No. _____

In the Supreme Court of the United States

MARK HEBERT, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was sentenced to 92 years' imprisonment after pleading guilty to stealing a wallet and making approximately $16,000 in fraudulent charges, a non-violent fraud crime carrying a Guidelines range of under 5 years. The 87-year upward variance was based solely on the district judge's contested factual finding that Petitioner later "heinous[ly]" murdered the owner of the wallet.

On appeal, the Fifth Circuit agreed that the district judge's murder finding was "integral" to the 92-year sentence, acknowledging that the sentence "cannot be sustained" as substantively reasonable without it. Nevertheless, the Fifth Circuit rejected Petitioner's preserved arguments that the 92-year sentence violated his jury rights under the Fifth and Sixth Amendments.

This petition presents the following questions:

1. Whether Petitioner's 92-year sentence for non-violent fraud offenses causing $16,000 in loss is unconstitutional, where, as the government and court of appeals each acknowledged below, the sentence would be substantively unreasonable, and therefore unlawful, but for the district judge's contested murder finding.

2. Whether a criminal defendant's Fifth and Sixth Amendment rights to a jury place any constraints on an appellate court's ability to use judicial-found facts as the basis to affirm the substantive reasonableness, and therefore the lawfulness, of the defendant's sentence, a question this Court acknowledged but postponed answering in *Rita* v. *United States*.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner Mark Hebert was the appellant in the court of appeals.

The United States was the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Hebert respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is not yet published but is available at 2015 WL 9461503.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2015. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, reproduced in full in the appendix (App., *infra*, 29a) provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

The Sixth Amendment to the United States Constitution, reproduced in full in the appendix (App., *infra*, 30a), provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to * * * an impartial jury."

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The pertinent portions of the Sentencing Reform Act and the Federal Sentencing Guidelines are reproduced in the appendix (App., *infra*, 32a-40a).

STATEMENT OF THE CASE

This case raises the question of whether a federal appellate court may, consistent with the defendant's Fifth and Sixth Amendment rights to a jury, affirm the substantive reasonableness of the defendant's 92-year prison sentence solely and concededly on the basis of the district judge's contested factual finding that the defendant committed a "heinous" murder, where the defendant (i) pled guilty and admitted merely to non-violent fraud offenses causing minor financial loss, (ii) was not charged with murder, and (iii) proclaimed his innocence of the murder allegation that the prosecution pursued at the post-plea sentencing proceedings. The Fifth Circuit's decision below, which answered this

question in the affirmative, is illustrative of an intolerable constitutional anomaly in federal sentencing law that only this Court can erase.

1. On November 20, 2013, Petitioner pled guilty and admitted to stealing Albert Bloch's wallet on August 2, 2007 and then using its contents to make approximately $16,000 in fraudulent bank transactions.[1] Based on Petitioner's factual admissions and criminal history category of II,[2] the Probation Office's initial Pre-Sentencing Report (PSR) calculated Petitioner's advisory Sentencing Guidelines range as 46-57 months' imprisonment. But before imposing a sentence, the district judge held a special "fact-specific[,] four-day" evidentiary hearing (App., *infra*, 16a) to resolve an additional, far more serious allegation: that two months after stealing Mr. Bloch's wallet, Petitioner hunted down and murdered Mr. Bloch, disposing of his body where it could not be found. Although it had never charged Petitioner with murder, the prosecution candidly told the district court that whether Petitioner murdered Mr. Bloch was the real primary issue in the case.

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[1] Petitioner pled guilty to five counts of bank fraud, one count of aggravated identity theft, and one misdemeanor civil rights violation. In addition to approximately $16,000 in completed fraudulent transactions, Petitioner admitted to attempting unsuccessfully approximately $15,000 in additional fraudulent transactions.

[2] In 2008 and 2009, Petitioner was convicted in Louisiana state court for using three individuals' stolen bank information to purchase some car parts, a lawnmower, and a stovetop. These offenses were committed relatively close in time to Petitioner's fraud crimes with respect to Mr. Bloch's bank account.

2. At the evidentiary hearing, the prosecution failed to offer any eyewitnesses or forensic evidence to support its murder allegation, and it conceded that its murder allegation was entirely circumstantial. Petitioner has repeatedly proclaimed his innocence of the murder, and no body has ever been found. Despite this absence of any direct evidence and the presence of competing explanations for the circumstantial evidence, the district judge concluded that on either October 2 or 3, 2007, Petitioner kidnapped and murdered Mr. Bloch, disposed of the body, and covered any trace of a crime scene—all without drawing the attention of a single eyewitness.

In sentencing Petitioner, the district judge did not merely take the murder finding into account in choosing a sentence that would be substantively reasonable (*i.e.*, legally authorized) even without the murder finding. Instead, solely and expressly based on the murder finding, and to impose a sentence befitting the crime of murder, the district court sentenced Petitioner to 92 years' imprisonment, an upward variance of 87 years and 1900% over the advisory Guidelines range calculated in the initial PSR.[3] Petitioner objected that the 92-year sentence violated the "constitutional requirement" under the Fifth and Sixth Amendments "that a jury determine, or a defendant admit, such facts as make a sentence authorized." App., *infra*, 42a. Petitioner argued that, "[i]f not for" the judicial finding that he kid-

[3] The initial PSR reached a recommendation of "a total of six to seven years of imprisonment" because the district court was statutorily bound to run two years consecutively for the aggravated identity theft count. App., *infra*, 6a.

napped and murdered Mr. Bloch, "the 92-year sentence would be [substantively] unreasonable" and thus could not lawfully be imposed. App., *infra*, 50a. The district court summarily denied Petitioner's argument.

3. Petitioner renewed his constitutional arguments on appeal. The Fifth Circuit acknowledged that Petitioner's constitutional claims were "preserved" and that, as the government conceded, Petitioner's 92-year sentence would be substantively unreasonable, and the district judge therefore would have lacked the legal authority under the Sentencing Reform Act to impose that sentence, but for the disputed murder finding. App., *infra*, 12a, 14a & n.4, 22a. The Fifth Circuit, however, held that (i) circuit precedent foreclosed Petitioner's constitutional claims, (ii) a 92-year sentence for an intentional murder is substantively reasonable, and (iii) Petitioner's 92-year sentence is lawful because the district judge found that Petitioner intentionally murdered Mr. Bloch. App., *infra*, 22a-25a.

A. Petitioner's Theft Of Albert Bloch's Wallet And His Fraudulent Use Of Mr. Bloch's ATM Card And Checkbook[4]

Petitioner was a Sheriff's Deputy for Jefferson Parish, Louisiana. On August 2, 2007, Petitioner was the first officer to report to a single-car accident. The car's driver, Albert Bloch, was unconscious. An emergency medical technician treating Mr. Bloch handed Mr. Bloch's wallet to Petitioner. The wallet contained Mr. Bloch's driver's license, bank ATM card, and blank

[4] The facts described in this subsection are those to which Petitioner admitted as part of his guilty plea. App., *infra*, 72a-83a.

checks. Petitioner should have logged the wallet into evidence or otherwise held it in police custody. Instead, however, Petitioner wrongfully kept the wallet and its contents for his own use.

Over the next two months, Petitioner made a series of fraudulent transactions with respect to Mr. Bloch's bank account. This included purchasing electronics and automobile parts with Mr. Bloch's ATM card, withdrawing cash from ATM machines using Mr. Bloch's ATM card, forging Mr. Bloch's signature on checks, moving money from Mr. Bloch's savings to his checking accounts, and posing as Mr. Bloch when speaking with bank representatives. All told, Petitioner successfully made approximately $16,000 in fraudulent transactions and attempted to make another $15,000 in unsuccessful transactions.

B. Mr. Bloch Is Reported Missing

On November 5, 2007, after Mr. Bloch had failed to make his usual therapy appointments, a social worker assigned to Mr. Bloch filed a missing person report with local police. Shortly thereafter, investigators began looking for Mr. Bloch, including interviewing a number of Mr. Bloch's social acquaintances. These individuals provided conflicting reports about when Mr. Bloch was last seen. Some told the police that they had not seen Mr. Bloch since early October 2007, while at least two others stated that they had seen Mr. Bloch as late as mid-November 2007 in local bars.

The authorities never located Mr. Bloch, who remains missing and whom authorities presume dead.

C. The Grand Jury's Bank Fraud Indictment

On March 28, 2013, a federal grand jury indicted Petitioner in the Eastern District of Louisiana. The indictment charged Petitioner with bank fraud, computer fraud, and aggravated identity theft for making $16,750.13 of fraudulent transactions against Mr. Bloch's bank account; obstruction of justice for concealing items he had purchased fraudulently with Mr. Bloch's ATM card; and one misdemeanor civil rights violation for abusing his law enforcement authority to misappropriate Mr. Bloch's wallet at the August 2, 2007 car accident scene. App., *infra*, 84a-111a. The indictment did not charge Petitioner with a homicide offense, although the indictment's preamble to the bank fraud charges alleged that, as "further part of the scheme and artifice to defraud," Petitioner, acting "with specific intent, did kill, or participate in conduct that caused the death of," Mr. Bloch. App., *infra*, 5a, 88a.

D. Petitioner's Guilty Plea To Non-Violent Fraud Offenses

Petitioner was contrite in admitting that he stole Mr. Bloch's wallet at the August 2, 2007 car accident scene and then used its contents to make numerous fraudulent bank transactions. Petitioner therefore readily agreed to plead guilty to five counts of bank fraud, one count of aggravated identity theft, and the misdemeanor civil rights violation for misappropriating Mr. Bloch's wallet. But Petitioner made clear to the United States Attorney's Office that he neither killed Mr. Bloch nor had anything to do with Mr. Bloch's disappearance and, thus, would admit only to facts directly related to the non-violent fraud allegations. Accordingly, in the agreed-upon factual basis for his plea, Peti-

tioner admitted to the following: (i) he was the first officer to respond to a single-car accident on August 2, 2007, where he found Mr. Bloch unconscious and being treated by an emergency medical technician; (ii) after the emergency medical technician handed him Mr. Bloch's wallet, he misappropriated the wallet's contents in violation of the Sheriff's Department protocol; and (iii) over the next two months, he made approximately $16,000 in successful and $15,000 in unsuccessful fraudulent bank transactions using Mr. Bloch's ATM card, checkbook, and driver's license, including fraudulent purchases of electronics from Circuit City and automobile parts from a local shop. App., *infra*, 73a-82a.

Petitioner did not admit to, and indeed expressly denied, the allegation that he killed or participated in the killing of Mr. Bloch. Petitioner has at all times maintained his innocence of any suggestion that he caused any physical harm to, let alone killed, Mr. Bloch.

E. The Post-Plea Evidentiary Hearing On The Prosecution's Disputed First Degree Murder Allegation

Petitioner's guilty plea to the non-violent fraud offenses ended up being a "mere preliminary to a judicial inquisition into the facts of the crime the State *actually* [was] seek[ing] to punish" him for: the alleged murder of Mr. Bloch. *Blakely* v. *Washington*, 542 U.S. 296, 306-307 (2004).

After the district court accepted Petitioner's plea to the non-violent fraud offenses, the prosecution urged the district court that the true nature of the Petitioner's offense—"the most egregious part of this case"—was homicide. App., *infra*, 48a (citation omitted). The prosecution requested an opportunity to prove its con-

tention that, two months after stealing Mr. Bloch's wallet, Petitioner hunted down and murdered Mr. Bloch, disposing his body somewhere it could never be found. The prosecution also told the district court that, in its view, the appropriate sentence for Petitioner was a sentence that would be appropriate for a vicious, intentional murder.

The district court granted the prosecution's request for a judicial adjudication of the murder allegation. The four-day hearing mimicked a murder trial—the parties gave opening statements and closing arguments, and numerous witnesses took the stand—only without the constitutionally mandated substantive and procedural protections of a criminal trial.[5] Most critically, the prosecution was not required to prove the murder allegation to a jury of Petitioner's peers beyond a reasonable doubt.

The prosecution conceded that it had only circumstantial evidence to support its murder allegation, each piece of which was susceptible to alternative explanation. There were no eyewitnesses to any murder, no crime scene, and no forensic evidence proving that Mr. Bloch had even been murdered (by Petitioner or anyone else). The evidence presented at the hearing also showed that Mr. Bloch had a history of going missing

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[5] Because neither the Confrontation Clause nor the Federal Rules of Evidence apply to post-plea evidentiary hearings, the prosecution was able to introduce a broad range of evidence that would have been inadmissible at an actual trial. For example, the prosecution was able to offer hearsay (including testimonial hearsay from several deceased declarants), negative character evidence, and victim impact evidence.

for extended periods of time. A Vietnam War veteran battling serious health conditions, alcoholism, and depression, he had few friends and lived alone in transitional housing for the chronically homeless. Mr. Bloch had lost his common-law wife only three years earlier and, in the weeks before his disappearance, reported to social workers that he was feeling particularly depressed. Furthermore, whereas the prosecution argued that Petitioner murdered Mr. Bloch on October 2 or 3, 2007, multiple disinterested witnesses acquainted with Mr. Bloch told missing-person investigators in early December 2007 that they had seen Mr. Bloch in November 2007.[6] Pet. C.A. Br. 10 (collecting record cites).

Despite these evidentiary gaps in the prosecution's case, the district judge found that Petitioner committed "second degree murder." App., *infra*, 65a. The district judge acknowledged that "there is no body and there is no clear crime scene." *Ibid.* But she adopted a theory of murder that she believed "logically explain[ed]" the "lack of physical evidence." *Ibid.* She speculated that Petitioner "could have" "initiated a traffic stop on Albert Bloch as he left Joe's Caddy Corner [bar]," "handcuffed" Mr. Bloch and taken him "to another location" where he "murdered him and disposed of his body," "returned to the" scene of the traffic stop to commandeer Mr. Bloch's car, "abandoned [Mr. Bloch's car] in the back of an apartment complex," and then retrieved his own car—without a single eyewitness to any of this. *Ibid.* The district judge concluded that "[o]ther scenar-

[6] The missing-person investigators tape-recorded at least two of these statements.

ios are possible, but under all scenarios it is clear [to me] that Mark Hebert killed Albert Bloch." *Ibid.*

F. The District Judge Imposes A 92-Year Sentence Based On Her Murder Finding

After the murder finding, the Probation Office filed a new PSR. The new PSR reasoned that because Petitioner's fraud "offense involved * * * murder," Section 2B1.1(c)(3) of the Sentencing Guidelines—a "cross reference" provision providing that if "the conduct set forth in the [fraud] count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline," U.S.S.G. § 2B1.1(c)(3)—was triggered. App., *infra*, 7a. Using this novel application of the cross-reference provision, the new PSR calculated Petitioner's Guidelines range under U.S.S.G. § 2A1.2 (second degree murder), resulting in an advisory Guidelines sentence of Life. *Ibid.*

Over Petitioner's objections, the district court imposed a sentence of 92 years' imprisonment.[7] The district court stated that even assuming Section

[7] None of Petitioner's crimes of conviction statutorily permitted a sentence of "Life." The district court's 92-year sentence, however, was clearly intended to impose a functional life sentence. The district court fashioned the sentence by imposing a sentence of 30 years—the maximum specified in 18 U.S.C. 1344—on each of the five counts of bank fraud and ordering three of the sentences to run consecutively. The identity theft charged carried a statutorily mandated two-year "on and after" sentence, resulting in a total imprisonment of 92 years. See 18 U.S.C. 1028A(b). The misdemeanor civil rights offense carried a United States Code maximum sentence of one-year, see 18 U.S.C. 242, and was ordered to run concurrently.

2B1.1(c)(3) was not triggered—because Petitioner's actual counts of conviction involved non-violent fraud, not murder—it would still impose an extreme upward variance to 92 years' imprisonment based on the murder finding. App., *infra*, 68a. Explaining the sentencing decision, the district judge stated: "For reasons that I will never understand * * * [y]ou wanted everything that belonged to Albert Bloch, even his life. * * * This heinous crime is beyond comprehension." *Ibid.*

Petitioner timely moved to correct the sentence under Federal Rule of Criminal Procedure 35(a), arguing that the 92-year sentence violated his constitutional right to a jury because it would not be substantively reasonable, and therefore could not lawfully be imposed, absent the disputed judicial finding of murder. App., *infra*, at 50a. The district court summarily denied Petitioner's motion. App., *infra*, at 12a.

G. The Fifth Circuit Relies On The District Judge's Murder Finding To Affirm The 92-Year Sentence

Petitioner appealed his 92-year sentence, asserting as he did below that the sentence violated his constitutional jury trial right. Petitioner made clear that he was not arguing that "the Constitution categorically prohibits a judge from finding any facts relevant to sentencing in [the] post-*Booker* sentencing regime." Pet. C.A. Reply 12. Instead, Petitioner argued, his 92-year prison sentence violated his constitutional right to a jury because it "would be substantively unreasonable and therefore unlawful" absent the district judge's finding that he committed a heinous murder, not just a non-violent fraud offense causing minor financial loss. Pet. C.A. Br. 23.

The United States conceded that Petitioner's 92-year sentence would not be substantively reasonable—that is, not legally authorized by the Sentencing Reform Act and reversed on appeal—but for the district judge's disputed murder finding. U.S. C.A. Br. 41 n.6. But, the United States argued, Petitioner's 92-year sentence did not violate his constitutional right to a jury because the district court did not impose (i) a sentence greater than 30 years, the maximum sentence specified in 18 U.S.C. 1344, on any of the five bank fraud counts, or (ii) a total sentence of greater than 153 years.[8] U.S. C.A. Br. 21, 23, 25. That, the United States argued, meant that Petitioner's sentence was within the "statutory maximum" and was sufficient to resolve any constitutional jury-trial-right issue. *Id.* at 25.

The Fifth Circuit affirmed Petitioner's sentence. The Fifth Circuit agreed "[a]t the outset" that Petitioner's "sentence cannot be sustained without a finding of second degree murder." App., *infra*, 14a. "The finding of murder was integral to the sentence," the Fifth Circuit explained, "because otherwise the district court could not have applied the cross-reference to U.S.S.G. § 2A1.2 and could not have applied an upward variance." *Ibid.* The Fifth Circuit then assumed without deciding that the district court "made a procedural error in applying the cross-reference" that ratcheted up Petitioner's advisory Guidelines range from less than five years to Life. App., *infra*, 17a-18a. The Fifth Cir-

[8] If the United States Code maximum sentence for each offense of conviction were imposed, with all sentences running consecutively, the cumulative total would be 153 years.

cuit, however, held that the procedural error was "harmless" because the 92-year sentence could "be affirmed on the district court's alternate basis for the sentence—that the sentence is appropriate as an [87-year] upward variance based on Bloch's murder." *Ibid.* The Fifth Circuit concluded that prior circuit precedent foreclosed Petitioner's "as-applied" jury-trial-right challenge to his sentence. App., *infra*, 23a (citation omitted).

REASONS FOR GRANTING THE PETITION

1. Petitioner's 92-year prison sentence conflicts not only with the constitutional rule that Justice Scalia suggested in his concurring opinion in *Rita* v. *United States*, 551 U.S. 338, 371-372 (2007), under which judicial-found, offense-related facts can never provide a lawful basis for a sentence's substantive reasonableness, but also with the constitutional standard that Justice Breyer championed in his *Apprendi* dissent, under which the jury-right that is inherent in the Due Process Clause would prohibit "judges or prosecutors" from essentially "'transform[ing]' crimes, punishing an offender convicted of one crime as if he had committed another" far more serious offense. *Apprendi* v. *New Jersey*, 530 U.S. 466, 562 (2000) (Breyer, J., dissenting).

Although Petitioner as a formal matter was punished for non-violent fraud offenses causing minor financial loss, the Fifth Circuit sensibly recognized what not even the prosecution would deny: as a matter of substance, Petitioner really was sentenced for murder, a crime that no jury has ever found Petitioner committed and of which Petitioner maintains his innocence. App., *infra*, 14a. The Fifth Circuit concluded that the district judge's murder finding was "integral" to the

Petitioner's 92-year sentence, and even the United States conceded that Petitioner's sentence would not be substantively reasonable absent the district judge's finding that Petitioner had committed a "heinous" murder. App., *infra*, 11a, 14a. Accordingly, Petitioner's sentence is as offensive to the constitutional jury trial right as the "egregious example" that Justice Breyer posited in his *Apprendi* dissent: "A prosecutor * * * charge[s] an offender with five counts of embezzlement * * *, while asking the judge to impose maximum and consecutive sentences because the embezzler murdered his employer." 530 U.S. at 562; see *Blakely* v. *Washington*, 542 U.S. 296, 321 (2004) (Breyer, J., dissenting) (describing "the *Apprendi* dissenters" as "preferring a nuanced interpretation of the Due Process Clause and Sixth Amendment jury trial guarantee that would generally defer to legislative labels while acknowledging the existence of constitutional constraints * * * that takes into consideration the values underlying the Bill of Rights").

2. Paradoxically, however, every federal court of appeals would affirm Petitioner's 92-year sentence, each on substantially the same three-step logic that the Fifth Circuit used below: (i) Petitioner was not sentenced to greater than 30 years on any of the five bank fraud counts of conviction, and his total sentence does not exceed 153 years; (ii) 92 years is a substantively reasonable sentence for murder; and (iii) although Petitioner admitted only to a non-violent fraud causing minor financial loss, the district judge found that Petitioner also committed a murder "heinous * * * beyond comprehension." The circuits uniformly have concluded that this mode of analysis is consistent with *Apprendi* and *Blakely*, see, *e.g.*, *United States* v. *White*, 551 F.3d

381, 384 (6th Cir. 2008) (en banc) ("In the post-*Booker* world, the relevant statutory ceiling is * * * the maximum penalty authorized by the United States Code."), cert. denied, 556 U.S. 1215 (2009). Some circuits even believe that the *Booker* remedial opinion compels this mode of analysis, see, *e.g.*, *United States* v. *Fisher*, 502 F.3d 293, 305-308 (3d Cir. 2007) (holding that "concerns about the 'tail wagging the dog' were * * * put to rest when *Booker* rendered the Guidelines advisory," and that "it is a logical impossibility [after *Booker*] for the 'tail to wag the dog'"), cert. denied, 552 U.S. 1274 (2008), even though four members of the *Booker* remedial majority specifically agreed that the "freedom * * * to choose to characterize a fact as a 'sentencing factor'" rather than as an "element of a crime" is subject to constitutional "constraints of fairness," *Booker* v. *United States*, 543 U.S. 220, 330 (2005) (Breyer, J., dissenting).

Despite the lack of a circuit split, many circuit judges specifically have called attention to the deep logical and practical contradictions between the narrow mode of analysis that the Fifth Circuit employed below and this Court's jury-trial-right jurisprudence. For example, a year after this Court decided *Rita*, a deeply fractured Sixth Circuit en banc panel held that so long as the defendant's sentence "does not exceed the * * * United States Code maximums," the defendant categorically has no cognizable jury trial right claim. *White*, 551 F.3d at 382. Writing for six dissenters, Judge Merritt questioned how that possibly can be correct, reasoning that where "the reasonableness—and thus legality—of [the defendant's] sentence depends entirely on the presence of facts that were found by a judge, not a jury," the sentence logically is "in contravention of the Sixth Amendment" rule set forth in *Apprendi* and

Blakely. *Id.* at 386-387. In *United States* v. *Broxmeyer*, then-Chief Judge Jacobs of the Second Circuit, echoing Justice Breyer's due process approach, urged that "the offense of federal conviction [should not] become just a peg on which to hang a comprehensive moral accounting," with the defendant's sentence being "upheld as reasonable" based solely on the district judge's finding that the defendant committed additional, more serious crimes. 699 F.3d 265, 298 (2012) (Jacobs, C.J., dissenting), cert. denied, 133 S. Ct. 2786 (2013). More recently, Judge Kavanaugh of the D.C. Circuit observed that finding a lengthy sentence substantively reasonable solely on the basis of a judge's finding of "uncharged conduct * * * seems a dubious infringement of the rights to due process and to a jury trial." *United States* v. *Bell*, 808 F.3d 926, 928 (2015) (Kavanaugh, J., concurring in denial of reh'g en banc), petition for cert. pending, No. 15-8606 (Mar. 17, 2016). Judge Millett has asked for this Court's urgent intervention, recognizing that "only the Supreme Court can resolve the contradictions in the current state of the law." *Id.* at 932 (Millett, J., concurring in denial of reh'g en banc).

3. In resisting previous petitions for certiorari raising questions similar to the one presented here, the Solicitor General has urged the Court to continue to follow its pattern of prior denials. That argument is now well past its sell-by date. It has been nearly eleven years since this Court decided *Booker* and nearly nine years since it decided *Rita*. This case, in which the Petitioner preserved his jury-trial-rights at each level, provides an ideal vehicle to resolve the questions. Further percolation will not make the questions presented any sharper for this Court's review. Rather, it will "only delay" this Court's provision of guidance to the cir-

cuits on "this important, frequently recurring" issue, to the irremediable detriment of Petitioner, similarly situated individuals, and coherent development of the law in the courts below. *Bell*, 808 F.3d at 932 (Millett, J., concurring in denial of reh'g en banc). In short, this case presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

"The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.'" Cf. *Alleyne* v. *United States*, 133 S. Ct. 2151, 2156 (2013) (plurality opinion). At a minimum, the "answer to [the] implicit question in *Apprendi*—what, exactly, does the 'right to trial by jury' guarantee?—is that it guarantees a jury's determination of facts that constitute the elements of a crime." *Id.* at 2167 (Breyer, J., concurring). Petitioner pled guilty and admitted to dishonoring his police badge by committing a low-level, non-violent fraud. Yet, on the basis of her own fact-finding, the district judge branded Petitioner a vicious murderer, determining that he committed a "heinous crime * * * beyond comprehension." App., *infra*, 11a. That judicial finding of murder was then the express driving force behind both the district judge's determination that Petitioner deserved a 92-year sentence and the Fifth Circuit's conclusion that the sentence was substantively reasonable. If the constitutional right to a jury is to have any substance, Petitioner's sentence and the decision below must be reversed.

I. THE DECISION BELOW RUNS COUNTER TO MULTIPLE STRAINS OF THIS COURT'S FIFTH AND SIXTH AMENDMENT JURISPRUDENCE

Petitioner's 92-year sentence, imposed and affirmed on the basis of the district judge's murder finding, violates the constitutional right to a jury under any strain of this Court's Fifth and Sixth Amendment, jury-trial-right jurisprudence. The Fifth Circuit's decision below contravenes the "bright-line" rule set forth in *Apprendi* and *Blakely*: the Fifth Circuit affirmed Petitioner's 92-year sentence despite agreeing that it far exceeds the maximum sentence that the district judge could legally impose solely on the facts to which Petitioner admitted as part of his plea. See *Rita* v. *United States*, 551 U.S. 338, 374 (2007) (Scalia, J., concurring); *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000); see also *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) ("[T]he statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."). And yet the sentence is equally infirm under the alternative, standards-based approach, rooted in notions of due process, that several of the *Apprendi* dissenters have championed: the prosecution and district judge effectively transformed a low-level fraud plea into a murder conviction and murder sentence without the intervention of an impartial jury of Petitioner's peers. See *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (reasoning that charging decisions that work an obvious end-run around the jury trial right is a "problem" that the "Due Process Clause is well suited to cure" (citing *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986)). Moreover, there is no principled way to square the Fifth Circuit's use of a judicial find-

ing of murder to sustain Petitioner's 92-year sentence with this Court's decision in *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013).

A. The Fifth Circuit's Affirmance Of Petitioner's Sentence Conflicts With *Apprendi* And *Blakely*

In *Blakely*, the Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303; see also *Cunningham* v. *California*, 549 U.S. 270, 275 (2007); *Ring* v. *Arizona*, 536 U.S. 584, 589 (2002). In *Rita*, the Court confirmed that, although the Guidelines are now advisory, the Sentencing Reform Act provides a distinct statutory cap on a district court's lawful sentencing authority: a sentence exceeding that which is substantively reasonable is an illegal sentence, and the Sentencing Reform Act prohibits the judge from imposing it. See *Rita*, 551 U.S. at 350-355; *United States* v. *Booker*, 543 U.S. 220, 266-268 (2005); see also *United States* v. *Cavera*, 550 F.3d 180, 189-190 (2d Cir. 2008) (en banc) (recognizing that the source of the substantive reasonableness limitation is 18 U.S.C. 3553(a)'s requirement that the sentence not be "greater than necessary"), cert. denied, 556 U.S. 1268 (2009). Thus, while a district judge has a wide discretionary range within which to sentence a defendant—and is entitled to consider a virtually unlimited array of facts, including uncharged or even acquitted conduct, in determining where to place the defendant within that legally authorized range—the Sentencing Reform Act does not legally authorize a district judge to impose a sentence that exceeds the "substantively

reasonable" threshold. The Fifth Circuit therefore ignored (or misunderstood) *Blakely* when it reflexively conflated the United States Code maximum of 30 years per bank fraud count and 153 years total with Petitioner's "statutory maximum for *Apprendi* purposes." *Blakely*, 542 U.S. at 303.

But for her contested factual finding that Petitioner committed murder, the district judge would not have been legally authorized to sentence Petitioner to 153 years in prison, or even remotely close to it. Thus, Petitioner's statutory maximum for *Apprendi* purposes is not 153 years, or even the maximum prison term that is substantively reasonable for a "heinous" murder. Rather, it is the maximum sentence that could be deemed substantively reasonable without the judicial finding of murder. Whatever that sentence might be, it surely is a very small fraction of 92 years, and there is no doubt that the outcome of this petition will be the difference between Petitioner dying in prison or being released while he still has many years to live.[9]

Petitioner has "the [constitutional] *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313.

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[9] To be clear, Petitioner is not arguing that it would have been an abuse of discretion for the district court to impose *some* upward departure or variance. Even on the facts to which Petitioner admitted, the district court would have been well within its discretion to decide that the top of the advisory Guidelines range, 57 months' imprisonment, was not sufficient to punish Petitioner's decision to use his law enforcement position as a means to steal money from an unconscious traffic accident victim that he was duty-bound to help. Even a 200% upward departure or variance, however, would still result in a sentence of less than 10 years.

In this case, the United States conceded and the Fifth Circuit agreed that the factual finding of the elements of second degree murder was legally essential to the 92-year sentence, and yet that murder finding was neither presented nor proved to a jury of Petitioner's peers beyond a reasonable doubt. Thus, the only way to square the Fifth Circuit's decision below with *Blakely* is to hold that 18 U.S.C. 3553(a)'s "'not greater than necessary' requirement," *Rita*, 551 U.S. at 355, is a statutory sentencing cap that, because it is not presented in fixed numerical form, is not relevant for purposes of the constitutional jury trial right—sophistry that would collide with *Apprendi*'s mandate that the "relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. "*Apprendi* is now the law, and its holding must be implemented in a principled way." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

B. The Decision Below Conflicts With The Standards-Based, Due Process Approach That The *Apprendi* Dissenters Have Championed As An Alternative To *Apprendi*'s Bright-Line Rule

To reverse the Fifth Circuit's decision below, this Court would not even need to apply *Apprendi*'s bright-line rule and *Blakely*'s definition of "statutory maximum for *Apprendi* purposes." *Apprendi*, 530 U.S. at 489; *Blakely*, 542 U.S. at 303. This is because Petitioner's 92-year sentence violates the standards-based approach, rooted in notions of due process, that the Court first suggested in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), and that several of the *Apprendi* dissenters have championed as an alternative to *Apprendi*'s "statutory maximum" framework.

In *McMillan*, the Court stated in *dicta* that the constitutional right to a jury would be offended where a sentencing factor was "a tail which wags the dog of the substantive offense" of conviction. 477 U.S. at 88. Disagreeing with the rigidity of the *Apprendi* majority's "statutory maximum" framework, Justice Breyer invoked the *McMillan dicta* in his *Apprendi* dissent, see 530 U.S. at 563, in his *Blakely* dissent, 542 U.S. at 344, and yet again in his *Booker* dissent, 543 U.S. at 330-331, to argue for a more nuanced approach based in due process. To illustrate how due process provides a separate constitutional constraint on the use of judicial-found facts to support the legality of a sentence, Justice Breyer in his *Apprendi* dissent posited an "egregious" hypothetical that bears an uncanny resemblance to the facts of Petitioner's case: a prosecutor charges the defendant with five counts of embezzlement (a maximum sentence of 10 years per count) but then seeks and obtains a 50-year sentence because he proves to the sentencing judge, but not a jury, that the defendant also murdered the embezzlement victim. *Apprendi*, 530 U.S. at 562-563 (Breyer, J., dissenting). Agreeing that this hypothetical depicted an "unusual and serious procedural unfairness," Justice Breyer reasoned that the "solution to the problem" is the "invocation of the Due Process Clause," which prohibits the state from doing an end-run around the defendant's constitutional right to have a jury determine beyond a reasonable doubt all of the elements of the crime that the state actually is seeking to punish. *Ibid.*

The Fifth Circuit erred by denying Petitioner's invocation of those rights here. To be sure, there is no "impression" that Congress purposefully "tailored" the bank fraud statute to enable the prosecutor's charging

strategy here. *Apprendi*, 530 U.S. at 563 (quoting *McMillan*, 477 U.S. at 88). But the fact that Congress could not plausibly have envisioned that murder would be used as a sentencing factor to sustain a 92-year prison sentence for a low-level bank fraud makes the constitutional infirmity of Petitioner's sentence all the more obvious. By affirming Petitioner's 92-year sentence, the Fifth Circuit endorsed something far more troubling than legislative manipulation of the offense elements, which can be checked through the democratic process. The Fifth Circuit endorsed a single prosecutor's manipulation of the charging process and evasion of Petitioner's right to have a jury decide the murder allegation beyond a reasonable doubt. Because the prosecutor was able to charge each of five fraudulent bank transactions, no matter how small, as a separate bank fraud count, he was able to create a total United States Code maximum sentence of 150 years for a low-level, non-violent fraud crime.[10] At the outset, Petitioner was contrite in admitting that he had committed the fraud, and so a guilty plea to the fraud counts was a foregone conclusion. The prosecutor then used the plea as the gateway to a judicial inquisition on the murder allegations. Thus, without ever having to charge and prove to a jury beyond a reasonable doubt that Petitioner actually committed a murder, the prosecutor was able to seek and obtain what on any clear-eyed view is a 92-year murder sentence. This course of events was not a mere procedural accident; rather, the prosecution

[10] The additional three years for Petitioner's "United States Code maximum" derive from two years for the violation of 18 U.S.C. 1028A(a)(1) and one year for the violation of 18 U.S.C. 242.

candidly acknowledged to the district court that this was its carefully-conceived prosecution strategy. App., *infra*, 48a & n.18.

There is no "tradition of regarding" murder "as a sentencing factor" for a low-level, non-violent bank fraud. *Jones* v. *United States*, 526 U.S. 227, 249 (1999); cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 241-243 (1998) (identifying "tradition" as a primary consideration in determining whether a particular fact may constitutionally be treated as a sentencing factor). And the Fifth Circuit's affirmance of Petitioner's 92-year sentence solely and concededly on the basis of the judicial finding of murder relegated the Petitioner's guilty plea on the fraud charges "to the relative importance of low-level gatekeeping." *Jones*, 526 U.S. at 244. If those things in combination do not cause Petitioner's sentence to violate the due process principles that the *Apprendi* dissenters have espoused, it is difficult to imagine what would.

C. There Is No Principled Basis On Which The Decision Below Can Be Reconciled With *Alleyne*

The Court's recent decision in *Alleyne* further confirms that Petitioner's 92-year sentence is unconstitutional and that this Court's intervention is necessary to resolve the jurisprudential anomaly and practical absurdity that the Fifth Circuit's decision below endorses.

In *Alleyne*, a jury convicted the defendant of using a firearm in relation to a robbery, in violation of 18 U.S.C. 924(c)(1)(A). 133 S. Ct. at 2155-2156. Based on the jury-found facts, Section 924(c)(1)(A) specified a mandatory minimum prison sentence of five years. *Ibid.* The sentencing judge, however, found by a pre-

ponderance of the evidence that the defendant did not merely "use" the firearm, but "brandished" it as well. *Ibid.* This judicial finding of fact raised the defendant's mandatory minimum sentence to seven years, which was the sentence the district court ultimately decided to impose. *Ibid.* This Court found that the defendant's sentence violated his constitutional right to a jury. The Court held that "any fact that increases the mandatory minimum [sentence] is an element" and "must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2155. The Court explained that, because the "brandishing" fact altered the low end of the statutory sentencing range, brandishing a gun in relation to a crime of violence is an offense "separate" from merely using or carrying a gun in relation to a crime of violence. *Id.* at 2162. The Court held that, whenever a fact "forms a constituent part of a new offense," it "must be submitted to the jury." *Ibid.*

As the Court has made clear, when it comes to the constitutional right to a jury, the "relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. The effect that the judicial murder finding had on Petitioner's sentence was far more severe than the effect of the brandishing finding in *Alleyne*. The district court in *Alleyne* could have sentenced the defendant to seven years (and was statutorily bound to sentence the defendant to at least five years) even absent the brandishing finding; by comparison, the Fifth Circuit agreed that Petitioner could not legally be sentenced to anywhere remotely close to 92 years in prison absent the district judge's murder finding. Cf. *Alleyne*, 133 S. Ct. at 2169 (Roberts, C.J., dissenting) ("[I]t is unclear what the right to trial by jury *does* guarantee if . . . it does not guarantee . . . the right to have a jury determine

those facts that determine the maximum sentence the law allows." (quotation marks and citation omitted)). If factfinding by a judge "could authorize a sentence beyond that allowed by the jury's verdict alone, the jury trial would be a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish. The Framers clearly envisioned a more robust role for the jury." *Ibid.* (quotation marks and citations omitted). Moreover, insofar as, solely by virtue of a small increase in the applicable mandatory minimum, brandishing a gun during a robbery is an altogether different crime from using or carrying a gun during a robbery, it would exalt form over substance to say that heinously murdering Mr. Bloch is the *same crime* as stealing Mr. Bloch's wallet and using its contents to make $16,000 in fraudulent transactions, such that the murder is appropriately considered a mere "sentencing factor" that grades the seriousness of the fraud.

This Court granted certiorari in *Alleyne* because it recognized the compelling need to "'erase [an] anomaly'" in and to "bring 'coherence and consistency' to [the Court's] Sixth Amendment law." 133 S. Ct. at 2165 (Sotomayor, J., concurring) (citation omitted); see also *id.* at 2166 (Breyer, J., concurring in part and concurring the judgment) ("[T]he law should no longer tolerate the anomaly that the *Apprendi*/*Harris* distinction creates."). The Court should grant Petitioner's petition for those same reasons. Cf. *United States* v. *Bell*, 808 F.3d 926, 928-929 (D.C. Cir. 2015) (Millett, J., concurring in denial of reh'g en banc) (asking for this Court to resolve this "frequently recurring * * * contradiction[ ]"

in federal sentencing law), petition for cert. pending, No. 15-8606 (Mar. 17, 2016).[11]

II. THE CIRCUIT COURTS NEED THIS COURT'S GUIDANCE ON THE QUESTIONS PRESENTED

It has been nearly nine years since this Court decided *Rita* v. *United States*, 551 U.S. 338 (2007), and the courts of appeals are in need of this Court's guidance with respect to the intersection between the constitutional right to a jury and substantive reasonableness review. Further percolation of the questions presented here will, if anything, further harden the courts of appeals' uniform, post-*Booker* holdings that the constitutional right to a jury, whether emanating from the Sixth Amendment or the Due Process Clause, does not provide any constraints on the use of judicial fact-finding to sustain the substantive reasonableness of a defendant's prison sentence. See *United States* v. *Jones*, 744 F.3d 1362, 1369 (D.C. Cir.), cert. denied, 135 S. Ct. 8 (2014); *United States* v. *Norman*, 465 F. App'x 110, 120-121 (3d Cir. 2012), cert. denied, 135 S. Ct. 383 (2014) (collecting cases). The circuit courts' confusion is most apparent where, as here, they reflexively affirm the defendant's sentence even where the judicial finding of fact is concededly both (i) responsible for the defendant's sentence, and (ii) the only basis on which the sentence could be found substantively reasonable. See, *e.g.*, *United States* v. *Fitch*, 659 F.3d 788, 795-796 (9th Cir. 2011), cert. denied, 133 S. Ct. 175 (2012); *United States* v. *Fisher*, 502 F.3d 293, 305-308 (3d Cir. 2007)

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[11] The *Bell* petition for certiorari presents a question distinct from the one Petitioner's petition presents.

(holding that "concerns about the 'tail wagging the dog' were * * * put to rest when *Booker* rendered the Guidelines advisory," and that "it is a logical impossibility [after *Booker*] for the 'tail to wag the dog'"), cert. denied, 552 U.S. 1274 (2008).

The circuit courts' present jurisprudence radically distorts the federal criminal justice system. "All too often, prosecutors charge individuals with relatively minor crimes, carrying correspondingly short sentences," but then argue for "significantly enhanced terms" at sentencing to effectively punish "other crimes that have not been charged." *United States* v. *St. Hill*, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring). As a result, defendants like Petitioner can effectively be subjected to sentences—and the resulting stigma—for crimes that are uncharged, untried, unpled, and completely unlike the formal offense of conviction. See, *e.g.*, *Fitch*, 659 F.3d at 795-796 (affirming 262-month sentence, based not on jury conviction of financial crimes supporting 41-51 months Guidelines range, but on judicial finding that defendant murdered his wife to perpetrate the crimes).

The questions presented here do not need more time to percolate in the circuits. This Court acknowledged but postponed deciding these very questions in *Rita*. 551 U.S. at 353-354; *id.* at 366 (Stevens, J., concurring) ("Such a * * * case should be decided if and when it arises."). Since then, every federal court of appeals has, in some form, addressed and rejected the argument that the constitutional right to a jury constrains an appellate court's ability to use judicial-found

facts as the basis to affirm the substantive reasonableness of a defendant's sentence.[12] Although Petitioner's case is likely the most egregious example of a prosecutorial end-run around the jury trial right, it is not the only one where the facts found by the jury or admitted by the defendant pale in importance to the facts found by the judge. See, *e.g.*, *Norman*, 465 F. App'x at 120-121 (relying on judicial finding of fact to affirm a 13-year fraud sentence, where the defendant's "Guidelines [range], based solely on the facts determined by the jury and his prior criminal history, was 8 to 14 months"); *Fitch*, 659 F.3d at 798-799 (relying on judicial finding of murder to affirm 262-month sentence for financial crimes otherwise carrying an advisory Guidelines range of 41-51 months); *United States* v. *Dickel*, 294 F. App'x 16 (4th Cir. 2008) (relying on judicial finding of

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[12] See *United States* v. *Gobbi*, 471 F.3d 302, 313-314 (1st Cir. 2006); *United States* v. *Singletary*, 458 F.3d 72, 80 (2d Cir.), cert. denied, 549 U.S. 1047 (2006); *United States* v. *Freeman*, 763 F.3d 322, 339 n.6 (3d Cir. 2014), cert. denied, 135 S. Ct. 1467 (2015); *United States* v. *Smith*, 751 F.3d 107, 117-118 (3d Cir.), cert. denied, 135 S. Ct. 383, and 135 S. Ct. 497 (2014); *United States* v. *Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008), cert. denied, 555 U.S. 1120 (2009); *United States* v. *Hernandez*, 633 F.3d 370, 373-374 (5th Cir. 2011), as revised (Mar. 23, 2011), cert. denied, 131 S. Ct. 3006 (2011); *United States* v. *Conatser*, 514 F.3d 508, 527-528 (6th Cir.), cert. denied, 555 U.S. 963 (2008); *United States* v. *Ashqar*, 582 F.3d 819, 824-825 (7th Cir. 2009), cert. denied, 559 U.S. 974 (2010); *United States* v. *Jackson*, 782 F.3d 1006, 1012-1014 (8th Cir.), cert. denied, 136 S. Ct. 501 (2015); *United States* v. *Treadwell*, 593 F.3d 990, 1017 (9th Cir.), cert. denied, 562 U.S. 973 (2010); *United States* v. *Redcorn*, 528 F.3d 727, 745-746 (10th Cir. 2008); *United States* v. *Ghertler*, 605 F.3d 1256, 1268-1269 (11th Cir. 2010); *United States* v. *Jones*, 744 F.3d 1362, 1368-1369 (D.C. Cir.), cert. denied, 135 S. Ct. 8 (2014).

murder to affirm 15-year sentence for pled-to convictions of making a false statement when purchasing a firearm and being an unlawful user of controlled substance in possession of a firearm), cert. denied, 556 U.S. 1197 (2009).

Driving this uniformity of outcomes is the reflexively categorical nature of the circuit courts' reasoning: they have reasoned that the jury trial right has no application to substantive reasonableness review because "the sentencing court is entitled to find * * * all facts relevant to the determination of a sentence" up to the maximum sentence specified in the applicable offense section of the United States Code. *E.g.*, *United States* v. *Hernandez*, 633 F.3d 370, 374 (5th Cir.), as revised (Mar. 23, 2011), cert. denied, 131 S. Ct. 3006 (2011). In other words, the circuit courts' position is that the Sentencing Reform Act's separate statutory sentencing cap—that a sentence not be "greater than necessary," 18 U.S.C. 3553(a)—which is manifested in the substantive reasonableness requirement, is irrelevant for purposes of the constitutional right to a jury. In addition, the circuits have concluded that "concerns about the 'tail wagging the dog'"—which, is to say, the notion that the Due Process Clause has any role to play in the jury-trial-right analysis—were "put to rest when *Booker* rendered the Guidelines advisory." *Fisher*, 502 F.3d at 305, 308 ("[I]t is [now] a logical impossibility for the 'tail to wag the dog.'"); cf. *United States* v. *Grubbs*, 585 F.3d 793, 801 (4th Cir. 2009) (describing the Third Circuit's analysis in *Fisher* as "well-reasoned" and "particularly instructive"), cert. denied, 559 U.S. 1022 (2010). Accordingly, the outcome is preordained even in transparently egregious cases such as Petitioner's.

This Court's guidance is essential to the proper development of federal sentencing law in the lower courts. Without it, the circuit courts will continue to fail to apply substantive reasonableness review in a manner that provides some vitality to the constitutional right to a jury.[13] Recognizing the limit on their ability to alter course, a growing number of panels and individual judges have called for this Court's intervention. See *United States* v. *Bell*, 808 F.3d 926, 929-932 (D.C. Cir. 2015) (Millett, J., concurring in denial of reh'g en banc) (quoting *Jones*, 135 S. Ct. at 9 (Scalia, J., Thomas, J., and Ginsburg, J., dissenting from denial of cert.)), petition for cert. pending, No. 15-8606 (Mar. 17, 2016). Their calls illustrate the urgency of the issue. As Judge Barkett explained, "'Sixth Amendment substance' is violently eroded" by sentences such as Petitioner's. *United States* v. *Faust*, 456 F.3d 1342, 1350 (11th Cir.) (Barkett, J., concurring), cert. denied, 549 U.S. 1046 (2006).

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[13] The circuit courts increasingly seem to be taking this Court's reticence to grant certiorari as a *sub silentio* rejection of the argument that the constitutional right to a jury constrains substantive reasonableness review. Several circuits have rejected the argument as "too creative for the law as it stands," *Treadwell*, 593 F.3d at 1017 (collecting cases), while others seem to treat the issue as having already been decided by this Court. See *United States* v. *White*, 551 F.3d 381, 384-385 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Mercado*, 474 F.3d 654, 656 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008).

III. This Petition Provides An Ideal Vehicle For The Court To Resolve The Questions Presented

Petitioner's case offers an ideal vehicle for the Court to address the questions presented. First, as the Fifth Circuit stated at the outset of its opinion below, there is no question that Petitioner fully preserved his constitutional arguments at each stage of the proceedings. App., *infra*, 12a.

Second, on appeal, the United States conceded and the Fifth Circuit agreed that if the substantive reasonableness of Petitioner's 92-year sentence cannot constitutionally be sustained on the basis of the district judge's murder finding, then its substantive reasonableness (and hence the district court's legal authority to impose it) cannot be sustained at all. Thus, this is not a case where the judicial-found facts were merely one consideration in, but were not essential to the legality of, the defendant's sentence.[14]

Third, the district court found Petitioner guilty of the distinct crime of second degree murder—and expressly and concededly imposed the 92-year sentence on that basis—after Petitioner had admitted merely to committing non-violent fraud offenses causing minimal financial loss. Thus, this is not a case where the judicial-found facts driving the sentence bear some sort of inherent affinity either to (i) the facts to which the de-

[14] Accordingly, Petitioner's petition neither requires nor asks this Court to endorse a rule that "any fact that influences [a district court's exercise of] judicial discretion must be found by a jury." *Alleyne* v. *United States*, 133 S. Ct. 2151, 2163 (2013).

fendant admitted as part of his guilty plea or that a jury found beyond a reasonable doubt, or (ii) the congressionally enumerated elements of the offense to which the defendant pled or of which the jury found him guilty. The difference between stealing someone's wallet and trying to make $32,000 in fraudulent transactions, on the one hand, and hunting down, murdering, and then disposing of the victim's body, on the other hand, is a difference in kind, not degree. Cf. *Fasulo* v. *United States*, 272 U.S. 620, 628 (1926) ("[T]hreats to kill or injure unless money is forthcoming do not constitute a scheme to defraud."); *A. Terzi Prods., Inc.* v. *Theatrical Protective Union*, 2 F. Supp. 2d 485, 500 (S.D.N.Y. 1998) (Sotomayor, J.) (holding that it is "long settled" under *Fasulo* that a scheme to defraud is an offense wholly distinct from a crime that involves an act of violence).

In sum, this petition presents a case in which, at the prosecution's urging and without a jury's involvement, the district judge effectively tried, convicted, and sentenced Petitioner to 92 years in prison for intentional murder, after Petitioner admitted merely to committing a non-violent fraud causing minor financial loss. The Fifth Circuit concluded that the Constitution poses no bar to using the judicial-found fact of murder as the basis to affirm the 92-year sentence, notwithstanding its agreement (and the government's concession) that the sentence would be well outside the range of the district judge's lawful sentencing authority but for the murder finding. The Constitution, however, "provide[s] for trial by jury as a 'security[] against [precisely this:] the prejudices of judges, who may partake of the wishes and opinions of the government.'" *Alleyne* v. *United States*, 133 S. Ct. 2151, 2169 (2013) (Roberts, C.J., dis-

senting) (quoting J. Story, Commentaries on the Constitution of the United States § 924, at 657 (Abr. 1833)).

Only this Court has the power to ensure that such violations do not continue to go unchecked.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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