No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID CLAYTON CONERLY—PETITIONER

VS.

UNITED STATES OF AMERICA—RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit err by mining the district record to uphold an upward adjustment to petitioner's offense level under the Sentencing Guidelines? Should it instead have reviewed only the sufficiency of the evidence actually cited by the district court, the approach used by the D.C. Circuit in *United States v. Hart*, 324 F.3d 740 (D.C. Cir. 2003), which better accords with the commands of the statutes governing the imposition and review of sentences?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF PRIOR PROCEEDINGS

- *United States v. Conerly*, Northern District of California, case no. 17-CR-578-JSW. Judgment entered November 27, 2018.
- *United States v. Conerly*, U.S. Court of Appeals for the Ninth Circuit, 9th Cir. No. 18-10454. Judgment entered January 14, 2020. Rehearing and *en banc* review denied April 16, 2020.
- No prior state court proceedings.

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The memorandum decision of the U.S. Court of Appeals for the Ninth Circuit affirming the judgment and the subsequent order denying rehearing and *en banc* review are unpublished. (Appendix ("App.") 1, 3.)

JURISDICTION

On January 14, 2020, a panel of the U.S. Court of Appeals for the Ninth Circuit issued a memorandum decision affirming the judgment. (App. 1.) On April 16, 2020, the Ninth Circuit denied rehearing and *en banc* review. (App. 3.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction of the case pursuant to 18 U.S.C. § 3231. The Court of Appeal had jurisdiction of petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

18 USC § 3742(a)(2)

A defendant may appeal a sentence arguing that it was "was imposed as a result of an incorrect application of the sentencing guidelines[.]"

18 USC § 3742(e)

"The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of

fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts."

STATEMENT OF THE CASE

On June 19, 2018, petitioner David Clayton Conerly ("petitioner") pled guilty to one count of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). (App. 63.) There was no plea agreement. On November 27, 2018, the district court sentenced petitioner to 108 months in prison. (App. 5.) At sentencing, the district court increased petitioner's offense level by four levels under USSG § 2K2.1(b)(6)(B), finding that he had unlawfully possessed the firearm in connection with the felony of possessing cocaine base, and rejecting petitioner's challenge that the evidence was insufficient. (App. 13-14.)

Petitioner raised the issue presented here on appeal, arguing that a four-level upward adjustment to his offense level under the advisory Sentencing Guidelines was not supported by the evidence cited by the district court. A panel of the Ninth Circuit rejected the argument and affirmed the judgment in a memorandum decision filed January 14, 2020. (App. 1-2.) After

receiving an extension of time, petitioner sought rehearing and *en banc* review. On April 16, 2020, the Ninth Circuit denied the petition. (App. 3.)

STATEMENT OF FACTS

On November 2, 2017, Berkeley Police Department officers responded to the report of an assault with a deadly weapon. The officers made contact with the victim, who stated that petitioner, her ex-boyfriend, had come to her residence in an intoxicated state. Fearing for her safety she grabbed a bat she had at the doorway, and after a brief verbal altercation, petitioner grabbed the bat from her. Petitioner then threw the bat at the victim and hit her with the bat in the leg. The victim told petitioner she was going to call the police, and he left on foot. (PSR 4.)

The officers conducted an area check and located petitioner. Petitioner fled and did not comply with commands. After a brief foot chase, he was detained. Nearby, a .40 caliber handgun with an extended magazine was discovered. There were no bullets in the magazine or in the chamber. The magazine had a 30-round capacity, but responding officers noted the base plate of the magazine and the spring were missing. These missing pieces would have allowed the rounds of ammunition to fall to the ground. (PSR 4-5.)

Five .40 caliber unspent rounds were located near where petitioner was apprehended. Two additional rounds were found during a search of

petitioner's person. Also found was suspected base cocaine that the officers believed was packaged for sale and a small plastic bag of marijuana. A Narcotics ID Kit test confirmed that petitioner was in possession of 20.93 grams of base cocaine. (PSR 5.)

After he was detained and during his transport, petitioner behaved violently towards the officers, threatening them, spitting at them, and kicking one of them. He was placed in a spit hood and a WRAP restraint and put in the police car. During transport, he banged his head repeatedly on the Plexiglass divider and tried to kick out the rear driver's side window. At the Berkeley jail, petitioner was placed in a safety cell and sedated. He was then taken to the hospital for evaluation. (PSR 5.)

After being declared "fit for incarceration" by the hospital staff, petitioner was taken to Santa Rita jail. A booking search of his person turned up four more rounds of ammunition, $737.98 in cash, and a baggie of white powder, which was tested and confirmed by a NIK test to be 4.85 grams of powder cocaine.[1] (PSR 5.)

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[1] Petitioner posted bail in state court. After federal charges were filed, he was eventually arrested without incident in southern California. (PSR 6.)

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Incorrectly Upheld the Challenged Four-Level Upward Adjustment to Petitioner's Offense Level by Going Beyond the Evidence Cited by the District Court and Mining the Record for Other Supporting Evidence.

A. Introduction

It is often said that proceedings in the trial court should be the main event. However, the Ninth Circuit allows reviewing courts to search the record for evidence supporting sentencing findings when the evidence cited by the district court is invalid. This conflicts with the D.C. Circuit's holding in *United States v. Hart*, 324 F.3d 740 (D.C. Cir. 2003) that district courts may not do so. *Hart* better accords with the commands of federal sentencing statutes. This Court should grant *certiorari* and settle the matter. Supreme Court Rule 10(a), (c).

B. Relevant Facts and Procedural Background

1. Proceedings in the District Court

The Presentence Report recited the offense conduct as set out above. (PSR 4-6.) It recited that petitioner's conviction under 18 U.S.C. § 922(g)(1) carried a statutory maximum sentence of ten years in prison. (PSR 1.) The advisory Guidelines range was 100 to 125 months, which was capped at 120 months. (PSR 26.)

Petitioner's adjusted offense level was 27. The base offense level was 26 pursuant to USSG § 2K2.1(a)(1) because petitioner possessed a handgun with a large capacity magazine after having sustained two convictions for possession for sale. This was increased to 30 by the challenged four-level increase under USSG § 2K2.1(b)(6)(B) for possessing the firearm in connection with another felony, the possession of powder cocaine and cocaine base for sale. Because petitioner pled guilty, the adjusted level was reduced to 27 for acceptance of responsibility pursuant to USSG § 3E1.1(a)-(b).) (PSR 7-8.)

The PSR recited that petitioner had nine criminal history points. This put him in Criminal History Category IV, yielding the initial range of 100 to 125 months. (PSR 8-11.) The PSR also recited petitioner's arrest history that resulted in dismissals or parole violations but not convictions and criminal history points. (PSR 12-20.)

Pertinent to the challenged four-level increase, paragraph 14 of the PSR recites: "Mr. Conerly's text messages included several incoming text messages into Mr. Conerly's cell phone with individuals asking for prices and specific types of marijuana strains. There was also text message communication from individuals and Mr. Conerly discussing meeting locations and ability to provide currency for requested drugs." (PSR 6.) The

PSR does not clarify if "requested drugs" includes cocaine base or is limited to marijuana as mentioned in the first sentence of this paragraph.

Paragraph 15 of the PSR recites:

> "On October 29, 2018, the undersigned received email correspondence from the Government regarding a declaration from California Highway Patrol Officer Sean Deise. The declaration was for the purpose of providing contextual evidence to support Mr. Conerly's involvement in possession of cocaine base for sale and transportation of cocaine base for sale. Officer Deise reported cocaine base is a CNS (Central Nervous System) stimulant with a usable amount weighing as little as .10 grams. Due to Mr. Conerly having a total of 17.52 grams of cocaine base on his person during the time of the instant offense, Officer Deise opined this amount would far exceed the amount considered for personal use. Officer Deise reported due to cocaine base being sold on the streets for as little as $5.00 to $10.00, it would be reasonable for Mr. Conerly to have currency with various denominations to facilitate drug sales." (PSR 6.)

The PSR does not suggest that Officer Deise opined about marijuana sales.

The Deise opinion was attached to the government's sentencing brief. (App. 57-58.) Though it recites that it is an "affidavit," it is not signed under penalty of perjury. It recites Deise's belief, quoted above in the PSR, that the amount of cocaine base found on petitioner was inconsistent with personal use and that the amount and denominations of cash found on him was consistent with sales of cocaine base. Deise cited his "training and experience" on this latter point. Deise also recited petitioner's prior drug convictions and claimed that petitioner had "a propensity of selling narcotics,

specifically cocaine, cocaine base, and marijuana." Deise did not, however, opine that petitioner was selling marijuana or powder cocaine. (App. 58.)

Deise's *curriculum vitae* was attached to the "affidavit." (App. 59-62.) He had been a CHP officer since 2008. His narcotics-related training and work was a Drug Recognition Expert ("DRE"). (App. 59-61.) The CV recites no training and experience in evaluating possession for sales cases or the behavior of addicts. Deise had testified in court many times, including 20 cases involving drug possession and/or drug sales. However, he only testified as an expert in ten cases. In those cases, he was qualified either as an expert on PAS or DRE.[2] (App. 61.) He was never qualified as an expert on possession for sale.

The government's sentencing brief recites that petitioner's cell phone contained "multiple text messages reflecting drug trafficking activity, including requests for price quotes and certain strains of marijuana. PSR, ¶ 13. There was also a message in which the defendant spoke about having a certain quantity of something that was 'spoon-ready.'" (App. 49-50.) Neither the PSR nor any other source is cited for this latter fact.

Addressing the general seriousness of the offense, the government noted that petitioner "was in possession of a loaded gun while also in

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[2] PAS refers to preliminary alcohol screening devices.

possession of crack cocaine, which he intended to sell." (App. 52.) Addressing the challenged four-level enhancement specifically, the government wrote,

> "The 4-level increase under 2K2.2(b)(6)(b) for possession of the firearm in connection with another felony is warranted because the defendant was in possession of crack cocaine for sale at the time he possessed the gun. The defendant has a long history of selling crack cocaine, including in quantities similar to the amount he possessed in this case, and he routinely carries a loaded gun while dealing drugs. The evidence in support of his enhancement includes the quantity of drugs he possessed in this case, the currency he had in small denominations, the opinion of CHP Officer Deise that the defendant was in possession of crack cocaine for sale, and the defendant's history of selling crack while armed, which is documented in the PSR." (App. 52.)

The government did not argue that any marijuana activities justified the four-level increase. It did not argue that petitioner was selling powder cocaine.

Petitioner raised two objections to the presentencing report. He argued that one of his marijuana convictions that had been dismissed in California should not count as part of his criminal history. (App. 39-42.) He also argued that the four-level enhancement for illegally possessing a firearm in connection with a felony was not supported by substantial evidence. (App. 37-39.) This was because Deise's opinions were not persuasive evidence that petitioner possessed cocaine base for sale when he was arrested and because the seemingly drug-related text messages on petitioner's phone related to marijuana, not cocaine base.

"Moreover, the government has not established by a preponderance of the evidence that the amount of cocaine possessed by Mr. Conerly could only have been possessed for sale as opposed to possession for personal use. The only evidence relied on by the government to establish that the aforementioned drugs were possessed for sale is the unsigned 'affidavit' of a California Highway Patrol Officer, who is completely unqualified to render an opinion that Mr. Conerly possessed the cocaine for sale. (Exhibit B) That 'affidavit' reveals that the CHP officer has no personal or other experience with street level drug dealing. The 'Curriculum Vitae' submitted with the 'affidavit' is completely devoid of any relevant experience dealing with street level drug dealing of any kind or the amount of or doses of drugs used by people who are abusing drugs as opposed to selling drugs. The only drug related law enforcement experience remotely possessed by the affiant appears to be (a) performing 'DRE's,' which are drug recognition examinations conducted at the roadside when a vehicle is pulled over for erratic driving and the driver is suspected of either drug or alcohol use and (b) testifying in court during a trial of persons arrested for driving under the influence of drugs. Also, the CHP officer's review of 'Conerly's criminal history' as a component of his opinion sheds little light on the issue herein, which is whether or not the drugs found on Mr. Conerly *on November 2, 2017* were possessed for sale, not whether Mr. Conerly has a propensity for possessing drugs for sale in his past. Finally, the search of Mr. Conerly's phone reveals a number of conversations which are consistent with a person who was selling street level quantities of marijuana as opposed to cocaine. This also would explain why, at the end of the night, Mr. Conerly possessed $737 in currency. Based on the foregoing, we request that the Court reduce Mr. Conerly's offense level by four points." (App. 38-39 [emphasis in original].)

At the sentencing hearing on November 20, 2018, the issue of the four-level increase was disposed of without further argument.

"The Court will overrule that objection. I believe that based upon the evidence submitted based upon the information contained in the presentence report, particularly as to what was on the phone,

> found on the phone, the information from the CHP officer, although the defendant attacks the credibility and reliability and competence of the officer to opine, I think that goes to the weight and not the admissibility. This is a sentencing proceeding, and I believe that the Court—there is—can find by a preponderance of the evidence that the basis for that particular four-point enhancement, four-level enhancement is justified, and we'll maintain that." (App. 13-14.)

Neither petitioner's criminal history nor his alleged "propensity" to sell drugs while armed was cited in support of the true finding. The court did not recite that possession of cocaine base for sale was established as a matter of common sense in light of the known facts. (App. 13-14.)

The district court agreed that the challenged marijuana conviction should not count in petitioner's criminal history. This put petitioner in Criminal History Category III instead of Category IV. It reduced the advisory Guidelines range to 87 to 108 months from 100 to 125 months. (App. 19-20.)

The government asked for a high-end sentence of 108 months given petitioner's "pretty heinous" background and the circumstances of this case, which involved threats to another person. (App. 20.) Defense counsel urged a reduced sentence given petitioner's recent efforts to turn his life around by attending truck driving school as well as his advancing age, which both suggested a diminished potential for recidivism and counseled in favor of a

lower sentence to allow him to build a career. (App. 21-23.)[3] Addressing the court, petitioner emphasized the efforts he had made and hoped to continue making. He regretted starting drinking again and allowing everything to fall apart. He said he had not intended to hurt anyone the day he was arrested. (App. 24-26.)

The district court sentenced petitioner to 108 months in federal prison to be followed by three years of supervised release. (App. 31.) It cited petitioner's lengthy record, the fact that a prior felon-in-possession case had been dismissed when a motion to suppress had been granted, and petitioner's violent behavior on the day of the incident, both to the woman and to the officers. The high-end sentence was necessary to deter petitioner from future misbehavior and to protect the public. (App. 26-31.)

2. **The Ninth Circuit's Decision**

The Ninth Circuit panel held:

> "The district court's finding that Conerly possessed cocaine base with the intent to sell was not 'illogical, implausible, or without support in inferences that may be drawn from the facts in the record.' *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir.

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[3] Petitioner's sentencing brief discussed his traumatic upbringing, his efforts to become a truck driver, and other attempts to better himself. (App. 42-44.) Defense counsel attached documentation supporting these points and numerous letters of support. Because the error in calculating the advisory Guidelines range requires reversal and remand, 18 U.S.C. § 3742(f)(1), these documents are not included in the Appendix and need not be summarized further.

> 2009) (en banc). The totality of the evidence in the record supports the district court's finding that Conerly's possession of the firearm potentially emboldened his efforts to sell crack cocaine, *see United States v. Polanco*, 93 F.3d 555, 567 (9th Cir. 1996), and the court did not abuse its discretion by applying the section 2K2.1(b)(6)(B) enhancement, *see Gasca-Ruiz*, 852 F.3d at 170." (App. 2.)

The panel did not address whether the evidence the district focused on—the Deise affidavit and the texts on petitioner's phone—supported its finding.

C. **Discussion**

Under USSG § 2K2.1(b)(6)(B), the offense level for being a felon in possession of a firearm is increased by four levels if the defendant "used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense[.]" In challenging the increase, petitioner focused on the two factors expressly cited by the district court: 1) the text messages, and 2) the unsworn Deise "affidavit." In affirming, the panel relied on the entire "record" and the "totality of the evidence." Thus, the panel affirmed a finding that the district court did not make. This was inappropriate.

The Court of Appeals cited *United States v. Polanco*, 93 F.3d 555, 566 (9th Cir.), *cert. denied*, 519 U.S. 973 (1996), for the proposition that the upward adjustment can be affirmed on any basis supported by the record.

(App. 2.) While *Polanco* addressed an upward adjustment for use of a firearm, it relied on *United States v. Alexander*, 48 F.3d 1477, 1487 (9th Cir.), *cert. denied, Alexander v. United States*, 516 U.S. 878 (1995), which applied the "any basis supported by the record" to a question of admissibility of evidence. *Polanco* should not have relied on *Alexander* in this way.

It is one thing to say that if a defendant focused on one *legal rationale* for excluding evidence in the trial court, he may not complain if a reviewing court finds the evidence admissible on another legal theory. Resolving that question of law on appeal generally will not usurp the trial court's role as fact finder. That has nothing to do with review of sentencing decisions grounded in findings of disputed fact and credibility determinations. *Polanco* is inconsistent with the statutes governing imposition and review of sentences.

A defendant may appeal a sentence arguing, *inter alia*, that it was "was imposed as a result of an incorrect *application* of the sentencing guidelines[.]" 18 U.S.C. § 3742(a)(2) [emphasis added]. Further, in reviewing a sentence,

> "The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the

> court of appeals shall review de novo the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e).[4]

Thus, except where *de novo* review is appropriate, reviewing courts review what the district court actually did, not what it might have done had it found other evidence or sentencing factors persuasive.

The case of *United States v. Hart*, 324 F.3d 740 (D.C. Cir. 2003) illustrates the appropriate division of labor between federal trial and reviewing courts. The D.C. Circuit addressed a challenge to the same four-level increase at issue here. *Id.* at p. 741. The district court had noted that the increase could be justified by several scenarios supporting either possession or use in connection with a felony. However, it did not specify what it believed actually happened. *Id.* at p. 744. The D.C. Circuit held that a finding grounded in two of the three possible scenarios would be legal error. *Id.* at p. 750. It did not then uphold the decision on the theory that it was supported by the evidence. Instead, it remanded for clarification even though it assumed that the district court would ultimately reach the factually supported result. *Id.* at p. 751. It deemed it "essential that the district court enunciate its findings in detail sufficient to allow this court to conduct its review without struggling to find evidentiary links." *Id.* at p. 749.

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[4] Subsections 3(A) and 3(B) deal with the district court's failure to state reasons and allegedly improper upward departures.

That is not what the Ninth Circuit did in *Polanco*. There, the district court had imposed the four-level increase challenged here, finding that the defendant had "used" the firearm in question in connection with a felony. *United States v. Polanco, supra,* 93 F.3d at p. 560. The Court held that in light of an intervening Supreme Court decision, the use finding could not be sustained as a matter of law. *Id.* at p. 566. Rather than reverse and remand, the Court examined the record on its own and made findings of fact that the defendant had "possessed" the firearm in question, which allowed it to affirm the judgment. *Id.* at p. 567.

Polanco is inconsistent with the standards of review set out in the sentencing statutes above. The approach in *Hart* which limited review to the findings of the district court is more faithful to those statutes. This Court should grant *certiorari* and confirm that *Hart* states the better rule.

This is an appropriate case in which to settle this issue. The text messages do not prove that petitioner was selling cocaine base. From what we know, they dealt entirely with marijuana, with the possible exception, according to the government's sentencing brief, of an unexplained reference to something being "spoon-ready." Neither the PSR nor Officer Deise nor the government deemed this a marijuana sales issue. Therefore, the text messages cannot sustain the enhancement.

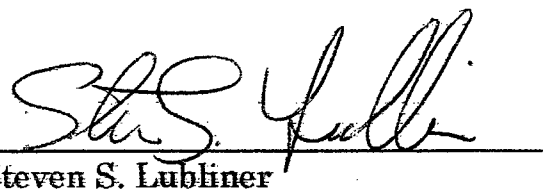
Deise had never testified as an expert on possession for sale, and he had no training in the matter or, apparently, in the acquisitive habits of addicts who might be abusing drugs rather than selling them. Deise threw in a make-weight observation about petitioner's criminal propensity to sell drugs, which says nothing about what he was doing on the day in question. On the other hand, Deise ignored the strong evidence suggesting that petitioner might have been selling marijuana rather than cocaine base as the government alleged. His unsworn opinion was entitled to no weight.

Finally, the Ninth Circuit's citation to *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc) or *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc) do not salvage its decision. (App. 2.) *Hinkson* set out how to evaluate whether a district court had abused its discretion in denying a motion for new trial. Like *Alexander*, the evidence case, it has nothing to do with this issue. *Gasca-Ruiz* held that a district court's decision to apply a Sentencing Guideline to the facts it found is reviewed for abuse of discretion because district courts are better situated to make such decisions in the first instance. It did not hold, as *Polanco* did, that a reviewing court can affirm the district court's factual findings by ignoring the weakness in the evidence the district court actually credited and making its own findings.

CONCLUSION

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

Dated: July 8, 2020



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