No. 19-7021

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Rules

REPLY BRIEF FOR PETITIONERS

Otis Hunter and Deshawn Evans submit this reply in support of their petition for a writ of certiorari.[1]

1. The government, like the court of appeals, ignores the critical feature of this case: the district court's clear and emphatic instruction that "[t]he punishment provided by law for the offenses charged in the indictment . . . 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. This Court found that instruction sufficient to overcome any concern that a jury would reject a not guilty by reason of insanity verdict out of fear that the defendant would be released immediately. *Shannon v. United States*, 512 U.S. 573, 584-85 (1994). If the "almost invariable assumption of the law that jurors follow their instructions" suffices to protect a defendant against jury speculation about a potential sentence, *id*. at 585, it surely suffices to protect the government as well.

The studied refusal by the government and the court of appeals even to *acknowledge* the instruction that the potential sentence "should never be considered by the jury in any way" highlights the profound flaw in the Seventh Circuit's approach. The court of appeals approved a bar on cross-examination about mandatory minimum sentences three cooperators avoided based on its fear that

[1] The government's Brief in Opposition is cited as "BIO."

jurors would infer the defendants' potential sentences, ignore the district court's instruction not to consider punishment, and vote to acquit despite proof beyond a reasonable doubt. The government cites no empirical evidence supporting the court's fear that jurors will nullify if they know the defendant's potential punishment. More important, the government cites no "evidence of an overwhelming probability" that jurors would disregard the district court's instruction not to consider punishment. *United States v. Corley*, 519 F.3d 716, 728 (7th Cir. 2008) (quotation omitted).

It is true, as the government notes (BIO 11-12), that the Sixth Amendment permits trial judges to impose limits on cross-examination in light of legitimate Fed. R. Evid. 403 concerns. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Lower courts have recognized, however, that trial courts applying Rule 403 "must give special consideration to the defendant's constitutional right to confront the witnesses against him." *Rhodes v. Dittmann*, 903 F.3d 646, 659 (7th Cir. 2018). At a minimum, courts must base a Rule 403 restriction on otherwise permissible defense cross-examination on something more than non-empirical speculation about juror behavior. And--critically here--courts must take into account the power of an emphatic limiting instruction and the "almost invariable assumption of the law" that jurors will follow such an instruction. *Shannon*, 512 U.S. at 585.

Neither the court of appeals nor the government gives any weight to the district court's instruction that potential punishment "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. That refusal to consider the effect of the instruction is contrary to *Shannon*, and it produces an unconstitutional application of Rule 403.

2. The government cites court of appeals cases for the proposition that permitting cross-examination concerning mandatory minimum sentences that cooperators avoid would "confuse" or "mislead" the jury. BIO 16. None of those cases explains how a jury would be confused or misled by learning, for example, that Scott had avoided a 25-year, consecutive mandatory minimum term of imprisonment by cooperating with the government. What the courts really seem to fear--as the court of appeals forthrightly acknowledged in this case, App. 15--is that jurors will infer the defendant's potential sentence, disregard the instruction not to consider punishment, and nullify. As noted, however, neither the government nor any court has cited actual evidence supporting this speculative possibility.

The government notes that this Court observed in *Shannon* that providing jurors with sentencing information would "create[] a strong possibility of confusion." BIO 16 (quoting *Shannon*, 512 U.S. at 579). *Shannon*, however, differs from this case instructively. In *Shannon*, the defendant sought an instruction that if the jury found him not guilty by reason of insanity, he would be involuntarily committed. The confusing effect of such an instruction is obvious. On one hand, the jury would be instructed that it must not consider the potential punishment in

reaching its verdict. On the other hand, the jury would be instructed about the punishment that one possible verdict would entail. A juror would naturally be puzzled by the tension between these directives.

No such confusion exists here. The jury would have understood that evidence of the mandatory minimum sentences the cooperators had avoided was admitted to show their motivation to favor the government. It is possible, as the court of appeals speculated, that some jurors would have inferred that petitioners faced similar sentences. But the district court's instruction that a defendant's potential sentence "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" would have eliminated any possibility that the jury would be confused about the role the defendants' potential sentences should play in the verdict. Under the court's instruction, which jurors are presumed to follow, those sentences would play no role at all.

3. In addition to its other flaws, the government's argument, like the court of appeals' rationale, is internally contradictory. On one hand, the government contends that evidence of the years of imprisonment the cooperators avoided would be "highly prejudicial," because the jurors might infer the sentences the defendants faced and acquit for that reason. BIO 12. On the other hand, the government insists that admission of that evidence would not have given the jury a "significantly different impression" of the cooperators' credibility, because the actual years of

imprisonment the cooperators avoided would have "limited incremental probative value." BIO 13-14. But if the evidence actually admitted concerning the cooperators' benefits conveyed essentially the same information as the length of the mandatory minimum sentences they avoided, then use of that evidence in lieu of the mandatory minimums would not alleviate the alleged prejudice to the government. And if the admitted evidence did *not* convey essentially the same information as the years of imprisonment the cooperators avoided, then admission of evidence concerning the mandatory minimums would have given the jury a "significantly different impression" of the cooperators' credibility, and exclusion of that evidence violated petitioners' Sixth Amendment rights. *Van Arsdall*, 475 U.S. at 680.

This contradiction exposes the incoherence of the government's argument. In fact, the term "substantial" and the other evidence admitted concerning the cooperators' deals did *not* convey essentially the same information as the details of the cooperators' sentence benefits, including their avoidance of lengthy mandatory minimum sentences. And the purported prejudice of which the government complains, to the extent it exists at all, could be cured with clear jury instructions, such as the instructions the district court gave in this case; there is no need to water down petitioners' Sixth Amendment right to expose the bias of the witnesses against them.

4. The government asserts that petitioners seek a "categorical" rule permitting cooperators to be cross-examined about the mandatory minimum sentences they have avoided. BIO 14, 15, 17-19. But it is the government, not petitioners, who support a categorical approach. The Seventh Circuit has held categorically that district courts may prohibit defendants from eliciting the mandatory minimum sentences that cooperating co-defendants have avoided by testifying for the prosecution. *United States v. Trent*, 863 F.3d 699, 704-07 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2025 (2018). The application of this rule does not depend on any case-specific indication that jurors will nullify if they learn the defendant's potential sentence. It does not require, for example, that the defendant's potential sentence be far out of proportion to his culpability, as might be the case where a low-level drug "mule" faces a lengthy mandatory minimum sentence. Nor does the *Trent* rule require *any* evidence--much less "evidence of an overwhelming probability"--that jurors will not follow the district court's instruction that they must not consider the punishment in reaching their verdict.

By contrast, the rule petitioners advocate would require the district court to articulate a case-specific basis for restricting a defendant's Sixth Amendment right to expose the mandatory minimum prison sentence a cooperator has avoided by testifying for the prosecution. That case-specific showing should include a finding of an "overwhelming probability" that jurors could not follow the court's instruction

not to consider punishment in reaching their verdict. If a district court found that these conditions existed, it could impose reasonable limits on the defendant's cross-examination. The only "categorical" rule petitioners propose is this: under the Sixth Amendment, a district court cannot restrict a defendant's otherwise permissible cross-examination to expose the bias of a prosecution witness based solely on generalized speculation about juror behavior and without considering the "almost invariable assumption of the law" that jurors will follow a limiting instruction.

5. The government downplays the conflict between *Trent* and similar decisions on one hand and *United States v. Chandler*, 326 F.3d 210 (3d Cir. 2003), and *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), on the other. BIO 16-20. The government's effort to reconcile these cases rests largely on its failure to recognize the categorical nature of the *Trent* approach and its incorrect insistence that petitioners advance a categorical rule of their own.

In discussing *Chandler*, the government cites two later Third Circuit decisions, *United States v. Mussare*, 405 F.3d 161 (3d Cir. 2005), and *United States v. Noel*, 905 F.3d 258 (3d Cir. 2018), that in its view bring the Third Circuit in line with *Trent* and similar decisions. In *Mussare*, the district court sustained objections only to the *maximum* possible sentence the cooperating witness would have faced absent his deal--not a *mandatory minimum* sentence, as here--and to certain questions about the witness' communications with his lawyer. *See* 405 F.3d at 170.

The district court allowed the defendant to elicit an array of other detailed information about the plea, including the witness' hope, as a result of his cooperation, not to serve any additional jail time. *See id*. at 169-70.

Nothing in *Mussare* suggests that a court can, absent a case-specific Rule 403 justification, bar the defendant from eliciting the *mandatory minimum* sentence a cooperator would have received absent his deal. It is one thing to prevent a defendant from eliciting the statutory maximum sentence applicable to dismissed charges; few defendants receive the statutory maximum, and the information might mislead the jury as to the witness' actual benefit. By contrast, information about a mandatory minimum sentence the witness avoided by cooperating has no potential to confuse the jury; absent the deal, the witness, if found guilty, would certainly have faced at least that term of imprisonment.

Noel, unlike *Mussare*, marks a departure from *Chandler*. The district court in that case, like the district court here, barred defense counsel from cross-examining cooperating prosecution witnesses about the specific sentencing benefits they had received, including mandatory minimum sentences they had avoided. *Noel* suffers from the same flaws as *Trent*: it permits restriction on cross-examination for bias without any case-specific Rule 403 determination, and it ignores the effect of the district court's instruction that the jury must not consider the defendant's potential

sentence in reaching its verdict. Not only is *Noel* wrongly decided for these reasons; it cannot be reconciled with *Chandler* and thus creates an intra-circuit split.[2]

The government has no answer to *Larson*, other than to note that it does not create a categorical rule. BIO 18-19. The same goes for its discussion of *United States v. Cooks*, 52 F.3d 10 (5th Cir. 1995), and *State v. Gracely*, 731 S.E.2d 880 (S.C. 2012). BIO 19-20. To repeat: petitioners do not advocate a categorical rule that the Sixth Amendment always permits inquiry into the mandatory minimum sentence that a cooperating witness avoided through his deal. They contend instead that a court may not restrict a defendant's otherwise permissible cross-examination into the mandatory imprisonment the witness avoided by cooperating based solely on generalized speculation about juror behavior and without considering the "almost invariable assumption of the law" that jurors will follow a limiting instruction.

6. Finally, the government asserts that this is a poor vehicle for addressing the question presented because the error in restricting cross-examination was harmless beyond a reasonable doubt. BIO at 20-22.[3] The government is mistaken.

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[2] The dissenting judge in *Chandler*--who, in her dissent, advocated an approach similar to *Trent*--was on the *Noel* panel. Neither of the judges who comprised the majority in *Chandler* was on the *Noel* panel.

[3] The court of appeals did not address the government's harmless error argument below.

Scott, Lindsey, and Rollins played a central role at trial. Their testimony consumed more than 350 pages of roughly 700 total pages of testimony in the prosecution case. The government cited the cooperators' anticipated testimony repeatedly in opening (Tr. 25-27, 31-32, 41), and it relied on their testimony heavily in closing (Tr. 847, 849-52, 854, 856, 859, 861, 863-64) and rebuttal (Tr. 895-96, 898-99, 902-03). If "the damaging potential" of the cross-examination about the cooperators' benefits had been "fully realized," *Van Arsdall*, 475 U.S. at 684, the jury might well have rejected their testimony entirely, and with it the heart of the prosecution's case.

The government contends that "other evidence powerfully corroborated" the cooperators' testimony. BIO 21. It asserts, for example, that "[f]our of the five robberies were captured on surveillance footage." *Id*. But the robbers captured on the surveillance footage had their faces covered or otherwise obscured, Tr. 147-49, 151-52, 329, 335-36, 341, which meant that the videos would have little probative force unless someone could identify the persons on them. And it was primarily *the cooperators* who identified petitioners as the robbers on the videos. In other words, a key part of the "corroboration" for the cooperators' testimony depended largely for

its probative value on the cooperators' credibility. That is bootstrapping, not corroboration.[4]

The government cites testimony from a carjacking victim (Aaron Sherman) about one of the robberies. BIO 4-5, 21. Sherman provided evidence of Hunter's involvement in that single robbery, but the heart of his testimony--his identification of Hunter in a photo array--was heavily challenged as the result of a highly suggestive procedure in presenting the array to him.[5] Because Sherman's identification of Hunter was so obviously the product of improper suggestion, it does little to corroborate the cooperators' testimony.

Finally, the government touts the cross-examination of the cooperators on matters other than bias, such as prior inconsistent statements, drug use, mental health issues, and dishonesty. BIO 21-22. The defense undoubtedly questioned the cooperators vigorously in these areas. But cross-examination *for bias* represents a distinct and crucial form of impeachment. This Court has "recognized that the exposure of a witness' motivation in testifying is a proper and important function of

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[4] As the government notes (BIO 21), Doris Brown also identified petitioners on the videos. But Brown had a powerful motive to point the finger at petitioners to deflect blame from cooperators Scott (her fiance) and Lindsey (her son). Her obviously biased testimony adds little weight to the prosecution case.

[5] *See United States v. Hunter*, No. 18-2013, Reply Brief of Defendant-Appellants, Otis Hunter and Deshawn Evans at 23-24 (describing respects in which photo array was improperly suggestive).

the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). Cross-examination on bias "is especially important with respect to witnesses who may have a substantial reason to cooperate with the government." *Cooks*, 52 F.3d at 103-04 (quotation and ellipsis omitted). Here, "[b]ecause so much depended on the credibility of [Scott, Lindsey, and Rollins], additional information about their motives in testifying might have proven decisive." *Chandler*, 326 F.3d at 225 (finding restriction on cross-examination about specifics of cooperators' sentencing benefits not harmless).

In any event, this Court has previously granted certiorari to review important questions and left it to the lower courts on remand to determine whether any error requires reversal. *See, e.g., Skilling v. United States*, 561 U.S. 358, 414-15 (2010); *Boulware v. United States*, 552 U.S. 421, 438-39 (2008). A similar approach is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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