No. 17-830

In the Supreme Court of the United States

PHIL LAMONT TRENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH 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 the cooperating witnesses who testified against him about the precise statutory minimum sentences they would have faced in the absence of cooperation with the government.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 863 F.3d 699.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2017. On September 29, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 8, 2017, and the petition was filed on that date. 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 Central District of Illinois, petitioner was convicted of distribution of heroin resulting in death, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); conspiracy to distribute and possess with intent to distribute heroin resulting in death, in violation of 21 U.S.C. 841(a)(1),

(b)(1)(C), and 846; and three counts of distribution of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 1a, 17a-18a. The district court sentenced him to 300 months of imprisonment. *Id.* at 19a. The court of appeals affirmed. *Id.* at 1a-16a.

1. On August 29, 2014, Kyle Hull called petitioner, his regular heroin supplier, and ordered three bags of heroin. One of the bags was for Hull's friend and fellow heroin addict Tyler Corzette. Petitioner set the price for the drugs and directed Hull to arrange a meeting with Curtis Land, one of petitioner's lieutenants. Hull arranged to meet Land at a local gas station, where the two men completed the transaction. Petitioner drove Land to the gas station to make the sale, then picked him up and collected the money. Pet. App. 2a-3a, 5a; Gov't C.A. Br. 3-4.

After the sale, Hull and Corzette drove to a park, where Hull helped Corzette cook and inject the heroin. Shortly thereafter, Corzette passed out in the car. Hull left to attend a music festival and found Corzette still unconscious when he returned. Hull checked Corzette's pulse and, believing him to be fine, left him in the car for the night. When Hull returned the next morning, he found Corzette dead. Hull initially panicked and left the scene, but later returned and called the police. A forensic pathologist concluded that Corzette had died of adverse effects from heroin. Pet. App. 3a-4a.

On the day Corzette died, Hull agreed to cooperate with the police. He told them that he had purchased the heroin from petitioner and Land, and he participated in a controlled purchase of three additional bags of heroin from Land. Land was then arrested, and he also agreed to cooperate. Land corroborated Hull's account by confirming that petitioner had provided the three bags of

heroin he had sold to Hull.[1] The police then arranged for an undercover officer to make two purchases of heroin from petitioner. After the second purchase, the police obtained an arrest warrant for petitioner. After his arrest, petitioner admitted that he had been distributing heroin to five to ten customers a day. Petitioner also brought up Corzette's death but refused to explain how he knew about it. Pet. App. 4a; Gov't C.A. Br. 6-7.

2. A grand jury returned an indictment charging petitioner with distribution of heroin resulting in death, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); conspiracy to distribute and possess with intent to distribute heroin resulting in death, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), and 846; and three counts of distribution of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 1a, 17a-18a.

a. At petitioner's trial, Hull and Land testified about their interactions with petitioner on and before August 29. Pet. App. 5a-6a. In addition, they stated that, in exchange for their cooperation, their truthful testimony, and their pleas of guilty to a charge of distribution resulting in death, the government had agreed to file motions to reduce their sentences. *Id.* at 6a.

Petitioner's counsel sought to cross-examine Hull and Land about the precise statutory minimum sentence—20 years in prison—that they would have faced if they had refused to cooperate. Pet App. 6a. Petitioner had been charged with the same offense to which Hull and

[1] Land initially told police that another supplier named "Tone" had provided the heroin he sold to Hull, but he then corrected himself, explaining that he had "made a mistake" because he "didn't know what day they [were] talking about." Trial Tr. 293; see *id.* at 267-268, 315-317.

Land had pleaded guilty—distribution of heroin resulting in death. *Id.* at 7a. The government therefore objected to revealing the precise sentence that Hull and Land faced because it would have disclosed to the jury the sentence that petitioner himself would have faced if convicted. *Ibid.* The district court sustained the objection, but also acknowledged petitioner's interest in "impeach[ing] [Hull and Land] fully regarding what they have to benefit in exchange for their cooperation." Trial Tr. 215. The court therefore stated that it would allow petitioner's counsel to question Hull and Land about the "substantial mandatory minimum" each faced, but "without quantifying the exact amount." Pet. App. 7a (quoting Trial Tr. 215). Petitioner's counsel objected that "substantial" did not adequately convey the severity of the sentence at issue, but he declined the court's invitation to propose "alternative language." Trial Tr. 215.

Petitioner's counsel then cross-examined Hull and Land by asking a variety of questions about the "substantial" mandatory minimum sentence that the two men would have faced had they not cooperated. Pet. App. 11a; see *id.* at 11a-12a (listing questions). In response, Hull agreed that the mandatory minimum was a "pretty long time," and Land said that "nobody would" want to serve such a long sentence. *Id.* at 13a (citations omitted). In addition, Hull and Land admitted that they were testifying under plea agreements and that the government had agreed to file motions to reduce their sentences if they testified truthfully. *Id.* at 12a. They also admitted that they understood that they could avoid "substantial" mandatory minimum sentences only if the government filed such motions. *Ibid.*

b. In addition to Hull's and Land's testimony, the government presented testimony from another heroin

user who stated that petitioner provided the heroin that Land sold and set the sales price. Gov't C.A. Br. 10. The government also presented evidence of Hull's controlled purchase of heroin from Land on August 30 and other undercover purchases involving petitioner. *Ibid.* In addition, the government introduced the recording and transcript of petitioner's post-arrest interview; phone records showing calls between and among petitioner, Hull, and Land; and evidence that the cell-site records for petitioner's, Land's, and Hull's phones were consistent with each phone having been in the area where Land sold the heroin to Hull on August 29, 2014. *Id.* at 10-11.

Petitioner testified in his own defense. Gov't C.A. Br. 11. Petitioner admitted that he twice sold heroin to the undercover local police officer. *Ibid.* He further admitted selling drugs to Hull earlier on August 29, but denied that he was the source of the drugs Land sold to Hull later that day. *Ibid.* On cross-examination, however, petitioner acknowledged that he "could have been" near the site where Land made the sale. *Ibid.* (citations omitted).

c. The jury found petitioner guilty on all counts. Pet. App. 8a. The district court sentenced him to 300 months of imprisonment. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-16a. As relevant here, the court rejected petitioner's contention that the restriction on his cross-examination of Hull and Land violated the Confrontation Clause of the Sixth Amendment. *Id.* at 8a-14a. The court observed that although the Sixth Amendment "'guarantees a defendant an opportunity for effective cross-examination,'" it does not require "a district court to permit a defendant to question witnesses 'in whatever way, and to whatever

extent, the defense might wish.'" *Id.* at 9a (citations omitted). "Instead," the court explained, "a district court has discretion to place reasonable limits on cross-examination, especially when necessary to prevent irrelevant or confusing evidence from being presented to the jury." *Ibid.*

The court of appeals noted that it had "permitted district courts to prevent juries from learning information from which they could infer defendants' potential sentences" because that information could "confuse or mislead the juries in their true task: deciding defendants' guilt or innocence." Pet. App. 9a-10a. The court thus determined that the district court appropriately "limited [petitioner's] cross-examination of Hull and Land to prevent the jury from learning the exact penalty that [petitioner] himself faced on conviction." *Id.* at 10a.

The court of appeals also rejected petitioner's contention that the prohibition on disclosing the specific sentence that Hull and Land faced had deprived him of his Sixth Amendment right to an opportunity for effective cross-examination. The court explained that the district court had "permitted [petitioner] to vigorously cross-examine" Hull and Land "about their potential biases or motives to lie." Pet. App. 11a. The court added that petitioner's counsel took advantage of that opportunity by exploring in "painstaking detail" the two witnesses' cooperation agreements and their resulting incentives to testify favorably to the government. *Id.* at 13a. The court therefore concluded that "the jury had ample information to make a discriminating appraisal of the motives of those two witnesses." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 8-30) that the district court violated the Confrontation Clause by declining to allow him to elicit testimony about the precise statutory minimum sentences Hull and Land faced. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision by this Court. Petitioner asserts that lower courts have reached differing results in resolving claims that the Confrontation Clause entitled defendants to cross-examine cooperating witnesses on sentencing matters. But those fact-specific decisions do not create any conflict warranting this Court's review, and the Court has repeatedly denied petitions for writs of certiorari raising the same issue and asserting similar circuit conflicts. See, *e.g.*, *Lipscombe* v. *United States*, 135 S. Ct. 945 (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. Indeed, this case would be an especially poor vehicle in which to take up the question presented because petitioner's own testimony disclosed the length of the mandatory minimum sentence that Hull and Land had faced and because other evidence of his guilt rendered any potential error harmless.[2]

1. The court of appeals correctly held that the limitation on petitioner's cross-examination of Hull and Land did not violate the Confrontation Clause.

a. 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-

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[2] A similar question is presented in the petition for a writ of certiorari in *Wright* v. *United States*, No. 17-1059 (filed Nov. 13, 2017).

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. 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." *Ibid.* (citation omitted). Accordingly, to establish that a limitation on cross-examination violated the Confrontation Clause, a defendant must demonstrate that "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [the defendant's] counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 680.

b. Here, the district court's limitation on cross-examination fell well within its "wide latitude * * * to impose reasonable limits on cross-examination." *Van Arsdall*, 475 U.S. at 679. The information that petitioner sought to elicit was highly prejudicial to the proper conduct of the trial because petitioner himself was charged with the same offense as Hull and Land. If

the jury had been informed of the precise statutory minimums for their offense, it likely would have inferred that petitioner himself faced the same mandatory minimum sentence. That inference would have created a significant risk of prejudice to the jury's unbiased evaluation of the evidence. "[P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion." *Shannon* v. *United States*, 512 U.S. 573, 579 (1994).

Furthermore, although the district court prohibited disclosure of the precise minimum sentences that Hull and Land had faced, it otherwise allowed petitioner's counsel "to vigorously cross-examine them" about their plea agreements and their resulting "potential biases or motives to lie." Pet. App. 11a. For example, the court allowed counsel to elicit testimony that Hull and Land had agreed to cooperate and testify against petitioner in order to avoid a "substantial mandatory minimum sentence" that would have required them to spend "a pretty long time in prison." *Id.* at 11a-12a. In addition, the court instructed the jury to examine "with caution and great care" the testimony of any witness who had been "promised, received or expected benefits" in exchange for testimony or cooperation and who had pleaded guilty to or claimed involvement in the crimes with which the defendant was charged. Trial Tr. 828.

Under the circumstances, the district court's narrow restriction on inquiry into the precise statutory minimum sentences faced by Hull and Land reasonably balanced the limited incremental probative value of such information against the substantial risk of prejudice to the jury's impartial evaluation of the evidence. And the

court of appeals correctly found no violation of the Confrontation Clause because the precise minimum sentences would not have given the jury "a significantly different impression of [the witnesses'] credibility." *Van Arsdall*, 475 U.S. at 680.

c. Petitioner asserts that "the Sixth Amendment *guarantees* defendants the right to cross-examine adverse witnesses as to the specific mandatory minimum sentences they avoided by cooperating with the government." Pet. 2; see Pet. 22-30. That rigid rule is inconsistent with this Court's admonition that the Confrontation Clause leaves trial judges with "wide latitude," *Van Arsdall*, 475 U.S. at 679, and "broad discretion," *Davis*, 415 U.S. at 316, to impose reasonable limits on cross-examination based on the circumstances of a particular case. Petitioner identifies no other context in which the Court has interpreted the Confrontation Clause to mandate that defendants be permitted not only to explore a given *topic*, but also to ask a specific *question*. In arguing that such a categorical rule is required here, petitioner both greatly understates the prejudicial effect of revealing sentencing information to the jury and greatly overstates the probative value of the precise numerical sentences faced by cooperating witnesses.

First, petitioner dismisses as "speculative" (Pet. 27) the concern that disclosing the defendant's potential sentence to the jury could affect the fairness of a trial. But this Court has rejected the view that petitioner advances, endorsing the "familiar precept[]" that that "providing jurors sentencing information * * * creates a strong possibility of confusion." *Shannon*, 512 U.S. at 579. Courts of appeals have likewise recognized the "certain prejudicial impact" that results when a jury

learns the sentencing consequences of its verdict. *United States* v. *Cropp*, 127 F.3d 354, 359 (4th Cir. 1997), cert. denied, 522 U.S. 1098 (1998); see, *e.g.*, *United States* v. *Rushin*, 844 F.3d 933, 939 (11th Cir. 2016) (sentencing information "could invite jury nullification"); *United States* v. *Arocho*, 305 F.3d 627, 636 (7th Cir. 2002) (sentencing information "could improperly sway the jury"), cert. denied, 550 U.S. 926 (2007).

One of the defense-oriented "practitioner guides" on which petitioner relies (Pet. 26) candidly embraces precisely that prejudicial effect. In a passage quoted by petitioner (*ibid.*), the guide urges defense counsel cross-examining a cooperating witness to "do the math in the presence of the jury" and to emphasize the sentence the witness would have faced absent cooperation. Benjamin Brafman, *Cross-Examining a Rat*, Litigation, Spring 1996, at 41. The guide explains that one of the chief advantages of that strategy is that it allows counsel to "implant[] in the minds of the jurors the severe consequences that will befall [the defendant] if convicted" and thereby circumvent "the prohibition against criminal defense counsel commenting * * * on the type of sentence to which the defendant will be exposed." *Id.* at 42. The guide emphasizes, for example, that if a cooperating witness acknowledges that he faced a life sentence, "[t]he jury will understand * * * that the defendant, if convicted, could face life in prison." *Id.* at 41. Petitioner cannot plausibly dismiss a risk of prejudice that his own trial guide touts as a principal benefit of his preferred cross-examination strategy.

Second, petitioner asserts (Pet. 24-27) that, as a categorical matter, only the precise statutory minimum sentence that a cooperating witness faced can adequately convey the witness's potential bias to the jury.

That is not so. As this case illustrates, defense counsel need not quantify the sentences that a cooperating witness would have faced in order to "vigorously cross-examine" the witness and expose his incentive to provide testimony favorable to the government. Pet. App. 11a. Under questioning from petitioner's counsel, for example, Hull conceded that he faced "a rather substantial mandatory minimum sentence"; that the sentence would have required him to spend "a pretty long time" in prison; that he knew that he could not receive "a sentence below that substantial mandatory minimum" absent a motion by the government; that he was testifying "to get [his] sentence reduced"; and that he entered into a plea agreement because he "d[id]n't want to serve that much time in prison if [he could] avoid it." *Ibid.*; see Trial Tr. 248-249; see also Pet. App. 12a (similar admissions by Land).

Petitioner contends (Pet. 25) that the witnesses' admission that they faced "substantial" mandatory minimum sentences did not adequately convey to the jury the severity of the 20-year sentences at issue. But the district court only limited petitioner's counsel from eliciting the specific term of years, and it twice invited counsel to propose "alternative language" if he was dissatisfied with "substantial" as a qualitative substitute. Trial Tr. 215; see *id.* at 216 ("If you wish for me to consider another word other than 'substantial' * * * I'm happy to consider something [as] an alternative."). Having failed to accept the court's invitation to offer an alternative, petitioner cannot now complain that the word "substantial" was inadequate.

2. The court of appeals' decision is consistent with many other decisions that have applied similar reason-

ing to uphold restrictions on the disclosure of the precise sentences that cooperating witnesses avoided or hoped to avoid. See, *e.g.*, *United States* v. *Wright*, 866 F.3d 899, 905-908 (8th Cir. 2017), petition for cert. pending, No. 17-1059 (filed Nov. 13, 2017); *Rushin*, 844 F.3d at 938-940; *United States* v. *Walley*, 567 F.3d 354, 358-360 (8th Cir. 2009); *Arocho*, 305 F.3d at 636; *Cropp*, 127 F.3d at 360; *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995), cert. denied, 517 U.S. 1234 (1996); *United States* v. *Nelson*, 39 F.3d 705, 708 (7th Cir. 1994). Petitioner contends (Pet. 8-18), however, that the decision below conflicts with the decisions of three other courts of appeals and four state supreme courts. That is incorrect.

a. Petitioner first asserts (Pet. 9-10, 13-15) that the Third, Fifth, and Ninth Circuits have held that defendants must always be allowed to cross-examine cooperating witnesses on the precise numerical sentences the witnesses would have faced absent cooperation. The decisions on which petitioner relies do not support that assertion.

In *United States* v. *Chandler*, 326 F.3d 210 (2003), the Third Circuit specifically declined to adopt a "categorical[]" rule that the Confrontation Clause permits every defendant to inquire into "the specific sentence [a cooperating] witness may have avoided through his cooperation." *Id.* at 221. Instead, the court concluded that whether such an inquiry must be permitted "depends on 'whether the jury had sufficient other information before it * * * to make a discriminating appraisal of the possible biases and motivation of the witnesses.'" *Id.* at 219 (citation omitted). Accordingly, the Third Circuit has upheld a district court's order prohib-

iting cross-examination "on the length of either the sentence [a cooperating witness] faced or the one he received" where—as here—the court allowed counsel to convey the severity of the sentence using qualitative terms. *United States* v. *Marrero*, 643 Fed. Appx. 233, 237 (2016). The Third Circuit has also stated, in direct opposition to petitioner's contentions here, that it has found "no cases holding" that defendants "have a categorical right to inquire into the penalty a cooperating witness would otherwise have received." *United States* v. *Mussare*, 405 F.3d 161, 170 (2005), cert. denied, 546 U.S. 1225 (2006).

The Fifth Circuit decision on which petitioner relies (Pet. 15) likewise 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.'" *United States* v. *Cooks*, 52 F.3d 101, 104 (1995) (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 where, as here, disclosure of the sentence faced by a cooperating witness would allow the jury to infer the sentence to which a conviction would subject the defendant himself. *Id.* at 103-104 & n.13.

The Ninth Circuit's decision in *United States* v. *Larson*, 495 F.3d 1094 (2007) (en banc), cert. denied, 552 U.S. 1260 (2008), also did not purport to adopt a categorical rule. The court instead recognized, consistent with this Court's precedents, that the question is whether a "reasonable jury might have received a sig-

nificantly different impression of the witness'[s] 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 violation of the Confrontation Clause where a cooperating witness faced a minimum sentence of life in prison and where the defendant was not 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. But the court had no occasion to consider a circumstance where, as in this case, the defendant was permitted to cross-examine a cooperating witness about the existence of a "substantial mandatory minimum," and where that sentence was something less than life in prison. Pet. App. 7a (citation omitted). The Ninth Circuit thus has not treated *Larson* as establishing a categorical rule permitting inquiry into the specific details of any mandatory minimum sentence faced by a cooperating witness. For example, the court found no error in the preclusion of specific inquiry into a 15-year mandatory minimum where "sufficient [other] evidence" allowed "the jury to assess [the cooperating witness's] credibility." *United States* v. *Gradinariu*, 283 Fed. Appx. 541, 543, cert. denied, 555 U.S. 962 (2008).

In sum, the courts of appeals 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. The 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.[3]

b. Petitioner also contends (Pet. 11-13, 15-16) that the decision below conflicts with the decisions of four state supreme courts. But petitioner cites no decision finding a violation of the Confrontation Clause where, as here, the defendant thoroughly explored a cooperating witness's plea agreement in qualitative terms and was barred only from quantifying the minimum sentence the witness would have faced.

In *State* v. *Gracely*, 731 S.E.2d 880 (2012), the South Carolina Supreme Court stated that "[t]he fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." *Id.* at 886. But the trial court in that case had precluded *all* questioning about the existence or the extent of the mandatory minimum sentences faced by cooperating witnesses. *Id.* at 882-883.

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[3] Petitioner also asserts (Pet. 18 n.8) that the Fourth Circuit has an "internal conflict" on the question presented. Such an intra-circuit disagreement would not warrant this Court's review even if it existed. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In fact, no conflict exists. In *Hoover* v. *Maryland*, 714 F.2d 301 (1983), the Fourth Circuit found a violation of the Confrontation Clause because counsel had been "prevented totally from developing [the witness's] understanding of what concrete benefits he would receive" from his immunity agreement with the government. *Id.* at 303. In contrast, the Fourth Circuit has found no violation where—as here—a court has allowed a defendant to establish that cooperating witnesses faced "severe penalties" absent cooperation but prohibited inquiry into their "exact sentences." *Cropp*, 127 F.3d at 359. Those decisions thus do not reflect any "internal conflict"; instead, they further confirm that the application of the Confrontation Clause in this context is fact-specific.

Similarly, in *State* v. *Morales*, 587 P.2d 236 (1978), the Supreme Court of Arizona concluded that the trial court erred by "refus[ing] to allow inquiry into the penalty the witness would have faced had he not agreed to testify." *Id.* at 239. There, too, the trial court had refused to permit any inquiry into the penalties that the witness would have faced. *Ibid.* The court also emphasized that "the witness faced a possible death penalty if he did not testify for the State." *Ibid.*

In *Manley* v. *State*, 698 S.E.2d 301 (2010), the Georgia Supreme Court concluded that the trial court had violated the Confrontation Clause by "excluding any evidence" of the effect of the witness's plea agreement on the length of time she would have to serve before being eligible for parole. *Id.* at 306. But the court did not adopt a categorical rule that a defendant must always be allowed to cross-examine a cooperating witness on that subject. To the contrary, it stated that its decision "does not mean that parole eligibility will regularly be a topic for cross-examination," and it tied its decision to the specific facts of that case. *Ibid.*[4]

Finally, in *Wilson* v. *State*, 950 A.2d 634 (2008), the Delaware Supreme Court concluded that a trial court had violated the Confrontation Clause by refusing to al-

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[4] The Georgia Supreme Court also deemed the error it perceived in *Manley* to be harmless because the excluded parole evidence would not have had "any meaningful effect on the jury's consideration of [the witness's] testimony." 698 S.E.2d at 306. That determination suggests that the court should not have found constitutional error at all. This Court has made clear that a limitation on cross-examination does not violate the Confrontation Clause at all if the excluded evidence would not have given the jury "a significantly different impression of [the witness's] credibility." *Van Arsdall*, 475 U.S. at 680.

low evidence of the sentencing benefit the witness received by pleading guilty. *Id.* at 638-639. The court reasoned that the jury "might have developed a different impression of [the witness's] credibility" if it had been "told of the extent of the benefit [the witness] received." *Id.* at 639. But the court had no occasion to consider whether the witness's potential bias could have been conveyed in qualitative rather than quantitative terms. And the court also stated that it was following the Third Circuit's decision in *Chandler*, which had specifically declined to adopt a categorical rule mandating the disclosure of specific sentencing information. *Id.* at 638-639; see pp. 13-14, *supra*.

c. Petitioner also asserts (Pet. 8-9) that some lower courts and commentators have stated that the lower courts are divided on the question presented. But those authorities relied on the same decisions as petitioner, and their conclusion is thus subject to the same criticism. Furthermore, even one of the decisions that petitioner cites recognized that, although courts of appeals have reached different results in different cases, "[n]o court has held that a defendant has a 'categorical right to inquire into a penalty a cooperating witness would otherwise have received' absent his or her cooperation with the government." *United States* v. *Dimora*, 843 F. Supp. 2d 799, 844 (N.D. Ohio 2012) (citation omitted). That confirms the absence of any conflict warranting this Court's intervention.

3. Even if the question presented otherwise warranted this Court's review, this case would be not be a suitable vehicle in which to consider it because any Confrontation Clause violation was harmless. See *Van Arsdall*, 475 U.S. at 684 ("[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness

for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis."). That is true for two independent reasons.

First, although the district court precluded petitioner's counsel from eliciting the precise mandatory minimum sentences that Hull and Land had faced in cross-examining those witnesses, petitioner himself disclosed that information to the jury when he took the stand later in the trial. While being cross-examined by the government, petitioner blamed Hull for Corzette's death: "Kyle [Hull] is a strange young man. For—first of all, for him to sit up there and let his friend pass out and try no medical aid, that's what I have a problem with, holding me responsible for his doing." Trial Tr. 783-784. Petitioner then told the jury—which already knew that Hull had faced a "substantial mandatory minimum sentence," Pet. App. 11a (citation omitted)—that Hull's sentence would have been "20 years" in prison:

> [I]f I had been there and this happened and I provide this man no medical help or no assistance from what I know then I could say, I come here and plead guilty and tell you and threw myself on the mercy of the Court and *did my 20 years*. And if I died in prison, then so be it; I did wrong.

Trial Tr. 784 (emphasis added).[5]

Second, even if petitioner had not disclosed the specific mandatory minimum sentence to the jury, any error in the exclusion of that information still would have been harmless. As this Court has explained, a "host of

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[5] Although petitioner's testimony on this issue likely also revealed to the jury the sentence that he himself faced, he has never contended that it retroactively undermined the district court's earlier determination to limit his cross-examination of Hull and Land.

factors" can demonstrate the harmlessness of a limitation on the cross-examination of a cooperating witness, 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." *Van Arsdall*, 475 U.S. at 684.

In this case, other evidence—including petitioner's own admissions—powerfully corroborated Hull's and Land's testimony and confirmed petitioner's guilt. Petitioner admitted that he had been selling heroin to five or ten people per day. Gov't C.A. Br. 6. He admitted that he had distributed heroin to Hull earlier in the day on August 29, 2014. Trial Tr. 763. And he admitted that Hull had called him later that day to ask for more heroin and that he had referred Hull to Land. *Id.* at 763-764. Petitioner claimed only that Land was not acting on his behalf when he sold Hull the heroin that killed Corzette. *Id.* at 764.

That self-serving claim was contradicted not only by Land and Hull, but also by surveillance videos and cell phone records. The videos showed that both petitioner's car and Corzette's car were near the gas station where Land sold Hull the heroin. Trial Tr. 617-619, 621-627. When confronted with that video, petitioner conceded that he "could have been there" when the sale occurred. *Id.* at 785. Cell phone records likewise confirmed that petitioner was in the vicinity of the gas station when the deal was completed. *Id.* at 373-374. And they also revealed that during the 30 minutes before and after the sale, petitioner texted or spoke at least six times with

Land and three times with Hull—including multiple calls immediately before and after the sale. *Id.* at 639-642.

Particularly because petitioner's counsel thoroughly cross-examined Land and Hull about their incentives to lie, this powerful corroborating evidence confirms that any Confrontation Clause error was harmless beyond a reasonable doubt. See *Larson*, 495 F.3d at 1108 (finding the error in that case to be harmless because "the Government offered significant evidence" of guilt and because defense counsel was allowed to explore the cooperating witness's "desire to obtain a lesser sentence"). Accordingly, petitioner would not be entitled to relief even if he prevailed on the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2018