No. 18-5468

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioners have presented three questions concerning federal sentencing law worthy of review. With respect to the first issue regarding whether departures from the Sentencing Guidelines are subject to independent appellate review, the government's brief ("Gov. Br.") concedes that there is conflict in the circuits, and it otherwise ignores the developments in this Court's precedent, *see Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), in arguing against review. With respect to the constitutional limits on the use of acquitted and dismissed conduct at sentencing as implicated by the second question presented, the government ignores the issue as it relates to the reasonableness of a sentence under 18 U.S.C. § 3553(a); the government also erroneously relies on *United States v. Watts*, 519 U.S. 148 (1997) as to the Sentencing Guidelines aspect of the question presented because that opinion did not address *dramatic* increases under the guidelines. As for the use of acquitted and dismissed conduct at sentencing under non-constitutional principles, the government over-reads 18 U.S.C. § 3661 and fails to cite any authority undermining petitioners' interpretation of 18 U.S.C. § 3553(a)(6). In the end, the government does not dispute the importance of the issues presented, as they are obviously critical to the administration of criminal justice. The Court should grant the petition.

ARGUMENT

I. The government concedes a conflict within the circuits as to whether departures from the guidelines are subject to independent appellate review, and it ignores the developments in this Court's case law, specifically *Molina-Martinez* and *Rosales-Mireles*, in arguing against review.

The government *concedes* that the "courts of appeals have taken different approaches to the review of sentences involving potential departures under the Guidelines[,]" Gov. Br. 11, and recognizes that the Ninth Circuit's approach, which prohibits appellate review of departures, is in the distinct minority. *Id.* at 12. The government also does not dispute that this conflict is important; indeed, the conflict results in disparate treatment of federal sentencing appeals throughout the country. The Solicitor General, however, contends that review is not warranted for essentially two reasons.

First, the government asserts that this Court has previously denied other "petitions seeking review of the circuits' different approaches to review of Guidelines departures." *Id.* at 12. The four petitions cited by the government were all filed before *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), and three of the four were filed before *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). By failing to argue otherwise, the Solicitor General apparently concedes that the Ninth Circuit's minority approach is inconsistent with *Rosales-Mireles* and *Molina-Martinez*. Given the developments in this Court's precedent,

the timing is now right to resolve the conflict and to eliminate the flawed approach taken by the Ninth Circuit.

Second, the government maintains that the Ninth Circuit reviewed the sentencing claims raised by petitioners. Gov. Br. 13-14. But the Ninth Circuit only reviewed those claims that petitioners *could* bring under Ninth Circuit law. Under the governing circuit precedent, petitioners could not challenge the legal validity of the upward departures, all of which were granted over their objections, and therefore asked the Ninth Circuit to overrule its case law prohibiting review. Their request was silently rejected. This Court should overrule the Ninth Circuit's precedent so that petitioners can be afforded the opportunity to obtain appellate review of the legal validity of the upward departures that were imposed by the district court over their objections, an opportunity that they have never had.[1] The limited scope of review performed by the Ninth Circuit is reflected in its analysis that any guidelines errors were inconsequential because "the district still would have selected the same ultimate sentences" as the "primary drivers behind the lengthy sentences were Defendants' abuse of their positions and their efforts to obstruct justice."

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[1] As pointed out by the government, Gov. Br. 14, the Ninth Circuit did review the bodily injury guidelines increase, but that was because the increase was a "specific offense characteristic," U.S.S.G. § 2L1.1(b)(7), not a "departure," and therefore was subject to appellate review under Ninth Circuit precedent.

Even the limited review conducted by the Ninth Circuit was inconsistent with *Rosales-Mireles* and *Molina-Martinez*, and the government does not dispute that any guidelines errors in imposing the upward departures would result in prejudice. *See Molina-Martinez*, 136 S. Ct. at 1347-48. Thus, this case is a good vehicle to review the acknowledged split in the circuits.

II. With respect to the constitutional limits on the use of acquitted and dismissed conduct at sentencing, the government ignores the question presented as it relates to the reasonableness of a sentence under 18 U.S.C. § 3553(a), and, as to the Sentencing Guidelines aspect of the question, the government's reliance on *Watts* is misplaced because that opinion did not address *dramatic* increases under the guidelines.

The government does not address the "reasonableness" aspect of petitioners' request for review of the use of acquitted and dismissed conduct at federal sentencing proceedings. In other words, the government only addresses the Sentencing Guidelines aspect of the question presented and ignores whether acquitted and dismissed conduct can constitutionally be used to demonstrate the reasonableness of a sentence under 18 U.S.C. § 3553(a). *See Jones v. United States*, 135 S. Ct. 8 (2014) (Scalia, J., joined by Justices Thomas and Ginsburg, dissenting from the denial of *certiorari*). As explained in *Jones*, the time for review of the reasonableness question is long overdue, and the government has no specific response to the interplay between § 3553(a) and the Fifth and Sixth Amendments.

Even as to the Sentencing Guidelines aspect of the question presented, the government's response is flawed. The Solicitor General contends that the question presented for review has already been resolved by *United States v. Watts*, 519 U.S. 148 (1997), although it recognizes that *Watts* was focused on the Double Jeopardy Clause, not the Sixth Amendment. Gov. Br. 15-16. Even putting this important distinction aside, *see United States v. Booker*, 543 U.S. 220, 240 n.4 (2005), the government is incorrect when it contends that *Watts* applies to *dramatic* increases under the guidelines. Gov. Br. 16. This Court specifically stated in *Watts*: "We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue." *Watts*, 519 U.S. at 156-57 (footnote omitted).

While this limitation focused on the conflicting views in the lower courts regarding the standard of proof for dramatic guidelines increases, it certainly demonstrates that *Watts* did not present the question of dramatic increases under the guidelines. Because *Watts* was focused on the Double Jeopardy Clause, rather than the Sixth Amendment, and did not present dramatic increases under the guidelines, it could not have resolved the question presented

for review in this case, where petitioners have raised a Sixth Amendment challenge to dramatic increases under the guidelines.

The government notes that the lower courts have unanimously held that acquitted conduct can be used to support guidelines increases. Gov. Br. 16-17. The opinions cited generally did not involve *dramatic* increases. *See, e.g.*, *United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006) (2-level increase for gun possession); *United States v. Farias*, 469 F.3d 393, 399-400 (5th Cir. 2006) (same). To the extent that they did, they failed to recognize the limitation noted in *Watts*, *see, e.g.*, *United States v. White*, 551 F.3d 381, 383-86 (6th Cir. 2008) (*en banc*); *United States v. Mercado*, 474 F.3d 654, 656-57 (9th Cir. 2007), and were met with vigorous dissent. *See White*, 551 F.3d at 386-97 (Merritt, J., dissenting); *Mercado*, 474 F.3d at 658-65 (Fletcher, J., dissenting). Similarly, the petitions cited by the government where this Court denied review, *see* Gov. Br. 17-18, generally failed to focus on the fact that *Watts* did not address dramatic guidelines increases. In any event, this Court has recently granted review to reconsider its Double Jeopardy jurisprudence despite the unanimous view of the lower courts and despite denying review in prior petitions, *see Gamble v. United States*, 138 S. Ct. 2707 (2018), and reconsideration of the Double Jeopardy opinion in *Watts* is no less deserving given the dissenting views expressed by several circuit judges.

Finally, the government appears to concede, as it must, that this case involves *dramatic* increases under the guidelines. The government also appears to concede that there are no preservation problems and that this case is an excellent vehicle to resolve the question presented. The issue presented is obviously important, and the government does not contend otherwise. For all of these reasons, this Court should grant review.

III. With respect to the use of acquitted and dismissed conduct at sentencing under non-constitutional principles, the government over-reads 18 U.S.C. § 3661 and fails to cite any authority undermining petitioners' interpretation of 18 U.S.C. § 3553(a)(6).

The government does not cite any precedent in support of its view that, as a matter of statutory law, the reasonableness of a sentence under § 3553(a) can be based on acquitted conduct. Gov. Br. 18-19. The government does not have a convincing response to the language in § 3553(a)(6), which specifically references convicted conduct, and instead solely relies on 18 U.S.C. § 3661, Gov. Br. 19, a statute in a different chapter of Title 18. The government over-reads § 3661, which does not answer the question presented.

Section 3661 states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person *convicted* of an offense which a court of the United States may receive and consider for the purpose of imposing an *appropriate* sentence." 18 U.S.C. § 3661

(emphases added). The statute specifically mentions "a person *convicted* of an offense[,]" and that language should be given some meaning and not rendered mere surplusage. In other words, there is a textual basis for concluding that § 3661 does not give a court carte blanche to consider acquitted conduct. Furthermore, the statute assumes the purpose of imposing an "appropriate" sentence, and the question presented is whether and to what extent acquitted conduct can be used appropriately. There are limitations on the information that a sentencing court can consider. For example, a sentencing court cannot consider a defendant's race, sex, or national origin in determining a sentence. *See* 28 U.S.C. § 994(d). Section 3661 should be considered in conjunction with other parts of the statutory scheme, and this Court can interpret the scheme as limiting the consideration of acquitted conduct to avoid the constitutional question.

In any event, even if a sentencing court can *consider* acquitted conduct under § 3661, that does not mean that such conduct can be relied upon to *determine* the reasonableness of a sentence under § 3553(a). In other words, under § 3553(a)(6), an offense of conviction presumably generates a range of reasonable sentences for a defendant with a particular record. A sentencing court may be able to consider acquitted conduct in deciding to impose a sentence at the high end of that range of reasonableness. The statutory scheme, however, does not permit a

sentencing court to rely on acquitted conduct to sentence a defendant above the high end of that range of reasonableness.

In sum, while petitioners urge this Court to address the important constitutional question presented by their petition, it can also avoid the question by limiting the use of acquitted and dismissed conduct under non-constitutional principles. *See United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (Kavanaugh, J.); *see also United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing *en banc*). Both the constitutional and non-constitutional questions presented merit review.

CONCLUSION

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

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Respectfully submitted,

s/Benjamin L. Coleman

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