No. __-________

In the Supreme Court of the United States

PABLO SANTANA ARELLANO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Sixth Amendment to the United State Constitution, defendants may be prohibited from asking cooperating witnesses, and former co-conspirators, details about their sentences and sentencing agreements with the government to expose the witnesses' bias?

PARTIES

Pablo Santana Arellano is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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Petition for a Writ of Certiorari

Petitioner Pablo Santana Arellano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Arellano*, No. 23-10199, 2024 WL 1156535, at *1 (5th Cir. Mar. 18, 2024)(unpublished), and is provided in the Appendix to the Petition. [Appendix A]. The district court's judgment is also attached in the Appendix. [Appendix B].

Jurisdictional Statement

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on March 18, 2024. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement

A. Facts and Trial Proceedings

1. Overview

In September of 2021, police stopped a vehicle driven by Petitioner Pablo Santana Arellano and occupied by his then romantic partner Bridgette Star Gardeazabel. (ROA.1038, 1041-42, 1259, 1150). A search of the car revealed six kilograms of fentanyl in a suitcase in the trunk; police arrested Petitioner and Gardeazabel. (ROA.1038, 1041-42, 1259, 1150). A grand jury then charged both of them with two counts of drug trafficking: 1) conspiracy to distribute and possess with intent to distribute 400 grams or more of fentanyl, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(vi) (Count One), and 2) possession with intent to distribute fentanyl, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) (Count Two). (ROA.93-94). Count One carries a statutory range of ten years imprisonment to life imprisonment; Count Two carries no minimum, and a maximum of twenty years. *See* 21 U.S.C. §§846, 841(a)(1), and 841(b)(1)(A)(vi), 841(b)(1)(C).

Petitioner would plead not guilty and invoke his right to trial by jury. Not Gardeazabel – she entered a plea agreement to Count Two and testified against Petitioner. (ROA.1122-24, 1170); [Appendix C, 6]. In exchange for this plea and her testimony, the government moved to dismiss Count One, saving her a mandatory minimum of ten years. (ROA.1122-24, 1170); [Appendix C, 6]. The jury, however, would not hear that she escaped a ten-year minimum; rather it heard that she escaped a minimum of unspecified length. (ROA.1203-04); [Appendix C, 39-40]. Nor would it hear that she hoped to receive probation for her testimony; instead, it heard that her maximum term of imprisonment had been reduced to 20 years. (ROA.1203-04); [Appendix C, 39-40].

2. Gardeazabel's direct examination.

Without question, Gardeazabel was the chief witness against Petitioner at his jury trial. She recounted a flight to Los Angeles a few days before the stop; there, Petitioner then got them an Uber from the airport to someone's house and bought a car with money on his person. (ROA. 1128-31). Gardeazabel identified this car as the one that Petitioner drove to Texas. (ROA.1133-34). The government also asked Gardeazabel about the suitcase in the trunk of the car. (ROA. 1134-38). She testified that she first saw the suitcase with Petitioner at the airport, that he traveled with the suitcase to the person's house where he purchased the car and put it in the trunk. (ROA. 1134-35). Crucially, she then testified that on the way, Petitioner stopped at a Wal-Mart where he purchased clothes, opened the suitcase, and put the clothes in. (ROA. 1137-38). Gardeazabel's testimony thus put Petitioner in direct visual contact with the open suitcase, where police found the contraband.

As discussed further below, Gardeazabel and Petitioner engaged in a recorded conversation in the back of the police car during the search of the vehicle. (ROA. 1060-61). At that time, Gardeazabel said that everything in the car belonged to her, which suggestion Petitioner resisted. (ROA. 1060-61). At trial, however, Gardeazabel sought to explain to the jury this inculpatory statement: she testified that on the date of the stop, she was under the influence, did not know what to say, and falsely claimed that "everything" belonged to her. (ROA. 1140-41).

The government also solicited testimony about other "trips" that Gardeazabel and Petitioner took together. (ROA. 1126). These "couple" trips occurred "weeks before" the September 24, 2021 stop and were to the Dallas/Fort Worth area. (ROA.1126, 1147). She said that Petitioner met "some people" during these trips, that Petitioner would pay cash for multiple motel rooms despite not working at the time, and that other people would also come to these motel rooms. (ROA. 1126-28).

The government then asked Gardeazabel whether Petitioner spoke on the phone during these "trips." (ROA.1146). Towards the end of her direct examination, the government explained that it played "a couple of recordings for [Gardeazabel] of phone calls." (ROA.1156). When asked if she recognized the voices on the recordings, Gardeazabel answered: "I recognize Pablo's voice and another familiar voice of a guy, a male voice who he would usually talk to on the phone constantly" during the trips. (ROA.1156-57).

The government asked about Gardeazabel's knowledge of someone named "Omar." (ROA.1148). According to Gardeazabel, Petitioner met "Omar" twice at an apartment in Fort Worth, about thirty minutes from the motel where Gardeazabel and Petitioner stayed. (ROA. 1148-49). Both times Omar and Petitioner met outside the apartment, and Omar gave Petitioner a bag. (ROA. 1148-49). "The first time," Gardeazabel testified, the bag contained "money. The second time, it was drugs." (ROA. 1149).

3. Gardeazabel's cross-examination and direct examination

On cross examination, Gardeazabel testified that she pleaded guilty to intending to distribute fentanyl and that her "maximum exposure to any prison sentence would be a maximum of 20 years." (ROA.1165-67); [Appendix C, 1-3]. She also confirmed that her "cooperation [wa]s important to whatever the government might recommend the judge to lower [her] sentence." (ROA.1167); [Appendix C, 3]. Finally, Gardeazabel confirmed that the government agreed "to recommend to dismiss their Charge Number 1, which would have had a possible life sentence." (ROA. 1170); [Appendix C, 6]. The defense did not ask about a mandatory minimum sentence at that time because of a pre-trial order forbidding such questioning. (ROA.483).

On redirect, the government and Gardeazabel disclaimed any agreement as to an exact sentence -- Gardeazabel said that she decided to testify of her own free will. (ROA. 1174-75); [Appendix C, 10-11]. On recross, Gardeazabel confirmed again that she understood the government was "the sole decider as to whether or not [she] did enough or provided substantial assistance in order to ask for more time off [her] sentence." (ROA.1181); [Appendix C, 17].

4. Petitioner's offer of proof – voir dire examination of Gardeazabel

Petitioner conducted a voir dire examination outside the presence of the jury to show what testimony Gardeazabel might have provided in the absence of the court's restrictions. During this examination, Gardeazabel confirmed that her testimony would save her from a ten-year mandatory minimum. (ROA.1184-85); [Appendix C, 20-21]. Petitioner asked Gardeazabel whether she "want(ed) to be placed on probation" (ROA. 1187); [Appendix C, 23]. "Yes," Gardeazabel answered. (ROA. 1187); [Appendix C, 23]. "And so that's something that you've talked about?" (ROA.1187); [Appendix C, 23]. "Yes," answered Gardeazabel again. (ROA.1187); [Appendix C, 23]. "As you sit here today," defense counsel asked, "you've gone from a possible maximum life sentence to a minimum sentence of zero, or maybe probation. Was that the goal in your defensive strategy?" (ROA.1187); [Appendix C, 23]. "Yes," she confirmed again. (ROA.1187); [Appendix C, 23].

In response, the government established that it had not promised Gardeazabel "any specific number of levels" under the Guidelines, that Gardeazabel wanted "to get as little time as possible" but did not have "any idea what that is at this point," and that the possibility of probation was never discussed with the government. (ROA. 1187-88); [Appendix C, 23-24]. The prosecutor then asked, "[i]s it your understanding that you are likely to go to prison for some period of time?" (ROA. 1188); [Appendix C, 24]. "Yes," answered Gardeazabel. (ROA. 1188); [Appendix C, 24].

The court itself examined Gardeazabel on the court's role in sentencing. (ROA.1188-90); [Appendix C, 24-26]. It asked: "there's no promise from either the government or your attorney that you will receive probation from this Court, who does sentencing?" (ROA. 1190); [Appendix C, 26]. "Yes, Your Honor," she answered. (ROA. 1190); [Appendix C, 26].

After voir dire, Petitioner again requested to elicit the witness's full statutory ranges – before and after cooperation -- on cross-examination. (ROA.1191); [Appendix C, 27]. Defense counsel argued: "Ms. Gardeazabel has a sincere - I know the government would term it as a wish, but I think she has a sincere belief that there is probation as a real possibility." (ROA.1192); [Appendix C, 28]. "[T]he jury should know that this particular individual... is highly motivated by the possibility of receiving probation, Your Honor." (ROA. 1192); [Appendix C, 28].

Ultimately, the court modified its prior order slightly to allow "testimony to maximums, minimums, but no numbers." (ROA.1194-96); [Appendix C, 30-32]. Petitioner then specifically asked whether he could reference Gardeazabel's "hope of probation." (ROA. 1197); [Appendix C, 33]. "I do not anticipate a probated term would even be within guidelines range, absent some extraordinary motions practice," the court answered. (ROA.1197-98); [Appendix C, 33-34]. According to the court, allowing Petitioner to explore Gardeazabel's hope for probation could directly lead to the jury engaging in sentencing math and eventually nullification. (ROA. 1198-99); [Appendix C, 34-35]. "I will allow you to make references generally to the ceiling and the floor as a maximum or minimum," the court ruled. (ROA. 1199); [Appendix C, 35]. "But any discussion of years, either by Arabic numeral or by references to decades or anything of that sort, would invite inquiry into the sentencing math that this jury may not do." (ROA. 1201); [Appendix C, 37].

Gardeazabel then resumed her testimony in front of the jury and exchanged with defense counsel as follows:

> Q: Ms. Gardeazabel, would it be a true statement that, based on Charge 1 having the possibility of being dismissed as part of your plea bargain, that you no longer face a statutory minimum of a number of years?
> A: Yes.
> Q: Would it also be true that being allowed to plead to a statute that does not have any mandatory minimum but sets the maximum statutory maximum at 20 years, you have already received a benefit to be here?

A: Yes.

(ROA.1203-04); [Appendix C, 39-40]

In response, the government made the point once more that it offered no promise as to an exact sentence, that any benefit would come from a motion by the government to the judge, and the judge ultimately decided the sentence. (ROA.1204); [Appendix C, 41]. That concluded Gardeazabel's testimony. (ROA. 1204-05); [Appendix C, 40-41].

5. Other trial evidence

Some of the government's trial evidence did not come from Gardeazabel. As noted above, Petitioner and Gardeazabel spoke in the back of the police car, watching the search. (ROA.1060, 1532-39). The prosecution would play this conversation to the jury. (ROA.1060, 1532-39). In it, Petitioner can be heard to say "we're going to get found out," along with other statements of panic and distress. (ROA.1060, 1532-39). But Gardeazabel can be heard to say that "everything" was hers. (ROA. 1060-61). In response, Petitioner counsels her to say "nothing. The just gave us the car to drive." (ROA. 1060-61).

The government also introduced statements from Petitioner made on the ride to jail. According to the arresting officer, Petitioner said "[h]e was just trying to make a little bit of money, and now he was here, which meant he was arrested." The officer also said that Petitioner asked how much time he would get. (ROA. 1221-24).

Finally, the prosecution would introduce Petitioner's phone calls made from inside jail. (ROA.1227-1242). During one call, the person on the other line asked: "Hey did they take all of them out of your car or no? ... What they found in the car?" (ROA. 1230). Arellano responded: "Yes, (pause), yes, son, why?" ROA. 1230. Petitioner later volunteered: "She talked, dude....I am still nailed and... she put me in here like that, dude. She is going to run out of money, dude, and when she runs out of money the people are going to turn on her, dude, because she snitched on somebody." (ROA.1230-310.

But "[s]on," Petitioner stated, "this mess isn't going to last long." (ROA. 1233). "They are going to let me go pretty quickly." (ROA. 1233). He then states: "Because they didn't know it was there, until they got over there, they began to search. Oh, we have like 12 kilos and the other dude said. What is it? They took out the pills because it was a bag because it just looked like a Ziploc." (ROA.1233). "And that's what they looked at," Petitioner stated, "and he said that's fentanyl, the other said, don't touch it and what I don't know what." (ROA.1233-34).

In another call, Petitioner asked the other party whether he had "spoken with Omar." (ROA. 1241). Petition instructed the other party: "Well, tell the dude that I'm twisted. He already knows, dude. He spends time with compadre, Omar, dude."(ROA.

1242). “Tell him that my boss was twisted there in Texas. He did the turn that you left him... He did the turn because he wanted to pay you, and he got f*cked,” Petitioner continued. (ROA. 1242). “Tell him like that, dude,” Petitioner pressed. (ROA. 1242). “He went to do the errand you left him. Because he wanted to pay you and it went to d*ck.” (ROA. 1242).

6. Closing, verdict, and sentence

Gardeazabel’s critical role in the government’s case was reflected in the government’s closing. (ROA. 1380-98). The government pointed to her testimony as proof that Petitioner agreed to possess fentanyl with intent to distribute, that Petitioner knew or should have known that the conspiracy involved fentanyl, and that Petitioner possessed the fentanyl found in the vehicle with intent to distribute it. (ROA.1381-82, 1383-84, 1388-90, 1392). Only Gardeazabel testified to Petitioner's purchase of the car, ownership of the suitcase and --- critically --- to his direct observation of the suitcase’s contents. (ROA.1381, 1388-90, 1392). The government highlighted this in closing: “Bridgette says that she sat in the front seat of the car and turned around and saw him open the trunk, open the suitcase, and put the clothes in the suitcase where the pills were.” (ROA. 1390). Immediately thereafter, the government argued: “He reasonably should have known that this involved 400 grams of fentanyl.” (ROA. 1390).

In addition, the government emphasized Gardeazabel's testimony about the couple's prior trips together. (ROA.1381-83, 1388, 1392). "Bridgette said that he has made prior trips to transport drugs and money before," the government emphasized in closing. (ROA.1388). "So I ask you, can you accidentally do something three times? You do the same thing over and over again, that's not a mistake." (ROA.1388). The government later repeated this line of argument. "Bridgette talks about his prior trips to transport drugs and money." (ROA. 1392). "Again, doing something three times shows that you did not accidentally do something." (ROA.1392).

Finally, the government used Gardeazabel's testimony to interpret Petitioner's jail calls. "What does she say about Omar?" the prosecutor asked the jury. (ROA.1382). "Omar brings out a bag to the defendant... and Bridgette sees the defendant take money out of the bag and count it." (ROA.1382). "So either Omar is paying the defendant for bringing him things, or Omar is giving money for the defendant to take back to California." (ROA.1382). "Why can you believe Bridgette's testimony?" the government concluded. (ROA.1397). "She has already pled guilty for her role in this, and we're only going to ask for a benefit for her truthful testimony." (ROA. 1398).

The jury convicted Petitioner on both counts, (ROA.516-17), and he ultimately received two concurrent terms of 240 months imprisonment, [Appendix B]; (ROA.537-38).

B. Appellate Proceedings

On appeal, Petitioner contended that the district court erred in restricting his right of confrontation in two respects: 1) it prevented him from asking the witness whether she hoped to receive probation, and, 2) it prevented him from asking whether she would have faced a ten-year mandatory minimum, as opposed to a minimum sentence of unspecified length, absent cooperation. Appellant's Initial Brief in *United States v. Arellano*, No. 23-10199, 2023 WL 6148932, at *29 (5th Cir. Filed September 11, 2023). The government defended these rulings as within the trial judge's discretion, and also urged the court to find them harmless. *See* Appellee's Brief in *United States v. Arellano*, No. 23-10199, 2023 WL 7548758, at *9-10 (5th Cir. Filed November 8, 2023).

The court of appeals made no finding as to harmlessness, instead affirming on the merits of the constitutional question. It found that Petitioner enjoyed no Sixth Amendment right to ask the witness about her hope for probation, nor about the ten-year mandatory minimum she escaped by cooperating with the government. Rather, it held that the facts the defendant did elicit provided the jury enough information:

> The district court did not violate the Confrontation Clause of the Sixth Amendment or abuse its discretion by limiting the cross-examination of Gardeazabel. Her potential bias and motivation were adequately addressed by defense counsel on cross-examination. The only limitations on defense counsel's cross-examination of Gardeazabel were that counsel could not ask Gardeazabel about the specific sentence she hoped she

> would receive or about the specific mandatory minimum for Count One. The jury was made aware that (1) Gardeazabel had entered into a plea agreement with the Government; (2) the Government had agreed to dismiss one of the counts against her, which carried a mandatory minimum term of imprisonment and a maximum of life; (3) the count to which she pleaded guilty carried a 20-year maximum but no mandatory minimum; and (4) she had agreed to cooperate with the Government by providing truthful testimony, in return for which the Government would ask for a lesser sentence. "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Arellano has not shown that reasonable jurors would have received a significantly different impression of Gardeazabel's credibility had she testified about the specific sentence she hoped to receive or about the specific mandatory minimum for Count One.

[Appendix A]; *United States v. Arellano*, No. 23-10199, 2024 WL 1156535, at *1 (5th Cir. Mar. 18, 2024)(unpublished)(citing *United States v. Tansley*, 986 F.2d 880, 886 (5th Cir. 1993), and *United States v. Davis*, 393 F.3d 540, 548 (5th Cir. 2004), and quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

<u>REASONS FOR GRANTING THE WRIT</u>

Federal Circuits and State Courts of Last Resort Have Divided on the Momentous Question of Whether the Sixth Amendment Guarantees Criminal Defendants the Right to Cross-Examine Prosecution Witnesses regarding the Terms of Their Plea Agreements and the Potential Sentences They Face in the Absence of Cooperation. Two Federal Courts and One State Supreme Court Have Acknowledged this Division of Authority. The Issue is Recurring and of Incomparable Significance to the Fairness and Accuracy of Criminal Trials, and to the Relative Power of the Jury, Prosecution and Judge in the American Constitutional Order.

A. The interests involved

This case concerns the Sixth Amendment, specifically, the right of a defendant to show the jury what benefits the government has conferred on its witnesses, and to show the immense value of those benefits to the witness. The court below, and many others, has held that defendants have no right to show a jury precisely what criminal penalties a witness has escaped by accusing the defendant in court. That holding contradicts the text and purpose of the Sixth Amendment, exposes criminal defendants to a risk of wrongful conviction, undermines the role of the jury as a bulwark of liberty, and conflicts with the law of multiple American jurisdictions. The division of authority is expressly recognized by two federal courts and has been discussed by the Supreme Court of New Jersey. This Court should grant certiorari and reverse the judgment below.

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…" Among other purposes, this right protects against conviction on unreliable evidence, by "forc[ing] the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'…" *California v. Green*, 399 U.S. 149, 158 (1970)(quoting 5 J. Wigmore §1367). This Court has said that trial judges may impose reasonable limits on the scope of cross-examination. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-679 (1986). Nonetheless, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316–17 (1974)(quoting *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). The ability to escape a mandatory minimum is as prototypical a source of witness "motivation" as might be imagined in a criminal case, bringing this case directly within the square holding of *Davis*. And the reliability of interested co-defendants is so questionable that federal courts routinely give juries special caution to take their testimony with extreme care.[1] Further, this Court has

[1] *See* First Circuit, Pattern Criminal Jury Instructions, §2.08 (2015), *available at https://www.ca1.uscourts.gov/sites/ca1/files/citations/Pattern%20Jury%20Instructions.pdf*; Third Circuit Pattern Criminal Jury Instructions 4.19 (2024), *available at https://www.ca3.uscourts.gov/sites/ca3/files/2023%20Chapter%204%20revisions%20final.pdf* ; Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina, p. 662 (2024 Online Edition), *available at http://www.scd.uscourts.gov/pji/PatternJuryInstructions.pdf;* Fifth

recognized that the government's failure to disclose a witness's interests in testifiying may constitute a violation of due process. *See Giglio v. United States*, 405 U.S. 150, 154 (1972).

Importantly, the right of confrontation is closely linked to the right to trial by jury, housed next to it in the Sixth Amendment. The right of confrontation is the right "to expose **to the jury** the facts from which jurors, **as the sole triers of fact and credibility**, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318 (emphasis added). As this Court's Confrontation Clause holdings in the hearsay context recognize, the Clause is chiefly concerned with "[t]he

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Circuit Pattern Jury Instructions (Criminal Cases) §1.16 (2019), *available at https://www.lb5.uscourts.gov/juryinstructions/fifth/crim2019.pdf;* Sixth Circuit Pattern Criminal Jury Instructions §7.07 (2023), *available at https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/Chapter%207.pdf*; The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit §3.05 (2023), *available at https://www.ca7.uscourts.gov/pattern-jury-instructions/Criminal_Jury_Instructions.pdf*; Eighth Circuit Model Jury Instructions §4.05B (2023), *available at https://juryinstructions.ca8.uscourts.gov/instructions/criminal/Criminal-Jury-Instructions.pdf* ; Ninth Circuit Manual of Model Criminal Jury Instructions, §3.9 (2024), *available at https://www.ce9.uscourts.gov/jury-instructions/model-criminal*; Tenth Circuit Criminal Pattern Jury Instructions, §1.15 (2021), *available at https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20revised%207-14-23.pdf*; Eleventh Circuit Criminal Pattern Jury Instructions, S1.2 (2024), *available at https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevisedAPR2024.pdf,see also Hoffa v. United States*, 385 U.S. 293, 311–12 & n.14 (1966); *Lee v. Illinois*, 476 U.S. 530, 541 (1986) ("Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.") (internal quotation marks omitted).

involvement of government officers in the production of testimonial evidence." *See Crawford v. Washington*, 541 U.S. 36, 52 (2004). Indeed, the Confrontation Clause was also intended to check the **judicial** power – it remits credibility determinations to the jury after presentation of the relevant facts. It does not ask judges to decide on a case-by-case whether evidence is sufficiently reliable to convict the defendant. As this Court unanimously explained when rejecting an exception to the Confrontation Clause for "reliable" testimonial hearsay:

> The Framers … knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. *Cf.* U.S. Const., Amdt. 6 (criminal jury trial); Amdt. 7 (civil jury trial). By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear.

Crawford, 541 U.S. at 67–68 (internal citation omitted)(citing *Ring v. Arizona*, 536 U.S. 584, 611–612 (2002) (Scalia, J., concurring).

The government is certainly permitted to introduce testimony from co-defendants, and to exchange promises of leniency for that testimony. That practice, however, jeopardizes several basic interests that the Sixth Amendment seeks to protect. It creates a risk of conviction on false evidence. It grants the prosecution an enormous power to shape the testimony of those who bear witness against the accused. And, when not fully disclosed to the jury, it undermines the role of the jury as a check on government power.

B. The courts are divided.

Given the foregoing – the special danger that promises or hopes for leniency will lead a cooperating witness to shade or distort the truth, the power that plea agreements give the government to shape a witness's testimony, and the Sixth Amendment's command to limit these risks by empowering the jury – one might expect that American courts would uniformly permit cross-examination regarding the precise benefits obtained by a cooperating witness. That is not so.

Instead, as two federal courts have explicitly recognized, "[t]he circuit courts are divided on whether a defendant may question a cooperating co-defendant about details of their potential sentences and plea agreements." *United States v. Henry*, No. CR 16-1097 JH, 2018 WL 802006, at *2–3 (D.N.M. Feb. 8, 2018) (citing *United States v. Lanham*, 617 F.3d 873, 884 (6th Cir. 2010)); *Lanham*, 617 F.3d at 884 ("There is a circuit split on the issue of whether defendants should be prohibited from asking cooperating witnesses, and former co-conspirators, details about their sentences and sentencing agreements with the government to expose the witnesses' bias."). State Supreme Courts have likewise divided on the same question, as the New Jersey Supreme Court has recognized. *See State v. Jackson*, 233 A.3d 440, 449–50 (N.J. July 2, 2020)(***contrasting*** *Jarrett v. State*, 498 N.E.2d 967, 968-69 (Ind. 1986)(finding a right to ask questions about the specific punishments a witness might have faced without the state's assistance), and *State v. Brown*, 399 S.E.2d 593, 594 (S.C. 1991)(same) ***with*** *State v. Jolley*, 656 N.W.2d 305, 309-10 (S.D. 2003)(finding no such right), and *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999)(same), *reconsideration granted by* 235 A.3d 1026 (July 20, 2020).[2]

In many jurisdictions, and in most federal circuits, trial judges may forbid cross-examination regarding the precise sentence faced by a prosecution witness in the absence of cooperation. *See United States v. Alvarez*, 987 F.2d 77, 82 (1st Cir. 1993)*; United States v. Blackwood*, 456 F.2d 526, 529–31 (2d Cir. 1972); *United States v. Scheetz*, 293 F.3d 175, 184 (4th Cir.2002); *United States v. Coffman*, 574 F. App'x 541, 551 (6th Cir. 2014)(unpublished); *United States v. Trent*, 863 F.3d 699, 704–06 (7th Cir. 2017); *United States v. Rushin*, 844 F.3d 933, 937–39 (11th Cir. 2016);

[2] Subsequent New Jersey courts have recognized the cited *Jackson* opinion as good law. *See State v. Smith*, No. A-1601-19, 2023 WL 4281375, at *1 (N.J. Super. Ct. App. Div. June 30, 2023), *cert. denied*, 301 A.3d 1284 (2023); *State v. Williams*, No. A-5557-18, 2022 WL 17944696, at *10 (N.J. Super. Ct. App. Div. Dec. 27, 2022).

United States v. Hall, 613 F.3d 249, 255–56 (D.C. Cir. 2010), *amended*, No. 07-3036, 2019 WL 6794225 (D.C. Cir. Dec. 12, 2019); *Jolley*, 656 N.W.2d at 309-10; *Greenleaf*, 591 N.W.2d at 502; *Peterson v. State*, 118 A.3d 925, 951–52 (Md. 2015); *State v. Davis*, 697 P.2d 1321, 1323 (Kan. 1985).

These courts permit the judge to limit cross-examination to the general terms of a deal rather than its specific terms. *See Alvarez*, 987 F.2d at 82; *Blackwood*, 456 F.2d at 529–31; *United States v. Shelton*, 200 F. App'x 219, 220–21 (4th Cir. 2006)(unpublished); *Trent*, 863 F.3d at 704–06; *Rushin*, 844 F.3d at 937–39; *Hall*, 613 F.3d at 255–56; *Jolley*, 656 N.W.2d at 309-10; *Peterson*, 118 A.3d at 951–52; *Davis*, 697 P.2d at 1323. They thus empower judges, not juries, to decide whether the particular incentives at issue could have been the difference between a witness's choice to give truthful and untruthful testimony.

Some of these courts also fear that a jury may draw inferences about the defendant's likely sentence from information about the witness's sentencing exposure. *See Alvarez*, 987 F.2d at 82; *United States v. Walston*, 733 F. App'x 719, (Mem)–720 (4th Cir. 2018); *Greenleaf*, 591 N.W.2d at 502. Rather than respect the "almost invariable assumption of the law that jurors follow their instructions," *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) – here an instruction to disregard the potential sentence imposed on the defendant -- these jurisdictions assume that jurors will react to truthful information about the witness's sentencing exposure by engaging in nullification.

The Third, Eighth, and Ninth Circuits, and the Indiana, New Jersey, and South Carolina Supreme Courts, however, have all found Confrontation error in the same circumstance. These courts have all found error when the trial judge forbade questioning as to a witness's precise sentencing exposure in the absence of cooperation. *See United States v. Chandler*, 326 F.3d 210, 223 (3d Cir.2003); *United States v. Caldwell*, 88 F.3d 522, 524–25 (8th Cir. 1996); *United States v. Larson*, 495 F.3d 1094, 1105 (9th Cir. 2007)(error but harmless); *Jarrett*, 498 N.E.2d at 968-69; *Jackson*, 233 A.3d at 449–50; *Brown*, 399 S.E.2d at 594; *see also Brown v. Powell*, 975 F.2d 1, 7–8 (1st Cir. 1992) (Pollak, Senior District Judge)(dissenting); *United States v. Cooks*, 52 F.3d 101, 103–04 (5th Cir. 1995)(affirming grant of motion for new trial by trial court that previously limited cross-examination regarding witness's sentencing exposure); *Jenkins v. United States*, 617 A.2d 529, 532 (D.C. 1992)(error, but harmless, to foreclose evidence of precise charge faced by prosecution witness as "the jury was" therefore "without knowledge if the crime committed carried a significant sentence which might induce [witness] to shade his trial testimony to curry the government's favor in the future."); *State v. Bennett*, 550 So.2d 201, 204–05 (La.App.1989)(intermediate court of appeals)("[w]e have no doubt in this case that the maximum sentence the witness could have received and the revocation of probation were particular facts which tended to show the bias or interest of this witness"); *accord Bohannon v. State*, 222 So. 3d 457, 486 (Ala. Crim. App. 2015)(intermediate court of appeals); *aff'd sub nom. Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016).

Admittedly, the federal circuits within this grouping have not applied these holdings consistently. The Third, Eighth, and Ninth Circuits have each affirmed when trial judges excluded evidence about a cooperating witness's sentencing exposure, notwithstanding the prior cases cited above. *See United States v. Mussare*, 405 F.3d 161, 169–70 (3d Cir. 2005); *United States v. Walley*, 567 F.3d 354, 360 (8th Cir. 2009); *United States v. Dadanian*, 818 F.2d 1443, 1449 (9th Cir. 1987), *rev'd in part on other grounds on rehearing*, 856 F.2d 1391 (9th Cir. 1988). None of them, however, have repudiated their earlier holdings.

The State Supreme Courts in the grouping – Indiana, New Jersey, and South Carolina -- have been more consistent. Each has expressly treated the holdings referenced above as good law. *See Standifer v. State*, 718 N.E.2d 1107, 1110 (Ind. 1999)(citing *Jarrett* with approval and reversing a conviction because "the trial court prevented Standifer from cross-examining [witness] about the amount of time remaining on a sentence he had served for possession of crystal methamphetamine."); *McCorker v. State*, 797 N.E.2d 257, 266 (Ind. 2003)(citing *Jarrett* with approval and observing that "[t]he **full extent of the benefit** offered to a witness is relevant to the jury's determination of the weight and credibility of the witness's testimony.")(emphasis added); *See State v. Smith*, No. A-1601-19, 2023 WL 4281375, at *1 (N.J. Super. Ct. App. Div. June 30, 2023)(citing *Jackson*, *supra*, as good law), *cert. denied*, 301 A.3d 1284 (2023); *State v. Williams*, No. A-5557-18, 2022 WL 17944696, at *10 (N.J. Super. Ct. App. Div. Dec. 27, 2022)(same); *State v. Bass*, 132 A.3d 1207, 1220 (N.J. 2016)(finding a Confrontation violation – but harmless -- because "[t]he jury should have been made aware that [witness] entered into a plea bargain with the State, as the State prepared for defendant's trial, and that by virtue of his plea bargain [witness] faced probation rather than a lengthy prison term."); *State v. Mizzell*, 563 S.E.2d 315, 317-18 (S.C. 2002)(citing *Brown* as good law and reversing defendant's conviction because the trial judge excluded evidence of the cooperating witness's possible sentence).

In Indiana, the law is particularly and profoundly clear. In that jurisdiction, a sturdy wall of precedent categorically entitles criminal defendants to bring out the specific terms of a witness's plea agreements and the precise penalties to be avoided, as one intermediate court observed:

> It is equally well-settled that the defendant is entitled to elicit the specific penalties a witness may have avoided through her agreement with the State:

> [S]ignificant harm results when the jury is prevented from learning the extent of benefit received by a witness in exchange for his testimony. It would be obviously relevant and proper for a jury to consider the amount of compensation a witness expects to receive for his testimony. It is equally proper for this jury to know the quantity of benefit to accusing witnesses. It is quite relevant whether they are thereby avoiding imprisonment of ten days, ten weeks, or ten years.

McCain, 948 N.E.2d at 1207 (quoting *Jarrett*, 498 N.E.2d at 968–69 (citations omitted), and citing *McCorker v. State*, 797 N.E.2d 257, 266 (Ind.2003); *Standifer*, 718 N.E.2d at 1110; *Bullock v. State*, 903 N.E.2d 156, 159–60 (Ind.Ct.App.2009); *Wright v. State*, 836 N.E.2d 283, 289–290 (Ind.Ct.App.2005), *reh'g granted with instructions, trans. denied*; Jones v. State, 749 N.E.2d 575, 580 (Ind.Ct.App.2001), *trans. denied*; *Sigler v. State*, 733 N.E.2d 509, 511 (Ind.Ct.App.2000), *reh'g denied*; *Bell v. State*, 655 N.E.2d 129, 132–33 (Ind.Ct.App.1995); *Hamner v. State*, 553 N.E.2d 201, 203 (Ind.Ct.App.1990); *Janner v. State*, 521 N.E.2d 709, 715 (Ind.Ct.App.1988); *Samuels v. State*, 505 N.E.2d 120, 123 (Ind.Ct.App.1987)).

Significantly, each of these State Supreme courts has rejected the reasoning of the district court here: that judges may suppress evidence of the witness's sentencing exposure if the witness and defendant could have been convicted of the same offense. *See Jarrett*, 498 N.E.2d at 968-69; *Jackson*, 233 A.3d at 449–50; *Brown*, 399

S.E.2d at 594; *Mizzell*, 563 S.E.2d at 317-18. It cannot be said in these states that a witness's sentencing exposure may be concealed in order to avoid a risk of jury nullification.

In short, some US jurisdictions afford the defendant a constitutional right to inquire into the sentencing exposure of a cooperating witness, while others do not, even in very similar cases. If nothing else, there is a manifest conflict between the decisions of federal courts of appeals and those of several highest state courts as to a federal matter. This is an "established reason for the grant of certiorari," and "will warrant review of either of the conflicting decisions since the Supreme Court is the final arbiter of matters of federal law decided by either state or federal courts." R. Stern, E. Gressman, K. Geller, S. Shapiro, *Supreme Court Practice*, §4.9 (8th ed. 2002)(citing *Florida v. White*, 526 U.S. 559 (1999), *United States v. Estate of Romani*, 118 S.Ct. 1478 (1998), *Hagen v. Utah*, 510 U.S. 399 (1994), *Andersen v. Maryland*, 427 U.S. 463 (1976), *Lakeside v. Oregon*, 435 U.S. 333 (1978), and *Baldwin v. Alabama*, 472 U.S. 372 (1985)).

C. The issue is of surpassing importance, and easily meets this Court's standards for certiorari.

The question is certainly recurring. The use of cooperating witnesses is absolutely pervasive in criminal trials. *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir.

1950) ("[C]ourts have countenanced the use of informers from time immemorial [because] it is usually necessary to rely upon [informers] or cooperators."); Jessica Roth, et al, *Why Criminal Defendants Cooperate: the Defense Attorney Perspective*, 117 Northwestern Law Review, 1351, 1354 (2023)("It is the rare federal criminal case—especially a complex one—that is built without the assistance of cooperators."). As such, the differing standards applied to the question will inevitably lead to inconsistent results by accident of geography.

Further, it is difficult to overstate the issue's critical importance both to individual criminal defendants and to the American constitutional design. Exposing the incentives of cooperating witnesses is an essential check against wrongful conviction. Of the death row inmates exonerated between 1974 and 2004, one study estimated that nearly half had been convicted in part due to the testimony of cooperating defendants. *See* Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, 3 (2005). Limiting the defendant's exposure of a witness's incentives places innocent people in danger of wrongful conviction.

As the Supreme Court of Indiana has bluntly explained:

> An accomplice who turns "state's evidence" and agrees to "cooperate" with the State in consideration of leniency or the dismissal of charges by the State, to be realistic, is being bribed, regardless of the fact that public policy has approved such action in the interest of effective law enforcement. It does not necessarily follow that because of inducements offered to the accomplice his testimony is false. It is, however, highly

> suspect. Because of the pressure of such undue influence upon the witness in such cases the jury should have the evidence relating thereto. Such type of influence naturally impairs the credibility of such a witness.

Newman v. State, 263 Ind. 569, 334 N.E.2d 684, 686–87 (1975); *accord McCain v. State*, 948 N.E.2d 1202, 1206 (Ind. Ct. App. 2011). If prosecutors can offer such powerful incentives to witnesses with criminal exposure, fairness and prudence demand that the jury know precisely what they are.

And putting aside the issue's importance to individual defendants, it is of significant importance to the American constitutional design more generally. As noted, the Framers intended the Confrontation Clause as a restraint on the power of the government. *Crawford*, 541 U.S. at 67–68. They committed the power to decide the truth of witnesses to the jury, not to prosecutor or the judge. *See id.* That choice to empower the jury is a political decision as much as a pragmatic one -- it reflects the Founding generation's commitment to popular control over the organs of government. *See* 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873)(purpose of the jury trial guarantee is "to guard against a spirit of oppression and tyranny on the part of rulers," and serve "as the great bulwark of [our] civil and political liberties"). That fundamental choice is utterly disregarded when the most basic facts regarding a witness's incentive to testify for the government – the time his or her testimony saves him or her in prison – are concealed from the jury on the judge's individual determination that they would not make a difference.

Finally, the case would merit certiorari even if the opinion below were correctly decided. Two federal courts have expressly recognized a circuit split. *Henry*, 2018 WL 802006, at *2–3; *Lanham*, 617 F.3d at 884. Although some of the circuits finding a broader right of cross-examination have not applied those holdings with consistency, neither have they overruled them. In any case, the question pertains to an incorporated constitutional right, and it has certainly divided the state courts of last resort. The New Jersey Supreme Court recognized the conflict in *Jackson*, *see Jackson*, 233 A.3d at 449–50, and the decisions of the Supreme Courts of New Jersey, Indiana, and South Carolina simply cannot be squared with those of Kansas, Maryland, and Minnesota (and many federal circuits). In the former states, a trial judge that excludes evidence regarding a cooperating witness's criminal exposure errs. In the latter, he or she acts within his or her discretion. The Federal Constitution is not, at present, given a uniform meaning on this momentous question.

D. This case is an excellent vehicle.

The present case is an ideal vehicle to address the conflict. The trial judge excluded evidence regarding the exact mandatory minimum faced by the government's chief witness, allowing the jury to learn that she avoided an unspecified mandatory minimum, but concealing its grave severity. (ROA.1199-1201). This case thus squarely presents the issue upon which the lower courts have divided: “whether a defendant may question a cooperating co-defendant about details of their potential sentences and plea agreements.” *Henry*, 2018 WL 802006, at *2–3; *see also Lanham*, 617 F.3d at 884.

The trial judge’s decision to conceal the length of the mandatory minimum makes the case an especially apt vehicle. A mandatory minimum, unlike a statutory maximum, acts as a particularly strong incentive to most witnesses to comply with the perceived wishes of the government. As the Ninth Circuit explained:

> The potential maximum statutory sentence that a cooperating witness might receive, however, is fundamentally different from the mandatory minimum sentence that the witness will receive in the absence of a motion by the Government. The former lacks significant probative force because a defendant seldom receives the maximum penalty permissible under the statute of conviction.

Larson, 495 F.3d at 1106. A witness facing a harsh mandatory minimum, unlike one who faces an enhanced maximum, cannot refuse to testify and hope to avoid the minimum sentence. Rather, he or she knows that pleasing the government represents the only way out. And while the jury learned that Gardeazabel faced an unspecified minimum, it didn’t know that the minimum was ten years rather than one year or one month. A witness unwilling to distort the truth to avoid a year in prison might well be willing to distort the truth to save herself ten.

Further, the Fifth Circuit's answer to the question presented represents the sole basis of decision below. *See* [Appendix A]; *United States v. Arellano*, No. 23-10199, 2024 WL 1156535, at *1 (5th Cir. Mar. 18, 2024)(unpublished). There is no question of preservation. Nor did the opinion below consider the question of harmless error. This Court can simply reach the question presented by reviewing the reasoning of the court of appeals. If necessary, it can remand for determination of harmless error, as its usual practice. *See Dawson v. Delaware*, 503 U.S. 159, 169 (1992); *Gilbert v. California*, 388 U.S. 263, 272 (1967); *Coleman v. Alabama*, 399 U.S. 1, 11 (1970).

Further, there is a good chance of relief if this Court finds error and remands to the court of appeals to determine whether error is harmless. As a constitutional error, a violation of the Confrontation Clause may be ignored only upon proof of harmlessness beyond a reasonable doubt. *See Van Arsdall*, 475 U.S. at 684. This heavy burden of persuasion increases the chances of relief, notwithstanding the government's as yet unadjudicated claim of harmless error.

Two further considerations unique to the analysis of harmless error in the Confrontation context will also add to Petitioner's chance for relief in the court below. First, in the Confrontation context, "harmless-error analysis first requires [a review court] to 'assum[e] that the damaging potential of the cross-examination were fully realized.'" *United States v. Jimenez*, 464 F.3d 555, 563 (5th Cir. 2006)(quoting *Van*

Arsdall, 475 U.S. at 684). Thus, the court below will assume that the witness's fear of a ten-year mandatory minimum would have wholly destroyed the jury's faith in her as a credible narrator of the relevant events.

Second, the court below has held that its job "in analyzing a Confrontation Clause violation is to look primarily at the specific testimony omitted, rather than the weight of the evidence notwithstanding the omitted testimony." *Jimenez*, 464 F.3d at 563; *see also United States v. Landerman*, 109 F.3d 1053, 1065 (5th Cir.1997) ("Although there was sufficient evidence to convict [the defendant] without [the witness]'s testimony, that is not the appropriate inquiry."). Accordingly, harmless error will evaluate Gardeazabel's contribution to the case, not the strength of independent evidence.

And there can be no question that Gardeazabel – a witness Petitioner could not fully impeach – made immense contributions to the government's case. The officers found the contraband at the center of the case in a suitcase; Ms. Gardeazabel's testimony placed that suitcase in Petitioner's hand from the very outset of the road-trip. (ROA.1134-35). Further, she testified that Petitioner opened the suitcase himself and placed his clothes inside of it. (ROA.1137). And she also provided incriminating testimony about prior trips she took with Petitioner. (ROA.1126, 1147). On these trips, she said, Petitioner conducted very suspicious activity, such as meeting strangers in motel rooms; she said that on other occasions she actually observed him in the conduct of drug transactions. (ROA.1126, 1147).

A jury that believed Ms. Gardeazabel would be almost certain to convict. As the government itself conceded below, “Gardeazabel’s testimony was compelling and the government referred to it at opening and closing…” Appellee’s Brief in *United States v. Arellano*, No. 23-10199, 2023 WL 7548758, at *9-10 (5^{th} Cir. Filed November 8, 2023). Whatever other evidence may appear in the record, no trial could be called fair unless the defendant enjoyed his full right to raise doubt about her testimony.

Even reaching beyond her directly inculpatory testimony, moreover, Gardeazabel provided critical context for other evidence against the defendant. Specifically, she told the jury that the two had met a man named Omar, who transacted drugs with them. (ROA.1148). With that information, the defendant’s jail calls – referring to “Omar” and passing on messages to his associates – became especially incriminating. (ROA.1242). Indeed, the government used Ms. Gardeazabel’s testimony about Omar for precisely that purpose at closing. (ROA.1382).

Finally, Ms. Gardeazabel’s testimony cut off a critical defensive theory, which might have explained some of the defendant’s statements to police. Immediately after the stop, Ms. Gardeazabel told the police that everything in the car belonged to her. (ROA.1140). That statement, of course, had obvious defensive potential. And upon learning that she had made this statement, Petitioner advised her to recant it, and instead to say that "[T]hey just gave us the car to drive." (ROA.1061). From that interaction, a reasonable jury could think that Petitioner sought to protect Gardeazabel from criminal exposure. After all, a person without meaningful attachment to Gardeazabel might have simply seized on the admission and tried to saddle her with the blame.

Against that backdrop, Petitioner's admissions to the police, (ROA.1221-24), can likewise be seen as an effort to offer himself in place of Gardeazabel. But Gardeazabel's testimony also provided an explanation for her claim of "everything" in the car. She said that the claim was false, and that she only said it because she was under the influence of drugs. (ROA.1140-41). A jury that believed her would thus have no reason to doubt Petitioner's statements to the police, and no reason to credit her prior claim of the drugs.

Most clearly, Gardeazabel's testimony was critical to the government's case for an enhanced sentencing range on Count One of the indictment, triggered by its drug type and quantity allegations. In the Fifth Circuit, "when the Government seeks an enhanced sentence under § 841(b)(1)(A), the jury must 'determine the [drug] amount which each defendant knew or should have known was involved in the conspiracy.'"

United States v. Hill, 80 F.4th 595, 604 (5th Cir. 2023)(quoting *United States v. Montemayor*, 55 F.4th 1003, 1012 (5th Cir. 2022)(further citation and quotation marks omitted). Gardeazabel testified that Petitioner actually opened the bag in which police found drugs, making it all but certain that he "knew or should have known" that he possessed more than 400 grams of Fentanyl. This was corroborated by her accounts of multiple long-distance trips to traffic drugs. In the absence of her testimony, Petitioner's statements did not establish knowledge of the requisite quantity, and did not show sufficient context to prove beyond a reasonable doubt that he should have known of it. Or, at least, the government cannot show beyond a reasonable doubt that a reasonable jury could not entertain a doubt as to this fact without considering Gardeazabel's testimony.

In any case, the court below has never held the error harmless. It reached the merits of the Confrontation Clause issue. There is accordingly no obstacle to this Court's review of the merits as well.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court issue an order granting the writ of *certiorari* to review the decision below.

Respectfully submitted this 17th day of June 2024.

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