No. 09-1576

IN THE

Supreme Court of the United States

JAMES BANNISTER,

Petitioner,

v.

ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF ROR PETITIONER

When the State retried petitioner, it decided to deviate from its standard practice – and the standard practice of prosecutors across the country – regarding plea bargains used to present purported accomplice testimony. Instead of simply requiring the purported accomplice to testify truthfully, the State required him to testify consistently with certain prior unsworn statements he had made to the police. In its brief in opposition, the State does not dispute that "prosecutors seem to reserve such [consistency] provisions for cases" – such as this one – "in which accomplices have told prior inconsistent stories and there is no direct corroboration for the story that the prosecution wants the witness to recite." Pet. 17. Nor does the State offer any alternative explanation for its decision to proceed in this manner in petitioner's trial.

The State nevertheless urges this Court to deny certiorari on the ground that consistency provisions supposedly have no effect whatsoever on accomplice testimony. This argument is at odds not only with the State's own decision to go out of its way to insist upon a consistency provision in this case, but also with decisions from several jurisdictions holding that presenting testimony subject to such a provision thwarts the truth-seeking function of trial in violation of the Due Process Clause. The State's argument also contravenes historical norms and this Court's due process jurisprudence. This Court should grant certiorari.

I. Courts Are Divided Over The Question Presented.

Try as it might, the State is unable to reconcile the conflicting case law concerning consistency provisions. In contrast to the Supreme Courts of Illinois, Tennessee, and Wisconsin, the Supreme Courts of California and Kansas, as well as the Court of Military Appeals, categorically prohibit prosecutors from presenting testimony subject to consistency provisions, regardless of any other provisions in an accomplice's plea agreement or the facts of the case. The Nevada Supreme Court also would have found that the testimony at issue here violated due process.

1. *California.* The California Supreme Court has held that due process prohibits the prosecution from introducing testimony subject to consistency provisions. *See* Pet. 12-13 (citing *People v. Allen*, 729 P.2d 115, 130-31 (Cal. 1986); *People v. Garrison*, 765 P.2d 419, 428, 430 (Cal. 1989)). The State asserts, however, that (a) "[i]n none of those cases" did the agreement contain a general provision requiring "truthful" trial testimony; and (b) the California Supreme Court's subsequent decision in *People v. Jenkins*, 997 P.2d 1044 (Cal. 2000), retreated from its prior holdings. BIO 15. Neither assertion is correct.

a. The plea agreements in *Allen* and *Garrison* both contained general truthfulness provisions. *See Allen*, 729 P.2d at 129 n.4 ("Allen hereby agrees that he will testify truthfully and completely . . . ."); *Garrison*, 765 P.2d at 427 ("He will . . . testify truthfully . . . ."). Yet in both cases, the California Supreme Court applied the rule of *People v. Medina*, 116 Cal. Rptr. 133, 145 (Ct. App. 1974), barring

testimony pursuant to consistency provisions, and made clear that "the use of such tainted testimony is a denial of the fundamental right to a fair trial in violation of federal constitutional principles." *Garrison*, 765 P.2d at 428; *see also Allen*, 729 P.2d at 130-31. The presence of general truthfulness provisions was irrelevant to the court's analyses.

b. Nothing in *Jenkins* backed away from these holdings. *Jenkins* did not even involve a consistency provision. Rather, the issue there was whether the prosecution may present an accomplice's testimony while charges are pending against him. The California Supreme Court held that it may do so. The court also reaffirmed *Allen*'s determination that presenting an accomplice's testimony under a plea agreement that requires him to testify "in conformity with an earlier statement to the police . . . would place the witness under compulsion inconsistent with the defendant's right to fair trial." *Jenkins*, 997 P.2d at 1120 (citing *Allen*, 729 P.2d at 130-31).

2. *Kansas.* The State concedes that the Kansas Supreme Court's decision in *State v. Dixon*, 112 P.3d 883 (Kan. 2005), "conflicts" with the Illinois Supreme Court's here, because it holds that presenting testimony under a plea agreement just like the one here violates due process. BIO 16. The State suggests, however, that it is "uncertain" whether *Dixon* is good law because the Kansas Supreme Court "relied" in part on Arizona decisions that the Arizona Supreme Court had recently "overturned" in *State v. Rivera*, 109 P.3d 83 (Ariz. 2005). BIO 15-16. This argument fails to withstand scrutiny.

The Kansas Supreme Court in *Dixon* surveyed cases from other jurisdictions only for their

persuasive value, not because it felt bound by them. *See* 112 P.3d at 917. Thus, even if the Arizona Supreme Court had shifted its attitude towards consistency provisions in *Rivera*, there would be no reason to believe that the Kansas Supreme Court would have found such a change significant. Indeed, in the five years since *Dixon* was announced, no Kansas court has questioned *Dixon*'s categorical holding that presenting testimony subject to a consistency provision violates the Due Process Clause.

At any rate, nothing in *Rivera* undermined – much less "overruled" – the Arizona Supreme Court's earlier decision in *State v. Fisher*, 859 P.2d 179, 184 (Ariz. 1993), that its state law prohibits the prosecution from including consistency provisions in plea agreements. The accomplices' plea agreements in *Rivera* "did not expressly condition the agreements upon the testimony at trial being consistent with the prior statements." 109 P.3d at 86. Instead, the agreements simply recited an avowal from each witness that their prior statements had been truthful. *Id.* at 84. The Arizona Supreme Court explained that such an avowal "is not the same as requiring [a witness] to testify consistently with [a] specific version of the facts" – something that Arizona law still "does not allow." *Id.* at 86-87.

3. *Court of Military Appeals.* The State argues that decisions from the U.S. Court of Military Appeals (now the Court of Appeals for the Armed Forces) forbidding testimony under consistency provisions do not conflict with the Illinois Supreme Court's because (a) they do not rest on due process grounds; and (b) the agreements in those cases

"lacked truthfulness provisions." BIO 14. Neither assertion is convincing.

a. The Due Process Clause prohibits the prosecution from introducing testimony that causes a "corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976); *see also Estes v. Texas*, 381 U.S. 532, 540 (1965) (due process prohibits practices that interfere with "the solemn purpose of endeavoring to ascertain the truth"). The Court of Military Appeals, in turn, has held that presenting testimony pursuant to consistency provisions "detract[s] from the quest for truth" and "pollut[es] . . . the stream of justice." *United States v. Stolz*, 14 C.M.A. 461, 464-65 (1964); *see also United States v. Gilliam*, 23 C.M.A. 4, 8 (1974). While these decisions do not recite the words "due process," the inescapable import of their reasoning is that presenting testimony subject to consistency provisions violates due process.

b. The State's assertion that the agreements in those cases "lacked truthfulness provisions," BIO 14, is most likely inaccurate and is, in any event, irrelevant. Neither *Stolz* nor *Gilliam* describes the agreements involved as lacking truthfulness requirements. What is more, standard practice among prosecutors is to include language requiring truthful testimony. *See* Br. of Center on the Administration of Criminal Law 6-7. It is therefore entirely likely that the agreements in *Stolz* and *Gilliam* contained truthfulness language, but the Court of Military Appeals neglected to mention that fact because it was so unremarkable.

At any rate, the Court of Military Appeals' reasoning makes clear that any truthfulness requirements would have been irrelevant to its holdings in *Stolz* and *Gilliam*. Even if the plea agreements in those cases had somehow lacked general truthfulness provisions, the accomplices in those cases would have taken oaths at trial requiring truthfulness. Yet the court deemed their testimony inadmissible, explaining that the prosecution can present accomplice testimony subject to a plea agreement only when the witness understands that he is to "testify *only* truthfully." *Gilliam*, 23 C.M.A. at 8 (emphasis added). The legal deficiency in those cases, therefore, arose because of the addition of consistency provisions to the plea agreements, not because of the absence of truthfulness provisions.

5. *Nevada.* The Nevada Supreme Court's holding in *Franklin v. State*, 577 P.2d 860 (Nev. 1978), plainly prohibits testimony subject to a consistency provision. And the State does not dispute that the Nevada Supreme Court's subsequent decision in *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (Nev. 1991), which cut back on broader postulates in *Franklin*, left that decision intact to the extent it forbids the prosecution from introducing testimony "where the bargain [itself] compels the witness to provide particularized testimony." BIO 17 (quoting *Acuna*, 819 P.2d at 201). The State contends, however, that "*Acuna* was speaking in the context of plea agreements that require only consistent testimony and not that the testimony also be truthful." BIO 17-18.

This is fanciful thinking. *Acuna* did not even involve a consistency provision. Rather, the issue

there was whether the prosecution could present accomplice testimony under an ordinary plea agreement while withholding the benefit of the bargain until after trial. 819 P.2d at 198. Consequently, the *Acuna* court had no occasion to disturb *Franklin*'s conclusion that "testimony becomes 'tainted beyond redemption' where the accomplice is placed under compulsion to testify in a particular fashion in order to receive the benefits of his plea bargain." *Franklin,* 577 P.2d at 862. If anything, *Acuna* reinforced that due process rule by signaling (as the State itself points out, BIO 18) that it agreed with California jurisprudence on the subject. *See* 819 P.2d at 201.

Even if *Acuna* had opened the door, at least under certain circumstances, to testimony subject to consistency provisions, the Nevada Supreme Court would not have allowed the testimony at issue here. That court's subsequent decision in *Leslie v. State*, 952 P.2d 966, 973 (Nev. 1998), requires the prosecution to have "[c]redible evidence" corroborating an accomplice's testimony before it may introduce such testimony under *any kind of plea bargain* that might lead him to feel compelled to testify in a particular way. Here, no other evidence corroborated the prior statements that Johnson's consistency provision required him to repeat at trial. Indeed, Johnson had previously made other statements under oath that directly contradicted those the State insisted that he repeat. Pet. 3, 5. Thus, the Nevada Supreme Court would have held that admitting Johnson's testimony violated due process.

II. The Illinois Supreme Court's Decision Is Incorrect.

The State does not dispute that due process prohibits the prosecution from presenting testimony that interferes with a witness's oath to tell the whole truth or that impedes the jury's fact-finding function. The State asserts, however, that presenting testimony subject to consistency provisions does neither of these things. The State's argument flouts logic as well as common sense.

1. Notwithstanding the fact that the State insisted here upon a consistency provision, it now contends that other provisions in plea agreements (including the agreement here) that require present and past truthfulness "provide[] the same alleged incentive" as consistency provisions for a witness "to testify consistently with his earlier statements." BIO 20. Not so.

a. A consistency provision "override[s]" a standard requirement in a plea agreement to testify truthfully at trial – not the other way around.

The plea agreement in this case illustrates the point. The general truthfulness provision required the accomplice to "testify truthfully." Pet. App. 68a. The very next sentence (the consistency provision) provided that "[s]uch truthful testimony shall be consistent with" certain specified statements the accomplice previously made to law enforcement. *Id.* The consistency provision thus set the parameters for what the State would accept as the "truth." It defined the term "truthful," in other words, in a manner that precluded from being considered

truthful even accurate testimony that deviated from the statements the State specifically selected.

Even apart from the strictures of contract interpretation, common sense dictates that a witness testifying under the force of a consistency provision will be guided far more by that provision than a general truthfulness provision alongside it. As prosecutors themselves frequently attest, "truth is elusive." Br. of Center on the Administration of Criminal Law 12; *see also* Pet. App. 28a (dissenting opinion) ("[T]he State has no crystal ball to know what the 'truth' is."). Consistency, by contrast, is a concept that is far more amenable to verification and enforcement. Accordingly, an accomplice who testifies untruthfully but consistently with prior statements the prosecution selected knows he will most likely retain the benefit of his bargain, while an accomplice whose truthful testimony diverges from such statements knows he will certainly not.

Even when a consistency provision binds a witness to a truthful pretrial statement, the provision interferes with the witness's oath at trial by impeding the normal process of recollection and adjustments as questioning stirs one's memories. A plea agreement requiring a witness to testify only truthfully encourages the witness at trial to remember and to convey "what happened." A plea bargain, however, that requires a witness to give testimony that is not only truthful but consistent with a prior unsworn statement forces him to perform an entirely different mental task – to focus on, and to repeat, what he *said* happened in his prior statements to the police. This explicit shift in testimonial motivation cannot be squared with the

oath, required since the inception of our Republic, to tell the whole truth.

b. Nor does the additional presence of a provision voiding an accomplice's plea agreement if his prior statements to law enforcement are "found to be false," Pet. App. 70a, provide the same incentive to prioritize consistency over accuracy that a consistency provision does. As the Arizona and California Supreme Courts have recognized, provisions requiring past truthfulness "allow a witness who has truthfully recounted the facts before trial to nonetheless truthfully recount the facts at trial in a manner not fully consistent with her previous statements – as a result, for example, of new information or refreshed recollection." *Rivera*, 109 P.3d at 87; *see also Garrison*, 765 P.2d at 429-30 (distinguishing past truthfulness provisions from consistency provisions). A consistency provision, by contrast, precludes this sort of deviation from prior statements.

The State attempts to dismiss this reality by suggesting that any trial testimony that violates a consistency provision but not an agreement simply requiring past and present truthfulness would not vary significantly enough from an accomplice's prior statements to "affect[] the outcome" of a case. BIO 19. But the State cannot arbitrate in advance what variations in testimony might create reasonable doubt. If an accomplice describes various details of an incident differently at trial than in pretrial statements, this divergence might not singlehandedly demonstrate dishonesty, but it may signal to the jury that the witness's purported recollection may be inaccurate. Because the State cannot know what

kinds of inconsistencies might affect a jury, it cannot insist on a contract that has the effect of preventing their disclosure.

In the end, nothing undercuts the State's arguments more than its own actions: If, as the State now asserts, provisions requiring past and present truthfulness actually prevented consistency provisions from having any impact, then no prosecutor would ever have any reason to include a consistency provision in any accomplice's plea agreement. Yet the State went out of its way to insist upon such a provision here – in a case it knew would stand or fall according to the accomplice's testimony and in which the accomplice had provided a menu of pretrial statements, only some of which aided the State. This indicates that the State itself thought the provision would influence the accomplice's testimony.

2. As the Petition for Certiorari explained, this Court has never suggested that an opportunity for cross-examination can cure prosecutorial interference with the truth-seeking function of trial. *See* Pet. 26 (citing *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam)). The State nonetheless suggests that disclosing the presence of a consistency provision and allowing a defendant to cross-examine the accomplice about it prevents the provision from impeding the jury's fact-finding function. BIO 22-23.

If anything, insisting upon disclosure and cross-examination exacerbates the due process problem with presenting testimony subject to consistency provisions. Settled "vouching" jurisprudence precludes the prosecution from apprising the jury of a

plea agreement's terms when they imply prosecutorial knowledge of the truth. *See* Pet. 26-27 (citing cases); *State v. Ish*, ___ P.3d ___, 2010 WL 3911355, at *5 (Wash. Oct. 7, 2010). As Judge Friendly expressed the concern on which this line of authority is based, "giv[ing] jurors the impression that the prosecution is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts" conveys prosecutorial certitude that not only is unrealistic but also intrudes upon the fact-finding role of the jury. *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir. 1978) (concurring opinion).

The State protests that revealing the existence of a consistency provision must be acceptable because the prosecution always "implicitly" signals to the jury that it believes its witnesses are telling the truth. BIO 23. But a consistency provision does much more: it *explicitly* tells the jury that the accomplice's specified prior statements (and his in-court testimony repeating them) are "truthful." Pet. App. 68a. In addition, it does so in a context in which the defendant is unable to call the prosecution as a witness to ask how it determined that those statements were "truthful" or why it thought a consistency provision was necessary to persuade the accomplice to convey that "truth[]" at trial. It thus is fundamentally unfair to allow the prosecution to reveal a consistency provision to the trier of fact – or to require a defendant to reveal such a provision in order to challenge the State's star witness against him.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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