No. 19-5796

In The Supreme Court of the United States

ALFREDO BELTRAN LEYVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICI CURIAE DUE PROCESS INSTITUTE, CATO INSTITUTE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RUTHERFORD INSTITUTE, DISTRICT OF COLUMBIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION, AND LAW PROFESSORS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should resolve the conflict in the circuits over the appropriate standard of review for sentencing enhancements based on the unsworn, out-of-court statements of cooperating witnesses by requiring de novo review?

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INTEREST OF AMICI CURIAE[1]

The Due Process Institute is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Due Process Institute has already participated as an amicus curiae before this Court in cases presenting important criminal justice issues, such as *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); *United States v. Haymond*, 139 S. Ct. 2369 (2019); and *Asaro v. United States*, No. 19-107 (petition for writ of certiorari pending). For the reasons that follow, the Due Process Institute views this case as a significant opportunity for the Court to enhance the fairness of federal sentencing.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the

[1] Under Sup. Ct. R. 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of amici's intention to file this amicus brief ten days before the due date. Letters of consent from both parties to the filing of this brief have been received by undersigned counsel.

criminal justice system, and accountability for law enforcement officers.

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the resolution of

this case because it affects the fundamental constitutional right of all persons to be subjected to criminal sanctions only on the basis of credible and reliable evidence.

The District of Columbia Association of Criminal Defense Lawyers is the District of Columbia chapter of the National Association of Criminal Defense Lawyers. DCACDL is composed of several hundred members and serves as the only organization for criminal defense lawyers practicing in local and federal courts in the District of Columbia. Collectively, DCACDL's members have represented thousands of defendants accused of crimes. DCACDL has participated as amicus curiae before this Court in cases presenting important issues for persons charged with crimes.

The Pennsylvania Association of Criminal Defense Lawyers is a professional association of attorneys who are actively engaged in providing criminal defense representation. Founded in 1988, PACDL is the recognized Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed by, among others, the United States Constitution, and who work to achieve justice for all defendants. PACDL membership currently includes more than 950 private criminal defense practitioners and public defenders throughout the Commonwealth of Pennsylvania.

PACDL has an interest in the fairness and workings of the criminal justice system and has filed amicus briefs in other cases before this Court (as well as in Pennsylvania Courts). PACDL's mission is to ensure the fair administration of justice and to advocate for the rights of all persons charged with, convicted of, and sentenced for, crimes. PACDL's members have a direct interest in the outcome of this appeal because they want to see structural and procedural changes necessary to compensate and prevent against errors such as mistaken eyewitness identification, false confessions, incentivized or unreliable witnesses, hearsay, and unproven forensic evidence. They want to ensure that the criminal justice system is calibrated to ensure that the standard of review should be de novo in those instances where witness reliability, psychological bias, or flaws is challenged.

The Texas Criminal Defense Lawyers Association is a non-profit, voluntary, membership organization. It is dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,000 and offers a statewide forum for criminal defense lawyers. It provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases. TCDLA also assists the courts by acting as amicus curiae in appropriate cases.

The Law Professor Amici have a strong interest in ensuring fairness in federal sentencing. The Law Professor Amici include the following professors:

Douglas A. Berman. Professor Berman is the Newton D. Baker-Baker & Hostetler Chair in Law at The Ohio State University Moritz College of Law.

Carissa Byrne Hessick. Professor Hessick is the Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law at the University of North Carolina School of Law. Her teaching and research interests include criminal law, criminal sentencing, and the structure of the criminal justice system. Professor Hessick is the author of multiple law review articles on Sixth Amendment sentencing rights and substantive sentencing law. Her work has appeared in the California Law Review, the Cornell Law Review, the UCLA Law Review, and the Virginia Law Review, among others. She currently serves as the Reporter for the ABA Criminal Justice Section's Sentencing Standards Task Force. Before joining the faculty at Carolina Law, Professor Hessick taught on the faculties at Arizona State University's Sandra Day O'Connor College of Law and the University of Utah's S.J. Quinney College of Law. She also spent two years as a Climenko Fellow at Harvard Law School.

Shon Hopwood. Professor Hopwood is an Associate Professor of Law at Georgetown University Law Center, where he teaches criminal procedure, criminal justice reform, civil rights, and sentencing.

Michael O'Hear. Professor O'Hear is a Professor of Law at Marquette University Law School, where he teaches Criminal Law, Criminal Process, and Evidence. He has authored or coauthored six books and more than seventy scholarly articles and book chapters, mostly related to sentencing, corrections, and criminal procedure. He served as the Law School's first Associate Dean for Research and is an elected member of the American Law Institute.

SUMMARY OF ARGUMENT

The standard-of-review question this case presents implicates profound concerns with federal sentencing--concerns with substantial constitutional implications. Federal courts routinely sentence defendants to years in prison based on hearsay statements relayed to the court at sentencing by law enforcement officers. Those statements often come from convicted criminals who want to reduce their sentences by cooperating with the government. The cooperating criminals do not appear in court, so the district judge has no opportunity to assess their demeanor. They do not swear an oath to tell the truth. They do not face cross-examination. And their out-of-court statements need only persuade the judge by a preponderance of the evidence. Petitioner Beltran Leyva faces a life sentence based on precisely such evidence.

Defendants have few safeguards against sentencing enhancements that rest on false out-of-court statements from cooperating criminals. One such protection is searching appellate review. De

novo review by the court of appeals ensures that the reliability of the cooperator's statement will receive a second level of careful scrutiny. And de novo review comports with the rationale for heightened appellate scrutiny: the stakes--a person's right to due process of law before losing his liberty--are high, and, because the district court never observes the cooperator's demeanor, the appellate court is just as capable of evaluating his credibility.

The Court should grant the writ, vacate the decision of the court of appeals, and remand for de novo review of the reliability of the cooperators' out-of-court statements.

ARGUMENT

1. Each day federal courts sentence defendants to years in prison based on information that has never been subject to adversarial testing at trial. This may occur because--as here--the defendant pleaded guilty and the government wants to enhance his sentence based on facts he did not admit through his plea, or it may be because the defendant was found guilty at trial and the government wants to enhance his sentence based on uncharged wrongdoing or other inculpatory facts not addressed at trial. In either setting, the district court may consider the information in calculating the Guidelines sentencing range as long as it tends to establish "relevant conduct" under U.S.S.G. § 1B1.3 or otherwise bears upon a contested sentencing factor. Under current law, the government generally need only prove this uncharged conduct by a preponderance of the

evidence. *United States v. Watts*, 519 U.S. 148, 156 (1997) (per curiam).

The rules of evidence--including, critically, the hearsay rule--do not apply to information presented at federal sentencings. Fed. R. Evid. 1101(d)(3). Nor does the Sixth Amendment Confrontation Clause, which courts consider a trial right. *See, e.g., United States v. Fields*, 483 F.3d 313, 332 (5th Cir. 2007); *United States v. Martinez*, 413 F.3d 239, 243 (2d Cir. 2005). The only constraints on the quality of the information presented at sentencing appear in U.S.S.G. § 6A1.3, which requires that sentencing information "has sufficient indicia of reliability to support its probable accuracy," and in the Due Process Clause, which similarly mandates that "some minimal indicia of reliability accompany a hearsay statement," *United States v. Egge*, 223 F.3d 1128, 1132 (9th Cir. 2000).

This regime is troubling under any circumstances. Depriving a person of liberty, often for years, based on information that a district court finds merely to have "probable accuracy" fits uneasily with the traditional requirement that guilt be proven beyond a reasonable doubt by evidence that satisfies the rules of evidence and the Confrontation Clause. Lawyers and judges may perceive a difference between elements of an offense and sentencing factors, the former requiring proof beyond a reasonable doubt based on evidence that satisfies the rules of evidence and the Confrontation Clause, and the latter requiring only a preponderance of the evidence based on evidence that has "some minimal indicia of reliability." But to the defendant headed to

prison for years based on an unsworn, un-cross-examined, out-of-court statement, the asserted difference likely appears bizarre and arbitrary.

The problem becomes even more acute when the damaging information comes from a law enforcement officer reciting the out-of-court statements of a cooperating informant--typically a convicted criminal looking to reduce his own sentence by helping the government. Judge Stephen Trott--for many years a federal prosecutor--has written eloquently about the "perils of using rewarded criminals as witnesses." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993); *see, e.g., Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1114-16 (9th Cir. 2001). As Judge Trott observes, "By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." *Bernal-Obeso*, 989 F.2d at 333. Judge Trott admonishes prosecutors to "commit th[is] message to memory": "[c]riminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law." Honorable Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1383 (1996); *see Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) ("This Court has long recognized the 'serious questions of credibility' informers pose.") (quoting *On Lee v. United States*, 343 U.S. 747, 757 (1952), and citing Judge Trott's article).

When "criminal informants" testify at trial, subject to the rules of evidence and the Confrontation Clause, there is at least some check on their self-interested mendacity. They must swear an oath to tell the truth, backed by the penalties of perjury. They must testify in the courtroom, face-to-face with the defendant. The jury can observe their demeanor. Under *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, the government must produce information that impeaches the witness' credibility. And, most important, the witness must face vigorous and searching cross-examination, "the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, *Evidence* § 1367 (3d ed. 1940)).

At a sentencing hearing of the kind petitioner Beltran Leyva received, by contrast, these protections do not exist. The informant never has to confront the defendant in person. The informant never has to swear an oath or face the possibility of a perjury prosecution for false testimony. Because the informant never comes to court, the factfinder cannot assess his demeanor. The government's *Giglio* obligation is enforced, if at all, less stringently than at trial. And the defendant never gets to cross-examine the informant. All he can do is cross-examine the law enforcement officer who presents the informant's statement in court, and that officer often knows nothing about the underlying facts other than what he has learned from the informant or read in an interview memorandum prepared by another officer.

The danger this process poses to liberty is manifest. As the D.C. Circuit explained in rejecting similar evidence offered at trial:

> At the time of the [agent's] testimony, [the cooperator]--the less-than-reputable convict, Thomas Rose--was sitting in a federal correctional institution. Meanwhile in court, telling Rose's story, was the clean-cut FBI agent, Neil Darnell. Thus, [the defendant] had no opportunity to test the recollection and sift the conscience of his accuser, nor could he compel him to stand face to face with the jury in order that they might look at him, and judge by his demeanor upon the stand and the manner in which he gave his testimony whether he was worthy of belief. Cross-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.

United States v. Evans, 216 F.3d 80, 85 (D.C. Cir. 2000) (brackets, quotation, and citations omitted). The same defects infect the out-of-court statements of cooperators offered at sentencing through the testimony of law enforcement officers. And the effect of the evidence is the same in each setting: a defendant loses his liberty.

2. A defendant facing a sentence enhancement based on a cooperator's out-of-court statement thus has little protection against damaging

falsehoods. Searching appellate scrutiny of the cooperator's statement is therefore essential. De novo review does not ensure that false evidence will be eliminated, but careful consideration of the cooperator's reliability by three appellate judges marks an important step toward fairness.[2]

Two principal circumstances justify de novo review. First, this Court has recognized that certain partially factual determinations bear so heavily on important constitutional rights that they warrant plenary review. The Court has determined, for example, that appellate courts should review de novo the trustworthiness of out-of-court statements to which a Confrontation Clause challenge is asserted, *see Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999) (plurality opinion), determinations of reasonable suspicion and probable cause under the Fourth Amendment, *see Ornelas v. United States*, 517 U.S. 690, 697 (1996), the voluntariness of a confession, *see Miller v. Fenton*, 474 U.S. 104, 112-18 (1985), and "actual malice" under the First Amendment, *see Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-511 (1984). As these cases show, whether a cooperator's out-of-court statement is sufficiently reliable to satisfy the Due Process Clause presents precisely the kind of question for which this Court has found plenary review appropriate.

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[2] For an example of such careful scrutiny under the de novo standard of review, see *United States v. Sutton*, 916 F.3d 1134, 1140-41 (8th Cir. 2019) (reversing revocation of supervised release based on appellate court's determination that statements of out-of-court cooperators were not sufficiently reliable).

Second, as a matter of institutional competence, courts almost invariably defer to a district court's credibility determinations based on observation of a witness' demeanor. *See, e.g.*, *Wainwright v. Witt*, 469 U.S. 412, 428 (1985) (determinations of "demeanor and credibility" are "peculiarly within a trial court's province"); *United States v. Fletcher*, 882 F.3d 151, 157 (5th Cir. 2018) ("Only the district court is able to observe the witnesses and the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.") (quotation omitted).

When a district court rests its sentencing determination on the out-of-court statement of a cooperator, however, the district judge has no opportunity to assess the cooperator's demeanor. When all the district court does is listen to a law enforcement officer recite what the cooperator has told him or another officer, there is no reason to think that judge is in a better position than the appellate judges to assess the cooperator's reliability or credibility. De novo review is therefore appropriate on this ground as well.

3. For these reasons, searching appellate scrutiny of cooperators' out-of-court statements is essential to fair and accurate sentencing. This is an ideal case to establish that principle. There is a clear split in the circuits on the standard of review. The issue arises dozens of times each year, given the government's frequent reliance on information from cooperators at sentencing. Petitioner urged the de novo standard in the court of appeals, and that court

squarely addressed the question. And this is a case where the standard of review is outcome-determinative; it is hard to imagine that, under the de novo standard, the court of appeals would find the cooperators' statements sufficiently reliable to support the district court's substantial enhancements to petitioner's sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2019