowledgment insufficient 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).

The same analysis applies to cooperators Rollins and Lindsey. The jury knew that the government had agreed to recommend that Rollins receive no more than nine years in prison and that he had pled guilty to robbery and brandishing a firearm. Tr. 461-62. But it did not know that Rollins--who admitted that evading prison time was more important to him than money, Tr. 466--had avoided a seven-year mandatory minimum that would have run consecutive to his robbery sentence. Nor did the jury have any idea that, thanks to Rollins' cooperation, he could receive a sentence as low as the 60 months the district court gave him a few months after petitioners' trial. R. 150.

1296 (E.D.N.Y. 1992) (one year in community treatment center a "substantial period of incarceration").

Similarly, although the jury knew that Lindsey's deal--under which he pled guilty to a robbery count but did not have to plead to the § 924(c) count--had saved him "substantial" consecutive time, it did not know--because the defense was barred from eliciting--that his cooperation with the government had spared him a mandatory minimum seven years in prison. This evidence, like the similar evidence concerning Scott and Rollins, "would have underscored dramatically their interest in satisfying the government's expectations of their testimony." *Chandler*, 326 F.3d at 222.

The court of appeals concluded that the *Trent* rule allowed sufficient cross-examination in this case because defense counsel elicited from "witnesses" that "without cooperating, they would have 'never seen the light of day' and would have 'died in prison.'" App. 16. In fact, the "die in prison" phrase does not come from testimony, but from defense counsel's closing argument, R. 216:876, which was not evidence. The actual testimony, elicited only from Scott (not from Rollins or Lindsey) over vehement objection by the government and after the district court cautioned defense counsel that he was "skating on mighty thin ice," R. 213:314-15, was as follows:

Q The second 924(c) has to be more than the first one, correct?

A Yes.

Q And it also has to be consecutive, correct?

A Yes.

Q And, correct me if I'm wrong, but that was enough of a substantial prison sentence you were facing. You might never see the light of day, correct?

A Yes.

R. 213:315. Scott's one-word acknowledgment that he "might never see the light of day" if he had incurred a second 924(c) conviction is a far cry from telling the jury that he would have received a mandatory, consecutive 25-year prison term if he had not made his deal with the government. "Might never see the light of day," like "substantial," is inherently ambiguous. Twenty-five years in prison is about as concrete as it gets. The jury needed the truth to evaluate Scott's bias and credibility, not some veiled facsimile of the truth.

B. The *Trent* Restriction on Cross-Examination Has No Factual Support and Ignores the *Shannon* Presumption That Jurors Follow the District Court's Instruction Not to Consider Punishment.

This much is beyond dispute, even under *Trent*: the evidence of the cooperators' specific benefits is directly relevant to their 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 in *Trent* and applied by the court of appeals in this case.

Trent restricts 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. 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 *Trent* rule. 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 *Trent* has a further, fatal flaw. Its linchpin--a generalized fear that jurors will nullify if they know the punishment the defendant faces--overlooks one of the

fundamental principles 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 the defendants' potential punishment: "The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of each defendant." R.129 at 25. To buttress this clear and unequivocal directive, the court instructed the jurors that they "ha[d] no right to disregard . . . any one of the instructions, or to question the wisdom of any rule of law," R. 129 at 2; that they "must not be influenced by . . . sympathy," *id.*; and that they "[were] to decide this case solely on the basis of the evidence received during the trial," R. 129 at 3.[8]

[8] These instructions come directly from the Seventh 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

These instructions made it perfectly clear that the jurors could not under any circumstances consider defendants' potential punishment in reaching their verdict. No juror could have been "confused" or "misled" about the role the defendants' potential punishment played in the jury's deliberative process; 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; emphasis added). 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 instructions as given." *United States v. Linwood*, 142 F.3d 418, 426 (7th Cir. 1998) (quotation omitted). Nor did the district court or the court of appeals cite any such evidence. The district court's instructions, and the presumption 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.

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a limiting instruction directing the jurors to consider the witness' potential punishment only in evaluating his credibility and for no other purpose.

Shannon (which the court of appeals and 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.

Shannon, 512 U.S. at 584-85 (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: *Trent* and similar decisions from other courts 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).

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE A CLEAR AND DEEPLY ENTRENCHED CONFLICT IN THE CIRCUITS.

The Court should grant the writ for a further reason: to resolve the clear conflict between *Trent* and similar cases from the First, Fourth, Eighth, and Eleventh Circuits on one hand[9] and cases from the Third and Ninth Circuits on the other.

In *Chandler*, the Third Circuit found a Sixth Amendment violation where the jury learned that a cooperating witness "pled guilty to an offense carrying a sentence of between 12 and 18 months, that he could have been charged with a greater offense, and that he received only one month of house arrest, plus probation," but the defense

[9] *See supra* note 2 (citing cases that have adopted the same approach as *Trent*).

was barred from eliciting that, absent cooperation, he would have faced an advisory Guidelines sentence of more than eight years in prison. 326 F.3d at 222. The result and reasoning in *Chandler* cannot be squared with *Trent*.

The same goes for *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc). In *Larson*, the Ninth Circuit held that restrictions on the defendant's ability to expose the "extent" and "magnitude" of the mandatory minimum life sentence a cooperator had avoided violated the defendant's Sixth Amendment right of confrontation. *Id*. at 1105; *see also United States v. Cooks*, 52 F.3d 101, 103-04 (5th Cir. 1995) (Sixth Amendment violation where the district court declined to allow questioning on the potential maximum penalties the cooperating witness faced on charges in two states); *State v. Gracely*, 731 S.E.2d 880, 885-86 (S.C. 2012) (reversing conviction where the defendant was barred from eliciting the specific mandatory minimum sentence that the cooperator had avoided through his deal).

These decisions stand in irreconcilable conflict with *Trent* and similar decisions. The Court should grant the writ to ensure that defendants tried in the First, Fourth, Seventh, Eighth, and Eleventh Circuits have the same ability to expose the bias of cooperating prosecution witnesses as defendants tried in the Third and Ninth Circuits.

III. THIS IS AN IDEAL VEHICLE FOR DECIDING WHETHER THE *TRENT* RESTRICTION ON CROSS-EXAMINATION VIOLATES THE SIXTH AMENDMENT.

This case is an ideal vehicle to decide whether the *Trent* restriction on cross-examination violates the Sixth Amendment Confrontation Clause. The case against petitioners rested heavily on the three cooperators. Petitioners' defense turned almost entirely on their ability to challenge the cooperators' credibility. The Sixth Amendment issue was litigated and squarely addressed both in the district court and on appeal. In their petition for rehearing, petitioners urged the court of appeals to overrule *Trent* on the grounds addressed above. The split in the circuits on the issue is deep and entrenched; it is unlikely to be resolved through further examination in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 18-2013 & 18-2044

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OTIS HUNTER and
DESHAWN EVANS,

Defendants-Appellants.

Appeals from the United States District Court for the
Eastern District of Wisconsin.
Nos. 17-CR-29-2 and 17-CR-29-4 — **J.P. Stadtmueller**, *Judge*.

ARGUED APRIL 5, 2019 — DECIDED AUGUST 5, 2019

Before FLAUM, KANNE, and SCUDDER, *Circuit Judges*.

KANNE, *Circuit Judge*. Police arrested five men involved in a string of Milwaukee armed robberies in late 2016. Three of the defendants cooperated with the government and pled guilty. The two remaining defendants, Otis Hunter and Deshawn Evans, proceeded to trial where a jury convicted them. Through counsel, the pair challenges the district court's handling of jury selection and denial of their *Batson* challenge.

They also challenge our circuit precedent and argue that the district court violated the Sixth Amendment's Confrontation Clause when it prevented them from cross-examining government witnesses about the specific prison terms they avoided through their cooperation. After obtaining authorization from the court, Hunter made additional, *pro se* arguments challenging how the trial court handled witness testimony and whether the government provided sufficient evidence to support his conviction. All challenges are rejected and we affirm.

I. BACKGROUND

Authorities arrested five men in connection with a series of crimes in late 2016: Dominique Rollins, Otis Hunter, Kelly Scott, Deshawn Evans, and Anthony Lindsey. Rollins, Scott, and Lindsey pled guilty and testified for the government, but Hunter and Evans proceeded to trial.

The government connected the defendants to the following crimes. First, on November 17, 2016, Hunter, Rollins, and Scott committed an armed robbery of a Roman's Food Market. They held up an employee, made him open the cash register, struck him on the head with a pistol, and then took the money and a large quantity of Newport cigarettes. Surveillance footage captured the robbery. Rollins and Scott testified at trial that they robbed the store with Hunter. They also narrated the surveillance footage and identified Hunter and his pistol. At the time of the robberies, Doris Brown—Lindsey's mother and Scott's fiancée—lived at a house on 15th Place where the defendants regularly congregated. She later testified that she saw Hunter with many packs of Newport cigarettes. She also viewed the surveillance footage and identified the robbers.

Three days later, on November 20, two men committed an armed carjacking of a food delivery driver outside of Aurora Sinai Hospital. The robbers struck the driver on the head with a pistol, took his phone, car keys, and wallet, and fled in his black Cadillac CTS. Surveillance footage captured the robbery. Scott and Lindsey viewed the footage at trial and identified the pair as Hunter and Evans.

Then on November 22, three men with stocking-covered faces robbed a George Webb restaurant. Two of the robbers brandished pistols. They took $70 in cash and some receipts from the register and held up employees. The three fled the scene in a black Cadillac. As before, surveillance footage captured the robbery. Scott and Lindsey confessed to robbing the restaurant with Hunter and identified Hunter and Scott at trial as the pair who brandished firearms.

A day after the George Webb robbery, on November 23, police found the black Cadillac CTS parked near the home on 15th Place where the defendants met. Inside the car, they found receipts from the George Webb restaurant and a nylon stocking. DNA recovered from the stocking linked it to defendant Anthony Lindsey.

On November 25, two men attempted to rob a Walgreens pharmacy at gunpoint. One of the two men brandished a pistol and pointed it at the cashier. When the cashier failed to open the register, the robber struck him on the head with the pistol, knocking him to the ground. The robbers also failed to open the register. They instead attempted to rob the customers as a consolation but recovered no valuables. Surveillance footage captured the attempted robbery. Lindsey, Scott, and Doris Brown viewed the footage at trial and identified the rob-

bers as defendants Hunter and Evans, with Evans brandishing the firearm and striking the cashier. Brown also testified that she overheard Hunter discussing the Walgreen's robbery at her house.

On December 4, two men carjacked the owner of a Ford Focus. They cornered the victim against the side of the car, one pressed a firearm into the victim's stomach, and they robbed him, taking his credit cards, phone, and wallet before making their escape in his vehicle. About 30 minutes after the carjacking, the robbers used the victim's credit cards at a Foot Locker store. The Foot Locker's surveillance footage from the time of the purchase showed Hunter there, accompanied by a minor. The victim identified the pair as the carjackers through photographs and later identified Hunter in court as the carjacker who pressed the pistol into his stomach. Brown, Scott, Lindsey, and Rollins each viewed the surveillance footage and identified Hunter.

On December 5, the stolen Ford Focus turned up parked behind the house on 15th Place. Police arrested Evans, the minor, and Anthony Lindsey in the car. Hunter—on-the-run—was arrested five days later in Ohio. Hunter's vehicle contained new Foot Locker merchandise and multiple Foot Locker receipts dated December 4, which reflected purchases made with the credit cards taken during the Ford Focus carjacking.

The grand jury returned an 11-count indictment against the five men. Relevant to this appeal, Hunter was charged with conspiracy (18 U.S.C. § 371), robbery of the Roman's Food Market under the Hobbs Act (18 U.S.C. § 1951), carjacking the Cadillac (18 U.S.C. § 2119), robbery of the George Webb restaurant under the Hobbs Act, attempted robbery of

the Walgreens under the Hobbs Act, and carjacking the Ford Focus. Hunter was also charged with brandishing a firearm during each of these crimes in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Evans faced charges for conspiracy, carjacking the Cadillac, and the attempted robbery at Walgreens. He was also charged with brandishing a firearm during these crimes.

Hunter and Evans—who are both African Americans—proceeded to a jury trial. As a preface to jury selection, the court questioned all potential jurors about their experiences testifying under oath in the judicial system and the courts. However, multiple jurors failed to disclose relevant information related to this line of questioning. During jury selection, the government struck several jurors for cause and used its peremptory strikes. The entire jury pool included just three potential African American jurors. The initial *voir dire* included only two. One of these two, Juror 12, was eventually empaneled.

The government questioned the other potential African American juror, Juror 7, about an allegedly racially-charged Facebook post on her profile. The government also learned that Juror 7's family had significant contacts with the criminal justice system and she personally had other abject experiences with the courts. Specifically, Juror 7's son has been adjudicated delinquent on multiple occasions, and her ex-husband was occasionally imprisoned following numerous convictions. During one of her ex-husband's arrests, authorities seized her firearm, which she later petitioned a court to recover. Juror 7 had also been through multiple eviction proceedings, a bankruptcy, and received adverse judgments for failing to pay utility bills. Altogether, during the first round

of *voir dire* questioning, Juror 7 never disclosed a number of her contacts with the courts and criminal justice system.

The government moved to exclude Juror 7 for cause, but the district court denied the motion. Before defense counsel even raised an objection, the district court specifically warned the government that if it moved to strike Juror 7, the court would conduct a *Batson* hearing. The government nevertheless used one of its peremptory strikes against Juror 7. Before the district court swore in the selected panel, the defendants raised a *Batson* challenge.

During the *Batson* hearing, the government explained that it struck Juror 7 due to her numerous abject engagements with law enforcement and the courts. In response, defense counsel laid out examples that it argued demonstrated the government's disparate treatment of similarly-situated white jurors. It pointed out that the government never attempted to strike three other jurors who also had similar judicial encounters. Moreover, the defense pointed out that Juror 35, a white male, had been recently charged with firearm-related offenses but found not guilty by reason of temporary insanity. Additionally, the defense suggested that the government's questions about Juror 7's Facebook posts demonstrated the impermissible, racial motivation for the strike. For its part, the government explained that it was not previously aware of Juror 35's identity or background and directed the court's attention to a list of potential jurors that the court gave to the parties a week earlier. That list did not include Juror 35. The court determined that it needed to investigate the matter. It ordered the parties to submit same-day briefing on the *Batson* challenge and adjourned for the day.

On the second day of trial, the district court determined that the clerk's office failed to include information about Juror 35 and several others in the materials it distributed to the parties.[1] The court allowed the parties to conduct supplemental *voir dire* for a few jurors, beginning with Juror 5, whom defense counsel identified during its *Batson* challenge as an example of the government's disparate treatment. On further questioning, despite initially claiming to have never been involved with the courts, Juror 5 admitted that he experienced a foreclosure and a bankruptcy years earlier but claimed he did not understand the court's earlier questions about previous court experience.

The parties then questioned Juror 35, a white man. The additional questions revealed that Juror 35 suffered from PTSD and was found not guilty by reason of a temporary mental deficiency to three counts related to an incident involving his discharging a firearm. Juror 35 also disclosed a divorce and a bankruptcy. The government then moved to strike Juror 35 for cause.

Next, the court allowed the government to conduct supplemental *voir dire* questioning of Juror 36, a white woman. The government's questioning revealed that Juror 36's brother had been convicted of a sexual assault of a minor more than 30 years earlier. She too had been through a divorce and a bankruptcy years earlier.

After the parties finished supplemental *voir dire* of Juror 36, the bailiff informed the court that Juror 35 was in the restroom, vomiting. The government renewed its motion to

[1] The record does not clearly identify the other affected jurors.

strike Juror 35 for cause, which the court granted over Hunter's counsel's objection.

To remedy the confusion regarding missing juror information, the district court then started jury selection over from the same venire. The district court asked all potential jurors, again, about their involvement with the court systems, giving explicit examples of different types of relevant proceedings where they might have been sworn and given testimony. Multiple jurors then acknowledged that they should have responded affirmatively to a similar question the day before. The parties selected a new panel and the government renewed its peremptory strike against Juror 7. However, this time it also used a peremptory strike on Juror 36.

The defense again objected under *Batson*, arguing that the government treated Juror 7 differently based on her race. The government explained that it struck all jurors who had negative experiences with the criminal justice system. The defense replied that the government used its strikes as a pretext for excluding Juror 7. The defense also complained that the court's process of going back and re-examining the other potential jurors enabled the government to make a *post-hoc* justification of its impermissible, race-based strike.

The district court concluded the defendants failed to establish that the government struck Juror 7 on account of her race. The court noted that, altogether, the government executed peremptory strikes on six jurors: five white jurors and Juror 7. Similarly, the court recognized that the government articulated a legitimate, race-neutral reason for striking Juror 7, and that the government struck other similarly-situated white jurors. The district court then swore in the jury, which included one African American juror, Juror 12.

As previously mentioned, three of the original defendants pled guilty and testified for the government. During their testimony, defense counsel sought to impeach these witnesses on the basis that they each benefitted from reduced sentences by virtue of their cooperation with the government. However, at the government's objection, the district court limited this cross-examination. Because each of the witnesses originally faced similar charges to Hunter and Evans, the government worried jurors might deduce the potential imprisonment terms that Hunter and Evans faced. The district court permitted cross-examination about the sentence reduction, but excluded questioning about the specific terms of their possible sentences.

The government also called Steven Strasser, an investigator at the Milwaukee County District Attorney's Office, to testify at trial. The government never identified Strasser as either an expert or a summary witness ahead of trial, but Strasser began his testimony drawing on his professional experiences and his general observations from reviewing hundreds of robberies. After Strasser began to draw comparisons between the surveillance videos from the different robberies to show consistent patterns, the defense objected. The court found that the government should have designated Strasser as a summary witness and, because it failed to do so, Strasser's testimony should be limited. The court also determined that the testimony was cumulative because the evidence the government expected him to testify to spoke for itself. The district court limited Strasser's testimony to issues of his own involvement in the case. Neither party asked for a curative instruction to the jury for the testimony that Strasser gave before the defendants' objection. The district court provided no curative or limiting instruction.

The jury convicted Hunter and Evans. The district court sentenced them to their mandatory minimum sentences plus one day: 107 years for Hunter and 32 years for Evans.

II. Analysis

On appeal, Hunter and Evans share two main arguments. First, the pair argues that the district court erred by rejecting their *Batson* challenge. Second, they argue that the district court improperly limited cross-examination of the government's cooperating witnesses about reductions in their potential sentences.

Despite receiving appointed counsel, Hunter also sought and received permission from the court to raise additional arguments, *pro se*. He objects, *pro se*, along three lines. First, he maintains that the district court should have excluded some witness testimony as hearsay or unduly prejudicial. Second, Hunter claims that the district court erred by failing to provide a curative instruction advising the jury to ignore a portion of Strasser's testimony. Lastly, Hunter believes that the government proffered insufficient evidence to prove the interstate-commerce elements on two of the business robberies and the *mens rea* elements of carjacking.

A. The District Court Committed No Error By Rejecting the Batson Challenge

Hunter and Evans argue that the district court failed to conduct an adequate *Batson* inquiry and also improperly accepted the government's "implausible" race-neutral rationale for striking Juror 7. We review the district court's finding on a *Batson* challenge for clear error. *United States v. Carter*, 111 F.3d 509, 512 (7th Cir. 1997). "[T]o reverse we must have a firm and definite conviction that a mistake was made." *United*

States v. Taylor, 636 F.3d 901, 905 (7th Cir. 2011) (quotation omitted). The Supreme Court has described our standard of review as "highly deferential." See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019).

In *Batson*, the Supreme Court determined that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

There are three steps to a *Batson* challenge. First, the defendant makes a *prima facie* showing that the prosecution's peremptory strikes were discriminatory. *Id*. at 93-94. Second, the government must tender a nonracial reason for the use of its peremptory strike. *Id*. Lastly, the district court must decide whether the defendant established purposeful discrimination. *Id*. Where the prosecution has "offered a race-neutral explanation for the peremptory challenge, the test is compressed down to the ultimate question of intentional discrimination; the preliminary question of a *prima facie* case becomes moot." *Carter*, 111 F.3d at 512 n.1 (citing *Hernandez v. New York*, 500 U.S. 352, 359 (1991)).

Fundamentally, Hunter and Evans seem to believe that because the court restarted jury selection from the same panel, the government had time to come up with an ostensibly legitimate excuse for striking Juror 7. They charge that the government clearly demonstrated its impermissible racial motivation by failing to investigate and strike similarly-situated jurors. Consequently, they believe they met their *Batson* burden with the first panel, but the government was able to hide its discriminatory purpose by striking other potential jurors on

similar grounds in the second, "redo" panel. The "redo" panel, therefore, deprived them of a valid *Batson* challenge and prejudiced them.

Viewing the whole record, we believe the district court ultimately committed no clear error. But two arguments which Hunter and Evans make merit further discussion. First, the government did not ask all other potential jurors the same number of probing questions about relationships with the courts or the criminal justice system. However, it appears that many of those other jurors (like Juror 7) either failed to disclose all the details they should have or did not understand this line of questioning. The district court attempted to correct the jury issues on the "redo" panel by clarifying the question for the potential jurors. When the government learned of others' contacts with the courts, it struck those jurors, too.

Second, the government initially did not strike Juror 35, despite his recent and serious criminal charges. But the clerk's office failed to distribute an updated potential juror list to the parties, so the government had no opportunity to investigate and strike Juror 35, as it did other jurors. This error demonstrates that the government's different treatment of Juror 35 was motivated by ignorance, not race. The district court corrected the error when it afforded the parties an opportunity to conduct additional questioning.

The record reflects the district court's *Batson* concerns. The court advised the government that the parties would conduct a full *Batson* hearing if the government used a peremptory strike against Juror 7. The court also provided a long explanation to the parties as to why it denied the defendants' *Batson* challenge. The defendants urged that the court's "redo" al-

lowed the government to cure its pretextual excuse for striking Juror 7 by also striking similarly-situated white jurors. They argue that this effectively allowed the government to expand its facially race-neutral rationale, conflicting with *Taylor*. That case involved multiple remands from our court to the district court for further exploration of the government's proffered reason for striking an African American juror. However, when the district court conducted another *Batson* hearing to supplement the record on remand, "the government took the opportunity to expand on its rationale for striking [the juror], advancing seven new reasons[.]" *Taylor*, 636 F.3d at 904. We held that "[a]ccepting new, unrelated reasons extending well beyond the prosecutor's original justification for striking [a juror] amounts to clear error." *Id*. at 906.

Here, the district court never swore the jury, but instead started selection over after new information came to light. The government's justification for striking Juror 7 remained consistent throughout the whole process. In the wake of a clerical error, the court's v*oir dire* process sought to reveal all necessary juror information to benefit the parties. To ensure a fair trial, the district court had the parties start over in selecting and striking jurors. The district court's restart process allowed the government to apply its rationale more evenly and fairly, but not to expand it. Even if we agree that the district court could have conducted a more perfect jury selection by starting over with a new panel, we do not believe the district court's "redo" in this case constituted clear error. The Supreme Court expressly declined to mandate a procedural approach for handling jury selection after a party raises a *Batson* challenge. *Batson*, 476 U.S. at 99 ("We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges."). *See also id.* at n.24

(noting the variety of jury selection processes employed in American courts). The district court provided a fair procedure for jury selection in this case. *United States v. Mannie*, 509 F.3d 851, 857 (7th Cir. 2007) ("It is axiomatic in our system of justice that an individual is entitled to a fair trial—not a perfect one.").

B. The District Court Properly Limited Defense Counsel's Cross-Examination of Government Witnesses

Hunter and Evans argue that the district court erred by preventing them from cross-examining the government's witnesses about the specific mandatory minimum sentences they avoided by cooperating with the government. They believe the district court's limitation violated the Sixth Amendment's Confrontation Clause.

"Our standard of review when a district court limits the defendant's cross-examination depends on whether the court's limit directly implicates the core values of the Confrontation Clause. If so, we review the limit *de novo*. If not, we review the limit only for abuse of discretion." *United States v. Trent*, 863 F.3d 699, 704 (7th Cir. 2017) (internal quotations omitted).

To advance their argument, Hunter and Evans directly challenge and invite us to overturn our opinion in *United States v. Trent*. We decline their invitation. In *Trent*, we held that limiting cross-examination of government witnesses about specific sentences and the sentencing guideline ranges they faced before and after their cooperation with the government did not violate a defendant's Sixth Amendment rights. 863 F.3d at 706. We explained that to satisfy the Confrontation Clause, it is enough that a defendant can elicit that witnesses

will receive a "substantial" reduction in imprisonment. *Id*. This limitation is sometimes necessary when criminal defendants and government witnesses face the same criminal charges. We explained that if the jury learned about the precise sentence terms that government witnesses faced, then it could deduce or infer the sentences facing the similarly-charged defendants. *Id*. Consequently, the reality of a serious sentence could prejudice the jury and cause it to acquit the defendants of crimes they actually committed. *Id*.

Hunter and Evans claim that *Trent* overstates the risk of prejudice from cross-examination about the mandatory minimum sentences. They argue *Trent* violates the Confrontation Clause and suggest that other circuits disagree with our analysis. To support this claim, Hunter and Evans cite cases from three other circuits. *See United States v. Chandler*, 326 F.3d 210 (3d Cir. 2003); *United States v. Cooks*, 52 F.3d 101 (5th Cir. 1995); *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (*en banc*).

However, *Chandler* and *Cooks* are distinguishable in that neither the Third nor the Fifth Circuits adopted categorical approaches stating that defendants can cross-examine cooperating witnesses on the precise nature of their prison terms. In both cases, the courts determined that the analysis depends on whether the jury has sufficient information "to appraise the bias and motives of the witness." *Cooks*, 52 F.3d at 104; *United States v. Mussare*, 405 F.3d 161, 170 (3d Cir. 2005) ("In *Chandler*, we left unresolved the question of whether the Confrontation Clause entitles a defendant categorically to inquire into the concrete terms of a cooperating witness's agreement with the government, including the sentence that witness may have avoided through his cooperation.") (quotation omitted).

And the Ninth Circuit's *Larson* opinion hinges on the fact that the cooperating witness in that case faced a particularly severe sentence: life imprisonment. *Larson*, 495 F.3d at 1107 ("[A]ny reduction from a mandatory life sentence is of such a significant magnitude that excluding this information denie[s] the jury important information necessary to evaluate [the witness's] credibility."). We do not find the Ninth Circuit's analysis so persuasive as to abandon *Trent*. The Eighth Circuit explicitly rejected *Larson*'s approach. *See United States v. Wright*, 866 F.3d 899, 907 (8th Cir. 2017). And at any rate, none of the government's witnesses in this case faced a sentence of life imprisonment.

Here, the district court directly followed our guidance in *Trent*. The record shows that the defense cross-examined the government's witnesses on the fact that they benefitted from cooperating with the government. Specifically, defense counsel elicited from witnesses that, without cooperating, they would have, "never seen the light of day" and would have "died in prison." The defense's cross-examination exposed enough information for the jury to deduce that the witnesses received a serious benefit from cooperating with the government. *See Trent*, 863 F.3d at 706 ("Because the court allowed Trent to engage in this thorough cross-examination, which readily exposed any of [the witnesses'] biases and incentives to testify adversely to Trent, the court did not offend the core values of the Confrontation Clause."). As in *Trent*, the district court's limitation did not significantly impact Hunter and Evans' ability to cross-examine adverse witnesses.

C. Hunter's Pro Se Arguments Do Not Prevail

Despite Hunter's representation by counsel, we also authorized him to present several arguments in an additional,

pro se brief. "Although there is no Sixth Amendment right to file a *pro se* brief when the appellant is represented by counsel, nothing precludes an appellate court from accepting the *pro se* brief and considering the arguments contained therein for whatever they may be worth." *Hayes v. Hawes*, 921 F.2d 100, 102 (7th Cir. 1990) (*per curiam*). Although sometimes authorized (as here), the filing of *pro se* briefs by a defendant who is represented by counsel is generally unhelpful. We consider Hunter's remaining, *pro se* arguments in turn.

1. The District Court Made Proper Evidentiary Rulings

Hunter, *pro se*, raises challenges to several evidentiary rulings made by the district court. "We review the admission of evidence for an abuse of discretion and 'will reverse an evidentiary ruling only when the record contains no evidence on which the district court rationally could have based its ruling.'" *United States v. Quiroz*, 874 F.3d 562, 569 (7th Cir. 2017) (quoting *United States v. Gorman*, 613 F.3d 711, 717 (7th Cir. 2010)).

First, Hunter believes that the district court should have excluded Brown's testimony because she was a "biased" witness. Earlier we mentioned that Brown's son and fiancé were defendants in the case who pled guilty and agreed to testify against Hunter and Evans. To support this argument, Hunter cites *United States v. Abel*, 469 U.S. 45, 53 (1984). However, *Abel* established that evidence of membership in a prison gang could be introduced to impeach a witness because it was probative of witness bias, not that biased witness testimony could never be admitted. *Id*. Indeed, the Court in *Abel* specifically validated exposing witness bias as an acceptable means of impeachment under the Federal Rules of Evidence. *Id*. at 51. And Hunter's counsel exposed Brown's relationship to two of the

government's cooperating witnesses and her potential bias on cross-examination. We therefore find no error in allowing Brown's testimony.

Second, Hunter challenges another portion of Brown's trial testimony on hearsay grounds. At trial, Brown testified to overhearing Hunter discuss details of the Walgreen's robbery in her kitchen. Over defense counsel's objection, the district court agreed with the government that that the testimony fell into the hearsay exception for a statement by a party opponent. Fed. R. Evid. 801. We agree. The Rule provides that statements made by a party in an individual capacity that are later offered against him are not hearsay. Fed. R. Evid. 801(d)(2)(A). Hunter attempts to rely on *United States v. El-Mezain* for the proposition that "a witness's testimony must be based on personal knowledge." 664 F.3d 467, 495 (5th Cir. 2011). He claims that because Brown testified that she learned of the Walgreens robbery from the news, she did not base her testimony about his involvement in the robbery on personal knowledge. Hunter's argument misses the point. Brown's testimony centered on her personal knowledge of what she heard Hunter say, and those things are admissible as non-hearsay statements by a party opponent. *Jordan v. Binns*, 712 F.3d 1123, 1128–29 (7th Cir. 2013) ("There are only two requirements for admissibility under FRE 801(d)(2)(A): a statement was made by a party, and the statement was offered against that party.").

Hunter similarly objects to testimony given by Kelly Scott, one of the co-defendants who cooperated with the government. Like Brown, Hunter believes Scott was a biased witness, but this complaint fails for the same reason. Hunter and Evans made Scott's cooperation with the government an issue at

trial, suggesting that Scott's reward for cooperating—a reduced sentence—motivated him to fabricate his testimony against them. Attempting to rehabilitate Scott, the government asked him whether he had anything to fear by cooperating and testifying. Scott mentioned that someone had hit him over the head in jail. The district court overruled the defense's objection for relevance. Scott also testified that he overheard Hunter and Evans discussing the case and making threats against him in a holding area during the trial.

Hunter claims that the district court should have excluded this testimony as irrelevant and characterizes it as highly prejudicial to the jury. We previously have held that evidence of threats by a defendant against a prosecution witness on direct examination is inadmissible unless it is linked to a specific credibility issue at trial—like a witness's behavior on the stand or testimony that is inconsistent with prior statements. *See United States v. Thomas*, 86 F.3d 647, 654 (7th Cir. 1996); *United States v. Thompson*, 359 F.3d 470, 477 (7th Cir. 2004). Indeed, *Thomas* and *Thompson* each rejected efforts to use threats against a witness to generally "bolster" or "boost" a witness's credibility. However, we have also held that "[o]nce a witness's credibility has been attacked…the non-attacking party is permitted to admit evidence to 'rehabilitate' the witness." *United States v. Lindemann*, 85 F.3d 1232, 1242 (7th Cir. 1996). We have explained that the government may introduce testimony about a witness's motives on direct examination when such testimony is rehabilitative and likely to give the jury a full picture. *United States v. McKinney*, 954 F.2d 471, 479 (7th Cir. 1992).

Hunter's defense counsel aggressively challenged the integrity of the government's witnesses from the trial's start and

vigorously cross-examined them about their motivations to lie. With respect to Scott, defense counsel thoroughly walked through Scott's inconsistent statements, criminal history, and his belief that lying to the police is occasionally permissible. The threats occurred in the midst of and in response to Scott's decision to testify for the government, so they were relevant to his testimony and credibility. In this context, we cannot agree that the district court abused its discretion by allowing Scott to testify to the adverse consequences of his cooperation. *See id*. ("Whether the potential for unfair prejudice of a given piece of evidence outweighs its probative value is a decision left to the district court's discretion.").

Accordingly, we find no errors in the district court's evidentiary rulings.

Hunter also claims that Dominique Rollins gave "false testimony" on the government's behalf. A defendant who "seek[s] a new trial based on perjured testimony has the burden to show that (1) the prosecution's case included perjured testimony; (2) the prosecution knew, or should have known, of the perjury; and (3) there is a likelihood that the false testimony affected the judgment of the jury." *United States v. Cosby*, 924 F.3d 329, 336 (7th Cir. 2019) (citation and internal quotation omitted). Hunter points to confusion and seeming contradictions in Rollins' testimony to support this claim. But even if Rollins gave confused testimony, Hunter fails to point to convincing evidence of perjury, much less perjury that the government knowingly proffered. We therefore conclude that this claim also fails.

2. *The Lack of a Curative Instruction for Investigator Strasser's Limited Testimony Was No Error*

Hunter believes that the district court should have administered a curative instruction to the jury advising it to disregard a portion of Strasser's trial testimony. The defense objected to Strasser's testimony on the grounds that the government never designated him as an expert or summary witness. The district court sustained the defense's objections and determined that Strasser could only testify to evidence in the case that he personally worked on or developed. However, before the objection, Strasser testified that he had viewed hundreds of examples of robbery footage and that generally criminals use the same tactics in each robbery. In his *pro se* brief, Hunter claims that the district court should have issued a curative instruction to advise the jury to disregard Strasser's brief, pre-objection testimony. The defense did not request a curative instruction at the time. Reviewing this on a plain error standard, Hunter's argument fails. *United States v. Christian*, 673 F.3d 702, 708 (7th Cir. 2012) (plain error requires that absent the error, the defendant probably would not have been convicted). Strasser's brief comments before the objection provided little information and could not have significantly prejudiced Hunter.

3. The Government Presented Sufficient Evidence to Support Hunter's Convictions

Hunter argues that the government failed to offer evidence to prove every element of his conviction under the Hobbs Act, which criminalizes robbery or extortion that affects commerce. *See* 18 U.S.C. § 1951(a). Hunter specifically claims that the government failed to prove that the robberies affected interstate commerce. However, the government only needs to show a *de minimis* effect on interstate commerce. *United States v. Bailey*, 227 F.3d 792, 797 (7th Cir. 2000). Here,

the parties stipulated that the Roman's Food Market and the George Webb restaurant were businesses engaged in interstate commerce. Hunter was involved in robbing both stores, which temporarily shut down after the robberies. Therefore, the government provided sufficient evidence to satisfy the "affects commerce" element of the Act.

Hunter lastly argues that the government produced insufficient evidence to satisfy the *mens rea* element for the car jackings. Under 18 U.S.C. § 2119, a defendant must "inten[d] to cause death or serious bodily harm." Given the defendants' affinity for pistol-whipping their victims, we find it hard to see the basis for this argument. We previously explained that the defendant need not actually attempt to kill or harm the victim, but rather must possess a "conditional intent to do the driver harm had he not complied with the defendants' demands." *United States v Jones*, 188 F.3d 773, 777 (7th Cir. 1999). The Cadillac's driver testified that the two men who carjacked him forced him to the ground and struck him in the back of the head with a gun. With respect to the Ford Focus, the victim testified that Hunter pressed a firearm into his stomach and took his possessions, including his car. The government provided evidence that both instances involved threats backed by a deadly weapon. One instance involved serious physical harm. The government provided sufficient evidence to establish the *mens rea.*

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs- CASE NO.: 17-CR-29

OTIS HUNTER and
DESHAWN EVANS,

Defendants.

VOLUME 1

JURY TRIAL in the above-entitled matter, held before the Honorable J.P. Stadtmueller, on the 29th day of January, 2018, commencing at 8:32 a.m.

A P P E A R A N C E S

United States Department of Justice
Office of the U.S. Attorney
Ms. Margaret B. Honrath and Ms. Rebecca Liane Taibleson
517 East Wisconsin Avenue, Room 530
Milwaukee, Wisconsin 53202
Appeared on behalf of the Plaintiff.

Richards & Hall, S.C.
Mr. Mark D. Richards and Ms. Natalie Wisco
209 8th Street
Racine, Wisconsin 53403
Appeared on behalf of the Defendant Deshawn Evans, also present.

Law Offices of Thomas E. Harris
Mr. Thomas E. Harris
20935 Swenson Drive, Suite 360
Waukesha, Wisconsin 53186-20778
Appeared on behalf of the Defendant Otis Hunter, also present.

Mr. Christopher Bader, Clerk.
Ms. Sheryl L. Stawski, Official Reporter.

T R A N S C R I P T O F P R O C E E D I N G S

(The proceedings commenced at 8:32 a.m.)

THE CLERK: The Court calls United States versus Otis Hunter and Deshawn Evans, Case Number 17-CR-29, for a jury trial.

May I have the appearances beginning with the Government.

MS. HONRATH: Good morning, Your Honor.

Margaret Honrath and Rebecca Taibleson on behalf of the United States. Also at counsel table with us is FBI Special Agent Erin Lucker.

MR. HARRIS: Good morning, Your Honor.

Thomas Harris appears on behalf of Mr. Otis Hunter, and Mr. Hunter is present in the courtroom seated to my left in civilian attire.

MR. RICHARDS: Good morning, Your Honor.

Deshawn Evans appears in person represented by Attorney Mark Richards and Natalie Wisco.

THE COURT: Thank you.

Good morning, Counsel; and good morning to each of the defendants; and good morning to our FBI agent.

Momentarily, the jury panel will be completing their orientation. So are there any matters that we need address?

MS. TAIBLESON: Your Honor, I do not believe that we have resolved the pending motions in limine in this case, to

the extent Your Honor would like to resolve them at this point.

THE COURT: Well, as I indicated at the final pretrial, most of these motions in limine are going to be addressed at the appropriate time during the receipt of evidence.

Insofar as the defendants' concern with regard to exploring with the cooperating defendants the nature and extent of the penalties that they would have otherwise faced, I believe that we are not going to get into the minutia of exactly how many years and months or whether it's a statutory mandatory penalty or anything of the like.

I think the *Trent* case, although the defense has taken exception to it, has provided the Court with a sufficient overview of the reality that these defendants are entitled to explore the fact that these cooperating defendants face, quote, substantial, close quote, penalties; and we are not going to get into the minutia of how many years and what's the impact of certain qualifiers that would otherwise excuse the applicability of those mandatory minimum penalties.

Insofar as the matter of prior records, the rule is pretty clear that witnesses are subject to cross-examination with regard to convictions but not into the details of those convictions. So it's simply the charge and whether it was by guilty plea, or whatever, and what the penalty may have been, and that's it.

MR. RICHARDS: Your Honor, as to that ruling, it was also addressed in the motion in limine. I understand the Court's ruling on the first part of it.

As to the second part of it, the Government and I have had discussions regarding Anthony Lindsey; and Anthony Lindsey is a prohibited person. In his interviews he denied being a prohibited person. He's prohibited for a burglary conviction as a juvenile which he received one year in the boys school and a domestic violence which occurred in February before any of these events happened and was sentenced before any of these events happened.

I believe that I should be able to prove that he is a prohibited person and, thus, had a reason to lie about his involvement and not possessing firearms in these matters.

THE COURT: All right. Well, if we get to that point and he testifies, we'll address it.

MR. RICHARDS: Thank you.

THE COURT: Insofar as the voir dire, as the Court indicated we will be picking a jury of 14. The Government will have six strikes. The defense total is ten. Meaning, when the jury list is passed, the Government will exercise its first strike, then Mr. Harris on behalf of Mr. Hunter will exercise his first strike, Mr. Richards on behalf of Mr. Evans the first, then it will go back to the Government, and then to Mr. Harris and Mr. Richards until the defense has exercised

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 18, 2019

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

Nos. 18-2013 & 18-2044

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OTIS HUNTER and DESHAWN EVANS,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.

Nos. 17-CR-29-2 and 17-CR-29-4

J. P. Stadtmueller,
Judge.

O R D E R

On consideration of the petition for rehearing and rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and all members of the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are **DENIED**.