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## ARTICLE

### SIXTH AMENDMENT LIMITATIONS PLACED ON CROSS-EXAMINATION OF AN ACCOMPLICE-TURNED- GOVERNMENT-WITNESS

*M. Jackson Jones Esq., M.S.*<sup>†</sup>

#### I. INTRODUCTION

*Alfred Pennyworth: I suppose they'll lock me up as well. As your accomplice . . . .*

*Bruce Wayne: Accomplice? I'm going to tell them the whole thing was your idea.*<sup>1</sup>

The federal courts of appeals are currently split over whether the Sixth Amendment's Confrontation Clause<sup>2</sup> is violated when a defendant is not allowed to cross-examine an accomplice-turned-government-witness about the specific penalty reduction the accomplice believed he or she would receive for testifying for the government and against the defendant.<sup>3</sup> This split that began in the 1980s has existed for nearly thirty years. Courts of appeals have fallen on one side or the other of the question of whether prohibiting inquiry into an accomplice's subjective beliefs violates the Confrontation Clause.<sup>4</sup> This Article argues that prohibiting such inquiry violates the Confrontation Clause.

Part II of this Article examines the early history of the Confrontation Clause, particularly cases and events that led to the adoption of the clause. Part III discusses some opinions from federal courts of appeals that have

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1. THE DARK KNIGHT (Warner Bros. Pictures 2008).
2. U.S. CONST. amend. VI.
3. See *United States v. Chandler*, 326 F.3d 210, 220 (3d Cir. 2003).
4. See *United States v. Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995). *But see Chandler*, 326 F.3d at 210; *United States v. Turner*, 198 F.3d 425 (4th Cir. 1999). The remaining federal courts of appeals are either undecided on the issue or have not addressed it.

addressed this issue. Part IV analyzes relevant Supreme Court precedent, the admissibility of accomplice statements, and the Federal Rules of Evidence.

## II. THE SIXTH AMENDMENT

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . 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.*<sup>5</sup>

The Bill of Rights conferred a host of additional constitutional protections in 1791, but many of these rights, including those relating to criminal prosecutions under the Sixth Amendment, have historical roots reaching back throughout history. “The inspiration for the Confrontation Clause likely derived from the English system, but the concept of ‘facing the accusers against you’ can be seen in the works of William Shakespeare and the *Bible*.”<sup>6</sup> For example, Shakespeare wrote in *Richard II*, “[t]hen call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .”<sup>7</sup>

Similarly, in *Acts 25*, the Apostle Paul was charged with several crimes.<sup>8</sup> Though Paul’s accusers wanted him sentenced to death,<sup>9</sup> Festus, the Roman governor of Judea, refused to sentence the Apostle without allowing him to face his accusers.<sup>10</sup> Festus declared, “[i]t 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.”<sup>11</sup>

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5. U.S. CONST. amend. VI (emphasis added to highlight the Confrontation Clause).

6. Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 765 (2000).

7. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (quoting WILLIAM SHAKESPEARE, *RICHARD II* act 1, sc. 1).

8. *Acts 25:7* (NIV).

9. *Acts 25:1-3* (NIV).

10. *Acts 25:1-6* (NIV).

11. *Coy*, 487 U.S. at 1015-16 (citing *Acts 25:16*).

The Roman Emperor Trajan faced the same confrontation issues during the Empire's prosecution of Christians.<sup>12</sup> He ruled, "anonymous accusations must not be admitted in evidence as against anyone, as it is introducing a dangerous precedent, and out of accord with the spirit of our times."<sup>13</sup>

Confrontation issues continued to proliferate throughout the sixteenth and seventeenth centuries. For example, English court officials, such as justices of the peace, examined witnesses prior to trial.<sup>14</sup> "These examinations were sometimes read in court in lieu of live testimony, a practice that 'occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face.'"<sup>15</sup>

Parties raised such demands in a number of British cases. In 1554, Sir Nicholas Throckmorton stood trial for treason.<sup>16</sup> The court would not allow Throckmorton to have an attorney, call witnesses, or present any defense.<sup>17</sup> During his trial that lasted one day, Throckmorton objected to the prosecution's use of a missing witness's deposition.<sup>18</sup> He stated, "how happeneth it he is not brought face to face to justify this matter . . . ."<sup>19</sup> Throckmorton's objection was unsuccessful, and he was convicted.

Nearly fifty years after Throckmorton's case, the confrontation issue was raised again during the trial of Sir Walter Raleigh. His trial was perhaps the most famous confrontation case in British history.

In 1603, Raleigh stood trial for treason.<sup>20</sup> During his trial, the prosecution read letters from Raleigh's alleged accomplice, Lord Cobham,<sup>21</sup> as well as Cobham's examination before the Privy Council.<sup>22</sup> In both the examination and the letter, Cobham implicated Raleigh.<sup>23</sup> Raleigh

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12. Daniel H. Pollit, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959).

13. *Id.*

14. *Crawford v. Washington*, 541 U.S. 36, 43 (2003).

15. *Id.*

16. Robert J. McWhirter, *How the Sixth Amendment Guarantees You the Right to a Lawyer, A Fair Trial, and a Chamber Pot*, ARIZ. ATT'Y, Dec. 2007, at 17 n.3.

17. *Id.*

18. David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 371 (2002).

19. *Id.*

20. *Crawford*, 541 U.S. at 44.

21. *Id.*

22. *Id.*

23. *Id.*

adamantly protested the introduction of these two items, arguing that a desire to obtain the King's favor motivated Cobham's accusations.<sup>24</sup> Raleigh stated, "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour."<sup>25</sup> Raleigh also demanded Cobham be brought to court to testify personally against him.<sup>26</sup> He said, "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ."<sup>27</sup> The trial judge did not grant Raleigh's demands and instead sentenced Raleigh to death.<sup>28</sup>

In the wake of Sir Walter Raleigh's unjust trial, Parliament made face-to-face confrontation mandatory for the prosecution of certain crimes.<sup>29</sup> "For example, treason statutes required witnesses to confront the accused 'face to face' at his arraignment."<sup>30</sup> Parliament also changed the rules for admitting evidence from witnesses who were unavailable to testify.<sup>31</sup> For example, in the 1696 case of *King v. Paine*, the court held that a deceased witness's testimony could not be used against a defendant when the defendant did not receive an opportunity to cross-examine the witness.<sup>32</sup>

#### A. *The Colonial Roots of the Confrontation Clause*

The American colonies also faced their own confrontation issues.<sup>33</sup> The Virginia Council "protested against the Governor for having 'privately issued several commissions to examine witnesses against particular men *ex parte*,' complaining that 'the person accused is not admitted to be confronted with, or defend himself against his defamers.'"<sup>34</sup> The colonists sought to remedy such governmental behavior by including constitutional provisions granting defendants the right to confront their accusers.

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* One of Raleigh's judges even said, "[t]he justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 46.

34. *Id.* at 47.

For example, Article XII of the Massachusetts Declaration of Rights states, “every subject shall have a right . . . to meet the witnesses against him face to face . . . .”<sup>35</sup> This same notion appears in Article I, Section XV of the New Hampshire State Constitution and Section IX of the Pennsylvania Declaration of Rights.<sup>36</sup>

Other state constitutions granted defendants the right to confront their accusers without using face to face terminology. For example, the Maryland Declaration of Rights provides “[t]hat in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him.”<sup>37</sup> The North Carolina State Constitution and the Virginia Declaration of Rights have similar provisions.<sup>38</sup>

Interestingly, the proposed federal Constitution almost did not contain the Confrontation Clause.<sup>39</sup> However, it became a part of the Constitution after legislators advocated for its adoption.<sup>40</sup>

#### B. *The International Response*

Other nations adopted constitutional provisions that are very similar to the Sixth Amendment’s Confrontation Clause. The Philippine Bill of Rights, for example, has been interpreted as “secur[ing] the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination.”<sup>41</sup> The Japanese Constitution also has a provision that states “[the accused] ‘shall be permitted full opportunity to examine all witnesses . . . .’”<sup>42</sup>

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35. MASS. CONST. pt. 1, art. XII.

36. See N.H. CONST. pt. I, art. XV (“Every subject shall have a right . . . to meet the witnesses against him face to face . . . .”); see also PA. CONST. art. I, § IX (“That in all prosecutions for criminal offences, a man hath a right . . . to be confronted with the witnesses [against him] . . . .”).

37. MD. CONST. Declaration of Rights art. XXI.

38. See VA. DECLARATION OF RIGHTS § 8 (1776) (“[A] man hath a right to . . . be confronted with the accusers and witnesses . . . .”); see also N.C. CONST. art. I, § 23 (“[I]n all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony . . . .”).

39. *Crawford*, 541 U.S. at 48.

40. *Id.* at 48-49.

41. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

42. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 37, para. 1 (Japan).

## III. THE FEDERAL CIRCUIT SPLIT

Federal courts vary in their application of the Confrontation Clause, and several circuits are split on an issue concerning the subjective intent of the witness. The confusion arises when determining whether the accused has a Sixth Amendment right to interrogate a witness concerning the subjective reasons behind a witness's acceptance of a plea agreement and the subsequent impact on the witness's willingness to testify.

A. *The First Circuit Court of Appeals' View in United States v. Luciano-Mosquera: No Confrontation Clause Violation if a Defense Attorney Cannot Inquire Into an Accomplice's Subjective Understanding of His or Her Plea Agreement With the Government*

Carlos Pan-San-Miguel ("Miguel"), Edgar Gonzalez-Valentin, Raul Lugo-Maya, Rafael Pava-Buelba, and Julio Luciano-Mosquera were found guilty of various drug offenses.<sup>43</sup> During Miguel's trial, one of his co-accomplices, Jonas Castillo-Ramos ("Ramos"), testified against him and for the government.<sup>44</sup> In return for Ramos's testimony, the government did not pursue firearm charges against him.<sup>45</sup>

Miguel's attorney attempted to cross-examine Ramos about the penalties Ramos would have faced if the government pursued the firearm charges.<sup>46</sup> Specifically, the defense attorney attempted to ask Ramos "whether [Ramos's] attorney had informed him that if he had been 'found guilty of the possession of the firearm during the commission of a drug offense [he would be] sentenced to thirty-five years in addition to the drug offense.'"<sup>47</sup> The judge did not allow this question.<sup>48</sup>

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43. *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1148 (1st Cir. 1995). The five defendants were found guilty of conspiracy to import cocaine, importing 232.8 kilograms of cocaine, possessing cocaine with intent to distribute, and knowingly carrying or aiding and abetting the carrying of firearms in relation to the drug trafficking. *See id.*

44. *Id.* at 1153.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* (noting that the trial judge ruled that informing the jurors about the possible penalties Ramos faced was an attempt to inform jurors about the penalties Miguel faced for violating the same firearm statute).

On appeal, Miguel argued that the judge's ruling violated his Sixth Amendment rights under the Confrontation Clause.<sup>49</sup> The First Circuit Court of Appeals agreed with the trial judge's ruling.<sup>50</sup> It noted that the trial court has discretion to limit cross-examination that may be prejudicial, repetitive, or irrelevant.<sup>51</sup> Additionally, the court stated that a trial judge does not exceed this discretion as long as the jury had enough evidence to "make a discriminating appraisal of the possible biases and motivations of the witnesses."<sup>52</sup>

In this case, the court believed the jury had sufficient information to make a discriminating appraisal of Ramos's biases. It recognized that Miguel's attorney was allowed to repeatedly ask Ramos about any benefits the government provided him for testifying.<sup>53</sup> The court believed that informing the jury of the number of years Ramos avoided was of very minimal value. It wrote, "[t]he district court properly decided that the value of the information was outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing."<sup>54</sup>

*B. Alternative Views: Confrontation Clause Violation If A Defense Attorney Cannot Inquire Into An Accomplice's Subjective Understanding Of His Or Her Plea Agreement With The Government*

Other circuits have rejected the First Circuit's view that there is minimal value in allowing the jury to hear the benefits bestowed on the witness for his or her testimony. These courts consider preventing a jury from hearing the consequences that will be imposed on the witness for not testifying as problematic. This information, they contend, is necessary for the jury to understand any bias or prejudice, and to determine what weight such testimony should be given.

1. The Fourth Circuit Court of Appeals: *United States v. Turner* (1999)

Eric Michael Turner was convicted of "engaging in a continuing criminal enterprise; intentionally killing an individual while engaging in a continuing criminal enterprise; interstate travel in aid of a racketeering

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* (quoting *Brown v. Powell*, 975 F.2d 1, 5 (1st Cir. 1992)).

54. *Id.* at 1153.



enterprise; and using and carrying a firearm during a crime of violence.”<sup>55</sup> On appeal, Turner argued that the trial court inappropriately limited his cross-examination of an accomplice-turned-government-witness, Denise Grantham.<sup>56</sup>

During his trial, Turner’s defense attorney attempted to cross-examine Grantham about the penalties she faced for participating in the murder. The following exchange took place:

[Turner’s attorney]: So your choices were to talk with the police or be indicted for continuing criminal enterprise and for murder; is that right?

[Grantham]: Yes.

[Turner’s attorney]: Did you have some idea what the penalties might be at that time?

[Grantham]: My understanding was . . . .<sup>57</sup>

The prosecution objected, asserting that the penalties were not relevant. The judge refused to allow Grantham to answer the question because the judge believed her answer would inform jurors of the penalties Turner faced.<sup>58</sup> Instead, Grantham was only permitted to state that the penalties she faced were “pretty serious.”<sup>59</sup>

The Fourth Circuit reversed the trial judge’s ruling, holding that an accomplice-turned-government-witness could be cross-examined about the accomplice’s subjective understanding of the penalties he would face if the accomplice did not testify for the prosecution.<sup>60</sup> The court believed that this information helped defense attorneys establish an accomplice’s bias, prejudice, and motive for testifying against his co-accomplice.<sup>61</sup> The court therefore ruled that such information was relevant in helping the jury assess the accomplice-turned-government-witness’s credibility.<sup>62</sup>

In addition, the Fourth Circuit was not concerned with the jury learning about the penalties Turner faced. It instead held that the “impeachment value of Grantham’s testimony” outweighed any of these concerns.<sup>63</sup>

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55. *United States v. Turner*, 198 F.3d 425, 427 (4th Cir. 1999).

56. *Id.* at 429.

57. *Id.*

58. *Id.*

59. *Id.* at 430.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

2. The Third Circuit Court of Appeals: *United States v. Chandler* (2003)

Linda Lee Chandler was convicted of drug trafficking and sentenced to 121 months imprisonment.<sup>64</sup> During Chandler's trial, two accomplices, Sly Sylvester and Kathleen Yearwood, testified against her for the prosecution.<sup>65</sup> Chandler's attorney "attempted to cross-examine Sylvester about the sentence reduction he had received, and to cross-examine Kathleen Yearwood about the reduction she hoped to receive, in exchange for their guilty pleas and cooperation."<sup>66</sup> The trial judge limited Chandler's attorney's inquiry to the accomplices' subjective beliefs.

(a) Sylvester's Testimony

Sylvester admitted that he was testifying pursuant to a plea agreement.<sup>67</sup> Since Sylvester testified against Chandler, the government "limited the charges against him to those associated with the three-ounce cocaine sale . . ." even though Sylvester admitted to selling nearly five kilograms of cocaine.<sup>68</sup> Instead of being imprisoned for twelve to eighteen months, as recommended by the Sentencing Guidelines, Sylvester's cooperation resulted in a sentence of one month of house arrest and probation.<sup>69</sup>

The following is an excerpt from the cross-examination of Sylvester:

[Chandler's Attorney]: Did anyone explain to you what the penalties for five kilos is under the guidelines?

[United States Attorney]: Your Honor, I object to these questions regarding the penalties for five kilos.

[The Court]: Okay. Penalties should not be discussed in the case, I would agree.

[Chandler's Attorney]: All right.

[Chandler's Attorney]: Did they ever—well, was it explained to you that it was much more serious, that the Government actually gave you a break by charging you this small amount?

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64. *United States v. Chandler*, 326 F.3d 210, 213 (3d Cir. 2003).

65. *Id.*

66. *Id.* at 216.

67. *Id.*

68. *Id.* at 216-17 (noting that during his testimony, Sylvester acknowledged that he could have been charged with trafficking cocaine).

69. *Id.* at 217.

[Sylvester]: That's a great question because they only had me on three ounces. That's what they said the terms of this would be 12 to 18. I am not so sure exactly of your question. Would you want me to say to you that the bigger you sell, the more you sell, the more penalty? Well, of course.

[Chandler's Attorney]: Okay. At the time you sold that three ounces, you had been dealing for awhile, hadn't you?

[Sylvester]: Yes, sir.<sup>70</sup>

(b) Yearwood's Testimony

Prior to testifying, Yearwood pled guilty to trafficking between fifteen to fifty kilograms of cocaine, but she had not been sentenced.<sup>71</sup> She testified in hopes "that the government would move for a reduced sentence against her."<sup>72</sup>

Yearwood's cross-examination was similar to Sylvester's:

[Chandler's Attorney]: . . . You want to talk about Linda Chandler, is that correct?

[Yearwood]: Right.

[Chandler's Attorney]: Because you have an agreement, isn't that correct, and [the assistant United States Attorney] is going to, you hope, put in a motion to cut your time?

[Yearwood]: Yes.

. . .

[Chandler's Attorney]: Now you want to help yourself and help—because you are in serious trouble. You were dealing in multikilos. Yes or no?

[Yearwood]: I'm 50. No more than 50.

[Chandler's Attorney]: No more than 50 in this. But do you think you dealt more than 50?

[Yearwood]: No, I don't think so.

. . .

[Chandler's Attorney]: How many lie detector tests did the Government put you on?

[Yearwood]: None, but they can put me on them.

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70. *Id.*

71. *Id.*

72. *Id.*

[Chandler's Attorney]: Isn't that in your plea agreement letter?

[Yearwood]: Yes, it is.

[Chandler's Attorney]: But they haven't, and it's [the assistant United States Attorney] who is going to write that letter to this Judge to say that you're honest and forthright, so you are going to talk about Linda Chandler, is that correct?

[Yearwood]: No.

[Chandler's Attorney]: That's what you are here for today, to talk about Linda Chandler?

[Yearwood]: No, I'm here to tell the truth.

...

[Chandler's Attorney]: And you know that you're here, you're facing a heavy sentence—what did your attorney, Mr. Riester, tell you you're facing?

[United States Attorney]: Your honor, again I object to discussing the penalties here.

[The Court]: The objection is sustained. I think the point's been made that she knows by testifying she might get a reduction.

[Chandler's Attorney]: Okay. No other questions.<sup>73</sup>

### (c) The Court's Ruling

The Third Circuit ruled that the trial judge should have permitted Chandler's attorney to inquire into Sylvester and Yearwood's subjective understanding of their plea agreements with the government.<sup>74</sup> It stated, "a reasonable jury could have 'reached a significantly different impression' of Sylvester's and Yearwood's credibility had it been apprised of the enormous magnitude of their stake in testifying against Chandler."<sup>75</sup>

The court recognized that the jury heard that Sylvester pled guilty to a drug offense and could have received twelve to eighteen months imprisonment but only received house arrest and probation.<sup>76</sup> The court ruled that this information was insufficient to allow the jury to adequately weigh Sylvester's testimony. Instead, the court determined that the jury should have been told that Sylvester could have received eight years

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73. *Id.* at 218.

74. *Id.* at 222.

75. *Id.*

76. *Id.*

imprisonment instead of “the modest sentence he in fact received.”<sup>77</sup> Thus, it ruled “[t]he limited nature of Sylvester’s acknowledgment that he had benefitted from his cooperation made that acknowledgment insufficient for a jury to appreciate the strength of his incentive to provide testimony that was satisfactory to the prosecution.”<sup>78</sup>

Additionally, the court held that the jury was also entitled to learn about the benefits Yearwood hoped to receive.<sup>79</sup> Yearwood was facing a penalty of nearly twelve years imprisonment.<sup>80</sup> Since she testified in hopes of receiving a reduced sentence, the court stated that the jury was entitled to hear the sentencing reduction she expected to receive.<sup>81</sup> If Yearwood “anticipated a benefit equal to even a fraction of Sylvester’s proportionate penalty reduction, her mere acknowledgment that she hoped that the government would move for a lesser sentence did not adequately enable a jury to evaluate her motive to cooperate.”<sup>82</sup>

#### IV. DO DEFENSE ATTORNEYS’ DESERVE DEFERENCE? AN ANALYSIS

##### A. *A Broad Test*

The Supreme Court has held that “cross-examination is the principal means by which the believability of a witness and the truthfulness of his testimony are tested.”<sup>83</sup> Even though trial judges are given significant latitude to limit cross-examination, the Supreme Court has indicated that defense attorneys should be given broad leeway in examining an accomplice’s bias. In *Delaware v. Van Arsdall*, it recognized the test for determining if a defendant’s Confrontation Clause rights have been violated. The Supreme Court ruled:

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

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77. *Id.* (noting that according to the Sentencing Guidelines, the base offense level for a defendant convicted of trafficking between 3.5 and 5 kilograms of cocaine is between 97 and 121 months imprisonment).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

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

thereby “to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.”<sup>84</sup>

To prove a violation of the Confrontation Clause, therefore, a defendant merely has to show two things: (1) he was attempting to cross-examine an accomplice about any potential bias the accomplice has for testifying for the government, and (2) this bias would aid the jury in determining how much credit it should give to the accomplice’s testimony.<sup>85</sup>

The Supreme Court has given substantial deference to defense attorneys when they are seeking to expose an accomplice’s bias. In these cases, the Supreme Court ruled the limitations placed on cross-examination violated the Confrontation Clause.

The first illustration of this point was revealed by the Court in *Davis v. Alaska*. On February 16, 1970, over \$1,000 dollars and a safe were stolen from the Polar Bar.<sup>86</sup> Police found the safe about twenty-six miles outside of Anchorage, Alaska near the home of Jess Straight and his family.<sup>87</sup> Straight’s stepson, Richard Green, told the police that he saw “two Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was later discovered.”<sup>88</sup> Green identified Davis as one of the men standing near the Chevrolet.<sup>89</sup>

During Davis’s trial, Green was called as a witness.<sup>90</sup> Prior to his testifying, the prosecutor sought to prevent the defense attorney from using Green’s juvenile record for impeachment purposes.<sup>91</sup> Davis’s attorney informed the court that he would not use Green’s juvenile record to impeach his character.<sup>92</sup> Instead, the attorney wanted to show Green aided

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84. *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (quoting *Davis*, 415 U.S. at 318).

85. The Court has placed parameters on this rule. For example, the testimony solicited by the defense attorney must be in accord with Federal Rule of Evidence 403. FED. R. EVID. 403. Any attempt to expose an accomplice’s bias must be relevant and not harassing, prejudicial or misleading. *See id.*

86. *Davis*, 415 U.S. at 309.

87. *Id.*

88. *Id.*

89. *Id.* at 310.

90. *Id.*

91. *Id.* at 310-11 (noting that at the time of the trial Green was on probation for burglarizing two cabins).

92. *Id.* at 311.

police “out of fear or concern of possible jeopardy to his probation.”<sup>93</sup> The attorney argued that he would only use the juvenile record to expose Green’s potential biases or prejudices for aiding the police.<sup>94</sup>

The trial judge agreed with the prosecutor and prevented the defense attorney from inquiring into Green’s juvenile probation.<sup>95</sup>

The Alaska Supreme Court affirmed the conviction.<sup>96</sup> The court refused to address the Confrontation Clause issue because it believed Davis’s attorney was afforded adequate opportunity to cross-examine Green about his potential biases or motivations for testifying for the government.<sup>97</sup> Davis appealed to the Supreme Court.<sup>98</sup>

The Court had to decide whether a defendant’s Confrontation Clause rights were violated when the defendant could not cross-examine a government witness about possible biases “deriving from the witness’ probationary status as a juvenile delinquent when such an impeachment would conflict with a State’s asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.”<sup>99</sup>

The Court noted that one of the most important rights under the Confrontation Clause is the right to cross-examination, which served two significant purposes.<sup>100</sup> First, it provided the defendant an opportunity to question a witness’s memory and observations.<sup>101</sup> Second, cross-examination served as an effective tool for impeaching or discrediting witnesses.<sup>102</sup> The Court wrote, “[w]e have recognized that the exposure of a

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93. *Id.*

94. *Id.*

95. *Id.* (noting that the judge’s decision was based on Alaska Rule of Children’s Procedure 23 and Alaska Statute § 47.10.080(g)). Rule 23 provides, in pertinent part: “No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.” ALASKA R. OF CHILD. PROC. 23. Under Section 47.10.080(g), “[t]he commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . . .” ALASKA STAT. § 47.10.080(g) *repealed by* 1996-59 Alaska Adv. Legis. Serv. 55 (LexisNexis); *see also Davis*, 415 U.S. at 311.

96. *Davis*, 415 U.S. at 314-15.

97. *Id.*

98. *Id.*

99. *Id.* at 309.

100. *Id.* at 315-16.

101. *Id.*

102. *Id.*

witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."<sup>103</sup>

In *Davis*, the Court believed the defense attorney's inquiry into Green's potential biases was appropriate. The Court noted that the jury was entitled to hear testimony about Green's probation status, because the government's case was largely based on Green's testimony.<sup>104</sup> Recognizing that Green's credibility was an important issue in the trial, the Court stated, "[t]he claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, as well as of Green's possible concern that he might be a suspect in the investigation."<sup>105</sup>

Additionally, in *Delaware v. Van Arsdall*, the Court reiterated its deference to defense attorneys during cross-examination. In *Van Arsdall*, the state of Delaware alleged that Robert Van to testify.<sup>106</sup> On cross-examination, Van Arsdall's attorney tried "questioning [Fleetwood] about the dismissal of a criminal charge against him—being drunk on a highway—after he had agreed to speak with the prosecutor about Epps' murder."<sup>107</sup> The trial court allowed the defense to only question Fleetwood about the dismissal outside the jury's presence.<sup>108</sup> In addition, the trial judge also ruled that Van Arsdall's attorney could not cross-examine Fleetwood about any specific details of his plea agreement with the government.<sup>109</sup> Van Arsdall was found guilty of first-degree murder.<sup>110</sup>

The Delaware Supreme Court reversed the conviction and held that "[b]y barring *any* cross-examination of Fleetwood about the dismissal of the public drunkenness charge, the ruling kept from the jury facts concerning bias that were central to assessing Fleetwood's reliability."<sup>111</sup> The United States Supreme Court vacated Van Arsdall's sentence and remanded his case.<sup>112</sup>

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103. *Id.*

104. *Id.* at 319-20.

105. *Id.* at 317-18.

106. *Id.* at 675.

107. *Id.*

108. *Id.*

109. *Id.* (noting that the judge's rationale for limiting any cross-examination about the plea agreement was based on Delaware Rule of Evidence 403, which is similar to the Federal Rule of Evidence 403); D.R.E. 403 (1980); FED R. EVID. 403.

110. *Van Arsdall*, 475 U.S. at 677.

111. *Id.*

112. *Id.* at 678.



The Court believed that completely precluding Van Arsdall's attorney from questioning Fleetwood about the dismissal of his public drunkenness case violated the Confrontation Clause.<sup>113</sup> It recognized that the jury's impression of Fleetwood might have been different if it had known about the dismissal of his criminal case.<sup>114</sup> The Court also noted that a judge's latitude to restrict cross-examination cannot, under any circumstances, impede a defendant's rights under the Confrontation Clause.<sup>115</sup> Thus, as the Fourth Circuit Court of Appeals noted, "any exercise of discretion once that threshold is reached must be informed by 'the utmost caution and solicitude for the defendant's *Sixth Amendment* rights.'"<sup>116</sup>

Both *Davis* and *Van Arsdall* establish that the Supreme Court has afforded defense attorneys broad discretion when cross-examining an accomplice-turned-government-witness about his or her motivations for testifying for the government. The Court has stated that cross-examination "reveal[s] possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand."<sup>117</sup> It has recognized it is a vital constitutional right that should be protected.

These cases also show that cross-examination allows a jury to better assess or weigh an accomplice's testimony. The policies underlying cross-examination support this premise. As the *Davis* court recognized, cross-examination serves two important functions.<sup>118</sup> First, it exposes an accomplice's bias and motivation for testifying.<sup>119</sup> Second, cross-examination tests a witness's memory or observations.<sup>120</sup> The second purpose is significant in situations in which the accomplice's memory or observations are swayed by the promise of a reduced term of imprisonment or dismissal of a criminal case. It is also significant in situations where the government's case is substantially based on the testimony of an accomplice. Cross-examination "is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness,

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113. *Id.* at 679.

114. *Id.* at 680.

115. *Id.* at 679.

116. *Hoover v. Maryland*, 714 F.2d 301, 305 (4th Cir. 1983).

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

118. *Id.* at 316.

119. *Id.*

120. *Id.*

intolerance, prejudice, or jealousy.”<sup>121</sup> An accomplice-turned-government-witness can fit into any of these categories.

*B. Accomplice Statements in Lilly v. Virginia*

In *Lilly*, the Supreme Court had to determine whether a defendant’s Confrontation Clause rights were violated when a court allowed introduction of an accomplice’s entire confession that contained both statements against the accomplice’s penal interest and implicated the defendant.<sup>122</sup> Benjamin Lee Lilly and two accomplices, Mark Lilly and Gary Wayne Barker, broke into a home and stole some alcohol, guns, and a safe.<sup>123</sup> They then kidnapped, shot, and killed Alex DeFilippis.<sup>124</sup> Benjamin and his accomplices then committed two more robberies.<sup>125</sup> Mark admitted to committing the burglary, stealing alcohol, and participating in at least one of the robberies.<sup>126</sup> He also informed police that Benjamin shot DeFilippis.<sup>127</sup>

During Benjamin’s trial, the government called Mark as a witness.<sup>128</sup> However, instead of testifying, he invoked his Fifth Amendment privilege against self-incrimination.<sup>129</sup> The trial judge allowed the Commonwealth to introduce Mark’s taped and written statements.<sup>130</sup> Benjamin was found guilty.<sup>131</sup> The Supreme Court of Virginia affirmed the conviction.<sup>132</sup>

The United States Supreme Court reversed ruling, “we have over the years ‘spoken with one voice in declaring presumptively unreliable accomplices’ confessions that incriminate defendants.”<sup>133</sup> Prior court precedence supported the Court’s position. In *Lee v. Illinois*, the Court stated, “[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation

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121. *Id.* at 317 n.4 (quoting *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

122. *Lilly v. Virginia*, 527 U.S. 116, 120 (1999).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 121.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 122.

131. *Id.*

132. *Id.*

133. *Id.* at 131 (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)).

is presumptively suspect and must be subjected to the scrutiny of cross-examination.”<sup>134</sup> In *Crawford v. United States*, the Court ruled that courts should be suspicious of an accomplice’s confession that implicated both the accomplice and defendant.<sup>135</sup> The *Crawford* court even recognized that accomplice confessions “ought . . . not be passed upon by the jury under the same rules governing other and apparently credible witnesses.”<sup>136</sup>

The sentiments of *Lilly* have been reflected in decisions from other courts.<sup>137</sup> These courts have also acknowledged that the testimony of accomplice-turned-government-witnesses is inherently unreliable and questionable. For example, one court has noted, “where . . . an accomplice of the defendant . . . may have some other substantial reason to cooperate with the government, the defendant should be permitted wide latitude in the search for the witness’ bias.”<sup>138</sup>

C. *Cross-Examination Should Solely Be Limited To An Accomplice’s Subjective Understanding of His Or Her Plea Agreement With The Government*

Defense attorneys should only be permitted to question the accomplice about his or her subjective understanding of any plea agreement he or she entered into with the government. The attorney should not be allowed to ask the accomplice about the government’s reasons for entering into the plea agreement. If the defense were permitted to do so, the accomplice would not know of the government’s motivations, and any answer by the accomplice would be mere speculation.

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134. *Id.* at 132 (citing *Lee*, 476 U.S. at 541). The *Lilly* Court recognized that the dissenting justices in *Lee* “agreed that ‘accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant’s but instead are likely to be attempts to minimize the declarant’s culpability.’” *Id.* (citing *Lee*, 476 U.S. at 552-53) (Blackmun, J., dissenting).

135. *Id.* at 131 (citing *Crawford v. United States*, 212 U.S. 183, 204 (1909)).

136. *Id.* (citing *Crawford*, 212 U.S. at 204).

137. *See, e.g.*, *Hoover v. Maryland*, 714 F.2d 301, 305 (4th Cir. 1983) (stating that a defendant should be permitted wide-latitude to search for a witnesses’ bias when an accomplice may have a substantial reason to cooperate with the government); *Burr v. Sullivan*, 618 F.2d 583, 586-87 (9th Cir. 1980) (discussing defendant’s right to cross-examine accomplices to show their inherent bias or self-interest in testifying); *United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1976) (discussing the importance of granting a defendant the right to cross-examine an accomplice who may have a substantial reason to cooperate with the government).

138. *Hoover*, 714 F.2d at 305 (quoting *United States v. Tracey*, 675 F.2d 433, 438 (1st Cir. 1982)).

In *Davis*, the Supreme Court twice noted that a witness's subjective motivation for testifying was an appropriate subject of cross-examination. It wrote, "[a] partiality of mind at some *former time* may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying."<sup>139</sup> There is partiality of mind when an accomplice-turned-government-witness enters a plea agreement to testify against another accomplice.

The *Davis* Court also stated, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."<sup>140</sup> The accomplice has a motive to testify because the accomplice anticipates his or her testimony will result in either a reduced sentence or dismissal of his or her criminal case.

#### D. Federal Rules of Evidence

Rule 403 of the Federal Rules of Evidence governs the admissibility of relevant evidence. It provides "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>141</sup> Any issue relating to the accomplice's bias is not only relevant, but of great probative value. The federal courts and Supreme Court have supported this premise by heavily scrutinizing the introduction of an accomplice's testimony.

Generally, courts are concerned that the value of the accomplice's subjective reason for entering into a plea agreement is not "outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing."<sup>142</sup> A jury's knowledge of the potential penalty a defendant is facing, though, should not outweigh the defendant's rights under the Confrontation Clause." The government's "interest in protecting the anonymity of juvenile offenders, ha[s] to yield to [the] constitutional

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139. *Davis v. Alaska*, 415 U.S. 308, 317 n.5 (1979) (citing 3A WIGMORE, EVIDENCE § 940, 776 (emphasis in original)).

140. *Id.* at 316-17 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

141. FED. R. EVID. 403.

142. *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995). This concern typically arises when the defendant and accomplice are charged with violating the same laws.

right to probe the ‘possible biases, prejudices, or ulterior motives of the [witness] . . . .’<sup>143</sup>

Rule 611 of the Federal Rules of Evidence provides the parameters of cross-examination. The Rule provides, “Cross-examination should be limited to the subject matter of the direct examination and matters affecting the *credibility of the witness*. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.”<sup>144</sup> Trial judges should use their discretion to allow defense attorneys to inquire into accomplice’s subjective motives for testifying for the government. Such information is directly relevant to the credibility of the accomplice-turned-government-witness by exposing his or her bias against the defendant.

#### V. CONCLUSION

The courts have unanimously recognized that one cannot trust accomplices. Not only is the accomplice usually charged with the same offense as the defendant, but the accomplice also shares culpability. When an accomplice-turned-government-witness testifies against another accomplice, he or she does so with the specific intent to receive a beneficial agreement from the government. These agreements usually include less severe terms of imprisonment or other penalties than the accomplice could face if he or she did not agree to testify for the government. The benefits of these agreements should always be presented to the jury.

If a jury is unaware of the accomplice’s understanding of his or her sentencing reduction, that jury’s assessment of the accomplice’s credibility may be skewed. As one court wrote, “[i]f the trial court [does] not [prohibit the defendant] from cross-examining [the witnesses] with respect to the *magnitude* of the sentence reduction they believed they had earned, or would earn, through their testimony, the jury might [receive] a significantly different impression of [their] credibility.”<sup>145</sup>

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143. *United States v. Chandler*, 326 F.3d 210, 223 (3d Cir. 2003) (quoting *Davis*, 415 U.S. at 316).

144. FED. R. EVID. 611 (emphasis added).

145. *Wilson v. Delaware*, 950 A.2d 634, 639 n.9 (Del. 2008) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).