CASE NO. 22-5993

IN THE SUPREME COURT OF THE UNITED STATES

October 2022 Term

MALIK ROSS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

Submitted By:

Beverly A. Beimdiek
Assistant Federal Public Defender
1010 Market, Suite 200
St. Louis, MO. 63101
(314) 241-1255

Counsel for Petitioner

QUESTION PRESENTED

Does a judge deny a defendant's Fifth Amendment rights by increasing a prison sentence based on disputed facts the Court did not find beyond a reasonable doubt, but for which the sentence would be stricken as substantively unreasonable on appeal?

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ARGUMENT

The Court should decide if the Fifth Amendment prohibits district courts from basing dramatic increases in federal sentences on disputed facts proved only by a preponderance of evidence without which the sentence would be struck down.

The plethora of facts vindicating the Saint Louis Prosecutor's finding that the evidence did not support any criminal charge against Petitioner make this case uniquely suited as a vehicle for this Court to assess the Fifth Amendment's proper scope in the context of a federal court imposing a nine-fold increase of punishment based on facts the judge pointedly did not find beyond a reasonable doubt. Petition for Certiorari at 9-11. Members of this Court who have previously cited the Constitutional implications of this Court's Twenty-First Century creation of "substantive reasonableness" review of federal criminal sentences noted the need to address the issue when a non-hypothetical case arose. *See Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., dissenting from denial of certiorari); *Rita v. United States*, 551 U.S. 338 (2007) (Stevens, J., concurring) ("Such a hypothetical case should be decided if and when it arises.").

The Government's redaction of all the exonerating facts supporting the Saint Louis prosecutor's conclusion that Petitioner should not be charged for the tragic death of a child down the street from where armed men approached him obscures the unique clarity this case provides as a vehicle to evaluate the Fifth Amendment issue *Jones* pointed out. Brief in Opposition ("BIO") at 2-3. Age 23 on the date in question, Petitioner had a long diagnosed intellectual disability that sharply depressed his IQ. He had no prior record, and he was walking home from his job driving an armored vehicle transporting money for which he lawfully carried a gun and wore an armored vest that often prompted reactions from strangers. At least one coworker told police he doubted Petitioner had the mental wherewithal to conceive of the embezzlement. His codefendant aunt undertook the preparations, purchasing two back packs to divide the money

and retrieving the bag of money from the spot where Petitioner was directed to leave it on the street. Police recovered almost half of the funds taken from Petitioner's backpack, but almost no money from the aunt's share.

None of the pending petitions the Government cites challenging sentences enhanced by acquitted conduct manifest such numerous and clear exonerating circumstances illustrating the injustice and oppression the preponderance of evidence standard may cause in federal sentencing. BIO at 12-13 & n.* The Government's suggestion that cases involving acquitted conduct present more compelling grounds to decide the issue because jurors acquitted the petitioners of one or more charges ignores the facts that no jury convicted Petitioner of anything, and the state prosecutor found the evidence did not justify charging him for any crime. Moreover, the fact Petitioner focuses on his Fifth Amendment right to the reasonable doubt threshold of proof while waving his right to a jury's application of it does not require this Court to engage in the ancillary complications as to how to reconvene or replace a jury to determine sentence enhancing facts. Petitioner's case presents a clear vehicle to examine the Fifth Amendment issue uncomplicated by challenges related to fulfilling the Sixth Amendment right to a jury in a sentencing context. Compare *United States v. Haymond*, 139 S. Ct. 2369, 2385 (2019) (leaving such issues for the lower Court on remand).

The Government's other arguments also provide no basis to further postpone the issue Petitioner presents. The Twentieth Century cases on which the Government principally relies predate the "substantive reasonableness" appellate review first created as a remedy for the Constitutional violation caused by mandatory Sentencing Guidelines in *United States v. Booker*,543 U.S. 220, 260-61 (2005). BIO at 8-11. None of the pre-*Booker* cases contemplated or even likely conceived of the possibility that the scope of lawful judicial sentencing would be

limited in a Sentencing Guidelines system prohibiting "substantively unreasonable" sentences. The Government does not dispute that Petitioner's 10-year sentence for confessing non-violent embezzlement for which the Sentencing Guidelines urged only 8-14 months would not survive review for substantive reasonableness in the Eighth Circuit but for the facts the District Court only found by a preponderance of evidence, *see* Petition for Certiorari at 20, citing *United States v. Martinez*, 821 F. 3d 984, 989 (8th Cir. 2016).

The Government's contention that the *Jones* dissent focused on the Sixth Amendment right to jury trial does not negate the propriety for this Court's prompt review. The Fifth Amendment guarantee applies to jury-waived trials decided by judges. *See United States v. Miller*, 829 F. 3d 519, 524 (7th Cir. 2016); *United States v. Kain*, 589 F. 3d 945, 948 (8th Cir. 2009). The contention that a majority of this Court's members have not "endorsed" Petitioner's position proves nothing. The "rule of four," requires only four votes to grant certiorari. *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (Stewart, J., concurring). Justices Thomas and Kavanaugh have already endorsed the idea that under *Booker*'s "reasonableness review," some facts without which a federal sentence could not survive a challenge of substantive unreasonableness on appeal must be found beyond a reasonable doubt. Justice Thomas joined Justice Scalia's dissent in *Jones*, and Justice Kavanaugh recognized the viability of this principle in an opinion concurring from the denial of rehearing while he sat on the District of Columbia Court of Appeals. *See United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*). Justice Gorsuch also recognized that the Constitutionality of a judge increasing a sentence based on unadmitted facts a judge finds without the aid of a jury is "far from certain," citing *Jones*. *See United States v. Sabillon-*

Umana, 772 F.3d 1328, 1331 (10th Cir. 2014). There may well be four or more votes to decide the issue among the current members of this Court.

Many of the unsuccessful attempts to raise this issue cited in the BIO lacked the compelling record Petitioner's case presents. Some of those cases did not even involve a claim that appellate "reasonableness review" reduced the scope of what constituted a lawful sentence. *See United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005) (decided three weeks after *Booker* and making no reference to whether facts essential to a substantive reasonableness finding on appeal must be found beyond a reasonable doubt); *United States v. Grier*, 475 F.3d 556 (3rd Cir. 2007) (Grier argued only the reasonable doubt standard should apply to Guidelines findings relating to "separate offenses"). Other cases dismissed the challenge Petitioner cites here in the context of sentences that fell dramatically *below* the Guidelines range the appellants challenged and thereby lacked factual support to establish substantive unreasonableness, *see United States v. Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008) (no Sixth Amendment violation appeared where the district court "slashed the defendant's Guidelines sentence in half"); *United States v. Treadwell*, 593 F.3d 990, 1017-18 (9th Cir. 2010) (the court varied five offense levels below the range it calculated), or involved far less dramatic Guidelines enhancements based on conduct for which the accused was acquitted, *see United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (then-Judge Kavanaugh noted equitable concerns yet followed the prevailing precedent permitting the use of acquitted conduct that raised a Guidelines range only from 37-46 months to 57-71 months).

Similar distinctions apply to the unsuccessful petitions for certiorari the Government cites, some of which also involved sentences far less inflated by judicial fact-finding than the nine-year increase in Petitioner's case and therefore lacked a clear factual basis required to claim

the court's factfinding had to employ the reasonable doubt threshold of proof. *See, e.g.*, *McCray v. United States*, 142 S. Ct. 1373 (2022) (No. 21-6077), Reply to Brief in Opposition, p. 6 (March 1, 2022) (sentence imposed was just 30 months higher than the Guidelines range the parties contemplated); *Lonnie Earl Parlor v. United States*, 142 S. Ct. 623 (2021) (No. 21-6148) (sentence was 49 months above the Guidelines range based on uncharged possession of different guns at different times); *Siegelman v. United States*, 577 U.S.1092 (2016) (No. 15-353) (the district court imposed a sentence almost 50 percent below the enhanced guidelines minimum term); *Culberson v. United States* 562 U.S. 1289 (2011) (No. 10-7097) (involving a 40 month sentence imposed within a 36-47 month Guideline range the judge calculated, *see United States v. Culberson*, 382 Fed. Appx 400, 401 (5th Cir. 2010)); *United States v. Chandia*, 675 F.3d 329, 333-334 (4th Cir.2012) (application of the Anti-Terrorism Guidelines enhancement increased guidelines range from 63-78 months to 360-months-to-life, but Court varied down to 180 months). Another case involved a petitioner whose defense was that a storm interrupted his plan to murder the victim after which his accomplice acted alone and without premeditation to kill their target), *see United States v. Jackson*, 782 F.3d 1006,1013 (8th Cir. 2015). Still other cases the Government cited were decided prior to Justice Scalia's dissent in *Jones* and did not apparently couch the Fifth Amendment claim in terms of the limits on lawful sentencing arising from substantive reasonableness review, *see United States v. Butler*, 429 Fed. Appx. 239, 241 (4th Cir. 2011), or did not raise it in the terms of the Fifth Amendment threshold, *United States v. Lee*, 625 F.3d 1030 (8th 2010), cert. denied, 565 U.S. 829 (2011) (No. 10-9512), or involved a defendant suspected, but not charged, with murdering a witness suspected of cooperating with police, *United States v. Gibson*, 328 Fed. Appx. 860, 862-63 (2009), cert. denied 559 U.S. 906 (2010) (No. 09-6907). The facts in Petitioner's case provide this Court a far clearer example of

the injustice and oppression invited by denying a defendant the Fifth Amendment safeguard of requiring facts proved beyond a reasonable doubt to impose punishment that could not otherwise survive a challenge on appeal.

At the very least, Petitioner's claim should be held in abeyance until such time as this Court rules on the pending petitions raising both the Sixth and Fifth Amendment implications posed by sentences enhanced based on acquitted conduct found only by a preponderance of evidence. BIO at 12 & n.*, citing *McClinton v. United States*, No. 21-1557; *Luczak v. United States*, No. 21-8190; *Shaw v. United States*, No. 22-118; *Karr v. United States*, No. 22-5345; *Bullock v. United States*, No. 22-5828; *Cain v. United States*, No. 22-6212; *Sanchez v. United States*, No. 22-6386. If any one of these petitions are granted and lead to a determination that the Sixth Amendment right to a jury trial precludes judicial finding of facts for which a defendant was previously acquitted, the Court will necessarily have established the right to have such sentencing enhancements established by proof beyond a reasonable doubt. *See Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (the Sixth Amendment right guarantees a jury's finding of requisite facts beyond a reasonable doubt). The compelling evidence that Petitioner lacked criminal culpability for the death of the child for which the district court inflated his sentence from 8-14 months to 10 years justifies holding this petition in abeyance pending this Court's resolution of any grant of certiorari in those cases.

CONCLUSION

WHEREFORE, Petitioner requests that this Court grant his Petition for a Writ of Certiorari or hold it in abeyances pending the disposition of the petitions for certiorari in *McClinton, Luczak, Shaw, Karr, Bullock, Cain*, or, *Sanchez, supra.*

Respectfully submitted,

Beverly A. Beimdiek
Assistant Federal Public Defender
1010 Market Street, Suite 200
St. Louis, Missouri 63101
Telephone: (314) 241-1255
Fax: (314) 421-3177
E-mail: Bevy Beimdiek@fd.org

ATTORNEY FOR PETITIONER