No. 15-353

IN THE

Supreme Court of the United States

DON EUGENE SIEGELMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. One of the Project's key areas of focus is the constitutional imperative of procedural fairness and due process in the criminal justice system, and particularly in sentencing. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. The Constitution Project regularly files *amicus* briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. The Project has particular expertise, knowledge and interest in the fair administration of the criminal law, consistent with the United States Constitution. In the wake of the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Project's Sentencing Initiative convened a blue-ribbon committee of current and former judges, prosecutors, defense attorneys, scholars, and sentencing experts. The committee published a series of principles and recommendations for sentencing that call for a return to an adversarial approach in fact-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

finding as a mechanism for more balanced and reliable results. The committee also has decried the use of acquitted conduct in criminal sentencing. The Project's work and mission bear directly on the issue of whether, and to what extent, acquitted conduct may be considered at sentencing. *Amicus* has filed this brief to highlight the need for the Court to prevent the erosion of the Sixth Amendment that has deprived defendants like petitioner of their right to a jury trial by considering acquitted conduct at sentencing.

INTRODUCTION

The issue is whether a court may consider acquitted conduct to increase a sentence within the statutory range of the offense for which the defendant was convicted. Here, the district court did just that. (Pet. at 4-8.) The Eleventh Circuit affirmed, citing *Duncan v. United States*, 400 F.3d 1297, 1304 (11th Cir. 2005), which held that acquitted conduct established by a preponderance of the evidence may be taken into account at sentencing without violating the Sixth Amendment right to a jury trial. (Pet. App. 18a-19a, 19a n.12.) Like most courts that have addressed the issue, however, *Duncan* relied on *United States v. Watts*, 519 U.S. 148, 157 (1997), a Fifth Amendment Double Jeopardy case. This brief addresses that issue.

ARGUMENT

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. "For more than six hundred years—that is, since Magna Carta, in 1215—there has been no clearer principle of English or American constitutional law" than the right to a jury trial in criminal cases. Lysander Spooner, *An Essay*

on the Trial by Jury, at 1 (Boston: John P. Jewet and Co., 1852). The right to a jury trial is as important as it is old.

I. Consideration of Acquitted Conduct to Enhance a Sentence Within the Statutory Range Violates a Defendant's Sixth Amendment Right to a Jury Trial.

It is well-settled that any fact, other than a prior conviction, that increases the statutory range of punishment for a criminal defendant must be submitted to a jury and proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *United States v. Gaudin*, 515 U.S. 506, 511 (1995); *Almendarez-Torres v. United States*, 523 U.S. 224, 243-46 (1998); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *Ring v. Arizona*, 536 U.S. 584, 602 (2002); *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Alleyne v. United States*, 133 S. Ct. 2151, 2163-64 (2013). However, that rule was fashioned in response to objections that judges were increasing sentences based on uncharged conduct, which was never before the jury. Acquitted conduct is different.

When a court increases a sentence in reliance on acquitted conduct, it oversteps its sentencing authority granted by the jury. *Almendarez-Torres*'s exception for prior convictions demonstrates the importance of the jury's authorization of a defendant's sentence. This Court initially supported *Almendarez-Torres*'s holding without reference to that authorization. 523 U.S. at 243-46. Likely recognizing the potential for overly expansive readings of the exception, *Apprendi* subsequently clarified that prior convictions, unlike

uncharged conduct, are endorsed by a jury (unless the defendant pled guilty):

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding *in which the defendant had the right to a jury trial* and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

530 U.S. at 496. Although it remains somewhat doubtful whether, in such circumstances, a jury truly gave the sentencing court permission to essentially combine the punishments for both convictions into one, *Apprendi*'s re-explanation of *Almendarez-Torres* reinforces the jury's central role.

More recently, this Court clarified that "a judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see* Spooner, *An Essay on the Trial by Jury*, at 51-56 (explaining that, historically, the right to fix a sentence rested firmly in the hands of the jury). The fundamental question is therefore: "[D]oes the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

Courts have reasoned that the jury authorized a sentence within the statutory range for the convicted offense, and therefore reliance on acquitted conduct is acceptable, provided that the sentence is within the statutory range. *See, e.g.*, *United States v. Waltower*, 643 F.3d 572, 574 (7th Cir. 2011). This devalues the jury's acquittal. A more faithful interpretation of the

scope of the jury's authorization would be a sentence within the statutory range without reliance on acquitted conduct.

To be sure, courts have followed the reasoning in *Watts* that a jury's finding of reasonable doubt does not imply that the same facts are not supported by a preponderance of the evidence. *See Watts*, 519 U.S. at 157. However, most verdicts are general verdicts that only state "guilty" or "not guilty" without further detail. In most cases, it is therefore unknown whether a jury might have also found that the elements were unsupported by a preponderance of the evidence. In assuming otherwise, courts risk contradicting the jury's decision in violation of *Blakely*'s directive that "a judge's authority to sentence derives wholly from the jury's verdict." 542 U.S. at 306.

Relying on *Watts* is also improper because *Watts* was a Fifth Amendment case. Yet most courts cite *Watts* in rejecting Sixth Amendment challenges regarding acquitted conduct. *See, e.g.*, *United States v. Waltower*, 643 F.3d 572, 577 (7th Cir. 2011) ("Because the Supreme Court has rejected due process and double jeopardy challenges to the use of acquitted conduct at sentencing, its use on an advisory basis cannot by itself furnish Sixth Amendment ammunition for excluding acquitted conduct at sentencing."); *United States v. Mercado*, 474 F.3d 654, 656 (9th Cir. 2007) (denying Sixth Amendment challenge to sentencing court's consideration of acquitted conduct and beginning analysis "as we must, with [*Watts*] . . . ," which would seem to provide "a complete answer to the issue before us"); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006) (denying Fifth and Sixth Amendment challenges to sentencing enhancement within guidelines range because *Watts* "made plain that

acquitted conduct, proved to the sentencing court by a preponderance of the evidence, may form the basis of a sentencing enhancement"); *United States v. Manigault*, 228 Fed. Appx. 183, 185-86 (3d Cir. 2007) (same); *United States v. Ashworth*, 139 Fed. Appx. 525, 527 (4th Cir. 2005) (same).

Given the importance of the Sixth Amendment jury-trial guarantee and the unsteady ground on which the lower courts have based their decisions, cert is warranted.

II. Increasing a Sentence on the Basis of Acquitted Conduct Violates the Principle of Popular Sovereignty Inherent in the U.S. Constitution.

The Sixth Amendment right to a jury trial belongs to "the accused." U.S. CONST. amend. VI. However, it also belongs to the people. This is supported by the text of the Sixth Amendment, which provides for "a *public* trial—a trial of, by, and before the people." Akhil Reed Amar, *Foreward: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642 (1996). While a defendant may waive the right to a jury trial by pleading guilty, "if he pleads not guilty, and thus demands a trial, he must get a public trial . . . ; for a trial from which the people are excluded is, in the Anglo-American tradition, not a 'trial' at all." *Id.* at 678 (citing Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 43, 103 (Brooke, 5th ed. 1797)).

Moreover, Article III states, without reference to the accused, that "[t]he Trial of All Crimes . . . shall be by Jury . . . ." U.S. CONST. art. III, § 2, cl. 3. This has been understood to reflect the principle of popular sovereignty; Thomas Jefferson even suggested that

the check juries place on the judiciary is more important than that of the electorate on the legislature. *See* Amar, *Sixth Amendment First Principles*, at 683 ("[I]t is necessary to introduce the people into every department of government . . . . Were I called upon to decide whether the people had best be omitted in the Legislative or Judicial department, I would say it is better to leave them out of the Legislative.") (quoting *Letter from Thomas Jefferson to L'Abbe Arnoux* (July 19, 1789), *reprinted in* 15 THE PAPERS OF THOMAS JEFFERSON, 1788-89, at 282-83) (internal quotation marks omitted)).

The Framers appreciated the critical functions that juries play in the democratic tradition. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995) ("[T]he jury's function in the federal constitutional scheme was not limited to the protection of individual litigants. Rather, the jury was an essential democratic institution because it was a means by which citizens could engage in self-government."). For one, the Framers recognized the jury's role in applying law to facts in a manner consistent with the values of the community. *See id.* at 219 (citing *Letter from the Federal Farmer (XV)*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 143, 315 (Herbert V. Storing ed., 1981)). They also "likened the role of the people in making up juries to the role of voters selecting legislative bodies . . . ," *id.* at 220, and some viewed jury service as "more necessary than representatives in the legislature . . . ." *Id.* (quoting *Essays by a Farmer (IV)*, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, at 36, 38) (internal quotation marks omitted). Finally, the Framers believed that "[c]itizens would learn self-government by doing self-government." *Id.* at 221 (quoting A. Amar, *Bill of*

Rights as a Constitution, 100 YALE L.J. 1131, 1187 (1991)).

It is therefore unsurprising that the text of the Constitution supports a finding that the right to a jury trial belongs to not only the accused, but also the people. Because the practice of increasing sentences on the basis of acquitted conduct transfers authority to the judiciary that is reserved to the people, it is inconsistent with the Framers' intent.

CONCLUSION

In light of the above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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