No. 18-5468

IN THE SUPREME COURT OF THE UNITED STATES

RAUL VILLARREAL AND FIDEL VILLARREAL, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on review of a sentence imposed by the district court, the court of appeals must separately consider the correctness of each departure from the Sentencing Guidelines in addition to reviewing the ultimate sentence for procedural and substantive reasonableness.

2. Whether a sentencing court may consider conduct that was not charged, or for which a defendant was not found guilty beyond a reasonable doubt, in calculating the defendant's advisory Sentencing Guidelines range.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-10*) is not published in the Federal Reporter but is reprinted at 725 Fed. Appx. 515. A prior decision of the court of appeals (Pet. App. 11-21) is not published in the Federal Reporter but is reprinted at 621 Fed. Appx. 883.

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* The appendix to the petition for a writ of certiorari is not paginated. This brief treats the appendix as if it were chronologically paginated, with the first page following the cover page to the appendix as page 1.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2018. A petition for rehearing was denied on May 3, 2018 (Pet. App. 3-4). The petition for a writ of certiorari was filed on August 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioners were convicted on one count of conspiracy to bring unauthorized aliens into the United States for financial gain, in violation of 18 U.S.C. 371; 11 counts of bringing unauthorized aliens into the United States for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii); one count of receiving a bribe as a public official, in violation of 18 U.S.C. 201(b)(2)(A) and (C); and one count of conspiracy to launder money, in violation of 18 U.S.C. 1956(a)(2)(A) and (h). Verdict Form 1-6; Indictment 2, 7-14. The district court sentenced petitioner Raul Villarreal to 420 months in prison and petitioner Fidel Villarreal to 360 months, both to be followed by three years of supervised release. D. Ct. Doc. 362, at 2-3 (June 28, 2013); D. Ct. Doc. 363, at 2-3 (June 28, 2013). The court of appeals vacated petitioners' bribery convictions and remanded for resentencing. Pet. App. 21. The district court resentenced petitioner Raul Villarreal to 336

months of imprisonment and petitioner Fidel Villarreal to 270 months, both to be followed by three years of supervised release. D. Ct. Doc. 493, at 2-3 (Apr. 21, 2016) (Raul Amended Judgment); D. Ct. Doc. 494, at 2-3 (Apr. 21, 2016) (Fidel Amended Judgment). The court of appeals affirmed. Pet. App. 5-10.

1. Petitioners are brothers and former agents with the U.S. Border Patrol. In 2005, while petitioners were still employed as Border Patrol agents, they formed an immigrant-smuggling ring with help from a sizable network of coordinators and transporters on both sides of the U.S.-Mexico border. See D. Ct. Doc. 451 ¶¶ 6-10 (Dec. 23, 2015) (Fidel Corrected PSR). Under petitioners' direction and control, the operation regularly transported groups of unauthorized aliens into the United States in exchange for bribes, using petitioners' Border Patrol vehicles to evade detection. Id. ¶¶ 9-10. Each group comprised approximately seven to ten unauthorized aliens. Id. ¶ 10. Petitioners smuggled more than 50 such groups over roughly 16 months. Ibid.

In June 2006, petitioners and several of their co-conspirators fled to Guadalajara, Mexico, after learning that they were under investigation by U.S. authorities. Fidel Corrected PSR ¶¶ 11, 26-29. While in Mexico, petitioners discussed killing other members of the conspiracy to prevent them from cooperating with law enforcement, id. ¶ 31, and Raul later brandished a gun while threatening co-conspirator Hector Cabrera, id. ¶ 32; 4/5/16 Sent.

Tr. 13-15. Shortly thereafter, Cabrera fled to the United States and began cooperating with the investigation. 4/5/16 Sent. Tr. at 15-16.

2. A federal grand jury charged petitioners with one count of conspiracy to bring unauthorized aliens into the United States for financial gain, in violation of 18 U.S.C. 371; 11 counts of bringing unauthorized aliens into the United States for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii); one count of receiving a bribe as a public official, in violation of 18 U.S.C. 201(b)(2)(A) and (C); one count of conspiracy to launder money, in violation of 18 U.S.C. 1956(a)(2)(A) and (h); one count of conspiracy to tamper with a witness, in violation of 18 U.S.C. 1512(a)(2)(A), (b)(1), and (k); and one count of tampering with a witness, in violation of 18 U.S.C. 1512(a)(2)(A). Indictment 1-15. Petitioners were arrested in Tijuana, Mexico; extradited to the United States; and eventually convicted on all counts except those related to witness tampering. Fidel Corrected PSR ¶ 13; Verdict Form 1-6. The district court sentenced Raul to 420 months of imprisonment and Fidel to 360 months of imprisonment, both to be followed by three years of supervised release. D. Ct. Doc. 362, at 2-3; D. Ct. Doc. 363, at 2-3.

3. The court of appeals affirmed all of petitioners' convictions except for the bribery convictions, which the court vacated and remanded due to an erroneous jury instruction. Pet.

App. 16. The government decided not to retry petitioners on the bribery count, see D. Ct. Docket Entry No. 448 (Aug. 10, 2015), and the district court proceeded with resentencing. Petitioners contended, among other things, that the calculation of their advisory Sentencing Guidelines ranges under the Sentencing Guidelines should not include an upward departure under Sentencing Guidelines § 2L1.1 (2011) based on the number of aliens they illegally brought into the United States because the evidence supported a finding of only "between 280 aliens and 500 aliens," 3/15/16 Sent. Tr. 17, nor an upward departure under Section 3C1.1 for obstruction of justice because the jury did not find them guilty beyond a reasonable doubt on tampering charges alleging the same conduct, id. at 32-33. Petitioners further contended that their initial sentences created unwarranted disparities with the sentences imposed on defendants in unrelated corruption cases. Id. at 56-62. The government responded that, according to the evidence introduced at trial, petitioners' operation transported ten aliens or more across the border "three to four times a week" for over a year, id. at 21, and argued that none of petitioners' purported comparator cases involved similar facts, id. at 70.

The district court determined that, with respect to the alien-smuggling counts, Raul was subject to an adjusted offense level of 31 and a Guidelines range of 108-135 months in custody; and Fidel to an adjusted offense level of 32 and a Guidelines range of

121-151 months in custody. 4/5/16 Sent. Tr. 20-21. The court further determined that the same adjusted offense levels applied to the money-laundering counts, id. at 21-22, and that Raul's and Fidel's combined offense levels were, thus, 31 for Raul and 32 for Fidel, id. at 22.

The district court then granted upward departures of (1) four levels for an offense "involving substantially more than 100 aliens" under Section 2L1.1, 4/5/16 Sent. Tr. 24-25; (2) two levels for "egregious" obstruction of justice under § 3C1.1 by Raul, based on his pulling a gun on a co-conspirator, id. at 26-27; (3) two levels for "disruption of government function" under Section 5K2.7, id. at 28-30; and (4) four levels for the "dismissed charge of bribery" under Section 5K2.21, id. at 31-33. Granting these departures (and denying others that the government requested) yielded a total offense level of 43 and resulting Guidelines range of life in prison for Raul and a total offense level of 42 and Guidelines range of 360 months to life for Fidel. Id. at 33-34.

Addressing petitioners' argument that "other alien-smuggling cases and other corruption cases" established that their sentences were "unreasonable" and would "result in an unwarranted sentence disparity," the district court observed that, unlike the defendants in the cited cases, petitioners here displayed "a lack of remorse" and "have remained mum as to the * * * identification and the location and concealment of ill-gotten gains." 4/5/16

Sent. Tr. 45-49. The court sentenced Raul to 336 months in prison and Fidel to 270 months, both to be followed by three years of supervised release. Id. at 56-60.

The district court subsequently clarified that, "to the extent it was improper" to comment on petitioners' failure to provide information about the location of the proceeds from their crimes, those statements "were mostly footnotes" because it was petitioners' receipt of bribes that predominantly informed the Guidelines calculation. 4/11/16 Sent. Tr. 5-6. The court further addressed petitioners' sentencing-disparity argument, identifying additional distinctions between their case and the ones on which they relied. Id. at 6-7.

4. The court of appeals affirmed. Pet. App. 5-10. The court determined that the district court had "adequately explained the extent of its departures and the ultimate sentences it imposed." Id. at 6. The court of appeals explained that the district court had permissibly found "that [petitioners]' abuse of their official positions to carry out a scheme whose goal was directly contrary to the mission of [their] agency, coupled with [their] violent efforts to obstruct justice, warranted sentences well above the pre-departure Guidelines ranges." Id. at 7. The court of appeals also rejected petitioners' contentions that the district court's conclusions "rest[ed] * * * on clearly erroneous facts," specifically upholding the district court's finding that

petitioners' "smuggling scheme involved 1,000 aliens." Ibid. The court of appeals additionally found no error in the district court's "comment regarding [petitioners]' 'remaining mum,'" which was, "considered in context, * * * an explanation for the relatively lenient sentences imposed in cases that the court was comparing to this case for purposes of" 18 U.S.C. 3553. Pet. App. 8. Finally, the court of appeals rejected petitioners' argument that consideration of conduct underlying the dismissed bribery charge, or conduct underlying the tampering charge as to which petitioners were not found guilty beyond a reasonable doubt, violated their Fifth and Sixth Amendment rights, id. at 9, and it found their sentences to be substantively reasonable, id. at 9-10.

ARGUMENT

Petitioners contend (Pet. 9-17) that the court of appeals erred by "limit[ing] its analysis to reasonableness review" rather than separately considering whether the district court procedurally erred with respect to each departure under the Sentencing Guidelines. Pet. 10. But because the court of appeals in this case did independently analyze the district court's Guidelines departures, any circuit disagreement in review of Guidelines departures is not implicated. Petitioners further contend (Pet. 17-19) that the district court violated their rights under the Fifth and Sixth Amendments by taking into account at sentencing conduct relating to counts that were dismissed or for

which were not found guilty beyond a reasonable doubt. Alternatively, they contend (Pet. 19-22) that "statutory and common law" precludes consideration of such conduct at sentencing. That contention lacks merit and implicates no conflict among the courts of appeals. This Court has repeatedly denied writs of certiorari in cases presenting similar questions and should follow the same course here.

1. Petitioners seek review (Pet. 10) of whether "'departures' under the Sentencing Guidelines are * * * subject to appellate review" independent of the broader "'reasonableness' [review] under 18 U.S.C. 3553(a)." This case does not present that question because, whatever the Ninth Circuit's practice has been in other cases, the court of appeals here separately evaluated the procedural reasonableness of the sentencing court's departures before reviewing the resulting sentences for substantive reasonableness.

a. Before United States v. Booker, 543 U.S. 220 (2005), the Sentencing Guidelines were mandatory and generally binding on district courts at sentencing. See Irizarry v. United States, 553 U.S. 708, 713 (2008). The Guidelines themselves, however, authorized sentencing courts to "depart[]" from the applicable Guidelines range in various circumstances. See id. at 713-714; see generally, e.g., Sentencing Guidelines, Ch. 5, Pt. K (2004). "'Departure' is a term of art under the Guidelines and refers only

to non-Guidelines sentences imposed under the framework set out in the Guidelines." Irizarry, 553 U.S. at 714. Under the mandatory Guidelines, "departures" were subject to "a de novo standard of review." Gall v. United States, 552 U.S. 38, 46 (2007).

In Booker, this Court held that the mandatory Sentencing Guidelines system was invalid under the Sixth Amendment. See 543 U.S. at 226-227, 245. As a remedy, the Court invalidated those provisions of federal sentencing law that made the Guidelines mandatory, 18 U.S.C. 3553(b)(1) (Supp. IV 2004), and that required appellate review in conformance with the Guidelines, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004). 543 U.S. at 245, 259. As a result, although district courts must "give respectful consideration to the Guidelines," the Guidelines are now "'advisory.'" Kimbrough v. United States, 552 U.S. 85, 101 (2007) (citation omitted); see, e.g., Beckles v. United States, 137 S. Ct. 886, 894 (2017).

Consequently, a sentencing court "may vary from Guidelines ranges" based on its application of the statutory sentencing factors in 18 U.S.C. 3553(a), whether or not the Guidelines authorize a departure under the circumstances. Kimbrough, 552 U.S. at 101 (brackets, citation, and internal quotation marks omitted). A court may do so based on "policy considerations, including disagreements with the Guidelines." Ibid. (citation omitted). A "variance" based on the court's exercise of discretion

under 18 U.S.C. 3553(a) is thus distinct from a "departure" within the Guidelines framework. See Irizarry, 553 U.S. at 712-714 (citation omitted).

The courts of appeals have taken different approaches to the review of sentences involving potential departures under the Guidelines. The Seventh and Ninth Circuits have generally reviewed sentences for reasonableness under Section 3553(a), without separately considering the correctness of any departure decisions under the Guidelines. See, e.g., United States v. Johnson, 427 F.3d 423, 426-427 (7th Cir. 2005); United States v. Mohamed, 459 F.3d 979, 987 (9th Cir. 2006). Those courts "do[] not preclude consultation of the system of departures that existed under the mandatory regime, either by the district court or by th[e] court [of appeals]." Mohamed, 459 F.3d at 987. But they recognize that "after Booker what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-Booker decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory." Johnson, 427 F.3d at 426. Those courts further recognize that "if 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" to impose a variance. Mohamed, 459 F.3d at 987. The Seventh and Ninth Circuits therefore generally review a sentence

involving a potential departure factor for substantive reasonableness, treating the departure analysis as part of the district court's broad sentencing discretion. Ibid.

Several other courts of appeals, however, have indicated that, after considering calculation of the Guidelines range, a reviewing court should review the propriety of any potential Guidelines departures under the relevant Guidelines departure provisions before addressing whether the ultimate sentence was reasonable under Section 3553(a). See, e.g., United States v. Wallace, 461 F.3d 15, 32-33 (1st Cir. 2006); United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005); United States v. Fumo, 655 F.3d 288, 308 (3d Cir. 2011); United States v. Gutierrez-Hernandez, 581 F.3d 251, 254-255 (5th Cir. 2009); United States v. Woods, 670 F.3d 883, 886 (8th Cir. 2012); United States v. Robertson, 568 F.3d 1203, 1210 (10th Cir.), cert. denied, 558 U.S. 1083 (2009); United States v. Crawford, 407 F.3d 1174, 1178, 1181-1182 (11th Cir. 2005).

b. This Court has repeatedly denied petitions seeking review of the circuits' different approaches to review of Guidelines departures. See Mendez-Maldonado v. United States, 137 S. Ct. 2116 (2017) (No. 16-7489); Dominguez-Garcia v. United States, 136 S. Ct. 36 (2015) (No. 14-9292); Vasquez-Cruz v. United States, 571 U.S. 837 (2013) (No. 12-10038); Cruz-Lopez v. United States, 568 U.S. 941 (2012) (No. 11-10989). The same result is

appropriate here. Each of petitioners' sentencing claims (Pet. C.A. Br. 17-35) -- that the district court "refused to address" their disparity arguments, that it "failed to explain adequately the extent of its upward departures," that it erroneously derived culpability from their "'remain[ing] mum'" about the disposition of their criminal proceeds, and that it erroneously calculated the number of immigrants transported -- was reviewed by the court of appeals. Id. at 17, 25 (citation omitted). In particular, the court undertook a step-by-step review of petitioners' arguments about the departures without suggesting that their arguments were foreclosed or citing any of the circuit precedent petitioners now challenge.

Before considering whether petitioners' sentences were substantively reasonable, see Pet. App. 9-10, the court of appeals determined that the district court had "adequately explained the extent of its departures and the ultimate sentences it imposed," id. at 6; and that the district court "did not rest its sentencing decisions on clearly erroneous facts," id. at 7 (recounting the "finding that [petitioners]' smuggling scheme involved 1,000 aliens," and the reliance on petitioners' "abuse of their official positions" and "efforts to obstruct justice" as "primary drivers behind the lengthy sentences"). And the court of appeals separately addressed petitioners' arguments as to unwarranted sentencing disparities, id. at 8; consideration of acquitted and

dismissed conduct, id. at 9; and the district court's "enhancement for bodily injury," id. at 10. Contrary to petitioners' contention (Pet. 16), no reason exists to believe that "petitioners' ability to attack the heart of the district court's sentencing analysis * * * [was] curtailed" by the court of appeals or that "appellate review of [their] sentences" was in any way "limit[ed]." Review of the question presented in this case is accordingly unwarranted.

2. Petitioners assert (Pet. 17) that this Court should grant review to consider "whether reliance on acquitted and dismissed conduct to support * * * dramatic departures under the Sentencing Guidelines violates the Fifth and Sixth Amendments." They identify no conflict among the courts of appeals or development in this Court's jurisprudence that would justify such review.

a. When selecting an appropriate sentence, a district court may, consistent with the Fifth and Sixth Amendments, consider conduct that was not intrinsic to the underlying conviction. Although the Sixth Amendment requires that, other than the fact of a prior conviction, "any fact that increase[s] the prescribed statutory maximum sentence" or the statutory "minimum sentence" for an offense "must be submitted to the jury and found beyond a reasonable doubt," Alleyne v. United States, 133 S. Ct. 2151, 2157-2158 (2013) (opinion of Thomas, J.), judges have broad discretion to engage in factfinding to determine an appropriate

sentence within a statutorily authorized range, see, e.g., id. at 2163 (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); Booker, 543 U.S. at 233 ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

Contrary to petitioners' contention (Pet. 17-19), neither the Fifth Amendment nor the Sixth Amendment precludes sentencing courts from finding facts about relevant conduct under this framework when the defendant is acquitted of that conduct under a higher standard of proof at trial, or when the government voluntarily dismisses the charge. As this Court explained in United States v. Watts, 519 U.S. 148 (1997) (per curiam), in addressing judicial factfinding under the Guidelines, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157. The Court found it "well established" in pre-Guidelines practice "that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." Id. at 152 (citation omitted). And as Watts explained, a jury's determination that the government failed to prove a fact beyond a reasonable doubt does

not have preclusive effect "in a subsequent action governed by a lower standard of proof." Id. at 156 (citation omitted). Although Watts specifically addressed a challenge to acquitted conduct based on double-jeopardy principles, rather than the Sixth Amendment, its clear import is that sentencing courts may take acquitted or uncharged conduct into account without offending the Constitution. See id. at 157.

Watts's analysis is incompatible with the arguments that petitioners press here, and their effort to distinguish Watts (Pet. 21-22) as involving only "dramatic guidelines increases" lacks merit. Watts did not purport to limit the use of acquitted or dismissed conduct to situations where it would result in only small sentencing increases. To the contrary, the Court reiterated that it is "essential" that sentencing courts use "the fullest information possible" about the defendant when "select[ing] * * * an appropriate sentence." Watts, 519 U.S. at 151-152 (citation omitted). And Booker cited Watts for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)." 543 U.S. at 251 (emphasis omitted).

Petitioners' constitutional argument therefore does not warrant further review. As petitioners acknowledge (Pet. 18), an "unbroken string of cases" -- indeed, every court of appeals with criminal jurisdiction -- has held since Booker that a district

court may consider acquitted or uncharged conduct for sentencing purposes. See United States v. Gobbi, 471 F.3d 302, 313-314 (1st Cir. 2006); United States v. Vaughn, 430 F.3d 518, 526-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); United States v. Ciavarella, 716 F.3d 705, 735-736 (3d Cir. 2013), cert. denied, 134 S. Ct. 1491 (2014); United States v. Grubbs, 585 F.3d 793, 798-799 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); United States v. Farias, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); United States v. White, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); United States v. Waltower, 643 F.3d 572, 575-578 (7th Cir.), cert. denied, 565 U.S. 1019 (2011); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006); United States v. Mercado, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); United States v. Magallanez, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); United States v. Siegelman, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015), cert. denied, 136 S. Ct. 798 (2016); United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir.), cert. denied, 135 S. Ct. 8 (2014).

In addition, this Court has repeatedly and recently denied petitions for writs of certiorari raising constitutional claims like petitioners'. See, e.g., Muir v. United States, 138 S. Ct. 2643 (2018) (No. 17-8893); Mayhew v. United States, 138 S. Ct. 1314 (2018) (No. 17-7791); Morgan v. United States, 138 S. Ct. 754

(2018) (No. 17-7131); Cook v. United States, 137 S. Ct. 2142 (2017) (No. 16-1210); Barnes v. United States, 137 S. Ct. 1353 (2017) (No. 16-7850); Bell v. United States, 137 S. Ct. 37 (2016) (No. 15-8606); Krum v. United States, 137 S. Ct. 41 (2016) (No. 15-8875); Siegelman v. United States, 136 S. Ct. 798 (2016) (No. 15-353). The same result is appropriate here.

b. Petitioners' alternative contention (Pet. 19-22) that acquitted and dismissed conduct cannot be considered at sentencing "as a matter of statutory and common law" is unfounded. Focusing on Section 3553's directive that sentencing courts "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. 3553(a)(6), petitioners argue (Pet. 20) that the statute "requires a comparison of convicted conduct, not acquitted conduct." That argument lacks merit.

The statutory text imposes no general limitation on the facts a sentencing court may consider in determining the appropriate sentence. Although the statute requires comparing a defendant's sentence to those imposed on defendants who have been convicted of similar crimes, it does not preclude sentencing courts from considering conduct extrinsic to the counts of conviction, including acquitted or uncharged conduct, in determining that sentence. The only constraint is to "avoid unwarranted sentence disparities," and petitioners offer no basis, textual or

otherwise, for deeming conduct extrinsic to the counts of conviction categorically "unwarranted" under 18 U.S.C. 3553.

To the contrary, Congress has expressly specified that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a district court "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661 (emphases added). Petitioners' assertion that Congress sought to limit the consideration of certain conduct at sentencing cannot be squared with that explicit statutory directive. Nor do they identify any court that has adopted the limitation they propose. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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