No.

IN THE SUPREME COURT OF THE UNITED STATES

FIDEL VILLARREAL AND
RAUL VILLARREAL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

The Ninth Circuit, contrary to at least eight other circuits, has held that upward departures from the advisory Sentencing Guidelines are not independently subject to appellate review. The first question presented is:

(1) Whether an upward departure from the advisory Sentencing Guidelines is subject to appellate review.

Relying on acquitted and dismissed conduct, the district court applied upward departures of 10 and 12 levels under the Sentencing Guidelines and "stacked" petitioners' sentences so that they received total sentences under 18 U.S.C. § 3553(a) that were higher than the statutory maximum penalty for each count of conviction. Petitioners' sentences were 17 years and 10 years above the high end of their pre-departure guidelines ranges. The second and third questions presented are:

(2) Whether reliance on acquitted and dismissed conduct to justify the reasonableness of a sentence under 18 U.S.C. § 3553(a) and dramatic increases under the Sentencing Guidelines violates the Fifth and Sixth Amendments; and

(3) Whether acquitted and dismissed conduct can be used to support the reasonableness of a sentence under 18 U.S.C. § 3553(a) and dramatic increases under the Sentencing Guidelines as a matter of statutory and common law.

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JURISDICTION

The court of appeals filed its decision on February 23, 2018 and denied rehearing and rehearing *en banc* on May 3, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment states: "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."

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C. § 3553(a) is included in the Appendix.

STATEMENT OF THE CASE

Petitioners are former United States Border Patrol agents. In 2008, a federal grand jury in the Southern District of California returned a multi-count indictment charging them and two codefendants. Petitioners were charged with one count of conspiracy to bring in illegal aliens for financial gain under 18 U.S.C. § 371, eleven substantive counts of bringing in illegal aliens for financial gain under 8 U.S.C. § 1324(a)(2)(B)(ii), one count of receiving a bribe under 18 U.S.C. § 201(b)(2), one count of conspiracy to launder money under 18 U.S.C. §§ 1956(a)(2) and (h), and three counts of conspiracy to tamper with a witness and witness tampering under 18 U.S.C. §§ 1512(a)(2), (b)(1), and (k).

Petitioners proceeded to a jury trial. The government presented evidence that petitioner Raul Villarreal began to smuggle aliens with the coconspirators in about April of 2005, and his brother, petitioner Fidel Villarreal, joined the conspiracy a few months later. The trial evidence detailed six alien smuggling incidents occurring from May 2005 to April 2006. In general, in each incident a guide led a group of aliens across the border to one of the petitioners, who then transported them in Border Patrol vehicles to another location shortly north of the border in San Diego County.

The jury acquitted petitioners of the alleged witness tampering but convicted them on the alien smuggling, bribery, and money laundering charges. The district court imposed consecutive sentences totaling 420 months (35 years) on petitioner Raul Villarreal and 360 months (30 years) on petitioner Fidel Villarreal. In calculating the Sentencing Guidelines, the district court relied on the guidelines for the bribery conviction, which generated the highest offense level. Petitioners appealed their convictions and sentences, and the Ninth Circuit reversed the bribery conviction but affirmed the other convictions. The Ninth Circuit also found that the district court misapplied the Sentencing Guidelines and inadequately explained petitioners' sentences under 18 U.S.C. § 3553(a).

On remand, the government elected not to go forward with a retrial on the bribery count, making the higher Sentencing Guidelines for bribery inapplicable. The case then proceeded to resentencing on the remaining counts. This time applying the alien smuggling guideline, U.S.S.G. § 2L1.1, which produced the highest offense level, and all applicable adjustments, the district court calculated an offense level of 31 for Raul Villarreal and 32 for Fidel Villarreal. Both appellants were in Criminal History Category I, generating a guidelines range of 108-135 months for Raul Villarreal and 121-151 months for Fidel Villarreal. Despite these hefty ranges, the government requested several upward departures and recommended that the district court again impose the same sentences of 420 months for Raul Villarreal and 360 months for Fidel Villarreal. Petitioners objected on numerous grounds, including that the government was requesting dramatic increases based on acquitted and dismissed conduct and it would violate the Fifth and Sixth Amendments to base the purported reasonableness of their sentences under 18 U.S.C. § 3553(a) on such conduct.

The district court proceeded to grant the government's requests for the upward departures over petitioners' objections. In total, the district court applied 12 levels of upward departures to Raul Villarreal and 10 levels of upward departures to Fidel Villarreal. The district court applied a 4-level upward

departure finding that substantially more than 100 aliens were smuggled during the conspiracy. *See* U.S.S.G. § 2L1.1 comment. (n.3). The district court also departed upward four levels due to the dismissed bribery count under U.S.S.G. § 5K2.21. Relying on similar reasoning for its bribery departure, the district court assessed a 2-level upward departure for disruption of government function under U.S.S.G. § 5K2.7. As to Raul Villarreal, the district court imposed a 2-level upward departure for egregious obstruction of justice, primarily based on the acquitted witness tampering conduct.

As a result of the upward departures, the district court arrived at a total offense level of 43 for Raul Villarreal, which produces a guidelines range of life imprisonment, and a total offense level of 42 for Fidel Villarreal, which produces a range of 360-life. In arriving at its ultimate sentencing determinations, the district court noted that petitioners had no prior record, had disadvantaged backgrounds, and worked and studied hard to obtain college degrees and careers as border patrol agents. But the court observed that petitioners received multiple bribes over an extended period of time, and their violent obstructive conduct suggested a need to protect the community. The district court also stated that petitioners' conduct compromised the core mission of the border patrol and was an embarrassment to the other agents who faithfully perform their duties.

The district court concluded that substantial sentences were necessary given the offensive conduct and to deter petitioners and other agents who may be tempted to violate the law. It therefore determined that it should "stack" sentences so that it could impose a total sentence that was greater than the statutory maximum penalties set forth in the individual counts of conviction.[1] Although the district court elected to "stack," it imposed sentences that were less than the inflated guidelines ranges that it had calculated and the government's recommendations. The district court ultimately imposed a total sentence of 336 months on Raul Villarreal and 270 months on Fidel Villarreal. The district court also imposed a $250,000 fine and three years of supervised release on both petitioners.

In their second appeal, petitioners challenged the procedural and substantive reasonableness of their sentences under § 3553(a) on several grounds and continued to maintain that it violated the Fifth and Sixth Amendments to justify their significantly enhanced sentences under § 3553(a) based on acquitted and dismissed conduct. At the very least, they argued that relying on such conduct contravened § 3553(a) and should be prohibited as a matter of policy and common law. Petitioners also argued that the Ninth Circuit should overrule its precedent

[1] The money laundering conspiracy count carried the highest statutory maximum of 20 years. *See* 18 U.S.C. §§ 1956(a)(2) and (h).

that prohibited them from challenging the upward departures on appeal because most other circuits had disagreed with the Ninth Circuit's rule.

The Ninth Circuit rejected appellants' challenges to the procedural and substantive reasonableness of their sentences. In doing so, the court relied on petitioners' purported "violent efforts to obstruct justice," for which they were acquitted, and even stated that it was a "primary driver[]" in their enhanced sentences. *Villarreal*, 725 Fed. Appx. at 517. The Ninth Circuit summarily held that the district court did not err under § 3553(a) in relying on the acquitted and dismissed conduct and that petitioners' Fifth and Sixth Amendment claims were "unavailing." *Id.* at 517-18. The Ninth Circuit ultimately determined that "[a]lthough Defendants' sentences are significantly lengthier than the top end of their pre-departure Guidelines ranges, we are not persuaded that this is the 'rare case' in which it is clear that the sentencing court committed a clear error of judgment." *Id.* at 518. The Ninth Circuit did not address petitioners' contention that its precedent foreclosing appellate review of upward departures should be overruled. Petitioners filed for rehearing and requested that an *en banc* panel overrule the Ninth Circuit's prohibition on appellate review of departures, but their request was summarily denied.

ARGUMENT

The district court imposed sentences that were approximately *17 years* and *10 years* above the high end of petitioners' respective Sentencing Guidelines ranges. The district court did so after calculating multiple upward departures totaling 12 levels and 10 levels for each of the petitioners. As a result, they received sentences far in excess of other defendants convicted of similar conduct and may have received the longest sentences ever imposed on federal law enforcement officers for comparable corruption. Against this backdrop, this petition presents three important questions concerning federal sentencing law.

First, there is a clear circuit-split regarding whether an appellate court can review "departures" from the Sentencing Guidelines. The Ninth Circuit's rule prohibiting such review is in the distinct minority and should be corrected because it is inconsistent with *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) and *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018).

Second, several Justices and circuit judges have urged this Court to review whether reliance on acquitted conduct to support dramatic increases in the Sentencing Guidelines and the reasonableness of a sentence under 18 U.S.C. § 3553(a) violates the Fifth and Sixth Amendments. *See, e.g.*, *Jones v. United States*, 135 S. Ct. 8 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ.,

dissenting from the denial of *certiorari*). The calls for such review have increased in number and vigor in recent years, and it is finally time to address this important question. This case is an ideal vehicle for doing so.

Third, and relatedly, the constitutional issue presented in the second question can be avoided by interpreting § 3553(a) and the Sentencing Guidelines to prohibit such reliance on acquitted and dismissed conduct. *See United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing *en banc*). While these second and third issues do not pose a circuit-split, it is precisely because of the entrenched nature of the lower court authority that a tipping point has been reached, and this Court should finally review these extraordinarily important issues to correct a flawed and ultimately unconstitutional federal sentencing regime.

I. This Court should overrule the Ninth Circuit's rule prohibiting appellate review of departures from the Sentencing Guidelines, a rule that has been rejected by at least eight other circuits and is inconsistent with this Court's recent opinions in *Molina-Martinez* and *Rosales-Mireles*.

A defendant has a statutory right to appeal a sentence that "was imposed in violation of law[,]" or "was imposed as a result of an incorrect application of the sentencing guidelines[,]" or "is greater than the sentence specified in the applicable guideline range . . . ." 18 U.S.C. § 3742(a). Similarly, a court of appeals is supposed to determine the propriety of a "departure." 18

U.S.C. § 3742(f). Nevertheless, in *United States v. Mohamed*, 459 F.3d 979, 985-87 (9th Cir. 2006), the Ninth Circuit held that, after *United States v. Booker*, 543 U.S. 220 (2005) created an "advisory" guidelines scheme, "departures" under the Sentencing Guidelines are not independently subject to appellate review and instead any review is limited to "reasonableness" under 18 U.S.C. § 3553(a). Thus, petitioners were constrained in challenging the departures supporting the extraordinary non-guidelines sentences imposed by the district court, and the Ninth Circuit limited its analysis to reasonableness review.

As cited in numerical order, most of the other circuits to consider the issue have disagreed with *Mohamed* and held that "departures" are independently subject to appellate review. *See, e.g.*, *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *United States v. Jackson*, 467 F.3d 834, 838-39 (3d Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006); *United States v. Gutierrez-Hernandez*, 581 F.3d 251, 255-56 (5th Cir. 2009); *United States v. McBride*, 434 F.3d 470, 476-77 (6th Cir. 2006); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006); *United States v. Sierra-Castillo*, 405 F.3d 932, 936 n.2 (10th Cir. 2005); *United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005).

In *Mohamed*, 459 F.3d at 985-97, the Ninth Circuit purported to adopt the approach in *United States v. Arnaout*, 431 F.3d 994, 1003 (7th Cir. 2005),

although the Seventh Circuit's statements in *Arnaout* were arguably dicta, as the court remanded the sentence for other reasons. Even if the Seventh Circuit is counted as part of the minority approach, the split still stands at 8-2, and the Court should grant this petition and adopt the majority view. Indeed, the Court's recent opinions in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) and *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018) demonstrate that the Ninth Circuit's minority view is incorrect and fails to account for how federal sentencing practice has evolved since *Booker* was decided.

In *Mohamed*, the Ninth Circuit reasoned that "[t]he discretion that the district court judge employs in determining a reasonable sentence will necessarily take into consideration many of the factors enumerated in Section 5K of the Sentencing Guidelines, but to require two exercises – one to calculate what departure would be allowable under the old mandatory scheme and then to go through much the same exercise to arrive at a reasonable sentence – is redundant." *Mohamed*, 459 F.3d at 986-87. Furthermore, the Ninth Circuit explained: "[I]f a district court were to employ a post-*Booker* 'departure' improperly, the sentencing judge still would be free on remand to impose exactly the same sentence by exercising his discretion under the now-advisory guidelines. Such a sentence would then be reviewed for reasonableness, in which case it is the review for

reasonableness, and not the validity of the so-called departure, that determines whether the sentence stands." *Id.* at 987.

The Ninth Circuit also focused on the issue of prejudice or harmless error, stating that "even if a district court judge were to misapply a departure, this error would still be subject to harmless error review." *Id.* at 987. "Presumably, this court would then review the sentence for reasonableness to determine whether the improper departure was harmless. If we were to declare the sentence reasonable, then the erroneous departure would be harmless." *Id.* at 987. Thus, the Ninth Circuit concluded that "review of the so-called departure would have little or no independent value." *Id.* at 987.

This Court's subsequent decisions in *Molina-Martinez* and *Rosales-Mireles* demonstrate that the two main underpinnings of *Mohamed* are incorrect. The first rationale – that the ultimate Guidelines determination is inconsequential because the sentencing judge can always impose what he or she wants based on reasonableness – is simply not the way sentencing practice has unfolded during the decade after *Booker* and *Mohamed* were decided. "The [Sentencing] Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez*, 136 S. Ct. at 1346. "The sources confirm that the Guidelines are not only the starting point for most federal sentencing

proceedings but also the lodestar. . . . In the usual case, then, the systemic function of the selected Guidelines will affect the sentence." *Id.* Thus, the Court has repeatedly stated that "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence." *Id.* at 1345 (quoting *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013)); *see Rosales-Mireles*, 138 S. Ct. at 1907.

Furthermore, the Court has now clearly stated: "Before a court of appeals can consider the substantive reasonableness of a sentence, 'it must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.' . . . If the district court is unable properly to undertake that inquiry because of an error in the Guidelines range, the resulting sentence no longer bears the reliability that would support a 'presumption of reasonableness' on review." *Rosales-Mireles*, 138 S. Ct. at 1910 (citations omitted). In short, the Ninth Circuit's outlier approach is simply wrong under *Rosales-Mireles* and *Molina-Martinez*.

The second *Mohamed* rationale – harmless error analysis makes review of departures unnecessary – is also undermined by *Rosales-Mireles* and *Molina-Martinez*. *Mohamed* essentially equated harmless error analysis with

reasonableness review, maintaining that if the sentence were reasonable, there could be no harmful error. But in explaining prejudice in *Molina-Martinez*, even under plain error review (inapplicable here because petitioners objected to the departures), this Court rejected such an approach. "In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Molina-Martinez*, 136 S. Ct. at 1346. "Where . . . the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." *Id.* at 1347. Thus, harmless error is not limited to an assessment of the reasonableness of the sentence, far from it. Indeed, "regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings." *Rosales-Mireles*, 138 S. Ct. at 1910.

The way the sentencing and appeal in this case played out shows the flaw in the *Mohamed* approach, as explained in *Rosales-Mireles* and *Molina-Martinez*. Here, the district court assessed 12 levels of upward departures on Raul Villarreal (increasing his offense level from 31 to 43) and 10 levels of upward departures on Fidel Villarreal (increasing his offense level from 32 to 42). As a

result, the district court increased the guidelines range for Raul Villarreal from 108-135 months to life imprisonment, and for Fidel Villarreal from 121-151 months to 360-life. The district court, however, ultimately sentenced *below* these ranges and lower than the government's recommendations, imposing a sentence of 336 months on Raul Villarreal and 270 months on Fidel Villarreal. If an appellate court were to determine that the district court erred in assessing the multiple and extraordinary number of levels of upward departures under the Guidelines, thereby requiring a lower guidelines range to use as a benchmark, there is certainly a possibility that the district court would impose a lesser sentence. *See Molina-Martinez*, 136 S. Ct. at 1347-48 (fact that the district court imposed a sentence at the bottom of the guideline range and lower than the government's recommendation demonstrated prejudice).

As one example, the district court imposed a suspect 4-level upward departure for the number of aliens, a departure that it did not impose at the initial sentencing hearing, and that conflicted with its findings at the initial hearing, the testimony of the government's very own witnesses, and the sentencing proceedings for the other defendants. Without the departure, Raul Villarreal's offense level would have been 39, with a range of 262-327, lower than his 336-month sentence. Likewise, Fidel Villarreal's offense level would have been 38,

where the bottom of the range is 235 months, lower than his 270-month sentence. Under *Molina-Martinez*, there is certainly a possibility that the district court would have imposed a lesser sentence if it had used these ranges as the benchmark.

The extraordinary sentences in this case demonstrate why the *Mohamed* rule, which has been widely rejected throughout the country, should be overruled. The sentences imposed on petitioners are among the longest, if not the longest, sentences ever imposed on federal law enforcement officials for such conduct and dwarf the sentences imposed in other similar cases. *See, e.g.*, *United States v. Ortiz-Martinez*, 593 Fed. Appx. 649 (9th Cir. 2015) (144-month sentence for border officer convicted after trial of bribery and the importation of 15 kilograms of methamphetamine and 8 kilograms of cocaine); *United States v. Merker*, 334 Fed. Appx. 953 (11th Cir. 2009) (78-month sentence for border agent convicted of bribery and alien smuggling after trial). Yet, petitioners' ability to attack the heart of the district court's sentencing analysis – upward departures of 12 and 10 levels that dramatically transformed the applicable sentencing benchmarks – is curtailed in the Ninth Circuit, thereby limiting appellate review of sentences that were double and triple the guidelines, guidelines that have been widely criticized as unduly harsh in the first place. *See, e.g.*, Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting

(Aug. 9, 2003). When sentences are so far removed from the standard guidelines, there should be more appellate review, not less. The Court should grant this petition, overrule the Ninth Circuit's approach, and allow petitioners to challenge the departures on appeal consistent with the view of virtually every other circuit.

II. This case presents an ideal vehicle to review the important question of whether reliance on acquitted and dismissed conduct to support the reasonableness of a sentence under 18 U.S.C. § 3553(a) and dramatic departures under the Sentencing Guidelines violates the Fifth and Sixth Amendments.

In *Jones v. United States*, 135 S. Ct. 8 (2014), Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from the denial of *certiorari* where the petitioners were acquitted of drug offenses but the sentencing judge found that they had engaged in the conduct, and "relying largely on that finding, imposed sentences that petitioners say were many times longer than those the Guidelines would otherwise have recommended." The three Justices explained that, "but for the judge's finding of fact, [petitioners'] sentences would have been 'substantively unreasonable' and therefore illegal[,]" and thus "their constitutional rights were violated" under the Fifth and Sixth Amendments. *Id.* at 8. Justice Scalia explained that such a constitutional rule "unavoidably follows" from the *Apprendi v. New Jersey*, 530 U.S. 466 (2000) line of precedent, but, "[f]or years," this Court has "refrained from saying so." *Jones*, 135 S. Ct. at 8. Furthermore, "the Courts

of Appeals have uniformly taken [this Court's] continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Id.* at 9.

This had already "gone on long enough" at the time of *Jones*, *id.*, and the issue still remains unresolved although it was merely one vote shy of review four years ago. Since that time, lower court judges have noted the "unbroken string of cases" encroaching on the Sixth Amendment right to a trial by jury but believe that "only the Supreme Court can resolve the contradictions in the current state of the law . . . ." *Bell*, 808 F.3d at 932 (Millett, J., concurring in the denial of rehearing *en banc*); *see, e.g.*, *United States v. Lasley*, 832 F.3d 910, 920-22 (8th Cir. 2016) (Bright, J., dissenting). The contradiction is "a grave constitutional wrong" both in terms of using acquitted conduct to justify reasonableness under § 3553(a) and to support dramatic deviations from the Sentencing Guidelines. *United States v. Brown*, 892 F.3d 385, 408-09 (D.C. Cir. 2018) (Millett, J., concurring). This Court should not delay "another opportunity to take up this important, frequently recurring, and troubling contradiction in sentencing law[,]" *Bell*, 808 F.3d at 932, and this case is an ideal vehicle for doing so.

The Ninth Circuit explicitly stated that the acquitted conduct involving petitioners' alleged violent efforts to obstruct justice were "primary

drivers" in their sentences. *Villarreal*, 725 Fed. Appx. at 517. The district court found that the standard guidelines ranges were 108-135 months and 121-151 months for petitioners but then imposed 12 and 10 levels of upward departures that included specific departures for the dismissed bribery offenses and the acquitted witness tampering offenses. The district court imposed total sentences that were beyond the statutory maximum penalty for each count of conviction and that were 17 and 10 years above the high end of the guidelines ranges. Thus, these increases were far beyond the 2-year increase in minimum penalty that triggered the constitutional violation in *Alleyne v. United States*, 570 U.S. 99 (2013). This case also presents the constitutional question *both* in terms of reasonableness under § 3553(a) and dramatic upward departures under the Sentencing Guidelines and in *both* the contexts of acquitted conduct and dismissed conduct. The constitutional questions are also fully preserved. In sum, it is time to take on this significant issue, and this is an ideal case to do so.

III. The Court should grant this petition and hold that, as a matter of statutory and common law, acquitted and dismissed conduct cannot be used to justify the reasonableness of a sentence under 18 U.S.C. § 3553(a) and to support dramatic increases under the Sentencing Guidelines.

This Court can also avoid the constitutional question raised above by prohibiting, as a matter of statutory and common law, the use of acquitted and dismissed conduct to justify the reasonableness of a sentence under § 3553(a) and

to support dramatic increases under the Sentencing Guidelines. *Jones v. United States*, 526 U.S. 227, 239-52 (1999); *see Bond v. United States*, 134 S. Ct. 2077, 2087 (2014). Judge Kavanaugh has endorsed this view, both in *Bell*, 808 F.3d at 387-89 (Kavanaugh, J., concurring in the denial of rehearing *en banc*), and more recently in *Brown*. *See Brown*, 892 F.3d at 415 (Kavanaugh, J., dissenting) ("[i]f th[e] system seems unsound – and there are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness – Congress and the Supreme Court may fix it").

There is at least one strong textual basis to support the view that acquitted conduct cannot be used to justify the reasonableness of a sentence under § 3553(a). Section 3553(a)(6) requires courts "to avoid unwarranted sentence disparities among defendants with similar records who have been *found guilty* of similar conduct . . . ." 18 U.S.C. § 3553(a)(6) (emphasis added). Thus, the statute itself requires a comparison of convicted conduct, not acquitted conduct. The Ninth Circuit's contrary determination below ignored the very language in the statute and instead summarily explained: "In comparing defendants under § 3553(a)(6), a court will almost necessarily have to consider the facts of the cases, including acquitted conduct, in order to tell whether the defendants are similarly situated and, if so, whether any sentencing disparities are 'unwarranted.'"

Villarreal, 725 Fed. Appx. at 517-18. The Ninth Circuit cited no authority in support of this reasoning, nor did it explain why a sentencing court would "necessarily" have to consider acquitted conduct when determining sentencing disparities. Such an analysis is exactly what the statute says a sentencing judge should not do. In short, the statutory language suggests that acquitted conduct cannot be used as a justification for reasonableness under § 3553(a).

Meanwhile, the Sentencing Guidelines state: "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, *unless otherwise prohibited by law*." U.S.S.G. § 1B1.4 (emphasis added). Under its supervisory power, this Court can certainly hold that consideration of acquitted conduct to support dramatic increases under the Sentencing Guidelines is "prohibited by law" in order to avoid the constitutional question noted by several Justices and distinguished lower-court judges. Such action would be similar to what this Court did in *Booker*. *See Booker*, 543 U.S. at 246-48.

By prohibiting consideration of acquitted conduct to support *dramatic* guidelines increases, this Court need not overrule *United States v. Watts*, 519 U.S. 148 (1997). In *Watts*, this Court considered two companion cases and

concluded that, under § 1B1.4, a sentencing court could consider acquitted conduct in determining a guidelines increase. One defendant's guidelines calculations were enhanced by two levels, *see Watts*, 519 U.S. at 150, while the other defendant's range was increased from 15-21 months to 27-33 months. *Id.* at 163 (Stevens, J., dissenting). Thus, the question of *dramatic* guidelines increases was not presented in *Watts*, and this Court specifically stated that it was not presented with "dramatic[]" increases under the guidelines and was not considering that issue. *Id.* at 156-57.

While the definition of a dramatic increase under the Sentencing Guidelines can be debated, there can be little question that the increases in this case so qualified, again making this case an excellent vehicle for review. Furthermore, the lower courts can set further boundaries for distinguishing significant or dramatic increases from standard increases. Indeed, some of the lower courts are already doing just that in the context of determining whether a heightened burden of proof applies to a particular guidelines increase. *See, e.g.*, *United States v. Hymas*, 780 F.3d 1285, 1289-93 (9th Cir. 2015).

Once again, this case presents an ideal vehicle to resolve an extremely important question of federal sentencing law. Indeed, unlike other cases, this case presents preserved constitutional *and* statutory/constitutional doubt claims.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of *certiorari*.

Dated: August 1, 2018

Respectfully submitted,

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