No. 23-7774

In the

Supreme Court of the United States

Pablo Santana Arellano,

Petitioner,

v.

United States of America,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

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ARGUMENT

Conflict prevails in the lower courts regarding the scope of the defendant's right to cross-examine cooperating witnesses. The core functions Confrontation Clause – protecting against erroneous conviction and exerting democratic control over the prosecution – are seriously undermined by the decision below and similar rulings.

In our country, prosecutors may offer a witness a reduced prison sentence in exchange for his or her testimony against the accused.[1] This gives the government enormous power over the citizenry and poses an obvious threat of abuse and wrongful conviction. Put simply, the threat of prison, or the hope of reprieve, may cause a witness to lie or shade the truth, misleading a jury to convict an innocent person.[2]

The Framers imagined that the people's primary check on the power of the prosecutor would be the jury, not a judge – trial or appellate.[3] Thus, when the defendant elects a trial, every felony conviction exists at the sufferance of this

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[1] *See United States v. Singleton*, 165 F.3d 1297, 1301 (10th Cir. 1999)(*en banc*)(citing *Hoffa v. United States, 385 U.S. 293, 310–12 (1966); Lisenba v. California,* 314 U.S. 219, 227 (1941); *Benson v. United States*, 146 U.S. 325, 333–37 (1892); *The Whiskey Cases*, 99 U.S. 594, 599–600 (1878)).

[2] *See Washington v. Texas*, 388 U.S. 14, 22–23 (1967)("Common sense would suggest that [an accused accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing."); Hon. Stephen S. Trott*, Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1383 (1996)("Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law."); Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements,* 72 Cornell L.Rev. 800, 802 (1987) ("Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators. Further, an accomplice may wish to please the prosecutor to ensure lenient prosecution in his own case.").

[3] *See Crawford v. Washington*, 541 U.S. 36, 67-68 (2004)(Founders distrusted judges to fairly and reliably evaluate the truthfulness and partiality of government witnesses, insisting instead on presentation of the witness to the jury); *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995)(right to trial by jury "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'")(quoting 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873)).

profoundly democratic institution.[4] Indeed, the Sixth Amendment right of Confrontation grew out of the Founders' skepticism toward the use of witnesses that curried favor with the prosecution in order to mitigate their own punishment.[5]

But the jury cannot check prosecutorial power unless the exercise of that power is fully exposed to its view. The government's view of the Confrontation Clause – that judges and prosecutors may pick and choose which parts of a government's deal with the witness to tell the jury about – runs exactly contrary to the purpose of the Confrontation Clause. In the government's view, it suffices if the jury knows the government's witness avoided a mandatory minimum – it need not know that she avoided ***ten years in prison***.[6] But of course many people who would not lie to avoid, say, one year in prison, might do so to avoid ***ten years***. Or, at least, many reasonable juries could hold that view of human nature, or the nature of drug dealers. And our system entrusts that question to the jury upon review of all relevant facts.[7] It is

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[4] *See Gaudin*, 515 U.S. at 510–11 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)); *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 2539, 159 L. Ed. 2d 403 (2004)("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.")(citing *Letter XV by the Federal Farmer* (Jan. 18, 1788), *reprinted in* 2 *The Complete Anti–Federalist* 315, 320 (H. Storing ed.1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), *reprinted in* 2 *Works of John Adams* 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control ... in every judgment of a court of judicature" as in the legislature*); Letter from Thomas Jefferson to the Abbe Arnoux* (July 19, 1789), *reprinted in* 15 *Papers of Thomas Jefferson* 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative")).

[5] *See Crawford*, 541 U.S. at 44, 50 (describing English political trials such as that of Sir Walter Raleigh in which defendant was incriminated by witnesses "at the King's mercy").

[6] *See* (Brief in Opposition, at 11-12).

[7] *See Davis v. Alaska*, 415 U.S. 308, 318 (1974)(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.").

simply not for a judge to say that the length of the mandatory minimum avoided by the witness is not relevant to her credibility.

As such, the decision below, and the comparable decisions of appellate courts, undermines a critical check on one of the most dangerous powers now entrusted to the government and its representatives. Moreover, the courts of appeals have divided on the question presented.[8] At a minimum, the decision below – and similar decisions of federal courts of appeals – quite directly conflicts with the clearly stated decisional law of several state courts of last resort.[9] The expositors of federal law are in conflict on a question of momentous import, which question is the sole basis for the decision below.[10] This Court should grant certiorari.

The government proffers three reasons to deny certiorari. First, it says that the decision below is correct.[11] Second, it claims that the question is fact-bound, implicating no clear conflict in the law.[12] And third, it argues that the error is

[8] *See United States v. Lanham*, 617 F.3d 873, 884 (6th Cir. 2010))("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."); *United States v. Henry*, No. CR 16-1097 JH, 2018 WL 802006, at *2–3 (D.N.M. Feb. 8, 2018) (citing *Lanham*).

[9] *See State v. Jackson*, 233 A.3d 440, 449–50 (N.J. July 2, 2020); *Jarrett v. State*, 498 N.E.2d 967, 968-69 (Ind. 1986); *State v. Brown*, 399 S.E.2d 593, 594 (S.C. 1991).

[10] *See United States v. Arellano*, No. 23-10199, 2024 WL 1156535, at *1 (5th Cir. Mar. 18, 2024)(unpublished).

[11] *See* (Brief in Opposition, at 9-12).

[12] *See* (Brief in Opposition, at 12-19).

harmless.[13] The government is wrong in all three assertions, and certainly has not provided a good reason to deny certiorari.

1. The decision below is wrong.

First, the government defends the decision below on the merits.[14] Again, the government's chief witness avoided a ten-year mandatory minimum sentence by testifying against the defendant.[15] The court below permitted the government to conceal that fact from the jury – for the all the jury knew, she might have avoided as little as a year or even a month of prison.[16] This is the paradigmatic fact that cross-examination was designed to expose: a witness's incentive to lie or shade the truth.[17]

Relying on *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the government points out that district courts may limit cross-examination to avoid "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[18] But none of that is implicated here, where the cross-examination denied pertained to the mandatory minimum the witness avoided by testifying for the government. Questioning on this matter is hardly

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[13] S*ee* (Brief in Opposition, at 19-21).

[14] *See* (Brief in Opposition, at 9-12).

[15] *See* (ROA.1122-24, 1170); [Appendix C, 6].

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

[17] *See Davis*, 415 U.S. at 316–17 ("the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.")(quoting *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

[18] *Van Arsdall*, 475 U.S. at 679; (Brief in Opposition, at 10).

"harassment," does not jeopardize anyone's safety, and implicates a core credibility issue, not a remote one.

The government contends that it might create prejudice for the jury to know that the relevant charge carried a ten-year mandatory minimum.[19] But if the jury were willing to disregard its solemn oath and acquit the defendant solely to avoid giving a drug dealer ten years in prison, surely a drug dealer might be willing to lie or shade the truth to avoid ten years of her own imprisonment. Thus, the government appears to concede the profound probative value of the information concealed from the jury – it agrees that a ten-year prison sentence is a momentous fact, which may cause people to violate their oaths. The only question is whether that risk is higher with a jury or a cooperating witness. As to the jury, there is an "almost invariable assumption of the law that jurors follow their instructions."[20] By contrast, the law treats the sworn testimony of cooperating witnesses as extremely suspect.[21] In any case, the Confrontation Clause demands that courts err on the side of exposing the truth through cross-examination.[22] Every time the prosecution makes a deal to reduce the sentence of its witnesses, there is a risk of prejudice to the government. The practice is unsavory, and a jury might well punish it. But it is very much the point of the Confrontation Clause that a jury will evaluate the means by which the

[19] *See* (Brief in Opposition, at 11).

[20] *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

[21] *See* (Petition, at 15-16, n.1).

[22] *See Jarrett*, 498 N.E.2d at 968–69 ("Against the crucial role of full and proper cross-examination, the State's desire to censor sentencing information is clearly subordinate.").

government assembles its case, and whether those tactics are well calculated to distinguish the guilty from the innocent.

Taken as a whole, the Confrontation holding of *Van Arsdall* supports Petitioner's position. This Court in *Van Arsdall* ultimately remanded to the Delaware Supreme Court to decide the question of harm,[23] but it unequivocally found that the limitation on cross-examination in that case violated the Sixth Amendment.[24] Notably, the prohibited questioning in that case pertained only to the dismissal of a public drunkenness charge.[25] This was classified as a "violation," less serious even than an ordinary misdemeanor.[26] By contrast, the district court here concealed from the jury a ten-year mandatory minimum. And while the trial court in *Van Arsdall* prohibited all questioning about the dismissed charge, it did so for essentially the same reason that the district court excluded evidence of the ten-year mandatory minimum. It exercised its discretion to weigh probative value and prejudice, and concluded that the latter outweighed the former.[27] The problem in *Van Arsdall*, as here, was that the Constitution guarantees the right to expose a witness's bias.

The government further contends that the denial of cross-examination may be tolerated here because the court permitted other information about the plea

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[23] *See Van Arsdall*, 475 U.S. at 684.

[24] *See id.* at 679.

[25] *See id.*

[26] *See* Delaware Code Tit. 5, §1315 (1986).

[27] *See Van Arsdall*, 475 U.S. at 606.

agreement.[28] *Van Arsdall*, again, found a Confrontation violation. It therefore does not stand for the proposition that a district court may conceal potentially critical elements of a plea agreement from the jury so long as some of that agreement is disclosed.

And if there were authority to conceal elements of a witness's plea agreement so long as the most important information came to light, it would not help the government here. The threat of a ten-year mandatory minimum is a powerful incentive to toe the government's line, even when compared to a lesser minimum sentence. In the context of a witness who lied about his deal with the prosecution, this Court would "not believe that the fact that the jury was apprised of other grounds for believing that the witness … may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one."[29] The government has offered no reason for a different rule when a district court rather than a prosecutor conceals the potentially critical fact about the witness's credibility.[30]

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[28] *See* (Brief in Opposition, at 11-12).

[29] *Napue v. People of State of Ill.*, 360 U.S. 264, 270 (1959).

[30] No prosecutor with any commitment to Due Process – or to complying with disciplinary rules -- would long consider the possibility of concealing a ten-year minimum from the defendant. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); ABA Model Rule of Professional Conduct 3.8 (2024)(prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense…"), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/, last visited August 30, 3024. Obviously, this protection presumes the defendant's ability to disclose the witness's plea agreement to the jury.

2. Conflict and unpredictable outcomes prevail in the lower courts.

The question presented has divided the courts of appeals, as multiple judicial opinions acknowledge.[31] If nothing else, the decision below conflicts with the law of multiple state courts of last resort, which courts provide the penultimate word on the scope of the Confrontation Clause in their jurisdictions, subject to review only by this Court.[32] Indeed, the government has implicitly conceded the existence of a split in the state courts of last resort on this federal constitutional issue.[33]

The government contests the split, noting cases in which the Third, Eighth, and Ninth Circuits declined to find violations of the Confrontation Clause.[34] But a division of constitutional authority between the federal circuits and state supreme courts would merit certiorari even if the federal courts of appeals were all aligned.[35]

Further, the government acknowledges that at least two lower federal courts have perceived a circuit split – it simply disagrees with the assessments of those courts. *See* (Brief in Opposition, at 19, n.4). But the perception of a division of

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[31] *See State v. Jackson*, 233 A.3d 440, 449–50 (N.J. July 2, 2020)[31]; *United States v. Henry*, No. CR 16-1097 JH, 2018 WL 802006, at *2–3 (D.N.M. Feb. 8, 2018); *United States v. Lanham*, 617 F.3d 873, 884 (6th Cir. 2010).

[32] *See State v. Jackson*, 233 A.3d 440, 449–50 (N.J. July 2, 2020); *Jarrett v. State*, 498 N.E.2d 967, 968-69 (Ind. 1986); *State v. Brown*, 399 S.E.2d 593, 594 (S.C. 1991).

[33] *See* (Brief in Opposition, at 17-18)(conceding that "some tension may exist…").

[34] *See* (Brief in Opposition, at 13-17).

[35] *See* R. Stern, E. Gressman, K. Geller, S. Shapiro, *Supreme Court Practice*, §4.9 (8th ed. 2002)(such a division of authority 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.")(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)).

authority may be as damaging as the reality. The governing rule in a given jurisdiction, after all, will eventually become what lower courts perceive it to be. And the wider perception of uniform federal law promotes public confidence in the legal system and in the security of federally guaranteed rights.

In the government's view, the conflicting outcomes of Confrontation challenges on similar facts only shows that the issue is "fact-intensive" and unamenable to bright lines.[36] It may be the case that the federal courts of appeals fail to apply consistent standards to adjudicate similar cases, but this is not a reason to deny review. To the contrary, case-by-case adjudication of Confrontation claims does violence to the constitutional design, which reposes in juries rather than judges the power to determine the credibility of witnesses, and to check the executive authority in the criminal sphere.[37]

The absence of bright line standards within the federal courts of appeals has generated inconsistent and unpredictable results. In *United States v. Campbell*, 986 F.3d 782, 795 (8th Cir. 2021), cited by the government,[38] the Eighth Circuit distinguished its earlier Confrontation decisions in *United States v. Caldwell*, 88 F.3d 522 (8th Cir. 1996), and *United States v. Roan Eagle*, 867 F.2d 436 (8th Cir. 1989). *Caldwell* and *Roan Eagle* found Confrontation violations in district court rulings

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[36] (Brief in Opposition, at 13).

[37] *See Crawford*, 541 U.S. at 67–68 ("The Framers … knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people ... They were loath to leave too much discretion in judicial hands. … By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable…").

[38] *See* (Brief in Opposition, at 15).

"forbidding cross-examination concerning potential minimum and maximum sentences." *Campbell*, 986 F.3d at 795 (recounting *Caldwell* and *Roan Eagle*). The court in *Campbell* thought those cases distinguishable "because" in *Caldwell* and *Roan Eagle*, "the government had ***already*** extended leniency to the cooperating witnesses," whereas the witness in *Campbell* merely entertained a "hope" of leniency from the mandatory minimums.[39]

That distinction between a mere hope and a leniency "already extended," however, is nowhere to be found in either *Caldwell* or *Roan Eagle*.[40] To the contrary, *Roan Eagle* says that a witness has ***greater*** incentive to testify falsely to please the government if he or she remains uncertain about the degree of leniency to come.[41] Yet because a later panel of the Eighth Circuit took the government's view that judges may supplant the jury in deciding the impact of a plea agreement on a witness's credibility, it upheld the denial of cross-examination about a specific mandatory minimum.[42] The Eighth Circuit cases cited by the government thus only demonstrate that the absence of clear standards for adjudicating confrontation claims yields uncertainty and conflict, not security in the exercise of fundamental constitutional rights.

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[39] *Id.* (emphasis in original).

[40] *See Caldwell*, 88 F.3d at 524-525; *Roan Eagle*, 867 F.2d at 443-444.

[41] *See Roan Eagle*, 867 F.2d at 443 ("The details of a plea can be highly relevant to a jury in assessing the credibility of a guilty-pleading co-defendant who has taken the stand to testify for the prosecution. This is especially true if that witness has not yet been sentenced as there is a continuing incentive to give testimony that strengthens the prosecution's case.").

[42] *See Campbell*, 986 F.3d at 795.

The government's Third Circuit cases show the same pattern. As the government correctly observes, that court honors no "categorical right" to cross-examination regarding all of the details of a co-defendant's plea agreement.[43] The result is a series of conflicting and unpredictable outcomes. In *United States v. Chandler*, 326 F.3d 210 (3rd Cir. 2003), the district court permitted testimony that a witness pleaded to a lesser charge carrying between 12- and 18-months imprisonment, ultimately receiving house arrest and probation.[44] But the Third Circuit found constitutional error because the district court excluded testimony that the original charge could have carried eight years imprisonment, "[c]onsidering the extent of that discrepancy…"[45]

Later, however, the Third Circuit subsequently permitted district courts to suppress testimony about "things like mandatory or specific sentences like 10 years or maximum of life."[46] Nothing in these opinions explains the disparate outcome save the impulses of the panel. The same court that found constitutional error in the suppression of an eight-year maximum in *Chandler* excused the suppression of a radically higher maximum in *Noel*, apparently life imprisonment.[47] Consequently,

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[43] *United States v. Mussare*, 405 F.3d 161, 170 (3d Cir. 2005).

[44] *See Chandler*, 326 F.3d at 221-222.

[45] *United States v. Noel*, 905 F.3d 258, 268 (3d Cir. 2018)(recounting *Chandler*).

[46] *Noel*, 905 F.3d at 266; *see also Mussare*, 405 F.3d at 170; *United States v. John-Baptiste*, 747 F.3d 186, 212 (3d Cir. 2014).

[47] ***Compare*** *Chandler*, 326 F.3d at 221-222 ***with*** *Noel*, 905 F.3d at 269.

nothing gives defendants in the Third Circuit any assurance that they may fully expose the incentives of cooperating witnesses should they exercise their right to trial.

In any case, the law enunciated by several state courts of last resort offers a clear bright line and is clearly contrary to the decision below and similar decisions. In Indiana, the defendant unquestionably enjoys the right to cross-examine a witness not merely about the fact of cooperation generally, but about the specific penalty ranges the witness has avoided. The Indiana Supreme Court has said flatly that "[i]t is … ***well-settled*** that the defendant is entitled to elicit the ***specific penalties*** a witness may have avoided through her agreement with the State."[48] It has not wavered in this view.[49] Likewise, the New Jersey Supreme Court has held that "the jury should have had ***full access*** to [the cooperating codefendant's] ***plea agreement*** history through the defense counsel's unfettered examination of that history."[50] And the South Carolina Supreme Court has held that the defendant enjoys the right to cross-examine regarding a cooperator's plea agreement, even if the proposed cross-examination would tend to reveal the defendant's own sentencing exposure.[51]

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[48] *McCain v. State*, 948 N.E.2d 1202, 1206 (Ind. Ct. App. 2011)(emphasis added).

[49] *See McCorker v. State*, 797 N.E.2d 257, 266 (Ind. 2003)("[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); *Standifer v. State*, 718 N.E.2d 1107, 1110 (Ind. 1999)[49](defendant was entitled to cross-examine as to "the amount of time remaining on a sentence…"); *see also 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); *Jones v. State*, 749 N.E.2d 575, 580 (Ind.Ct.App.2001); *Sigler v. State*, 733 N.E.2d 509, 511 (Ind.Ct.App.2000); *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)).

[50] *State v. Jackson*, 243 N.J. 52, 59 (2020)(emphasis added), *reconsideration granted by* 243 N.J. 539, 235 A.3d 1026 (July 20, 2022)(Table,) *cited as good law by State v. Smith*, No. A-1601-19, 2023 WL 4281375, at *5 (N.J. Super. Ct. App. Div. June 30, 2023).

[51] *State v. Mizzell*, 563 S.E.2d 315, 317-18 (S.C. 2002).

The government offers only one response to the state authorities: it says that in "several of the decisions" the trial court forbade even general examinations about the penalties avoided by cooperation. But "several" is not "all," so the fact remains that state courts have applied the constitution differently from the court below on indistinguishable facts.[52]

Further, many of the trial courts in the government's cited state cases ***did*** permit some cross-examination regarding the witness's penal incentives to testify favorably to the government.[53] The prosecuting authorities in these cases thus could have made essentially the same argument that prevailed here: that cross-examination revealed the incentives for bias, if not the force of those incentives. The

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[52] *See McCain*, 948 N.E.2d at 1207 ("McCain was permitted to ask McGuinn whether she faced a 'very substantial amount of time in jail' and dodged 'some very serious charges' in exchange for her participation as a confidential informant, but the trial court prohibited any discussion of the sentences McGuinn might have received if convicted of her suspected drug offenses."); *Sigler*, 733 N.E.2d at 511-512 ("Defense counsel suggested, and the trial court and the State agreed, that he question the State's witnesses about their plea agreements, and, when referring to the reduction in prison terms, he use percentages rather than a specific number of years of imprisonment…. Here, the trial court improperly disallowed defense counsel's questioning of the State's witnesses regarding their specific terms, in years, of imprisonment."); *State v. Smith*, No. A-1601-19, 2023 WL 4281375, at *4 (N.J. Super. Ct. App. Div. June 30, 2023))(reversing even though the "[t]he judge …reasoned that 'the defense clearly is going to be permitted to question and cross-examine Ms. Soohoo on the deal that she has,' and [] continued, '[s]he could be cross-examined on her awareness that she was facing a term of incarceration in New Jersey State Prison. ... I have no objection to the use of the word "years."'"); *Mizzell*, 563 S.E.2d at 319 ("Steele's general admission he 'could get a long sentence for these crimes,' denies petitioners' Confrontation Clause rights under the Sixth Amendment. A 'long sentence' may have different meanings to different jurors.").

[53] *See Jackson*, 233 A.3d at 446 (defense counsel elicited testimony that defendant was offered three years prison by the state, but received 180 days imprisonment and probation; court suppressed evidence of a higher maximum sentence); *McCorker*, 797 N.E.2d at 266 ("Defendant was able to cross-examine Caldwell regarding … the presence of the beneficial plea agreement," but was not permitted to explore its terms); *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991)("On cross-examination, Bethel testified she was originally charged with trafficking in cocaine but the charge was 'dropped' as part of the agreement."); *Standifer*, 718 N.E.2d at 1109 ("Standifer was permitted to reveal that Larry was on parole but was not permitted to question him about the amount of time remaining.").

state courts came to a different conclusion than the court below not because they received different facts, but because they maintain a different view of the Confrontation Clause.

In any case, the clearly enunciated holdings of each of these three courts – the Supreme Courts of Indiana, New Jersey, and South Carolina -- leave no room for a different outcome where the trial court permits only general questions about sentencing exposure. All of them require full disclosure of the specific incentives to testify for the government.[54] As such, the courts below are in conflict on a momentous constitutional question. And that conflict is not appreciably less serious because the government can retrospectively posit hypothetical rules of decisions for the cases below. The state courts, not the Solicitor General, state the holdings of their cases.

3. The possibility of harmless error provides no reason to deny certiorari.

Finally, the government contends that any error would be harmless.[55] As it notes, the government made the same argument at length below,[56] yet the court below did not adopt it.[57] If the court below regarded the error as harmless, it could simply have said as much, rather than reaching a disputed constitutional issue on the merits.

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[54] *See McCain v. State*, 948 N.E.2d at 1206; *Jackson*, 243 N.J.at 59; *Mizzell*, 563 S.E.2d at 317-18.

[55] *See* (Brief in Opposition, at 19-21).

[56] *See* (Brief in Opposition, at 20).

[57] *See United States v. Arellano*, No. 23-10199, 2024 WL 1156535, at *1 (5th Cir. Mar. 18, 2024)(unpublished).

Referring to "numerous other sources," in addition to Gardeazabel, "including the testimony of the officers who investigated the case and petitioner's own recorded statements,"[58] the government seeks to persuade this Court that the outcome would be the same with or without her testimony. Notably, however, it makes no argument at all regarding its ability to prove Petitioner's personal responsibility for the ***drug quantity*** with independent evidence. Again, Gardeazabel testified that Petitioner ***actually opened the bag*** in which police found Fentanyl,[59] making it all but certain that he "knew or should have known,"[60] that it contained the requisite quantity. The government has pointed to no evidence from an independent source with comparable probative force on this issue.

In any case, this Court often grants certiorari without satisfying itself that an error would be harmful. That is why its ordinary practice is to reach a merits question presented and remand to determine questions of harmlessness.[61]

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[58] (Brief in Opposition, at 20).

[59] (ROA.1134-35).

[60] *United States v. Hill*, 80 F.4th 595, 604 (5th Cir. 2023).

[61] *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).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 9th day of September, 2024.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner