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

REPLY BRIEF OF PETITIONER

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Petitioner's case is the ideal vehicle for the Court finally to address the important constitutional sentencing question that it has left lingering since *Rita* v. *United States*, 551 U.S. 338 (2007). Petitioner's Fifth and Sixth Amendment objections to his 92-year sentence are fully preserved,[1] and the outcome of his peti-

[1] In footnote 2 of its opposition brief, the United States suggests that Petitioner might have waived an argument that the Due Process Clause "impose[s] relevant limits beyond those of *Booker* and *Apprendi*." Br. in Opp. 18 n.2. Setting aside that this is not an accurate description of the Due Process Clause argument that Petitioner makes in his petition, it is undisputed that Petitioner explicitly claimed below that his 92-year sentence violated his rights under both the Fifth and Sixth Amendments. See, *e.g.*, Pet. App. 22a. Petitioner's Fifth Amendment claim is preserved, and he is not limited to expressing his argument in precisely the same fashion he did below. Preserving a claim does "does not demand the

tion will determine whether he spends the remainder of his life in prison or is released with potentially decades more to live in freedom.

The United States does not dispute that the petition is an ideal vehicle to address the questions presented. Nevertheless, the United States advances two reasons why the petition should be denied. First, the United States argues that Petitioner's 92-year prison sentence is fully consistent with the Court's *Booker* line of cases, which recognizes that judicial factfinding has a constitutionally proper role to play at sentencing. Second, the United States argues that, in the absence of a circuit split, the questions presented are unworthy of this Court's review.[2] Neither argument is convincing.

1. After Petitioner pled guilty to a low-level, nonviolent fraud offense carrying an advisory Guidelines

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incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue," which Petitioner plainly did below. *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469-470 (2000); see also *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1997) ("[The] traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " (quoting *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992))).

[2] The United States also devotes pages (Br. in Opp. 2-7) to a one-sided recitation of the evidence it adduced against Petitioner during the sentencing proceedings. The United States, however, does not argue that this recitation is relevant to Petitioner's constitutional claims. None of the evidence the United States describes was ever presented to a jury, and much of it would not even have been *admissible* at a jury trial, such as a hearsay statement the victim made in a bar, *id.* at 4.

range of 46-57 months, the district judge found that Petitioner's principal crime was actually the heinous murder of the fraud victim and, based solely and exclusively on that finding, sentenced Petitioner to 92 years in prison. The Fifth Circuit rightly agreed that the 92-year sentence "cannot be sustained without" the district judge's murder finding. Pet. App. 14a. Yet, the Fifth Circuit saw no constitutional infirmity with Petitioner's sentence because it was "within the 153-year statutory maximum he could have received for the seven counts to which he pleaded guilty." *Id.* at 24a.

The Fifth Circuit's affirmance of Petitioner's 92-year prison sentence is irreconcilable with this Court's jury-trial-right decisions, both pre- and post-*Booker*. The Court's "precedents make clear * * * 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*." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004); *United States* v. *Booker*, 543 U.S. 220, 237-238 (2005) (the *Appendi* "statutory maximum" is not the *literal* U.S. Code maximum because "[m]ore important than the language used in our holding in *Apprendi* are the principles we sought to vindicate"). Moreover, the Court's precedents "have held that a substantively unreasonable penalty is illegal and must be set aside" on appeal. *Jones* v. *United States*, 135 S. Ct. 8, 8 (2014) (Scalia, J., joined by Thomas, J. and Ginsburg, J., dissenting from denial of certiorari) (citing *Gall* v. *United States*, 552 U.S. 38, 51 (2007)). In the proceedings below, the Fifth Circuit agreed that a prison sentence of 92 years was *not* a substantively reasonable sentence, and therefore not a legally authorized sentence, absent the district judge's murder finding.

Accordingly, the Fifth Circuit's holding that Petitioner's "statutory maximum" for jury-trial-right purposes was "153 years," and that his 92-year sentence was therefore constitutional despite being substantively unreasonable, logically conflicts with the holdings of this Court on an issue of critical constitutional importance.[3] This Court's review is warranted for this reason alone. See S. Ct. R. 10(c).

Nothing in the Court's *Booker* remedial opinion endorses either the Fifth Circuit's holding or mode of analysis. To the contrary, Justice Ginsburg, who provided the *Booker* remedial opinion's decisive fifth vote, joined Justice Scalia's dissent from denial of certiorari in *Jones*, in which Justice Scalia rejected the reading of the *Booker* remedial opinion that the United States advances in its opposition brief. Moreover, Justice Breyer, who authored the *Booker* remedial opinion, previously has implied that a district judge could not, consistent with a defendant's constitutional right to a jury,

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[3] As it did in the Fifth Circuit below, the United States concedes in its opposition brief that Petitioner's 92-year sentence was "longer than otherwise would have been reasonable" without the district judge's finding of murder. Br. in Opp. (I). "It unavoidably follows" that this fact "must be either admitted by the defendant or found by the jury. It *may not* be found by a judge." *Jones*, 135 S. Ct. at 8 (Scalia, J., joined by Thomas, J. and Ginsburg, J., dissenting from denial of certiorari). To escape this "unavoidabl[e]" conclusion, the United States argues that the sentence's imposition was lawful because it fell "below the statutory maximum" of 153 years. Br. in Opp. (I), 13. But this simply ignores *Blakely*'s explanation of what "statutory maximum" means "for *Apprendi* purposes." 542 U.S. at 303.

impose a 60-year sentence on a defendant who pled guilty to embezzlement based upon a judicial finding that the defendant subsequently murdered the embezzlement victim, *Apprendi* v. *New Jersey*, 530 U.S. 466, 562 (2000) (Breyer, J., dissenting), a hypothetical that is even less egregious than what actually occurred in Petitioner's case.

To be sure, the *Booker* remedial opinion and the Court's post-*Booker* decisions recognize that judicial factfinding has a constitutionally proper place in an advisory Guidelines regime. But Petitioner does not quarrel with this, and his petition does not ask the Court either to strike down the practice of judicial factfinding or call into question a district judge's authority to consider judge-found facts at sentencing. Indeed, Petitioner agrees that a defendant's jury trial rights are not violated where, for example, a district court uses judge-found facts to explain why it is choosing to impose the maximum prison sentence that is legally authorized by the facts found by a jury or admitted by the defendant.[4] The constitutional infirmity in Petitioner's case, however, is not that the district judge considered her murder finding in selecting Petitioner's punishment. Rather, Petitioner's 92-year sentence violates the Constitution's jury trial requirements because it is dramatically outside the sentencing range legally authorized by the facts that Petitioner admitted as part of

[4] Under the Court's *Booker* line of cases, the maximum sentence legally authorized by the facts found by the jury or admitted by the defendant may exceed the top of the advisory Guidelines range that corresponds to such facts.

his fraud plea and "cannot be sustained without" the district judge's murder finding. Pet. App. 14a.

Under the Fifth and Sixth Amendments, a defendant who has pled guilty to a low-level, non-violent bank fraud cannot constitutionally be sentenced to 92 years' imprisonment based on a district judge's determination that the defendant also committed a murder with which he was never charged and that he never admitted.

The United States implies that, were this Court to reverse Petitioner's sentence on constitutional grounds, it could disrupt the courts of appeals' implementation of reasonableness review. Specifically, the United States says that, were this Court to rule in Petitioner's favor, it would mean that in "every case" the reviewing appellate court would be required to engage in a "hypothetical analysis" of the reasonableness of the defendant's sentence. Br. in Opp. 17. This is a gross overstatement that fundamentally misunderstands Petitioner's arguments.

Determining whether a given sentence is reasonable based on a particular set of facts does not require a reviewing court to speculate on a series of "what if's." In the Fifth Circuit below, for example, Petitioner did not ask the Fifth Circuit to engage in any sort of "hypothetical analysis." Rather, Petitioner's constitutional argument required the Fifth Circuit first to determine whether his 92-year sentence was reasonable without the district judge's murder finding. In making this predicate legal determination, the Fifth Circuit considered a discrete set of concrete facts: the agreed-upon statement of facts that accompanied Petitioner's plea agreement and the factual admissions Petitioner made during his plea colloquy. The Fifth Circuit had no diffi-

culty whatsoever in agreeing that Petitioner's 92-year sentence was substantively unreasonable absent the district judge's murder finding. Contrary to the concerns the United States suggests in its opposition brief, there is no reason to think that courts of appeals would have difficulty performing similar analyses, either in the mine run of cases or in exceptional scenarios such as Petitioner's.

2. It is imperative that the Court address the constitutional questions that the petition presents, and there is no plausible jurisprudential benefit to further delay. The absence of a circuit split should not provide the Court with any comfort. Rather, it simply proves Justice Scalia's warning that "the Courts of Appeals have uniformly taken [the Court's] continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the [literal] statutory range." *Jones*, 135 S. Ct. at 9. The fact that the Fifth Circuit reflexively affirmed Petitioner's 92-year sentence is an alarming indication of how far the courts of appeals have veered off course in their post-*Booker* understanding of the Constitution's jury trial requirements. This Court's intervention and guidance is essential to getting the courts of appeals back on the correct track.

In its opposition brief, the United States urges this Court to deny Petitioner's petition because the Court "repeatedly" has denied other petitions that raise similar "as-applied" jury-trial-right challenges. Br. in Opp. 20-21. But those other cases had significant vehicle problems—*e.g.*, the petitioner's sentence was substantively reasonable based on the facts found by the jury

or admitted by the petitioner, or the petitioner failed to preserve his constitutional claims—and the United States in each instance pointed to those vehicle problems as a basis to deny the petitions.[5] There are no such vehicle problems in Petitioner's case. To the contrary, "this case presents the best possible concrete version" of "the nonhypothetical case the Court decided to wait for." NACDL Br. 3, 7. As *amici curiae* recognize, this Court is unlikely to receive another vehicle as

[5] The United States cites ten cases in which this Court denied review of similar challenges. Br. in Opp. 21. In each, the United States had argued in opposition that the vehicle was unsuitable because the sentence was reasonable even without the judge-found fact, the Petitioner waived the argument, or both. *See* U.S. Br. at 25-26, *Smith* v. *United States*, 135 S. Ct. 704 (2014) (No. 13-10424) (petitioner's sentence was substantively reasonable even absent the judge-found facts); U.S. Br. at 9-10, *Jones* v. *United States*, 135 S. Ct. 8 (2014) (No. 13-10026) (same); U.S. Br. at 10, *Garcia* v. *United States*, 132 S. Ct. 1093 (2012) (No. 11-6626) (same); U.S. Br. at 10-11, *Culberson* v. *United States*, 562 U.S. 1289 (2011) (No. 10-7097) (same); U.S. Br. at 9-10, *Taylor* v. *United States*, 562 U.S. 1181 (2011) (No. 10-5031) (same); U.S. Br. at 8, *Gibson* v. *United States*, 559 U.S. 906 (2010) (No. 09-6907) (petitioner's sentence was substantively reasonable even absent the judge-found facts, and he also failed to preserve his constitutional claim in the court of appeals); U.S. Br. at 31 n.17, *Magluta* v. *United States*, 556 U.S. 1207 (2009) (No. 08-731) (petitioner failed to preserve his constitutional claim in the court of appeals); U.S. Br. at 11-14 & n.5, *Marlowe* v. *United States*, 555 U.S. 963 (2008) (No. 07-1390) (petitioner's sentence was substantively reasonable even absent the judge-found facts, and he also failed to preserve his constitutional claim in the court of appeals); U.S. Br. at 14-16, *Bradford* v. *United States*, 552 U.S. 1232 (2008) (No. 07-7829) (same); U.S. Br. at 12, *Alexander* v. *United States*, 552 U.S. 1188 (2008) (No. 07-6606) (petitioner's sentence was substantively reasonable based solely on the facts to which he admitted).

well-suited for addressing the important constitutional questions that the petition presents.[6] *Id.* at 3; Berman Br. 4.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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JUNE 2016

[6] The fact that Petitioner was never charged with murder, either in federal or state court, makes Petitioner's case an even cleaner vehicle for addressing the questions presented than a petition that involves a district judge's consideration at sentencing of so-called "acquitted conduct." Indeed, the fact that the prosecution pursued the murder allegation exclusively in a sentencing proceeding, where the Federal Rules of Evidence and the Confrontation Clause do not apply, simply underscores the fundamental constitutional violation that occurred here.