No. 22-____

IN THE

Supreme Court of the United States

RONY GALICIA,

PETITIONER,

v.

MARYLAND,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

STEPHEN B. MERCER
Counsel of Record
RaquinMercer LLC
50 West Montgomery Ave.
Suite 200
Rockville, MD 20850
(301) 880-9250
Steve@RaquinMercer.com

Counsel for Petitioner

QUESTIONS PRESENTED

This case presents the following questions:

1. Whether the Sixth Amendment is violated by a trial court's denial of cross-examination into an accomplice's confession, where the prosecution introduced the confession, where the confession implicates other co-conspirators, and where the inquiry would fairly rebut the inference that the defendant participated in a double murder?

2. There is a split among the courts of appeals and several states on the following question: Whether appellate courts should review violations of the Confrontation Clause de novo or for abuse of discretion?

PARTIES TO PROCEEDING AND RELATED CASES

The parties to the proceeding in this Court appear on the cover of the petition. There are proceedings between Maryland and the petitioner's codefendants involving issues unrelated to the question presented in the petition:

- *Canales-Yanez v. State*, 244 Md. App. 285, 223 A.3d 1040 (Md. App. 2020); *aff'd*, 472 Md. 132, 244 A.3d 1096 (2021).

- *Garcia-Gaona v. State*, 2021 WL 130513 (Md. Ct. Spec. App. Jan. 14, 2021), *cert. denied*, 474 Md. 725, 255 A.3d 1093 (2021).

- *Garcia v. State*, 253 Md. App. 50, 263 A.3d 175 (2021), *aff'd*, 480 Md. 467, 281 A.3d 115 (2022).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

PETITION FOR WRIT OF CERTIORARI

Rony Galicia respectfully petitions for a writ of certiorari to review the judgment of the Maryland Court of Appeals.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals is published at 479 Md. 341, 278 A.3d 131 (Md. 2022). Pet. App. 1. The opinion of the Maryland Court of Special Appeals ("COSA") is unpublished and can be found at 2021 WL 130513 (Md. Ct. Spec. App. Jan. 14, 2021). Pet. App. 77. The Court of Appeals' order to deny reconsideration is unpublished. Pet. App. 184.

JURISDICTIONAL STATEMENT

The Maryland Court of Appeals entered its judgment denying reconsideration in this case on August 10, 2022. Pet. App. 185. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment 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 defence."

STATEMENT OF THE CASE

On June 5, 2017, on the eve of their high-school graduation, Shadi Najjar and Artem Ziberov were shot multiple times while they sat in their parked car in a residential neighborhood in Montgomery County, Maryland. By July 13, 2021, the police had arrested three men for the murders and related offenses: Edgar Garcia-Gaona, Roger Garcia, and Jose Ovilson Canales-Yanez.[1] The police arrested these men based on information provided by Ms. DaSilva, Edgar's girlfriend. Around midnight on the evening of the murders, Ms. DaSilva was at the residence she shared with Edgar waiting for him to come home. Edgar texted her that Ovilson was driving him home; shortly afterward, she saw Edgar arrive in a car typically driven by Ovilson. The next day Edgar spoke to Ms. DaSilva about the murders.

Edgar told Ms. DaSilva the shooting was like a "seven-second movie." Pet. App. 23. He explained to her that that day "he took the cellphone from the boys, smashed it, and then after they just started shooting them." Pet. App. 23. Edgar related that he "was surprised that his little brother took out a gun and just shot them guys, too" and "that his brother, [Roger Garcia], took out the gun too and shot the guys as well." Pet. App. 34. Although Edgar specifically mentioned Roger, he never implicated Rony in the shooting or even

---

[1] For clarity and convenience, the petitioner Rony Galicia and codefendants Edgar Garcia-Gaona and Roger Garcia are referred to in this petition by their first names. Edgar and Roger are half-brothers with similar surnames. Jose Ovilson Canales-Yanez is referred to by his nickname "O" or Ovilson, depending on the context.

mentioned his name to Ms. DaSilva. Following their arrest on June 17, 2017, Edgar told Roger during the ride to the station house not to "say anything." Edgar said, "we did good," "[Ovilson] doesn't say anything[.]" Pet. App. 80. Again, Edgar never implicated Rony in the murders nor mentioned his name.

Over five months later, on December 7, 2017, a grand jury for the Circuit Court of Montgomery County, Maryland, returned an indictment charging the petitioner Rony Galicia with the murders of Najjar and Ziberov, one count of conspiracy to murder (victim Najjar), four counts of firearm-related offenses, and one count of armed robbery. The State charged Rony after he provided a DNA sample that police matched to a DNA profile recovered from shell casings at the murder scene.

At the joint trial of Rony, Edgar, and Roger for two counts of first-degree murder and related charges, the State introduced Edgar's confession to his girlfriend, Ms. DaSilva, that on the day of the murders, "he took the cellphone from the boys, smashed it, and then after they just started shooting them." Pet. App. 23. Edgar's confession that "they just started shooting them" supported the State's theory of the case that Rony, Ovilson, Roger, and Edgar were at the murder scene and shot the victims. The State buttressed that inference by emphasizing the close relationships between Edgar, Roger, Ovilson, and Rony. The State also introduced a group picture of them through Ms. DaSilva.

Given that Ms. DaSilva's testimony plainly could have been understood by the jury to implicate Rony, he maintained that he had the right to cross-examine her to explain what she meant when she testified that Edgar told her that "they just started shooting them." Pet. App. 181. Also, Rony sought to ask Ms. DaSilva whether Edgar ever mentioned Rony's name while confessing to her. *Id.* The trial court denied Rony's requests initially because the questions would violate Roger's right to a fair trial; however, Roger's case was mistried (due to his counsel's illness). Pet. App. 178, 183. Still, the trial court denied Rony the opportunity to cross-examine Ms. DaSilva in front of the jury about what she meant when she testified that Edgar told her that "they just started shooting them" and whether Edgar ever mentioned Rony's name while confessing to her.[2]

Rony disputed the State's theory and challenged its evidence at every step. For example, although a DNA witness for the State testified that Rony was a contributor of DNA found on shell casings recovered from the location of the shooting and the expert opined that it was possible to transfer DNA to a firearm cartridge when loading a firearm, the expert conceded

---

2 Although the trial judge believed Edgar's statement that implicated himself and Roger was not admissible as a statement against Edgar's penal interest, it ultimately concluded Rony could not cross-examine Ms. DaSilva about "they" because the phrase did not expressly implicate Rony. Pet. App. 183. The COSA disagreed on both points. Pet. App. 155-59; Pet. App. 161-63. The Court of Appeals assumed Edgar's statement implicating Roger was admissible and held the trial court did not abuse its discretion in denying Rony's right of confrontation. Pet. App. 3.

on cross-examination that the DNA did not establish Rony's presence at the scene of the shooting. The DNA could have been deposited through secondary or tertiary transfer. Moreover, Rony called ten witnesses in his defense. Rony introduced an alibi defense through lay and expert witnesses and business records from his Internet service provider and Microsoft to show that he was home watching Netflix at the time of the murders.

Still, to clarify that the meaning of "they just started shooting them" was *not* neutral, Rony needed to cross-examine Ms. DaSilva about other admissible parts of Edgar's confession in two critical ways. First, when Edgar confessed, he implicated himself, Roger, and Ovilson but not Rony. Second, Rony had to cross-examine Ms. DaSilva about the relevant circumstance of Edgar's confession, *to wit*, that during the entire discussion with her about the murders, Edgar never mentioned Rony's name. Pet. App. 182.

However, the trial court prohibited Rony from examining Ms. DaSilva to clarify that when Edgar confessed and referred to other, unspecific co-conspirators in the phrase "they just started shooting them," he mentioned Roger and Ovilson but not Rony. The trial court would not even allow Rony to ask Ms. DaSilva whether Edgar mentioned Rony's name *at all*. Pet. App. 183. The trial court reasoned that because Ms. DaSilva had referenced multiple shooters with a "neutral" or generic pronoun, Rony was not prejudiced. *Id.* Therefore, he had no right to confront her, even though the transcript of Ms. DaSilva's recorded interview demonstrated that the generic pronoun was

not neutral but *affirmatively* excluded Rony. Pet. App. 181.

On November 19, 2018, the jury found Rony and Edgar guilty on all counts. The trial court sentenced Rony to double consecutive life without parole for the murders, a concurrent life for conspiracy to murder, and a total of 60 years consecutive for the remaining firearm and armed robbery counts.

On direct appeal, the COSA reversed. In an 87-page meticulously reasoned decision authored by Judge Deborah S. Eyler, a three-judge panel of the COSA unanimously held that the trial court improperly restricted Rony's cross-examination of Ms. DaSilva. The COSA correctly concluded that Rony had the right to confront and cross-examine Ms. DaSilva about Edgar's confession to show that Edgar did not implicate Rony nor mention his name when he confessed to murdering Najjar and Ziberov with Roger and other persons. Pet. App. 161-63. The COSA determined the trial court's error was not harmless beyond a reasonable doubt. *Id.*

The State sought review by the Maryland Court of Appeals. In a 5 to 2 decision, the Court of Appeals reversed the judgment of the COSA. Pet. App. 3. The Court of Appeals held that the trial court did not abuse its discretion when it denied Rony's right to confrontation because Ms. DaSilva used a "neutral" phrase that did not directly implicate Rony. Pet. App. 41, 42, 50, 64. The Court of Appeals explained that, under *Gray v. Maryland*, 523 U.S. 185, 192 (1998), a non-testifying accomplice's confession that *implicated*

the defendant on trial could be replaced with a generic "me and a few other guys" without violating *Bruton v. United States*, 391 U.S. 123 (1968). Pet. App. 40, 41. Therefore, the Court of Appeals reasoned that the trial court could prohibit a defendant from examining a witness to show that a generic phrase or pronoun *excluded* the defendant. *Id.* The Court of Appeals failed to balance the probative value of an inquiry against any potential for the unfair prejudice that the inquiry might generate. Also, the Court of Appeals applied an outcome determinative deferential abuse of discretion standard of review. Pet. App. 17, 18, 64.

The two judges in dissent (Hon. Shirley M. Watts, joined by Hon. Irma S. Raker), would have held—like the three judges in the COSA—that the trial court improperly restricted Rony's opportunity to cross-examine Ms. DaSilva and that the error was not harmless. *Id.* at 66. Judge Watts wrote that "[Rony] had a right under the Sixth Amendment's Confrontation Clause and Article 21 of the Maryland Declaration of Rights to cross-examine [Luz] DaSilva about the matter because DaSilva's testimony that [Edgar] said that 'they just started shooting them' plainly could have been understood by the jury as implicating [Rony]. In addition, [Edgar's] statement implicating Roger [] and [Ovilson] were admissible and would have indicated that [Rony] was not one of the shooters." *Id.* at 67.

Rony timely asked the Court of Appeals to reconsider its decision. On August 10, 2022, the Court of Appeals denied Rony's motion to reconsider. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Lower Court's Decision is in Material Conflict this Court's Decisions on the Fundamental Right of Confrontation and Deepens a Split on the Standard of Review in the Lower Courts.

The Confrontation Clause of the U.S. Constitution, in relevant part, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with witnesses against him…." U.S. CONST. AMEND. VI. Frequently, at a trial of multiple defendants, the prosecution introduces an accomplice's nontestimonial statement that does not explicitly implicate another defendant on trial under the hearsay exception for statements of a party opponent, with a limiting instruction. Although the accomplice's nontestimonial statement may be admissible under *Bruton*, 391 U.S. 123, and the rules of evidence without the defendant having a prior opportunity to cross-examine the accomplice, the Confrontation Clause still requires a minimum amount of cross-examination of the witness who relates the accomplice's hearsay statement to elucidate, modify, explain, contradict, or rebut it.

To determine the constitutionally required threshold level of inquiry of the relator of the accomplice's statement, the trial court must balance the probative value of an inquiry against the unfair prejudice that the inquiry might generate. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (Confrontation Clause not violated by limitation on matters of marginal relevance). Here, the trial judge

prohibited *any* inquiry from clarifying that the accomplice's confession did *not* implicate the petitioner as a participant in a double murder. That is a matter of special relevance in Rony's trial. Still, the Maryland Court of Appeals affirmed under an abuse of discretion standard of review that deferred to the trial court's belief that Edgar's confession was "neutral" as to Rony.

There is a split among the courts of appeals and several states on whether appellate courts should review violations of the Confrontation Clause de novo or for abuse of discretion. These variations in the level of appellate review preclude a uniform national standard for the right of confrontation.

A. The Decision of the Maryland Court of Appeals is in Material Conflict with the Court's Confrontation Clause Jurisprudence.

The Court of Appeals has effectively lowered the threshold of the Confrontation Clause guarantee. Now, in Maryland, the Sixth Amendment right of confrontation means something different based on the standard of appellate review. To be sure, once the threshold level of inquiry is met, the trial court has the discretion to limit the scope of cross-examination to prevent, for example, prejudice, confusion of the issues, repetitive questions, or inquiry into irrelevant areas. *Van Arsdall*, 475 U.S. at 678–79. Still, within the constitutionally prescribed zone of confrontation, a defendant must be free to cross-examine as a matter

of right that "is the essence of a fair trial[.]" *Alford v. United States*, 282 U.S. 687, 692 (1931).

Here, the Court of Appeals reached the contradictory conclusion that the trial court's *denial* of Rony's cross-examination of Ms. DaSilva afforded him the right to confrontation unless he made an affirmative showing of prejudice from its absence. Pet. App. 50. That makes no sense and conflicts with long-standing decisions of the Court. Even if the generic phrase "they started shooting" is neutral, denying *any* cross-examination to clarify that the phrase *excluded* Rony is harmful. Yet under the Court of Appeals' deferential standard of review, it would not reverse because the trial judge believed a "neutral" phrase did not result in prejudice. Pet. App. 41-42, 50.

In *Van Arsdall*, 475 U.S. 673 and *Davis v. Alaska*, 415 U.S. 308, 316–17 (1974), the Court set forth the general principle that the confrontation clause of the Sixth Amendment affords defendants the right to cross-examine witnesses regarding matters which affect the witnesses' biases, interests, or motives to falsify. The limitation of cross-examination should not occur until after the defendant has reached his constitutionally required threshold level of inquiry. *Van Arsdall*, 475 U.S. at 678–79. These principles apply with equal force to the circumstances at hand where the prosecution introduced Egar's confession that a jury could plainly understand to implicate Rony.

Stated another way, although the scope of cross-examination is generally limited to the subjects

raised on direct examination, within that limit a defendant should be free to cross-examine to rebut testimony that an accomplice's confession implicates him in a double murder. The Court has recognized that a defendant's right to confront the witnesses against him is central to the truth-finding function of the criminal trial. *Van Arsdall*, 475 U.S. at 679, 684. Precisely for that reason, the total denial of cross-examination about a subject matter area of such importance as an accomplice's confession that implicates others is subject to de novo review for harmless error.

However, the lower court's error was to defer to the trial judge's belief that Edgar's confession did not prejudice Rony because it was neutral. Pet. App. 41, 42. The court below confused and conflated the Court's holding in *Gray*, 523 U.S. 185, and *Bruton*, 391 U.S. 123, as limiting Rony's cross-examination of Ms. DaSilva about the otherwise admissible portions of Edgar's confession that explained, rebutted, and clarified that the generic phrase "they just started shooting" excluded Rony. *Gray* and *Bruton* are inapposite to the case at hand. The court below erroneously relied on *Gray* and *Bruton* to prohibit any cross-examination of Ms. DaSilva about the other admissible parts of Edgar's confession that excluded Rony as a participant in the murders.

Certiorari is warranted here because the Maryland Court of Appeals' application of a deferential standard of review to affirm the denial of the right of confrontation violates this Court's precedent and the original meaning of the Sixth

Amendment. The Court should grant the instant petition and review the decision of the Maryland Court of Appeals.

B. *There is a Split Whether Appellate Courts Should Review Violations of the Confrontation Clause De Novo or for Abuse of Discretion.*

There is also an acknowledged circuit split on the standard of appellate review. The Tenth Circuit "review[s] de novo all Confrontation Clause challenges to restrictions on cross-examination." *United States v. John*, 849 F.3d 912 (10th Cir. 2017). The Fifth Circuit does the same. *See United States v. Richardson*, 781 F.3d 237, 243 (5th Cir. 2015). By contrast, the Eighth Circuit "review[s] a district court's limitations on cross-examination . . . [for] an abuse of discretion" and "will reverse only if a clear abuse of discretion occurred." *United States v. Ramos*, 852 F.3d 747 (8th Cir. 2017). The same standard applies in the Second, Third, Fourth, Sixth, and D.C. Circuits. *See United States v. Ulbricht*, 858 F.3d 71, 118 (2d Cir. 2017); *United States v. Mussare*, 405 F.3d 161, 169 (3d Cir. 2005); *United States v. Kiza*, 855 F.3d 596, 603-04 (4th Cir. 2017); *United States v. Ford*, 761 F.3d 641, 651 (6th Cir. 2014); *United States v. Vega*, 826 F.3d 514, 542 (D.C. Cir. 2016).

Other circuits apply a two-tier standard of review. The Ninth Circuit reviews a trial court's exclusion of an entire "area of inquiry" de novo. Still, it applies abuse of discretion to "limitation[s] on the scope of questioning within a given area." *United*

States v. Larson, 495 F.3d 1094, 1101 (9th Cir. 2007). In the First Circuit, once an accused "establish[es] a reasonably complete picture of the witness' veracity, bias, and motivation," the court reviews "particular limitations" on cross-examination for abuse of discretion. *United States v. Jiménez-Bencevi*, 788 F.3d 7, 21 (1st Cir. 2015); *accord United States v. Garcia*, 13 F.3d 1464, 1468 (11th Cir. 1994). The Seventh Circuit's standard of review depends on whether the trial court's limitation "directly implicates the core values of the Confrontation Clause." *United States v. Trent*, 863 F.3d 699, 704 (7th Cir. 2017). If so, review is de novo. *Id.* Otherwise, review is only for abuse of discretion. *Id.*

State courts are equally divided on the standard of review—many review Confrontation Clause violations de novo. *See*, *e.g.*, *State v. Orn*, 197 Wn.2d 343, 350 (Wash. 2021) (*en banc*); *State v. Rainsong*, 807 N.W.2d 283, 286 (Iowa 2011); *State v. Davis*, 298 Conn. 1, 11 (2010); *People v. Hill*, 282 Mich. App. 538, 540 (2009). Others review for abuse of discretion. *See*, *e.g.*, *State v. Jackson*, 243 N.J. 52, 64 (2020); *People v. Linton*, 56 Cal. 4th 1146, 1188 (2013); *State v. Tran*, 712 N.W.2d 540, 550 (Minn. 2006).

The Maryland Court of Appeals takes a hybrid two-tiered approach. On the first tier, the court below applies an abuse of discretion standard of review unless the trial court's decision is based on a legal determination. On the second tier, the court below rejects a de novo standard of review for a denial of the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause. Pet. App. 18-

19. The court below takes a "cumulative result" approach under which it considers the total effect of the subsidiary decisions leading up to the ultimate denial of the Confrontation Clause right. *Id.* However murky the standard of review on tier two may be, here, the court below squarely applied an abuse of discretion standard of review. Pet. App. 64. This was an error.

A Confrontation Clause violation occurs when a defendant is prohibited from engaging in otherwise appropriate cross-examination designed to show the unreliability of testimony. *Cf. Van Arsdall*, 475 U.S. at 680 (subject matter of bias to reveal unreliability). This is a question of law that merits de novo review. The trial record provides the only facts relevant to this inquiry—*i.e.*, what questions were prohibited. And whether a trial court "applied the proper standard to essentially undisputed facts" presents a question of law. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). De novo review is also "consistent with the position [this Court] ha[s] taken in past cases." *Ornelas v. United States*, 517 U.S. 690, 697 (1996). In defining the Confrontation Clause's scope, this Court has never "expressly deferred to the trial court's determination." *Id.*; *see, e.g.*, *Davis*, 415 U.S. at 319; *Chambers v. Mississippi*, 410 U.S. 284, 297-98 (1973); *Olden v. Kentucky*, 488 U.S. 227, 232 (1988).

Instead, this Court has asked—without deference—whether a "court's ruling violated [an accused's] rights secured by the Confrontation Clause." *Van Arsdall*, 475 U.S. at 679. Even if Confrontation Clause violations were considered mixed questions of law and fact, de novo review would still be appropriate. On such questions, this Court

considers several factors to determine which "judicial actor is better positioned" to make the decision. *Miller v. Fenton*, 474 U.S. 104, 114 (1985). These factors include whether the legal rule at issue "acquire[s] content only through application," as well as de novo review's tendency to "unify precedent" and "stabilize the law." *Ornelas*, 517 U.S. at 697-98.

"In the constitutional realm," however, "the calculus changes." *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018). On constitutional questions, "the role of appellate courts 'in marking out the limits of a standard through the process of case-by-case adjudication' favors de novo review even when answering a mixed question primarily involves plunging into a factual record." *Id*. By any standard, therefore, Confrontation Clause violations should receive de novo review. The inconsistent treatment of this issue in different jurisdictions confirms that de novo review would help "unify precedent" and clarify the protected scope of cross-examination. *Ornelas*, 517 U.S. at 697-98

CONCLUSION

This case presents the Court an opportunity to resolve the conflict that the court below has deepened with this Court's Sixth Amendment jurisprudence and provide authoritative guidance to the lower courts on an important and recurring question of the standard of review. In the public interest, the petition for issuance of a writ of certiorari should, respectfully, be granted.

Respectfully Submitted,

STEPHEN B. MERCER
Counsel of Record
RaquinMercer LLC
50 West Montgomery Ave.
Suite 200
Rockville, MD 20850
(301) 880-9250
Steve@RaquinMercer.com

Counsel for Petitioner