No. _____

In The

Supreme Court of the United States

MOHAMAD Y. HAMMOUD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

James P. McLoughlin, Jr.
Counsel of Record
MOORE & VAN ALLEN, PLLC
100 North Tryon Street
Suite 4700
Charlotte, NC 28202
(704) 331-1000

Counsel for Petitioner

Stanley L. Cohen
ATTORNEY AT LAW
119 Avenue D
Third Floor
New York, NY 10009
(212) 995-2690

Counsel for Petitioner

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTIONS PRESENTED

1. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts (other than the fact of a prior conviction) that increase the maximum sentence dictated by the United States Sentencing Guidelines when those facts were not charged in the indictment and neither found by the jury on proof beyond a reasonable doubt (and subject to the admissibility requirements of the Federal Rules of Evidence) nor admitted by the defendant.

2. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts found by a preponderance of the evidence (and without regard for the admissibility requirements of the Federal Rules of Evidence) to apply a section of the United States Sentencing Guidelines, such as Section 3A1.4, that requires proof of elements not found in the underlying criminal statute and increases the sentence above the maximum sentence found in the underlying criminal statute.

3. If the answer to the first or second question is "yes," the following question is presented: What role do the Sentencing Reform Act of 1984 (and specifically 18 U.S.C. § 3552), the United States Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal sentencing practice.

4. If the answer to the first or second question is "yes," the following question is presented: May the Government re-indict Petitioner or convene a sentencing jury to correct the Constitutional violation(s) in light of the Double Jeopardy Clause, the Due Process Clause and *United States v. Jackson*, 390 U.S. 570 (1968).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. Constitutional Provisions

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MOHAMAD Y. HAMMOUD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mohamad Y. Hammoud, through his counsel of record, petitions for a writ of certiorari in a case pending on appeal to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The published order of the United States Court of Appeals for the Fourth Circuit (Case No. 03-4253) affirming the judgment (and sentence) of the United States District Court for the Western District of North Carolina (Docket No. 3:00CR147-1-MU) and holding that "*Blakely v. Washington* ... does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines" was filed on August 2, 2004. App., *infra*, 1. The order can be

found at http://pacer.ca4.uscourts.gov/opinion.pdf/034253OR.P.pdf. The district court's order regarding sentencing was not published, but a transcript of the sentencing hearing has been reproduced in the Appendix. App., *infra*, ___.

JURISDICTION

The district court imposed sentence on February 28, 2003 and entered judgment on March 18, 2003. App., *infra*, 3. Petitioner filed a notice of appeal on March 7, 2003. App., *infra*, 15. After multiple rounds of briefing and oral argument in the Fourth Circuit, including oral argument before the *en banc* court, the Fourth Circuit published an order affirming the judgment of the district court and denying Petitioner relief with respect to sentencing. Petitioner has not sought rehearing before the Fourth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e) pursuant to Sup. Ct. R. 11.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES INVOLVED

The constitutional provisions involved are:

U.S.C.A. Const. Amend. V:

> 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 navel 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.

U.S.C.A. Const. Amend. VI:

> 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 defense.

The statutes and United States Sentencing Guidelines involved are set forth in the Appendix. App., *infra*, 52.

STATEMENT

1. The District Court Proceedings

A. The Indictments

On July 31, 2000, Petitioner and sixteen other defendants were named in an indictment. R. 184-212. The indictment charged Petitioner with immigration fraud in violation of 8 U.S.C. § 1325(c) and 18 U.S.C. § 1546 (Counts 1 and 2); conspiracy to smuggle cigarettes in violation of 18 U.S.C. §§ 371 and 2342 (Count 35); and money laundering in violation of 18 U.S.C. §§ 1956(h) (Count 36). *Id.* On March 28, 2001, a superseding indictment charged Petitioner, Said Harb, and others (defined in the indictment as the "Charlotte Hizballah cell") with constituting a RICO enterprise that had engaged in immigration fraud, cigarette smuggling, credit card, mail fraud, wire fraud, money laundering and bribery in order to, among other things, "provide some of the illegal proceeds of the enterprise to Hizballah, a designated foreign terrorist organization" (Count 71). R. 259-76. The superseding indictment also charged Harb, Ali

Amhaz, Mohamad Dbouk, and Hassan Laqis with conspiring to use fraudulent credit cards to purchase military or "dual use" items in Canada for Hizballah, thereby providing material support or resources to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B (Count 72). *Id.* The superseding indictment alleged that Harb, Amhaz, and Dbouk provided additional services to Hizballah, including wiring money to accounts held by Hizballah operatives, obtaining fraudulent identifications for Hizballah procurement activities, and evaluating life insurance for Hizballah operatives killed in the course of terrorist attacks. *Id.*

In February 2002, Harb entered into a sealed plea agreement in which he pleaded guilty to conspiracy to commit immigration fraud, conspiracy to smuggle cigarettes, conspiracy to launder money, RICO, and conspiracy to provide material support to a designated foreign terrorist organization. R. 440. He stipulated to upward adjustments under the United States Sentencing Guidelines ("Guidelines"). All totaled, his offense level was 28, which yielded a Guideline range of 78 to 97 months. *Id.* Ultimately, by testifying against Petitioner, Harb was able to reduce his sentence to less than 4.5 years.[1]

On March 12, 2002, a second superseding indictment added Petitioner and Sheik Abbas Harake, who was described as a Hizballah military commander living outside Beirut, Lebanon, to the list of alleged co-conspirators in Count 72. R. 461-502. Specifically, the second superseding indictment alleged that Petitioner used his position as the leader of a group of Lebanese nationals in Charlotte to support and raise funds for violent Hizballah activity in Southern Lebanon; that he held meetings to solicit funds for Hizballah; and that he sent "unknown thousands of

[1] The stark contrast between Harb's 4.5 year sentence and Petitioner's 155 year sentence is enlightening about how the Guidelines can be manipulated to achieve dramatically different results.

dollars" to Hizballah operatives in Lebanon, including Harake and Shaykh Fadlallah. *Id.* It also alleged that Petitioner provided material support to a designated foreign terrorist organization (Count 78). *Id.*

B. The Trial

The central activity that drove almost all of the alleged offenses was cigarette smuggling. The cigarette smuggling operation, which was conducted by the sixteen defendants (most Lebanese nationals) thrived by purchasing cigarettes at 50 cents per carton tax in North Carolina, then delivering them to Michigan, where they were generally sold at a discount to the $7.50 per carton Michigan tax. R. 464. Profits derived from the smuggling operation sometimes went to a Michigan account in a false name and were then transferred to an account in the same name in North Carolina. Petitioner and his American wife/co-conspirator Angela Tsioumas, had joint authority over those accounts.

Tsioumas, who testified against her husband pursuant to a plea agreement, testified that she was not a member of a "Charlotte Hizballah cell;" had never been a member of Hizballah; and had never given any money to Hizballah. R. 2015-17. Like Tsioumas, none of the other members of the alleged "Charlotte Hizballah cell" testified that they were members of Hizballah or that the purpose of the cigarette smuggling was to support Hizballah. Indeed, no fact witness testified that the purpose of the cigarette smuggling was to obtain money for Hizballah.

Harb, the Government's star witness, testified that he was not a member of Hizballah. R. 2806. He testified that Petitioner had told him that the charitable donations made by Petitioner and others were sent to Harake, an alleged military commander for Hizballah in Beirut. R. 2760. Harb "corroborated" this claim by testifying that he had once carried $3,500 intended for Harake to Beirut at Petitioner's

request. R. 2763-64. However, Harb testified that he never delivered the money to Harake even though he spoke with him by telephone while he was in Lebanon. R. 2764-66. Instead, Harb gave the envelope to his *mother* for delivery to Petitioner's mother without ever mentioning Harake. R. 2765. Neither Harb nor any other witness provided evidence that the money reached Harake, yet this was the sole financial transaction supporting Counts 72 and 78 against Petitioner. With respect to procuring dual-use technology in Canada, Harb testified that Petitioner was not involved. R. 2685-86, 2734-49, 2860.

Petitioner testified in his defense. He testified to being born in the Bourj Al-Barajneh, a poor neighborhood of Beirut that has suffered from militia occupation by the Palestinians, who left when the Israelis invaded, followed by Amal, then Hizballah. R. 3040-43. Petitioner openly acknowledged his sympathies with Hizballah's humanitarian efforts in Lebanon and its effort to expel the Israeli army from Lebanon. R. 3077-78. He indicated that he was in the United States because his brother had told him how good it is here. R. 3050-51.

Although Petitioner admitted that he had received many requests for money for the Lebanese Resistance from Abu Adham, he testified that he had never sent Adham any money. R. 3070. Petitioner also admitted that Harake, who had been his next door neighbor in Lebanon since he was a child, is a member of Hizballah. R. 3076. However, Petitioner denied ever sending money to Harake. R. 3076-77. He further denied ever giving Harb money to send to Harake, his mother or anyone else.

Petitioner testified that Fadlallah is a worldwide spiritual leader for Shi'a Muslims, not a member of Hizballah, and has been in conflict with Hizballah over the last several years. R. 3071-72. Petitioner admitted sending him money in 1994, when Fadlallah was not on any terrorist

list, but sent none after it became illegal to do so. R. 3074. The Government presented no evidence to the contrary.

C. The Jury Verdict

After a three-week trial, the jury began its deliberation. Count 71 (RICO) charged the enterprise with four purposes, only one of which involved Hizballah. In response to a question from the jury, the district court instructed the jury that it had to agree unanimously on one or more of the four purposes, but it was not required to agree unanimously on all four purposes or any particular one. R. 3626-29.

On the third day of deliberations, the jury asked "[D]o we have to find one conspiracy or a conspiracy out of multiple (sic) utilizing only some of the manner and means of conspiracy." R. 3648. The district court instructed the jury that in order to convict on Count 72 (conspiracy to provide material support), it must find that "that there was a single conspiracy, not multiple conspiracies. Multiple conspiracies with a common goal. Not what was charged." R. 3648. This instruction conflated the separate conspiracies into one. At approximately 3 p.m. that afternoon, the jury indicated that it could not reach an agreement on Count 72; the District Court responded with an *Allen* Charge. R. 3641-44. The jury emerged with the verdict form at 5:20 p.m. that day. R. 3650. The verdict form asked the jury to vote guilty or not guilty on each offense and contained no special interrogatories. The jury found Petitioner guilty on Counts 1 and 2 (immigration fraud), 35 (conspiracy as to cigarette smuggling), 36 (conspiracy as to money laundering), 37 and 41 (cigarette smuggling), 43 and 49 (money laundering), 53, 54, and 55 (credit card fraud and conspiracy as to same), 71 (RICO), 72 (conspiracy to provide material support), and 78 (material support). *Id.*

D. The Sentencing

On February 28, 2003, Petitioner was sentenced to 1,860 months imprisonment in accordance with the recommendations of a Presentence Investigation Report ("PSR") first prepared on October 31, 2002. App., *infra*, 49. As an initial matter, the PSR grouped all of the offenses for Guideline calculation purposes and used the most serious offense to establish the base offense level. R. 836. According to the PSR, the most serious offense was the violation of 18 U.S.C. § 2342 (conspiracy to smuggle cigarettes) because under U.S.S.G. §§ 2E4.1 and 2T4.1, the base offense level was determined by reference to the amount of tax evaded. *Id.* With respect to this issue, the PSR concluded that the "conspiracy involved more than $2,500,000 in taxes evaded." Pursuant to U.S.S.G. § 2T4.1(J), it found that the base offense level was 24.[2] *Id.*

To the base offense level of 24, the PSR added another (1) two points under U.S.S.G. § 2S1.1(b)(2)(B), because Petitioner was convicted of violating 18 U.S.C. § 1956, (2) two points under U.S.S.G. § 2S1.1(b)(3) for "sophisticated [money] laundering," (3) four points under U.S.S.G. § 3B1.1 for being a "leader and organizer," and (4) two points under U.S.S.G. § 3C1.1 for "obstruction of justice." R. 837-38. The PSR then increased the resulting offense level of 34 by another 12 points pursuant to the terrorism enhancement in U.S.S.G. § 3A1.4. R. 3691-92, 3706. U.S.S.G. § 3A1.4 also increased Petitioner's criminal history category from a I to a VI, despite the fact that Petitioner had no prior offenses. *Id.* The end result was a base offense level of 46 and a criminal history category VI, which yielded a Guideline range of "life." R. 3706.

---

[2] Elsewhere, the PSR referred to a tax loss of "over $3 million dollars" and "in excess of $4 million dollars." R. 833-34. The PSR did not reconcile these internal inconsistencies.

The maximum sentences authorized by the statutes setting forth the various offenses for which Petitioner was convicted ranged from 60 to 240 months. Rather than limit the sentence to the statutory maximum of the most significant offense, the district court imposed the maximum sentence for all but two offenses[3] and then "stacked" them to reach the "life" sentence mandated by the Guidelines. App., *infra*, 52. Thus, the district court imposed consecutive 240 month sentences on Counts 36, 43, 49 and 71, consecutive 120 month sentences on Counts 2, 54, 55, 72 and 78, and consecutive 60 month sentences on Counts 1, 35, 37, 41, 53. *Id.* at 49. The district court handed down the 1,860 month (155 years) sentence because it believed that it was "required by law." *Id.* at 49.

2. The Court of Appeals Proceedings

After an initial round of briefing, a three-judge panel of the Fourth Circuit heard oral argument on May 4, 2004. On June 30, 2004, the Fourth Circuit ordered supplemental briefing and a rehearing *en banc* on the impact of *Blakely v. Washington,* 124 S. Ct. 2531 (2004), on the sentencing issues raised by Petitioner. Oral argument before the *en banc* court was held on August 2, 2004. That same day, the Fourth Circuit published an order affirming the judgment of the District Court and holding that *Blakely* "does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines." App., *infra*, 1. The order directed district courts within the Circuit to continue sentencing defendants pursuant to the Guidelines, but pending a definitive ruling by the Supreme Court, also announce an alternative sentence pursuant to 18 U.S.C. § 3553(a) treating the Guidelines as "advisory only." *Id.*

---

[3] The district court imposed 120 month, rather than 180 month, sentences on Count 72 and 78.

REASONS TO GRANT THE PETITION

In *Blakely*, this Court reaffirmed that the Sixth Amendment's right to a jury trial includes the right to have a jury determine that the Government has proved beyond a reasonable doubt all facts legally essential to the sentence imposed. *Blakely*, 124 S. Ct. at 2533 . By most accounts, this reaffirmation created serious ripples in the previously still waters of the federal sentencing scheme. See, e.g., *United States v. Penaranda*, 2004 WL 1551369 (2nd Cir. July 12, 2004) ("*Blakely* not only casts a pall of uncertainty on more than 22,000 federal sentences imposed since Apprendi was decided ..., but it also raises the prospect that many thousands of future sentences may be invalidated. . . ."); *United States v. Gonzalez*, 2004 WL 1444872 (S.D.N.Y. June 28, 2004) ("Needless to say, Blakely calls into question the long-standing practices of federal courts in implementing the United States Sentencing Guidelines"). Petitioner is aware that this Court granted certiorari this week in *United States v. Booker*, 2004 WL 1535858 (7th Cir. July 9, 2004), *cert. granted*, 2004 WL 1713654 (August 2, 2004) and *United States v. Fanfan*, 2004 WL 1723114 (D.Me. June 28, 2004), *cert. granted*, 2004 WL 1713655 (August 2, 2004) both of which present questions related to *Blakely*'s impact on the Guidelines. Petitioner argues that this case is an appropriate, indeed necessary, companion to *Booker* and *Fanfan* because of the breadth and uniqueness of the issues this case presents.

1. This Case Allows The Court To Address A Wide Range of *Blakely* Issues

The core *Blakely* issue in both *Booker* and *Fanfan* is the district court's determination regarding drug quantity. See *Booker*, No. 04-104, Petition for a Writ of Certiorari, p. 2-7; *Fanfan*, No. 04-105, Petition for a Writ of Certiorari, p. 7. By contrast, this case presents six different *Blakely* issues. Based upon proof by a preponderance of the evidence (and

without regard for the admissibility requirements of the Federal Rules of Evidence), the district court found (1) that Hizballah was a terrorist organization and that Petitioner had committed a federal crime of terrorism with the specific intent to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct; (2) that Petitioner had evaded taxes in excess $2.5 million; (3) that Petitioner had obstructed justice; (4) that Petitioner had engaged in sophisticated money laundering; and (5) that Petitioner had occupied a leadership or organizing role in the underlying conspiracy. The district court then "stacked" multiple maximum statutory sentences to reach the "life" sentence dictated by the Guidelines. Each aspect of this judicial debacle allows the Court a distinct opportunity to provide lower courts with guidance about the real-world impact of *Blakely*.

2. This Case Allows The Court To Address *Blakely*'s Impact On Un-Charged Crimes

In *Fanfan*, No. 04-105, the district court's reliance on facts not charged in the indictment and not proved to the jury beyond a reasonable doubt would have increased Fanfan's sentence by a factor of 3 (from a Guideline range of 63 to 78 months to a Guideline range of 188 to 235 months). See *Fanfan*, No. 04-105, Petition for a Writ of Certiorari, p. 3-4. In this case, the district court's reliance on facts not charged in the indictment and not proved to the jury beyond a reasonable doubt increased Petitioner's sentence by a factor of more than 30 (from Guideline range of 46 to 57 months to a Guideline range of "life," which the district court imposed in the form of a 1,860 month sentence). This jaw-dropping increase in Petitioner's sentence is primarily the result of the district court's application of U.S.S.G. § 3A1.4, which in and of itself increased Petitioner's base offense level by 12 and shifted his criminal history category from a I to a VI.

To apply Section 3A1.4, the district court had to find (1) that Hizballah was a terrorist organization and (2) that Petitioner committed a "federal crime of terrorism," which requires specific intent to "influence or affect the conduct of government by intimidation or coercion" even though neither fact was charged in the indictment nor presented to the jury. This fact-finding resulted in Petitioner being sentenced for an entirely different crime (violation of U.S.S.G. § 3A1.4) with an entirely different *mens rea* than the one for which he was convicted by the jury (violation of 18 U.S.C. § 2339B).

The only mental state requirement in 18 U.S.C. § 2339B is that the defendant must "knowingly" provide material support or resources to a foreign terrorist organization. 18 U.S.C. 2339B. The district court instructed the jury that a defendant acts knowingly when "he was conscious and aware of his action, realized what was happening around him, and did not act because of ignorance, mistake or accident." R. 3315. The district court's instructions did not even require the jury to find that Petitioner had knowledge that his conduct was unlawful.[4] The district court, however, went beyond the jury verdict to find that Petitioner specifically intended to affect the conduct of government by intimidation or coercion or to retaliate against government conduct based upon literature found in Petitioner's home (R. 2248-2301), selected videotape excerpts of Hizballah (*id.*), and unsupported allegations about attacks by Hizballah on Americans and Western Europeans (R. 3091-3100). The district court did not even bother to enumerate which clause in U.S.S.G. § 3A1.4 ("intended to affect" or "retaliate against") it was basing its finding on or which "government" it believed that

---

[4] Contrast *United States v. Kent*, 912 F.2d 277, 280-81 (9th Cir. 1990), *op. withdrawn and superseded on reh'g by*, 945 F.2d 1441 (9th Cir. 1991) (reading "knowingly" as requiring knowledge of unlawfulness of conduct where statute criminalizes broad range of apparently innocent conduct); *Liparota v. United States*, 471 U.S. 419, 426 (1984) (same).

Petitioner intended to affect or retaliate against. Concern for this type of judicial fact-finding was at the core of the Court's holding in *Blakely*:

> "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."

Blakely at 2539 (emphasis in original). This case provides the perfect vehicle for the Court to address the impact of *Blakely* on un-charged crimes.

3. This Case Allows The Court To Address *Blakely*'s Impact On Base Offense Level Calculations And Enhancements

To determine Petitioner's base offense level, the district court blindly adopted the PSR's conclusion that the conspiracy caused a tax loss of greater than $2.5 million. R. 837. This conclusion was apparently based on documents in the United States Attorney's discovery file, interviews with un-named agents, and untested estimates. *Id.* At trial, the district court had defined "contraband cigarettes" for the jury as "a quantity in excess of 60,000 cigarettes which bear no evidence of the payment of applicable state cigarette taxes ...." R. 3315. Thus, even if each of the three convictions related to 18 U.S.C. § 2342 (Counts 35, 37, 41) involved different contraband cigarettes, the only fact fully supported by the jury's verdict is that Petitioner sold 180,003 cigarettes, which is equivalent to 900 cartons of cigarettes. At $7.50 tax per carton,[5] the only fact fully supported by the jury's verdict is that Petitioner avoided $6,750 in taxes. Under U.S.S.G. § 2T4.1, a tax loss of $6,750

---

[5] $7.50 tax per carton is the assumption used in the PSR. R. 833.

yields a base offense level of 10. With a criminal category history I, a base offense level of 10 translates into a Guideline range of 6 to 12 months. Nevertheless, the district court, rather than the jury, found that Petitioner avoided more than $2.5 million in taxes and thereby raised his base offense level under U.S.S.G. § 2T4.1 from a 10 to a 24. Had the jury been asked to find a specific amount of tax loss, they would have had to consider the considerable evidence that the Government failed to take into account legitimate sales of cigarettes for which tax was paid. For example, when the sentencing of Petitioner's brother and alleged co-conspirator Chawki Hammoud, the district court accepted evidence introduced at trial that a significant amount of tax (at least $1 million) was paid and therefore a significant credit was due. R. 2175.

The district court increased Petitioner's sentence for "obstruction of justice" under U.S.S.G. § 3C1.1 based upon the spurious allegations in the PSR that Petitioner attempted to destroy evidence, harm the prosecutor, and committed perjury when he testified at trial. The Government admitted that the jailhouse snitch who claimed Petitioner conspired to harm the prosecutor was unreliable, and had likely falsified evidence; nonetheless, the district court found this sufficient to provide support for an enhancement by a preponderance of the evidence.

The district court also increased Petitioner's sentence for "sophisticated [money] laundering" under U.S.S.G. § 2S1.1(b)(3) and for having an "leadership/organizing" role in the conspiracy under U.S.S.G. § 3B1.1. If the jury had been asked to determine the latter issue, it may well have concluded that Petitioner did not have a leadership role as the conspiracy was in place long before Petitioner became involved.

4. This Case Allows The Court To Address *Blakely*'s Impact On "Stacking"

Both *Booker* and *Fanfan* involve convictions on a simple drug charge. In contrast, this case involves multiple convictions and "stacking" - the imposition of consecutive sentences for multiple offenses to reach the sentencing range dictated by the Guidelines. The maximum sentence allowed by statute for any one of the offenses for which Petitioner was convicted was 240 months (20 years). However, Petitioner's sentence was 1,860 months (155 years) because the district court imposed the maximum statutory sentence for all but two of the offenses and then made them run consecutively so as to bring the sentence within the "life" range under the Guidelines. This draconian approach to sentencing merits special consideration in light of *Blakely*. Where, as here, the sentence dictated by the Guidelines exceeds the maximum sentence that is authorized by statute for the most serious offense, the effect of the Guidelines is to impose a sentence that exceeds the statutory maximum for the offense that drives the sentence. In this case, U.S.S.G. § 3A1.4, intended to punish crimes of terrorism, called for a sentence of "life" even though the most serious terrorism offense for which Petitioner was convicted (18 U.S.C. § 2339B) carries a maximum penalty of fifteen years unless the death of any person results from the terrorism. 18 U.S.C. § 2339B(a)(1). In this case, no such death was alleged or proved at trial or at sentencing. Nonetheless, Petitioner's 18 U.S.C. § 2339B conviction resulted in a "life" sentence.

5. This Case Avoids The Peculiarities Of 21 U.S.C. § 841

Booker and *Fanfan* have little bearing on other federal criminal cases because the sentencing scheme at issue in those cases involves the escalating statutory maximums and statutory minimums contained in the federal drug statute, 21 U.S.C. § 841. Like the criminal statutes at issue in this

case, most federal criminal statutes simply state a statutory maximum and leave the sentencing calculation up to the Guidelines. Consequently, this case allows this Court to address *Blakely's* impact on the most common form of federal criminal statutes. Because this case is not a drug case, it also avoids the circuit conflict on the question of whether drug quantity is statutorily defined as an element of the Section 841 offense. See generally Brief *Amici Curiae* of National Association of Criminal Defense Lawyers and National Association of Federal Defenders at 17-18, *Booker*, No. 04-104, *Fanfan*, No. 04-105, *United States v. Bijou*, No. 04-2572,

6. This Case Allows The Court To Address The Appropriate Remedy For *Blakely* Violations

Circuit courts and district courts have proposed a number of different remedies for *Blakely* violations. See *United States v. Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) (noting that the district court may convene a "sentencing jury" on remand); *United States v. Zompa*, 2004 WL 1663821 (D. Me. July 26, 2004) (applying Guidelines sans enhancements based on facts not admitted by defendant); *United States v. King*, 2004 U.S. Dist. LEXIS 13496 (M.D. Fl. July 19, 2004) (sentencing defendant within range established by statute but using Guidelines for guidance); *United States v. Landgarten*, 2004 WL 1576516 (E.D.N.Y. July 15, 2004) (scheduling a "sentencing jury trial" to decide enhancement factors beyond a reasonable doubt); *United States v. Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004) (sentencing defendant within range established by statute); see also *United States v. Thompson*, 2004 U.S. Dist. LEXIS 13213 (S.D. W.Va. July 14, 2004) (unpublished) (postponing all sentencing hearings until after October 15, 2004 "in the interests of justice."). Although all of these remedies have flaws, sentencing juries may implicate additional Constitutional concerns. *Zompa*, 2004 WL 1663821 (D. Me. July 26, 2004) ("In this case, the drug

quantity enhancement was not included in the Information to which the Defendant pled guilty, nor did the Defendant admit to distributing any particular amount of cocaine base. Multiple constitutional principles, including Due Process and Double Jeopardy, may ... prevent[] the Government from now seeking to prove beyond a reasonable doubt that this Defendant can be held accountable for distributing 15.3 grams of cocaine base."). But see, *Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) ("Unless the facts sought to be proven by the government to enhance Ameline's sentence constitute elements of a statutory offense required to be alleged in the original indictment, the constitutional prohibition of double jeopardy would not be implicated."). This Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), also may pose an obstacle to convening sentencing juries. Jackson, 390 U.S. at 580 (in the context of rejecting the concept of a sentencing jury, noting "[i]t is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality."). Unlike *Booker* and *Fanfan*, this case specifically raises the issue of remedy and therefore is the perfect vehicle for this Court to provide much needed guidance to the lower courts.

7. Petitioner's Sentence Presents An Additional Fifth Amendment Issue

All nine Justices in *Blakely* recognized that an enhancement may so disproportionately increase a sentence that the disputed sentencing factor become "a tail which wags the dog of the substantive offense," in violation of constitutional Due Process. 124 S. Ct. at 2560 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); *Blakely*, at *8 n.13 (majority opinion); *id.*, at *28 (Breyer J., dissenting). Here Petitioner received a "life" sentence under the Guidelines for "terrorism" but the maximum penalty under the statute that is the basis for the conviction (18 U.S.C. §

2339B) is 15 years, the validity of the Guidelines under the Fifth Amendment is legitimately before this Court. Thus, this case presents the Court with the issue of whether a sentence imposed under the Guidelines is so disproportionate to the sentence for the underlying statutory offense that a defendant's Due Process rights under the Fifth Amendment are violated.

8. The Exceptional Circumstances Of This Case Warrant Granting Certiorari Before Judgment

Admittedly, the grant of a petition for writ of certiorari before judgment in a case pending in a court of appeals is rare. See *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976). This Court grants certiorari in such cases "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11.

In the first instance, the strict standard of Sup. Ct. R. 11 should not apply to Petitioner because for all intents and purposes, the Fourth Circuit has entered judgment in this case. After two rounds of briefing and two rounds of oral argument - one before a three-judge panel and one before the *en banc* court - the Fourth Circuit published and filed an order affirming the judgment entered by the district court and expressly holding that "*Blakely v. Washington* ... does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines." App., *infra*, 1. Moreover, the Fourth Circuit used the order to direct district courts within the Circuit to continue sentencing defendants pursuant to the Guidelines. *Id.* Granting certiorari in this procedural posture represents only a minor deviation from normal appellate practice.

Even if the strict standard of Sup. Ct. R. 11 applies, this case satisfies that standard. This case presents exceptionally

important legal questions related to the constitutionality of the federal sentencing scheme. The Court recognized the importance of some of these questions by granting certiorari this week in *Booker* and *Fanfan* -- even though the latter had not proceeded to judgment in the courts of appeals. The similarity between some of the questions presented by this case and the questions presented by *Booker* and *Fanfan* does not preclude a grant of certiorari before judgment because, as outlined above, this case is different from *Booker* and *Fanfan* in constitutionally significant ways. This Court granted certiorari before judgment in *Gratz v. Bollinger*, 539 U.S. 244 (2003) because it involved an affirmative action policy with important differences from the program at issue in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and therefore allowed the Court an opportunity to address the constitutionality of race in university admissions in a wider range of circumstances. Similarly, this Court should grant certiorari in this case to address *Blakely*'s impact in a wider range of circumstances.

CONCLUSION

This case is an ideal companion to *Booker* and *Fanfan*. It presents a wide range of *Blakely* issues in a non-drug context and has the additional advantage of presenting a disproportionality issue under the Fifth Amendment. For the foregoing reasons, Petitioner requests that this Petition for a Writ of Certiorari be granted and that this case be ordered briefed and heard by the Court on the same schedule as *Booker* and *Fanfan*.

This 6th day of August, 2004.

Respectfully submitted,

/s/James P. McLoughlin, Jr.
Of Counsel