Nos. 10-8969 and 10-9194

IN THE SUPREME COURT OF THE UNITED STATES

KERN CARVER BERNARD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

DURWANDA ELIZABETH MORGAN HEINRICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated the Confrontation Clause of the Sixth Amendment by refusing to allow petitioners to cross-examine a cooperating government witness about the magnitude of the sentence reduction he hoped to receive in exchange for his cooperation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on November

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[1] All references to "Pet." and "Pet. App." are to the petition and appendix in No. 10-8969, which are "essentially identical" to the petition and appendix in No. 10-9194. Pet. 1 n.1.

15, 2010. The petition for a writ of certiorari in No. 10-9194 was filed on February 11, 2011, and the petition for a writ of certiorari in No. 10-8969 was filed on February 12, 2011. 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 Eastern District of Louisiana, petitioner Wilson was convicted on one count of bribing a public official, in violation of 18 U.S.C. 201, and one count of conspiring to commit bribery, in violation of 18 U.S.C. 371. Pet. App. 1, 5. He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release, and was fined $15,000. Ibid.; Gov't C.A. Br. 3. Petitioner Heinrich was convicted on two counts of bribing a public official, in violation of 18 U.S.C. 201, and one count of conspiring to commit bribery, in violation of 18 U.S.C. 371. Pet. App. 1, 5. She was sentenced to 60 months of imprisonment, to be followed by three years of supervised release, and was fined $5,000. Ibid.; Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1-19.

1. In the wake of Hurricane Katrina, the United States Army Corps of Engineers (Corps) undertook to reconstruct and improve the hurricane protection system in the greater New Orleans area, including rebuilding the Lake Cataouatche Levee. Pet. App. 2. Seeking to work as a consulting engineer on recovery projects,

petitioner Wilson moved from Florida to New Orleans, where he met petitioner Heinrich, who worked as a supplier of dirt and sand for construction contractors. Ibid. Wilson and Heinrich began a friendship and a romantic relationship. Ibid. In July 2006, Wilson started working as a consulting engineer for Integrated Logistical Support, Inc. (ILSI) under contract with the Corps. Ibid. Through that job, Wilson met Raul Miranda, another consulting engineer from ILSI. Ibid. Wilson and Miranda became close friends and rented apartments in the same building. Ibid. Miranda met Heinrich during her frequent visits to Wilson's apartment. Ibid.

Miranda was a technical advisor to the Corps' source selection committee, which evaluated the proposals for the Lake Cataouatche Levee reconstruction contracts. Pet. App. 2. The Corps used a "best-value approach" (instead of a low-bid process) to award the Lake Cataouatche contracts. Id. at 3. Using that approach allowed the Corps to assign value to non-price factors such as technical approach and timing and to award the contract to the proposal judged to be the best value overall. Ibid. The Corps did not make the submitted proposals public because bidding contractors were given an opportunity to address deficiencies in and modify their proposals during the evaluation process; allowing a contractor to have access to a competitor's confidential proposal would have given such contractor an unfair advantage. Ibid. To ensure

fairness in the process, all Corps engineers (including contract employees such as Wilson and Miranda) are required to sign a Procurement Integrity Act statement informing them that source-selection and bid-proposal information is proprietary and must be kept confidential. Ibid. As part of his job, Miranda identified deficiencies in the bid proposals so that the selection committee could discuss those issues during oral presentations by the bidding contractors. Id. at 2-3.

Heinrich was interested in working with the Corps on the Lake Cataouatche project as a sub-contractor supplying sand and gravel to the prime contractor working on construction of the levee. Pet. App. 2. She made that interest clear to Wilson and Miranda. Ibid. Heinrich informed Wilson and Miranda when she decided to support the proposal submitted by Manson Gulf, LLC, and Miranda agreed to provide Wilson (whose job did not involve any duties related to the Lake Cataouatche project) and Heinrich with the information necessary for Manson Gulf to correct any technical deficiencies in its proposal. Id. at 3. Miranda made clear that he expected to be paid for providing that confidential information, and Heinrich agreed to pay Wilson and Miranda 25 cents each for every cubic yard of material that she sold to Manson Gulf. Ibid. Miranda testified that he expected that they would net "close to $300,000" from their scheme. Gov't C.A. Br. 10.

After Manson Gulf submitted its Lake Cataouatche proposal to

the Corps, Miranda evaluated it for technical deficiencies. Pet. App. 4. In the week preceding the date the contractors' revised proposals were due, Miranda on several occasions provided Wilson and Heinrich with details concerning the deficiencies in Manson Gulf's proposal and information about how Manson Gulf could correct those deficiencies. Ibid.; Gov't C.A. Br. 9-10. Heinrich, in turn, contacted Michael Mayeux, the head of Manson Gulf's levee division; informed him that his proposal had fatal flaws; and offered to help him correct those flaws. Pet. App. 4. She then passed the information about the technical difficulties in Manson Gulf's proposal to Mayeux via telephone, fax, and e-mail. Ibid. Mayeux used that information to respond to questions during Manson Gulf's oral presentation to the source selection committee. Ibid. Based on his suspicions that Heinrich had obtained her information from a source inside the Corps, Mayeux informed the Corps about what had transpired, and the Corps contacted federal law enforcement. Ibid.

2. A grand jury in the Eastern District of Louisiana returned an indictment charging Wilson with one count of bribery, in violation of 18 U.S.C. 201(b)(2)(B), and one count of conspiracy to commit bribery, in violation of 18 U.S.C. 371. The indictment also charged Heinrich with two counts of bribery, in violation of 18 U.S.C. 201(b)(1)(B), and one count of conspiracy to commit bribery, in violation of 18 U.S.C. 371. Pet. App. 5. Miranda

cooperated with the government; pleaded guilty to accepting a bribe, in violation of 18 U.S.C. 201(b)(2)(B); and was sentenced to four months of imprisonment. Id. at 4.

Pursuant to his plea agreement, Miranda testified against petitioners at trial. Pet. App. 4. During cross-examination, petitioners questioned Miranda about his plea agreement, soliciting testimony establishing that, in exchange for his plea and agreement to testify, the government had agreed to charge Miranda with only one count of bribery. Id. at 6; 3/31/2009 Tr. 396-397, 402. The district court instructed petitioners' counsel not to delve into detail about Miranda's advisory Sentencing Guidelines calculation and not to reveal the potential sentence petitioners were facing. 3/31/2009 Tr. 316-318. The court further instructed petitioners' counsel to limit themselves to asking about Miranda's understanding of what sentence he might get as a result of his plea agreement and whether he expected to get a reduced sentence because of his testimony. Pet. App. 6; 3/31/2009 Tr. 404. Although petitioners' counsel were instructed not to ask about the maximum sentence Miranda could have faced, Miranda testified that he faced a maximum possible sentence of 15 years of imprisonment under the statute or a Guidelines range of 18 to 24 months of imprisonment, and that he hoped to receive a lesser sentence as a consequence of his cooperation and testimony. Pet. App. 6; 3/31/2009 Tr. 402-406. In its charge to the jury, the district court cautioned that, because

Miranda's plea agreement "provid[ed] for the government's agreement not to bring additional charges, and the possibility of a lesser sentence than [Miranda] would otherwise be exposed to," Miranda's testimony should be "received with caution and weighed with great care." Pet. App. 7; 4/01/2009 Tr. 783.

3. The court of appeals affirmed petitioners' convictions. With respect to petitioners' claim that the trial court had improperly limited Miranda's cross-examination, the court noted that "[t]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Pet. App. 7 (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)). The court rejected petitioners' argument that "jurors were entitled to know the 'magnitude of the benefit' made available to Miranda," instead holding that the district court properly prevented the jury from learning of the potential Guidelines range petitioners faced and properly avoided "unnecessarily confusing the jury." Ibid.

The court of appeals explained that a defendant's Sixth Amendment right to cross-examine witnesses against him is "not infringed provided defendant is able to expose facts from which the jury could draw inferences as to the witness' reliability." Pet. App. 5-6. And, the court noted, the "[j]urors were made more than well aware of the potential bias associated with Miranda's

testimony." Id. at 7. The court therefore concluded that petitioners had failed to establish that a reasonable jury might have had a "significantly different" view of Miranda's credibility if petitioners had been permitted to further explore the range of penalties to which Miranda might have been subject. Id. at 8.

ARGUMENT

Petitioners argue (Pet. 6-11) that the district court violated the Confrontation Clause by limiting their cross-examination of a cooperating witness about the magnitude of the sentence reduction he hoped to receive in exchange for his cooperation. Further review of that argument is not warranted, however, because the court of appeals' decision was correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly held that the district court did not err in restricting petitioners' ability to question Miranda in further detail about the magnitude of the sentence reduction he expected to receive in exchange for his testimony. As this Court has noted, "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)). This Court has 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." Id. at 679. In order to establish a violation of the Confrontation Clause, a defendant must show that "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defendant's] counsel been permitted to pursue his proposed line of cross-examination." Id. at 680.

In this case, the district court instructed petitioners' lawyers to limit their questioning about the length of the sentence Miranda hoped to receive in exchange for his cooperation or the length of the sentence he might have been subjected to if he had proceeded to trial and been convicted. 3/31/2009 Tr. 316-317, 402-406. The court made clear, however, that petitioners had "leeway" to elicit testimony in order to "apprise[]" the jury that Miranda "has cut a deal with the government, that he is testifying and cooperating with the government, that he's hoping to get a much lighter sentence than he otherwise would be facing." 3/31/2009 Tr. 316-317. The court also made clear that its limitation on questioning was intended to prevent the jury from learning about the potential length of sentence that petitioners faced if convicted. 3/31/2009 Tr. 317, 402-403. In spite of the district court's instructions, testimony was in fact elicited from Miranda

establishing that he could face a maximum sentence of 15 years under the statute or a Guidelines range of 18 to 24 months and that he hoped to receive a lower sentence as a result of his cooperation and testimony. 3/31/2009 Tr. 405-406.

The district court's ruling was a permissible exercise of its discretion. The information that petitioners sought to elicit was highly prejudicial because petitioners themselves were charged with some of the same crimes that Miranda could have been charged with if he had not agreed to plead guilty. Permitting cross-examination about the potential sentences associated with those charges, and the associated Guidelines calculations, would have informed the jury of the sentences that would have followed if petitioners were convicted, thereby creating a significant risk of prejudice to the government. See Shannon v. United States, 512 U.S. 573, 579 (1994) ("[P]roviding 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."). Counsel for petitioners were permitted to probe into Miranda's potential biases, his hopes for a considerable reduction in his sentence based on his cooperation and testimony, the charges that could have been brought against him but were not, or the timing of his plea agreement –– and they did so. 3/31/2009 Tr. 394-406, 428-432. In addition, the district court properly instructed the jury to consider Miranda's testimony with caution

and care, and counsel for petitioners both argued in closing that Miranda had strong motivation to lie in order to gain a reduced sentence. 3/31/2009 Tr. 754-756, 770-772, 783. The district court reasonably balanced the risk of prejudice against the limited probative value of the evidence in deciding to limit petitioners' questioning. The court's fact-intensive exercise of discretion does not warrant this Court's review.

2. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Petitioners are incorrect in asserting (Pet. 6) that "[t]he circuits are split about whether the Confrontation Clause entitles a defendant to question an accomplice about the magnitude of the benefit he received or hopes to receive from testifying for the government." On the contrary, the courts of appeals agree that no categorical rule applies either to permit every defendant to cross-examine every cooperating witness about the details of his plea agreement or to forbid every defendant from pursuing such questioning. Indeed, even the cases petitioners rely on eschew adoption of a per se rule. In United States v. Chandler, 326 F.3d 210, 221 (2003), for example (see Pet. 7-8), the Third Circuit declined to adopt a "categorical[]" rule about whether the Confrontation Clause permits every defendant "to inquire into the 'concrete terms' of a cooperating witness's agreement with the government, including the specific sentence that witness may have avoided through his

cooperation."[2] Instead, the court held that whether such an inquiry must be permitted "depends on 'whether the jury had sufficient other information before it, without the excluded evidence, to make a discriminating appraisal of the possible biases and motivation of the witnesses.'" Id. at 219 (quoting Brown v. Powell, 975 F.2d 1, 4 (1st Cir. 1992), cert. dismissed, 506 U.S. 1073 (1993)).

Similarly, in United States v. Larson, 495 F.3d 1094 (2007) (en banc), 552 U.S. 1260 (2008) (see Pet. 7), the Ninth Circuit did not purport to adopt a categorical rule, instead inquiring 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 (quoting Van Arsdall, 475 U.S. at 680) (alterations in original). In that case, the cooperating witness would have faced a mandatory minimum life sentence if he had not cooperated. In finding that the defendant should have been permitted to elicit that information for the jury, the court of appeals reasoned that a mandatory minimum life sentence is "fundamentally different" both from statutory maximum sentences, which the court noted are

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[2] The Third Circuit's avoidance of a categorical rule in Chandler is also apparent from its decision two years later in a similar case in which it held that it was proper to prevent a defendant from questioning a cooperating witness about the magnitude of the sentence reduction he hoped to receive in exchange for testifying. United States v. Mussare, 405 F.3d 161, 169-170 (3d Cir. 2005), cert. denied, 546 U.S. 1225 (2006).

"seldom" imposed, and from "a potential sentence range under the Sentencing Guidelines" (such as Miranda's in the instant case), which could prove "difficult for a jury to understand." Id. at 1106 & n.13.

Thus, 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 is fact-intensive and case-specific. The courts of appeals have resolved that question in different ways when considering different sets of facts.[3] That is not surprising, and it does not indicate the existence of a conflict warranting this Court's intervention.

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[3] Compare, e.g., United States v. Arocho, 305 F.3d 627, 636 (7th Cir. 2002) (upholding limitation on questions concerning the specific sentences and sentencing Guidelines the cooperators faced because the defendants "were able to elicit sufficient information to allow the jury to assess" the cooperators' "credibility, motives and bias"), cert. denied, 550 U.S. 926 (2007); United States v. Cropp, 127 F.3d 354, 358 (4th Cir. 1997) (upholding district court's ruling "that the defense could not ask about the specific penalties that the cooperators would have received absent cooperation, or about the specific penalties they hoped to receive due to their cooperation"), cert. denied, 522 U.S. 1098 (1998); United States v. Luciano-Mosquera, 63 F.3d 1142, 1153 (1st Cir. 1995) (upholding limitation on question about the number of years cooperator would have faced on dismissed charge when cooperator was asked "repeatedly whether he had received a benefit for his testimony"), cert. denied, 517 U.S. 1234 (1996); with Chandler, 326 F.3d at 221 (limitation was error because "the jury might have 'received a significantly different impression of [witnesses'] credibility'" (quoting Van Arsdall, 475 U.S. at 680)); United States v. Roan Eagle, 867 F.2d 436, 443-444 (8th Cir.) (noting that inquiry into the terms of a cooperating defendant's plea agreement "is essential" to effective cross-examination, but finding error to be harmless because the cooperating witness's credibility "was not really an issue"), cert. denied, 490 U.S. 1028 (1989).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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