No. 20-1790

In the Supreme Court of the United States

ALSTON CAMPBELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. 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 sentences the witnesses faced.

2. Whether the court of appeals applied the correct standard of review in considering petitioner's claim that the district court's limitation on his cross-examination of cooperating government witnesses violated the Confrontation Clause.

ADDITIONAL RELATED PROCEEDING

United States Supreme Court:

William Marcellus Campbell v. *United States*, No. 21-5666 (petition for writ of certiorari filed Sept. 13, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 986 F.3d 782.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2021. The petition for a writ of certiorari was filed on June 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A) and 846; and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. The district court sentenced petitioner to 262 months of imprisonment, to be followed by five years of

supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-44.

1. In 2016, a task force began investigating drug trafficking by petitioner and his family in eastern Iowa. Pet. App. 2. The multiyear investigation employed confidential informants, controlled buys and payoffs, wiretaps, and surveillance. *Ibid.* Officers observed petitioner's participation in payoffs and transactions suspected to be drug purchases, and they recorded and took photographs of him during certain transactions. See, *e.g.*, Trial Tr. 118-122, 139-142, 341, 350-358, 473-476, 493-495, 525-528; see also Gov't C.A. Br. 21-22, 28. Wiretap evidence revealed that petitioner, using multiple cell phones, regularly discussed large sums of money, used coded language, and received orders for cocaine and cocaine base. See, *e.g.*, Trial Tr. 153, 157, 343, 590-600, 609-619, 625-627, 749-756; see also Gov't C.A. Br. 24-28. And during a search of petitioner's residence, officers found several firearms, ammunition, three bags of caffeine and lidocaine (commonly used as cutting agents for cocaine), bowls and a spoon with cocaine residue, plastic baggies, empty duffle bags, a bag sealer, and a receipt for a storage garage. Trial Tr. 158-159, 162-176; see Gov't C.A. Br. 28-29. At the storage garage, officers recovered mail addressed to petitioner and a coffee can with a false bottom containing cocaine, cocaine base, and cutting agents. Trial Tr. 176-183; see Gov't C.A. Br. 29.

Following the investigation, a federal grand jury in the Northern District of Iowa charged petitioner and several other defendants with various drug-trafficking offenses. Pet. App. 5-6. The grand jury charged petitioner with conspiring to distribute five kilograms or

more of a mixture containing a detectable amount of cocaine and 280 grams or more of a mixture containing a detectable amount of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A) and 846; and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Superseding Indictment 2, 7. After several defendants pleaded guilty, petitioner and the remaining defendants proceeded to trial. Pet. App. 2, 6.

At trial, the government presented testimony from, *inter alia*, four cooperating witnesses who had entered plea agreements but had not yet been sentenced. Pet. App. 12, 88. In their plea agreements, the cooperating witnesses acknowledged that they faced statutory minimum sentences of either ten or 20 years (depending on the witness). The plea agreements further specified that the witnesses could avoid those minimum sentences if the government, in its "sole discretion," filed a motion for departure based on the defendant's "substantial assistance" to the prosecution. *Id.* at 132, 147; *id.* at 161, 176-177; *id.* at 191, 197-198; *id.* at 208, 225. The government objected to defense counsel's planned introduction of the plea agreements on cross-examination of the cooperating witnesses. *Id.* at 48. The district court sustained that objection on the grounds of relevance and juror confusion, but noted that defense counsel could still ask the cooperating witnesses about the substance of their plea agreements. *Id.* at 52.

The government also requested that defense counsel not be allowed to ask the cooperating witnesses about the precise penalties they were facing. Pet. App. 53-54. The government observed that because the witnesses and petitioner faced similar charges, the witnesses' sentencing exposure could "be extrapolated by the jury" to

determine the penalty that would apply to petitioner, thereby inviting jury nullification. *Id.* at 54; see *id.* at 48, 53-54. The district court granted the government's request, instructing that defense counsel could question the cooperating witnesses "as to whether they're facing a substantial amount of time"—including that they were "facing a mandatory minimum" or "an increased amount of time in prison because of their prior criminal history"—but not as to the precise term of imprisonment they were facing. *Id.* at 54-56; see *id.* at 62. The court further permitted defense counsel to question the witnesses about a sentencing court's inability to depart downward from the applicable statutory minimum "without a government motion." *Id.* at 94. The court explained that the judge, not the jury, determines punishment, and that the limitation on cross-examination was necessary to prevent the jury from inferring the specific sentence that petitioner himself might face if convicted of the crimes with which he was charged. See *id.* at 54, 84.

A jury found petitioner guilty of both charged offenses. Judgment 1. The district court sentenced him to 262 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

2. The court of appeals affirmed. Pet. App. 1-44. As relevant here, petitioner contended that the district court's limitation on cross-examination of the cooperating witnesses violated his Confrontation Clause rights. *Id.* at 35. The court of appeals reviewed that claim for abuse of discretion, quoting this Court's observation in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), that trial courts "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." Pet. App. 10 (quoting *Van Arsdall*, 475 U.S. at 679). At the same time, the court recognized "the sanctity of a defendant's ability to expose witness bias," observing that a limitation on cross-examination may violate the Confrontation Clause when the defendant "shows that a reasonable jury might have received a significantly different impression of the witness's credibility had defense counsel been permitted to pursue his proposed line of cross-examination." *Ibid.* (quoting *United States* v. *Dunn*, 723 F.3d 919, 934 (8th Cir. 2013), cert. denied, 571 U.S. 1145 (2015)).

The court of appeals found that the district court did not abuse its discretion when it "allowed defense counsel to cross-examine the government's cooperating witnesses about looming mandatory minimum or 'substantial' sentences they faced, the possibility of receiving an increased sentence based on prior criminal history, and their hopes of earning a reduced sentence through their cooperation," but precluded "cross-examination that would reveal the precise amount of incarceration, in years, that any witness was facing." Pet. App. 10; see *id.* at 35. The court of appeals noted that the "degree of leniency" each witness would receive "in exchange for his cooperation" was "unascertainable at the time of cross-examination," because the record showed only that the witnesses "'hoped through [their] assistance to reduce by an undefined degree the sentence that [they] otherwise faced.'" *Id.* at 11-12 (citation omitted; brackets in original). And finding no error, the court declined to decide whether the limitation prejudiced petitioner. *Id.* at 12.

ARGUMENT

Petitioner contends (Pet. 21-35) that the district court violated the Confrontation Clause by not allowing him to elicit testimony about the precise sentences that the cooperating witnesses faced, and that the court of appeals erred in reviewing that claim for abuse of discretion. Further review is unwarranted. The court of appeals' decision was correct, and no conflict in the circuits or state courts of last resort warrants further review in this case. Indeed, this case would be a poor vehicle for considering petitioner's arguments because he would not be entitled to relief even if this Court agreed with them.

This Court has repeatedly denied review on the Confrontation Clause question, see, *e.g.*, *Hunter* v. *United States*, 140 S. Ct. 2522 (2020) (No. 19-7021); *Wright* v. *United States*, 138 S. Ct. 2026 (2018) (No. 17-1059); *Trent* v. *United States*, 138 S. Ct. 2025 (2018) (No. 17-830); *Lipscombe* v. *United States*, 574 U.S. 1081 (2015) (No. 14-6204); *Heinrich* v. *United States*, 564 U.S. 1040 (2011) (No. 10-9194); *Wilson* v. *United States*, 564 U.S. 1040 (2011) (No. 10-8969); *Reid* v. *United States*, 556 U.S. 1235 (2009) (No. 08-1011), as well as the standard-of-review question, see, *e.g.*, *Cuevas Cabrera* v. *United States*, 137 S. Ct. 2240 (2017) (No. 16-7775); *Perez-Amaya* v. *United States*, 132 S. Ct. 2378 (2012) (No. 11-8631); *Smith* v. *United States*, 562 U.S. 1061 (2010) (No. 10-18); *Larson* v. *United States*, 552 U.S. 1260 (2008) (No. 07-7481). The same result is warranted here.[*]

[*] One of petitioner's co-defendants has also filed a petition for a writ of certiorari raising the same two questions presented. See *William Marcellus Campbell* v. *United States*, No. 21-5666 (Sept. 13, 2021).

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

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

This Court has simultaneously recognized, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679; cf. Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of," *inter alia*, "unfair prejudice" or "confusing the issues"). The Court has thus emphasized that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Van Arsdall*, 475 U.S. at 679 (citation omitted). Accordingly, to establish that a limitation on cross-examination violated the Confrontation Clause, a defendant must demonstrate that "[a] reasonable jury

might have received a significantly different impression of [the witness's] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 680.

Here, the district court's limitation on cross-examination fell within its "wide latitude * * * to impose reasonable limits on such cross-examination." *Van Arsdall*, 475 U.S. at 679. The information that petitioner sought to elicit was highly prejudicial to the proper conduct of the trial because petitioner was charged with the same or similar offenses as the cooperating witnesses. Compare Superseding Indictment 2, 7, with Pet. App. 132, 161, 191, 208. Thus, as the district court recognized, if the jury had been informed of the precise statutory minimums for the witnesses' offenses, it likely would have inferred that petitioner himself faced a similar minimum sentence. See Pet. App. 53-55, 84. That inference would have created a significant risk of prejudice to the jury's unbiased evaluation of the evidence. As this Court has noted, "providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Shannon* v. *United States*, 512 U.S. 573, 579 (1994).

At the same time, although the district court declined to allow disclosure of the precise sentences that the cooperating witnesses faced, it allowed petitioner's counsel to elicit enough information for the jury to infer that the witnesses potentially had a significant, sentencing-related incentive to cooperate with the government. Defense counsel was permitted to cross-examine the cooperating witnesses about their "looming mandatory minimum[s]" and "'substantial'" sentences

in light of their criminal history, and "their hopes of earning a reduced sentence through their cooperation." Pet. App. 10; see *id.* at 54-56. For example, defense counsel asked one cooperating witness whether he was "facing an enhanced number of years because of [his] extensive criminal record"; whether he had "a possibility of * * * getting a reduction in the number of years [he was] facing if a motion [was] made by the government on [his] behalf"; and whether he would "like that to happen." *Id.* at 64. The witness responded in the affirmative to each question. *Ibid.*

Under those circumstances, the district court's narrow restriction on inquiry into the precise sentences the cooperating witnesses faced 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 without regard to petitioner's own sentencing exposure. The court of appeals correctly found that the precise minimum sentences would not have given the jury "a significantly different impression of the witnesses' credibility," Pet. App. 10 (citation omitted); see *Van Arsdall*, 475 U.S. at 680, and that no Confrontation Clause violation occurred. And petitioner's narrow, circuit-specific disagreement (Pet. 21-22) with the court's distinction of this case, where the witnesses had not yet been granted any leniency, from circuit precedent that had allowed questions about cooperating witnesses' precise sentencing exposure where "the government had *already* extended leniency to the cooperating witnesses," Pet. App. 11, does not warrant this Court's review.

b. Petitioner asserts that the "original meaning" of the Confrontation Clause permits "almost unfettered

cross-examination," suggesting that it categorically entitles a defendant to elicit the precise sentence that a cooperating witness faces absent cooperation. Pet. 23. That rigid rule, however, 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. In arguing that such a categorical rule is required here, petitioner greatly overstates the probative value of the precise sentences faced by cooperating witnesses and altogether disregards the prejudicial effect of revealing sentencing information to the jury.

First, petitioner errs in suggesting that, as a categorical matter, only the precise sentence that a cooperating witness faces can adequately convey the witness's potential bias. See, *e.g.*, Pet. 28. As this case well illustrates, that information is not necessary for defense counsel thoroughly to cross-examine the witness as to potential bias. Under questioning from defense counsel, for example, one cooperating witness acknowledged that he faced an "enhanced" sentence because of his "extensive criminal record," and that a government motion could lead to "a reduction in the number of years" he was facing, with an ultimate result "below a mandatory minimum." Pet. App. 64. Admissions like those make clear that a particular witness has an incentive to testify favorably to the government.

Second, petitioner disregards the risk of prejudice and confusion posed by questions about the precise sentence a cooperating witness faces. This Court has endorsed the "familiar precept[]" that "providing jurors

sentencing information * * * creates a strong possibility of confusion." *Shannon*, 512 U.S. at 579. Courts of appeals have similarly 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. *Wright*, 866 F.3d 899, 906 (8th Cir. 2017) (sentencing information would "introduce improper and confusing considerations before" a jury) (citation omitted), cert. denied, 138 S. Ct. 2026 (2018); *United States* v. *Trent*, 863 F.3d 699, 705 (7th Cir. 2017) (sentencing information "might confuse or mislead the juries"), cert. denied, 138 S. Ct. 2025 (2018); *United States* v. *Rushin*, 844 F.3d 933, 939 (11th Cir. 2016) (sentencing information "could invite jury nullification"). Petitioner has no response to that problem.

Even setting aside this Court's precedents, petitioner's historical argument lacks solid foundation. Petitioner acknowledges that "early American criminal records are sparse," and the earliest state decision he cites is from 1839—over 50 years after ratification of the Constitution. See Pet. 31 (citing *Commonwealth* v. *Sacket*, 39 Mass. 394, 396 (1839)). Moreover, the few American sources that petitioner discusses, see Pet. 29-33, stand only for the general proposition that defense counsel has latitude to inquire into sources of bias on cross-examination—a principle that the decision below endorsed and applied. Those sources shed no light on the narrow question presented here concerning whether precise quantification of a cooperating witness's potential sentence is categorically required in all circumstances.

c. The court of appeals' decision is consistent with many other decisions that have upheld restrictions on the disclosure of the precise sentences that cooperating witnesses avoided or hoped to avoid. See, *e.g.*, *Wright*, 866 F.3d at 905-908; *Trent*, 863 F.3d at 704-706; *Rushin*, 844 F.3d at 938-940; *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); see also Pet. 13-15 (listing cases).

Petitioner contends (Pet. 10-11) that the decision below conflicts with decisions of the Fifth and Ninth Circuits. But 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.

In *United States* v. *Cooks*, 52 F.3d 101 (1995), the Fifth Circuit declined to adopt a categorical rule and recognized that restrictions on cross-examination about specific sentences do not violate the Confrontation Clause "if 'the jury has sufficient information to appraise the bias and motives of the witness.'" *Id.* at 104 (brackets and citation omitted). Moreover, because that case involved cross-examination about a witness's potential sentences on unrelated *state* charges, the court had no occasion to consider the substantial risk of prejudice that arises 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.

Nor did the Ninth Circuit's decision in *United States* v. *Larson*, 495 F.3d 1094 (2007) (en banc), cert. denied, 552 U.S. 1260 (2008), purport to adopt a categorical rule. The court instead recognized, consistent with this Court's precedents, that the relevant Confrontation Clause inquiry is whether a "reasonable jury might have received a significantly different impression of the witness' credibility had . . . counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 1106 (brackets and citation omitted). In *Larson* itself, a bare majority of the en banc court found a Confrontation Clause violation where a cooperating witness faced a minimum sentence of life in prison and 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, defense counsel was permitted to cross-examine cooperating witnesses about "'substantial' sentences," where those sentences were something less than life in prison. Pet. App. 10. 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 inquiry into the specific statutory minimum penalties the cooperating witnesses would have faced where "sufficient" other evidence allowed "the jury to properly evaluate the credibility of the cooperating witnesses." *United States* v.

Tones, 759 Fed. Appx. 579, 585 (9th Cir. 2018), cert. denied, 140 S. Ct. 67 (2019).

Petitioner also contends (Pet. 11-13) that the decision below conflicts with the decisions of various state courts of last resort. Although some tension may exist, petitioner fails to identify a square conflict warranting the Court's review in this case. In several of the decisions petitioner cites, the trial court appeared to preclude defense counsel not only from asking a cooperating witness quantitative questions about the particular penalty he faced, but also any qualitative questions on that subject (*e.g.*, about the degree of severity). See *State* v. *Gracely*, 731 S.E.2d 880, 882-883 (S.C. 2012); *State* v. *Vogleson*, 571 S.E.2d 752, 755 (Ga. 2002); *State* v. *Jackson*, 233 A.3d 440, 452 (N.J. 2000); *State* v. *Brown*, 399 S.E.2d 593, 594 (S.C. 1991); *Jarrett* v. *State*, 498 N.E.2d 967, 968 (Ind. 1986). The state supreme courts thus had no occasion to address the question presented here, where the trial court precluded questions concerning the "specific number of months" of imprisonment faced by the cooperating witnesses, but permitted cross-examination about the existence of substantial mandatory minimums. Pet. App. 56.

The other decisions petitioner cites differ from this one on a variety of grounds. *State* v. *Mizzell*, 563 S.E.2d 315 (S.C. 2002), did not involve a cooperating witness, as the relevant witness there "had neither agreed to a plea bargain nor pled guilty." *Id.* at 318. *People* v. *Bonilla*, 160 P.3d 84 (Cal. 2007), cert. denied, 552 U.S. 1117 (2008), did not involve a limitation on cross-examination at all. *Id.* at 100. *Manley* v. *State*, 698 S.E.2d 301 (Ga. 2010), distinguished between situations where "the defendant was seeking to elicit 'objective ev-

idence' of the disparity between the sentence the witness will get as a result of his cooperation and the sentence he faced had he not cooperated, as opposed to" situations where defense counsel sought to elicit "the witness's mere hope for or speculation about the possibility of a lower sentence." *Id.* at 304-305. And finally, *State* v. *Donelson*, 302 N.W.2d 125 (Iowa 1981) (en banc), did not expressly purport to interpret or apply the Confrontation Clause.

2. Petitioner's additional challenge to the standard that the court of appeals applied to his Confrontation Clause claim likewise does not warrant further review.

a. The court of appeals correctly applied abuse-of-discretion review to petitioner's claim. As discussed above, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits" on "defense counsel's inquiry into the potential bias of a prosecution witness," *Van Arsdall*, 475 U.S. at 679, including limitations on the questions defendants may ask cooperating witnesses about the sentences they are facing. See *Alford* v. *United States*, 282 U.S. 687, 694 (1931) (observing that "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court"); *Glasser* v. *United States*, 315 U.S. 60, 83 (1942); *District of Columbia* v. *Clawans*, 300 U.S. 617, 632 (1937). Given that broad discretion, appellate review is necessarily deferential. The question on appeal is not what the appellate court itself would have done, but instead whether what the trial court did was "reasonable." *Van Arsdall*, 475 U.S. at 679. Trial court determinations subject to a reasonableness standard are properly reviewed for abuse of discretion. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 56 (2007) (observing

that review of whether a sentence is "reasonable" equates to review of "whether the District Judge abused his discretion").

Petitioner contends that an alleged Confrontation Clause violation "presents a question of law" because it involves application of "the proper standard to essentially undisputed facts." Pet. 34 (citation omitted). But the substantive standard in this context is reasonableness, which inherently requires the exercise of discretion. Petitioner further suggests (Pet. 35) that de novo review is appropriate merely because a Confrontation Clause claim is constitutional in nature. But not all constitutional claims are subject to de novo review. Instead, the proper standard of review depends on the character of the right asserted. A defendant's constitutional right to be free of racial bias in jury selection, for example, is reviewed for clear error, because the critical issue is the prosecutor's discriminatory intent, and the trial court is uniquely situated to observe both the prosecutor's demeanor in explaining his reasons for striking certain jurors and the demeanor of the potential jurors themselves. See *Snyder* v. *Louisiana*, 552 U.S. 472, 477-478 (2008). Similarly here, a challenge to a limitation on cross-examination is appropriately reviewed for abuse of discretion, given the trial judge's unique position in managing the admission of evidence and the trial more generally. See *Davis*, 415 U.S. at 318 n.6 (noting that, in *Alford*, the Court had reviewed a cross-examination claim of "constitutional dimension" for "abuse of discretion").

b. To whatever extent "de novo" review in a context where a district court may adopt "reasonable" restrictions may differ from "abuse of discretion" review, no conflict in the lower courts on the appellate standard

for Confrontation Clause claims warrants this Court's review. The decision below is consistent with many other decisions that have reviewed Confrontation Clause challenges to limitations on cross-examination for abuse of discretion. See, *e.g.*, *United States* v. *Ulbricht*, 858 F.3d 71, 118 (2d Cir. 2017), cert. denied, 138 S. Ct. 2708 (2018); *United States* v. *Mussare*, 405 F.3d 161, 169 (3d Cir. 2005), cert. denied, 546 U.S. 1225 (2006); *United States* v. *Kiza*, 855 F.3d 596, 603-604 (4th Cir. 2017); *United States* v. *Ford*, 761 F.3d 641, 651 (6th Cir.), cert. denied, 574 U.S. 1054 (2014); *United States* v. *Vega*, 826 F.3d 514, 542 (D.C. Cir. 2016), cert. denied, 137 S. Ct. 1238, and 137 S. Ct. 2240 (2017); see also Pet. 16 (citing cases). And petitioner errs in asserting that the decision below conflicts with decisions from various other courts of appeals. At the outset, Eighth Circuit precedent on this question appears to be mixed. Although the decision in this case reviewed petitioner's claim for abuse of discretion, see Pet. App. 9, the Eighth Circuit has elsewhere stated that "[w]e review evidentiary rulings regarding the scope of cross examination for abuse of discretion, but where the Confrontation Clause is implicated, we consider the matter de novo." *United States* v. *Bentley*, 561 F.3d 803, 808 (quoting *United States* v. *Kenyon*, 481 F.3d 1054, 1063 (8th Cir. 2007)), cert. denied, 558 U.S. 865 (2009). Petitioner failed to cite that caselaw in his briefs below and did not seek rehearing en banc. This Court should decline to intervene for that reason alone, because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, this case does not implicate any conflict in the circuits. Petitioner asserts that four courts of appeals employ a hybrid approach in reviewing Confrontation Clause challenges to limits on cross-examination, under which courts review "de novo" a challenge based on the exclusion of "an entire 'area of inquiry,'" but review for "abuse of discretion * * * 'limitation[s] on the scope of questioning within a given area.'" Pet. 16 (quoting *Larson*, 495 F.3d at 1101, and citing *United States* v. *Jiménez-Bencevi*, 788 F.3d 7, 21 (1st Cir. 2015); *United States* v. *Trent*, 863 F.3d 699, 704 (7th Cir. 2017); *United States* v. *Garcia*, 13 F.3d 1464, 1468 (11th Cir.), cert. denied, 512 U.S. 1226 (1994)). But such an approach would not help petitioner, since his claim would be reviewed for abuse of discretion even under the hybrid model. The district court here did not foreclose all questioning about the cooperating witnesses' potential sentences, but merely "limit[ed] * * * the scope of questioning within [that] area" by barring cross-examination about their precise length. *Larson*, 495 F.3d at 1101.

Petitioner also asserts (Pet. 15-16) that the Fifth and Tenth Circuits apply de novo review across the board. But the Fifth Circuit uses a hybrid approach of a sort that would make no difference here. See, *e.g.*, *United States* v. *Davis*, 393 F.3d 540, 548 (2004) (rejecting Sixth Amendment challenge after finding "no abuse of discretion in the trial court's limitation of [a witness's] cross examination"). And the Tenth Circuit's precedent is internally inconsistent, as that court itself has recognized. In *United States* v. *Mullins*, 613 F.3d 1273 (Gorsuch, J.), cert. denied, 562 U.S. 1035 (2010), the court cited conflicting caselaw on this question, observing that

"[t]here may be some tension within our circuit's precedents" but leaving "the task of reconciling whatever conflict there may be in our precedents for a case where the standard of review might affect the outcome." *Id.* at 1283 n.4. Even the decision petitioner cites, although it did not cite any potentially conflicting precedent, expressed skepticism about de novo review and noted that "[a]t some point it may be appropriate to reexamine our standard of review," but that "the standard of review does not affect the result here." *United States* v. *John*, 849 F.3d 912, 918 (10th Cir.), cert. denied, 138 S. Ct. 123 (2017). This Court should permit the Tenth Circuit an opportunity to harmonize its own precedents in the first instance. See *Wisniewski*, 353 U.S. at 902.

Petitioner is also mistaken in his claim (Pet. 16) that "[s]tate courts are equally divided on the standard of review." *State* v. *Orn*, 482 P.3d 913 (Wash. 2021) (en banc), observed that "a trial court's rulings on Sixth Amendment claims are *generally* reviewed de novo," but explained that the limitation there violated the defendant's constitutional rights "[e]ven under the abuse of discretion standard." *Id.* at 920 (emphasis added). *State* v. *Rainsong*, 807 N.W.2d 283 (Iowa 2011), did not involve a limitation on cross-examination. *Id.* at 289. And *State* v. *Davis*, 1 A.3d 76 (Conn. 2010), applied a hybrid approach, emphasizing that the "trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination" and that an appellate court would "make every reasonable presumption in favor of upholding the trial court's rulings on these bases." *Id.* at 85 (citations and brackets omitted). The court explained that "[i]f, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then

the defendant's constitutional claims necessarily fail," and that it would review a defendant's Confrontation Clause claim "'de novo'" only if it "conclude[d] that the trial court improperly excluded certain evidence." *Ibid.* (citation omitted).

3. Even if the questions presented otherwise warranted this Court's review, this case would not be an appropriate vehicle for considering them. Petitioner would not be entitled to relief if he prevailed on the second question alone, because no Confrontation Clause violation occurred under any standard of review. See pp. 7-11, *supra*. And even if he prevailed on the first question presented, any error was harmless beyond a reasonable doubt.

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

In this case, the government's other evidence both corroborated the testimony of the cooperating witnesses and independently supported petitioner's convictions. Officers observed petitioner's participation in payoffs and suspected drug purchases. See, *e.g.*, Trial Tr. 118-122, 139-142, 341, 350-358, 473-476, 493-495,

525-528; see also Gov't C.A. Br. 21-22, 28. Wiretap evidence revealed that petitioner, using multiple cell phones, regularly discussed large sums of money, used coded language, and received orders for cocaine and cocaine base. See, *e.g.*, Trial Tr. 153, 157, 343, 590-600, 609-619, 625-627, 749-756; see also Gov't C.A. Br. 24-28. And during a search of petitioner's residence, officers found several firearms, ammunition, three bags of cutting agents, bowls and a spoon with cocaine residue, plastic baggies, empty duffle bags, a bag sealer, and a receipt for a storage garage. Trial Tr. 158-159, 162-176; see Gov't C.A. Br. 28-29. At the storage garage, officers recovered a coffee can with a false bottom containing cocaine, cocaine base, and cutting agents. Trial Tr. 176-183; see Gov't C.A. Br. 29. Petitioner contends (Pet. 20) that the cooperating witnesses were necessary to establish drug quantity, but several significant items of independent evidence spoke to that question. See, *e.g.*, Pet. App. 32-33; Gov't C.A. Br. 26-28.

In addition, the district court permitted defense counsel to explore the cooperating witnesses' incentives to testify favorably for the government, and barred inquiry only into the granular details of their sentencing exposure. See, *e.g.*, Pet. App. 54-56, 62, 94. Particularly in light of the overwhelming evidence of petitioner's culpability, any marginal value gleaned from additional cross-examination would not have affected the jury's verdict. See *Larson*, 495 F.3d at 1108 (finding error harmless because "the Government offered significant evidence" of guilt and defense counsel was allowed to explore the cooperating witness's "desire to obtain a lesser sentence"). Any Confrontation Clause error in this case was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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