No. _____

In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

ALFREDO BELTRAN LEYVA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

After pleading guilty to federal narcotics charges, Petitioner was sentenced to life imprisonment based entirely on unverified in-court testimony by agents recounting unsworn statements made by unsentenced cooperators during debriefings. Petitioner was denied cross-examination of the cooperators.

On appeal, Petitioner contended that his sentence rested on constitutionally offensive misinformation and should be reviewed *de novo*—as the Sixth Circuit has held and the Eighth Circuit does in the closely analogous context of revocation of supervised release. However, the court below reviewed only for abuse of discretion, as if the cooperators had appeared in-court, despite acknowledging that four courts of appeals apply the less deferential clear-error standard.

The question presented is whether the Court should resolve this conflict by requiring *de novo* review (or at a minimum, review for clear error).

RULE 14.1(b) CERTIFICATE

Petitioner certifies as follows:

(i) Parties. The parties who appeared before the United States District Court for the District of Columbia and in the United States Court of Appeals for the District of Columbia Circuit in the proceedings which resulted in the judgment from which a writ of certiorari is sought are: Petitioner Alfredo Beltran Leyva and Respondent the United States of America.

(ii) Corporate disclosure statement: No corporation was before the Court of Appeals or the District Court below.

(iii) Related cases: The underlying case, *United States v. Alfredo Beltran Leyva*, Criminal No. 12-0184(RJL), was initiated in the United States District Court for the District of Columbia. A Final Judgment was entered on April 5, 2017.

The Court of Appeals, No. 17-3027, entered its opinion, reported at 916 F.3d 14 (D.C. Cir. 2019), and judgment on February 26, 2019.

Petitioner is aware of no other related cases in any other court or before this Court.

/s/ Stephen c. Leckar

Stephen C. Leckar, Counsel of Record

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PETITION FOR A WRIT OF CERTIORARI

Alfredo Beltran Leyva respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion affirming the district court's sentencing decision (App., *infra*, 1a-z) is reported at 916 F.3d 14 (D.C. Cir. 2019).

JURISDICTION

The court of appeals' judgment was entered on February 26, 2019. A petition for rehearing or rehearing *en banc* was denied on April 5, 2019 (App., *infra*, 2a-b). On June 20, 2019, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to and including September 2, 2019. That day being a federal holiday, this brief is filed the following day. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case asks the Court to resolve an inter-circuit split of the appropriate standard of review to govern appeals of federal sentencing fact-findings that follow guilty pleas and are based entirely on unobserved cooperators' unsworn hearsay. The courts of appeals are divided three ways in reviewing claims that the underlying factual determinations failed to meet the Constitution's due process guarantee protecting people from being sentenced based on misinformation. Several circuits, including the D.C. Circuit, review for abuse of discretion. Others review for clear error. Yet others apply *de novo* review.

Resolving this split is important. Almost 97% of federal prosecutions are resolved by guilty pleas. Quite frequently, the sentencing hearings consist of agents offering extrajudicial hearsay purportedly imparted to them by cooperators, people whose veracity the law has always regarded with suspicion. Petitioner's case is one such example: he pled guilty to a narcotics importation conspiracy with a Sentencing Guidelines Base Offense Level of 38, meaning a range of 235-293 months

imprisonment. As a result of enhancements that were based entirely on two agents reciting three unobserved cooperators' unsworn hearsay claims, Petitioner's Offense Level leaped to 50. He received a life sentence.

In upholding that sentence, the D.C. Circuit chose the most deferential standard, abuse of discretion. That mode of analysis is ill-fitted for reviewing federal sentencing fact-findings challenged as constitutionally unreliable. It assumes that the district court evaluated the demeanor of knowledgeable witnesses claiming knowledge of the facts—not proxies relating multiple levels of hearsay. Yet the district court here did not do that. Had the court of appeals used a *de novo* (or even clear error) standard of review, the enhancements likely would have been rejected.

FACTUAL BACKGROUND[1]

Petitioner was indicted in the District Court for the District of Columbia in 2012 for conspiracy to distribute narcotics. He pled guilty without a plea agreement to cocaine and methamphetamine conspiracy charges.

No trial or evidentiary hearing was held. The parties stipulated to a proposed Guideline Level 42 sentence, a range of 360 months to life. However, that stipulation mistakenly included three sentencing enhancements that were adopted three years after Petitioner's arrest.

The district court (Richard Leon, J), rejected the proposed sentencing. "I know you [*the government*] have ulterior motives, I know you've got your own hidden

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[1] Petitioner will refer to pages in his Main Brief ("MB:_"), Reply Brief ("RB:_") and Appendix filed in the Court of Appeals ("APP").

agendas. … But I cannot and I will not just accept a stipulation that stipulates away reality."[2] The court instead held a sentencing hearing that was unambiguously based on the agents' hearsay and then imposed a life sentence on Petitioner.

The only "evidence" came from two FBI agents with no first-hand knowledge of any information relevant to Petitioner. They reported unsworn and unverified accounts of their dozens of meetings with unsentenced Spanish-speaking cooperators with favorable plea agreements. Those men were addicts and murderers who had committed a wide array of crimes of dishonesty throughout their lives, including bribery—one was convicted of attempting to bribe a Bureau of Prisons officer *after* making a cooperation agreement with the government. Two of them barely knew Petitioner. The third was a Mexican policeman working for drug cartels; his entire life was spent living a lie while engaging in acts of force and brutality.[3]

Had these three "sources" testified, these issues and others arising from their inculpatory claims would have been valid grounds for cross-examination. But the district court refused to require their in-court testimony, notwithstanding Petitioner's continued requests. Instead, their claims were filtered through the agents—one of whom did not speak Spanish—and who admittedly never corroborated their sources' claims.[4]

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[2] [APP-184].

[3] [MB:7-14; RB:7].

[4] [MB:6-7, 14-16; RB:7].

It is unsurprising that the Government failed to provide information with "sufficient indicia of reliability to support its probable accuracy." This is illustrated, for example, by the district court's findings pertaining to the leadership enhancement under U.S.S.G. § 3B1.1. The court claimed that two of the unobserved cooperators' "corroborate with each other with respect to the defendant meeting with El Chapo and Mayo Zambada [leaders of the Sinaloa Cartel]." [5] Actually the hearsay did not claim that.[6]

Despite that and many similar deficits, the district court's oral findings ("Findings") stated that the defense had offered only "rather generalized" attacks on the cooperators' credibility.[7] It found that the "reports credible for the additional reason that the *witnesses*"—the unseen cooperators—"had firsthand knowledge"[8] This also is incorrect: there were no true witnesses to speak of and the district court overlooked other identified concerns. For instance, a bribery enhancement (which only became effective in 2010, long after Petitioner's arrest) was tagged on to Petitioner's sentence although no one purportedly made any such direct claim.[9]

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[5] [APP454].

[6] [MB:18].

[7] [MB:7].

[8] In addition to calling the non-testifying cooperators "witnesses," the Findings repeatedly mistakenly refer to the unsworn hearsay statements conveyed by the FBI as the cooperators' "testimony." *See* MB:17 (collecting examples).

[9] [MB:22-23, 25-26, 33-34]; RB:17 & Addendum].

On such findings was Petitioner's life sentence upheld. In so doing, the Court of Appeals did not address Petitioner's constitutional claim. Instead it accorded "'especially strong deference'" to the district judge's "credibility determinations"—determinations that were not based on observing any witness claiming to be conversant with the facts.[10]

In these circumstances, which occur regularly in the federal courts, a court of appeals is as well-situated, if not better positioned, to determine whether a district judge's fact-findings based on unseen sources' unsworn hearsay is constitutionally reliable.

Notably, in applying an abuse of discretion standard, the D.C. Circuit declined to rule on Petitioner's Ex Post Facto challenge, which it characterized as "serious,"[11] because it believed that such a ruling would not change the Guidelines levels and outcome of Petitioner's sentence. In other words, because the circuit court gave great deference to the district court's "factual" findings, it did not rule on another grave constitutional question that under this Court's precedent would have impacted several of the enhancements to Petitioner's base offense level.

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[10] *Compare United States v. Leyva*, 916 F.3d 14, 25 (D.C. Cir. 2019). (citation omitted) *with United States v. Sabillon-Umana*, 772 F.3d 1328, 1331–32 (10th Cir. 2014) (Gorsuch, J.) ("in our legal order properly found facts drive sentencing decisions, not the other way around. Before settling on a guidelines offense level or some other sentencing conclusion, a district court must take account of the facts—whether conceded by the defendant, found by a jury, or (perhaps) found by the court. When that process is reversed, mistakes and miscalculations can creep in, and we risk sending defendants … to prison for more time than the law fairly permits").

[11] *Leyva*, 916 F.3d at 29.

REASONS FOR GRANTING THE PETITION

This Court has recognized that a case's substantive outcome can change "depending on which standard is used."[12] Legal scholars also have found that the standard of review is often outcome-determinative.

There is a clear split in the standards of review used to assess reliability of fact-finding in federal sentencings following guilty pleas. Two courts of appeals have applied a *de novo* standard to review due process claims arising from sentencings and from the analogous circumstance of revocation of supervised release.[13] Six courts of appeals, now including the D.C. Circuit below, follow the highly deferential "abuse of discretion" standard. And as the D.C. Circuit recognized, at least four other circuits review the reliability of sentencing factfinding under the somewhat less deferential standard of clear error.

This Court should resolve this inter-circuit conflict. And it should do so in a way that makes it unmistakable that a deferential standard of review should not be employed when it is inappropriate—such as to assess a post-plea hearing with

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[12] *Dickinson v. Zurko*, 527 U.S. 150, 161-162 (1999); *see also Brown v. Payton,* 544 U.S. 133, 148 (2005) (Breyer, J., concurring) ("[T]his is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference."); *Southwest Voter Registration Educ. Pro. v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (*en banc*) (noting "standard of review is important to our resolution of this case").

[13] Although the Court of Appeals below cited five circuits as applying an abuse of discretion standard, one of the cases it cited, *United States v. Moncivais*, 492 F.3d 652, 656 (6th Cir. 2007) (Clay, J.), applied a *de novo* standard of review to a due process claim. N.20 *infra* and accompanying text.

contested fact-finding that was completely driven by unobserved unverified hearsay. Here, the district court had no more familiarity with the absentee cooperators' "testimony" than did the D.C. Circuit– it was all unsworn anecdotal hearsay and multiple hearsay, filtered through language barriers and then supposedly conveyed by two agents. A three-judge panel with a breadth of experience was as capable of reviewing the sentencing transcripts *de novo*, if not better situated to do so, to determine whether Petitioner's sentence rested on constitutionally reliable factfinding.

Petitioner's situation is not anomalous: almost all federal prosecutions culminate in a guilty plea. Since the Sentencing Guidelines' advent, the number of defendants who stood trial, as compared to pled guilty, has declined from about 16% to 3%.[14] Yet the practice of appraising the reliability of "facts" supposedly related by unobserved unsentenced cooperators is recurrent in sentencings.

Using a highly deferential standard to adjudicate an appeal under these circumstances misapplies the basis for the abuse of discretion and clear error standards of review. "There is nothing either extraordinary or inexplicable about the proposition that constitutional rulings—even fact specific ones—should be reviewed

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[14] *Compare Lafler v. Cooper*, 566 U.S. _, 132 S. Ct. 1376, 1388 (2012) (currently 97% plead guilty) *with* Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 365 (1994) (84% formerly pleaded guilty) (citing U.S. Dep't of Justice, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 528, tbl. 5.36 (1991)).

under a more demanding standard."[15] For the foregoing reasons, this Court should grant the petition and resolve the conflict.

[15] *United States v. McKinney*, 919 F.2d 405, 412 (7th Cir.1990).

ARGUMENT AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Empirical evidence and recent scholarship confirm that standards of review matter—often to the point of being outcome-dispositive.[16] This Court's intervention is necessary to reconcile the inter-circuit split on the proper standard to review claims by defendants concerning their due process right to be sentenced only upon trustworthy information.

I. There is a clear conflict in the standard used to review fact-findings in federal sentencings that follow guilty pleas.

There is a due process right not to be sentenced based on "misinformation of constitutional magnitude."[17] There is a multi-circuit split in how such claims are reviewed. The standard of review can be dispositive and this case is a prime example of why this Court should resolve the circuit conflict.

The D.C. Circuit selected an abuse of discretion standard to review the reliability of federal sentencing fact-findings after concluding that five circuit courts of appeals follow that practice.[18] At the same time, it recognized that at least four

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[16] *See*, *e.g.*, Jeffrey C. Dobbins, *Changing Standards of Review*, 48 LOY. CHI. L. REV. 205, 208, 227-232 (2016); Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference* Mistakes, 82 U. CHI. L. REV 643, 657-658, 661 (2015) (citing appellate decisions); Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 409, 431 (2011); Amanda Peters, *The Meaning, Measure and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 235-236 (2009).

[17] *United States v. Tucker*, 404 U.S. 443, 447 (1972). *See also Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948).

[18] *Leyva*, 916 F.3d at 25 (citations omitted).

circuits apply clear error review to those determinations. Unrecognized by the court of appeals below, one of the decisions it cited used a *de novo* standard to evaluate a due process sentencing misinformation claim. That is *identical* to the standard of review advanced by Petitioner.

Other than to follow what it characterized as the majority rule, the D.C. Circuit did not explain why it chose the most deferential form of review.[19]

a. In *United States v. Moncivais*, a decision that the D.C. Circuit cited for using an abuse of discretion review, the Sixth Circuit Court of Appeals held that determining the reliability of facts found in sentencing proceedings for consistency with due process was a mixed question of law and fact. For that reason, it followed a *de novo* review.[20] That approach is not exceptional: the same court of appeals had earlier endorsed *de novo* review as appropriate to determine whether the underlying proceeding was "fundamentally unfair."[21]

The Sixth Circuit is not unique in requiring a *de novo* standard to assess the deprivation of liberty where cogent due process concerns are identified, as they were here. Using an abuse of discretion standard to review decisions based on uncorroborated misinformation from shadowy absentee sources was rejected a week

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[19] *Leyva*, 916 F.3d at 25 (citations omitted).

[20] *United States v. Moncivais*, 492 F.3d 652, 656 (6th Cir. 2007) (Clay, Gilman & McKeague, JJ) (quoting *United States v. Sanders*, 452 F.3d 572, 576 (6th Cir. 2006)).

[21] *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993).

after the underlying decision here. In *United States v. Sutton*, the Eighth Circuit Court of Appeals applied a *de novo* standard to find reversible error in a district court's decision to revoke supervised release—a denial of liberty—also based on hearsay and multiple hearsay from unsworn unseen sources of dubious character.[22]

b. Even the decisions cited by the D.C. Circuit to support abuse of discretion review do not support its conclusion that the underlying sentencing process was sound, much less constitutionally so:

1. Two of the opinions cited as examples of abuse of discretion review involved sentences that followed trials. In each the district judge had observed the witnesses whose testimony was later relied on at sentencing.[23]

2. In a third case, in which sentencing following a guilty plea, the defendant's undisputed admissions proved the determinant factor.[24] And in the fourth case, also a post-plea sentencing matter, the appellant-defendant unsuccessfully protested the sentencing judge's rejection of the *defense's* proffering unsworn hearsay that was not subject to cross examination.[25]

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[22] 916 F.3d 1134, 1138 (8th Cir. 2019) (Gruender, Kelly & Grasz, JJ).

[23] *United States v. Rodriguez*, 731 F.3d 20, 31 (1st Cir. 2013); *United States v. Pineda*, 770 F.3d 313, 318 (4th Cir. 2014).

[24] *United States v. Hernandez-Guerrero*, 633 F.3d 933, 935, 938 (9th Cir. 2011).

[25] *United States v. Kendrick*, 697 F. App'x 622, 623 (11th Cir. 2017). Notably the panel in *Kendrick* reviewed the district judge's fact findings for clear error. *Id.*

c. Nor do the clear error decisions cited by the D.C. Circuit justify rejecting *de novo* review of particularized due process challenges to the factfinding process' reliability. For one thing, none of those opinions indicate that the appellant had pursued constitutional claims to contest a sentence completely predicated upon hearsay.[26] And each is further distinguishable: in one, the dispute centered on whether the appellant's prior convictions were properly memorialized in a docket sheet—even though he conceded the key statements in his Presentence Report.[27] In the others, the courts found abundant external corroboration besides the unseen cooperator's hearsay.[28] Here the agents admittedly undertook no effort to independently corroborate the word of their absentee sources.

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[26] *See United States v. Ryan*, 806 F.3d 691, 693 (2nd Cir. 2015); *United States v. Jones*, 514 Fed. App'x 229, 232 (3d Cir. 2013) (unpublished); *United States v. Ortega-Calderon*, 814 F.3d 757, 760 (5th Cir. 2016); *United States v. Martinez*, 824 F.3d 1256, 1261 (10th Cir. 2016).

[27] *Ortega-Calderon*, 814 F.3d at 760-61.

[28] *Martinez*, 824 F.3d at 1262; *Ryan*, 806 F.3d at 694-95; *Jones*, 514 Fed. App'x at 232-33.

II. There are serious concerns with applying the abuse of discretion and clear error standards to review the constitutional reliability of sentencing fact-findings based entirely on uncorroborated hearsay.

This Court should grant certiorari to resolve the conflicts among the circuit over a proper standard of review. The abuse of discretion standard is ill-suited for post-plea federal sentencings that rely on unsworn hearsay supposedly emanating from unseen cooperators. And the clear error standard, although an improvement over abuse of discretion, nonetheless invites error because the district judge did not actually observe any testimony of actual, knowledgeable witnesses.

a. "'When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor,' deferential review is favored."[29] That deferential standard flows from the understanding that the trier of fact "has had the 'opportunity to observe the demeanor of the witness.'"[30] Echoing that perspective, the Court of Appeals below justified its decision to follow an abuse of discretion standard by emphasizing that "[w]e give 'especially strong deference to credibility determinations because the district court has a unique opportunity to evaluate the credibility of witnesses and to weigh the evidence.'"[31]

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[29] Harry T. Edwards & Linda A. Elliott, FEDERAL STANDARDS OF REVIEW—REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 13 (2007) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

[30] *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989) (citations omitted). *See also United States v. Bailey*, 444 U.S. 394, 413 n.9 (1980).

[31] *Leyva*, 916 F.3d at 25 (quoting *United States v. (Joseph) Jones*, 744 F.3d 1362, 1367 (D.C. Cir. 2014)).

However, the Court of Appeals' pronouncement mischaracterized the nature of the proceedings below. Properly administered, "[g]uideline sentencing is an adversarial process [which] envisions a confrontation between the parties similar to that which occurs at a civil bench trial."[32] The process followed here departed greatly from that adversarial model.

1. The district court made *no* evaluation of any knowledgeable witnesses' in-court credibility or demeanor. Indeed, the district judge affirmatively barred examination or cross-examination of the invisible cooperators. Instead, the judge's factfinding was based on unsworn hearsay supposedly coming from unsentenced cooperators kept away from the courtroom by the Government, coupled with the judge's inaccurate recital that Petitioner had only offered "generalized" objections to the hidden sources.

Applying the "gentleness of abuse-of-discretion appellate review"[33] to resolve the reliability of unseen cooperators' claims abdicates meaningful review. That would be true even if the sentence being reviewed was not the second most severe form of punishment in our system.

2. Granting great deference to one person as a factfinder in a case such as this, which was driven by unobserved hearsay, invites error. The fact of the matter is that there is "an emerging consensus in the legal and social science literature that people

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[32] *United States v. Scroggins*, 880 F.2d 1204, 1209 (11th Cir. 1989).

[33] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice,* 107 YALE L. J. 1, 13 (1997).

generally do a poor job in evaluating demeanor evidence."[34] Even when district judges do evaluate demeanor evidence their fact-finding decisions may not always get it right: "the research to date has found little evidence that those who might be thought lie detection 'experts,' such as law enforcement officers, forensic psychiatrists, lawyers, and judges, perform much better [than anybody else] in experimental settings."[35] And "the commentators who have assessed the transferability of the experimental results to the courtroom setting have 'uniformly concluded' that the courtroom setting is unlikely to produce substantially better results, and may actually worsen the problem."[36]

3. When a district judge's sentencing completely excludes demeanor and credibility evidence, the notion of that judge's "being there" is unlikely to yield advantages over an appellate panel's review.[37] Indeed an appellate panel's competence to evaluate the reliability of a district judge's factual findings "'may be less a limitation than a source of institutional advantage.'"[38] This is particularly

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[34] Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2142 (2010) (citations omitted). *Accord* Note, *More Than A Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 967 (2014).

[35] O'Hear, 51 WM. & MARY L. REV. at 2143 (citing Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 438 (2004)).

[36] O'Hear, 51 WM. & MARY L. REV. at 2143 (citing Oldfather, 57 VAND. L. REV. at 458-459).

[37] Note, *More Than A Formality*, 127 HARV. L. REV. at 967.

[38] *Id.* (quoting O'Hear, 51 WM. & MARY L. REV. at 2148-49).

pertinent where the facts being reviewed emanate from unsworn statements attributed to unseen sources whose dubious reliability the defense challenged.[39]

4. Favoring an abuse of discretion standard to review a record comprised of unsworn hearsay is akin to ratifying prosecution by affidavit, a process whose unfairness prompted the common law restrictions on hearsay.[40] "[I]t is perhaps not too much to claim for the appellate courts that in their supervisory function they may have the advantage of a wider perspective" than a single district judge.[41]

b. An appropriate review for clear error, which frequently is applied to nonguilt findings of fact in criminal cases, has a fundamental distinction from what happened here—and happens whenever contested sentencing factfinding becomes a function of what agents report being told by unseen cooperators. Although there is a difference between review for abuse of discretion and for clear error,[42] the "clearly erroneous" standard of review still remains based on "the importance of first-hand

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[39] Henry C. Friendly, *Indiscretion About Discretion*, 31 EMORY L. REV. 747, 759& n. 39 (1982) (citing *Orvis v. Higgins*, 180 F.2d 537, 539 (2nd Cir. 1950) (Frank, J.)). Judge Friendly's discussion and criticism of the abuse of discretion standard has been described as "classic." Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice,* 107 YALE L. J. at 13 n.41.

[40] *White v. Illinois*, 502 U. S. 346, 361-362 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

[41] Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249, 275 (1962) (statement of Sobeloff, C.J.).

[42] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

observation."[43] "Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations, which explains why they are reviewed deferentially under the clearly erroneous standard."[44] That process never occurred in this case.

While a clear error standard would be more appropriate than abuse of discretion, it is not suitable for due process challenges to the unreliability of sentencing factfinding linked to multiple levels of hearsay from unsentenced unobserved cooperators—people whose credibility even experienced federal prosecutors confess to have difficulty assessing.[45]

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[43] Edwards & Elliott, FEDERAL STANDARDS OF REVIEW at 19 (quoting *Maine v. Taylor*, 477 U.S. 131, 145 (1985) (citing *Campbell v. United States*, 373 U. S. 487, 493 (1963)). *Accord* Carissa B. Hessick & Andrew F. Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 14 (2008).

[44] *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (*en banc*). A thorough analysis of the connection between credibility determinations and clear error review also appears in *United States. v. Williams*, 340 F.3d 1231, 1240-1242 (11th Cir. 2003).

[45] Shana Knizhnik, *Failed Snitches and Sentencing Stitches: Substantial Cooperation and the Cooperators' Dilemma*, 90 N.Y.U. L. REV. 1722, 1745-47 (2015) ("One of the primary critiques of snitching in the criminal justice system is the endemic problem of cooperators providing false information").

III. A *de novo* standard should govern review of claims of unreliable factfinding in post-plea sentencings that depend on hearsay from unseen cooperators.

Where a mixed question of constitutional law and fact is presented, a *de novo* review is favored. A writ of certiorari should issue here to confirm that standard should be used in cases of this nature, where liberty interests are at stake.

a. In *Lilly v. Virginia*,[46] this Court held that its precedents "indicate that we have assumed, as with other fact-intensive, mixed questions of constitutional law, that 'independent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights."[47] *De novo* review is necessary to assess issues such as reliability, for it is a "fluid concept[] that take[s] [its] substantive content from the particular contexts in which the standards are being assessed."[48] Otherwise, employing a deferential standard of review would lead to "varied results" which would "be inconsistent with the idea of a unitary system of law."[49]

1. When a reviewing court must go beyond a given case's facts to consider whether constitutional guarantees were satisfied, a *de novo* standard of review is

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[46] 527 U.S. 116, 136 (1999).

[47] *Id.*, 527 U.S. at 136 (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (reasonable suspicion and probable cause determinations should be reviewed *de novo*)).

[48] *Ornelas*, 517 U.S.at 696.

[49] *Id.*, 517 U.S. at 697.

necessary.[50] An independent appellate review of the reliability of the sentencing factfinding—an "evaluative determination" [51]—is necessary to "maintain control of, and to clarify the legal principles"[52] and through that process "unify precedent."[53]

2. In addition,"[r]egarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact."[54] "Providing clear legal guidance is particularly important in the area of sentencing, not only because it involves important interests like liberty, but also because sentencing affects so many people."[55]

b. Although mixed questions of fact and constitutional law sometimes are reviewed under a lesser standard, the prototypical example still "involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor,"

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[50] *See*, *e.g.*, *Miller v. Fenton*, 474 U.S. at 112-18; *Strickland v. Washington*, 466 U.S. 668, 698 (1984) (effective assistance of counsel); *United States v. White*, 620 F.3d 401, 405 (4th Cir. 2010) (forced medication to restore competency); *United States v. Swanson*, 341 F.3d 524, 528 (6th Cir. 2003) (whether suspect is in custody).

[51] Randall H. Warner, *All Mixed Up about Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 143-144 (2005).

[52] *Ornelas*, 517 U.S.at 698.

[53] *Id. See also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (*de novo* review "helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself").

[54] *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984).

[55] Hessick & Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. at 33.

where "there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court."[56] Here, however, the district court refused to observe the unsentenced cooperators, let alone allow for their cross-examination.[57]

c. Finally, "frequently recurring fact patterns warrant specific judicial norm elaboration rather than being left to the trier of fact under a more general standard."[58] That perspective also aptly fits this case because so many post-plea sentencings are a function of a district court's dwelling on the "evidence" of hearsay interviews of unsentenced cooperators of questionable credibility that are presented through "clean-cut government agents," officers who "undoubtedly would have been consistent and confident in answering questions."[59] As the D.C. Circuit recognized in the context of a trial, when the government presents the "story" of a "less-than-reputable convict . . . sitting in a federal institution" through a "clean-cut FBI agent,"

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[56] *Thompson v. Keohane*, 516 U.S. 99, 111 (1995); *Miller*, 474 U.S. at 114; *see also* 2 Steven A. Childress & Martha S. Davis, FEDERAL STANDARDS OF REVIEW, § 7.05 at 20 (4th ed. 2010).

[57] The District Court below asserted that only the Ninth Circuit, which it incorrectly described as "reversed 80 percent of the time," might object to a sentencing hearing based exclusively on agents' hearsay. [MB:6-7].

[58] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 267 (1985). *See also* Joseph T. Sneed, *Trial-Court Discretion: Its Exercise by Trial Courts and Its Review by Appellate Courts*, 13 J. APP. PRAC. & PROCESS 201, 204 (2012) ("Issues that pertain to determining the scope and nature of constitutional rights" should not be subject to trial court discretion).

[59] Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. at 345 (emphasizing importance of having "firsthand testimony" subject to cross-examination as the basis for reliable factfinding at sentencing).

"[c]ross-examination may be the 'greatest legal engine ever invented for the discovery of truth,' but it is not of much use if there is no one to whom it can be applied.[60]

[60] *United States v. Evans*, 216 F.3d 80, 85 (D.C. Cir. 2000) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)).

IV. This case is a good vehicle for review.

The district judge's decision is a direct function of rank unsworn unobserved hearsay from sources that the courts have long found to present reliability issues.[61] Each unseen unsentenced cooperator "may very well have been hoping to curry favor with law enforcement officials" by implicating Petitioner.[62] In addition, there is a "time-honored teaching," fully applicable to the sentencing phase, "that a co-defendant's confession inculpating the accused is inherently unreliable"[63] and should be viewed with "'special suspicion.'"[64] Use of the abuse of discretion standard in these analogous circumstances sidestepped those inconvenient truths.

a. "It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence," and while "courts uniformly hold that such a witness may testify so long as the government's bargain with him is fully ventilated so that the jury can

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[61] *United States v. McGowan*, 668 F.3d 601, 607 (9th Cir. 2012) ("Most important, the sentencing judge had no opportunity to observe Seevers in order to evaluate his credibility, and no one representing McGowan's interests ever had an opportunity to cross-examine Seevers").

[62] *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995). *See also United States v. Corral*, 172 F.3d 714, 716 (9th Cir. 1999) (due process violated following guilty plea by reliance on absent accomplice).

[63] *Lee v. Illinois*, 476 U.S. 530, 546 (1986); *United States v. Pimentel-Lopez*, 859 F.3d 1134, 1143-1144 (9th Cir. 2017).

[64] *United States v. Gomez-Lemos*, 939 F.2d 326, 330 (6th Cir.1991) (quoting *Lee*, 476 U.S. at 541). *See also Northern Marianas Islands v. Bowie*, 243 F.3d 1109, 1124 (9th Cir. 2001) ("[each 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.").

evaluate his credibility," [65] that evaluation did not occur here—certainly not by the district judge, who "[found] these reports credible for the additional reason that the witnesses had firsthand knowledge." [66] Calling those invisible people "witnesses" further confirms that deferential review should only be provided where sentencing resembles a real evidentiary hearing. That was not true here:

b. The district judge's terse findings also reflect no discussion about whether the agents had unwittingly alerted the cooperators to alter or conform their stories to the government's theory.[67] And agents themselves can lose objectivity.[68] Precluding the defense from cross-examining the cooperators over these issues only added to the deficits identified above.

c. The underlying sentencing hearing featured recognized harbingers of *un*reliability: no oath; no genuine opportunity to cross-examine; no opportunity to "observe the declarant's demeanor"; no consideration of contradicting evidence; and no "distinct findings regarding the reliability of the hearsay evidence" presented.[69]

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[65] *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (*en banc*) (citation omitted).

[66] *Id*. at 316.

[67] Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1403-04 (1996).

[68] Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1083 (2011).

[69] *United States v. Pimentel-Lopez*, 828 F.3d 1173 (9th Cir. 2016), *amended op*., 859 F.3d 1134, 1143-1144 (9th Cir. 2017); *United States v. Hope*, 686 Fed. App'x 623, 626, 629-630 (11th Cir. 2017) (reversing upwards variance based on agents' relating unsworn hearsay); *McGowan*, 668 F.3d at 607.

Further proof beyond the vague and contradictory hearsay used to justify the leadership enhancement imposed by the district court demonstrates the outcome-determinative effect of a proper standard of review. A *de novo* standard also would have found the bribery enhancement unreliable for constitutional purposes because none of the unseen cooperators claimed to have seen Petitioner bribe public officials.[70] And had a *de novo* standard been used, it would have been exceedingly difficult to characterize as constitutionally reliable a determination that Petitioner had engaged in violence when one of the invisible cooperators (who supposedly said he only met Petitioner three times over the years) evidently had said nothing about that to the agents; the second (who only met Petitioner once) purportedly said that someone else had told him further hearsay about violence; and the third was a confirmed addict who offered only vague allegations.[71] Furthermore, the district court appears to have forgotten that during the hearings it had expressed skepticism over one cooperator's purported ability to reconstruct events that supposedly occurred a decade or more earlier.[72]

Finally, the Court of Appeals recognized that Petitioner had raised what it described as "a serious ex post facto issue" of plain error centering on evidence that three of the five sentencing enhancements found by the district court appeared to be

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[70] [MB:23-24].

[71] [MB:21-22].

[72] [MB:9]. That cooperator was the one who was convicted of attempting to bribe a Bureau of Prisons official while under a cooperation agreement.

based on claims that predated those enhancements' adoption.[73] But for the appellate court's application of a "gentle" standard of review, one designed for situations in which the witnesses are not proxies, this grave constitutional consideration and the extent to which Petitioner's Base Offense Level was artificially inflated by six levels, also would have been addressed.

CONCLUSION

The issues presented are growing exponentially as more federal defendants plead guilty and are sentenced in the manner that was used here. Petitioner has identified important concerns which call for a uniform reconciliation of the standard of review used to assess due process claims that a sentencing factfinding was unreliable. The Court should grant this Petition.

Respectfully submitted,

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[73] *Leyva*, 916 F.3d at 29.