No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ERICH DEOLAX RIKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a factual finding that is necessary to render a federal sentence substantively reasonable must be found by a jury beyond a reasonable doubt.

LIST OF RELATED PROCEEDINGS

United States v. Riker, No. 20-CR-1220 (D. N.M.) (judgment entered June 15, 2021)

United States v. Riker, No. 21-2072 (10th Cir.) (judgment entered Nov. 16, 2022)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioner, Erich Deolax Riker, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on November 16, 2022.

DECISION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit in this case is unpublished, but it is available on Westlaw at 2022 WL 16955059, and it is reproduced in the Appendix at A1.

JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction in this criminal case pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The Tenth Circuit entered its judgment on November 16, 2022. Mr. Riker's certiorari petition is being filed within 90 days of that judgment and, therefore, is timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

U.S.S.G. § 2A3.5(b)(1) provides:

> (b) Specific Offense Characteristics
>
> (1) (Apply the greatest):
> If, while in a failure to register status, the defendant committed—
>
> (A) a sex offense against someone other than a minor, increase by 6 levels;
>
> (B) a felony offense against a minor not otherwise covered by subdivision (C), increase by 6 levels; or
>
> (C) a sex offense against a minor, increase by 8 levels.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

As a result of a judge's preponderance-of-the-evidence finding that Petitioner Erich Riker committed an uncharged sex offense, Mr. Riker was sentenced pursuant to a Federal Sentencing Guidelines range that was about 160% higher than it otherwise would have been. But for such judicial factfinding, and the dramatic increase to his Guidelines range that resulted, Mr. Riker's sentence would have been substantively unreasonable and therefore illegal. Below, Mr. Riker claimed that allowing a judge to find facts with such a profound impact on his sentence violated his constitutional right to trial by jury. The Tenth Circuit rejected his claim. This Court should grant certiorari to recognize what several Justices have already concluded: "[A]ny fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury." *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting).

STATEMENT OF THE CASE

Mr. Riker was charged in the United States District Court for the District of New Mexico with failing to register as a sex offender. Appendix at A2. He pleaded guilty. *Id.* A presentence report prepared by the probation office accused Mr. Riker of committing an uncharged sex offense against a minor while in failure to register status—an accusation that, if sustained by the sentencing judge, substantially increases a defendant's Guidelines range by adding eight offense levels pursuant to U.S.S.G. § 2A3.5(b)(1)(C). Mr. Riker disputed the truth of this accusation and also objected that applying § 2A3.5(b)(1)(C) under the circumstances would amount to

impermissible judicial factfinding in violation of the Fifth and Sixth Amendments. Appendix at A3.

The district court overruled Mr. Riker's objection and found, by a preponderance of the evidence, that he had committed the uncharged sex offense. *Id.* As a result of its application of § 2A3.5(b)(1)(C), the district court applied a Guidelines range 70 to 87 months' imprisonment. *Id.* at A2. Without the enhancement, Mr. Riker's sentencing range would have been just 27 to 33 months' imprisonment. *See* Presentence Report at 5–13; U.S.S.G. §§ 2A3.5(a)(2), 3E1.1, 5A. The judge sentenced Mr. Riker to 87 months' imprisonment—the top of the range it had calculated in accordance with § 2A3.5(b)(1)(C).

Mr. Riker appealed to the United States Court of Appeals for the Tenth Circuit. He argued that the district court's application of § 2A3.5(b)(1)(C) violated his Fifth and Sixth Amendment rights. Appendix at A3–A4. In particular, he maintained that (1) without the district court's finding that he had committed an uncharged sex offense against a minor, his sentence would be substantively unreasonable and (2) a fact necessary to render a sentence substantively reasonable is effectively an element of a greater offense and must be either admitted by the defendant or found by a jury beyond a reasonable doubt. *Id.* at A4.

The Tenth Circuit ruled against Mr. Riker by rejecting the second prong of his argument. The court assumed that, absent the application of § 2A3.5(b)(1)(C), Mr. Riker's sentence would indeed be substantively unreasonable. The court ruled, however, that its existing case law foreclosed Mr. Riker's constitutional theory: "We have

held that the Constitution does not prohibit a district court from applying the sentencing guidelines based on facts the court finds by a preponderance of the evidence—even if the sentence would be substantively unreasonable without the findings." Appendix at A4 (citing *United States v. Stein*, 985 F.3d 1254, 1266 (10th Cir. 2021), and *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir. 2005)).

This Petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to put a stop to recurring violations of the right to jury trial in the federal criminal justice system. The Tenth Circuit, in lockstep with lower courts across the country, holds that facts necessary to render a longer sentence substantively reasonable may be found by a judge by a preponderance of the evidence. As will be explained below, this approach is contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—which provides that any fact that exposes a defendant to a punishment greater than otherwise legally permitted must be found by a jury beyond a reasonable doubt. Certiorari is warranted not only because the lower court decisions contradict *Apprendi* but also because the error affects a substantial number of federal criminal cases. Frequently applied Guidelines for frequently prosecuted offenses allow for judicial factfinding to radically increase defendants' Guidelines ranges—and thereby allow for judicial factfinding to expose defendants to longer sentences than would otherwise be legally available. As three Justices have already recognized, this issue has been festering in the lower courts for too long already; further percolation will not help. And Mr. Riker's case presents a strong vehicle for this Court to bring the federal sentencing system into compliance with *Apprendi*.

I. The Lower Courts' Approach of Allowing Judges to Find Facts Necessary to Render a Sentence Substantively Reasonable Violates *Apprendi*.

As exemplified by the Tenth Circuit's decision in Mr. Riker's case, the lower courts uniformly permit judges to find by a preponderance of the evidence facts that are needed to make a federal sentence substantively reasonable. *See Jones*, 574 U.S. at 948 (Scalia, J., dissenting) (collecting cases). This is impossible to square with *Apprendi*.

As a matter of background, although district courts are not bound to impose a sentence within the range specified in the Federal Sentencing Guidelines, the Guidelines range nevertheless plays a crucial role in federal sentencing. The Guidelines "are the framework for sentencing and serve to anchor the district court's [sentencing] discretion." *Molina-Martinez v. United States*, 578 U.S. 189, 198–99 (2016) (quotation and alteration marks omitted). And, crucially for this case, a sentence that strays too far from the Guidelines range without sufficient justification is substantively unreasonable and cannot stand. *See Gall v. United States*, 552 U.S. 38, 50–51 (2007).

Under this regime, factual findings that dramatically increase the Guidelines range, and which thereby authorize sentences that would otherwise be substantively unreasonable, are elemental findings that must be made by a jury. As this Court recognized in *Apprendi*, the jury trial guarantee applies to all elements of the offense, and any fact that exposes a defendant to a punishment greater than that otherwise legally permitted counts as an element. *See Apprendi*, 530 U.S. at 483 n.10. In the federal sentencing system, facts that increase the Guidelines range to such an extent that they render a longer sentence substantively reasonable thereby expose the

defendant to a higher sentence than would otherwise be legally permitted. Under *Apprendi*, such facts are elements that, unless admitted by the defendant, must be submitted to a jury.

Mr. Riker is hardly alone in recognizing that *Apprendi* requires jury factfinding in this situation. A 2007 concurring opinion authored by Justice Scalia and joined by Justice Thomas did so. *See Rita v. United States*, 551 U.S. 338, 367–84 (2007) (Scalia, J., concurring). This is how that concurrence described the constitutional problem:

> [F]or every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. Every sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment. Appellate courts' excessiveness review will explicitly or implicitly accept those judge-found facts as justifying sentences that would otherwise be unlawful. The only difference between this system and the . . . mandatory Guidelines [invalidated in *United States v. Booker*, 543 U.S. 220 (2005), as in violation of the Sixth Amendment] is that the maximum sentence based on the jury verdict or guilty plea was specified under the latter but must be established by appellate courts, in case-by-case fashion, under the former. This is, if anything, an additional constitutional disease, not a constitutional cure.

Id. at 372.

Seven years later, Justice Scalia authored an opinion dissenting from the denial of certiorari on the question presented in this case. *See Jones*, 574 U.S. at 948 (Scalia, J., dissenting). This time, Justice Scalia was joined not only by Justice Thomas but also by Justice Ginsburg. In *Jones*, Justice Scalia described the *Apprendi* violation as follows:

> Petitioners present a strong case that, but for the judge's finding of fact, their sentences would have been substantively unreasonable and therefore illegal. If so, their constitutional rights were violated. The Sixth

> Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt. Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime and must be found by a jury, not a judge. We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge.

Id. at 948 (citations and quotation marks omitted).

Justice Scalia's understanding of how the Sixth Amendment interacts with the federal sentencing system is correct, and this Court should grant certiorari to require the lower courts to comply with *Apprendi*.

II. The Lower Courts' Error Is Highly Consequential.

Also supporting a grant of certiorari is the fact that the *Apprendi* violation described above affects a substantial number of federal defendants. Numerous provisions of the Federal Sentencing Guidelines allow for judicial factfinding to produce large increases to defendants' Guidelines ranges. And, significantly, judicial factfinding that occurs in connection with commonly prosecuted federal offenses—wire fraud, drug trafficking, and unlawful firearm possession—may have such a massive impact on a defendant's Guidelines range that jury factfinding should clearly be required.

For example, a defendant convicted of wire fraud could have a default offense level of 7 and a Guidelines-recommended sentence of less than one year in jail.[1] *See*

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[1] This example and the two that follow assume, for Guidelines-calculation purposes, that the defendant has a middling criminal history (category III). The relative impact of the judicial factfinding would be similar for other criminal history categories.

U.S.S.G. §§ 2B1.1(a)(1), 5A. But if a judge found by a preponderance of the evidence that the defendant's fraud caused $25 million in loss, that would result in a 22-point increase to the offense level and produce a Guidelines-recommended sentence of about ten years' imprisonment. *See* U.S.S.G. § 2B1.1(b)(1).

To take another example, a defendant convicted of selling 5 grams or more of methamphetamine would have a default offense level of 24 and a Guidelines range of 63 to 78 months' imprisonment. *See* 21 U.S.C. § 841(b)(1)(B)(viii); U.S.S.G. § 2D1.1(c)(8). However, a judge could determine by a preponderance of the evidence that the defendant actually participated in a broader drug conspiracy involving 5 kilograms of methamphetamine. That finding would increase the defendant's offense level to 38 and result in a Guidelines range of 292 to 365 months' imprisonment. *See* U.S.S.G. § 2D1.1(c)(1).

As a final example, a defendant convicted of being a felon in possession of a firearm would have a default offense level of 14 and a Guidelines-recommended sentence of 21 to 24 months. *See* U.S.S.G. § 2K2.1(a)(6). But if a judge found by a preponderance of the evidence that the defendant used the firearm in a premeditated attempt to kill another person, that would increase the offense level to 33 and result in a Guidelines range of 168 to 180 months' imprisonment. *See* 18 U.S.C. § 924(a)(8); U.S.S.G. §§ 2K2.1(c)(1)(A), 2X1.1, 2A2.1(a)(1), 5G1.1(c)(1).

Scenarios like these are not just theoretical possibilities. According to data collected and published by the United States Sentencing Commission, in 2021 (the most recent year for which data is available), 179 defendants sentenced under the fraud

guideline sustained an offense level increase of 20 points or more due to a judge's preponderance-of-the-evidence finding regarding the amount of loss their offenses caused. *See* U.S. Sent. Comm'n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2021* at 25–26, https://bit.ly/3XdPVQM (last visited Feb. 8, 2023). During that same year, more than a thousand drug-trafficking defendants were sentenced pursuant to a base offense level of 38, rather than a far lower offense level, due to judicial factfinding. *Id.* at 55. Although the Sentencing Commission has not published statistics regarding how frequently judges sentence firearms defendants based on preponderance-of-the-evidence findings that they committed a more serious crime with the gun, in undersigned counsel's experience, this too occurs frequently: federal prosecutors often charge unlawful firearms possession as a jurisdictional hook that allows them to prosecute shootings and attempted shootings that would otherwise be relegated to state court. And these scenarios are just the tip of the iceberg, as Mr. Riker's case shows. Although the particular Guideline at issue in his case is not as common, the 8-level increase was nevertheless imposed 87 times during the ten-year period between 2011 and 2021. *See* U.S. Sent. Comm'n, *Data Reports by Guideline*, https://bit.ly/3JObmEZ (last visited Feb. 8, 2023).

In short, the lower courts' erroneous refusal to apply *Apprendi* in these circumstances affects numerous federal criminal defendants every year.

III. Further Percolation in the Lower Courts Is Not Warranted.

Allowing this issue to continue to percolate in the lower courts would be of no benefit. As Justice Scalia observed in *Jones*, "the Courts of Appeals have uniformly

taken [this 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 statutory range." *Jones*, 574 U.S. at 948 (Scalia, J., dissenting) (collecting cases). As far back as 2014, three members of this Court opined that such *Apprendi* violations "ha[d] gone on long enough." *Id.* Nine years later, this issue is more than ripe for review. The Court will gain no further insight from lower court litigation, as Mr. Riker's own case shows. The Tenth Circuit's opinion below did not give any meaningful treatment to the *Apprendi* issue and, instead, simply noted that it had previously ruled against Mr. Riker's claim. *See* Appendix at A4. Further, the lower courts' precedent is entrenched. There is no realistic prospect that they will make a course correction absent this Court's intervention.

IV. Mr. Riker's Case Is a Solid Vehicle for Addressing the Question Presented.

Mr. Riker's case presents an appropriate opportunity for this Court to redress the lower courts' recurring *Apprendi* violations. There is no question of preservation. As the Tenth Circuit recognized, Mr. Riker duly presented his constitutional claim in the district court. *See* Appendix at A3. And Mr. Riker presented the exact same argument in the Tenth Circuit that he is presenting in this petition. *Id.* at A3–A4.

Importantly, the Tenth Circuit decided this case based on—and only based on—the question presented in this petition. Specifically, the only reason the Tenth Circuit gave for rejecting Mr. Riker's constitutional argument was its view "that the Constitution does not prohibit a district court from applying the sentencing guidelines based on facts the court finds by a preponderance of the evidence—even if the

sentence would be substantively unreasonable without the finding." Appendix at A4. Thus, no alternative holding would prevent the Court from reaching the question presented. Indeed, neither the Tenth Circuit's opinion nor the government's answer brief below even alludes to any possible alternative ground for decision.

Finally, the scenario presented by Mr. Riker's case throws the Sixth Amendment problem in sharp relief. Here, the sentencing court did not merely find an additional, consequential fact; it found that Mr. Riker committed an entirely different crime and then used its preponderance-of-the-evidence declaration of Mr. Riker's guilt of that offense to increase his sentencing exposure. For a judge to find Mr. Riker guilty of an uncharged offense and then find him eligible for a higher sentence on that basis strikes at the heart of the jury trial guarantee.

Because Mr. Riker's case is an apt illustration of a widespread problem, this Court's review is warranted.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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