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 THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that represents criminal defense lawyers and works to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL submits many *amicus curiae* briefs each year to the United States Supreme Court and other courts to provide assistance on issues important to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.[1]

SUMMARY OF ARGUMENT

This case presents the question whether it violates the Fifth and Sixth Amendments of the Constitution for a trial court to impose a sentence that would be substantively unreasonable but for the

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or counsel for *amicus*, made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioner and respondent, upon timely receipt of notice of NACDL's intent to file this brief, have consented to its filing.

judicially found fact that the defendant committed another crime.

That question has been percolating in the lower federal courts at least since this Court expressly left the issue undecided in *Rita* v. *United States*, 551 U.S. 338 (2007). In the intervening years, the courts of appeals have rejected constitutional objections to sentencing enhancements based on judicially found facts, but as highlighted in the petition, a number of federal jurists have noted the serious questions raised by the practice and the need for this Court's review.

The time for that review is now. Although earlier decisions have presented similar issues, none has involved facts that so starkly illustrate the importance of the constitutional principles at stake. The petitioner here was convicted of non-violent fraud, which carried a Guidelines range of under five years, yet will receive an 87-year enhancement based *solely* on the district judge's own finding—on a hotly contested record—of a "heinous" murder. And unlike in some prior cases, here there is no plausible contention of harmless error; there is no issue of waiver; and petitioner is represented by able counsel who will ensure that the issues are thoroughly and competently litigated before the Court. Nor is there any reason to wait for further developments in the relevant law. Despite numerous reservations expressed by individual judges in concurring and dissenting opinions, the courts of appeals have reached consistent holdings on this issue, which is likely to prevent significant further developments in the law.

ARGUMENT

In 2007, this Court in *Rita* v. *United States* declined to consider the hypothetical issue of whether judicial factfinding may justify an otherwise unreasonable sentence. 551 U.S., at 353; *see also id.*, at 374 (Scalia, J., concurring in part and concurring in the judgment) (explaining that, under the Court's approach, "there will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts"). Other Justices recognized that "[s]uch a hypothetical case should be decided if and when it arrives." *Id.*, at 366 (Stevens, J., joined in part by Ginsburg, J., concurring).

That hypothetical case has become all too real. Although other cases have raised similar issues in the near decade since *Rita* was decided, none has presented the combination of facts that make this case such an ideal vehicle to address the question expressly left unresolved in *Rita*. For several reasons, this case presents the best possible concrete version of *Rita*'s hypothetical:

First, this case involves a "sentence[] that w[as] . . . upheld as reasonable only because of the existence of judge-found facts," *Rita*, 551 U.S., at 374 (Scalia, J., concurring in part and concurring in the judgment)—in the starkest possible terms. Petitioner pled guilty to a non-violent fraud offense causing $16,000 in loss. The Guidelines range for the offense was 46 to 57 months, yet petitioner faces effective life imprisonment based on the "fact" that he also committed murder—a "fact" found only by a

single judge, on a contested record that easily could have resulted in acquittal before reasonable jurors charged to find guilt beyond a reasonable doubt.

There is no question that this result implicates petitioner's jury-trial rights and all of the worst policy and constitutional consequences that flow from a judicial failure to safeguard them. Under any practical view of the case, petitioner is now serving a sentence for murder—a crime he was never charged with, let alone tried and convicted of. Indeed, it is doubtful that the district court even had jurisdiction to convict petitioner of such a crime. *Cf., e.g.*, 18 U.S.C. § 1111 (establishing federal offense for murder, but only "[w]ithin the special maritime and territorial jurisdiction of the United States"); *id.*, §§ 1112–1122 (establishing other homicide-related offenses in other specialized circumstances). The prosecution secured the sentence for murder without having to prove beyond a reasonable doubt that petitioner had committed that crime. Relieved of this burden, the government did not have to account to a jury beyond a reasonable doubt for critical evidentiary holes in its hypothetical case—for example, the facts that the victim has never been found, that certain eyewitnesses recall seeing the victim after the date on which the government argues he was killed, that no clear crime scene has been identified, and that the victim suffered from a mental illness that had led to multiple past episodes of going missing.

Second, and relatedly, there is no plausible question of harmless error here. There may be cases involving sentences that would arguably remain reasonable even absent judicially found facts, but no such argument is tenable here. Indeed, both the

government itself and the Fifth Circuit acknowledged the incontrovertible fact that petitioner's sentence would have been unreasonable, and therefore unlawful, absent the district judge's factfinding. *United States* v. *Hebert*, 813 F.3d 551, 563 (5th Cir. 2015).

Third, there are no potential waiver issues. As the Fifth Circuit noted, petitioner has adequately preserved all of his constitutional arguments—presenting this Court with a clean vehicle on which to resolve the question left open by *Rita*. *Id.*, at 559.

Fourth, petitioner is represented by eminently qualified counsel, who have experience before this Court and expertise with the issues presented. As a result, this Court can expect a strong adversarial process that will bring to light all relevant issues and arguments for the Court's consideration.

And finally, there is no reason to wait in the hopes that a similarly compelling case will arise after further developments in the lower courts. As the petition makes clear, little further development can be expected in the courts of appeals at this point. Indeed, as the Justice Scalia remarked in a dissent from the denial of certiorari in *Jones* v. *United States*, the *Rita* majority's decision to "dismiss[] the possibility of Sixth Amendment violations resulting from substantive reasonableness review" and the Court's ensuing "silence" on that question led the courts of appeals to conclude "that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding[.]" *Jones* v. *United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from the denial

of certiorari).[2] As Justice Scalia concluded, "[t]his has gone on long enough." *Ibid.*

And it is evident that a number of judges on the courts of appeals agree, as illustrated most recently by the concurring opinions authored by two judges of the D.C. Circuit submitted in connection with that court's denial of rehearing en banc in *United States* v. *Bell*. *See* 808 F.3d 926, 929 (D.C. Cir. 2015) (per curiam) (Millett, J., concurring in denial of reh'g en banc) ("[T]he 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.*, at 927–928 (Kavanaugh, J., concurring in the denial of reh'g en banc) (expressing a shared "concern" about allowing judges to "rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would"); *see also*, *e.g.*, *United States* v. *White*, 551 F.3d 381, 387 (6th Cir. 2008) (Merritt, J., dissenting) (arguing that judicial factfinding that is necessary to impose a sentence violates the Sixth Amendment); *United States* v. *Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (B. Fletcher, J., dissenting) ("If the jury does not substantively authorize the defendant's sentence, it cannot ensure the people's 'control in the

[2] The petition explicates this body of law in greater detail, but for some examples see *United States* v. *Treadwell*, 593 F.3d 990, 1017–1018 (9th Cir. 2010); *United States* v. *Ashqar*, 582 F.3d 819, 823–825 (7th Cir. 2009); *United States* v. *White*, 551 F.3d 381, 384–385 (6th Cir. 2008) (en banc); *United States* v. *Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008); *United States* v. *Redcorn*, 528 F.3d 727, 745–746 (10th Cir. 2008).

judiciary,' as required by the Sixth Amendment." (citation omitted)); *United States* v. *Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., specially concurring) (noting that the "reasonable doubt standard is warranted when imputations of criminal conduct are at stake not only 'because of the possibility that [an individual] may lose his liberty upon conviction' but also 'because of the *certainty* that he would be stigmatized. . . .'" (citations omitted)).

In short, this petition presents the nonhypothetical case the Court decided to wait for in *Rita*. The Court should grant review to determine whether it was permissible for the district court to impose a 92-year sentence for a non-violent fraud with a Guidelines range of under five years, based solely on a judicial finding that petitioner committed a "heinous" murder. And for the reasons further detailed in the petition, the Court should also conclude that this sentence violated petitioner's right to a jury trial under the Fifth and Sixth Amendments.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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