Loyola of Los Angeles Law Review

Volume 51 | Number 4 Article 1

Summer 7-1-2018

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Ani Oganesian

THE CONFRONTATION CLAUSE: EMPLOYING THE "GREATEST LEGAL ENGINE EVER INVENTED FOR THE DISCOVERY OF TRUTH"[1] TO PROMOTE JUSTICE IN CRIMINAL COURTS

Ani Oganesian∗

I. INTRODUCTION

In 2014, two friends, Hull and Corzette, planned on attending a music festival together.[2] They purchased three bags of heroin from Trent, a known dealer.[3] They then picked up the bags from Land, one of Trent's dealers, and headed to the music festival.[4] At a nearby park, Hull cooked the heroin and Corzette injected it.[5] When Corzette passed out, an unworried Hull returned to enjoy the musical festivities.[6] When he later returned to the park, he found that Corzette was still passed out, with vomit on his clothes.[7] Hull left Corzette in his car overnight "believing him to be fine."[8] The next day, Hull found Corzette dead in the car.[9]

After some time, Hull contacted the police and cooperated with the officers to make an undercover purchase from Trent and Land, which led to their arrests.[10] Eventually, Land pleaded guilty and

1. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, ET AL., EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).

∗ J.D. Candidate, May 2019, Loyola Law School, Los Angeles; B.S., Business Management, Woodbury University. I wish to thank Professor Eric Miller for his invaluable guidance and teaching, the members of the Loyola of Los Angeles Law Review for their impeccable work, and my family and friends for their love and support. Special thanks to my husband for his unwavering encouragement throughout the writing process.

2. United States v. Trent, 863 F.3d 699, 701 (7th Cir. 2017).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 701–02.
7. *Id.* at 702.
8. *Id.*
9. *Id.*
10. *Id.*

agreed to testify with Hull against Trent at trial.[11] Trent was charged with heroin distribution resulting in death, which carries a twenty-year minimum sentence.[12] Trent's defense counsel sought to impeach Hull and Land by exposing their desires to avoid twenty-year minimum sentences by testifying.[13] The district court found it sufficient to refer to the sentences as "substantial," finding that any additional information would "improperly sway the jury's decision in Trent's case."[14] The Seventh Circuit Court of Appeals affirmed, holding that the cross-examination was "thorough" and "did not offend the core values of the Confrontation Clause."[15] This flawed line of reasoning, followed by the majority of United States circuit courts, disrupts the constitutional rights of criminal defendants throughout the nation.

The Sixth Amendment was passed by Congress on September 25, 1789 and ratified on December 15, 1791.[16] It provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[17]

The Amendment serves an important mission: to protect the integrity of the "truth-determining process" in criminal proceedings.[18] By virtue of this mission, the Confrontation Clause affords criminal defendants the "fundamental right" to cross-examine witnesses who testify against them.[19] "Cross-examination is the principal means by

11. *Id.* at 703.

12. *Id.* at 702–03. Land and Hull also faced the same charge. *Id.*

13. *Id.* at 701, 703.

14. *Id.*

15. *Id.* at 706. Trent filed a petition for certiorari on December 8, 2017. United States v. Trent, 863 F.3d 699 (7th Cir. 2017), *petition for cert. filed*, (U.S. Dec. 8, 2017) (No. 17-830).

16. Stephanos Bibas & Jeffrey L. Fisher, *Common Interpretation: The Sixth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-vi (last visited Feb. 8, 2018).

17. U.S. CONST. amend. VI (emphasis added).

18. *See* Phillips v. Neil, 452 F.2d 337, 348 (6th Cir. 1971) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

19. *See Dutton*, 400 U.S. at 101 (citing Pointer v. Texas, 380 U.S. 400, 403 (1965)).

which the believability of a witness and the truth of his testimony are tested."[20] It is a procedural guarantee that enables defendants to challenge the government's evidence. Thus, sufficient cross-examination is especially important where the witness, who has been indicted himself, has agreed to testify pursuant to a cooperation agreement with the government.[21]

In light of these concerns, U.S. courts have consistently discussed restrictions on the scope of cross-examination.[22] But the Supreme Court has yet to address a critical issue: the extent to which criminal defendants may cross-examine witnesses about their cooperation agreements with the government.

To determine the acceptable scope, it is important to understand the underlying purpose of the Confrontation Clause, how witnesses obtain cooperation agreements with the government, and the function that juries are historically meant to serve. Part II of this Note details the history and purpose of the Confrontation Clause. Part III focuses on the government's process of obtaining cooperation agreements in exchange for testimony.

Part IV addresses the circuit split. Part IV.A discusses the minority approach adopted by the Third, Fifth, and Ninth Circuits, which permits defendants to inquire into the specific sentences or charges that witnesses have avoided or hope to avoid by cooperating with the government.[23] Part IV.B details the contrasting majority approach adopted by the First, Second, Fourth, Sixth, Seventh, Eighth, and Eleventh circuits, which bars defendants from probing into the specifics of government witnesses' agreements.[24] Part V critiques the majority approach, focusing on how such limitations on cross-examination deprive defendants of their confrontation rights and frustrate the jury's ability to perform its function. Part VI proposes a bright-line rule allowing for liberal cross-examination of government witnesses about their cooperation agreements.

20. Davis v. Alaska, 415 U.S. 308, 316 (1974).

21. *See* United States v. Onori, 535 F.2d 938, 945 (5th Cir. 1976) ("This right is especially important with respect to accomplices or other witnesses who may have substantial reason to cooperate with the government.").

22. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (providing a list of decisions that reflect these two inquiries).

23. *See* United States v. Dimora, 843 F. Supp. 2d 799, 843 (N.D. Ohio 2012).

24. *Id.*

II. THE CONFRONTATION CLAUSE: A WALK THROUGH HISTORY

A criminal defendant's right to confront adverse witnesses was far from a novel idea when the founding fathers ratified the Sixth Amendment of the Constitution. It is a right that "'comes to us on faded parchment' with a lineage that traces back to the beginnings of Western legal culture."[25]

A. Confrontation Rights in Early Rome and England

Defendants' confrontation rights can be traced to Roman law. The beginnings of this right first appear in the fifth book of the New Testament, the Acts of the Apostles ("Acts").[26] Roman governor Festus explained in the Acts, "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."[27]

The right to confront an accuser was later incorporated as a procedural requirement of Roman criminal trial, as described in Cicero's Verrine Orations ("Orations").[28] In Orations, Cicero writes about his prosecution of then-governor of Sicily, Gaius Verres, who was accused of misconduct in office.[29] One such instance of misconduct alleged was when Verres sat as a judge in the prosecution of an accused, Sthenius, on two charges: forgery and a capital offense.[30] Both trials were conducted without the presence of Sthenius, and the second trial was conducted without the presence of his accuser.[31] Sthenius was found guilty at both trials.[32] Cicero found that both convictions, made in Sthenius's absence and in the absence of his accuser, were violations of the defendant's rights.[33]

Sir Walter Raleigh's 1603 trial for charges of treason marks the touchstone for defendants' confrontation rights in England.[34] Raleigh

25. *Coy*, 487 U.S. at 1015 (quoting California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) (citation omitted)).

26. Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 486 (1994).

27. *Coy*, 487 U.S. at 1015–16 (quoting *Acts* 25:16).

28. Herrmann & Speer, *supra* note 26, at 486.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 481–82, 543.

was convicted primarily based upon the out-of-court testimony of his alleged co-conspirator, Lord Cobham, which was read to the jury.[35] "[L]et Cobham be here," Raleigh begged the judges, "Call my accuser before my face."[36] Raleigh argued that "false witnesses" could only be revealed by asking them questions.[37] The judges denied Raleigh's request, and he was sentenced to death.[38] In the aftermath of Raleigh's death, cross-examination of adverse witnesses became a facet of English common-law, which later provided the basis for the Sixth Amendment.[39]

B. Adoption of the Sixth Amendment

The Federal Constitution, as originally proposed, did not account for confrontation rights.[40] This omission was opposed by many, as it was seen as a shift back into English civil-law practices of the inquisitorial nature—namely, conducting pretrial examination in the absence of the defendant.[41] Eventually, the Founders accounted for the omission by introducing the Sixth Amendment in the Bill of Rights.[42] The Sixth Amendment was a means through which the Founders "sought to strengthen [the] vigorous adversarial process" and depart from the inquisitorial implications that its absence might have had on criminal trials.[43]

The text of the Sixth Amendment and the recorded debates at the Constitutional Convention provide little guidance as to its underlying purpose.[44] As a result, the Sixth Amendment, and particularly the Confrontation Clause, have been the focus of many cases before the Supreme Court. Confrontation Clause inquiries became even more prevalent after 1965, when the Court held in *Pointer v. Texas*[45] that

35. *Id.* at 545.

36. *Id.* (alteration in original); *see* Mathew Lyons, *The Trial of Sir Walter Raleigh: A Transcript*, WRITER & HISTORIAN (Nov. 18, 2011), https://mathewlyons.wordpress.com/2011/11/18/the-trial-of-sir-walter-ralegh-a-transcript/.

37. Lyons, *supra* note 36.

38. *See* Crawford v. Washington, 541 U.S. 36, 44, 48 (2004).

39. *Id.* at 481–82.

40. *See Crawford*, 541 U.S. at 48.

41. *See id.*

42. *See id.* at 49.

43. Bibas & Fisher, *supra* note 16.

44. Jonathan Clow, *Throwing a Toy Wrench in the "Greatest Legal Engine": Child Witnesses and the Confrontation Clause*, 92 WASH. U. L. REV. 793, 796 (2015).

45. 380 U.S. 400 (1965).

the Sixth Amendment extends to states through the Fourteenth Amendment.[46]

Interpretation of the Confrontation Clause has mainly involved two issues: "the admissibility of out-of-court statements" and "restrictions on the scope of cross-examination."[47] As the heart of this Note involves the latter inquiry, I will turn to an analysis of Supreme Court decisions which have helped define the scope of the Confrontation Clause.

C. The Supreme Court Interpreting the Scope of the Confrontation Clause

In order to determine the appropriate scope of cross-examining government witnesses about their cooperation agreements, it is essential to understand not only that cross-examination is an enumerated right conferred by the Confrontation Clause, but also *why* cross-examination is a constitutionally-protected right. Based upon an analysis of the historical underpinnings identified *supra*, the Supreme Court has recognized that a primary purpose of the Confrontation Clause is to ensure the "accuracy of the truth-determining process in criminal trials."[48] As Justice Brown notably wrote in one of the earliest cases dealing with the Confrontation Clause:

> The primary object of the [Confrontation Clause was] to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony *whether he is worthy of belief*.[49]

46. *Id*. at 403.

47. Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

48. *See* Dutton v. Evans, 400 U.S. 74, 89 (1970) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the [testimony].'") (second alteration in original) (quoting California v. Green, 399 U.S. 149, 161 (1970)).

49. Mattox v. United States, 156 U.S. 237, 242–43 (1895) (emphasis added).

This procedural guarantee of cross-examination allows defendants to "safeguard[] . . . the truth" by testing witnesses' "veracity."[50] In essence, when witnesses are placed before a jury under oath, face-to-face with the defendant they are implicating, and are vigorously cross-examined by defense counsel with respect to their potential biases, two results are achieved: (1) witnesses are "more likely to testify truthfully;"[51] and (2) the jury is better able to assess the full extent of witnesses' credibility and prejudices towards the defendant.[52] The jury's assessment of witness credibility will, in turn, assist the jury in determining whether that particular testimony incriminates the defendant.

Cross-examination is not an absolute right. It is limited, pursuant to Federal Rule of Evidence 611, to "the subject matter of the direct examination and matters affecting the witness's credibility."[53] Thus, defendants have "the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable" by "delv[ing] into the witness' story to test the witness' perceptions and memory . . . [to] impeach, i.e., discredit, the witness."[54] Limiting cross-examination is within the "broad discretion" of the trial judge,[55] but "discretion in the area of bias evidence becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant."[56]

Two Supreme Court decisions have discussed "the scope of cross-examination [of government witnesses] permitted" by trial courts and concluded that the limitations on cross-examination violated the defendants' confrontation rights.[57] In both cases, the Court found that the defendants' inquiries were well within the permissible scope of cross-examination and served to reveal witnesses' biases and credibility to the jury.[58]

50. *See* Donnelly v. United States, 228 U.S. 243, 273 (1913).
51. Clow, *supra* note 44, at 798.
52. *See Green*, 399 U.S. at 158.
53. FED. R. EVID. 611(b).
54. Pennsylvania v. Ritchie, 480 U.S. 39, 51–52 (1987); Davis v. Alaska, 415 U.S. 308, 316 (1974).
55. *See* Marshall v. Walker, 464 U.S. 951, 952 (1983) (Rehnquist, J., dissenting).
56. Brown v. Powell, 975 F.2d 1, 8 (1st Cir. 1992) (Pollak, J., dissenting).
57. *See Davis*, 415 U.S. at 315; Delaware v. Van Arsdall, 475 U.S. 673 (1986).
58. *See Davis*, 415 U.S. at 315; *Van Arsdall*, 475 U.S. at 673.

1. *Davis v. Alaska*

The Supreme Court's has stated that its decision in *Davis v. Alaska*[59] exemplifies the scope of cross-examination.[60] In *Davis*, the Court considered whether "the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status."[61]

There, the defendant, Davis, was charged with stealing a safe containing cash and checks from a local bar.[62] The safe was later found near Green's home.[63] Green became a key prosecution witness when he revealed, during interrogation at the police station, that he had seen a man near the area where the safe was found holding a crowbar.[64] Green later identified Davis in a line-up.[65]

At the time Green testified to seeing Davis near his home, Green was on juvenile probation for having "burglarize[ed] two cabins."[66] Prior to his testimony at trial, the prosecution sought a protective order to prevent mention of Green's juvenile record.[67] Defense counsel objected, arguing that any such mention would be necessary to reveal Green's bias and prejudice, and demonstrate that he may have feared "possible jeopardy to his probation" when the safe was found near his home and "made a hasty and faulty identification of [Davis] to shift suspicion away from himself."[68] The trial court granted the protective order.[69]

At trial, defense counsel questioned Green about whether he felt anxious that the police officers might have believed he was responsible for stealing the safe, given that it was found on his property.[70] Green responded that he did not.[71] The trial court did not

59. 415 U.S. 308 (1974).
60. *See* Delaware v. Fensterer, 474 U.S. 15, 19 (1985).
61. *Davis*, 415 U.S. at 309.
62. *Id.* at 309–10.
63. *Id.*
64. *Id.* at 310.
65. *Id.*
66. *Id.* at 310–11.
67. *Id.* at 310.
68. *Id.* at 311.
69. *Id.* In doing so, the trial court relied upon Alaska state statutes, which provide that evidence of a minor's juvenile status is not admissible. *Id.*
70. *Id.* at 312.
71. *Id.* at 313.

allow any further cross-examination into the matter, and Davis was ultimately convicted.[72]

The Supreme Court reversed Davis's convictions, finding violation of Davis's Sixth Amendment right of confrontation.[73] The Court reasoned that "[t]he accuracy and truthfulness of Green's testimony were key elements in the State's case against [Davis]."[74] The defense sought to admit Green's juvenile record to allow the jury to make the inference that Green may have been biased because he was concerned about being a possible suspect and because of his probationary status.[75] The Court found that Green's entitlement to "testify free from embarrassment and with his reputation unblemished must fall before the right of [Davis] to seek out the truth in the process of defending himself."[76]

The Court further opined that cross-examination is "'not for the idle purpose of gazing upon the witness.' . . . [It] is the principal means by which the believability of a witness and the truth of his testimony are tested."[77] One way to reveal the truth of such a witness's testimony is to explore his "partiality" using questioning that may "reveal[] possible biases, prejudices, or ulterior motives . . . as they may relate directly to issues or personalities in the case at hand."[78] The Court noted that without further questioning, the jury had no understanding of *why* Green might have been biased and any such suggestion by the defense would have appeared "speculative."[79] Finally, the Court found that the State's interest in protecting Green's juvenile record "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[80]

The *Davis* Court's language accentuates the bedrock principle of the Confrontation Clause: cross-examination is a procedural right that affords defendants the opportunity to reveal witnesses' ulterior motives and prejudices.[81] This ruling provides that a trial court abuses

72. *Id.* at 313–14.
73. *Id.* at 315.
74. *Id.* at 317.
75. *Id.* at 317–18.
76. *Id.* at 320.
77. *Id.* at 316 (quoting 3A JOHN HENRY WIGMORE, ET AL., EVIDENCE IN TRIALS AT COMMON LAW § 940 (Chadbourn rev. ed. 1970)).
78. *Id.*
79. *Id.* at 318.
80. *Id.* at 320.
81. *Id.* at 316.

its discretion when it limits inquiry aimed at exposing witness credibility *even if* the questioning has already revealed some potential bias.[82] Probing a witness about facts that would make him more or less likely to testify without the "impartiality expected of a witness at trial"[83] is necessary for the defense to develop its theory of bias in full. Moreover, the Court's finding that "the right of confrontation is paramount"[84] to the State's statutory protection of juvenile offenders suggests that a defendant's right to cross-examine an adverse witness with respect to his credibility is a supreme right which can seldom be disturbed.

2. *Delaware v. Van Arsdall*

Over a decade later, in *Delaware v. Van Arsdall*,[85] the Supreme Court was faced with a closely-related issue: whether defense counsel was inappropriately prohibited from cross-examining a prosecution witness about his agreement to testify "in exchange for the dismissal of an unrelated criminal charge against him."[86]

There, Van Arsdall was convicted of stabbing Epps to death in her apartment following a New Year's Eve party.[87] Fleetwood, who was staying in a neighboring apartment, testified at trial.[88] He "recount[ed] uncontroverted facts about the party" and stated that he saw Van Arsdall sitting in Epps's apartment from the doorway.[89]

In exchange for Fleetwood's testimony at trial, the prosecution dismissed a pending, unrelated public drunkenness charge against him.[90] During cross-examination, defense counsel attempted, to no avail, to elicit information about the charge to expose Fleetwood's motivation for testifying.[91] Instead, the judge allowed cross-examination about the charge to occur "outside the presence of the jury."[92]

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82. *Id.* at 318.
83. *Id.* at 318.
84. *Id.* at 319.
85. 475 U.S. 673 (1986).
86. *Id. Van Arsdall* is the only time that the Court has specifically discussed whether confrontation rights are violated when a trial court limits cross-examination of a government witness's cooperation agreement.
87. *Id.* at 674.
88. *Id.* at 675.
89. *Id.* at 675.
90. *Id.* at 676.
91. *Id.*
92. *Id.*

The Court found that the trial court had violated Van Arsdall's confrontation rights, providing that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[93] The Court recognized the wide discretion a trial court has in limiting cross-examination due to basic concerns such as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[94]

However, the Court found that insofar as "*all* inquiry" into Fleetwood's possible bias was limited, the jury was denied the chance to consider his "motive for favoring the prosecution in his testimony."[95] In concluding, the Court proposed the following:

> We think 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."[96]

As *Van Arsdall* and *Davis* provide, cross-examination guarantees defendants the right to reveal witnesses' biases (no matter how marginal they may be), essentially equipping the jury with a tool for assessing the credibility and weight to afford those witnesses' testimonies. While cross-examination may be limited, these opinions and the history of the Confrontation Clause dictate that exposing a cooperating witness's motive for testifying against a criminal defendant is a primary and significant component of the constitutional right to confront.

III. SECURING COOPERATION AGREEMENTS: NO CEILING ON GOVERNMENT DISCRETION

Cooperating co-defendants often serve as key and sometimes sole witnesses against defendants in criminal proceedings, particularly in

93. *Id.* at 678–79 (citing Davis v. Alaska, 415 U.S. 315, 316–17 (1974)). Dissenting on other grounds, Justice Marshall maintained that cross-examination is such an important right, and that the denial of that right should have resulted in the reversal of Van Arsdall's conviction entirely. *Id.* at 688 (Marshall, J., dissenting).

94. *Id.* at 679 (majority opinion).

95. *Id.*

96. *Id.* at 680 (quoting *Davis*, 415 U.S. at 318).

drug cases.[97] This practice carries with it a dangerous reality: such testimony is often replete with fabrication and/or exaggeration due to the witnesses' incentives to "please" the government.[98] This section will discuss a simplified process of how the government obtains witnesses, and the problems posed by this process.

A. How Defendants Become Cooperating Witnesses

Obtaining witnesses to testify against a defendant in exchange for cooperation agreements is a two-part process that engages the investigator and the prosecutor.[99] The process involves the extensive exercise of prosecutorial discretion and control, which injects inherent bias into the witnesses' ultimate testimony.[100] Cooperating witnesses often have one primary goal: to comply with the government's requests in hopes of a beneficial deal,[101] thereby raising the concern that such testimony may be biased, exaggerated, and sometimes even untruthful. As such, the process has been critiqued by legal scholars as being "unjust, corrupt, and undemocratic."[102]

1. Role of the Investigator

Investigating officers or agents typically engage in the first contact with potential witnesses, as they are responsible for arrests and investigations, and they have "the most information about and influence over [potential witnesses]."[103] Investigators "recruit" witnesses in various ways.[104] The most common method is to offer an arrested individual the opportunity to "mitigate his situation" by providing certain information and cooperating with the arresting officer.[105] Investigators may also arrest an individual that has committed a particular crime for the purpose of turning him into an informant.[106] "Informed bluff[ing]" is another method utilized.[107] In

97. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 46 (2011).
98. *Id.* at 22.
99. *Id.* at 17–18.
100. *Id.* at 49–50.
101. *See id.* at 22.
102. *See* ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 143 (2012).
103. NATAPOFF, *supra* note 97, at 18.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

this method, an investigator allows an individual to believe that there is an indictable case against him, but in reality, the investigator has not produced enough evidence for a prosecutor to press charges.[108]

Afraid of the possibility of being charged, such individuals often agree to comply with officers' requests.[109] Illegal methods are also employed. For example, officers may target a potential witness (who they know is prone to criminal activity) and wait until he commits a crime to arrest him.[110] They then propose a favorable deal to him in exchange for his cooperation.[111] Although police and investigators do not have the authority to induce official cooperation agreements, they may make promises that the prosecutor will.[112]

2. Role of the Prosecutor

The prosecutor's practice of obtaining plea bargains with defendants was never "voted upon by state or federal legislatures[,] . . . emerged with very little scrutiny," and essentially "sidelines" the judge, allowing prosecutors to take "center stage."[113] Prosecutors have the sole discretion to press charges against arrested individuals.[114] Prosecutors also have the power to alter or drop criminal charges against individuals in exchange for their cooperation.[115] This charging power is "unreviewable by courts," except in the rare instance when there is reason to believe the "prosecutor has charged someone on an impermissible basis such as race, vindictiveness, or to punish the defendant for exercising his constitutional rights."[116] In addition, prosecutors may recommend lenient and reduced sentencing to a trial judge.[117] Judges are highly deferential to prosecutors' recommendations and rely heavily upon "the government's substantial assistance motion" and "evaluation of the assistance received" in making sentencing determinations.[118]

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108. *Id.*
109. *Id.*
110. *Id.* at 18–19.
111. *Id.* at 19.
112. *Id.* at 48.
113. DZUR, *supra* note 102, at 144–45.
114. NATAPOFF, *supra* note 97, at 49.
115. *Id.*
116. *Id.* at 50.
117. *Id.*
118. *See* Brian A. Jacobs, et al., *Navigating the Cooperation Process in a Federal White Collar Criminal Investigation*, PRACTICAL LAW 8 (2017), https://www.maglaw.com/publications/articles/2017-04-20-navigating-the-cooperation-process-

When confronted with multiple defendants involved in a particular crime, prosecutors apply a "utilitarian calculation, whereby the relative dangerousness and culpability of each defendant is evaluated."[119] This calculation results in a determination of whom to prosecute and whom to offer a deal in exchange for his incriminating testimony against the other.[120]

Two types of general agreements may be arranged with cooperating witnesses: cooperation agreements and immunity orders.[121] Immunized witnesses "typically face no criminal liability" in exchange for their testimony.[122] Conversely, witnesses who testify pursuant to cooperation agreements are still prosecuted for their role in the criminal offense, but are promised leniency (typically altered or dropped charges, or a reduced sentence recommendation to the judge) in exchange for their testimony.[123] The cooperation agreement essentially operates as a bilateral contract.[124] The extent to which a cooperating witness's duty is considered fulfilled pursuant to the agreement largely depends upon the prosecutor's determination of the "quality or utility of the witness' testimony."[125]

Only after determining that the witness's testimony was satisfactory is the government required to perform its end of the bargain.[126] Such "contingent plea agreements" have been consistently upheld by courts.[127] Consequently, if a prosecutor determines that the witness's testimony was not particularly incriminating, she may refuse to afford the witness the benefit of the deal in its entirety. This

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in-a-federal-white-collar-criminal-investigation/_res/id=Attachments/index=0/Navigating%20the%20Cooperation%20Process%20in%20a%20Federal%20White%20Collar%20Criminal%20In....pdf.

119. Spencer Martinez, *Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency*, 47 CLEV. ST. L. REV. 141, 144 (1999).

120. See *id.*

121. Robert R. Strang, *Plea Bargaining, Cooperation Agreements, and Immunity Orders*, 155TH INT'L TRAINING COURSE VISITING EXPERTS' PAPERS, http://www.unafei.or.jp/english/pdf/RS_No92/No92_05VE_Strang1.pdf (last visited Feb. 9, 2018).

122. *Id.*

123. *Id.*

124. Martinez, *supra* note 119, at 148.

125. *Id.* at 149.

126. *Id.* at 148–49.

127. *Id.* at 149–50 (citing United States v. Valle-Ferrer, 739 F.2d 545 (11th Cir. 1984); United States v. Kimble, 719 F.2d 1253 (5th Cir. 1983); United States v. Edwards, 549 F.2d 362 (5th Cir. 1977)).

"pressure on the witness to please is extreme" and, thus, creates a "plausible risk that the witness will commit perjury to do it."[128]

The investigator's tactical approach to securing witnesses, coupled with the prosecutor's wide discretion and power in charging individuals or recommending reduced sentences triggers many important concerns. First, it results in disproportionate sentencing.[129] Defendants who commit the same crime may receive significantly different penalties.[130] This disproportionality undercuts the "important civic interest in having public inquiry and adjudication" of criminal offenses.[131] As a result, criminal jurisprudence suffers.[132]

In addition to disproportionate sentencing, there is unequal bargaining power between a criminal defendant and a prosecutor who has the power to single-handedly change or, at the very least, significantly influence a defendant's penalty under the law. These issues are particularly concerning when courts prohibit cross-examination of cooperating witnesses regarding the details of their dealings with the prosecutor.[133]

How truthful will such witnesses be on the stand when faced with the strong incentive to "please" the prosecutor to ensure that they obtain what they have bargained for? How likely is it that a cooperating witness will minimize his own role in the crime, shifting the entire blame onto the defendant? These questions are best left for the jury to assess, equipped with all the facts necessary in making such a determination.

B. Cooperating Witness Testimony: True or False?

> [E]ach contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. . . .

128. Martinez, *supra* note 119, at 149.

129. DZUR, *supra* note 102, at 144.

130. *Id.*

131. *Id.* at 145 (quoting John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 124 (1992)).

132. *See* DZUR, *supra* note 102, at 145.

133. The unequal bargaining power of prosecutors and defendants and the disproportionate sentencing that results from cooperation agreements are beyond the scope of this Note. However, these issues underscore the many problems with prosecutorial discretion and how the limitation on cross-examination of government witnesses becomes even more problematic when considering that unfettered discretion.

> [R]ewarded criminals [] represent a great threat to the mission of the criminal justice system.[134]

Cooperating witnesses have "predictable and powerful inducements to lie."[135] In fact, with liberty and sometimes even life at stake, "[i]t is difficult to imagine a greater motivation to lie."[136] Justice Ginsburg has noted that the "Court has long recognized the 'serious questions of credibility' informers pose."[137]

In her book, Snitching, former Assistant Federal Public Defender Alexandra Natapoff explores this issue by tracing several studies which reveal the extent of cooperating witnesses' false testimonies.[138] A study conducted by Northwestern Law School's Center on Wrongful Convictions in 2004 indicated that 45.9 percent of wrongful capital convictions hinged on untruthful informant testimony.[139] University of Michigan Law School professor Samuel Gross's studies showed that close to "50 percent of wrongful murder convictions involved perjury" by witnesses "who stood to gain from the false testimony."[140]

Ninth Circuit Court of Appeals Judge Trott has compared the use of cooperating witnesses against other criminals to a scalpel—"a marvelous tool . . . [that] can remove a deadly tumor or repair a diseased heart."[141] He warned, however, that "as in the case of a scalpel, the careless, unskilled, or unprepared use of cooperating criminal as a witness has the capacity to backfire so severely that an otherwise solid case becomes irreparably damaged."[142] Judge Trott has noted that one such damaging aspect is the untruthful cooperating witness:

> Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out

134. Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1124 (9th Cir. 2001).

135. NATAPOFF, *supra* note 97, at 70.

136. *Id.* (quoting United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987)).

137. Banks v. Dretke, 540 U.S. 668, 701 (2004) (citing On Lee v. United States, 343 U.S. 747, 757 (1952)).

138. *See* NATAPOFF, *supra* note 97, at 69–81.

139. *Id.* at 70.

140. *Id.* (citing Samuel R. Gross et. al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543–44 (2005)). For a more comprehensive illustration of the studies conducted, *see* NATAPOFF, *supra* note 97, at 76–78.

141. Stephen S. Trott, *The Use of a Criminal as a Witness: A Special Problem*, AM. CIV. LIBERTIES UNION LECTURE SUPPLEMENT 1 (Oct. 2007) https://www.aclu.org/files/pdfs/drugpolicy/informant_trott_outline.pdf.

142. *Id.* at 2.

> of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including the prosecutor.[143]

Take, for example, the story of Marion "Mad Dog" Pruett.[144] Pruett began his criminal career in 1971 when he robbed a bank.[145] In 1975, he was imprisoned in Atlanta for a subsequent bank robbery.[146] While in prison, he killed his cellmate, blamed it on another inmate, and testified against him.[147] In exchange for his testimony, which resulted in the conviction of the innocent inmate, the government released him through the Federal Witness Protection Program.[148] Pruett then began a murderous rampage through the country, killing four people.[149] He later admitted that he had also killed his cellmate and that his testimony against the convicted inmate had been a lie.[150]

Courts have repeatedly overturned convictions due to determinations that government witnesses had fabricated their testimonies.[151] In *United States v. D'Angelo*,[152] the district court granted the defendant's motion for judgment of acquittal for a murder conviction after finding that three of the government's key cooperating witnesses, the defendant's accomplices, had provided false testimony.[153] Specifically, the accomplices lied about their own involvement in the murder, as well as the circumstances of how the murder had occurred.[154] One of the accomplices even had a "sordid history of perjury and subornation of perjury, of which the government was aware."[155]

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143. *Id.* at 5.
144. *Id.* at 5–6.
145. *Execution Set for 'Mad Dog' Pruett*, AMARILLO GLOBE-NEWS (Apr. 11, 1999), http://amarillo.com/stories/041199/tex_227-1142.shtml#.WqNvsBpwZol.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *See*, *e.g.*, N. Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir. 2001); United States v. D'Angelo, No. 02 CR 399(JG), 2004 WL 315237 (E.D.N.Y. Feb. 18, 2004).
152. No. 02 CR 399 (JG), 2004 WL 315237 (E.D.N.Y. Feb. 18, 2004).
153. *Id.* at *1.
154. *Id.* at *16–18.
155. *Id.* at *19.

In *Northern Mariana Islands v. Bowie*,[156] the Ninth Circuit reversed the defendant's convictions because the prosecution failed to investigate a possible conspiracy among the accomplice witnesses to testify against the defendant untruthfully.[157] There, a group of men were arrested in connection with a murder.[158] Most of the group agreed to "full cooperation" with the prosecution and to give "truthful testimony" against the defendant, Bowie.[159] The promises given in exchange for their testimonies ranged from probation to pleading guilty to charges lesser than murder, which carried nine-year sentences.[160]

At trial, the witnesses "collectively paint[ed] an evidentiary picture of Bowie's personal responsibility for [the victim's] death," and Bowie was convicted of premeditated murder and kidnapping.[161] At trial, Bowie introduced evidence of a letter that was found in one of the witness's jail cells that read as follows:

> Hey brod I want you to help me please for this problem that were facing right now because if they know that Im the one that did this theyre gonna put me in jail for life. I tried this before. Brah this Is what we gonna do listen carefully okay if we go to court on Thursday and they ask us questions how the murder happens and who kill the philipino just say J.J. because I already talk to John and Brasslley before I was arrested but anyway don't worry about Lucas because I talk to Lucas that don't tell the detectives that Im the one that did this things.
>
> You know what brah, don't worry about this case because well win this just imagine four against one I I even lied to my lawyer about the incedent.[162]

Although the Assistant Attorney General in charge of the case had been notified of the letter, he had instructed the Sergeant "not to do anything with the letter, just to keep it until" it was needed.[163]

156. 243 F.3d 1109 (9th Cir. 2001).
157. *Id.* at 1111.
158. *Id.* at 1112.
159. *Id.* at 1113.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 1113.

These examples, and many more, portray the inherent danger that exists in allowing cooperating government witnesses to testify against a criminal defendant. Undoubtedly, cooperating witnesses have been and continue to be crucial in providing meaningful and necessary testimony, particularly in cases where no other evidence exists.[164] But in order to ensure that defendants are afforded their confrontation rights and are able to expose these potential biases, juries must be given full disclosure.

In most jurisdictions, judges inform the jury that a witness has cooperated with the government and is obtaining some benefit in exchange for his testimony.[165] Some even invite the jury to carefully scrutinize such testimony.[166] These are steps in the right direction, but there is more that the criminal justice system can accomplish—starting with expanding the scope of cross-examination.

IV. THE CIRCUIT SPLIT: HOW FAR IS TOO FAR?

The foregoing analysis raises the following questions: Do the details of a witness's plea deal speak to his credibility? Or is it sufficient to simply know that the witness has cooperated in some way with the government in exchange for his testimony? A majority of U.S. courts have answered the latter question in the affirmative. In doing so, these courts have found that informing the jury that a witness is cooperating with the government is sufficient and have limited any further inquiry into the details of the cooperation. On the other hand, the minority of U.S. courts have held that specific cross-examination of witnesses about their agreements with the government is necessary in some circumstances.

A. The Majority Approach

The majority approach is as follows: the cross-examination of witnesses about their agreements with the government should be

164. Martinez, *supra* note 119, at 142 ("In spite of advances in scientific and statistical evidence, the success of a criminal prosecution continues to hinge primarily on witness testimony. Such evidence is difficult to come by, especially in the case of more sophisticated criminals or defendants who commit crimes through syndicates that insulate them from the relevant *actus reus*.").

165. NATAPOFF, *supra* note 97, at 76.

166. *Id.*; *see* Judicial Council of the United States Eleventh Judicial Circuit, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* (2016), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructions2016Rev.pdf.

limited to avoid jury confusion and nullification.[167] These courts have found that revealing the witnesses' specific penalties and sentences are not probative in exposing witness bias.[168]

The First Circuit has held that any value that an inquiry into the "precise number of years" that a witness may avoid by testifying is "outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing."[169] In *United States v. Luciano-Mosquera*,[170] the defendants faced various charges surrounding "a scheme to smuggle cocaine into Puerto Rico."[171] In exchange for defendant Castillo-Ramos's testimony against defendant Pagan-San-Miguel, the prosecution dropped a firearms charge against Castillo-Ramos.[172] During cross-examination at trial, Pagan-San-Miguel's defense counsel asked Castillo-Ramos if he was aware that he would have faced a thirty-five-year sentence had the firearms charge not been dropped.[173] The district court sustained an objection to the question.[174] The Court of Appeals agreed with the district court's action, finding that although exposing the biases of witnesses is important, the jury could have made "a discriminating appraisal of the possible biases and motivations of the witnesses" without this particular inquiry.[175]

In line with the First Circuit's reasoning, the Second, Fourth, and Eleventh Circuits have held that where defense counsel has had the chance to elicit testimony about witnesses' cooperation with the government and expectations of reduced sentences, detailed cross-examination about the "specific penalties at stake" is impermissible.[176] The Fourth Circuit has voiced the concern that "the jury might 'nullify' its verdict if it knew the extreme penalties faced by the [defendants]" in a case where the witnesses faced the same charges as the defendant.[177] Specifically, the court found "that if the jury could

167. United States v. Dimora, 843 F. Supp. 2d 799, 843 (N.D. Ohio 2012).
168. *Id.* at 843–44.
169. United States v. Luciano-Mosquera, 63 F.3d 1142, 1153 (1st Cir. 1995).
170. 63 F.3d 1142, 1153 (1st Cir. 1995).
171. *Id.* at 1146–48.
172. *Id.* at 1153.
173. *Id.*
174. *Id.*
175. *Id.* (quoting Brown v. Powell, 975 F.2d 1, 5 (1st Cir. 1992)).
176. United States v. Cropp, 127 F.3d 354, 358 (4th Cir. 1997); *see* United States v. Rushin, 844 F.3d 933, 940 (11th Cir. 2016); United States v. Reid, 300 F. App'x 50, 52 (2d Cir. 2008).
177. *Cropp*, 127 F.3d at 358.

infer the very long sentences faced by the [defendants] from knowing the sentences faced by the co-conspirators, the jury members would hesitate to find the [defendants] guilty even if the evidence proved their guilt."[178]

Similarly, the Seventh Circuit recently disagreed with a defendant's contention that the jury couldn't make a "discriminating appraisal" of the witnesses' biases without knowing the exact length of the mandatory minimum sentence he faced absent cooperation.[179] The district court did not permit the defendant to introduce to the jury that the witness was facing a twenty-year minimum sentence, although it did allow the defendant to refer to the sentence as "substantial."[180]

The Eighth Circuit has held similarly. In *United States v. Walley*,[181] the district court did not permit defense counsel to ask the cooperating witness about his forty-year maximum sentence or his five-year mandatory minimum sentence, finding that this was a way to reveal to the jury the possible sentences that the defendant faced.[182] The district court did, however, allow defense counsel to indicate that the witness faced a "significant sentence."[183] The Court of Appeals held that informing the jury that the witness faced a possible five-year sentence as opposed to calling the sentence "significant," would not have given the jury a "significantly different impression" of the witness's credibility.[184]

B. The Minority Approach

A minority of U.S. Circuit Courts have held that inquiry into the details of a cooperating witness's agreement with the government is necessary to expose to the jury potential biases and afford defendants their confrontation rights.[185]

1. The Fifth Circuit

The Fifth Circuit has held that a district court's wide discretion in limiting cross-examination is, in turn, limited "by the requirements of

178. *Id.*
179. United States v. Trent, 863 F.3d 699, 703 (7th Cir. 2017).
180. *Id.*
181. 567 F.3d 354 (8th Cir. 2009).
182. *Id.* at 359.
183. *Id.*
184. *Id.* at 360.
185. United States v. Dimora, 843 F. Supp. 2d 799, 843 (N.D. Ohio 2012).

the Sixth Amendment."[186] Recognizing the importance of exposing cooperating witnesses' potential biases, the court has reversed rulings which have prevented the disclosure of information related to witnesses' efforts to avoid the penalties they would face in the absence of cooperation with the government.[187]

In *United States v. Landerman*,[188] five defendants challenged their ability to cross-examine a government witness about pending felony charges in state court.[189] The witness had pleaded guilty to two counts of fraud in federal court related to the defendants' charges, and had an unrelated pending drug charge in state court.[190]

Outside the presence of the jury, defense counsel asked the witness whether he believed the government would make a favorable recommendation to the state prosecutor in exchange for his cooperation in the federal case.[191] The district court barred the admission of this testimony into evidence, finding that it was unduly prejudicial.[192] The Court of Appeals reversed, reasoning that "the jury, as the trier of fact, should have been allowed to draw its own inferences regarding [the witness's] credibility and determine what effect, if any, the pending criminal charge had on [his] motivation to testify."[193]

2. The Third Circuit

The Third Circuit has made similar rulings. In *United States v. Chandler*,[194] the defendant was charged with conspiracy to distribute and possess with intent to distribute cocaine.[195] The defendant's co-conspirators pleaded guilty and cooperated with the government to testify against her at trial.[196] Defense counsel attempted to solicit information about the witnesses' sentence reductions and agreements

186. United States v. Cooks, 52 F.3d 101, 103 (5th Cir. 1995) (quoting United States v. Garcia, 13 F.3d 1464, 1468 (11th Cir. 1994)).
187. *See, e.g.*, *id.* at 101; United States v. Landerman, 109 F.3d 1053 (5th Cir. 1997).
188. 109 F.3d 1053 (5th Cir. 1997).
189. *Id.* at 1061.
190. *Id.*
191. *Id.* at 1062.
192. *Id.*
193. *Id.*
194. 326 F.3d 210 (3d Cir. 2003).
195. *Id.* at 212.
196. *Id.* at 213.

with the government.[197] However, the district court "substantially restricted" defense counsel's efforts to do so.[198]

The first witness, Sylvester, had dealt about five kilos of cocaine, but was charged with only a three-ounce sale in exchange for his cooperation with the government.[199] During cross-examination, Sylvester testified "that he could have been charged for trafficking in much larger quantities" than the three ounces that he was ultimately charged for.[200] The second witness, Yearwood, had pleaded guilty to trafficking anywhere from fifteen to fifty pounds of cocaine.[201] Yearwood had not yet been sentenced at the time of the defendant's trial, but testified that she hoped her sentence would be reduced for agreeing to testify against the defendant.[202] The district court denied defense counsel the opportunity to ask the witnesses what sentences they had avoided and hoped to avoid in exchange for cooperating with the government.[203]

The Third Circuit found that the jury would have received a "significantly different impression" of Chandler's co-conspirators had her counsel been permitted to expose the "magnitude" of their potential sentence reductions.[204] The court concluded that excluding information about these reductions, which would "expose to the jury the facts from which [they] . . . could appropriately draw inferences" about the co-conspirators' credibility, violated the Sixth Amendment's Confrontation Clause.[205] The court acknowledged that exposing the jury to information about the witnesses' potential sentences could lead to nullification, but found that nullification is outweighed by the defendant's right to cross-examine.[206]

3. The Ninth Circuit

More recently, the Ninth Circuit followed this line of reasoning in an en banc decision, finding constitutional error when the district court disallowed defense counsel to explore a cooperating witness's

197. *Id.* at 216.
198. *Id.*
199. *Id.* at 216–17.
200. *Id.* at 217.
201. *Id.*
202. *Id.*
203. *Id.* at 218.
204. *Id.* at 222.
205. *Id.*
206. *Id.* at 223.

mandatory minimum life sentence.[207] In *United States v. Larson*,[208] four defendants—Poitra, Lamere, Larson, and Laverdure—were each charged with one count of conspiracy to possess with intent to distribute methamphetamine.[209] Poitra and Lamere pleaded guilty and agreed to cooperate with the government.[210] In light of his two prior felony drug convictions, Lamere faced a mandatory minimum sentence of life without the possibility of release.[211] Poitra faced a mandatory minimum of five years.[212]

The district court shut down defense counsel's attempts to solicit information about the witnesses' respective mandatory sentences.[213] The Ninth Circuit held that the restriction of Poitra's cross-examination about her five-year mandatory minimum was warranted and did not violate the defendants' confrontation rights because defense counsel had a chance to "adequately explore [her] motivation to lie."[214] In contrast, inquiring into Lamere's mandatory minimum life sentence "would [have] reveal[ed] to the jury Lamere's potential biases and motivations for testifying against [the] Defendants," and therefore contained significant probative value.[215] The Court further explained that:

> The potential maximum statutory sentence that a cooperating witness *might* receive, however, is fundamentally different from the *mandatory* minimum sentence that the witness *will* receive in the absence of a motion by the Government. The former lacks significant probative force because a defendant seldom receives the maximum penalty permissible under the statute of conviction. In contrast, the fact that here a cooperating witness faced a mandatory life sentence without the possibility of release in the absence of a government motion is highly relevant to the witness*'* credibility. It is a sentence that the witness knows *with certainty* that he will receive unless he satisfies the

207. United States v. Larson, 495 F.3d 1094, 1107 (9th Cir. 2007).
208. 495 F.3d 1094 (9th Cir. 2007).
209. *Id.* at 1097.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 1099.
214. *Id.* at 1103.
215. *Id.* at 1104.

> government with substantial and meaningful cooperation so that it will move to reduce his sentence.[216]

V. LIMITING THE CROSS-EXAMINATION OF GOVERNMENT WITNESSES LIMITS JURIES' ROLES AND DEFENDANTS' SIXTH AMENDMENT RIGHTS

[E]specially broad latitude should be afforded the questioning of an accomplice now acting as a government witness which concerns "the nature of any agreement he has with the government or any expectation or hope that he will be treated leniently in exchange for his cooperation."[217]

The underlying purpose of the Confrontation Clause together with the means and methods by which the government obtains cooperating witnesses leads to the following conclusion: the majority view is severely flawed. First, limiting extensive cross-examination of witnesses' cooperation agreements prevents the jury from adequately assessing the magnitude of witnesses' biases and credibility. Second, district courts place these limitations without a proper application of Federal Rule of Evidence 403, which provides that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . prejudice."[218] This results in a conclusory declaration that jury nullification is a substantial risk that outweighs the probative value of the evidence. Finally, these limitations violate criminal defendants' Sixth Amendment confrontation rights.

The following sections will explain why the majority's approach infringes on defendants' Sixth Amendment rights, and how jury nullification is a trivial concern that is substantially outweighed by the probative value of cooperation agreement evidence.

A. Jury Nullification: The Lesser of Two Evils

The majority has voiced the concern that when juries are informed of the specific sentences witnesses have avoided or hope to avoid by testifying, they attribute those sentences to the defendant and nullify as a result.[219] These courts' decisions to limit cross-

216. *Id*. at 1106 (footnotes omitted).
217. United States v. Lynn, 856 F.2d 430, 433 (1st Cir. 1988).
218. FED. R. EVID. 403.
219. *See* United States v. Dimora, 843 F. Supp. 2d 799, 843 (N.D. Ohio 2012).

examination rest largely upon this proposition. However, the courts fail to account for a host of questions that accompany such a broad statement. What factors in a criminal case account for jury nullification? And most importantly, how often do those factors actually contribute to nullification?

Multiple studies have shown that jury nullification is not as common as critics contend.[220] A study conducted by scholars at the National Center for State Courts gathered data from 372 felony jury trials in the Bronx, Los Angeles, Phoenix, and Washington D.C.[221] The data revealed that the jury nullified in only 0.5 percent of the cases in which there was strong prosecution evidence but "low juror perceptions of legal fairness," and in only 2 percent of the cases in which there was ambiguous evidence.[222] An Oxford University study of more than 300 jury trials concluded that juries generally acquit due to the prosecution's failure "to provide enough information or to present it in court in a way that would convince" the jury "of the defendant's guilt."[223] Thus, it appears that the driving force behind jury nullification is the prosecution's flawed case presentation.

Jury nullification exists despite strong evidence of guilt, but is "limited and principled."[224] For example, juries may nullify when "defendants are arrested for protesting an immoral war, physically disabling a would-be murderer, or assisting the suicide of a terminally ill patient."[225] Juries also nullify where a case "involve[s] a serious offense, a young victim, and an unemployed defendant."[226] Even so, those "deviations [are] not excessive[,] . . . widespread, nor routine."[227]

What is more, courts have at their disposal various methods by which to prevent or mitigate the risk of nullification. For example, judges may provide an instruction that "the jury must impartially apply and follow the law, no matter what."[228] Courts may also prohibit

220. DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 70–71 (2012).
221. *Id.* at 71.
222. *Id.*
223. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 154 (1986).
224. *Id.*
225. DEVINE, *supra* note 220, at 69.
226. HANS & VIDMAR, *supra* note 223, at 154.
227. *Id.*
228. Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1110 (2014) (citing Lawrence W. Crispo, et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 56 (1997)).

counsel from making any mention of a jury's right to nullify in closing arguments.[229] Extensive voir dire examination to filter jurors likely to engage in nullification is also a viable option.[230]

Additionally, as further discussed in Part V.B, *infra*, principled nullification is sometimes necessary and fulfills the jury's democratic function in acting as a check on the government. Indeed, the Supreme Court has found "that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created."[231] Thus, the majority's concern that comprehensive cross-examination of witnesses' cooperation agreements results in jury nullification is without merit.

B. Probative Value & The Jury's Dual Function

"The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."[232]

The Sixth Amendment provides criminal defendants another vital guarantee: the right to a jury trial.[233] Juries are meant to perform both communitarian and democratic functions.[234] As representatives of the public, juries "participate in the administration of justice"[235] by carrying the "shared responsibility" of determining a criminal defendant's "guilt or innocence."[236] This determination rests heavily upon weighing the credibility and potential biases of testifying witnesses. In fact, jury deliberation is one of the most critical methods through which witness credibility is tested.[237]

229. *Id*. (citing Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68, 89–94 (2002)).

230. *Id.* at 1111 (citing Lawrence W. Crispo, et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 54–55 (1997)).

231. Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

232. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

233. U.S. CONST. amend. VI.

234. Jenny Carroll, *The Jury as a Democracy*, 66 ALA. L. REV. 825, 830 (2015).

235. Powers v. Ohio, 499 U.S. 400, 406 (1991).

236. Brown v. Louisiana, 447 U.S. 323, 330 (1980) (quoting Williams v. Florida, 399 U.S. 78, 87 (1970)).

237. Davis v. Alaska, 415 U.S. 308, 318 (1974).

The Supreme Court declared that the right to a jury trial is "granted . . . in order to prevent oppression by the Government."[238] As a democracy, criminal juries provide "indispensable protection against the possibility of governmental oppression."[239] Serving on a jury instills in the public a "conscious duty" to "guard the rights" of parties and "prevent [the] arbitrary use or abuse" of the criminal justice system.[240] Juries provide a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[241] At its core, a criminal jury makes "judicial or prosecutorial unfairness less likely."[242]

A government witness that poses the danger of providing unreliable testimony is the prime example of a threat that juries are meant to police.[243] Courts alert juries to the possibility of untruthful witnesses. For example, the Ninth Circuit model instructions provide that "the witness's interest in the outcome of the case . . . the witness's bias or prejudice . . . [and] any other factors that bear on believability" should be considered in giving weight to testimony.[244] Similarly, the Sixth Circuit model instructions urge the jury to consider whether "the witness had any relationship to the government or the defendant, or anything to gain or lose from the case . . . any bias, or prejudice, or reason for testifying that might cause the witness to lie or slant the testimony in favor of one side or the other."[245]

Moreover, juries are often advised to "consider . . . with more caution" testimony where the witness has immunity or is an

238. Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

239. *Brown*, 447 U.S. at 330 (citing *Williams*, 399 U.S. at 87) ("[T]he concept of relying on a body of one's peers to determine guilt or innocence [is] a safeguard against arbitrary law enforcement.").

240. *Powers*, 499 U.S. at 406–07 (citation omitted); Balzac v. Porto Rico, 258 U.S. 298, 310 (1922).

241. *Duncan*, 391 U.S. at 156.

242. *Id.* at 158; *see also* Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1253 (1995) ("Supreme Court jurisprudence demonstrates that jury-control practices that seek to limit the jury's role to mere factfinder . . . [are] impermissible in the criminal context if they interfere with the jury's political function under the Sixth Amendment as buffer against potential governmental abuses.").

243. NATAPOFF, *supra* note 97, at 76 ("[T]he jury remains one of the American system's most important checks on informant reliability.").

244. Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* 8 (Dec. 2017), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2017_12.pdf.

245. Sixth Circuit Committee on Pattern Criminal Jury Instructions, *Pattern Criminal Jury Instructions* (Dec. 20. 2017), http://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/crmpattjur_full.pdf.

accomplice or codefendant with a cooperation agreement.[246] Judges even inform the jury that such witnesses "may have a reason to make a false statement in order to strike a good bargain with the Government."[247]

Notwithstanding these guidelines, the majority of U.S. courts still decline to provide the jury with the tools necessary to properly conduct such a cautionary assessment. For a jury to fully determine the magnitude of a particular witness's credibility and bias, it must be supplied with *all* information with which it can make an informed-decision. And if a jury is to combat "judicial or prosecutorial unfairness,"[248] revealing a witness's cooperation agreement with the government provides a crucial method in doing so. Thus, it defeats logic to assume that information about witnesses' sentence reductions or charge alterations lacks the requisite probative value necessary for admission into evidence.

Suppose there are two cooperating witnesses that provide conflicting testimonies. One witness testifies in exchange for the reduction of a mandatory minimum 25-year sentence, whereas the other witness hopes to avoid a mandatory maximum 5-year sentence. The first witness, who knows that he certainly faces 25 years behind bars, clearly has a stronger incentive to ensure his testimony "pleases" the prosecutor. Conversely, the other witness knows that he will probably receive even less than the maximum 5-year sentence, and might be less likely to lie as a result.[249] Assuming both witnesses are credible in all other respects, how can the jury determine which testimony to afford more weight? Clearly, such information directly speaks to motive, bias, and prejudice.[250]

246. Judicial Council of the United States Eleventh Judicial Circuit, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* (2016), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructions2016Rev.pdf.

247. *Id.*

248. Duncan v. Louisiana, 391 U.S. 145, 158 (1968).

249. *See* United States v. Larson, 495 F.3d 1094, 1106 (9th Cir. 2007) (finding that mandatory minimum sentences lack minimum force because defendants "seldom" receive the maximum sentence permissible).

250. This is not to suggest that witnesses' sentences or punishments directly correlate with their truthfulness on the stand. Detailed information about cooperation agreements should be used in conjunction with a juror's "common sense" and "everyday experience," as well as other indicators of credibility, including the witness's memory, demeanor, and consistency of the testimony. *See* United States v. Larson, 495 F.3d 1094, 1106 (9th Cir. 2007). However, "common sense" dictates that a witness has a lot to lose if his cooperation agreement fails, and thus, his incentive to stretch the truth may significantly increase.

The risk posed by prohibiting the admission of such evidence is even more elevated when the conflicting testimonies are those of the defendant and the cooperating accomplice. *Brown v. Powell*[251] is illustrative. There, the defendant, Brown, and the prosecution's main witness, Warner, were involved in the murder of Watson.[252] According to Brown, the two visited Watson in his apartment.[253] When an argument ensued between Watson and Warner, Brown interfered.[254] Watson hit Brown, and in response, Brown struck Watson on the head "several times."[255] Warner and Brown then dragged Watson to his car, placed him in the trunk, drove him to a nearby river, and threw his body into the river.[256] At this point Watson was still alive, but he later drowned.[257] Brown was ultimately charged with first-degree murder and Warner was charged with accomplice to first-degree murder, which carries the same sentence.[258] Pursuant to a cooperation agreement, Warner pleaded guilty to manslaughter and accepted a 15 to 30-year maximum prison sentence.[259]

At trial, "Warner testified that he never fought with Watson."[260] Brown repudiated his police statement and stated that "because he feared Warner, he had falsely told the police that he, not Warner, was the chief offender."[261] Thus, their testimonies became directly conflicting. On cross-examination, Warner admitted that he currently faced a 15 to 30-year maximum sentence for manslaughter, and that he knowingly avoided a first-degree charge.[262] The trial court, however, did not allow defense counsel to ask Warner what penalty first-degree murder entailed.[263] The First Circuit Court of Appeals affirmed, finding that the jury was presented with "ample evidence" to assess Warner's credibility.[264]

251. 975 F.2d 1 (1st Cir. 1992).
252. *Id.* at 2–3.
253. *Id.* at 2.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 2–3.
258. *Id.* at 3.
259. *Id.*
260. *Id.*
261. *Id.* at 6.
262. *Id.* at 4.
263. *Id.*
264. *Id.* at 5–6.

While the jury was presented extensive evidence alluding to Warner's possible biases, the trial judge struck evidence that arguably "mattered most."[265] The fact that Warner's alternative to the manslaughter charge was life in prison without parole could have alerted the jury to the possibility that Warner's testimony was untruthful, and that he shifted all of the blame onto Brown.

Brown and its progeny demonstrate that evidence of cooperating witnesses' sentence reductions or charge alterations carries probative value insofar as it assists the jury in performing its dual function.

Limiting this inquiry paints an incomplete picture and restricts the jury's ability to perform its communitarian function and assess witness credibility and bias. More importantly, preventing the jury from obtaining full disclosure of a witness's cooperation agreement severely thwarts its democratic function. This is especially concerning given that prosecutors choose their witnesses carefully and strategically, and that plea deals are subject to withdrawal by the prosecutor. A jury cannot act as a check on the prosecutor's abusive practices without a complete understanding of those practices. In fact, in *Hoffa v. United States*[266] the Supreme Court upheld the constitutionality of the use of cooperating witnesses in large part because it found the jury and cross-examination are "established safeguards of the Anglo-American legal system" and shields against the practice's many shortcomings.[267]

Finally, to the extent that a jury might nullify upon learning this information, nullification in that context is perhaps essential in fulfilling the jury's democratic function. Considering the broad discretion that police and prosecutors have in pressing charges and recruiting witnesses and the "very little review" their discretion undergoes, nullification may "weed out inappropriate prosecutions where police and prosecutors failed to do so."[268] Thus, in almost all circumstances, the threat of jury nullification posed by detailed information about cooperation agreements is substantially outweighed by its probative value.

265. *Id.* at 7.
266. 385 U.S. 293 (1966).
267. *Id.* at 311.
268. *See* McKnight, *supra* note 228, at 1127.

C. The Van Arsdall *Test and the Unconstitutionality of the Majority View*

The test articulated in *Delaware v. Van Arsdall* provides strong support to the minority view that limiting cross-examination about cooperation agreements is a violation of the supreme right of confrontation.[269] As demonstrated *supra*, extensive cross-examination about cooperation agreements is "otherwise appropriate"[270] insofar as the risk for jury nullification is outweighed by its probative value and falls within the permissible scope of Federal Rule of Evidence 611.[271] The minor risks that such cross-examination poses "must fall before the right of [a criminal defendant] to seek out the truth in the process of defending himself."[272]

In addition, cooperating witness testimony contains a "prototypical form of bias"[273] since it is precisely this type of witness that presents a risk of providing untruthful testimony.[274] Finally, by limiting such cross-examination, courts prevent defendants from "expos[ing] to the jury the facts from which" juries may assess the "reliability of the witness."[275] Thus, cross-examination of government witnesses with respect to their cooperation agreements certainly falls within the "constitutionally required threshold level of inquiry" that must be "afforded [to a] defendant."[276]

VI. PROPOSAL

"[T]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails."[277]

Courts should establish a uniform rule that allows defendants to comprehensively cross-examine government witnesses about their cooperation agreements; specifically, defendants should be permitted to inquire about the precise sentences and/or charges that witnesses avoided or hoped to avoid by cooperating with the government. Such

269. *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).
270. *See id.*
271. FED. R. EVID. 611 ("Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility.").
272. *See* Davis v. Alaska, 415 U.S. 308, 320 (1974).
273. *See Van Arsdall*, 475 U.S. at 680.
274. NATAPOFF, *supra* note 97, at 70.
275. *See Van Arsdall*, 475 U.S. at 680.
276. *See* Brown v. Powell, 975 F.2d 1, 8 (1st Cir. 1992) (Pollak, J., dissenting).
277. Lee v. Illinois, 476 U.S. 530, 540 (1986).

a rule will create consistency in criminal trials across the nation and afford defendants "so vital a constitutional right [to expose the] . . . bias of an adverse witness."[278] Exposing the bias of cooperating witnesses will be beneficial for the jury in determining what weight to afford witness testimony in the process of deciding a defendant's guilt or innocence.

A uniform rule will also safeguard defendants from prosecutors' autonomous powers in charging and securing cooperation agreements. It is undisputable that the government has the upper hand in obtaining witnesses. In fact, defendants, unlike the government, are not able to secure a cooperation deal in exchange for testimony.[279] This rule would balance the playing field. Defendants would be able to expose any relevant information that may alert the jury of overreaching by prosecutors and "assur[e] that individuals whose conduct is unlawful, yet less than fully blameworthy, do not get punished unjustly."[280] In addition, if prosecutors know that cooperation agreements will undergo scrutiny from the jury, they would likely exercise more caution and fairness in the process of obtaining cooperating witnesses. Hence, the gains from establishing a uniform rule heavily outweigh any of its possible shortcomings.

To offset the concern that juries might confuse the issues or nullify, courts should provide limiting jury instructions. These instructions should inform jurors that such information should be used solely for the purpose of evaluating credibility, bias, and prejudice. Judges might also mandate that jurors avoid presuming a defendant's sentence based upon the information they learn about a witness's agreement. Finally, jurors should be reminded that it is the defendant who is on trial, not the cooperating witness.

VII. CONCLUSION

There is a split among the U.S. circuit courts regarding the permissible scope of cross-examination with respect to government witnesses.[281] The majority view is that defendants should not be permitted to cross-examine cooperating witnesses about the precise

278. *See* Davis v. Alaska, 415 U.S. 308, 320 (1974).

279. NATAPOFF, *supra* note 97, at 49.

280. Sauer, *supra* note 242, at 1255 (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 308 (1971)).

281. *See* United States v. Dimora, 843 F. Supp. 2d 799, 843 (N.D. Ohio 2012).

benefits they hope to gain in exchange for testifying.[282] The minority view is that preventing defendants from inquiring about the details of cooperation agreements violates their Sixth Amendment confrontation rights.[283]

This Note argues that in addition to a constitutional violation, such prohibition distorts the function of the jury, and gives more discretion to the prosecutor. This Note also proposes establishing a uniform rule: defendants must be given the full opportunity to cross-examine government witnesses about their cooperation agreements. Limiting jury instructions should be provided to address any potential concerns that this rule would raise. Hopefully, the Supreme Court will resolve this issue accordingly in its upcoming terms.

282. *Id.*
283. *Id.*