Case No.:_____

In The Supreme Court of the United States

KEITH RANIERE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Because it impacts upon the very structure of the trial, should a finding of absolute harmlessness, rather than harmlessness beyond a reasonable doubt, be required where the Court committed an intentional and egregious Sixth Amendment violation by terminating defense counsel's cross-examination of the government's sole cooperating witness in the middle of an extended answer that the court concluded would jeopardize the prosecution's theory, yet falsely suggesting to the jury that the examination was being stopped due to some impropriety of counsel, and should that be the rule, notwithstanding a prosecutorial offer to make such witness later available on the defense's case-in-chief?

PARTIES TO THE PROCEEDINGS

The parties in the Court of Appeals were the United States of America, Appellee, and Keith Raniere and Clare Bronfman, Appellants. Only Keith Raniere is the Petitioner in this Court.

RELATED PROCEEDINGS

Also decided by the United States Court of Appeals for the Second Circuit was an unrelated issue in a signed opinion, also dated December 9, 2022. See *United States v. Keith Raniere*, *et al*, 55 F.4th 354 (2d Cir. 2022), Docket Nos. 20-3520-cr (L); 20-3789-cr (Con).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Raniere seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The judgment and opinion of Court of Appeals (Appendix A) was entered on December 9, 2022, affirming a judgment of the United States District Court for the Eastern District of New York (Garaufis, J.) (Appendix B), rendered October 7, 2020, convicting Petitioner, following a jury trial, of racketeering, sex trafficking and a forced labor conspiracy.

Basis for Jurisdiction

Jurisdiction to entertain this petition for a writ of certiorari lies pursuant to 28 U.S.C. § 1257(a) and Rules 10(a) and 13 of the Rules of the Supreme Court. The basis for jurisdiction in the United States District Court for the Eastern District of New York was the filing of an indictment.

Constitutional Provisions Involved

United States Constitution, Amendment VI, provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.

Statement of the Case

A. The Indictment and Theory of the Prosecution

The government alleged that Petitioner was the founder of NXIVM, an executive counseling organization, and that he ran a subsidiary and confidential organization named DOS, an acronym for "Dominus Obsequious Sororium" (said to mean "Lord/Master of the Obedient Female Companions"). DOS was made up of female NXIVM members whom Petitioner was alleged to have subjected to coerced sexual relationships, to the exclusion of any other male partners.

The Government further alleged that Petitioner directed certain female NXIVM members ("masters") to recruit women to DOS ("slaves"), which he headed as the sole male. Recruited women were required to proffer "collateral" to DOS, thereby demonstrating their allegiance both to him and the organization. Collateral usually consisted of photographs wherein the "slaves," *inter alia*, would be featured in various stages of undress and sexually compromised situations.

B. The Trial

1. ESP, NXIVM and DOS

Insofar as relevant to the limited issue raised in this petition, and as culled from Petitioner's Brief as Appellant in the Court of Appeals, in 1998, Petitioner and Nancy Salzman created a "human potential" school known as Executive Success Programs ("ESP") (1514).[1] ESP was designed to help participants achieve their

[1] Numerical references are to the transcript of trial.

individualized goals and consisted of workshops designed to "actualize human potential. "Salzman was the CEO of the company, and Petitioner was its philosophical leader (467; 549-550).

In the early 2000s, the legal entity NXIVM, headquartered in Latham, New York, was established which served as an umbrella organization for ESP and many other programs that were developed by Petitioner and Salzman (468-478). A community ultimately developed in the area known as Clifton Park, comprised of NXIVM devotees who were committed to Petitioner's and NXIVM's teachings (567-571; 575). NXIVM also opened centers in other parts of the country as well as in Canada and Mexico (552; 555).

Petitioner was involved in simultaneous sexual relationships with numerous female members of NXIVM, including Lauren Salzman, Nancy's daughter. Lauren's relationship with Petitioner began in 2001 and she frequently participated in consensual sexual activities with Petitioner and his other partners (1538-1539). Some of the other women, including two sisters, discussed with one another their respective relationships with the Petitioner and their desire to be with him romantically. They agreed it could prove problematic, but they ultimately continued having simultaneous sexual relations with him (2398-2399).

In late 2015, along with a number of women, including Allison Mack, Petitioner created a secret society known as "DOS" or "The Vow" (1619). Although a number of DOS members came from the larger NXIVM community, involvement in NXIVM was not a prerequisite to membership, and DOS and NXIVM

were unrelated (211; 1783; 3847). In fact, Petitioner expressed a preference for enrolling people into DOS who were not part of the NXIVM community (1620).

DOS was a women's sorority built on a "master" and "slave" hierarchy, with the Petitioner positioned at the top of the structure as the "Grandmaster" (1594). Immediately below Petitioner were his "slaves," consisting of a number of women, including -- but not limited to -- Allison Mack and Lauren Salzman. These women were also considered "masters," because they recruited their own slaves into the group (1601). Petitioner had a sexual relationship with most, but not all, of the first-line masters (1595; 1601). Salzman personally recruited a total of six slaves into DOS, and testified as a cooperating witness that membership in DOS required complete secrecy (1601-02).

There was an enrollment process whereby the prospective slaves would be asked to provide collateral, which consisted of highly sensitive information, true or untrue, that was sufficiently valuable to ensure the recruit's commitment to the secrecy of the group (1602; 1621). Once the collateral was provided, the prospective slave would learn that members made a lifetime vow of obedience as part of DOS; that it was premised on a master-slave dynamic; and that they would eventually be asked to be branded as symbolic of their membership in DOS (1603; 1621).

If the recruit decided to move forward with membership, she was expected to collateralize all areas of her life by providing her master with rights to material possessions and more damaging information. According to Lauren Salzman, the sole cooperating witness, the purpose of the collateral was to create fear

among the "slaves" that it would be forfeited or released as a measure of preventing them from breaking their vow by leaving DOS or from disclosing its existence (1603; 1621). First-line "masters" were prohibited from revealing that Petitioner was the "Grandmaster" or that the brand they would be expected to get consisted of the Petitioner's initials (1602-03; 1621).

There were a number of practices associated with DOS, including checking in with one's master in the morning and before going to bed a night (1603-1604). In addition to other requisite routines (1604), DOS "slaves" were also expected to do "acts of care" for their respective masters, consisting of such undertakings as running errands, picking up groceries, or generally helping to make the master's life easier (1615). The concept of "acts of care" was familiar to the NXIVM community, because it put great value on the notion of learning to care for somebody just for the sake of caring (1615).

2. The Importance Of The Cooperating Witness Lauren Salzman

The Government called only one cooperating witness: Lauren Salzman. Her testimony was central to the prosecution's version of events, and it used her guilty plea to racketeering, racketeering conspiracy and extortion to directly impute that guilt to Petitioner. In addition to testifying to almost twenty years of her observations of Petitioner, including her lengthy intimate relationship with him, Salzman testified that she and he committed extortion and other crimes together in connection with women in DOS. The single most important area of the cross-

examination of Ms. Salzman was to show that, at the time, she and Petitioner had engaged in the conduct at issue, she genuinely believed she was helping, not harming, the person with whom they were interacting.

The primary theme propounded by the defense, therefore, from opening statements through the examination of each witness and to the closing argument, was that, while highly unorthodox and even offensive to some, Petitioner and others, including Salzman, genuinely believed they were helping people overcome various limitations that these people came to NXIVM to overcome. Accordingly, the focus of the entire cross examination of this cooperating witness was to get her to admit that she was trying at all times to help people in their best interests. As will be shown below, as soon as she testified to the jury that in fact she was motivated by "helping them in their best interest," the trial judge shut down the cross.

3. The District Court's Abrupt Termination of Cooperating Witness Lauren Salzman's Cross Examination

Cooperating co-defendant, Lauren Salzman, pleaded guilty to racketeering and conspiracy to commit racketeering before testifying against Petitioner pursuant to a cooperation agreement with the government (2005-2007). Salzman told the jury that she faced up to 20 years in prison for her role in the charged offenses and the alleged enterprise. She testified that, in exchange for her truthful testimony against Petitioner, the government would inform the sentencing judge of such cooperation, but that it would

not recommend a specific sentence (2008).

During defense counsel's vital cross-examination of Salzman, defense counsel began a line of questioning designed to show that Salzman was testifying against Petitioner for reasons unrelated to her or his guilt. The following exchange took place when the district court -- after directing the witness to respond -- suddenly sought to protect her from what it viewed as her highly stressful appearance, by abruptly directing counsel to effectively cease his inquiry:

> Q. Did you think it was extortion when you took the stuff? Were you doing it to scare them?
>
> Ms. Hajjar: Objection
>
> The Court: You may answer.
>
> A. I had concerns that it was problematic and I chose to go with what Keith said. If I didn't think it was problematic, I wouldn't have raised it.
>
> Q. Did you intend to hurt anyone, did you intend to scare anyone?
>
> Ms. Hajjar: Objection The Court: Sustained
>
> ***
>
> Q. When you were in DOS, before anybody was arrested, were you doing things intentionally to break the law?
>
> Ms. Hajjar: Objection
>
> The Court:That requires a legal conclusion.
>
> Q. What was your intention when you were in

DOS?

The Court: *You may answer*.

A. My intention was to prove to Keith that I was not so far below the ethical standard that he holds that I was – don't even how far below I am. I was trying to prove my self worth, and salvage this string of hope of what I thought my relationship might some day be, and I put it above other people, helping them in their best interest. That's what I did when I was in DOS.

The Court: Okay, that it. We are done Mr.

Agnifilo: Okay Judge. Thank you.

The Court: You are done.

Mr. Agnifilo: I know. I am done.

The Court: No, I said you're done

Mr. Agnifilo: I know. I am.

The Court: So you can sit down.

2264-2265.

Significantly, the witness was in the middle of answering a question which the court had directed her to answer because the court considered it appropriate. The government indicated it had no redirect and the witness was excused.

Thereafter, following the discharge of the jury for the day, defense counsel immediately addressed the court, stating: "I don't know why Your Honor cut off my cross-examination." The court responded:

If you want to know, you went way over

the line as far as I'm concerned with regard to this witness. You could have asked your questions and moved on to the next question, but you kept coming back, and I am not going to have someone have a nervous breakdown on the witness stand in front of - - excuse me, this is not DOS. This is not the allegations. This is a broken person, as far as I can tell, And whether she's telling the truth, whether the jury believes her. I think it's absolutely necessary that there be a certain level of consideration for someone's condition And that's really what this was. You had plenty of – if you have other things to say, you could have gone on and said them. But what I had here was, I had a crisis here. And not in my courtroom. I have to sentence this defendant and what you did was, basically, ask her to make legal judgments about *whether what she did in pleading guilty was farcical that she took somebody else's advice, some lawyer, so she could get out from under a trial*. I thought that really went pretty far beyond the pale, frankly.

Mr. Agnifilo: Your Honor, I –

The Court: I took her guilty plea, sir.

All right?

Mr. Agnifilo: I am not trying to argue with you. I am not trying to argue with you.

> The Court: Then don't argue with me. Mr.
>
> Agnifilo: No –
>
> The Court: You can take your appeal if you should not be successfully. I don't want to talk about it anymore. I thought it was extremely excruciating. When I tried to cut off the line of questioning, you just went right back to the line of questioning. You could have gone on to something else. You could have. I may not get everything right up here, *but I will tell you, as a human being, it was the right decision. Alright? And before I'm a judge, I'm a human being*. And that goes for everybody in this room, and it includes you and the Government. *And I am not going to allow someone to be placed in this circumstance and that let it continue.* I am the one who is disappointed. I'm done

2267-2270; emphasis added.

The court's after-the-fact justification for terminating the cross-examination of the government's only cooperating witness is plainly inconsistent with the record facts. First, the court said to counsel "you went over the line." But the court overruled the government's objection as to this question and directed the witness to answer. Second, the court suggested that it had stopped the cross-examination because the cooperating witness was having a "nervous breakdown on the witness stand." There was no prior instance, however, of the witness breaking down. Even so, this was no excuse, given the scope of this sacred Sixth Amendment right, to terminate the cross-examination

of such a crucial prosecutorial witness.

The court's actual reason for stopping the cross is readily manifest in the record. The court screamed at counsel, "excuse me, this is not DOS." The court here stated that even though the cooperating witness was answering a question which the court had directed her to answer, counsel's questioning had made the legal proceedings akin to the allegations about DOS.

4. The Application for a Mistrial

A few hours later, defense counsel filed with the court a written application for a mistrial. Appendix C. Counsel initially maintained that

> [t]he Court's actions strike at the heart of a fair trial. Indeed, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254 (1970). The jury must pass on the credibility of this critical cooperating witness. Central to that consideration is whether the witness genuinely believed that she was harming people, as opposed to helping people, through her actions in DOS. The jury is absolutely within its right to conclude that a cooperating witness pleaded guilty for reasons other than, or in addition to, her actual guilt. This is especially true where, as here, the government touts the cooperating witness' guilty plea as being truthful and consistent with the government's view that Raniere is guilty

> of the same crimes. The defense is under no obligation to merely accept this view of the facts. Indeed, defense counsel is well within his rights and legal obligation to shake the government's position on these issues, to show that perhaps the witness is not guilty of certain crimes and that the witness has pleaded guilty and cooperated against the defendant for personal reasons or for reasons unrelated to her actual guilt. *See United States v. Lynn*, 856 F.2d 430, 432 (1st Cir. 1988) (because bias is always relevant as discrediting the witness and affecting the weight of the witness' testimony, a defendant is entitled to explore a witness' motivation for testifying).
>
> Moreover, the Court should not have saved the cooperating witness from herself or her own answers, in violation of Raniere's Sixth Amendment right. ***

Appendix C, at p. 3.

> Counsel then elaborated:
>
> This is a critical cooperating witness. The government—who undoubtedly views her as a co-conspirator and not a victim—solicited and finalized her cooperation. The government then chose to put this witness on the witness stand in a very serious case where the possibility of life in prison is in the balance. If this witness is indeed "damaged," that is not the fault of the defendant who is, after all, seeking to

demonstrate her lack of credibility. The jury must be able to see this witness for whatever she is—good, bad or indifferent—without the Court saving her by stopping her mid-testimony and ordering the defendant to ask her no more questions. This deprived Raniere the ability to confront Ms. Salzman effectively and elicit evidence which was favorable to his defense. *See Gordon v. United States*, 344 U.S. 414, 423 (1953) (trial judge's discretion "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.") Our view and the view we were trying to share with the jury was that Ms. Salzman's difficulty with answering these questions was due to the fact that because she truly believed DOS was a positive influence on her and others (prior to seeing the discovery and undergoing the change in perspective to which she admitted) she was struggling to identify how exactly she broke the law given her outlook at the time she engaged in these actions.

While her actions may or may not take on a different dimension in hindsight, her actions at the time were not intended to be hurtful. By stopping this examination and preventing wholesale the defendant's ability to develop this theme -- which was

> at the core of the defendant's opening statement and was developed through other witness' at this trial -- the Court impermissibly intervened into the facts, prevented the development of a central line of cross-examination and then scolded counsel sternly in front of the jury, all in the interest of minimizing the emotional upset of a cooperating witness. While the Court's concern for the cooperating witness as a person is admirable in the abstract, the Court could have done many things short of announcing the end of cross-examination sternly and without warning. The Court could have, for instance, given the witness a break or adjourned for the day. But the Court opted to cause the jury to believe unfairly that defense counsel had done something wrong to a witness in a case with highly sensitive issues and to fully terminate a critical cross-examination without any notice or warning whatsoever.

Id., at p. 4.

Counsel then concluded by noting:

> Due to the Court stopping the cross-examination, counsel was not permitted to question the witness about several areas covered during her direct examination. This includes (1) the impact of her potential jail term on her decision to cooperate, (2) certain other facts she

> learned in discovery that caused her to view Raniere and DOS differently than she had previously, (3) certain specific portions of the tape recordings she heard of meetings between Raniere and other DOS members, and (4) other aspects of her plea agreement and her cooperation. As a result, the jury is left with only the prosecution's version of these topics, which have not been covered in cross-examination.
>
> Finally, for the Court to chastise counsel by repeatedly directing him to end his cross examination and to sit down, where the Court had specifically ruled that the witness could answer the question is patently unfair. Counsel has been fair and appropriate to every witness called by the government and whatever good will counsel has endeavored to engender in the minds of the jury is now forever lost. There is no coming back from this. The damage is done. The witness' cross-examination has been ended. Counsel has been dressed down in front of the jury. There is no remedy.
>
> We move for a mistrial.

Id., at p.5.

Without asking the government to respond, and without hearing any argument on the clear issue of overwhelming constitutional significance, the court only stated that the motion was denied. It offered no reason, no legal analysis and no opinion in any form.

C. The Appeal to the Court of Appeals

On appeal, in addition to challenging the abrupt curtailment of his counsel's cross-examination of Lauren Salzman, Petitioner raised several issues, including the insufficiency of the evidence of the several counts, Rule 403 challenges, and other rulings of the district court. Appendix B. With respect to the claimed improper termination of Salzman's cross-examination, Petitioner maintained that "[t]he district court's abrupt termination of defense counsel's cross-examination of Salzman before the jury interfered with [his] right to a fair trial and his right to confront the government witness, including on the subject matter of whether Salzman pled guilty because she was actually guilty."

The Court of Appeals rejected this argument. In so doing, though agreeing with the Government that the district court's actions amounted to harmless error, the Court essentially assumed that the abrupt curtailment of Salzman's cross-examinations had indeed been improper in the first instance. As the Court explained:

> Here, any arguable error was harmless. Raniere vaguely asserts that he was precluded from crossing Lauren Salzman on a range of topics, including: (1) the impact of her potential jail term on her decision to cooperate; (2) "certain other facts" she learned in discovery that caused her to change her view of Raniere and DOS; (3) "certain specific portions" of recordings she heard of meetings between Raniere and other DOS members; and (4)

"other aspects" of her plea agreement and her cooperation. Raniere's Br. 81. But Raniere fails to provide any further detail about these potential questions or explain how the inability to address them—after an already lengthy cross-examination that included many questions on related topics—deprived him of his ability to test the veracity of Lauren Salzman's testimony. *See, e.g.*, *United States v. Stewart*, 433 F.3d 273, 313 (2d Cir. 2006).

Furthermore, after the District Court terminated counsel's cross-examination of Lauren Salzman and at the close of the Government' s case- in- chief, the Government stated—and Raniere's counsel confirmed—that the Government had "offered to the defense to make any of its witnesses available" to testify at Raniere's case-in-chief, "including Lauren Salzman," and that Raniere had not elected to avail himself of that opportunity and declined to put on a case. Gov. App'x 976. Under these particular circumstances, we conclude Raniere "suffered no harm" from the District Court's prior decision to cut off Lauren Salzman's cross-examination. *Cf. United States v. Barbarino*, 612 F. App'x 624, 627 (2d Cir. 2015) (summary order) (concluding that any error in limiting defendant's cross examination of a witness was harmless where "[t]he Government offered to make [the witness] available for

> further cross-examination by telephone" and "Barbarino has not identified other questions he was prevented from asking on cross-examination").

Appendix A, at pp.10-11

Reasons for Allowance of the Writ

A. The Right to Confrontation

Certainly for the last half century, since at least its reference thereto in *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489 (1970), the Supreme Court has characterized the Sixth Amendment right to confrontation, embodied in the right to cross-examination, by repeatedly quoting 5 Wigmore, Evidence § 1367, at 32 (Chadbourn rev 1974), as "the greatest legal engine ever invented for the discovery of truth." *See e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 123, 119 S. Ct. 1887, 1894, 144 L. Ed. 2d 117 (1999); *White v. Illinois*, 502 U.S. 346, 356, 112 S. Ct. 736, 743, 116 L. Ed. 2d 848 (1992); *Maryland v. Craig*, 497 U.S. 836, 846, 110 S. Ct. 3157, 3163, 111 L. Ed. 2d 666 (1990); *Perry v. Leeke*, 488 U.S. 272, 283, 109 S. Ct. 594, 601, 102 L. Ed. 2d 624, n.7 (1989); *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S. Ct. 2658, 2662, 96 L. Ed. 2d 631 (1987); *Ford v. Wainwright*, 477 U.S. 399, 415, 106 S. Ct. 2595, 2604, 91 L. Ed. 2d 335 (1986); *Lee v. Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 2062, 90 L. Ed. 2d 514 (1986); and *Watkins v. Sowders*, 449 U.S. 341, 349, 101 S. Ct. 654, 659, 66 L. Ed. 2d 549, n.4 (1981).

In *Davis v. Alaska*, 415 U.S. 308, 315–16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974), explicating upon the Sixth Amendment right to confrontation, this

Court further noted that

> [t]his right is secured for defendants in state as well as federal criminal proceedings.... Confrontation means more than being allowed to confront the witness physically. "Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination."

415 U.S. 308, 315–16 (citing *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) and quoting *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965)).

The time-honored breadth of this sacred trial right, and the various means by which it is effectuated, was chiseled into sharp relief:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the

> average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Davis v. Alaska, 415 U.S. at 316–17 (footnote omitted) (quoting 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970) and citing *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

Accordingly,

> [t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's

> constitutional goal." Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.

Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046, 35 L. Ed. 2d 297 (1973) (quoting *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970) and *Pointer v. Texas*, *supra*, 380 U.S. at 405, 85 S.Ct. at 1068, 13 L.Ed.2d 923 (1965); and citing *Bruton v. United States*, 391 U.S. 123, 135—137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); and *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969)

In the final analysis, therefore, the Court has reaffirmed *Davis v. Alaska*, thereby holding that

> "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.' "

Olden v. Kentucky, 488 U.S. 227, 231, 109 S. Ct. 480, 483, 102 L. Ed. 2d 513 (1988) (quoting *Delaware v.*

Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) quoting *Davis, supra*, 415 U.S., at 318, 94 S.Ct., at 1111). To be sure, the Court noted that in "*Van Arsdall*, supra, it was also held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) harmless-error analysis." 475 U.S., at 684, 106 S.Ct., at 1438; *Olden*, 488 U.S. at 232, 109 S. Ct. 480, 483, 102 L. Ed. 2d 513 (1988).

B. <u>The Doctrine of Harmless Error</u>

In *Chapman*, involving a Fifth Amendment violations the Court, noting that all states and the federal government sanction some degree of harmless error analysis, addressed and rejected the argument that "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." the Court held, however, that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. 18, at 24. That burden of course falls upon the prosecution. *See e.g. Deck v. Missouri*, 544 U.S. 622, 635, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); *United States v. Dominguez* Benitez, 542 U.S. 74, 81, n. 7, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004); and *Arizona v. Fulminante*, 499 U.S. 279, 295–296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (referenced by Justice Sotomayor, concurring in the denial of certiorari in *Gamache v. California*, 562 U.S. 1083, 131 S. Ct. 591, 592, 178 L. Ed. 2d 514 (2010)).

In *Van Arsdall* the Respondent suggested that the Court, in *Davis v. Alaska,* had "foreclose[d]" the "application of harmless-error analysis to the particular sort of Confrontation Clause violation involved in the Respondent's case, quoting from *Davis,* wherein it was stated that "[Davis] was thus denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." 475 U.S. 673, 682–83, 106 S. Ct. 1431, 1437, 89 L. Ed. 2d 674 (1986). Rejecting that assertion, the Court advised that "*Davis* does not support an automatic reversal rule, and the above-quoted language merely reflects the view that on the facts of that case the trial court's error had done 'serious damage' to the petitioner's defense. *Id.*

C. Where the District Court Inappropriately Terminates a Defense Counsel's Cross-examination of the Sole Cooperating Witness, Whose Testimony Goes to the Very Heart of the Charges, the Supreme Court Should Consider Whether Any Finding of Harmless Error by a Reviewing Court Should Be Predicated on a Determination of Absolute Harmlessness Rather Than Beyond a Reasonable Doubt

Undoubtedly, the Supreme Court has certainly been clear that harmless error must be found in the face of a confrontation violation if a reversal of a judgment of conviction is to be avoided. It is submitted however, that, in an instance where "serious damage" results because the cross-examination of the government's sole cooperating witness was improperly halted, a reviewing Court should be required to

consider whether the burden on the government must be a demonstration that the harmlessness of the error was beyond *any* doubt, amounting to an absoluteness of the lack of any such doubt. And this is certainly so where the trial court so rules in an admitted effort to protect the challenged witness from judicially perceived anxiety or from possibly discrediting her arlier guilty plea allocution.[2]

In *Gray v. Maryland*, 523 U.S. 185, 194, 118 S. Ct. 1151, 1156, 140 L. Ed. 2d 294 (1998), this Court recalled that its decision in *Bruton v. United States*, 391 U.S. 123, 136, 88 S. Ct. 1620, 1628, 20 L. Ed. 2d 476 (1968) held that the "powerfully incriminating" effect of what Justice Stewart called "an out-of-court accusation," 391 U.S., at 138, 88 S.Ct., at 1629 (concurring opinion), creates "a special, and vital, need for cross-examination—a *need that would be immediately obvious had the codefendant pointed*

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[2] Otherwise stated, it is submitted that such an error impacts upon the very structure of the trial. And as recalled in *Weaver v. Massachusetts*, 198 L. Ed. 2d 420, 137 S. Ct. 1899, 1907–08 (2017) (citations and internal quotation marks omitted),

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself. For the same reason, a structural error def[ies] analysis by harmless error standards. (internal quotation marks omitted).

directly to the defendant in the courtroom itself." Emphasis added. *See also Lilly v. Virginia*, *supra*, 527 U.S. at 128, 119 S. Ct. at 1896, 144 L. Ed. 2d 117.

In this case, Lauren Salzman did in fact *point "directly to the defendant in the courtroom itself*." Yet, as even assumed by the Court of Appeals to have been constitutional error, the district court abruptly terminated defense counsel's cross examination of that crucial prosecution witness who advanced the government's essential theory of coercion. The district court unabashedly did so because it wanted to spare her the obvious ordeal that attends a probing confrontation -- undoubtedly, a rather inappropriate role for the court to assume, certainly with respect to a major cooperating witness who was in a unique situation to recount It also wanted to safeguard her earlier plea from being reduced to a "farce." But her examination needed to be pursued by defense counsel to probe the nature of her own conduct, and whether she had pleaded guilty because she believed she was actually guilty of assisting in the alleged coercion, or simply to minimize her custodial exposure.

Upon being told he was done and he should sit down, thereby completely dressing him down in the full presence of the jury -- with the "serious damage" that such wrought upon his crucial credibility in the minds of the jurors -- defense counsel promptly filed an unsuccessful written motion for a mistrial. So, in the end, not only was cross-examination unconstitutionally curtailed, but defense counsel was outed as a brute in the presence of the jury,

Contrary to the holding of the Court of Appeals, this Court should consider whether a prosecutorial

offer of direct testimony -- not the offer of *continued cross-examination* as found in *Barbarino*, *supra* -- can ever supplant the greatest legal engine ever invented for the discovery of truth that is cross-examination.[3] Rather, the Court should consider whether any sound justification exists for the district court's premature and abrupt termination of counsel's cross examination

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[3] Compare *Barbarino,* 612 F. App'x at 627 ("The Government offered to make Dr. Moore available for further cross-examination by telephone, and Barbarino has not offered any reason why this compromise would not have been adequate."), to *United States v. Lowenberg*, 853 F.2d 295, 300 (5th Cir. 1988) ("Federal Rule of Evidence 611 makes clear that a trial judge is not required to permit cross-examination that exceeds the scope of the direct examination. Moreover, the defense was permitted to elicit all the evidence it sought through this witness in the presentation of its own case. The fact that this examination was conducted *on the same day* minimized any alleged prejudice concerning the separation of time between the government's examination of Hagerty and Lowenberg's. Furthermore, Lowenberg's attorney did not object or complain about this alleged "temporal bias" until after the government rested, when he moved for a mistrial. Under these circumstances, the trial court clearly did not err" (citing *United States v. Carlock*, 806 F.2d 535, 553 (5th Cir.1986), *cert. denied*, 480 U.S. 949, 107 S.Ct. 1611, 94 L.Ed.2d 796 (1987)). Here, the defense's decision whether to present a direct case was a long way off, if at all, and the mistrial application was filed immediately. And of course, Petitioner had no obligation to put on any defense. *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). The Second Circuit's reliance on that offer, therefore, requires the sacrifice of one right (to cross-examine a crucial witness) to compel the sacrifice of another (not to present any defense at all), a constitutional conundrum if there ever was one . To borrow from the New York Court of Appeals, such a mandated sacrifice "would be to allow error compounded to become error invincible." *People v. Rosenberg*, 45 N.Y.2d 251, 257, 380 N.E.2d 199, 202 (1978). In any event, such a remedy would give the witness an undue opportunity to prepare for difficult questions now known to come.

of the government's key and sole cooperating witness with a view toward determining whether, in such a situation, the requisite level of harmlessness needs to be aggravated.

Fed. R. Evid. 607, notwithstanding, the Second Circuit's claim that an offer to the defense to later call Salzman during its direct case might well be seen by this Court as flouting the Court of Appeal's own precedents distinguishing between direct and cross-examination. *See e.g. United States v. Pedroza*, 750 F.2d 187, 196 (2d Cir. 1984) ("The principal opportunity for defendants to elicit facts as to Carlos's consent occurred on the cross-examination of Carlos, after the government had asked him on direct examination if he had any involvement in Luis's kidnaping. '[I]f a matter has been raised on direct examination, generally cross-examination must be permitted,' and we see no basis for a deviation from this general principle in the present case.") (quoting *United States v. Segal*, 534 F.2d 578, 582 (3d Cir.1976)).

Here, defense counsel's line of questioning was necessary and decidedly appropriate. In fact, the district court had first directed the witness to answer the question posed by counsel over the government's objection immediately prior to abruptly terminating the examination absent explanation to the jury. Yet, the district court later suggested that defense counsel had done something inappropriate by probing whether Salzman had truly intended harm in connection her conduct underlying the charges to which she had pleaded guilty. In so doing, the district court appeared far more concerned that the witness might answer defense counsel's questions in a manner that

contradicted her guilty plea given in its courtroom. Curiously, it even seemed perplexed that defense counsel did not share that concern.

Quite to the contrary. Defense counsel had every right, indeed an obligation, to test the veracity of Salzman's testimony, including an effort to show bias and motive, even if that would have undermined the colloquy at the cooperating witness's plea. The district court simply had no discretion to curtail cross-examination so as to prevent the jury from hearing facts bearing on the witness's credibility. *See Gordon v. United States, supra*, 344 U.S.at 423 (trial judge's discretion "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness crucial testimony").

When the district court impermissibly intervened in the fact-finding process during a central line of cross-examination, the prejudice suffered by the Petitioner was only exacerbated by the manner in which the district court handled the issue. For here, the jury was left with the false impression that defense counsel had done something so improper as to justify the draconian sanction of forfeiting continued cross examination along with a tongue-lashing by the court. The end result was that Salzman's eminently challengeable credibility remained largely intact

In reality, defense counsel was simply doing his job as the Sixth Amendment directs -- cross-examining the sole cooperating witness in an attempt to discredit her. Whether that would have undermined what the witness had earlier sworn to upon pleading guilty, or whether it would have caused the witness anxiety, is simply not a defense attorney's concern -- which was

solely to demonstrate prosecutorial overreaching in extracting Salzman's plea. As the Chief Justice has opined in a separate though parallel context:

> Federal prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers -- one at a time. In my view, the Court's opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching.

Kaley v. United States, 571 U.S. 320, 134 S. Ct. 1090, 1114-15, 188 L.Ed.2d 46 (2014) (Roberts, C.J., dissenting)

* * *

The Supreme Court should consider whether a prosecutorial offer to make such witness available on the defense case could ever cure a Sixth Amendment deprivation. And, if so, it should determine whether any level of harmlessness thereupon found, when the witness involved is the government's sole cooperator, needs to be absolute. In short, the Court should not countenance the trial court committing an intentional and egregious violation of a sacrosanct Sixth Amendment right expecting and hoping to be saved by the doctrine of harmless error.

Conclusion

The Petition for a Writ of Certiorari Should Be Granted

Dated: Bronx, New York
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Respectfully submitted,

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