No. 20-1790

IN THE
Supreme Court of the United States

ALSTON CAMPBELL, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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REPLY BRIEF

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State and lower federal courts are deeply fractured over the questions presented. The Brief in Opposition cannot dispel that acknowledged conflict of authority. At issue is whether the Confrontation Clause guarantees the right to cross-examine accomplices about the specific benefits they have received (or hope to receive) from the government in exchange for their cooperation. The Eighth Circuit says that it doesn't, but several circuits and many state courts disagree. *See United States v. Lanham*, 617 F.3d 873, 884 (6th Cir. 2010) (noting split).[1]

The government tries to massage this split, but it cannot bring itself to deny that petitioner's case would have been decided differently in many jurisdictions, including in the state courthouse across the street. *See State v. Donelson*, 302 N.W.2d 125, 131 (Iowa 1981). That conclusion is irrefutable. And while the government shyly acknowledges "some tension" in the lower courts, BIO 14, it offers no reason to let this conflict fester any longer.

The Sixth Amendment is meant to secure for all defendants "the trial rights of Englishmen." *Giles v. California*, 554 U.S. 353, 375 (2008). But today, the

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[1] The Fifth Circuit, Ninth Circuit, California, Florida, Georgia, Indiana, Iowa, Michigan, New Jersey, and South Carolina all recognize a categorical right to cross-examine accomplices about specific sentencing benefits. *See* Pet. 10-13. The First Circuit, Fourth Circuit, Seventh Circuit, Eighth Circuit, Kansas, Ohio, and South Dakota do not. *See* Pet. 13-15.

scope of those rights depends on the happenstance of geography.

The government does not even claim that its preferred rule adheres to the original meaning of the Confrontation Clause. Its only response to petitioner's historical analysis, Pet. 23-33, is that "early American criminal records are sparse," BIO 11. But the government does not dispute that "[w]herever we might look to determine" the Framers' understanding of confrontation—"whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020). Confrontation includes the right to cross-examine accomplices about the specific benefits offered for their cooperation.

The government also does not dispute that this oft-recurring issue is extremely important. "Federal prosecutors alone now authorize reduced sentences in exchange for accomplice cooperation in more than 10,000 cases *each year*." Pet. 19. And they rely on accomplice testimony "in just those cases where the extrinsic evidence is not sufficient . . . to convict." Pet. 17. In every one of those cases, the ability to fully expose an accomplice's bias "can make the difference between conviction and acquittal." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987).

Finally, the government offers no defense of the Eighth Circuit's reasoning, which drew an unjustifiable line between an accomplice's hoped-for benefits and those already received. App. 11-12. Abandoning that logic, the government relies instead on a trial court's claimed discretion to prohibit otherwise relevant and admissible cross-examination.

BIO 8. But the scope of the Sixth Amendment is not a matter of discretion. Whether the Confrontation Clause guarantees the right to cross-examine accomplices on the details of government-conferred benefits is a discrete legal question that deserves a clear answer. The government does not even try to justify leaving this decision to individual discretion.

This Court should grant the petition.

I. Federal and state courts are deeply divided over the questions presented.

The government cannot dispute that "[t]here *is a circuit split* on the issue of whether defendants should be prohibited from asking cooperating witnesses . . . details about their sentences and sentencing agreements with the government." *Lanham*, 617 F.3d at 884 (emphasis added). This split results from the circuits' divergent understandings of what the Confrontation Clause protects, not any "fact-intensive and case-specific" factors. BIO 12.

In the Ninth Circuit, the "law is clear." *United States v. Nickle*, 816 F.3d 1230, 1235 (9th Cir. 2016). "Where a plea agreement allows for some benefit or detriment to flow to a witness as a result of his testimony, the defendant *must* be permitted to cross examine the witness sufficiently to make clear to the jury what benefit or detriment will flow, and what will trigger the benefit or detriment." *Id.* (emphasis added). The government ignores this holding in claiming that the Ninth Circuit has not "adopt[ed] a categorical rule." BIO 13.

The Fifth Circuit likewise recognizes the "well-established Sixth Amendment right to . . . elicit *any*

relevant information bearing on [an accomplice's] bias." *United States v. Cooks*, 52 F.3d 101, 103 (5th Cir. 1995) (emphasis added). And it has found this right violated when an accused is prohibited from exposing "all of the pertinent facts" relevant to an accomplice's bias, including the punishment he faced absent cooperation. *Id.* at 104 & n.13.

Other circuits hold the opposite. In the Fourth Circuit, for example, a trial court can prohibit defense counsel from "ask[ing] any quantitative questions whatsoever about the benefits . . . witnesses expect[] to receive for their cooperation." *United States v. Cropp*, 127 F.3d 354, 359 (4th Cir. 1997).

Among the states, interpretations of the Sixth Amendment diverge just as sharply. New Jersey allows "unfettered examination" of an accomplice's plea bargain, including "what sentence he faced and what was offered in the plea agreement." *State v. Jackson*, 243 N.J. 52, 59, 70 (2020). The same rule applies in Georgia and many other states. *See, e.g.*, *State v. Vogleson*, 275 Ga. 637, 640 (2002) (recognizing the right to cross-examine an accomplice on "the *amount* of prison time he is avoiding by testifying" (emphasis added)).

But Kansas and other states recognize no Sixth Amendment right to cross-examine an accomplice on the length of the sentence he faced or that he hoped to receive for cooperating. *See State v. Sharp*, 289 Kan. 72, 99 (2009). Those states allow any restrictions on cross-examination so long as the jury is "generally" aware that an accomplice "would receive some sort of lesser sentence" for his cooperation. *Id.*

This is a "square conflict" meriting this Court's review. BIO 14. If petitioner had been tried in Iowa *state* court, for example, he would have enjoyed the "unquestioned" right to "develop[] on cross-examination the full facts about the plea bargain[s], . . . *especially* the magnitude of the reduction . . . in exchange for testifying." *Donelson*, 302 N.W.2d at 130-31 (emphasis added). But because he was tried in Iowa *federal* court, his cross-examination was restricted to "generalized phraseology." App. 12.

On the second question presented, the government does not dispute the circuit split over the standard of review for claimed violations of the Confrontation Clause. *See United States v. John*, 849 F.3d 912, 917-18 (10th Cir. 2017) (noting split). Even on non-constitutional questions, this Court has found it "important to clarify the standard of review." *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 324 (2015). The government gives no reason why clarity is less important in the constitutional realm.

II. The rule below is inconsistent with the original meaning of the Confrontation Clause.

The Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). So it is remarkable that the government does not even *claim* that the restrictions here would have been allowed at the founding. That is no oversight; the historical record leaves no other choice. The established confrontation right in the early Republic included the right to cross-examine

accomplices on the specific benefits gained from their cooperation.

The government's lone paragraph on history is conspicuously limited. *See* BIO 11. It ignores the English "[c]ases and treatises of the time," even though this Court often turns to these sources when interpreting the Confrontation Clause. *Giles*, 554 U.S. at 360. Those authorities make clear that common-law defendants had the right to probe an accomplice's bias through "a minute examination of circumstances." William D. Evans, *On the Law of Evidence* 232 (1806) ("Evans"). In practice, this meant that defense counsel could ask "what questions he pleases" about an accomplice's motivations. Thomas Peake, *A Compendium of the Law of Evidence* 141 (2d ed. 1804).

English trial records from the eighteenth century reveal cross-examination's central role in exposing a witness's bias. Counsel were free to ask about the specific punishment an accomplice faced. Pet. 26 ("They talked of sending you to Botany for seven years; did not they?"). They could explore any benefits promised to an accomplice. Pet. 27 ("What is the price of the blood of these men, if they are convicted?"). Or they could do both. In a 1788 robbery trial, for example, cross-examination revealed that not only had a confession saved the accomplice's life, but he stood to profit more from his testimony than from the robberies themselves:

> Q. These two rewards will be better than the robberies?
>
> A. I do not expect to get nothing.

> Q. You turned evidence to save yourself from being hanged?
>
> A. Yes.

Abraham Lee, OBSP (Feb. 1788) at 262.

As these records show, defense counsel at common law had the right to "go as far as they pleased" when exploring an accomplice's bias. Evans 269. And any question that could "elicit the actual dispositions of the witness" was "not only justifiable but meritorious." *Id.* at 268.

The government never addresses English practice. Its only contention is that because "early American criminal records are sparse" they "shed no light on the narrow question presented here." BIO 11. But it cites no evidence that American practice diverged on the scope of cross-examination, and early cases confirm that it did not.

The government argues that American cases "stand only for the general proposition that defense counsel has latitude to inquire into *sources* of bias on cross-examination." BIO 11 (emphasis added). To the contrary, they confirm that the *amount* of an accomplice's award was "material evidence." *Commonwealth v. Bosworth*, 22 Pick. 397, 400 (Mass. 1839). *Bosworth*, for example, upheld the right to cross-examine an accomplice about whether a deputy sheriff "had given him assurances, that he would not be prosecuted . . . and that he should be paid the sum of $100." *Id.* at 397.

The government also complains that few cases in the first half of the nineteenth century discuss the

scope of cross-examination. BIO 11. But later cases explain that any scarcity stemmed from the lack of disagreement on this issue. Because defense counsel were invariably afforded "great latitude" in cross-examining accomplices, there was little need for appellate courts to reaffirm this principle. *Commonwealth v. Sacket*, 39 Mass. 394, 395 (1839).

Consider the Supreme Court of California's reaction when, in 1877, a defendant was prevented from asking a witness whether he expected a "reward of one thousand dollars" for his testimony. *People v. Benson*, 52 Cal. 380, 381 (1877). Before ordering a new trial, the court observed that it was "difficult to see on what ground this evidence was excluded; as it is *perfectly well settled* that on cross-examination a witness may be interrogated as to any circumstance which tends to impeach his credibility." *Id.* at 381-82 (emphasis added). Indeed, the court went further and said that "[n]o citation of authorities [was] needed on a point so well settled." *Id.* at 382; *accord Marler v. State*, 68 Ala. 580, 587 (1881) ("The rule is, that upon cross-examination, especially of an accomplice, great latitude will be allowed in order to probe his . . . credibility.")

This history shows that nineteenth-century courts and treatise writers were not innovating when they recognized the right to "submit [accomplices] to the fullest and most searching inquiry." *Foster v. People*, 18 Mich. 266, 276 (1869); *see* Francis Wharton, *A Treatise on the Law of Evidence in Criminal Issues* 359 (8th ed. 1880) ("Great latitude . . . is allowed in the cross-examination of an accomplice, and the most searching questions are permitted in order to test his veracity."). They were affirming "a right *always*

deemed of the utmost consequence." *People v. Haynes*, 38 How. Pr. 369, 380 (N.Y. App. Term 1868) (emphasis added). And this right dictated that nothing "in the least bearing on the question of [an accomplice's] credibility . . . should be excluded." *Id.*

The restrictions here flout the original meaning of the Confrontation Clause.

III. The decision below was wrong.

The government does not defend the Eighth Circuit's reasoning, but the arguments it advances fare no better. The Confrontation Clause "admit[s] only those exceptions established at the time of the founding." *Giles*, 554 U.S. at 358. Yet the government does not argue that the restrictions here were even countenanced—much less "established"—at that time. That fact alone could resolve this case.

Even setting aside history, the government relies on a chain of assumptions unsupported at every link. It claims that "if the jury had been informed" of the accomplices' sentences, "it likely would have inferred that petitioner himself faced a similar minimum," which "would have created a significant risk of prejudice." BIO 8. The government offers no support—empirical or otherwise—for any of these assumptions. And its reasoning contradicts this Court's decisions.

"Speculation as to the effect" of relevant questioning "cannot justify exclusion of cross-examination." *Olden v. Kentucky*, 488 U.S. 227, 232 (1988). But speculation is all the government offers here. This is all the more remarkable because the government acknowledges that evidence of an

accomplice's sentence is routinely admitted in courts around the country. In fact, its *own journal* recently observed that "accomplice witnesses *can be* cross-examined on the minimum and maximum penalties they face." Howard J. Zlotnick, *An Approach to Cross-Examining Defendants*, 69 DOJ J. Fed. L. & Prac. 121, 132 (2021) (emphasis added). If the risk of prejudice from this testimony were real, the government would have no difficulty marshalling evidence of its effect in other cases.

Even assuming a risk of prejudice, the government ignores ways to mitigate this prejudice while preserving the right to "searching cross-examination." *Alford v. United States*, 282 U.S. 687, 692-93 (1931). Here, the district court instructed jurors that they could not consider petitioner's "punishment *in any way*" when reaching a verdict. D. Ct. Dkt. 276 at 5 (emphasis added). And it is the "almost invariable assumption of the law that jurors follow their instructions." *Shannon v. United States*, 512 U.S. 573, 585 (1994). So even assuming the jury would have inferred anything about petitioner's possible sentence, this instruction would have addressed any potential effect on the jury's deliberations.

The government also mischaracterizes a judge's discretion to impose "reasonable limits" on cross-examination. BIO 7-8. This discretion is meant to prevent questions intended "merely to harass, annoy or humiliate" a witness. *Alford*, 282 U.S. at 694. It also allows a judge to "determin[e] when [a] subject is exhausted." *Smith v. Illinois*, 390 U.S. 129, 132 (1968). But a trial court's discretion does not extend to prohibitions on "otherwise appropriate cross-

examination designed to show a prototypical form of bias on the part of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). "[A] defendant is *entitled* to broad latitude to probe [accomplice] credibility by cross-examination." *On Lee v. United States*, 343 U.S. 747, 757 (1952) (emphasis added).

Nor is limiting cross-examination to the word "substantial" sufficient under the Confrontation Clause. BIO 9. That word obscures more than it clarifies "the quantity of benefit to accusing witnesses." *Jarrett v. State*, 498 N.E.2d 967, 968 (Ind. 1986). This Court, for example, has described "a substantial term of imprisonment" as anything "more than two years." *Logan v. United States*, 552 U.S. 23, 37 (2007). If petitioner's jury assigned the same meaning to the term "substantial," it would have grossly underappreciated the strength of the accomplices' incentives. And there was nothing to inform the jury that "substantial" meant ten years for some accomplices and twenty years for others.

On the standard of review, the government does not dispute that de novo review is "consistent with the position this Court has taken in past cases." Pet. 34. In *Van Arsdall*, for example, this Court gave no deference to the trial court's Rule 403 analysis. 475 U.S. at 676. It exercised its own judgment to determine that "the court's ruling violated [the] rights secured by the Confrontation Clause." *Id.* at 679. The government gives no reason to depart from that practice now. As Justice Thomas observed earlier this term, it would be "a bit odd" for a court to review for abuse of discretion "if it thought it had a constitutional issue before it." Tr. of Oral Arg. 30-31, *Hemphill v. New York*, No. 20-637. This is because

"[i]n the constitutional realm . . . the role of appellate courts . . . favors de novo review." *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018).

Nothing about the first question presented is "fact-intensive" or "case-specific." BIO 12. The Confrontation Clause either guarantees the right to cross-examine accomplices on the specific benefits they have received for their cooperation, or it does not. The government never explains why the answer to this question should depend on the name outside a courthouse.

IV. This case is an ideal vehicle.

The government's half-hearted vehicle argument also fails. The district court's error was not harmless, and even if it were that would not be grounds to deny review. *See, e.g.*, *Van Arsdall*, 475 U.S. at 684 (remanding for harmless-error analysis after resolving the question presented).

The government does not dispute that "[t]he police neither observed petitioner selling drugs nor found drugs on him." Pet. 8. Yet the jury convicted him of "conspiracy to distribute 5 kilograms or more of cocaine and 280 grams or more of cocaine base." App. 115. It reached that verdict based on the testimony of the alleged accomplices, who were each asked to confirm the "all together" drug quantity they received from petitioner and his co-defendants. *See, e.g.*, App. 74, 101-103; 111. It follows that if the jury rejected this testimony, there would have been insufficient evidence to support the alleged drug quantities, and thus no conviction.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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