No. 15-1190

IN THE

Supreme Court of the United States

MARK HEBERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PROFESSOR DOUGLAS A. BERMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BETH HEIFETZ
JAMES M. BURNHAM
Counsel of Record
SARAH A. HUNGER
WILLIAM R. WEAVER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-5429
jmburnham@jonesday.com

Counsel for Amicus Curiae

QUESTION PRESENTED

The district court sentenced Mr. Hebert to 92 years of imprisonment following his admission to stealing a wallet and making roughly $16,000 in fraudulent charges. The district court based that massive sentence on its determination at sentencing, by a preponderance of the evidence, that Mr. Hebert had intentionally murdered the wallet's owner. On appeal, the Fifth Circuit was clear that the sentence could not be "sustained" absent the district court's finding of murder. The question presented is therefore whether Mr. Hebert's 92-year prison sentence for non-violent fraud offenses is unconstitutional when its lawfulness was contingent on a judicial finding by a preponderance of the evidence that he had committed intentional murder—a crime with which he has never been charged.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is a law professor who teaches, conducts research, and practices in the fields of criminal law and sentencing in the United States. He has a professional interest in ensuring that federal sentencing statutes are interpreted and applied in a manner that coherently advances their purposes and is consistent with longstanding constitutional principles and with how the criminal law actually operates.

SUMMARY OF ARGUMENT

It is difficult to imagine a starker violation of the Sixth Amendment and due process than what transpired below. Mr. Hebert pleaded guilty to a $16,000 fraud that carried a guidelines range topping out at 5 years. After persuading Mr. Hebert to admit responsibility for his fraud and accept punishment for *that* crime, the Government ambushed him at sentencing by asserting that he had committed an *intentional murder* along with the fraud to which he had confessed. The Government then asked the district court to find it was more likely than not that Mr. Hebert committed this un-charged, non-admitted, never-convicted, non-federal crime. Then, on the basis of that judicial determination, the district court gave Mr. Hebert a 92-year sentence—a sentence the

[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to its filing. Letters of consent to the filing of this brief executed by all parties have been lodged with the Clerk of the Court pursuant to Rule 37.2. In accord with Rule 37.6, *Amicus* states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

Government has conceded and the Fifth Circuit recognized "would have been substantively unreasonable under the post-*Booker* sentencing regime absent a judicial finding of murder," Pet.App.22a—again, a crime with which Mr. Hebert has never even been charged.

Because Mr. Hebert has never been charged with—much less convicted of—murder, he remains entirely innocent of that crime. If the Government wishes to convict Mr. Hebert of murder, it is welcome to try. But what it cannot do is use Mr. Hebert's confession to lesser crimes as the springboard for *de facto* convicting him of a far more serious crime in a judicial proceeding with no jury, the civil standard of proof, and none of the criminal justice system's fundamental rules and procedures. Simply put, the Constitution does not countenance condemning a man to die in prison because a single judge made a factual determination that is "plausible in light of the record as a whole," Pet.App.15a, as this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), made abundantly clear. The Court's guidance on this critical, recurring issue—guidance many judges have repeatedly beseeched the Court to give—is needed.

There are at least two constitutional provisions that, under this Court's well-established jurisprudence, forbid this inverted regime. *First*, this Court has made clear that a criminal defendant has a Sixth Amendment "right to have a jury find the facts behind his punishment." *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016). That right reflects the vital role of the jury as the "circuitbreaker in the State's machinery of justice"—a role that cannot be

"relegated to making a determination that the defendant at some point did something wrong [as] a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004). The Sixth Amendment right to a jury trial is a constitutional protection of "surpassing importance," *Apprendi*, 530 U.S. at 476, yet the decision below makes a mockery of it.

It makes no constitutional difference that the legality of Mr. Hebert's sentence turns on substantive reasonableness review rather than the formal application of sentencing guidelines. The Fifth Circuit made clear that it would have vacated Mr. Hebert's sentence but for the district court's finding by a preponderance of the evidence that he committed murder. Pet.App.22a. That finding thus dramatically increased the maximum punishment for which Mr. Hebert was eligible and was, in turn, a textbook *Apprendi* violation. This Court's decisions have not been driven by "Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance," *United States v. Booker*, 543 U.S. 220, 237 (2005); the Sixth Amendment's prohibition on judge-found facts increasing one's potential punishment thus does not depend on what apparatus generates the maximum limit. Whether that maximum comes from a statute, from a sentencing guideline, or from a court of appeals applying substantive reasonableness review, if that upper limit depends on factual findings, then those findings must comport with the Sixth Amendment.

Second, this Court has long recognized that due process forbids grossly unfair procedures when a

person's liberty is at stake. Specifically, this Court has indicated that (1) judges are sometimes limited from imposing distinct new punishments based on "a new finding of fact that was not an ingredient of the offense charged," *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (citation omitted); (2) the "safeguards of due process" in criminal cases are "concerned with substance rather than [any] kind of formalism," *Mullaney v. Wilbur*, 421 U.S. 684, 698–99 (1975); and (3) constitutional concerns are raised whenever sentencing findings become "a tail which wags the dog of the substantive offense," or when the government restructures criminal prosecutions "to 'evade' the commands" of the Constitution. *McMillan v. Pennsylvania*, 477 U.S. 79, 88–89 (1986).

The simple principle that unifies these decisions is fatal to the legal rule embraced below: Due process forbids prosecutors from manipulating the criminal justice system to evade its core protections. Applied here, that principle barred prosecutors from waylaying Mr. Hebert at sentencing with allegations of a far more serious crime for which he has never been indicted or convicted—allegations that depend, moreover, on evidence which the prosecutors were apparently unwilling to subject to the crucible of a criminal trial or test against the burden of proof they must carry there. Due process demands more.

Finally, this case is an excellent vehicle for addressing this important issue. Few cases will ever present the issue more starkly than this one, which comes to this Court with facts that lie at the bottom of the puddle at the foot of the slippery slope; indeed, this case is almost identical to the "egregious example" Justice Breyer hypothesized in *Apprendi* as

a prototypical due process violation—the Government charging "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 (Breyer, J., dissenting). This Court should seize the opportunity and grant review. After all, each day that passes without this Court's guidance means more people condemned to our already-teeming prisons because "a single employee of the State," *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring), thinks they *probably* did something wrong.

ARGUMENT

I. THIS COURT'S CLARIFICATION OF THE CONSTITUTIONAL LIMITS ON JUDICIAL INCREASES IN MAXIMUM SENTENCES IS SORELY NEEDED.

A. The Sixth Amendment Forbids Increasing Maximum Sentences Based On Judge-Found Facts.

The right to trial by jury is the cornerstone of our criminal justice system and a critical bulwark against "oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *Batson v. Kentucky,* 476 U.S. 79, 86 (1986) ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."); *Williams v. Florida*, 399 U.S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in [its] interposition between the accused and his accuser."). And in setting limits on sentences—every bit as much as in assessing criminal guilt—the jury supplies a

"barrier between the defendant and the State" and acts as crucial "guard against judicial overreaching." *Alleyne v. United States*, 133 S. Ct. 2151, 2169–71 (2013) (Roberts, C.J., dissenting); *id.* at 2161 (stressing "the historic role of the jury as an intermediary between the State and criminal defendants"); *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2351 (2012) ("*Apprendi*'s animating principle [is] the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense."); *Oregon v. Ice*, 555 U.S. 160, 169 (2009); *Booker*, 543 U.S. at 237–39; *Blakely*, 542 U.S. at 305–06; *Apprendi*, 530 U.S. at 477; *United States v. Gaudin*, 515 U.S. 506, 510 (1995). This case presents—in the starkest possible terms—the question of what that right really means.

Here, the Government charged Mr. Hebert with a handful of low-level, non-violent fraud offenses, to which he pleaded guilty. Then, once it had Mr. Hebert's guilty plea in hand, the Government sprung its far more serious allegation—that Mr. Hebert had murdered the person whose identity he fraudulently used. The Government proceeded to "prove" its murder allegations in an evidentiary hearing wherein a single judge found facts using the permissive, more-likely-than-not standard from civil litigation, and at which none of the constitutional protections that govern criminal trials—such as the right to confrontation and exclusion of hearsay—were applicable. The district court found that Mr. Hebert had probably committed the alleged murder and proceeded to sentence him as though he definitely had—handing down an astonishing 92-year sentence for his fraud convictions. That judicial

transformation of a garden-variety fraudster (facing five years) into a murderer (who will die in prison) was permissible, the Fifth Circuit said, because the district court's factual determination was "plausible in light of the record as a whole." Pet.App.15a.

That complete inversion of the criminal justice system violated Mr. Hebert's Sixth Amendment right to a jury trial. It is black-letter law that "[a]ny fact … which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244. Or as this Court put it in *Blakely*, "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, 290 (2007) ("If … the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied."). Here, all agree that the district court's sentence would have been unlawful but for the judicial finding of murder. *E.g.*, Pet.App.22a (Mr. Hebert's "92-year sentence would have been substantively unreasonable under the post-*Booker* sentencing regime absent a judicial finding of murder"). That judicial finding "alter[ed] the legally prescribed punishment so as to aggravate it," and "necessarily form[ed] a constituent part of a new offense"; it thus needed to "be submitted to the jury." *Alleyne*, 133 S. Ct. at 2162. Because it was not, Mr. Hebert's sentence violated the Sixth Amendment.

This straightforward analysis does not change simply because the "legally prescribed punishment" is dictated by substantive reasonableness review rather than by a formal guideline or statutory maximum. As Judge Millett recently explained, "it is not the abstract dignity of the statutory maximum that is at stake in the Supreme Court's Sixth Amendment jurisprudence, but the integrity of the jury right itself.'" *United States v. Bell*, 808 F.3d 926, 931 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc) (quoting *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., concurring specially)). Substantively unreasonable sentences are just as unlawful as sentences that violate mandatory guidelines, *see Rita v. United States*, 551 U.S. 338, 350–55 (2007); their Sixth Amendment status should thus be the same.

Booker itself makes this point implicitly: If the congressionally enacted statutory maximum were the only criterion relevant to a federal sentence's legality, there would have been no reason for this Court to strike down the statutory provisions that made the Guidelines mandatory. After all, guidelines sentences still fell below the statutory maxima. As Judge Barkett explained in *Faust*, "'Sixth Amendment substance' is violently eroded when our notion of a sentence 'authorized by the jury verdict' is limited to punishments which merely stay within the statutory maximum for the crime of conviction." 456 F.3d at 1350 (Barkett, J., specially concurring); *see also United States v. Mercado*, 474 F.3d 654, 664 (9th Cir. 2007) ("To hold that any sentence beneath the statutory maximum is acceptable is not enough:

Apprendi requires examination 'not of form, but of effect.'") (Fletcher, J., dissenting).

It makes sense to forbid prosecutors from back-loading criminal prosecutions and seeking massive sentences based on far-more-serious uncharged or acquitted conduct. The Sixth Amendment requires juries to find facts that increase the scope of the potential punishment beyond a reasonable doubt for a reason. Depriving someone of liberty is one of the weightiest things society can do. Before the Government may take that drastic step, the Constitution requires that its factual predicate be established to the highest degree of certainty our legal system provides. That means the accused must plead guilty or the Government must establish guilt beyond a reasonable doubt to the unanimous satisfaction of an impartial jury.

In short, "[t]he foundational role of the jury is to stand as a neutral arbiter between the defendant and a government bent on depriving him of his liberty." *Bell*, 808 F.3d at 928–29 (Millett, J., concurring in the denial of rehearing en banc) (citations omitted). But when the Government dramatically increases a defendant's sentence based solely on disputed, judge-found facts, "that liberty-protecting bulwark becomes little more than a speed bump at sentencing." *Id.*

B. The Due Process Clause Forbids Massive Sentence Enhancements Based on Judges Finding That Defendants Committed Serious, Never-Charged Crimes.

This Court has long recognized that the Due Process Clause precludes prosecutors and judges from skirting trials (and their associated

constitutional protections). Even in cases like *Patterson v. New York*, 432 U.S. 197 (1977), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), in which this Court held that states had not transgressed due process requirements, the Court made clear that constitutional concerns attach to any government efforts to circumvent traditional trial procedures. As this Court explained in *Patterson*, "there are obviously constitutional limits beyond which the States may not go in this regard." 432 U.S. at 210; *see also McMillan*, 477 U.S. at 85.

In *Jones v. United States*, as part of a lengthy review of cases "dealing with due process and the guarantee of trial by jury," this Court warned of the "relative diminution of the jury's significance" and reprinted a prescient discussion authored 350 years ago by William Blackstone. 526 U.S. 227, 240, 244–46, 249 (1999). In words still relevant today, Blackstone warned that "other liberties would remain secure only 'so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience.'" *Id.* at 246 (quoting 4 Blackstone 342-44). As Blackstone wrote, "'however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.'" *Id.*

Similarly, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court discussed these principles and repeatedly reiterated that numerous cases support "the broad proposition that sometimes the Constitution does require" that certain facts be proved through traditional trial procedures rather than being repackaged as sentencing factors. *Id.* at 242. As the Court stressed in *Almendarez-Torres*,the Constitution's trial protections are not always implicated for "the most traditional [bases] for a sentencing court's increasing an offender's sentence"—such as prior convictions—but it also suggested that the Constitution forbids sentencing procedures that would increase the "risk of unfairness." *Id.* at 243–45.

This Court's opinion in *Almendarez-Torres* makes clear that any effort to convert traditional common law crimes (like homicide) into sentencing factors, especially when doing so would produce serious unfairness to a particular defendant (as is obvious here), would be constitutionally problematic no matter how this Court ultimately defined "the constitutional limits [through] which due process forbids the reallocation or reduction of burdens of proof in criminal cases." *Id.* at 252–53. Put simply, the reasons this Court gave in *Almendarez-Torres* for holding that a (limited) judicial sentence increase based on an uncontested prior conviction was constitutionally permissible point to the opposite conclusion here—*i.e.*, that a (massive) judicial sentence increase based on a disputed murder is constitutionally forbidden.

Here, the Government charged Mr. Hebert with bank fraud and identity theft—ultimately reaching a

plea agreement under which Mr. Hebert pled guilty to those fraud-related charges. It was only *after* the district court accepted Mr. Hebert's plea that the prosecutors began arguing Mr. Hebert had committed a murder, which they called "the most egregious part of this case." Pet. at 8. Yet, rather than require the Government to charge and prove beyond a reasonable doubt that Mr. Hebert had committed murder, the district court held a four-day mini-trial to make that determination for itself. At this judicial hearing, Mr. Hebert was not afforded the constitutional protections that attach at an actual trial, and his guilt was adjudged by a preponderance of the evidence instead of beyond a reasonable doubt.

After hearing the evidence, the judge found that Mr. Hebert had committed intentional murder—though the judge could not discern "exactly how" Mr. Hebert carried out the crime, Pet.App.64a—and sentenced him to 92 years in prison based on that finding. Mr. Hebert's sentencing thus contained the "unusual and serious procedural unfairness" that occurs when the government "transform[s] (jury-determined) facts that constitute elements of a crime into (judge-determined) sentencing factors, thereby removing procedural protections that the Constitution would otherwise require." *Apprendi*, 530 U.S. at 562 (Breyer, J., dissenting). Few sentences exemplify that constitutional violation as vividly as the 92-year sentence Mr. Hebert received for his $16,000 fraud convictions. The Court should take this opportunity to say so.

II. THIS CASE IS AN IDEAL VEHICLE FOR PROVIDING LONG-OVERDUE GUIDANCE ON THIS VITALLY IMPORTANT ISSUE.

The issue in this case has arisen with considerable frequency in the lower courts. *See* Pet. at 28-32. And a considerable number of federal judges have raised constitutional concerns about the rule applied below, while calling for this Court to rectify this "important, frequently recurring, and troubling contradiction in sentencing law." *Bell*, 808 F.3d at 932 (Millet, J., concurring in the denial of rehearing en banc). Without review from this Court, defendants such as Mr. Hebert will continue to be subject to prosecutorial circumvention of their trial rights and will continue to face extreme prison sentences for crimes they vigorously dispute committing and of which they are innocent in the eyes of the law. The time for this Court's intervention has come.

A. Numerous Appellate Judges Have Implored This Court To Give Guidance On This Issue.

One clear theme runs throughout the appellate decisions reviewing extreme sentences based on district courts finding by a preponderance of the evidence that defendants engaged in additional criminal conduct: In light of this Court's decisions in *Booker* and *Rita*, which significantly altered the legal landscape of sentencing, there is an urgent need for guidance on the contours of defendants' Fifth and Sixth Amendment rights in the context of substantive reasonableness review.

Most recently, D.C. Circuit Judges Kavanaugh and Millett called for a reexamination of this critical issue

in separate concurrences from denial of the petition for rehearing en banc in *Bell*, a case in which the trial court imposed a substantial sentence on the defendant based upon conduct of which the jury had acquitted him. Judge Millett, invoking Justice Scalia's dissent from denial of certiorari in *Jones v. United States*, explained that, while her hands were tied, "I agree with Justices Scalia, Thomas, and Ginsburg [] that the circuit case law's incursion on the Sixth Amendment 'has gone on long enough." *Bell*, 808 F.3d at 929 (quoting 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari)). Judge Millett then asked this Court for guidance, writing that "the time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury's judgment of acquittal will safeguard liberty as certainly as a jury's judgment of conviction permits its deprivation." *Id.*

Also in *Bell*, Judge Kavanaugh wrote "separately to underscore the problem identified by Judge Millett," which he described as a "dubious infringement of the rights to due process and to a jury trial." *Id.* at 927–28 (Kavanaugh, J., concurring in the denial of rehearing en banc). Judge Kavanaugh then queried: "If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20–year sentence?" *Id.* at 928.

Likewise, Judge Barkett on the Eleventh Circuit penned an impassioned concurrence in *Faust*, where

she determined that as a "matter of simple justice, factual findings by a sentencing judge ought to reflect the moral blameworthiness of an *already culpable* defendant." 456 F.3d at 1352 (Barkett, J., concurring) (citation omitted). Judge Barkett thus called for a reexamination of this contradiction in the sentencing regime to ensure that the courts "preserv[e] an ancient guarantee under a new, rather than age-old and familiar, set of circumstances." *Id.* at 1351.

Also notable is Judge Torruella's concurrence in *United States v. St. Hill*, in which he commented on the "disturbing trend" that has now impacted Mr. Hebert: "[a]ll too often, prosecutors charge individuals with relatively minor crimes, carrying correspondingly short sentences, but then use [the Guidelines] to argue for significantly enhanced terms of imprisonment under the guise of 'relevant conduct'—other crimes that have not been charged (or, if charged, have led to an acquittal) and have not been proven beyond a reasonable doubt." 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring). "Put differently, if the government intends to seek an increase in a criminal defendant's sentence for conduct that *independently* may be subject to criminal liability, the government should charge that conduct in the indictment." *Id.* at 41.

These opinions are just a fraction of the instances since *Booker* and *Rita* in which federal judges have criticized or questioned judicial fact-finding to support extreme sentence enhancements. Opinions to that effect are literally legion. *See, e.g.*, *United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) ("Because I believe the inclusion of 'acquitted conduct' to fashion a sentence

is unconstitutional, I urge the Supreme Court to re-examine its continued use forthwith."); *United States v. White*, 551 F.3d 381, 390 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (when "judge-found facts are necessary for the lawful imposition of the sentence, [it] violat[es] the Sixth Amendment right to a jury trial"); *United States v. Grier*, 475 F.3d 556, 589 (3d Cir. 2007) (en banc) (Sloviter, J., dissenting) (calling it "astonishing" that "[t]he majority affirms the District Court's sentence based on its finding by a preponderance of the evidence that Grier committed aggravated assault under Pennsylvania law even though Grier pled guilty only to possession of a firearm by a convicted felon and consistently denied that he committed an aggravated assault"); *id.* at 604 (McKee, J., dissenting) ("I believe that the Fifth Amendment does not allow a sentencing court to enhance a sentence pursuant to U.S.S.G. § 2K2.1(b)(5) when the Government only establishes that the defendant committed an uncharged felony by a preponderance of the evidence."); *Mercado*, 474 F.3d at 662 (Fletcher, J., dissenting) ("By failing to consider the substantive impact that the consideration of acquitted conduct has on the right to jury trial, each of these decisions ignores the impact of *Jones*, *Apprendi*, *Ring*, *Blakely*, and *Booker*. Thus, I am not content, as the majority is, to join this 'parade of authority.'"); *see also United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014); *United States v. Shahid*, 486 Fed. App'x 915, 917 (2d Cir. 2012) ("We are bound by the prior decisions of this court unless and until those precedents are reversed *en banc* or by the Supreme Court."); *United States v. Waltower*, 643 F.3d 572, 578 (7th Cir. 2011) ("[W]e, like the D.C.

Circuit, understand why defendants consider it unfair to take acquitted conduct into account at sentencing, their use does not violate the United States Constitution under existing doctrine." (citation omitted)); *United States v. Papakee*, 573 F.3d 569, 578 (8th Cir. 2009) (Bright, J., concurring) (restating view that enhancing sentences based on acquitted conduct violates the Sixth Amendment and noting that "[i]t is now incumbent on the Supreme Court to correct this injustice"); *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) ("Many judges and commentators have similarly argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system.") (citations omitted).

B. This Case Exemplifies The Need For Review.

While there might be some close cases, this is not one of them. The district court's finding of intentional murder goes miles beyond constitutionally permissible "judicial fact-finding by a preponderance of the evidence at sentencing … such as about character, criminal history, cooperation, and even some unadjudicated conduct." *Bell*, 808 F.3d at 930 (Millett, J., concurring). If any constitutional line exists, sentencing someone to 92 years for murder after he pleaded guilty to some non-violent fraud offenses crosses it. This case provides the ideal vehicle for this Court to explain that there is, indeed, a constitutional line that puts some limit on extreme

sentence enhancements based on unproven, disputed criminal conduct.[2]

Recent petitions on this issue did not provide that same degree of clarity. Many involved (1) judicial findings about the manner in which the defendant committed the underlying conduct; (2) judicial findings of conduct or a pattern of conduct similar in kind and degree to the convicted conduct; or (3) extensive factual development at trial, which afforded the defendant constitutional protections as the facts came to light. These issues are absent here.

First, Mr. Hebert's sentence is based on an entirely separate, more severe crime than those for which he admitted guilt. Murder is not simply "the manner in which [a defendant] commits the crime of [bank fraud]." *United States v. Watts*, 519 U.S. 148, 154 (1997). Mr. Hebert's case is thus far more egregious than instances in which circuit courts have upheld sentences that were increased based upon findings related to how the underlying crime was committed. *See, e.g.*, *St. Hill*, 768 F.3d at 39 (defendant pled

[2] *Amicus* alternatively suggests that the constitutional problems in this extreme case could be addressed by interpreting and applying post-*Booker* reasonableness review to reverse the sentence imposed here. The sentencing instructions Congress set forth in 18 U.S.C. § 3553(a) can and should be understood to place procedural and substantive limits on the extent to which a judge may enhance a sentence based on more serious uncharged criminal allegations brought forward by federal prosecutors at a sentencing for indisputably less serious criminal charges. *Cf. United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (Posner, J.) (suggesting that "a sentence based almost entirely on evidence that satisfied only the normal civil standard of proof would be unlikely to promote respect for the law or provide just punishment for the offense of conviction").

guilty to distributing oxycodone, sentence enhanced based on judicial findings of prior drug sales to confidential informants, some of which were undisputed); *United States v. Norman*, 465 F. App'x 110, 120–21 (3d Cir. 2012) (defendant convicted of bank fraud, identity theft, and conspiracy, sentence enhanced based on judicial findings of (1) the extent of loss caused; (2) the number of victims; and (3) the defendant's supervisory role in the scheme); *White*, 551 F.3d at 382 (driver of a bank robbery getaway car was convicted of armed robbery and carrying a firearm without a serial number, sentence enhanced based on judicial finding that defendant aided and abetted his confederates who were firing weapons at police during car chase).

Second, this is not a case in which the district judge enhanced the sentence based upon a finding that the defendant had engaged in a similar pattern of conduct over time, only some of which was charged and convicted. *See, e.g.*, *Bell*, 808 F.3d at 929 (Millett, J., concurring) (defendant indicted and tried for myriad, related drug offenses, jury convicted him of most but acquitted him of conspiracy, and judge enhanced sentence based on conspiracy); *United States v. Grubbs*, 585 F.3d 793, 801 (4th Cir. 2009) (defendant pled guilty to six counts of transporting a minor in interstate commerce to engage in sexual activity and traveling in interstate commerce for the same purpose, sentence enhanced based on factual findings of additional child molestation throughout the same time period). Here, Mr. Hebert admitted a pattern of purely nonviolent offenses, but the judge found he had committed murder. Nothing in his admitted conduct demonstrates a pattern of behavior

similar in kind or degree to the crime of murder for which he was ultimately punished.

Finally, unlike defendants who were tried and convicted prior to sentencing, Mr. Hebert never received the constitutional protections that come with the development of facts during a trial. The facts that the district judge found in order to sentence Mr. Hebert were based entirely on evidence presented outside the protections of trial. *Compare with United States v. Broxmeyer*, 699 F.3d 265, 269 (2d Cir. 2012) (enhancing the defendant's sentence based on evidence "developed at trial and reported in the" presentence report that he had repeatedly abused his position as a high school coach to engage underage players in sexual relationships); *United States v. Fitch*, 659 F.3d 788 (9th Cir. 2011); *Norman,* 465 F. App'x at 120–21. Although it is quite problematic when judges sentence defendants based on alleged misconduct for which they have been acquitted, the Government's decision to forgo charging Mr. Hebert with the most serious crime alleged against him meant he never even had the chance to invoke the reliability-enhancing constitutional protections of trial (such as the right to confrontation). The evidence underlying Mr. Hebert's judge-found guilt was tested solely in a four-day judicial inquisition where those traditional trial rules did not apply.

In short, prior cases, though regularly leading to the expression of constitutional concerns by lower courts, have not presented the Fifth and Sixth Amendment issues as starkly as does Mr. Hebert's 92-year sentence for a few $16,000 fraud convictions. That clear presentation of issues going to the heart of "constitutional protections of surpassing importance,"

Apprendi, 530 U.S. at 476, provides an ideal opportunity for this Court to finally address whether sentencing proceedings like those below comport with the bedrock protections of the Bill of Rights.

CONCLUSION

Mr. Hebert pleaded guilty to fraud and was sentenced for murder. "As a matter of simple justice," it is "obvious" that "the procedural safeguards designed to protect" Mr. Hebert from "punishment" for fraud should "apply equally" to protect him from being punished for murder. *Booker*, 543 U.S. at 231. The Court should grant Mr. Hebert's petition.

Respectfully submitted,

BETH HEIFETZ
JAMES M. BURNHAM
Counsel of Record
SARAH A. HUNGER
WILLIAM R. WEAVER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-5429
jmburnham@jonesday.com

May 9, 2016