

No. _____

In The
Supreme Court of the United States

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MAX JULIAN WRIGHT,

Petitioner,

v.

UNITED STATES,

Respondent.

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**On Petition For Writ Of Certiorari
To The Eighth Circuit Court Of Appeals**

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

- I. Whether the Sixth Amendment right to confrontation is violated where the trial court prevents a defendant from cross-examining a government witness regarding the mandatory life sentence he would have faced absent cooperation in order to prevent the jury from inferring the defendant's likely life sentence.

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Petitioner, Max Wright, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 8, 2017.



OPINIONS BELOW

On August 8, 2017, the Eighth Circuit issued a published opinion, affirming Mr. Max Wright's conviction in case 16-3292. *United States v. Wright*, 866 F.3d 899 (8th Cir. August 8, 2017).¹



JURISDICTION

The judgment of the court of appeals was entered on August 8, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). A seven-day extension of time to petition for certiorari was requested and granted on November 6, 2017.



CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.

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

¹ A copy of the opinion is attached as App. 1.

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.

I.

STATEMENT OF THE CASE

Max Julian Wright was convicted of three drug related charges following a jury trial. Count One charged Mr. Wright with conspiracy to distribute heroin, cocaine base, and fentanyl, resulting in serious bodily injury under 21 U.S.C. § 841(a)(1). The jury entered special findings holding Mr. Wright responsible for multiple overdoses and over 100 grams of heroin as part of the conspiracy. Prior to trial, the Government filed an information, pursuant to 21 U.S.C. § 851, announcing its intent to pursue enhanced penalties based on Wright's prior felony drug convictions. As a result, Mr. Wright was sentenced to a mandatory term of life imprisonment. Mr. Wright's prior conviction was admitted into evidence and presented to the jury under Federal Rule of Evidence 404(b).

At trial, the government presented evidence that Mr. Wright worked with co-defendant and cooperating witness, Deshaun Anderson, to sell heroin and cocaine base in the Cedar Rapids, Iowa, area from 2013 until June, 2015.

Much of the argument at trial concerned, not whether Wright was a drug dealer, but rather whether Anderson and Wright conspired together to distribute narcotics and, if so, whether the drug quantity and overdoses alleged by the government were within the scope of the charged conspiracy.

The government's principal evidence regarding the scope of the conspiracy presented at trial was the testimony of Deshaun Anderson. Anderson testified that he and Wright conspired to distribute heroin and cocaine base in Cedar Rapids and that he sold drugs only at Wright's direction.

Like Wright, Anderson also had a prior felony drug conviction and was charged with a conspiracy resulting in death and serious bodily injury. He agreed to plead guilty to the conspiracy charge and to testify against Wright in exchange for the Government declining to file a § 851 information, which would have resulted in a mandatory life sentence if he were convicted.

During cross examination, Wright's counsel attempted to demonstrate Anderson's bias and motivation to testify favorably to the government in order to avoid the mandatory life sentence he would have faced had the government filed the §851 information against him. Following objection from the government, the district court allowed Wright to ask Anderson whether he faced "decades and decades in custody" in the absence of his cooperation agreement, but prohibited Wright from mentioning the mandatory life sentence

Anderson avoided by cooperating with the government. The district court reasoned that mentioning the specific penalty Anderson faced would allow the jury to infer that Mr. Wright faced the same penalty. Thereafter, Mr. Wright was convicted on all counts.

A. Proceedings before the Appellate Court.

Mr. Wright appealed to the Eighth Circuit Court of Appeals. Mr. Wright argued, in relevant part, that the district court's limitation of the cross examination of Mr. Anderson violated his rights under the Sixth Amendment Confrontation Clause. Specifically, Mr. Wright argued that he had a right under the Confrontation Clause to contrast the mandatory life sentence Mr. Anderson would have received in the absence of a cooperation agreement with the 20-year sentence that he was likely to receive as a result of his cooperation. The threat of a life sentence in particular provides cooperating witnesses with an overwhelming motivation to testify for the government. Mr. Wright argued that exposing that bias was a core Sixth Amendment interest. The district court, therefore, abridged Mr. Wright's Sixth Amendment rights by preventing him from placing before the jury facts sufficient to expose this bias. Further, Mr. Wright argued that the government's interest in preventing the jury from inferring Mr. Wright's likely sentence was insufficient to overcome Mr. Wright's right to cross examination.

Applying an abuse of discretion standard, the Eighth Circuit found that the district court's limitation

of the cross examination of Mr. Anderson did not violate the Confrontation Clause and upheld Mr. Wright's conviction. The Eighth Circuit found that the district court's concern that the jury would have inferred Mr. Wright's likely sentence if told of Anderson's likely sentence was justified. In addition, the Eighth Circuit reasoned that the difference between questioning Mr. Anderson on whether he would receive "decades" in prison and "life in prison" would not provide the jury with a significantly different impression of the witness's credibility. The Eighth Circuit upheld Mr. Wright's conviction and sentence. This petition follows.

II.

REASONS FOR GRANTING THE PETITION

In *Delaware v. Van Arsdall*, 473 U.S. 673 (1986), this Court held that the Confrontation Clause protects a criminal defendant's right to cross examine a government witness as to the benefits the witness expects to receive in exchange for testifying for the government. *Id.* at 679. In that case, the trial court prohibited cross examination of a prosecution witness regarding his cooperation agreement to testify in exchange for the dismissal of a pending misdemeanor charge. *Id.* This Court affirmed the Delaware Supreme Court ruling finding constitutional error. This Court found that by preventing the defendant from inquiring into the witness's agreement with the government, the trial court prevented the defendant from exposing "to the jury the facts from which jurors . . . could

appropriately draw inferences relating to the reliability of the witness.” *Id.* at 680 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

This case concerns a number of splits among the circuit courts regarding the degree to which the Sixth Amendment limits the scope of a trial court’s discretion to restrict a criminal defendant’s ability to cross examine a cooperating witness as to benefits he expects to receive pursuant to a cooperation agreement. First, there is a split among the circuits as to whether the Sixth Amendment gives criminal defendants the right to cross examine a cooperating witness regarding the specific benefits he stands to gain as a result of his cooperation with the government. Second, where both the defendant and the government witness face a mandatory life sentence, the circuits are split as to whether the government’s interest in preventing the jury from inferring the defendant’s likely sentence is sufficient to justify limiting a defendant’s right to cross examine on the sentence the government witness faced prior to cooperating.

A. Circuit split regarding whether the Sixth Amendment requires that defendants be allowed to expose the specific benefits gained by cooperating witnesses.

Several circuit courts have held that once some bias has been established, the Sixth Amendment does not protect a defendant’s right to cross examine a

cooperating witness regarding the specifics of the pre and post cooperation sentences he faced. In *United States v. Rushin*, 844 F.3d 933, 939 (11th Cir. 2016), the Eleventh Circuit upheld the district court’s decision to limit the cross examination of cooperating witnesses regarding the specific “numerical” sentencing benefit the cooperating witnesses stood to gain. *Id.* at 937. Discussing the degree of benefit gained by the cooperating witnesses would “speak to the potential sentences that could be received by the defendants and encourage jury nullification.” *Id.* Defense counsel was able to discuss the plea agreements and benefits of a reduced sentence generally, but was not allowed to question witnesses regarding the actual number of years of their life that would be saved from imprisonment by the cooperation agreement. *Id.* The Eleventh Circuit reasoned that “While it is imperative that a defendant be able to address the reliability and potential bias of a cooperating witness, in this case the precise number of years the cooperating witnesses may have faced provides little, if any, value above those questions defense counsel were permitted to ask.” *Id.* at 939.

Similarly, in *United States v. Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995), the First Circuit upheld the district court’s decision to disallow the defendant from cross examining the cooperating witness regarding the 35-year sentence he would have faced if charged with a firearms count in addition to the drug trafficking crimes to which he pled guilty. *Id.* at 1153. The First Circuit held that, because the cooperating witness admitted to some benefit under the

agreement, the defendant had a “sufficient opportunity to expose potential biases,” and “[a]ny probative value of information about the precise number of years” the witness would have faced “was slight.” *Id.*

In *United States v. Trent*, 863 F.3d 699 (7th Cir. 2017), the Seventh Circuit upheld the district court’s decision to prevent the defendant from cross examining a cooperating witness on the 20-year mandatory minimum sentence he would have received in the absence of cooperation. *Id.* at 705. Instead, the district court allowed the defendant to elicit from the cooperating witness that he received a “substantial” benefit in exchange for his cooperation. *Id.* The Seventh Circuit found that The Sixth Amendment “is only offended when ‘the defense is completely forbidden from exposing the witness’s bias.’” *Id.* (citing *United States v. Sanders*, 708 F.3d 976, 990 (7th Cir. 2013)). See also *United States v. Nelson*, 39 F.3d 705, 709 (7th Cir. 1994) (finding that where cooperating witness testified pursuant to an immunity agreement, defense counsel was properly restricted from questioning witness regarding the potential penalties where fact of immunity agreement itself was sufficient to establish bias); *United States v. Cropp*, 127 F.3d 354 (4th Cir. 1997) (affirming limitation on cross examination of cooperators as to specific benefits received because of risk that jury may infer defendant’s likely sentence); *Brown v. Powell*, 975 F.2d 1, 4 (1st Cir. 1992) (permitting restriction of cross examination as to potential life sentence faced by cooperating witness because the jury could infer the defendant’s likely sentence); *United States v. Estrada*,

430 F.3d 606, 621 (2d Cir. 2005) (“the marginal impact of evidence relating to the cooperating witness’ specific offenses of conviction could not have given a reasonable jury a significantly different impression of the witness’ credibility”). By contrast, other circuit court decisions have found constitutional error where a defendant is prohibited from contrasting the specific numerical benefit received by a cooperating witness with the sentence he would have received in the absence of cooperation. In *United States v. Chandler*, 326 F.3d 210 (3d Cir. 2003), the defendant was prohibited from questioning two cooperating witnesses regarding the fact that they would have faced 97-121, and 151-188 month sentences, respectively, in the absence of a plea agreement with the government. *Id.* at 221-22. The Third Circuit reversed, finding that the jury may have reached a different conclusion as to the witnesses’ credibility if it “had known of the enormous magnitude of their stake” in testifying against the defendant. *Id.* at 222.

Similarly, in *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc) the trial court allowed defense counsel to question the cooperating witness regarding the fact that he stood to receive a significant reduction. However, defense counsel was prohibited from eliciting the fact that the cooperating witness faced a mandatory life sentence without cooperation. *Id.* at 1099. The Ninth Circuit reversed, finding that the life sentence provided the cooperating witness with a specific and significant motivation to incriminate the defendant, about which the jury should have been made aware.

In *United States v. Cooks*, 52 F.3d 101 (5th Cir. 1995) the trial court allowed for cross examination of a paid informant regarding his hopes for leniency on certain charges in state court. However, the district court prohibited defense counsel from eliciting the specific fact that the cooperating witness was at risk of 40-year and 99-year sentences on two pending state court charges. The Fifth Circuit reversed, finding that the severity of the penalties the paid informant faced provided him with a significant incentive to testify favorably to the government, about which the jury should be informed. *Id.* at 103-04.

The Fourth Circuit in *Hoover v. State of Maryland*, 714 F.2d 301 (4th Cir. 1983) found constitutional error where the trial court prohibited a cooperating witness from being cross examined about the amount of time he believed he was avoiding through cooperation.

B. Circuit split as to whether the risk that a jury may infer that the defendant faces mandatory life is sufficiently significant to overcome a defendant's Sixth Amendment right to expose to the jury the fact that a cooperating witness is facing mandatory life

In *United States v. Larson*, 495 F.3d 1094, 1104 (9th Cir. 2007) the Ninth Circuit held that failure to allow cross examination regarding a potential mandatory life sentence violates a defendant's Sixth Amendment right to confrontation even where it might allow the jury to infer the defendant's potential sentence.

The Ninth Circuit reasoned that, “[t]he probative value of a mandatory life sentence is significant. A cooperating witness who faces a statutorily mandated sentence of life in prison unless the government moves for reduction of the sentence has a compelling incentive to testify to the government’s satisfaction.” Thus, “the mandatory nature of the potential sentence, the length of the sentence, and the witness’ obvious motivation to avoid such a sentence cast considerable doubt on the believability of the witness’ testimony.” *Id.* See also *United States v. Smith*, 919 F.2d 734 (4th Cir. 1990) (unpublished opinion) (finding that the defendant had a right to confront the witness about the mandatory life sentence he would have faced if charged and convicted of first degree murder despite the concern the jury may draw implications regarding the defendant’s potential penalty).

In *United States v. Roan Eagle*, 67 F.2d 436, 443 (8th Cir. 1989), the Eighth Circuit overturned the defendant’s conviction where the cooperating witness pled guilty to voluntary manslaughter, but was originally charged with first degree murder. Similar to *Larson*, the trial court in *Roan Eagle* “was consciously worried about . . . the likelihood – indeed, the probable certainty – that the jury, learning that [the cooperating witness] who was by all counts as guilty as [the defendant], would get a maximum of a ten-year sentence while [the defendant] faced the specter of a judge imposed sentence up to life.” *Id.* The court held that this concern does not justify restricting a defendant’s right to cross examination even on the issue of a potential

life sentence. Instead, the Eighth Circuit found that the right to cross examine includes “not only the specific crime to which the co-actor is pleading guilty, but the range of punishment to which the one pleading guilty is exposed to in contrast to what that person knows – or ought to know – is the potential sentence for a conviction following a plea of not guilty.” *Id.*

By contrast, the First Circuit and the court below have held that the defendant does not have a Sixth Amendment right to cross examine a cooperating witness on a potential life sentence where such cross examination puts at risk the government’s interest in ensuring that the jury does not infer a defendant’s potential sentence. In *Brown v. Powell*, 975 F.2d 1 (1st Cir. 1992), a murder defendant was prohibited from cross examining a cooperating witness regarding the likely life sentence he would face if charged with first degree murder. The First Circuit found that petitioner was himself on trial for first degree murder, and ruled that evidence of the penalty for that offense should be excluded to avoid informing the jury of the defendant’s possible punishment. *Id.* at 4-5. The First Circuit ruled that, based on the information available at trial, the *Brown* “jury could have inferred that by pleading guilty to manslaughter and receiving a sentence of 15 to 30 years, [the cooperating witness] had avoided a significantly harsher penalty than if he had been tried and convicted for first or second degree murder and for hindering apprehension.” *Id.* at 5. One judge dissented, finding that the prosecution’s interest in preventing the jury from inferring the defendant’s

likely sentence cannot be overcome by the defendant's interest in vindicating his Sixth Amendment rights. *Id.* (Pollack, J., dissenting).

In *United States v. Rushin*, 844 F.3d 933, 939 (11th Cir. 2016) the Eleventh Circuit upheld the district court's decision to limit cross examination regarding the specific penalties faced by the cooperating witness but noted that "this is not a case like *Larson* where discussion of a mandatory minimum life sentence was prohibited. Here, to the contrary, defendants were able to ask if the cooperators faced a 'severe penalty' prior to cooperating, whether they expected to receive a lesser sentence as a result of their cooperation, and whether the plea was one of the most important documents a cooperating witness had ever signed."

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CONCLUSION

This case presents an opportunity for this Court to eliminate a deep circuit split regarding one of the most fundamental rights in the criminal justice system, the right to meaningfully confront and cross examine witnesses against a criminal defendant. The current state of the law is that the Confrontation Clause has different meanings for similarly-situated defendants in different circuits throughout the country. Only this Court can bridge the divide among circuits and provide clarity and uniformity to the application of the Confrontation Clause.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

November 13, 2017

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