No. 07-1094

In the Supreme Court of the United States

DENARD MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a new trial based on a prosecutor's misleading statement that a cooperating witness was certain to receive a mandatory minimum sentence, when the statement had no reasonable likelihood of affecting the verdict.

2. Whether petitioner's Sixth Amendment rights were violated on the theory that his sentence would be unreasonable but for the sentencing court's reliance on conduct underlying a charge on which the jury had returned a verdict of not guilty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 498 F.3d 634.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2007. A petition for rehearing was denied on September 25, 2007 (Pet. App. 55a-56a). On January 9, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including February 22, 2008, and the petition was filed on that date. 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 Northern District of Indiana, petitioner

was convicted of possessing 50 grams or more of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 1); and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2). He was sentenced to a total of 262 months of imprisonment, to be followed by five years of supervised release. Pet. App. 21a-29a. The court of appeals affirmed in relevant part. *Id.* at 1a-20a.[1]

1. On August 15, 2003, petitioner pulled his white van up to a street corner in East Chicago, Indiana, where his cousin, Tramayne Peterson, was standing. Pet. App. 2a. Peterson got into the van, intending to ask petitioner for a ride to the mall. *Ibid.*; 01/19/05 Tr. 56-57. A few blocks later, the men drove past East Chicago police officer George Valdez, who, knowing that there was an outstanding warrant for petitioner's arrest, initiated a stop of the van. Pet. App. 2a.

As Officer Valdez approached the van, petitioner handed Peterson a gray plastic bag and said: "Take this and run." Pet. App. 2a. Peterson exited the van with the bag, and Officer Cima DeVilla, who had just arrived on the scene, gave chase. *Ibid.*; Gov't C.A. Br. 3-4. As Peterson scaled a fence, items began falling out of the bag, including baggies containing cocaine base and marijuana, a .45 caliber pistol, and an electronic scale. Pet.

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[1] The district court initially sentenced petitioner to concurrent terms of 262 months of imprisonment, to be followed by concurrent terms of five years of supervised release. Pet. App. 1a, 21a-29a. Because the term of imprisonment initially imposed for Count 2 exceeded the statutory maximum, the court of appeals remanded for resentencing with respect to that count. *Id.* at 20a. The district court then issued an amended judgment sentencing petitioner to concurrent terms of 262 months of imprisonment on Count 1 and 120 months of imprisonment on Count 2. *Id.* at 44a.

App. 2a-3a, 17a-18a. Peterson was ultimately apprehended by a third officer, and Officer Morris arrested petitioner back at the van. Pet. App. 3a.

2. On September 4, 2003, a grand jury charged petitioner and Peterson with possessing 50 or more grams of cocaine base with intent to distribute it (Count 1); possessing marijuana with intent to distribute it (Count 2); and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (Count 3). Indictment 1-3.

On November 3, 2004, Peterson agreed to plead guilty to the cocaine base count (Count 1), and to testify truthfully at petitioner's trial. Plea Agreement 1, 6-7. In return, the government agreed to dismiss the marijuana and firearm counts at sentencing, *id.* at 7, to seek a downward adjustment for acceptance of responsibility under Sentencing Guidelines § 3E1.1, *id.* at 2, and to recommend "a period of imprisonment at the low end of the applicable guideline range," *id.* at 5. The plea agreement stated that Peterson "underst[ands]" that the charge to which he would be pleading guilty carried a term of "imprisonment of not less than ten (10) years." *Id.* at 3. The plea agreement did not mention the possibility of a further sentencing reduction under Sentencing Guidelines § 5K1.1 or 18 U.S.C. 3553(e) (Supp. V 2005).

At petitioner's trial, Peterson testified that he had not seen the gray bag when he first got into the van, that petitioner "threw [the bag] on [his] lap" at the time of the stop, and that he did not know what was in the bag until after he started running. 1/19/05 Tr. 59, 76-80. Under questioning from the government, Peterson acknowledged that he had entered into "a plea agreement" under which the government had agreed to dismiss

Counts 2 and 3 and "make a recommendation to sentence me at the low end of the guidelines." *Id.* at 55; see *id.* at 81 (cross examination). Peterson also stated that he "underst[ood]" that he was facing a ten year "mandatory sentence." *Id.* at 55; see *id.* at 81 (cross examination).

During both its opening statement and its closing argument, the defense asserted that Peterson's testimony had been influenced by the plea agreement, noting that he was "not coming in here as a concerned citizen," but rather had "cut a deal." 1 Tr. 112-113 (Jan. 18, 2005); see 1/20/05 Tr. 23 ("What is [Peterson's] interest or bias? Got a great plea agreement, and he has a huge interest in testifying as the government expects him to testify."); see also *id.* at 35-36, 38. In its own closing arguments, the government acknowledged that "Peterson had a plea agreement," but stated that Peterson had testified that "[h]e's looking at a mandatory minimum sentence" of ten years of imprisonment, and that that sentence "has to be imposed" and was "the lowest he can get." *Id.* at 11-12; see *id.* at 17 ("It would be agreed that a ten-year sentence is something. It's not—not facing anything."); *id.* at 46 ("[A] mandatory sentence of ten years is not a great deal."). The jury found petitioner guilty on the cocaine base and marijuana counts (Counts 1 and 2) and not guilty on the firearms count (Count 3). Pet. App. 21a-22a.

After petitioner's jury returned its verdict, the government filed a motion for a downward departure on Peterson's behalf pursuant to Sentencing Guidelines § 5K1.1 and 18 U.S.C. 3553(e) (Supp. V 2005). Pet. App. 1a-2a. The district court granted the government's motion, and sentenced Peterson to 70 months of imprisonment. *Id.* at 2a.

On December 14, 2005, the district court sentenced petitioner to 262 months of imprisonment. 12/14/05 Sent. Tr. 36. Applying the preponderance of the evidence standard, the district court found that petitioner had possessed a dangerous weapon within the meaning of Sentencing Guidelines § 2D1.1(b)(1), which increased his offense level by two. 12/14/05 Sent. Tr. 24-25. Given petitioner's criminal history category of VI, his advisory Guidelines range was 262-367 months. *Id.* at 27. Had the district court not imposed a two-level increase for gun possession, petitioner's advisory Guidelines range would have been 210-262 months. Pet. 4; Sentencing Guidelines Ch.5, Pt. A (Sentencing Table).

5. a. Petitioner appealed his conviction and sentence. He argued that the government had engaged in prosecutorial misconduct by "repeated[ly] referenc-[ing] * * * a so-called 'mandatory' sentence of ten years," Pet. C.A. Br. 23, "allowing Peterson to deliver * * * false testimony" to that effect, *id.* at 26, and then "recommend[ing] * * * a sentence of only five years for Peterson," *id.* at 27. Petitioner asserted that "[t]here are two standards for determining materiality of [withheld] evidence"—standards that he associated with *United States* v. *Bagley*, 473 U.S. 667 (1985), and *United States* v. *Agurs*, 427 U.S. 97 (1976), respectively—and he argued that he prevailed "under either the *Bagley* or *Agurs* standard." Pet. C.A. Br. 26-27.

In response, the government stated that, at the time of petitioner's trial, neither it nor Peterson had anticipated that a motion for a downward departure would be filed on Peterson's behalf. Gov't C.A. Br. 24. The government explained that, under the original plea agreement, "the *only* real benefit Peterson would have received * * * would have been the avoidance of a 5 year

consecutive sentence on Count 3 (the 924(c) charge)." *Id.* at 24 n.4. Because the jury had acquitted petitioner on the firearms charge, and because "the evidence on that count was stronger on [petitioner] than it was on Peterson," the government determined that a Section 5K1.1 motion was appropriate in order to prevent the benefits that Peterson was to obtain under the plea agreement from becoming "illusory." *Ibid.* The government also noted that "[b]oth the defense and the jury were aware of Peterson's motivation to lie," and maintained that "[t]he fact that Peterson received some unanticipated and unexpected additional benefit down the road does not impact his motivation/bias at the time he testified." *Id.* at 24.

b. The court of appeals affirmed in relevant part. Pet. App. 1a-20a; see note 1, *supra*. The court concluded that it had been "improper [for the prosecutor] both to give the jury the impression that Peterson's sentence could not go below 10 years during his examination of Peterson, and then later to argue the same thing to the jury, at least when it is obvious that [at the time of petitioner's trial] the United States had not firmly rejected the possibility of the § 5K1.1 motion." Pet. App. 7a-8a.

The court of appeals further determined, however, that the prosecutor's conduct did not require reversal of petitioner's convictions. The court of appeals noted that this Court "has announced two different standards to employ in deciding whether improper comments were material," and that "[t]he easier standard for the defendant to meet" asks whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Pet. App. 9a (quoting *Agurs*, 427 U.S. at 103). The court of appeals described the *Agurs* standard as "not necessarily the best fit here,"

but it determined that, even under that standard, it could not conclude that the prosecutor's "improper comments were material and therefore deprived [petitioner] of a fair trial." *Ibid.* The court explained that "[t]he picture the jury had before it of Peterson's plea agreement made it aware that he was receiving a substantial benefit for his testimony and, more importantly, that he had strong incentives to please the government." *Ibid.* And although the court of appeals acknowledged that "the jury might have recognized the potential for an additional reduction in Peterson's sentence as a marginally greater incentive for Peterson to tailor his testimony in favor of the government," it determined that "the information that the jury had before it was not different enough to lead us to believe that there was a 'reasonable likelihood' that the result would have changed." *Ibid.*

The court of appeals also rejected petitioner's contention that his acquittal on the Section 924(c) count made it improper for the district court to impose a two-level sentencing enhancement for possessing a firearm. Pet. App. 18a-19a. Relying on circuit precedent decided after *United States* v. *Booker*, 543 U.S. 220 (2005), the court found that "'[c]onduct underlying an acquitted charge may be included as long as that conduct is proved by a preponderance of the evidence.'" Pet. App. 19a (quoting *United States* v. *Frith*, 461 F.3d 914, 917 (7th Cir. 2006)).[2]

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[2] The court of appeals incorrectly stated that petitioner's Sixth Amendment claim had not been raised at trial, and was therefore subject to plain error review. Pet. App. 18a-19a. The court corrected that error in its order denying rehearing, stating that "the shift in standard of review ultimately makes no difference." *Id.* at 55a.

ARGUMENT

Petitioner contends (Pet. 5-22) that this Court should grant review to consider two questions: (1) whether to recognize "a new, stricter standard of materiality" to be applied in situations where the prosecution "knowingly utilizes false testimony and disregards a specific request by the defense for exculpatory evidence known to the prosecution"; and (2) whether his Sixth Amendment rights were violated because his sentence would be found unreasonable were it not for the sentencing court's finding of a fact that constituted acquitted conduct. Pet. i. Further review is not warranted. The court of appeals' decision is correct, and petitioner does not assert that it conflicts with the decisions of any other court of appeals or state court of last resort. In addition, petitioner did not properly raise either of the questions upon which he seeks review before the court of appeals.

1. Petitioner asserts that the court of appeals "relied on a materiality standard that did not fully take into account the prejudice and injustice served upon [him]," Pet. 7, and that this Court should grant review to "consider whether a stricter standard of materiality should apply in cases that combine the knowing use of false testimony with a disregard for specific evidentiary requests," Pet. 9; see Pet. 8-18. Petitioner did not propose any "new, stricter standard of materiality" (Pet. i.) in the court below. Instead, he argued (Pet. C.A. Br. 26) that two already existing materiality standards were relevant to his claim. The first was the standard announced in *United States* v. *Bagley*, 473 U.S. 667 (1985), for cases "of prosecutorial failure to disclose evidence favorable to the accused." *Id.* at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part

and concurring in the judgment). Under that standard, evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in the judgment). The other standard petitioner identified below was the one announced in *United States* v. *Agurs*, 427 U.S. 97 (1976), which applies where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Id.* at 103. In that situation, this Court has stated that a defendant's conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Ibid.*

In resolving petitioner's case, the court of appeals applied the "easier" and more "favorable" *Agurs* standard, despite recognizing that it was "not necessarily the best fit here." Pet. App. 9a. Because the court of appeals applied the most favorable materiality standard actually proposed by petitioner, this Court should decline to consider his current argument that a different, stricter test should govern his case. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time on appeal by a party who advocated a contrary position in the court below). And although petitioner also suggests without explanation that the court of appeals "misapplied" the relevant materiality standard, see Pet. 8; see Pet. 15-16, that factbound claim does not warrant this Court's review.

In addition, petitioner's argument in support of a new materiality standard also rests on a dubious factual assertion that was not presented to the lower courts. In

his petition for a writ of certiorari, petitioner relies heavily on the fact that he made "a specific request * * * for exculpatory evidence known to the prosecutor." Pet. i; see Pet. 6, 8, 10, 14, 16-17. In his brief to the court of appeals, however, petitioner did not even assert that he had made such a request, much less claim that his doing so altered the relevant materiality standard. See Pet. C.A. Br. 22-24, 25-27, 28-30. As a result, the court of appeals did not consider the issue, and petitioner may not properly rely upon it as a basis for seeking to overturn the court of appeals' judgment. See *Ortiz*, 422 U.S. at 898.

At any rate, petitioner's contention that the government "disregard[ed] a specific request" (Pet. i) lacks merit. Petitioner sought disclosure of "all promises, considerations, rewards, or inducements * * * wherein the Government has agreed * * * [t]o recommend * * * a downward departure from the Guidelines if [a person] provides substantial assistance to authorities." Pet. App. 59a-60a. As the government explained in its brief to the court of appeals, see pp. 5-6, *supra*, the government never agreed to make a downward departure recommendation for Peterson, and decided to file such a motion only *after* the jury had acquitted petitioner on Count 3. Accordingly, the record does not support petitioner's claim that the government failed to disclose exculpatory material in response to a specific discovery request.[3]

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[3] It is true that "[n]o competent Assistant U.S. Attorney is unaware of the existence of U.S.S.G. § 5K1.1." Pet. 12 (quoting Pet. App. 7a). But the same is true of all competent defense attorneys. As a result, the government could not have violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), merely by failing to disclose the *existence* of that Guidelines provision to the defense. See, *e.g.*, *United*

Finally, even if petitioner's claims had been properly raised below and were supported by the record, this Court's review would still be unwarranted. Petitioner fails to explain why this Court should adopt a wholly new standard of materiality for cases that involve "multiple instances of" (Pet. 13) or "two forms of" (Pet. 9) prosecutorial misconduct. Indeed, petitioner does not even specify what standard of materiality the Court should adopt, simply asserting that due process was violated here, Pet. 16, and urging the Court to adopt *some* standard that will be "more deferential to the defense in criminal trials," Pet. 18. In any event, a new rule is unnecessary because, under existing law, courts already consider the cumulative impact of any government misconduct. See, *e.g.*, *Berger* v. *United States*, 295 U.S. 78, 89 (1935); *Solles* v. *Israel*, 868 F.2d 242, 248 (7th Cir.), cert. denied, 490 U.S. 1101 (1989).

This Court has likewise already rejected petitioner's suggestion that a "stricter standard of materiality" is called for when the prosecution "disregards a specific request for exculpatory evidence." Pet. i. In *Bagley*, this Court held that, regardless of the existence or nature of a defense request, exculpatory evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in judgment). Petitioner identifies no reason why that decision merits reconsideration, let alone reconsideration in a case where no lower

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States v. *Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001) ("*Brady* does not apply to evidence that a defendant would have been able to discover himself through reasonable diligence.").

court has found that the government ignored a specific discovery request.

2. Petitioner contends (Pet. 18-22) that his Sixth Amendment rights were violated because his sentence would be unreasonable absent the district court's reliance on conduct underlying a charge on which the jury had returned a verdict of not guilty. That claim lacks merit and does not warrant review.

a. Relying on Justice Scalia's statement in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), that the Court's opinion "does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea," *id.* at 2479 (Scalia, J., concurring in part and concurring in the judgment), petitioner contends that his Sixth Amendment rights were violated here because his sentence "would not have been reasonable without the district court finding by a preponderance of the evidence that [petitioner] possessed a firearm while trafficking drugs," Pet. 20. This Court has recently denied review in several cases that involved similar claims. See, *e.g.*, *Bradford* v. *United States*, 128 S. Ct. 1446 (Feb. 25, 2008); *Alexander* v. *United States*, 128 S. Ct. 1218 (Feb. 19, 2008), and 128 S. Ct. 1298 (Feb. 19, 2008). In addition, petitioner's claim is without merit and does not warrant this Court's review.

First, petitioner did not make an as-applied challenge to his sentence in the court below, and the court of appeals did not address such a challenge in its opinion. See Pet. C.A. Br. 32 (summarizing constitutional challenge by stating that "*Booker* and *Apprendi* Mandate that a Defendant is Entitled to Have a Jury Decide All Facts that Result in the Imposition of Sentencing Enhancements Beyond a Reasonable Doubt."); see also *id.*

at 13, 31-33. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (quotation marks and citation omitted).

Second, here, as in *Rita*, "even if some future unusually harsh sentence might violate the Sixth Amendment because it exceeds some yet-to-be-defined judicial standard of reasonableness, * * * this case does not present such a problem." 127 S. Ct. at 2473 (Stevens, J., concurring but for Part II). The concurring opinion upon which petitioner places primary reliance states that an as-applied Sixth Amendment violation would exist only if the defendant's sentence "would have been *unreasonable* in the *absence* of any judge-found facts." *Rita*, 127 S. Ct. at 2478 (Scalia, J., concurring in part and concurring in the judgment).

Petitioner cannot meet that standard. Petitioner's sentence of 262 months of imprisonment is within the advisory Guidelines range that would have applied even had the district court not found that he possessed a firearm. See p. 5, *supra*. Accordingly, it would have been entitled to a presumption of reasonableness even absent that finding. *Rita*, 127 S. Ct. at 2459.[4] Nor does petitioner identify any reason why an appellate court would set aside that presumption in his case. The jury found that petitioner possessed with an intent to distribute 50

[4] Petitioner insists (Pet. 20-21) that, absent the firearms finding, the district court would have given him a different sentence. There is no way to know if this claim is true, but even assuming that it was, it would not support a hypothetical "as-applied" Sixth Amendment challenge. That a particular judge might have given him a lesser sentence absent a specified fact does not mean that the sentence he received was unreasonable absent that fact.

grams or more of crack cocaine, a finding that, given his prior felony drug conviction, subjected petitioner to a mandatory minimum sentence of 240 months of imprisonment. 21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005). Petitioner's sentence is thus only 22 months above the statutory minimum sentence, and is far below the maximum available sentence of life imprisonment. See 21 U.S.C. 841(b)(1)(A)(iii). In addition, petitioner had an extensive criminal history and his offenses were committed less than two years after his release from custody for another drug offense. Presentence Investigation Report paras. 32-48, 50. See *Booker*, 543 U.S. at 244 (preserving rule that prior convictions are not subject to the Sixth Amendment principles adopted in *Apprendi* and applied to the federal Sentencing Guidelines). Given these facts, a 262 month sentence would not be unreasonable as a matter of law regardless of whether petitioner possessed a firearm. See *Gall*, 128 S. Ct. at 598 (holding that a "deferential abuse-of-discretion standard of review * * * applies to all sentencing decisions.").

b. To the extent that petitioner challenges the sentencing court's reliance on acquitted conduct, that claim also does not warrant review. In *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam), this Court held that "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." Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles rather than the Sixth Amendment, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account at sentencing

without offending the Constitution. See *id.* at 157. That principle predated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines put in place by *United States* v. *Booker*, 543 U.S. 220 (2005).

Since *Booker*, every court of appeals has held that a district court may consider acquitted conduct at sentencing.[5] This Court has repeatedly denied petitions for a writ of certiorari raising that issue,[6] including after its recent decisions in *Rita* and *Gall* v. *United States*, 128

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[5] See *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir. 2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409 (4th Cir. 2007), cert. denied, No. 07-8076 (Mar. 31, 2008); *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, No. 07-605 (Mar. 31, 2008); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, No. 07-581 (Mar. 31, 2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).

[6] See, *e.g.*, *Edwards* v. *United States*, cert. denied, 127 S. Ct. 1815 (2007) (No. 06-8430); *Dorcely* v. *United States*, cert. denied, 127 S. Ct. 691 (2006) (No. 06-547); *Armstrong* v. *United States*, cert. denied, 127 S. Ct. 109 (2006) (No. 05-1548); *Lynch* v. *United States*, cert. denied, 127 S. Ct. 89 (2006) (No. 05-10945); *Magluta* v. *United States*, cert. denied, 126 S. Ct. 2966 (2006) (No. 05-952).

S. Ct. 586 (2007).[7] There is no reason for a different result here.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

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[7] See, *e.g.*, *Hurn* v. *United States*, cert. denied, No. 07-605 (Mar. 31, 2008); *Mercado* v. *United States*, cert. denied, No. 07-5810 (Mar. 31, 2008); *Smith* v. *United States*, cert. denied, No. 07-7432 (Mar. 31, 2008); *Wemmering* v. *United States*, cert. denied, No. 07-7739 (Mar. 31, 2008); *Ashworth* v. *United States*, cert. denied, No. 07-8076 (Mar. 31, 2008); *Freeman* v. *United States*, cert. denied, No. 07-9368 (Mar. 31, 2008).

[8] After the Sixth Circuit upheld a district court's consideration of acquitted conduct in *United States* v. *Mendez*, 498 F.3d 423, 426-427 (2007), a panel of that court issued an opinion adhering to the *Mendez* ruling but suggesting that the defendant file a petition for rehearing en banc on the question of whether the continuing use of acquitted conduct as a sentencing enhancement violates *Booker*. *United States* v. *White*, 503 F.3d 487, 487 (2007). On November 30, 2007, the Sixth Circuit withdrew the panel opinion in *White* and granted rehearing en banc. See 503 F.3d at 487. Because the panel decision in *Mendez* remains in effect, however, there is no current conflict in lower court authority, this Court's review would be premature at this time.