No. 15-1190

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
VIJAY SHANKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court violated petitioner's Fifth and Sixth Amendment rights by relying on its factual findings about petitioner's conduct to impose a sentence longer than otherwise would have been reasonable, but below the total statutory maximum authorized for petitioner's crimes of conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 813 F.3d 551.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2015. The petition for a writ of certiorari was filed on March 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on five counts of bank fraud, in violation of 18 U.S.C. 1344 and 2; one count of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1) and 18 U.S.C. 2; and one count of depriving a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States

while acting under color of law, in violation of 18 U.S.C. 242 and 2. Pet. App. 5a-6a. He was sentenced to 92 years of imprisonment, to be followed by three years of supervised release. *Id.* at 10a-11a. The court of appeals affirmed. *Id.* at 1a-28a.

1. Petitioner, a sheriff's deputy in Jefferson Parish, Louisiana, carried out an identity theft and fraud scheme against a victim, Albert Bloch, through methods that ultimately included murdering Bloch. Petitioner first encountered Bloch in the early morning of August 2, 2007, when petitioner responded to the scene of a traffic accident that had left Bloch unconscious. An emergency medical technician at the accident scene gave Bloch's cell phone and wallet to petitioner for safekeeping, before transporting Bloch to the hospital. The wallet contained Bloch's driver's license and an automated teller machine (ATM) card issued by Chase Bank that could be used as a debit card. Pet. App. 2a-3a; Gov't C.A. Br. 4-5; D. Ct. Gov't Sent. Mem. 5.

That day, while Bloch was in the hospital, petitioner used Bloch's ATM card to purchase more than $1300 in electronics. The next day, after Bloch had been released, petitioner went to Bloch's apartment and returned Bloch's cellular phone. Petitioner did not, however, return Bloch's wallet or its contents. Bloch subsequently discovered that his checkbook was missing. Pet. App. 2a; Gov't C.A. Br. 5-6.

In the following days, petitioner used Bloch's ATM card to make or attempt other purchases, transfers, and withdrawals from Bloch's checking and savings accounts. Gov't C.A. Br. 6. Between August 2 and August 9, he made cash withdrawals totaling over $2600; made purchases totaling over $6300; attempted

additional purchases of more than $5500; and transferred more than $16,000 from Bloch's savings account to the checking account to which Bloch's stolen ATM card was tied. Pet. App. 2a; Gov't C.A. Br. 6.

On August 10 and August 11, petitioner attempted additional cash withdrawals, but the transactions were declined by Chase Bank. Pet. App. 2a-3a; Gov't C.A. Br. 6. Around that time, Bloch discovered the fraudulent transactions and reported them to Chase Bank. The bank issued Bloch a replacement ATM card. Pet. App. 3a; Gov't C.A. Br. 7; Presentence Investigation Report (PSR) ¶ 49.

In the months afterward, petitioner continued his identity theft scheme using methods other than the now-invalid ATM card. He obtained access to Bloch's social security number and other personal information by conducting repeated searches about Bloch in a National Crime Information Center database. Gov't C.A. Br. 7; PSR ¶ 52. Equipped with Bloch's social security number, petitioner used forged checks drawn on Bloch's account to buy about $9000 in auto parts from September 17, 2007, through October 3, 2007. To make these purchases, petitioner provided Bloch's driver's license and social security number as proof of identity. Receipts for some of the transactions were later found in petitioner's home, and some of the purchased products were found hidden under a pile of leaves in the woods behind petitioner's father's home. Pet. App. 3a; Gov't C.A. Br. 7-8.

Petitioner continued his fraud and identity theft scheme in early October 2007 by murdering Bloch and stealing Bloch's new ATM card, in addition to other property. The last reliable reports of witness sightings of Bloch were on October 1, 2007, and October 2,

2007. On both those days, Bloch visited a bar that he frequented, known as Joe's Caddy Corner. Bloch had used his new ATM card there 30 times in the five weeks after he started using the new card. Pet. App. 62a-63a. On October 1, 2007, Bloch used his ATM card at Joe's Caddy Corner a final time, to make an ATM withdrawal. He returned the next day, and told another regular at the bar, before leaving around 9 p.m., "[s]ee you tomorrow, darling." *Id.* at 62a.

After those visits, no reliable sightings of Bloch were ever reported. Bloch stopped filling life-sustaining prescriptions that were necessary to treat his chronic lung disease. Case workers from Responsibility House, a housing and substance abuse program assisting Bloch, were unable to find Bloch, despite repeated efforts over the course of a month. Pet. App. 3a, 62a-63a; Gov't C.A. Br. 10-11. In early November 2007, they reported Bloch missing to police. Gov't C.A. Br. 10. On November 14, police found Bloch's Volvo concealed behind an apartment building located about halfway between Joe's Caddy Corner and Bloch's apartment. The license plate had been removed and the vehicle identification number had been covered. *Id.* at 12.

Evidence from myriad sources established that petitioner had killed Bloch in order to continue his scheme of identity theft and fraud. Petitioner significantly ramped up his fraudulent activity against Bloch immediately after Bloch disappeared—including fraudulent activity using the replacement ATM card that had been in Bloch's possession on October 1, 2007. Between October 2 and October 4, 2007, petitioner used that card to withdraw $405 in cash and unsuccessfully tried to make further cash withdrawals total-

ing $607. In addition, just after Bloch's disappearance, petitioner arranged further transfers from Bloch's savings account to Bloch's checking account, ultimately bringing the savings account balance to zero. On October 3, 2007, the day after Bloch disappeared, petitioner twice went to Chase Bank locations and presented checks drawn on Bloch's account and bearing Bloch's forged signature, which petitioner sought to cash, using Bloch's driver's license and other identification. Both times, Chase Bank employees refused to cash the checks because petitioner did not match the photo on Bloch's driver's license. Petitioner subsequently attempted multiple additional cash withdrawals using Block's replacement ATM card, but they failed, because Chase Bank placed a fraud restriction on Bloch's accounts following petitioner's attempts to cash forged checks. On October 5, 2007, petitioner called Chase Bank and unsuccessfully tried to convince the bank to remove the fraud restriction. Pet. App. 3a-4a; Gov't C.A. Br. 8-10.

Police uncovered physical evidence connecting petitioner to Bloch's disappearance and to petitioner's scheme of fraud and identity theft, in multiple locations. Inside Bloch's Volvo—the car that was found hidden in altered condition near where Bloch was last seen—police found a note that contained information concerning a paid security detail at a local plant that was available only to sheriff's deputies in the office where petitioner was employed. Inside petitioner's police cruiser, officers found a key to Bloch's Volvo. And inside petitioner's truck, police found checks belonging to Bloch. Pet. App. 4a, 9a; Gov't C.A. Br. 9, 12.

Additional items connecting petitioner to Bloch's disappearance were found in petitioner's residence. There, police found the replacement ATM card that Chase Bank had issued Bloch and that Bloch had used on the night before he was last seen. In addition, police found mail and bank correspondence dating after Bloch's disappearance, as well as Bloch's television. Pet. App. 4a, 8a; Gov't C.A. Br. 9, 12. The television had been seen in Bloch's home by a Responsibility House employee on October 5—after Bloch disappeared—but it was gone by October 10. Gov't C.A. Br. 13. Petitioner's wife recalled that petitioner brought a television home around that time. *Ibid.* Bloch's identification cards were also found in petitioner's home. *Ibid.*; see Pet. App. 4a, 8a.

Both telephone and employment records also placed petitioner near Bloch's home shortly before Bloch's disappearance. From 10 p.m. on October 2 to 6 a.m. on October 3, petitioner worked a night shift as a sheriff's deputy in the Metairie area, close to Bloch's home and Joe's Caddy Corner. In addition, records from petitioner's cellular phone placed petitioner near Bloch's apartment in Metairie on both October 1 and 2. Pet. App. 8a; Gov't C.A. Br. 11.

In late November 2007, detectives interviewed petitioner about Bloch's disappearance. The detectives noticed that petitioner was sweating profusely and appeared nervous. Pet. App. 4a & n.1; Gov't C.A. Br. 13. Petitioner admitted that he had responded to Bloch's car accident, but denied using Bloch's ATM cards and checks, and falsely asserted that Bloch had loaned him money to buy auto parts. Pet. App. 3a-4a; Gov't C.A. Br. 13-14. While petitioner claimed he had nothing to do with Bloch's disappearance, he told

police at the end of the interview that "[i]f you had a body, I would already be in jail." Pet. App. 4a n.1; see Gov't C.A. Br. 14.

2. a. A federal grand jury in the Eastern District of Louisiana returned a 60-count indictment charging petitioner with 49 counts of bank fraud, in addition to counts of computer fraud; aggravated identity theft; deprivation of civil rights under color of law; and obstruction of justice. Pet. App. 84a-111a. The indictment alleged that petitioner killed or caused the death of Bloch in furtherance of the charged bank fraud and identity theft scheme. *Id.* at 88a.

Petitioner pleaded guilty pursuant to a plea agreement to seven counts: one count of depriving a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States while acting under color of law, in violation of 18 U.S.C. 242 and 2; five counts of committing bank fraud, in violation of 18 U.S.C. 1344 and 2, stemming from fraudulent transactions from August 2, 2007, through October 3, 2007; and one count of committing aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1) and 18 U.S.C. 2. Pet. App. 5a-6a, 72a-83a.

As part of a stipulated factual basis for the guilty plea, petitioner acknowledged making fraudulent use of Bloch's initial ATM card, Bloch's checks, and the replacement ATM card that Bloch himself had been using until his disappearance. Pet. App. 79a-80a. For instance, petitioner acknowledged that on October 3, 2007—the day after the last reliable report of a person seeing Bloch alive—he had used Bloch's ATM card to make a withdrawal of over $200; that on the following day, he initiated "a telephone transfer that zeroed out Albert Bloch's savings account," and also "attempted

to make multiple cash withdrawals" using the replacement ATM card; and that telephone records demonstrated that on the next day, his phone was used to call Chase Bank in order to attempt to have the fraud restriction removed from Bloch's card. *Id.* at 80a-81a.

In the plea agreement, petitioner agreed that "the issue of whether [he] is responsible for the death of Albert Bloch and the appropriate guideline range is a contested matter that will have to be determined by the Court at the sentencing hearing. [Petitioner] understands that the Court will determine sentencing factors by a preponderance of the evidence." Pet. App. 6a; see Gov't C.A. Br. 18.

b. Subsequently, the Probation Office prepared draft PSRs to determine petitioner's offense level under the Sentencing Guidelines for his offenses of conviction. After noting that the indictment had charged that petitioner had murdered Bloch as part of his fraud scheme, the Probation Office determined that petitioner's offense level was appropriately increased based on his having committed murder in connection with the underlying crimes. Pet. App. 7a. Taking into account petitioner's criminal history, the Probation Office determined that the recommended sentence was the statutory maximum of 153 years of imprisonment. *Ibid.*

Petitioner contested the Sentencing Guidelines calculation, contending that the evidence was insufficient to hold him accountable for Bloch's murder; that his base offense level under the Sentencing Guidelines was improperly calculated with reference to the first-degree murder Sentencing Guideline; and that the dis-

trict court could not adjudicate the murder consistent with the Fifth and Sixth Amendments. Pet. App. 7a.

c. The district court held a four-day evidentiary hearing to resolve the disputed factual issue surrounding petitioner's relevant conduct. The government presented 30 witnesses; petitioner did not present any evidence. See Gov't C.A. Br. 19.

After the hearing, the district court found that petitioner murdered Bloch as part of his fraudulent scheme and that it was appropriate to consider those acts in sentencing petitioner. Pet. App. 57a-66a. The court observed that under the Sentencing Guidelines, "all acts and omissions committed by [petitioner] that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense are relevant conduct." *Id.* at 59a. It observed that whether petitioner "murdered Albert Bloch during the course of the crimes to which he pleaded guilty," as the indictment has alleged, was relevant conduct with respect to the crimes of conviction. *Ibid.*

Following a detailed review of the evidence establishing that petitioner had murdered Bloch, Pet. App. 59a-65a, the district court made a factual finding that petitioner had murdered Bloch, under the preponderance-of-the-evidence standard applicable to Sentencing Guidelines determinations, *id.* at 65a. The court also concluded that the government had shown the murder "by clear and convincing evidence"; that "under all scenarios, it is clear that [petitioner] killed Albert Bloch"; and "that in assessing all of the evidence, [it] could not find a doubt to which [it] could assign reason." *Ibid.*

d. After further submissions by the parties and preparation of a revised PSR, the district court held a sentencing proceeding, at which it resolved disputes concerning the Sentencing Guidelines and ultimately imposed a sentence of 92 years of imprisonment. Pet. App. 67a-71a; 11/10/14 Sent. Tr. (Tr.) 1-40. Agreeing with the revised post-hearing PSR, the court determined that a cross-reference in the Sentencing Guidelines provision relevant to bank fraud, Sentencing Guidelines § 2B1.1(c)(3), established that petitioner's offense level was properly calculated using the guideline for second-degree murder. Tr. 17-20 (discussing cross-reference of Sentencing Guidelines § 2B1.1 (2013), governing fraud offenses, to Sentencing Guidelines § 2A1.2, concerning second-degree murder). In addition, the court agreed with the Probation Office that vulnerable-victim and obstruction-of-justice enhancements were applicable. Tr. 20-21. For an offender with petitioner's criminal history, the court determined, the resulting recommended Sentencing Guidelines term of imprisonment was the statutory maximum of 153 years. Tr. 22.

The district court sentenced petitioner to 92 years of imprisonment and three years of supervised release—a downward variance from the Sentencing Guidelines range. Tr. 36-38. The district court explained that it had concluded petitioner's sentence was appropriate under 18 U.S.C. 3553(a), which directs courts to consider a variety of factors in setting sentences in individual cases. It further stated that even if it had accepted petitioner's argument that the second-degree murder cross-reference in Sentencing Guidelines § 2B1.1 (2013) did not apply to petitioner's bank-fraud convictions, petitioner's "sentence would

have been exactly the same," because the court "would have applied a substantial upward variance" in light of the objectives of sentencing set forth at 18 U.S.C. 3553(a), based on petitioner's relevant conduct of murdering Bloch to steal his assets through bank fraud and abusing public trust by committing that crime using his status as a law enforcement officer. Tr. 35; see Tr. 36.[1]

3. The court of appeals affirmed. Pet. App. 1a-28a. The court first found no clear error in the finding that petitioner murdered Bloch. *Id.* at 14a-16a. The court next declined to decide petitioner's challenge to the calculation of his recommended range of imprisonment under the Sentencing Guidelines, because the district court had explained that it would have imposed the same sentence under 18 U.S.C. 3553(a) regardless of how petitioner's Sentencing Guidelines range was calculated. Pet. App. 18a-19a.

The court of appeals then accepted the government's concession that the sentence would not be substantively reasonable without the finding of a

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[1] The district court subsequently denied petitioner's motion for reconsideration or correction of his sentence, which had invoked Federal Rule of Criminal Procedure 35 and the district court's inherent authority to raise constitutional claims under the Fifth, Sixth, and Eighth Amendments, in addition to statutory and Sentencing Guidelines claims. D. Ct. Doc. 133 (Dec. 19, 2014); D. Ct. Doc. 122 (Nov. 24, 2014); see Pet. App. 41a-56a. The court explained that Rule 35 allowed only correction of "a sentence that resulted from arithmetical, technical, or other clear error," and that petitioner had demonstrated no such clear error here. D. Ct. Doc. 122, at 1 (citation omitted). In addition, the court determined that it lacked statutory or other authority to modify petitioner's sentence based on the challenges that petitioner presented, which it found lacked merit in any event. D. Ct. Doc. 133.

murder, Pet. App. 14a n.4, but concluded that on the present record, petitioner's sentence was substantively reasonable under Section 3553(a), *id.* at 19a-22a. It explained that the district court had stated that it was considering the relevant factors set forth under Section 3553(a), while "specifically not[ing] that the 18 U.S.C. § 3553(a) factors merited an upward variance because [petitioner] had abused his position of trust and authority as a police officer to take Bloch's life." Pet. App. 21a. It concluded that "[i]n light of [its] deferential review and the thorough findings made by the district court," it could not find the sentence imposed to be substantively unreasonable. *Ibid.*; see *id.* at 22a.

The court of appeals next concluded that the district court had not violated the Fifth and Sixth Amendments by imposing a sentence that relied on the district court's findings that petitioner murdered his victim. Pet. App. 22a-25a. The court of appeals explained that it had previously held that "courts can engage in judicial factfinding where the defendant's sentence ultimately falls within the statutory maximum term." *Id.* at 23a. This precedent, it explained, foreclosed petitioner's contention that "judicial factfinding violates a defendant's constitutional right to a jury trial where the factfinding renders reasonable an otherwise substantively unreasonable sentence." *Id.* at 22a. The court found *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), inapposite, because the district court's factfinding in petitioner's case, unlike the factfinding in *Alleyne,* did not increase any mandatory minimum sentence. Pet. App. 24a-25a. Finally, the court rejected petitioner's contention that his sentence violated the Eighth Amendment. *Id.* at 25a-28a.

ARGUMENT

Petitioner contends (Pet. 14-35) that his sentence for fraud, identity theft, and civil rights offenses, which fell below the maximum authorized by statute, was imposed in violation of the Fifth and Sixth Amendments because the district court's exercise of sentencing discretion was made reasonable in part by its factual findings about petitioner's murder of his victim. This Court has recently and repeatedly rejected such claims, which implicate no conflict among the courts of appeals, and the same result is warranted here.

1. This Court's decisions in *United States* v. *Booker*, 543 U.S. 220 (2005), and related cases establish that judges may engage in factfinding regarding relevant offense conduct or offender characteristics in determining an appropriate sentence under an advisory Sentencing Guidelines system, so long as any resulting sentence falls at or below the statutory maximum for the offenses of conviction. This Court explained the permissibility of such factfinding in *Booker*. It explained that judges had traditionally made factual findings about defendants' actual conduct, even when not proved to a jury, and used those findings to determine the appropriate sentence. See, *e.g.*, *id.* at 250-251. This practice, it reaffirmed, was constitutionally permissible, because "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id.* at 233. The constitutional problem with the mandatory Sentencing Guidelines created in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, *Booker* explained, was that the Sentencing

Guidelines "required," rather than merely "recommended * * * the selection of particular sentences in response to differing sets of facts." *Ibid.*

Booker explained that this Sixth Amendment problem was resolved by the advisory Sentencing Guidelines system whose application petitioner now challenges. The Court concluded that the constitutional flaw in the mandatory Sentencing Guidelines framework could be cured by severing the portions of that act that made the Sentencing Guidelines mandatory—while leaving in place the requirements that judges determine the Sentencing Guidelines by making findings about the "real conduct that underlies the crime of conviction," *Booker*, 543 U.S. at 250 (emphasis omitted); consider the sentencing recommendations that result, *id.* at 259; and then select sentences reflecting the broad objectives set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004), 543 U.S. at 260. The Court also severed the appellate review provision that was interwoven with the mandatory Sentencing Guidelines regime, with the result that appellate courts would consider only whether district courts had acted unreasonably—or, in other words, abused their sentencing discretion. 543 U.S. at 260-262; see *Rita* v. *United States*, 551 U.S. 338, 351 (2007) ("[A]ppellate 'reasonableness' review merely asks whether the trial court abused its discretion.").

This Court made clear that the resulting framework posed no Sixth Amendment problem. The Court explained, in particular, that "everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district

judges." *Booker*, 543 U.S. at 233. It reiterated that "the existence of" the provision making the Sentencing Guidelines binding "is a necessary condition of the constitutional violation" and that "without this provision * * * the statute falls outside the scope of [the] requirement" set forth in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Booker*, 543 U.S. at 259. And it explained that the Court's determination that the statutory provision making the Sentencing Guidelines mandatory was the source of the Sixth Amendment problem "ma[de] * * * possible" the Court's remedial holding that the Sixth Amendment violation could be cured by excising the portion of the statute that made the Sentencing Guidelines mandatory and the corresponding appellate review provision, while leaving in place the advisory Sentencing Guidelines regime, provision setting forth broad sentencing objectives, and scheme of appellate reasonableness review. *Id.* at 233. *Booker* thus makes clear that judicial factfinding under the advisory Sentencing Guidelines regime, such as the factfinding at issue in petitioner's case, is constitutionally permissible.

The remedial approach in *Booker* is not compatible with petitioner's contention that the Sixth Amendment is violated when a judge concludes that a sentence is reasonable in part based on its findings of fact concerning the offense or offender. The Court in *Booker* recognized that under the advisory Sentencing Guidelines regime it adopted to cure the Sixth Amendment defect in mandatory guidelines, judicial assessments of real conduct would often be critical to the calculation of the recommended sentence under the Sentencing Guidelines, and to the district court's ultimate sentence. For example, the Court discussed at length

how factfinding about offense characteristics would be critical in cases involving extortion, bank robbery, and mail fraud, on matters such as use of weapons; injury in the course of an offense; leadership role; and extent of monetary loss. See *Booker*, 543 U.S. at 252-254. Findings about such offense characteristics often dramatically increase the recommended sentence under the Sentencing Guidelines that trial judges must consider, and that appellate courts may presume reasonable, *Rita*, 551 U.S. at 347-356. For example, offense characteristics such as drug quantity and leadership role increased the recommended range of imprisonment from about five years to about 15 years for one of the defendants in *Booker* itself. 543 U.S. at 226-228. Petitioner's suggestion that sentences under the post-*Booker* framework are unconstitutional when factual findings about offense characteristics are critical to the ultimate sentencing decision is not consistent with *Booker*'s acknowledgement that judicial factfinding would often play a critical role in the framework it found to be an adequate constitutional remedy.

This Court's decision in *Rita* confirms that the Court anticipated that sentencing judges would find facts about the defendant's real conduct—beyond the facts found by the jury—and would rely on those findings in justifying their sentences. The Court rejected an argument that an appellate presumption of reasonableness for within-Guidelines sentences would "raise[] Sixth Amendment concerns" because it would increase the likelihood that district courts would impose sentences that rely on "special facts," made relevant under the Sentencing Guidelines, that were found by "the sentencing judge, not the jury." 551 U.S. at

352. The Court responded: "This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury *and to increase the sentence in consequence*." *Ibid.* (emphasis added). The Court fully recognized that substantive reasonableness would provide a limitation in some cases on the maximum permissible sentence. *Id.* at 354 ("In sentencing as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur."). But the Court did not suggest that an appellate court, to comply with the Sixth Amendment, would have to conduct a hypothetical analysis of whether the sentence imposed would be substantively reasonable solely in light of the facts found by the jury—a consequence that would logically follow in every case under petitioner's rule. Rather, the Court interpreted *Booker* to "recognize[]" that a scheme in which sentencing courts exercise discretion based on all of the facts "will ordinarily raise no Sixth Amendment concern." *Ibid.* And the Court was unpersuaded by the concurrence's suggestion that a substantive reasonableness cap, based on the jury-found facts, would exist in every case, thus "doom[ing] the construct of reasonableness review established and applied by today's opinion." *Id.* at 374 (Scalia, J., concurring in part and concurring in the judgment).

Petitioner's assertion (Pet. 22-24) that his sentence violates *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), similarly lacks merit. *Alleyne* held that facts that increase the statutory minimum sentence applicable for an offense must be proved to a jury, see *id.*

at 2160-2163, but it reaffirmed that the Sixth Amendment permits "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law,'" *id.* at 2161 n.2 (citation omitted). Since petitioner's case does not involve a mandatory minimum sentence, *Alleyne*'s determination that facts necessary to trigger mandatory minimums must be proved to the jury lacks application here.[2]

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[2] Petitioner also asserts that the Fifth Amendment independently barred the sentence at issue here, on due process grounds, because the district court's determination that petitioner murdered his victim as part of his fraud scheme is "'a tail which wags the dog of the substantive offense' of conviction." Pet. 23 (quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986)); see Pet. 22-24. While petitioner cited the Fifth Amendment below as one of the constitutional bases for *Booker* and *Apprendi*, however, he did not make any argument in the courts below that the Fifth Amendment imposed relevant limits beyond those of *Booker* and *Apprendi*. See Pet. App. 50a (district court filing invoking due process clause as "also a source" of the principles in *Booker* and *Apprendi*); Pet. C.A. Br. 23-25 (citing due process clause in arguing that sentence was invalid based on Justice Scalia's concurrence in *Rita*, which relied on *Booker* and *Apprendi*). Accordingly, neither of the courts below treated petitioner as advancing the sort of distinct Fifth Amendment argument he now seeks to offer. See Pet. App. 22a-25a; see also D. Ct. Doc. 133; D. Ct. Doc. 122. Petitioner's case would therefore be an inappropriate vehicle through which to review such an argument.

In any event, petitioner's sentencing under the *Booker* remedial framework does not present the features that *McMillan* suggested might present due process problems. The advisory Sentencing Guidelines framework applied here does not exceed Congress's power to differentiate elements from offense factors under the Due Process Clause because it does not alter the burden of proof applicable to elements, see *McMillan*, 477 U.S. at 86-87, or alter the applicable statutory maximum in a manner that "gives [the]

2. No conflict in the lower courts exists on the question presented, as petitioner concedes (Pet. 15). The courts of appeals have uniformly rejected constitutional challenges such as petitioner's, concluding that under the *Booker* remedial framework, district courts may engage in factfinding concerning conduct relevant to an offense of conviction in order to inform their selection of sentences up to the statutory maximum. See *United States* v. *Crosby*, 397 F.3d 103, 109 n.6 (2d Cir. 2005), abrogated on other grounds by *United States* v. *Lake*, 419 F.3d 111, 113 n.2 (2d Cir. 2005), cert. denied, 549 U.S. 915 (2006); *United States* v. *Grier*, 475 F.3d 556, 566 (3d Cir.) (en banc), cert. denied, 552 U.S. 848 (2007); *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.), cert. denied, 564 U.S. 1010 (2011); *United States* v. *McCormick*, 401 Fed. Appx. 29, 33-34 (6th Cir. 2010); *United States* v. *Ashqar*, 582 F.3d 819, 825 (7th Cir. 2009), cert. denied, 559 U.S. 974 (2010); *United States* v. *Treadwell*, 593 F.3d 990, 1017-1018 (9th Cir.), cert. denied, 562 U.S. 916 and 562 U.S. 973 (2010); *United States* v. *Redcorn*, 528 F.3d 727, 745-746 (10th Cir. 2008); *United States* v. *Smith*, 741 F.3d 1211, 1226-1227 & n.5 (11th Cir. 2013), cert. denied, 135 S. Ct. 704 (2014); *United States* v. *Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009).

Petitioner acknowledges (Pet. 16-17) the "lack of a circuit split," but suggests that this Court's review is warranted because of several dissenting opinions in Sixth Amendment cases in the courts of appeals. This

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impression of having been tailored" by the legislature to evade constitutional requirements, *id.* at 88.

Court does not ordinarily grant certiorari where the courts of appeals are unanimous simply because some judges have expressed dissenting views. And in any event, petitioner is mistaken in suggesting considerable disagreement exists on the question presented even in dissenting opinions. While petitioner identifies four dissenting opinions as a basis for granting review of his as-applied Sixth Amendment contention despite the absence of a circuit split, only one of those dissenting opinions contended, as petitioner does, that a sentence whose substantive reasonableness depends in part on judicial factfinding violates the Sixth Amendment. *United States* v. *White*, 551 F.3d 381, 386-387 (6th Cir. 2008) (Merritt, J., dissenting) (adopting this argument, in a case that involved judicial factfinding regarding acquitted conduct), cert. denied, 556 U.S. 1215 (2009). The remaining dissenting opinions did not embrace that theory, objecting instead only to the consideration of *acquitted* conduct, *United States* v. *Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of reh'g en banc); *id.* at 932 (Millett, J., concurring in the denial of reh'g en banc), or to the substantive reasonableness of a particular sentence under Section 3553(a), *United States* v. *Broxmeyer*, 699 F.3d 265, 298 (2d Cir. 2012) (Jacobs, C.J., dissenting), cert. denied, 133 S. Ct. 2786 (2013). Accordingly, even if certiorari could be warranted on the ground that a uniform appellate consensus had attracted a robust dissenting jurisprudence, that criterion would not be satisfied in petitioner's case.

Moreover, this Court has repeatedly and recently denied review of decisions that have held that district courts may engage in judicial factfinding under the

advisory Sentencing Guidelines regime in choosing sentences below the statutory maximum, in rejecting "as applied" constitutional challenges such as petitioner presses here. See, *e.g.*, *Smith* v. *United States*, 135 S. Ct. 704 (2014) (No. 13-10424); *Jones* v. *United States*, 135 S. Ct. 8 (2014) (No. 13-10026); *Garcia* v. *United States*, 132 S. Ct. 1093 (2012) (No. 11-6626); *Culberson* v. *United States*, 562 U.S. 1289 (2011) (No. 10-7097); *Taylor* v. *United States*, 562 U.S. 1181 (2011) (No. 10-5031); *Gibson* v. *United States*, 559 U.S. 906 (2010) (No. 09-6907); *Magluta* v. *United States*, 556 U.S. 1207 (2009) (No. 08-731); *Marlowe* v. *United States*, 555 U.S. 963 (2008) (No. 07-1390); *Bradford* v. *United States*, 552 U.S. 1232 (2008) (No. 07-7829); *Alexander* v. *United States*, 552 U.S. 1188 (2008) (No. 07-6606). Petitioner identifies no development since those denials to justify granting a petition for a writ of certiorari now on a question as to which this Court has repeatedly and recently declined review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
VIJAY SHANKER
Attorney

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