No. 17-830

In the Supreme Court of the United States

PHIL LAMONT TRENT,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MURRAY W. BELL
2435 Kimberly Rd.
Suite 235 S.
Davenport, IA 52803
(563) 325-4095

PAUL W. HUGHES
Counsel of Record
CHARLES A. ROTHFELD
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

REPLY BRIEF FOR PETITIONER

The Sixth Circuit, Eleventh Circuit, and district courts across the country have all recognized the clear conflict of authority over the question presented. Pet. 8-9. This issue recurs with considerable frequency, and this case is a suitable vehicle for resolving it. That is reason enough to grant the petition.

The government tellingly opens its opposition with the merits. BIO 7-12. But, in the face of a well-recognized circuit conflict, the government's merits arguments are no reason to deny review—a position that the government itself advances with some frequency. In all events, the government's cramped understanding of the confrontation right is incorrect.

The government's response to our demonstration of a conflict among the lower courts (BIO 12-18) is most notable for what it omits. Although it quibbles with factual nuances of the various cases, the government does not deny that other circuit courts and state courts of last resort would decide this case differently. Indeed, as we demonstrated in the petition, that conclusion is irrefutable.

The government's final contention is that any error was harmless. BIO 18-21. But the court of appeals made no such finding, and that is a subsequent question for remand. The government is nonetheless wrong: petitioner's fundamental strategy was to discredit Land's recantation of his original testimony. Critical to that was Land's motive; the only way he could avoid a 20-year mandatory minimum was to contradict his initial statement to the police. The district court, however, forbade petitioner from presenting these concrete details to the jury.

A. There is a deep, acknowledged split of authority.

The petition demonstrated that several other federal circuits and state courts of last resort have found confrontation-right violations in circumstances indistinguishable from those here—where a trial court forbids a defendant from exploring the *mandatory minimum* term that a witness avoided via his or her testimony. Pet. 9-16. We thus demonstrated that other courts would have decided this case differently.

For its part, the government focuses on whether other courts have adopted a "categorical rule" permitting inquiry into "the precise numerical sentences the witnesses would have faced absent cooperation" in all contexts, including those not involving mandatory minimums. BIO 10, 13. But the relevant question is whether petitioner would have prevailed had his case arisen elsewhere. The evidence is overwhelming—in several jurisdictions, petitioner could have conducted the line of cross-examination that he was denied here.

1. In *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007), the en banc court held that the district court erred when, by limiting cross-examination into the details of the mandatory minimum, the defendant could not describe "the extent to which [the witness] stood to benefit from testifying in a manner that satisfied the Government." *Id.* at 1105. This precluded the defendant from "reveal[ing] the magnitude of [the witness's] incentive to testify to the Government's satisfaction." *Ibid.*

The government is wrong to argue that, in *Larson*, "the defendant was not allowed to elicit *any* testimony about the existence or magnitude of that

mandatory minimum." BIO 15. To the contrary, the defendant obtained testimony showing that Lamere depended upon the prosecutor for seeking a sentencing reduction and, further, that Poitra faced a mandatory minimum sentence. See *Larson*, 495 F.3d at 1110 (Graber, J., concurring in part and specially concurring in part). The problem, the majority held, was that the defendant was not able to reveal the "extent" and the "magnitude" of the benefit that the witnesses hoped to obtain. So too here.

While the witness in *Larson* did face a potential life sentence, the critical factor, *Larson* held, was the *mandatory* nature of the sentence absent cooperation: "It is a sentence that the witness knows with *certainty* that he will receive unless he satisfies the government with substantial and meaningful cooperation so that it will move to reduce his sentence." 495 F.3d at 1106.

The government's attempted distinctions are belied by subsequent holdings of the courts bound by *Larson*. District courts broadly recognize, in circumstances no different from those here, that defendants may cross-examine a witness about the *specific* mandatory minimum. One court, for example, explained that "*Larson* stands for the proposition that the district court cannot exclude cross-examination of *cooperating witnesses* concerning their potential sentences on the ground that sentencing is a matter for the court *or* on the ground that such cross-examination may allow the jurors to infer what a defendant's potential sentence might be." *United States* v. *Norita*, 2010 WL 1752673, at *7 (D. N. Mar. I. 2010).

Several other courts have understood *Larson* just the same way:

- "[A] defendant must be allowed to elicit not only the fact that the witness will receive a benefit, but the witness's subjective understanding of the magnitude of that benefit." *United States* v. *Boyajian*, 2013 WL 4189649, at *22 (C.D. Cal. 2013).
- "[T]he defendants must be permitted to reference the punishment of cooperating witnesses in order to impeach them." *United States* v. *Williams*, 2017 WL 4310712, at *8 (N.D. Cal. 2017).
- "[T]he court may permit evidence of a mandatory minimum sentence that a witness faces in the absence of a motion by the government." *United States* v. *Joyce*, 2017 WL 895563, at *2 (N.D. Cal. 2017).

The real-world effect of *Larson* is far broader than the government acknowledges—and it undoubtedly conflicts with the result reached here.[1]

2. The government attempts to dismiss *State* v. *Gracely*, 731 S.E.2d 880 (S.C. 2012), on the basis that "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." BIO 16. Not so: counsel asked witness Hall, for example, about avoiding "the maximum thirty year sentence." 731 S.E.2d at 886. This did not, the court concluded, "reach[] the requisite degree of

[1] In *United States* v. *Gradinariu*, 283 F. App'x 541, 543 (9th Cir. 2008), the court's analysis turned on the "numerous references to a hypothetical 18-year sentence," which was *greater* than the mandatory minimum that the witness faced. *Ibid*. No such specifics about witness sentences were offered here.

granularity." *Ibid*. The court unmistakably held that the *specifics* of the *mandatory minimum* are essential.

Again, the proof lies in the courts bound by *Gracely*. In *State* v. *Pradubsri*, 743 S.E.2d 98, 103 (S.C. Ct. App. 2013), a defendant cross-examined a witness "in general terms about the sentence [she] faced under her original charges." But, "to avoid informing the jury of the exact sentence [the defendant] was facing, the trial court refused to allow [the defendant] to question [the witness] on the exact potential sentence of each charge." *Ibid*. Based on *Gracely*, the state court of appeals found error: the defendant's "right to meaningful cross-examination outweighed the State's interest in excluding the evidence." *Id*. at 104. Moreover, "[b]ecause the evidence was critical to showing [the witness's] potential bias, the trial court erred in refusing to allow that evidence into the record." *Ibid*.

That is *identical* to the circumstances here—yet *Gracely* mandated a different result. The conflict is apparent. See also *State* v. *Whatley*, 756 S.E.2d 393, 398 (S.C. Ct. App. 2014) ("Because at least one of the charges against [the witness] was reduced from an offense with a mandatory minimum sentence to an offense without such a sentence, the trial court erred in precluding [the defendant] from questioning her on the sentences she faced for the reduced charges.").

3. *Manley* v. *State*, 698 S.E.2d 301 (Ga. 2010), is also in clear conflict. There, the defendants "were allowed to ask [the witness] about the length of her sentence as a result of the deal." *Id*. at 304. The problem was the degree of specificity; defendants "were not allowed to question her about any parole differential." *Ibid*. That limitation breached defendants'

confrontation rights. *Id*. 306. It is immaterial that the court proceeded to find the error harmless in view of the evidence of guilt; *Manley*'s holding as to the scope of the confrontation right is undeniably binding on all state courts in Georgia. *Ibid*.

4. As to *United States* v. *Chandler*, 326 F.3d 210, 221 (3d Cir. 2003), the government observes that the Third Circuit requires an analysis of the information before the jury. BIO 13. But the government does not respond to our demonstration that the jury in *Chandler* had substantial information before it—indeed, more information than that here—yet the Third Circuit nonetheless found a violation of the confrontation right. See Pet. 13-14. That was because the witnesses obtained a benefit of "enormous magnitude," and the extent of that benefit "would have borne directly on the jury's consideration of the weight, if not the fact, of" the witnesses' motivations. *Chandler*, 326 U.S. at 222.[2]

Applying *Chandler*, the Third Circuit subsequently found that a trial court erred by prohibiting a defendant from cross-examining a witness "about the period of incarceration he would be facing had he not cooperated with authorities." *United States* v. *Throckmorton*, 269 F. App'x 233, 236 (3d Cir. 2008). There, the witness acknowledged that he "would be offered some leniency," but the defendant was unable "to provide the jury with any estimate of the punishment he would otherwise be facing." *Ibid*. The lack of these specifics improperly "deprived the jury

[2] Because *Chandler* was decided prior to *United States* v. *Booker*, 543 U.S. 220 (2005), the sentencing guidelines at issue there were akin to mandatory minimums.

of any frame of reference to evaluate his motive to cooperate." *Ibid.*[3]

* * *

The courts have broadly recognized (Pet. 8-9 & n.5) the "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. *Lanham*, 617 F.3d 873, 884 (6th Cir. 2010). Only this Court can resolve the conflict.

B. This is a suitable vehicle for review.

This is an appropriate case for doing so. The government's suggestion (BIO 18-21) that any error here was harmless lacks merit, and the prior petitions (BIO 7) were not suitable vehicles.

1. The government's harmless error argument—an issue never reached below—is misplaced, because the "usual practice" is to leave the harmless error analysis "for resolution on remand." *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1931 (2017). See also, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 414 (2010).

In all events, the government is mistaken. The government first contends (BIO 19) that petitioner somehow revealed the sentence that Hull avoided. But the testimony on which the government relies is

---

[3] *United States* v. *Marrero*, 643 F. App'x 233, 238 (3d Cir. 2016), and *United States* v. *Mussare*, 405 F.3d 161, 171 (3d Cir. 2005), are not to the contrary because neither involved a *mandatory minimum* sentence or any equivalent. Those potential sentences did not, therefore, pose the sort of concrete harm that would necessarily befall a witness but for cooperation.

not just cryptic, it is unintelligible. At best, it could have suggested the sentence that *petitioner* faced. It certainly did not convey to the jury with any clarity that Hull avoided a 20-year mandatory minimum, and it said nothing whatsoever about Land, whose testimony was critical. See Pet. 3-7, 30. This statement, moreover, had no bearing on the actual issue: whether petitioner was permitted to *cross-examine* Land about the magnitude of his incentive to recant his earlier testimony, and whether petitioner was able to use this in closing. See Pet. 5-7.

The government also identifies (BIO 20-21) other circumstantial evidence connecting petitioner to Land, including surveillance video and cell phone records. But little wonder why: petitioner *admitted* that he sold drugs to Land. Indeed, based on that admission, petitioner told the jury that he should be convicted on the charges *other than* the count of conspiracy to distribute resulting in death. Pet. 5-6. The issue here, by contrast, is who supplied the *specific* drugs that resulted in Corzette's death.

On that point, Land's testimony was essential. Land acknowledged (and the government does not dispute) that, in August 2014, Land bought drugs from multiple suppliers. Pet. 3-4. As we explained, after Land was arrested—and *before he knew of Corzette's* death—he told officers that he obtained the August 29 drugs from a supplier named Tone, and the August 30 drugs from petitioner. *Ibid*. Because Land did not then know about Corzette's death, he would have understood his testimony to implicate both Tone *and* petitioner equally. Land could not, therefore, have been trying to protect petitioner. *Ibid*. Only after police informed him of

Corzette's death did Land agree—at police insistence—to recant his original statement. *Ibid.*[4]

If the jury had been aware that Land was obligated to satisfy the government with his testimony in order to avoid a *20-year* mandatory minimum, it may have viewed Land's credibility quite differently.

2. The government's identification of prior petitions (BIO 7) confirms that this issue will continue to recur with frequency until the Court resolves it. But those cases, unlike this one, were not suitable vehicles for review.

In *Lipscombe* v. *United States*, 135 S. Ct. 945 (2015) (No. 14-6204), the defendant petitioned from an unpublished, per curiam opinion. See *United States* v. *Lipscombe*, 571 F. App'x 198, 199 (4th Cir. 2014). That cursory opinion offered no reasoned analysis of the issues.

The identical petitions in *Heinrich* v. *United States*, 564 U.S. 1040 (2011) (No. 10-9194), and *Wilson* v. *United States*, 564 U.S. 1040 (2011) (No. 10-8969), arose from the same, unreported decision, resulting in the government's filing a consolidated opposition. See *United States* v. *Wilson*, 408 F. App'x 798 (5th Cir. 2010). The issue there, moreover, was charge-bargaining, not relief from an otherwise applicable mandatory minimum. *Id.* at 802-803. And—quite unlike here—the *witness* did directly disclose

---

[4] The government now tries to assert that Land was confused as to about which day he had initially been asked. BIO 3 n.1. The court of appeals did not endorse this argument, and for good reason. Because the officers were interrogating Land on August 30 for conduct that had occurred the day before, August 29, this explanation makes little sense. See Pet. 3-4.

the scope of the sentence he faced. See BIO at 9-10, *Heinrich* v. *United States*, 564 U.S. 1040 (2011) (No. 10-9194).

Finally, *Reid* v. *United States*, 556 U.S. 1235 (2009) (No. 08-1011), was also decided below via an unpublished opinion. In opposition, while the government acknowledged "there is some disagreement in the courts of appeals on the question presented" (BIO at 6, *Reid* v. *United States*, 556 U.S. 1235 (2009) (No. 08-1011)), the government identified multiple vehicle flaws: petitioner had not raised a Sixth Amendment objection during trial (*id.* at 11), and petitioner added a second question—about whether a defendant has a right to inform a jury of his *own* potential mandatory minimum—that rendered review inadvisable (*id.* at 12-14).

The pendency of *Wright* v. *United States*, No. 17-1059, confirms the urgent need for review.[5]

C. The decision below is incorrect.

The government begins its opposition with the merits, but—in the face of a well-recognized, oft-recurring conflict—that is no basis to deny review. Indeed, the government itself recognizes that, even if the lower court "correctly" decided a case, "[t]his Court's review is nonetheless warranted" when "the decision below deepens an existing circuit conflict." U.S. *Amicus Curiae* Br. at 8, *Lamar, Archer &*

[5] Petitioner submits that this case presents the better vehicle. In *Wright*, the trial court denied the defendant leave to cross-examine the witness about his mandatory sentence *because* defense counsel provided the jury with additional context that would have allowed the jury to deduce the defendant's sentence. See BIO at 15, *Wright* v. *United States*, No. 17-1059. There is no similar obstacle to review here.

Cofrin, LLP v. *Appling*, No. 16-1215. That is decidedly the case here.

Regardless, the question presented is a substantial one, deserving of review. The government's argument, in the main, is that the cross-examination petitioner sought poses a "substantial risk of prejudice" because of the threat of juror nullification. BIO 9-10. Meanwhile, the government contends that this information would offer petitioner only "limited incremental probative value" to impeach the witnesses against him. *Ibid.*

But these two contentions are contradictory. The government's prejudice contention rests on the assumption that, if a jury were aware of the 20-year mandatory minimum facing the defendant, this information would influence its behavior in a way that informing a jury that the defendant faces a "substantial" mandatory minimum would not. If that is true, then the government must be wrong to argue that the testimony petitioner was foreclosed from eliciting had only "limited incremental probative value." The government's very objection in this case belies its assertion that the cross-examination defendant sought to undertake has minimal probative value.

Apart from that, the government disregards our demonstration that jury nullification is not a significant practical concern (Pet. 27-28) and, moreover, that its argument is at odds with longstanding historical practice (Pet. 28). We showed, additionally, that denial of the confrontation right requires something more than a "generalized finding" of potential risk. Pet. 27-28. The government nonetheless rejoins with precisely such "generalized findings." See BIO 10-11.

Most tellingly, the government has no response to our solution to any seeming tension between cross-examination rights and the speculative fear of juror nullification—a jury instruction. Pet. 28-29. Courts frequently instruct juries not to consider the possible sentence when adjudicating guilt, and there exists a powerful presumption that juries follow their instructions. Pet. 28-29. The government is silent.

Finally, the government's suggestion that "petitioner cannot now complain" because he offered no qualitative synonym to the word "substantial" (BIO 12) is meritless. Defense counsel's point—which is the same argument presented here—was that the precise term of years is what was necessary, in the context of this case, to "convey[] the real thing." Trans. 215 (Dkt. No. 68).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MURRAY W. BELL
2435 Kimberly Rd.
Suite 235 S.
Davenport, IA 52803
(563) 325-4095

PAUL W. HUGHES
Counsel of Record
CHARLES A. ROTHFELD
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

APRIL 2018