No. 23-7774

IN THE SUPREME COURT OF THE UNITED STATES

PABLO SANTANA ARELLANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated the Confrontation Clause of the Sixth Amendment by limiting petitioner's ability to cross-examine a cooperating witness who testified against him about the precise details of her future sentencing.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Arellano, No. 21-cr-88 (Feb. 23, 2023)

United States Court of Appeals (5th Cir.):

United States v. Arellano, No. 23-10199 (Mar. 18, 2024)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is available at 2024 WL 1156535.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2024. Petitioner filed a petition for a writ of certiorari on June 17, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute 400 grams or more of fentanyl, in violation of 21 U.S.C. 846, and one count of possessing fentanyl with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. B1. The court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Id. at B2. The court of appeals affirmed. Id. at A1-A3.

1. In September 2021, police officers in Amarillo, Texas stopped a car for speeding on Interstate 40. Presentence Investigation Report (PSR) ¶ 9. Petitioner was the driver and his then-girlfriend, Bridgette Gardeazabel, was a passenger. PSR ¶¶ 4, 9, 15. Officers smelled marijuana coming from inside the car, and petitioner acknowledged that he "was just about to roll one." PSR ¶ 9. During a search, officers found more than six kilograms of fentanyl pills in the trunk of the car. PSR ¶¶ 10-11, 24.

A federal grand jury in the Northern District of Texas charged petitioner and Gardeazabel each with one count of conspiring to distribute and possess with intent to distribute 400 grams or more of fentanyl, in violation of 21 U.S.C. 846(a)(1) and (b)(1)(A)(vi), and one count of possessing fentanyl with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). See Indictment 1-

2. The conspiracy charge carried a statutory punishment range of ten years to life in prison; the possession-with-intent-to-distribute charge carried a statutory punishment range of zero to 20 years in prison. See 21 U.S.C. 841(b)(1)(A)(vi) and (C).

Gardeazabel pleaded guilty to possessing fentanyl with intent to distribute it. D. Ct. Doc. 91 (Sept. 23, 2022). In exchange, the government agreed to dismiss the conspiracy charge against her. Ibid. Gardeazabel also agreed to testify against petitioner at trial. Pet. App. A3.

2. Before petitioner's trial, the government moved in limine to exclude any reference to petitioner's possible punishment. C.A. ROA 255-256. In response, petitioner raised the argument that, if the government called Gardeazabel -- who had been charged with the same crimes -- to testify, petitioner should be allowed to question Gardeazabel about her plea agreement and how it might have affected her motivation for testifying. Id. at 310. In resolving the government's motion in limine to exclude information about petitioner's own sentence, the district court made clear that petitioner could question Gardeazabel about her "'motives for entering a plea agreement and testifying'" and elicit testimony about "the general topic of a reduction in her sentence." Id. at 482 (citation omitted).

The district court also made clear that it would allow petitioner to ask Gardeazabel about the maximum sentences that she faced on her pending charges, and to ask whether she "may no longer

face a potential life sentence" as a result of her plea agreement. C.A. ROA 482-483. It explained, however, that to avoid prompting the jury to compare Gardeazabel's and petitioner's identical charges, petitioner would not be permitted to inquire "'about [Gardeazabel's] exact sentencing range or about the exact sentence reduction she might receive,'" id. at 482 (citation omitted), and instructed the parties to refer to Gardeazabel's conspiracy charge as "Charge One" and her possession-with-intent-to-distribute charge as "Charge Two," id. at 483. The court found that following those guidelines would avoid misleading the jury or inviting it to engage in nullification, while simultaneously protecting petitioner's right to cross-examine a cooperating witness on her potential bias and motivation to testify. Ibid.

At trial, the government presented testimony from five witnesses, including Gardeazabel. See C.A. ROA 1034, 1093, 1113, 1205, 1264. On direct examination, Gardeazabel testified (among other things) that (1) she had pleaded guilty to one count in the indictment in exchange for the government's agreement to dismiss the other count and recommend a lesser sentence; (2) she had agreed to cooperate with the government by providing truthful testimony; (3) she had met with the government's attorneys and investigators several times; (4) she was aware that she still (even with one count dismissed) faced up to 20 years in prison; (5) she had not yet been sentenced; (6) no one had promised her an exact sentence;

and (7) she understood that the district judge had sole discretion to decide her sentence. Id. at 1122-1124.

On cross-examination, Gardeazabel admitted that her "cooperation [was] important to whatever [sentence] the government might recommend." Pet. App. C3. Gardeazabel also admitted that, in exchange for her guilty plea on a charge that carried a maximum punishment of 20 years in prison, the government had agreed to dismiss "Charge Number 1, which would have had a possible life sentence." Id. at C6. Following that testimony, the district court permitted petitioner to voir dire Gardeazabel outside the presence of the jury. Id. at C20-C23. Petitioner then asked the court to "reconsider" its prior decision and allow the jury to hear both the "full ranges" of punishment that Gardeazabel faced, id. at C27, and her desire to receive a sentence of "probation," id. at C28.

The district court "grant[ed] in part" petitioner's request and clarified its earlier decision. Pet. App. C30. The court made clear that it would permit petitioner to establish that Gardeazabel "was potentially facing a count with a statutory minimum," which the court could "dismiss * * * pursuant to [her] plea agreement." Id. at C37. The court also made clear that petitioner would be allowed to ask Gardeazabel whether dismissing that charge "could result in a significant benefit to [her]," id. at C35, and "significantly reduce[]" her "potential sentencing exposure," id. at C37. The court further clarified that petitioner

could "elicit testimony on [Gardeazabel's] hopes for leniency," including her plans to "mak[e] various motions in support of maximal leniency." Id. at C30. And the court explained that while petitioner could "make references generally to the ceiling and the floor as a maximum or minimum," id. at C35, the parties should not discuss the specific "years" or "decades" of imprisonment that Gardeazabel faced because doing so "would invite inquiry into the sentencing math that th[e] jury may not do." Id. at C37.

After the jury returned to the courtroom, petitioner resumed his cross-examination. Pet. App. C39. In response to questioning, Gardeazabel testified that, given "the possibility" that "Charge 1" would "be[] dismissed as part of [her] plea bargain," she "no longer face[d] a statutory minimum of a number of years." Ibid. Gardeazabel also testified that she had "already received a benefit" in return for her presence at petitioner's trial, because she had been "allowed to plead to a statute that does not have any mandatory minimum but sets the * * * statutory maximum at 20 years." Id. at C39-C40.

The jury found petitioner guilty of both charged offenses. Pet. App. B1. The district court sentenced him to 240 months of imprisonment, to be followed by five years of supervised release. Id. at B2.[1]

[1] Gardeazabel later was sentenced to 57 months of imprisonment, to be followed by one year of supervised release. See D. Ct. Doc. 162, at 2 (Feb. 9, 2003).

3. The court of appeals unanimously affirmed in an unpublished per curiam opinion, rejecting petitioner's claim that his Confrontation Clause rights had been violated by limitations on his cross-examination of Gardeazabel. Pet. App. A1-A3. The court explained that it reviews "alleged Sixth Amendment Confrontation Clause violations de novo, but any violations are subject to a harmless error analysis." Id. at A2 (citation omitted). And it observed that the "Confrontation Clause is generally satisfied when defense counsel has been 'permitted 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 witnesses.'" Ibid. (quoting United States v. Restivo, 8 F.3d 274, 278 (5th Cir. 1993), cert. denied, 513 U.S. 807 (1994)). "The relevant inquiry," the court explained, "is whether the jury had sufficient information to appraise the bias and motives of the witness." Ibid. (quoting United States v. Tansley, 986 F.2d 880, 886 (5th Cir. 1993)).

On the particular facts here, the court of appeals found that the "district court did not violate the Confrontation Clause of the Sixth Amendment or abuse its discretion by limiting the cross-examination of Gardeazabel," because Gardeazabel's "potential bias and motivation were adequately addressed by defense counsel on cross-examination." Pet. App. A2. The court observed that "[t]he 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." Id. at A3. And the court emphasized this Court's instruction that the "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." Ibid. (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)).

ARGUMENT

Petitioner renews his contention (Pet. 15-35) that the district court violated the Confrontation Clause of the Sixth Amendment by limiting petitioner's ability to cross-examine a cooperating witness who testified against him about the precise details of her future sentencing. The court of appeals' decision was correct, and no conflict in the circuits or state courts of last resort warrants further review of the unpublished and nonprecedential decision in this case. Indeed, this case would be a poor vehicle for considering petitioner's arguments because he would not be entitled to relief even if this Court agreed with them.

This Court has repeatedly and recently denied review of petitions raising similar questions. See, e.g., Campbell v. United States, 142 S. Ct. 784 (2022) (No. 21-5666); Campbell v. United States, 142 S. Ct. 751 (2022) (No. 20-1790); Hunter v. United States, 140 S. Ct. 2522 (2020) (No. 19-7021); Wright v. United States, 584 U.S. 992 (2018) (No. 17-1059); Trent v. United States, 584 U.S. 992 (2018) (No. 17-830); Lipscombe v. United States, 574 U.S. 1081 (2015) (No. 14-6204); Heinrich v. United States, 564 U.S. 1040 (2011) (No. 10-9194); Wilson v. United States, 564 U.S. 1040 (2011) (No. 10-8969); Reid v. United States, 556 U.S. 1235 (2009) (No. 08-1011). The same result is warranted here.

1. The court of appeals correctly rejected petitioner's Confrontation Clause challenge. Petitioner's renewal of that claim does not warrant this Court's review.

This Court has recognized that "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 678-679 (1986) (quoting Davis v. Alaska, 415 U.S. 308, 316-317 (1974)). The Court has thus cautioned that a trial court may violate the Confrontation Clause if it "prohibit[s] all inquiry" into a potential basis for a witness's bias or prejudice. Id. at 679; see Olden v. Kentucky, 488 U.S. 227, 231-232 (1988) (per curiam); Davis, 415 U.S. at 316-318.

This Court has simultaneously recognized, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 679; cf. Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of," e.g., "unfair prejudice," "confusing the issues" or "misleading the jury"). The Court has thus emphasized that "the 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." Van Arsdall, 475 U.S. at 679 (citation omitted). Accordingly, to establish that a limitation on cross-examination violated the Confrontation Clause, a defendant must show that "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense] counsel been permitted to pursue his proposed line of cross examination." Id. at 680.

Here, as the court of appeals correctly recognized, the district court's limitation on cross-examination fell within its "wide latitude * * * to impose reasonable limits on such cross-examination." Van Arsdall, 475 U.S. at 679. The additional information that petitioner sought to elicit was highly

prejudicial to the proper conduct of the trial, because petitioner was charged with the same offenses as Gardeazabel. See Indictment 1-2. Thus, as the district court observed, had the jury been informed of the precise statutory minimum for Gardeazabel's conspiracy charge, it likely would have inferred that petitioner himself faced the same statutory minimum sentence if convicted. That inference would have created a significant risk of prejudice to the jury's unbiased evaluation of the evidence. As this Court has noted, "providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." Shannon v. United States, 512 U.S. 573, 579 (1994).

At the same time, although the district court declined to allow disclosure of the precise sentence that Gardeazabel faced, it allowed petitioner's counsel to elicit enough information for the jury to infer that Gardeazabel had a significant, sentencing-related incentive to cooperate with the government. As the court of appeals emphasized, the jury heard testimony 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." Pet. App. A3. The district court also granted petitioner permission to cross-examine Gardeazabel on whether her plea agreement would "significantly reduce[]" her "potential sentencing exposure if * * * all work[ed] out the way [she] anticipate[d]," id. at C37, and to "elicit testimony on * * * her hopes for leniency," id. at C30. And defense counsel additionally established that Gardeazabel had "received a benefit to" appear at petitioner's trial. Id. at C39-C40.

Under those circumstances, the district court's narrow restriction on inquiry into the precise details of the future sentencing balanced the limited incremental probative value of such information against the substantial risk of prejudice to the jury's impartial evaluation of the evidence without regard to petitioner's own sentencing exposure. The court of appeals correctly found that revealing the exact exposure associated with Gardeazabel's conspiracy charge -- which was identical to petitioner's own -- would not have given the jury "a significantly different impression of Gardeazabel's credibility," Pet. App. A3 (citation omitted); see Van Arsdall, 475 U.S. at 680, and that no Confrontation Clause violation occurred.

2. The court of appeals' decision is consistent with many other decisions that have upheld restrictions on the disclosure of the precise sentences that cooperating witnesses avoided or hoped

to avoid. See, e.g., United States v. Campbell, 986 F.3d 782, 794-796 (8th Cir. 2021), cert. denied, 142 S. Ct. 751 and 142 S. Ct. 784 (2022); United States v. Wright, 866 F.3d 899, 905-908 (8th Cir. 2017), cert. denied, 584 U.S. 992 (2018); United States v. Trent, 863 F.3d 699, 704-706 (7th Cir. 2017), cert. denied, 584 U.S. 992 (2018); United States v. Rushin, 844 F.3d 933, 938-940 (11th Cir. 2016); United States v. Cropp, 127 F.3d 354, 360 (4th Cir. 1997), cert. denied, 523 U.S. 1042 (1998); United States v. Luciano-Mosquera, 63 F.3d 1142, 1153 (1st Cir. 1995), cert. denied, 517 U.S. 1234 (1996); see also Pet. 20-22 (listing cases). And it does not implicate any conflict in authority that would warrant this Court's review.

a. Petitioner contends (Pet. 19-23) that the decision below conflicts with decisions from the Third, Eighth, and Ninth Circuits. But as petitioner himself acknowledges (Pet. 23), the "Third, Eighth, and Ninth Circuits have each affirmed when trial judges excluded evidence about a cooperating witness's sentencing exposure." The courts of appeals accordingly appear to treat the inquiry into whether and to what extent a defendant should be permitted to question a cooperating witness about the benefits he hopes to receive in exchange for his cooperation as fact-intensive and case-specific. And courts have resolved that question in different ways when considering different sets of facts. That is neither unexpected nor problematic, and it does not indicate the existence of a conflict warranting this Court's intervention.

In United States v. Chandler, 326 F.3d 210 (2003), for example, the Third Circuit relied on the specific facts at issue in that case to find that the district court's particular limitations on a defendant's cross-examination of two cooperating witnesses violated the Confrontation Clause. Id. at 216-224. The court in Chandler made clear that it was not deciding "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 specific sentence that witness may have avoided through his cooperation." Id. at 221. "Rather," the court explained, it "need[ed] only decide whether" the case-specific facts had shown that "the jury might have 'received a significantly different impression of [the witnesses'] credibility.'" Ibid. (quoting Van Arsdall, 475 U.S. at 680); see id. at 222 (finding a Confrontation Clause violation "[i]n light of these facts"). In subsequent decisions, the Third Circuit has repeatedly distinguished Chandler on its particular facts and has found no Confrontation Clause violation when a district court "preclud[es] cross-examination on the specific details of [a cooperating witness's] sentencing exposure," especially when the district court "permit[s] cross-examination in more general terms about the [witness's] sentencing reductions and other benefits of cooperation." United States v. Noel, 905 F.3d 258, 267 (2018); see, e.g., United States v. John-Baptiste, 747 F.3d 186, 212, cert. denied, 572 U.S. 1129 and 573 U.S. 948 (2014); United States v.

Mussare, 405 F.3d 161, 170 (2005), cert. denied, 546 U.S. 1225 (2006).

In United States v. Caldwell, 88 F.3d 522, cert. denied, 519 U.S. 1048 (1996), the Eighth Circuit found that, on the facts of that case, the district court's limitation on cross-examination constituted a harmless Confrontation Clause violation. Id. at 525. At the same time, the court of appeals acknowledged that a "district court is given wide latitude to limit cross-examination to avoid witness harassment, prejudice, confusion of the issues, or unnecessary repetition." Ibid. (citing Van Arsdall, 475 U.S. at 679). And much like how the Third Circuit has viewed Chandler, the Eighth Circuit has repeatedly distinguished Caldwell in decisions addressing different factual circumstances. See, e.g., Campbell, 986 F.3d at 794-796 (distinguishing Caldwell and finding no Confrontation Clause violation where "the district court allowed defense counsel to cross-examine the government's cooperating witnesses about looming mandatory minimum or 'substantial' sentences they faced, the possibility of receiving an increased sentence based on prior criminal history, and their hopes of earning a reduced sentence through their cooperation" but "did not allow cross-examination that would reveal the precise amount of incarceration, in years, that any witness was facing"); Wright, 866 F.3d at 905-908 (similar); United States v. Baldenegro-Valdez, 703 F.3d 1117, 1122-1124 (8th Cir.) (similar), cert.

denied, 569 U.S. 999 (2013); United States v. Walley, 567 F.3d 354, 358-360 (8th Cir. 2009) (similar).

Nor does the Ninth Circuit's decision in United States v. Larson, 495 F.3d 1094 (2007) (en banc), cert. denied, 552 U.S. 1260 (2008), purport to adopt a categorical rule that conflicts with the decision below. The Ninth Circuit instead recognized, consistent with this Court's precedents, that the relevant Confrontation Clause inquiry is whether a "reasonable jury might have received a significantly different impression of the witness' credibility had . . . counsel been permitted to pursue his proposed line of cross-examination." Id. at 1106 (brackets and citation omitted). In Larson itself, a bare majority of the en banc court found a Confrontation Clause violation where a cooperating witness had faced a minimum sentence of life in prison and the defendant had not been allowed to elicit any testimony about the existence or magnitude of that mandatory minimum. Id. at 1105-1107; see id. at 1108 (Graber, J., concurring in part and specially concurring in part). The court suggested that a mandatory life sentence is particularly probative of a cooperating witness's potential bias. Id. at 1105-1107; see id. at 1106 n.11 (observing "a fundamental difference between a sentence involving 'substantial prison time' with a likelihood of release and life in prison without the possibility of release"). But the court had no occasion to consider a circumstance where, as in this case, defense counsel was permitted to cross-examine a cooperating witness about

an unspecified statutory minimum sentence and her potential bias where the witness faced something less than life in prison. The Ninth Circuit thus has not treated Larson as establishing a categorical rule permitting inquiry into the specific details of the sentencing exposure faced by a cooperating witness. For example, the court found no error in the preclusion of inquiry into the specific statutory minimum penalties the cooperating witnesses would have faced where "'sufficient'" other evidence allowed "the jury to properly evaluate the credibility of the cooperating witnesses." United States v. Tones, 759 Fed. Appx. 579, 585 (9th Cir. 2018), cert. denied, 140 S. Ct. 67 (2019) (citation omitted).[2]

b. Petitioner also contends (Pet. 22-26) that the decision below conflicts with the decisions of various state courts of last resort. Although some tension may exist, petitioner fails to

[2] To the extent petitioner posits (Pet. 22) an intra-circuit conflict between the decision below and United States v. Cooks, 52 F.3d 101 (5th Cir. 1995), that contention does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, no such conflict exists. In Cooks, the Fifth Circuit declined to adopt a categorical rule and recognized that restrictions on cross-examination about specific sentences do not violate the Confrontation Clause "if 'the jury has sufficient information to appraise the bias and motives of the witness.'" 52 F.3d at 104 (brackets and citation omitted). Moreover, because that case involved cross-examination about a witness's potential sentences on unrelated state charges, the court had no occasion to consider the substantial risk of prejudice that arises when, as here, disclosure of the sentence faced by the cooperating witness would allow the jury to infer the sentence to which a conviction would subject the defendant himself. See id. at 103-104 & n.13.

identify a square conflict warranting the Court's review in this case. In several of the decisions petitioner cites, the trial court appeared to preclude defense counsel not only from asking a cooperating witness quantitative questions about the particular penalty he faced, but also any qualitative questions on that subject (e.g., about the degree of severity). See State v. Jackson, 233 A.3d 440, 452 (N.J. 2020); State v. Bass, 132 A.3d 1207, 1219-1220 (N.J. 2016); McCorker v. State, 797 N.E.2d 257, 261 (Ind. 2003); Standifer v. State, 718 N.E.2d 1107, 1110 (Ind. 1999);[3] State v. Brown, 399 S.E.2d 593, 594 (S.C. 1991); Jarrett v. State, 498 N.E.2d 967, 968 (Ind. 1986). The state supreme courts thus had no occasion to address the question presented here, where the trial court precluded questioning about the specific sentence previously faced by the cooperating witness (and currently faced by the defendant on trial) but permitted cross-examination about the existence of a statutory minimum.

Although petitioner asserts a state-level conflict only with respect to the Indiana, New Jersey, and South Carolina supreme courts, he suggests in a string cite that the District of Columbia similarly falls on the opposite side of the alleged conflict. See Pet. 22 (citing Jenkins v. United States, 617 A.2d 529, 532 (D.C.

[3] Contrary to petitioner's assertion (Pet. 23), the court in Standifer did not "revers[e]" the defendant's convictions; instead, it found any error was "harmless" and "affirmed." 718 N.E.2d at 1110-1111. And State v. Mizzell, 563 S.E.2d 315 (S.C. 2002), did not involve a cooperating witness, as the relevant witness there "had neither agreed to a plea bargain nor pled guilty." Id. at 318.

1992)). But Jenkins did not adopt a categorical rule conflicting with the decision below. On the contrary, the court of appeals observed that "the probative value of impeachment does not vest an examining attorney with an unbridled license." Id. at 532. And while it took the view that the trial court's restriction of cross-examination in that case -- which had left the jury "without knowledge if the crime committed [by the witness] carried a significant sentence which might induce [him] to shade his trial testimony" -- constituted error, it found that error harmless. Ibid. Like the courts discussed above, the court in Jenkins had no occasion to address a circumstance where a trial court permitted defense counsel to examine a cooperating witness not only about the existence of a statutory minimum and a statutory maximum (on the same charges faced by the defendant), but also about the significant benefits of cooperating testimony.[4]

3. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle for

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[4] Petitioner states (Pet. 19-23) that some lower courts have themselves stated that courts are divided on the question whether a defendant may cross-examine a cooperating witness about details of their potential sentences. But those authorities relied on the same decisions as petitioner. Furthermore, even one of the decisions that petitioner cites recognized that, although courts of appeals have reached different results in different cases, none has "impose[d] a categorical right" to ask about "the concrete terms of a cooperating witness's agreement with the government" or the "concrete terms of [a] sentence"; "[i]nstead, the courts determine how much detail" to allow "on a case-by-case basis." United States v. Henry, No. CR 16-1097, 2018 WL 802006, at *2 (D.N.M. Feb. 8, 2018).

considering it. Even if there were a Confrontation Clause violation in petitioner's case, any error was harmless beyond a reasonable doubt.

As this Court has explained, "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to * * * harmless-error analysis." Van Arsdall, 475 U.S. at 684. Whether an error was harmless depends on a "host of factors," including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Ibid.

As the government detailed in its brief to the court of appeals, see Gov't C.A. Br. 2-3, 21-23, all of the pertinent factors in this case support a finding of harmlessness. Gardeazabel's account of petitioner's drug-trafficking activity was corroborated and supported by numerous other sources, including the testimony of the officers who investigated the case and petitioner's own recorded statements. For example, the jury heard a recording of statements that petitioner had made while police officers were searching his car, in which petitioner instructed Gardeazabel to keep quiet, C.A. ROA 1533, and then -- when officers began searching the trunk where he had stashed more

than six kilograms of fentanyl -- said "[w]e're gonna get found out," id. at 1535. The government also introduced recordings of petitioner's jail calls in which he discussed drug trafficking, id. at 1227-1243, as well as petitioner's unsolicited incriminating statements to the Drug Enforcement Administration, id. at 1224.

In addition, as explained above, the district court gave petitioner's counsel substantial latitude to explore Gardeazabel's incentives to testify favorably for the government, including her significantly reduced sentencing exposure and her desire for maximum leniency, and barred inquiry only into certain granular details of her potential punishment. Particularly in light of the overwhelming evidence of petitioner's culpability, any marginal value gleaned from additional cross-examination would not have affected the jury's verdict. See Larson, 495 F.3d at 1108 (finding error harmless because "the Government offered significant evidence" of guilt and defense counsel was allowed to explore the cooperating witness's "desire to obtain a lesser sentence"). Any Confrontation Clause error in this case was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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