No. 08-1104

In the Supreme Court of the United States

KENDALL TANKERSLEY, PETITIONER

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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QUESTION PRESENTED

Whether the court of appeals correctly affirmed petitioner's sentence as reasonable under *United States* v. *Booker*, 543 U.S. 220 (2005), and the factors set forth in 18 U.S.C. 3553(a), notwithstanding the court's failure to consider whether the district court had correctly relied on Sentencing Guidelines § 5K2.0 in departing from the advisory Guidelines range.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 537 F.3d 1100.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2008. A petition for rehearing was denied on December 1, 2008 (Pet. App. 68a). The petition for a writ of certiorari was filed on March 2, 2009 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Oregon, petitioner was convicted of conspiracy to commit arson and destruction of an energy facility, in violation of 18 U.S.C. 371; attempted

arson, in violation of 18 U.S.C. 2 and 844(i); and arson, in violation of 18 U.S.C. 2 and 844(i). She was sentenced to 41 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-35a.

1. From 1996 to 2001, activist groups known as the Earth Liberation Front (ELF) and the Animal Liberation Front worked to damage or destroy property belonging to government agencies and private companies that the group believed were harming the environment. As many as 16 individuals, including petitioner, participated in the conspiracy to destroy property. The conspirators committed multiple crimes in five Western States and caused tens of millions of dollars in property damage. Pet. App. 2a-4a.

In December 1998, as part of the conspiracy, petitioner and several co-conspirators agreed to target the headquarters building of U.S. Forest Industries, Inc., a private timber company in Oregon that had substantial logging contracts with the United States Forest Service, a government entity. Pet. App. 2a, 6a-7a, 14a n.7. Petitioner conducted the initial research of the company's building. Gov't C.A. Br. 9. On December 22, she served as a lookout while her cohorts placed timed incendiary devices near the building. The conspirators fled after placing the devices, and they learned later that the devices had malfunctioned. A few days later, petitioner and one of her co-conspirators, Jacob Ferguson, gathered materials for new devices. Petitioner then drove Ferguson back to the U.S. Forest Industries building and waited in the car while Ferguson placed the new devices. This time the devices ignited and the building burned. The fire caused a loss of about $990,000. Pet.

App. 6a-7a; Gov't C.A. Br. 9-11; Presentence Report (PSR) ¶¶ 25-32.

In January 1999, after conferring with petitioner, Ferguson released a "media communiqué" in which ELF took credit for the fire. The communiqué stated that the fire was "in retribution for all the wild forests and animals lost to feed the wallets of greedy fucks like Jerry Bramwell, U.S.F.I. president," and was "payback and * * * a warning, to all others responsible we do not sleep and we won't quit. For the future generations we will fight back." Pet. App. 7a-8a.

In February 1999, petitioner and Ferguson researched and performed reconnaissance at a United States Bureau of Land Management facility in Litchfield, California. Later, without petitioner's involvement, the conspirators destroyed that government facility through arson. Pet. App. 8a-9a; Gov't C.A. Br. 13; PSR ¶ 64.

2. In December 2005, petitioner was arrested. She waived indictment and pleaded guilty to a three-count information charging her with conspiracy to commit arson and destruction of an energy facility, in violation of 18 U.S.C. 371; attempted arson, in violation of 18 U.S.C. 2 and 844(i); and arson, in violation of 18 U.S.C. 2 and 844(i). Pet. App. 1a, 4a-5a, 9a; Gov't C.A. Br. 2-3.

Before sentencing, the government submitted a detailed sentencing memorandum recounting the conspiracy as relevant to each defendant's sentencing calculations. C.A. E.R. 250-408. As to petitioner, the government argued for, *inter alia*, a terrorism enhancement under Sentencing Guidelines § 3A1.4 (2000),[1] which pro-

[1] Unless otherwise indicated, citations in this brief to the Sentencing Guidelines refer to the November 2000 Guidelines Manual, under which

vides for a 12-level upward offense-level adjustment and an automatic increase to criminal history category VI where "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." The Guidelines incorporate the definition of "federal crime of terrorism" in 18 U.S.C. 2332b(g), which includes the arson of certain property in violation of 18 U.S.C. 844(i), where the offense "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." Guidelines § 3A1.4, comment. (n.1); 18 U.S.C. 2332b(g)(5) (2000).[2] In support of the terrorism enhancement, the government contended that the arson of U.S. Forest Industries' headquarters "was calculated to influence or affect the future conduct of government and private business," and it was therefore a "federal crime of terrorism" under Section 3A1.4, noting that: (a) U.S. Forest Industries was "well known" for its extensive logging contracts with the federal government (C.A. E.R. 322); (b) Ferguson's communiqué had sent "a warning" to "all others responsible" for the "los[s]" of "wild forests," which forests necessarily included federally owned land subject to timber sales (*ibid.*); and (c) for her part, petitioner "frequently and publicly spoke out against the government, particularly on television," and her research on U.S. Forest Industries included the company's timber contracts with the federal government (*id.* at 328).

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petitioner's advisory Guidelines sentence was calculated. See PSR ¶ 5.

[2] Although Section 2332b(g)(5) has since been amended, the current version of the statute is identical in all material respects to the version in effect in 2000. See 18 U.S.C. 2332b(g)(5) (2006).

In petitioner's PSR, the Probation Office calculated a base offense level of six (PSR ¶ 42; see Guidelines §§ 2K1.4(a)(4), 2B1.3(a)); added a 13-level enhancement because the arson caused a loss of between $800,000 and $1.5 million (PSR ¶ 43; see Guidelines §§ 2B1.3(b)(1), 2B1.1(b)(1)(N)); assessed a two-level enhancement because the arson involved more than minimal planning (PSR ¶ 44; see Guidelines § 2B1.3(b)(3)); agreed with the government that a 12-level increase was warranted because the arson "involved, or was intended to promote, a federal crime of terrorism" (PSR ¶ 45; see Guidelines § 3A1.4); recommended a two-level downward adjustment because petitioner was a minor participant in the arson (PSR ¶ 46; see Guidelines § 3B1.2(b)); and recommended a three-level downward adjustment because petitioner accepted responsibility for her offenses (PSR ¶ 49; see Guidelines § 3E1.1). The probation office thus calculated a total offense level of 28. PSR ¶ 50. It further reported that petitioner had three adult criminal convictions but that they did not result in any criminal history points. PSR ¶¶ 52-55. Though zero criminal history points would normally result in a criminal history category of I, the Probation Office assessed a criminal history category of VI under Guidelines § 3A1.4. PSR ¶ 56; see Guidelines § 3A1.4(b); see also Pet. App. 12a.

At its initial sentencing hearing, the district court adopted all of the PSR's Guidelines assessments except one: it declined to apply the terrorism enhancement under Guidelines § 3A1.4. Pet. App. 61a. Emphasizing that Ferguson's post-arson communiqué did not specifically "mention any conduct of government," the court concluded that the government had failed to prove, "by clear and convincing evidence," that the arson of the

U.S. Forest Industries building "was calculated to retaliate against government conduct." *Ibid.* (suggesting that the government's evidence may have sufficed "under a more likely than not standard, but not [under the] clear and convincing" standard required by relevant Ninth Circuit case law).

Nevertheless, the district court decided to depart upward by 12 levels under Guidelines § 5K2.0, on grounds that the advisory Guidelines range, absent the enhancement, did "not adequately take into account [petitioner's] intent to frighten, intimidate, and coerce private individuals at the U.S. Forest Industries through her actions." Pet. App. 63a-64a. The court explained that "we have to recognize using intimidation and violence against private individuals really isn't much different" from using intimidation and violence against the government, and it should not be treated as "so dramatically different" that offenders receive a "pass" because they destroyed "private property" rather than "torch[ing] [the] government." *Id.* at 63a.

The district court's 12-level upward departure resulted in an offense level equivalent to the offense level that would have applied under the terrorism enhancement in Guidelines § 3A1.4(a). Pet. App. 64a. The court did not, however, depart upward in petitioner's criminal history category, which remained at category I, rather than VI. *Ibid.*; cf. Guidelines § 3A1.4(b). The court granted a downward departure of four levels (to offense level 24) based on the government's substantial-assistance motion under Guidelines § 5K1.1, and "ch[o]se to depart one additional level for a final offense level of 23" because petitioner had ceased her involvement in the conspiracy "long before" the conspirators were apprehended. Pet. App. 64a-66a. With a total offense level of

23 and a criminal history category of I, petitioner's advisory Guidelines range was 46 to 57 months. *Id.* at 66a. After "consider[ing]" the "factors that are set out in 18 U.S.C. [§] 3553," the court sentenced petitioner to 46 months, stating that 46 months of imprisonment was "reasonable but not greater than necessary." *Id.* at 66a-67a.

Shortly after the initial sentencing hearing, petitioner moved to reopen the sentencing on the ground that she had received insufficient notice of the district court's intent to depart upward by 12 levels. The court granted the motion and held a second hearing. Pet. App. 16a-17a.

At the second sentencing hearing, the district court largely adhered to its earlier determinations. Pet. App. 36a-49a. The court again imposed a 12-level upward departure on the ground that the advisory range, absent the terrorism enhancement, did not adequately account for petitioner's "intent to frighten, intimidate, and coerce private individuals at * * * U.S. Forest Industries." *Id.* at 45a. The court further explained that the departure was designed in part to ensure sentencing parity between petitioner and her co-conspirators, some of whom had received enhancements under Guidelines § 3A1.4, since "the purposes of the conspiracy, the means, motives, intents, and actions to carry out those purposes were the same and should be treated similarly." Pet. App. 38a. The court departed downward one additional level, however, based on petitioner's early abandonment of the conspiracy, resulting in a total offense level of 22, and an advisory Guidelines range of 41 to 51 months. *Id.* at 42a, 48a. The court imposed a sentence of 41 months of imprisonment, stating that such a

term was consistent with the sentencing factors set forth in 18 U.S.C. 3553(a). Pet. App. 47a-49a.

3. The court of appeals affirmed. Pet. App. 1a-35a. The court rejected petitioner's arguments that her sentence was unreasonable. Pet. C.A. Br. 22-34. First, relying on *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007), the court rejected petitioner's argument that the district court's decision to impose a 12-level upward departure was unreasonable because, in petitioner's view, it was based on a policy disagreement with the Sentencing Guidelines. Pet. App. 25a-29a.

The court of appeals next turned to petitioner's arguments that the upward departure was erroneous under Guidelines § 5K2.0 and that a 12-level departure was unreasonable in any event. Pet. App. 29a-35a. The court reviewed both contentions under a "unitary" standard of reasonableness. *Id.* at 29a-31a (quoting *United States* v. *Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006)). The court noted that, after this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), "the scheme of downward and upward departures" under the Guidelines "has been replaced by the requirement that judges impose a reasonable sentence." Pet. App. 29a (citing *Mohamed*, 459 F.3d at 986). The court further explained that, under circuit law, although the departure scheme remains relevant "insofar as factors that might have supported (or not supported) a departure may tend to show that a non-guidelines sentence is (or is not) reasonable," *id.* at 30a, the court did not "need to consider whether the district court correctly applied the departure provision in § 5K2.0," but rather whether the district court imposed a reasonable sentence, *id.* at 31a.

Reviewing petitioner's 41-month sentence in light of the factors enumerated in 18 U.S.C. 3553(a), the court of

appeals concluded that the sentence was reasonable. Pet. App. 31a-35a. The court noted that the district judge had sentenced ten individuals involved in the conspiracy, *id.* at 35a, and held that the judge could properly "conclude that, given the objectives of the criminal conspiracy, those co-defendants for whom the terrorism enhancement did not directly apply should not be treated" substantially more leniently than the conspirators for whom it did apply, *id.* at 34a. The court further reasoned that the judge could properly consider "the grave nature and aggravated circumstances of [petitioner's] offense, the enormous destruction it caused, and the intent to harm and intimidate entire communities." *Id.* at 35a. Finally, the court noted that the district judge had granted *downward* departures from the advisory Guidelines range based on several mitigating factors, including petitioner's remorse, withdrawal from the conspiracy, and cooperation with the government. *Id.* at 16a, 34a-35a. Thus, in the court's view, the resulting 41-month sentence "was well-reasoned and properly based on the § 3553(a) factors." *Id.* at 35a.

ARGUMENT

Petitioner renews her claim (Pet. 9-28) that her sentence was unreasonable because the district court erred in granting a 12-level upward departure under the Sentencing Guidelines. The court of appeals correctly held that petitioner's 41-month sentence was reasonable. Although the court's standard of review differs somewhat from the standards that some other circuits apply, this case would not be a suitable vehicle for resolving any tension between the approaches of the courts of appeals, since petitioner's sentence was reasonable under any standard. Further review is unwarranted.

1. In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court held that the mandatory Sentencing Guidelines system was invalid under the Sixth Amendment. 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. Recognizing that the excision of Section 3742(e) would leave the federal sentencing statute without an explicit standard of appellate review, the Court relied on the pre-2003 version of the provision to "infer * * * a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness],'" taking into consideration the statutory sentencing factors in 18 U.S.C. 3553(a). *Booker*, 543 U.S. at 260-261 (brackets in original) (quoting 18 U.S.C. 3742(e)(3) (1994)).

As petitioner correctly notes (Pet. 11-12), in the wake of *Booker*, the courts of appeals have taken different approaches to review of non-Guidelines sentences, depending on whether the district court's deviation from the Guidelines range rested on the court's authority under the Guidelines to "depart" from the Guidelines sentence, see Guidelines § 1B1.1, comment. (n.1(E)) (2008), or its discretion to "vary" from the Guidelines sentence based on Section 3553(a). Several courts of appeals have indicated that, in reviewing a non-Guidelines sentence for reasonableness, a court should first review the propriety of any Guidelines departures under the relevant Guidelines departure provisions (*e.g.*, Guidelines § 5K2.0) and only thereafter review whether the ultimate sentence imposed 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. *Saldana*, 427 F.3d 298, 310-313 (5th Cir.), cert. denied, 546 U.S. 1067 (2005), and 546 U.S. 1122 (2006); *United States* v. *Munoz-Tello*, 531 F.3d 1174, 1186 (10th Cir. 2008), cert. denied, 129 S. Ct. 1314 (2009); *United States* v. *Crawford*, 407 F.3d 1174, 1181-1182 (11th Cir. 2005).

By contrast, the Seventh and Ninth Circuits review all sentences outside the otherwise applicable Guidelines range, like within-Guidelines sentences, for reasonableness under Section 3553(a), without separately considering the correctness of any departure under the Guidelines. See, *e.g.*, *United States* v. *Johnson*, 427 F.3d 423, 426 (7th Cir. 2005); *United States* v. *Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006).[3]

2. This case is not, however, a suitable vehicle for resolving any differences among the courts of appeals, since petitioner's sentence was reasonable under any standard. Petitioner's claim that the district court abused its discretion in departing upward by 12 levels under Guidelines § 5K2.0 (Pet. 23-27; see Pet. App. 25a-35a) would fail even in those circuits that assess the propriety of traditional Guidelines departures as a discrete step of reasonableness review.[4]

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[3] Although the Ninth Circuit has held that departures and variances are subject to a "unitary" review for reasonableness, it has also made clear that courts may continue to consult the Guidelines' departure provisions, *Mohamed*, 459 F.3d at 987, and that those provisions remain relevant "insofar as factors that might have supported (or not supported) a departure may tend to show that a non-guidelines sentence is (or is not) reasonable," Pet. App. 30a; see also *Mohamed*, 459 F.3d at 987.

[4] Indeed, it is far from clear that petitioner is not subject to the terrorism enhancement in Guidelines § 3A1.4. The district court found

a. Section 5K2.0 authorizes a district court to depart from the advisory Guidelines range "if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration'" by the advisory range. Guidelines § 5K2.0 (quoting 18 U.S.C. 3553(b)). The provision itself counsels strong deference to the district court: "The decision as to whether and to what extent [a] departure is warranted rests with the sentencing court on a case-specific basis." Guidelines § 5K2.0; accord *Koon* v. *United States*, 518 U.S. 81, 96-100 (1996) (holding that decisions to depart from the Guidelines are reviewable for abuse of discretion).

The district court in this case properly exercised its discretion based on the specifics of petitioner's offense, concluding that the Guidelines did not "adequately take into account aggravating circumstances of the offense conduct." Pet. App. 45a. The court emphasized that (1) petitioner shared the same overarching goals as her co-conspirators and should therefore "be treated simi-

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that the government had failed to establish by "clear and convincing evidence" that petitioner's offense was "calculated to retaliate against government conduct," but it acknowledged that, "[p]erhaps" it could be shown that petitioner's offense was so calculated "under a more likely than not standard." Pet. App. 61a. Although the government did not challenge the applicability of the "clear and convincing evidence" standard in the Ninth Circuit, and the court therefore "assume[d], without deciding" that it applied, *id.* at 11a n.5, the Ninth Circuit's application of a "clear and convincing" standard to certain determinations under the Guidelines is a minority position that is incorrect. See, *e.g.*, *United States* v. *Villareal-Amarillas*, No. 07-3616, 2009 WL 939125, at *3-*4 & nn.3-4 (8th Cir. Apr. 9, 2009). Under the correct, preponderance standard, the district court might well have applied the terrorism enhancement because "U.S. Forest Industries," the target of the arson, "harvested timber from federal lands." Pet. App. 61a.

larly" to them even though her conduct, unlike theirs, did not directly target the government, *id.* at 38a;[5] and (2) petitioner's arson of the U.S. Forest Industries building sent such a "devastating" and "frighten[ing]" "message" to the community that special deterrence was "need[ed]" to ensure that similarly-situated offenders would not think they would receive a "pass" when destroying private (as opposed to government) property, *id.* at 61a-63a.[6]

b. In any event, even had the district court erred in granting a Guidelines departure, any such error would

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[5] Notably, although the district court treated petitioner "similarly" to the co-conspirators who directly targeted the government (Pet. App. 38a), it did not treat her as though she herself had directly targeted the government under Guidelines § 3A1.4. As noted (p. 6, *supra*), the court did not enhance petitioner's criminal history category from I (the category that applied given her lack of criminal history points) to VI (the category that would have applied under the terrorism enhancement). If the court had done so, petitioner's ultimate advisory imprisonment range—even accounting for the downward departures that she received—would have been 84 to 105 months, or more than twice the range to which she was actually subject.

[6] Petitioner contends (Pet. 23-24) that the upward departure was erroneous under Guidelines § 5K2.0 because the aggravating circumstances cited by the district court failed to constitute circumstances "not adequately taken into consideration by the Sentencing Commission." That argument appears to rest on an inference from the Guidelines' deletion of a previous policy statement authorizing departures if "the defendant committed the offense in furtherance of a terroristic action." Guidelines § 5K2.15 (1989); see Pet. 24. But petitioner offers no persuasive reason to think either that the aggravating circumstances identified by the district court were already factored into the Guidelines calculation, or that the Guidelines precluded consideration of those circumstances. Indeed, in 2002, the Sentencing Commission amended the commentary to Guidelines § 3A1.4 to clarify that upward departures may be warranted for terrorism offenses targeting civilians. Guidelines § 3A1.4, comment. (n.4) (2002).

be subject to harmless-error review under Federal Rule of Criminal Procedure 52(a). Here, the district court's extensive explanation of its sentencing decision indicates that the court would have imposed the same sentence on petitioner, regardless of the Guidelines departure provisions, in order to comply with its statutory obligation to "impose a sentence sufficient, but not greater than necessary" under 18 U.S.C. 3553(a). See Pet. App. 42a-43a, 47a-49a; see also *id.* at 31a-32a. Petitioner does not contend that her 41-month sentence is unreasonable under Section 3553(a). Any error under the departure provisions of the Guidelines is therefore harmless. See *Mohamed*, 459 F.3d at 987.[7]

3. Petitioner also contends (Pet. 20-23) that this Court's review is warranted to resolve whether and to what extent this Court's decision in *Williams* v. *United States*, 503 U.S. 193 (1992), "remains valid after * * * *Booker*." Pet. i; see Pet. 20-23.

This Court held in *Williams* that when a sentencing court departs on both valid and invalid grounds, a remand is required unless the reviewing court determines that the sentence was reasonable and that the sentencing court would have imposed the same sentence absent consideration of the invalid grounds. 503 U.S. at 199-205. In so holding, the Court relied on 18 U.S.C. 3742(f)(1), which provides for a remand where "the court of appeals determines that * * * the sentence was * * * imposed as a result of an incorrect applica-

[7] Although petitioner argues (Pet. 27) that the district court's sentencing of her co-conspirators demonstrates that it would not have imposed a 41-month sentence on petitioner had it not deemed an upward departure to be appropriate under the Guidelines, the district court's extensive discussion of the issue is to the contrary. See Pet. App. 36a-49a.

tion of the sentencing guidelines." See *Williams*, 503 U.S. at 199-205. As petitioner points out (Pet. 20), the Court in interpreting Section 3742(f)(1) reasoned that "a sentencing court's use of an invalid departure ground is an incorrect application of the Guidelines." 503 U.S. at 200.

Petitioner reads the latter statement to mean that Section 3742(f)(1), even after *Booker*, requires a court of appeals to evaluate a traditional Guidelines departure as a discrete step of its reasonableness review, rather than under a unitary standard focusing on Section 3553(a). Pet. 20-22. But petitioner did not make that argument in her opening brief on appeal (Pet. C.A. Br. 45-47), so neither the government (Gov't C.A. Br. 33-34) nor the court of appeals (Pet. App. 19a-20a, 29a-31a) had occasion to address it.[8] And this Court's "traditional" practice ordinarily "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) (internal quotation marks and citation omitted). Petitioner suggests no basis for an exception to that principle.

In any event, petitioner would not be entitled to relief under the rule in *Williams* because there was no error under the Guidelines. Remand is not required under *Williams*, moreover, if the reviewing court "concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed." 503 U.S. at

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[8] Petitioner relied on *Williams* for a non-unitary standard in her court of appeals reply brief (Pet. C.A. Reply Br. 2-3, 28), but the Ninth Circuit has long held that "arguments not raised by a party in its opening brief are deemed waived." *E.g.*, *Smith* v. *Marsh*, 194 F.3d 1045, 1052 (1999).

203. See pp. 12-14, *supra*. Because resolution of the *Williams* issue would have no effect on petitioner's sentence, further review of that issue is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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