No. 11-963

In the Supreme Court of the United States

WALTER LLOYD BLAIR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a person who knowingly uses illegal drug proceeds to hire lawyers for the associates of a deceased drug dealer engages in a "transaction necessary to preserve a person's right to representation as guaranteed by the [S]ixth [A]mendment" within the meaning of 18 U.S.C. 1957(f)(1).

2. Whether the district court's evidentiary ruling precluding government witnesses from testifying about "drug money" should have resulted in judgments of acquittal for petitioner.

3. Whether the district court abused its discretion when it precluded the testimony of witnesses whom petitioner proffered as experts concerning rules of professional responsibility for attorneys and tax rules concerning partnerships.

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OPINION BELOW

The opinion of the court of appeals (Pet. Supp. App. 1-47) is reported at 661 F.3d 755.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2011. A petition for rehearing was denied on October 28, 2011 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 24, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on eight counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); one count of engaging in illegal monetary transactions, in violation of 18 U.S.C.

1957(a); one count of witness tampering, in violation of 18 U.S.C. 1512; one count of obstructing justice, in violation of 18 U.S.C. 1503(a); one count of making a false statement, in violation of 18 U.S.C. 1001(a)(2); and two counts of failing to file an income tax return, in violation of 26 U.S.C. 7203. Petitioner was sentenced to 97 months of imprisonment. Pet. Supp. App. 2. The court of appeals affirmed all of petitioner's convictions except for his obstruction of justice conviction, which the court reversed for insufficient evidence. The court of appeals accordingly vacated petitioner's sentence and remanded for resentencing. *Id.* at 33.

1. In 2003, Anthony Rankine and several associates operated a large marijuana distribution ring in Richmond, Virginia, receiving regular 500-pound shipments of marijuana from the West Coast. Pet. Supp. App. 3. In August 2003, Elizabeth Nicely purchased a Cadillac Escalade for Rankine in her own name, using an $18,000 down payment that Rankine provided to her. *Ibid.* Subsequently, Nicely stored a safe for Rankine at her house in Maryland, even though Nicely knew that Rankine earned his living as a drug dealer. *Ibid.*

In the fall of 2003, Rankine was murdered. Pet. Supp. App. 3. Fearing for her safety, Nicely moved Rankine's safe to a storage facility. *Ibid.* Meanwhile, Deshawn Saunders, a member of Rankine's drug distribution organization, obtained permission from Nicely to take possession of the Cadillac Escalade that she had purchased for Rankine. *Id.* at 4. When Saunders and Shannon Bell, another marijuana dealer, went to retrieve the Escalade, they were arrested on drug trafficking charges. *Ibid.* Officers retrieved $42,000 in drug proceeds from the vehicle. *Ibid.*

After Nicely began to receive threats and phone calls about the drug money that she held in Rankine's safe, Nicely called petitioner, a defense attorney, and told him that she was holding a safe containing Rankine's drug proceeds. Pet. Supp. App. 4. Petitioner told Nicely and her co-worker, Michael Henry, to open the safe and bring the contents to petitioner. *Id.* at 5. Nicely and Henry complied, and Henry watched petitioner count approximately $170,000 while Nicely left the room; petitioner then told Nicely that the cash amounted to only $70,000. *Ibid.* Petitioner gave Nicely and Henry a cover story to explain the money and told Nicely that he would set up a real estate corporation for her, even though she had not asked him to do so. *Id.* at 5-6. Petitioner also told Nicely and Henry that some of the money should be used to cover the legal fees of Saunders and Richard Bernard, both of whom were Rankine's associates and had been arrested on drug charges. *Id.* at 6.

Petitioner retained most of the drug money that Nicely had given him. Pet. Supp. App. 6-7. He contacted two Virginia attorneys to represent Saunders and Bernard and gave them each a $10,000 cashier's check that he purchased with the cash from Nicely. *Id.* at 7. Petitioner also retained $10,000 himself as co-counsel for Saunders. *Ibid.* In November 2003, after FBI agents contacted Nicely, petitioner supplied her with a cover story explaining her possession of Rankine's drug money and her involvement in paying legal fees for Saunders and Bernard, and he instructed her to memorize it. *Id.* at 8-9.

In order to serve as Saunders' co-counsel, petitioner sought admission pro hac vice in the United States District Court for the Eastern District of Virginia, in the

process falsely representing that he had never been subject to professional disciplinary action. Pet. Supp. App. 10. The district court in Virginia granted petitioner's application for admission. *Ibid.* Saunders eventually pleaded guilty to the drug charges against him, and Bernard pleaded guilty to murder during a conspiracy to distribute drugs. *Id.* at 10 & n.2.

2. In a superseding indictment dated May 13, 2009, petitioner was charged with eight counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); one count of engaging in illegal monetary transactions, in violation of 18 U.S.C. 1957(a); one count of witness tampering, in violation of 18 U.S.C. 1512; one count of obstruction of justice, in violation of 18 U.S.C. 1503; one count of making false statements, in violation of 18 U.S.C. 1001(a)(2); two counts of failing to file tax returns, in violation of 26 U.S.C. 7203; and criminal forfeiture under 18 U.S.C. 982(b). Pet. App. 20a-39a. The Section 1957(a) count concerned the $20,000 in bank checks that petitioner had purchased in order to pay the attorneys he solicited to represent Saunders and Bernard. Section 1957(a) prohibits "knowingly engag[ing] * * * in a monetary transaction in criminally derived property of a value greater than $10,000," 18 U.S.C. 1957(a), and the indictment alleged that petitioner had violated the provision by using funds "derived * * * from specified unlawful activity, that is, conspiracy to distribute narcotics and distribution of narcotics under 21 U.S.C. §§ 846 and 841," to "purchas[e] bank checks * * * at SunTrust Bank." Pet. App. 30a; see *id.* at 26a-27a.

Petitioner moved to dismiss the Section 1957(a) count, relying on Section 1957(f)(1), which exempts from the definition of prohibited "monetary transaction[s]"

any "transaction necessary to preserve a person's right to representation as guaranteed by the [S]ixth [A]mendment to the Constitution." 18 U.S.C. 1957(f)(1); 9/21/09 Tr. 15. The district court denied the motion, finding that the transaction at issue "is simply one in which [petitioner] alleges that the transaction had something to do with legal representation of somebody" rather than a transaction by a defendant who needed to pay for his own attorney. *Id.* at 30-31.

Following a jury trial, petitioner was convicted on all counts and sentenced to 97 months of imprisonment. Pet. Supp. App. 2. That sentence included concurrent 97-month sentences on each of the eight money laundering counts, the illegal monetary transaction count, the witness tampering count, and the obstruction of justice count; a 60-month concurrent sentence on the false statement count; and 12-month concurrent sentences on the two income tax counts. Pet. App. 11a.

3. a. The court of appeals affirmed all but one of petitioner's convictions, reversing only his conviction for obstruction of justice.[1] Pet. Supp. App. 1-33. With respect to the Section 1957(a) count, the court rejected petitioner's "broad contention that any drug money that goes to the payment of counsel fees falls within the § 1957(f) safe harbor provision," explaining that that "sweeping claim founders on several points." *Id.* at 25. The court reasoned that "[h]ad Congress wanted to create a broad exception like the one [petitioner] now seeks,

[1] The court rejected petitioner's challenges to the sufficiency of the evidence on several of the Section 1956 money laundering counts, Pet. Supp. App. 11-15, and his argument that the tax counts were improperly joined under Fed. R. Crim. P. 8(a) and should have been severed, Pet. Supp. App. 20-24. Petitioner does not renew those contentions before this Court.

it could have employed unqualified language exempting transactions 'for payment of counsel.'" *Ibid.* Indeed, Congress had considered and rejected language that would have created such an exemption. *Id.* at 29. Instead of using such broad language, the court explained, "Congress expressly tied the § 1957(f) exception to the Sixth Amendment right, on which the Supreme Court has the last and definitive word." *Id.* at 25. Because the Supreme Court had held in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989), that the Sixth Amendment does not guarantee the right to use criminally derived proceeds to pay an attorney, the court of appeals concluded that petitioner "cannot meet the most basic requirement for protection under § 1957(f)." Pet. Supp. App. 26.

The court acknowledged that reading Section 1957(f)(1) in conjunction with *Caplin & Drysdale* effectively rendered the exemption a nullity, but it rejected petitioner's argument that such a result would be inconsistent with congressional intent. Pet. Supp. App. 26. Congress, the court explained, "was well aware of that possibility when it drafted the exception" because *Caplin & Drysdale* was pending before the Court at the time. "Rather than join the fray and attempt to define the contours of the Sixth Amendment itself, Congress sensibly left the resolution of this issue to our nation's highest tribunal." *Ibid.* Numerous other statutory provisions, the court observed, "track[] constitutional boundaries," and "Congress often relies on the Supreme Court's expertise in constitutional interpretation." *Id.* at 30 (citing statutes).

Finally, the court of appeals responded to the dissenting judge's argument that Section 1957(f)(1) protects any transaction "that secures legal representation

in a criminal proceeding" so long as that transaction is "necessary" to secure Sixth Amendment rights. Pet. Supp. App. 39; see *id.* at 30. That rule, the court stated, would place too much weight on judges' views of what payments are "necessary" to criminal defense representation and lead to considerable uncertainty about the types of payments that would be protected. *Ibid.* Moreover, the court noted, petitioner's transactions were hardly "necessary" to protect Sixth Amendment rights. *Id.* at 28. The court found no indication in the record that Saunders or Bernard needed petitioner "to serve as a middle man" to secure legal representation for them, and petitioner did not contend otherwise. *Id.* at 31.

b. Chief Judge Traxler dissented with respect to petitioner's Section 1957(a) conviction. Pet. Supp. App. 33-47. In his view, Section 1957(f)(1) "protects transactions that would otherwise be illegal, provided the transaction secures legal representation in a criminal proceeding." *Id.* at 38. Chief Judge Traxler acknowledged that "*Caplin & Drysdale* established that the Sixth Amendment does not prohibit the forfeiture of criminally derived proceeds, even if those proceeds are needed for the defendant to hire the attorney of his choice." *Id.* at 45. Relying on the Eleventh Circuit's decision in *United States* v. *Velez*, 586 F.3d 875 (2009), however, Chief Judge Traxler concluded that Section 1957(f)(1) "establishes that the use of criminally derived proceeds to hire a criminal defense attorney is not itself a fresh criminal act under § 1957(a), provided the defendant can satisfy the 'necessity' requirement of § 1957(f)(1)." Pet. Supp. App. 45-46. In Chief Judge Traxler's view, the "necessity" of the transaction would depend on the circumstances; for instance, a "general retainer to an attorney for ongoing legal advice" or a

payment of an "unreasonably large amount in light of the complexity of the criminal proceeding" would likely not be protected by Section 1957(f)(1). *Id.* at 39-40. In petitioner's case, Chief Judge Traxler concluded that the transaction was necessary to "secure[] representation for Saunders and Bernard" and thus satisfied the requirements of Section 1957(f)(1). *Id.* at 40.

4. On remand, the district court resentenced petitioner to 97 months of imprisonment, to be followed by three years of supervised release. See 8:08-cr-00505-PJM Docket entry No. 242 (D. Md. Mar. 23, 2012). Petitioner's appeal of that sentence is currently pending before the Fourth Circuit. See 12-4252 Docket entry No. 1 (Apr. 5, 2012).

ARGUMENT

Petitioner renews his contention (Pet. 16-31) that his Section 1957(a) conviction should be vacated because the transactions at issue fell within Section 1957(f)(1)'s exemption for transactions that are "necessary to preserve a person's right to representation as guaranteed by the [S]ixth [A]mendment to the Constitution." The court of appeals correctly rejected that contention, and because this case is in an interlocutory posture and the Section 1957(f)(1) issue arises only infrequently, any disagreement with the Eleventh Circuit's decision in *United States* v. *Velez*, 586 F.3d 875 (2009), does not merit this Court's review. Petitioner also challenges (Pet. 31-43) the sufficiency of the evidence with respect to his Section 1956 convictions and the district court's exclusion of certain witnesses, but petitioner did not present those arguments to the court of appeals. Further review is not warranted.

1. Because the court of appeals reversed petitioner's conviction for obstruction of justice and remanded for resentencing, the court of appeals' decision is interlocutory. That posture "alone furnishe[s] sufficient ground for the denial of" the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). Petitioner will have the opportunity to raise his current claims, together with any other claims that may have arisen during his resentencing, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

2. Petitioner first contends (Pet. 16-31) that the court of appeals erred in holding that his use of Rankine's drug proceeds to purchase checks to pay attorneys for Rankine's associates did not fall within Section 1957(f)(1)'s exemption for transactions "necessary to preserve a person's right to representation as guaranteed by the [S]ixth [A]mendment to the Constitution." The court's decision is correct, and further review is not warranted.

a. Section 1957(a) prohibits a person from knowingly engaging or attempting to engage "in a monetary transaction in criminally derived property of a value greater than $10,000."[2] 18 U.S.C. 1957(a). In 1988, two

[2] As an initial matter, petitioner argues (Pet. 28-29) that the government failed to establish that the funds in question were "drug money." Petitioner's disagreement with the jury's finding that petitioner's trans-

years after Section 1957's enactment, Congress added Section 1957(f)(1), which amended the term "monetary transaction," as used in Section 1957, to exempt "any transaction necessary to preserve a person's right to representation as guaranteed by the [S]ixth [A]mendment to the Constitution."[3] 18 U.S.C. 1957(f)(1).

Because the exemption in Section 1957(f)(1) is limited to transactions "necessary to preserve" a defendant's Sixth Amendment rights, the exemption is co-extensive with and defined by that Amendment. Generally, the Sixth Amendment provides a defendant with the right "to be represented by an otherwise qualified attorney whom th[e] defendant can afford to hire." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). One year after Section 1957(f)(1) was enacted, however, the Supreme Court held that the Sixth Amendment does not entitle a defendant to use criminal proceeds to pay for legal fees. See *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989); *United States* v. *Monsanto*, 491 U.S. 600, 614-615 (1989). Because the Sixth Amendment does not confer a right to use criminal proceeds to pay a defense lawyer, the use of tainted funds to pay a lawyer cannot be "necessary to preserve" a defendant's Sixth Amendment rights as is

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actions involved criminal proceeds is a factbound issue that does not warrant this Court's review.

[3] Petitioner suggests (Pet. 20-21) that the lower courts should have applied the exemption contained in Section 1957(f)(1) to certain of the charges that petitioner engaged in money laundering transactions in violation of 18 U.S.C. 1956. But Section 1957(f)(1)'s exclusion of transactions necessary to preserve Sixth Amendment rights applies only to the definition of "monetary transaction" "[a]s used in this section"; the exemption therefore does not apply to the "transaction[s]" prohibited in Section 1956. See 18 U.S.C. 1957(f)(1).

required to come within the scope of Section 1957(f)(1). See *Caplin & Drysdale*, 491 U.S. at 626 (A "robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended."); see also *Georgia* v. *McCollum*, 505 U.S. 42, 58 (1992) (the Sixth Amendment does not guarantee the "right to carry out through counsel an unlawful course of conduct"). Petitioner's conduct therefore does not fall within Section 1957(f)(1)'s exemption from the definition of prohibited transactions in criminal proceeds.

Petitioner contends (Pet. 19, 30) that *Caplin & Drysdale* "has no bearing on 18 U.S.C. § 1957(f)(1)" because that decision "is a civil forfeiture case." The court of appeals correctly rejected that argument. Pet. Supp. App. 26. In *Caplin & Drysdale*, the petitioner was a law firm engaged in criminal defense representation. The firm argued that the statute providing for forfeiture of proceeds derived from illegal drug transactions, 21 U.S.C. 853, exempted money used to pay for legal representation and that if the statute did not contain such an exemption, it violated the Sixth Amendment. 491 U.S. at 621-622. This Court first rejected the law firm's statutory argument, holding that Section 853 did not exempt tainted funds used to pay an attorney. *Id.* at 623; see *Monsanto*, 491 U.S. at 611-614 (rejecting statutory argument). The Court then held that the absence of such an exemption did not violate the Sixth Amendment because a defendant "has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that [the] defendant will be able to retain the attorney of his choice." *Caplin & Drysdale*, 491 U.S. at 626. Contrary to petitioner's suggestion, the Court's conclusion that

the Sixth Amendment does not confer a right to use tainted funds to pay legal fees was not limited to the forfeiture context. Rather, the Court categorically rejected "any notion of a constitutional right to use the proceeds of crime to finance an expensive defense." *Id.* at 630.

Petitioner also argues (Pet. 24-25) that reading Section 1957(f)(1) in light of *Caplin & Drysdale* would anomalously render the provision a nullity. But as the court of appeals explained, Pet. Supp. App. 26, Congress enacted Section 1957(f)(1) in the face of significant uncertainty about whether the Sixth Amendment protected the right to use criminal proceeds for legal fees. When Congress was considering the provision, the Fourth Circuit, in a divided en banc decision, had just reversed a panel decision holding that the Sixth Amendment *did* confer a right to use tainted funds for representation. See *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988). This Court granted certiorari in that case and in *Monsanto* to consider the question, and the American Bar Association argued before the Court that defendants had a Sixth Amendment right to use tainted funds to pay legal fees. Am. Bar Ass'n Amicus Br. at 12, Nos. 87-1729, 88-454. In the face of that uncertainty, Congress provided for the possibility that the Supreme Court would hold that the Sixth Amendment extended to the use of tainted funds for legal fees by purposefully using language that made the exemption dependent on the scope of the Sixth Amendment. That conclusion is reinforced by Congress's specific rejection of language in the initial House version of the provision that would have created a broad exemption that was entirely independent of the Sixth Amendment. See H.R. 5210, 100th Cong., 2d Sess.

§ 6113 (1988) (covering "monetary transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation").

b. As petitioner observes (Pet. 28), the Eleventh Circuit held in *United States* v. *Velez*, *supra*, that "the plain meaning of the exemption set forth in § 1957(f)(1), when considered in its context, is that transactions involving criminally derived proceeds are exempt from the prohibitions of § 1957(a) when they are for the purpose of securing legal representation to which an accused in entitled under the Sixth Amendment." 586 F.3d at 877. *Velez* rested on the incorrect premise that *Caplin & Drysdale* "has no bearing on § 1957(f)(1)" because that decision's discussion of the Sixth Amendment pertained only to "*civil forfeiture* of criminally derived proceeds" and not "*criminal* penalties." *Ibid*. As discussed above, however, the Court's conclusion in *Caplin & Drysdale* that criminal proceeds used for legal fees need not be exempted from forfeiture was premised on the principle that the Sixth Amendment confers no right to use tainted funds for legal fees; that principle is not limited to the civil forfeiture context. Contrary to the Eleventh Circuit's view, then, the Supreme Court's categorical conclusion about the scope of the Sixth Amendment *did* "alter or refine the meaning of the Sixth Amendment limitation to the exemption in § 1957(f)(1)." *Id*. at 878. Moreover, the Eleventh Circuit's conclusion that Section 1957(f)(1) "clearly exempts criminally derived proceeds used to secure legal representation to which an accused is entitled under the Sixth Amendment," *id*. at 879, ignores the provision's requirement that the transaction be "necessary to preserve" Sixth Amendment rights. Since a defendant has no Sixth Amendment right to pay for legal services with tainted funds, such trans-

actions cannot be "necessary" to protect Sixth Amendment rights.

The disagreement between the Fourth and Eleventh Circuits' decisions, however, does not warrant this Court's review. The disagreement is recent and shallow, and petitioner does not identify any other decision squarely addressing the question whether, as the Eleventh Circuit held, Section 1957(f)(1) permits individuals to use criminal proceeds to pay for legal services. Indeed, in the nearly 25 years that Section 1957(f)(1)'s exemption has been in effect, only one other decision, aside from *Velez* and the decision below, has addressed its scope. See *United States* v. *Hoogenboom*, 209 F.3d 665 (7th Cir. 2000). Rather than addressing the question presented here, that decision concerned whether the "eventual[]" use of illegal funds to pay lawyers, long after the transaction at issue, was sufficient to preclude prosecution. See *id.* at 669 (stating in dicta that the exception in Section 1957(f)(1) "appears to have been inserted to prevent the broad reach of the statute from criminalizing a defendant's bona fide payment to her attorney," but concluding that the defendant could not avail herself of the exception); cf. *United States* v. *Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997) (stating, in a case not involving Section 1957(f)(1), that without the exception, "a drug dealer's check to his lawyer might have constituted a new federal felony"). Absent evidence that the question presented arises with greater regularity, this Court's intervention is unwarranted.

3. Petitioner next contends (Pet. 31-37) that because the district court ruled in his favor that two government witnesses lacked personal knowledge to testify that the funds used by petitioner constituted illegal "drug money," every count of the indictment should have been

dismissed. Petitioner did not raise this argument in the court of appeals, see Pet. C.A. Br. 1-2, and that court accordingly did not consider it. This Court ordinarily does not entertain claims that were neither pressed nor passed upon in the courts below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, the question is a factbound evidentiary issue that does not warrant review. Petitioner has not established that the issue implicates any conflict among the courts of appeals or that the district court's rulings were incorrect. The district court correctly instructed the jury that the government had "to prove beyond a reasonable doubt * * * that [petitioner] knew that the property involved in the financial transaction was the proceeds of some form of unlawful activity." 12/14/09 Tr. 43. Petitioner's argument (Pet. 37) that in "the absence of any admissible testimony about 'drug money,' * * * the entire conviction should be reversed," is at bottom a disagreement with the jury's finding that even without the excluded witnesses' testimony, the evidence was sufficient to support petitioner's convictions beyond a reasonable doubt.

4. Petitioner asserts (Pet. 38-43) that the district court erred in granting the government's motion to exclude "expert witnesses" whom petitioner had subpoenaed to testify about his legal ethical obligations and about the tax provisions applicable to partnerships. Petitioner did not raise this contention below and the court of appeals did not pass on it. That is sufficient reason to deny review.

Although petitioner asserts (Pet. 38) that the exclusion of the proffered expert testimony violated the Compulsory Process Clause, that Clause does not give "[t]he

accused * * * an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). Petitioner has not explained how the district court's application of the Federal Rules of Evidence violated the Compulsory Process Clause, or demonstrated that the district judge abused his discretion in excluding the testimony. This fact-bound issue does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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