No. 21-1557

IN THE
Supreme Court of the United States

DAYONTA MCCLINTON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Due Process Institute is a bipartisan, non-profit, public-interest organization that works to preserve, and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn promise to "establish Justice" and to "secure the Blessings of Liberty." U.S. Const. pmbl. It has already participated as an *amicus curiae* before this Court in cases bearing on the Sixth Amendment right to a jury trial such as *United States v. Haymond*, 139 S. Ct. 2369 (2019). This case presents another important, recurring criminal justice issue worthy of the Court's consideration: whether the Sixth Amendment right to a jury trial prohibits judges from basing sentences on charges for which juries have acquitted criminal defendants. Resolving this issue is essential to restoring the vital role of juries in our criminal justice system, a process this Court began in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in response to a host of federal and state sentencing laws that threatened to significantly dilute the importance of the jury trial right. In our view, any rule that permits sentencing judges to disregard acquittals and to impose sentences based on conduct for which the jury acquitted likewise subvert the jury's essential constitutional role and should be similarly discredited. The continued existence of such laws and practices, perfectly exemplified by the decision below, create a

[1] The parties were timely notified and have consented to the filing of this brief, in accordance with Rule 37.2. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and their counsel, made a monetary contribution to the preparation or submission of the brief.

substantial and unexplained gap in this Court's otherwise robust Sixth Amendment jurisprudence.

SUMMARY OF ARGUMENT

The Sixth Amendment jury trial right is one of the critical pillars of our criminal justice system. In the 1980's and 1990's, however, state legislatures and Congress threatened the primacy of this right by passing a series of laws permitting judges to engage in expansive fact-finding at sentencing that went well beyond any facts found by the jury. In response, this Court held the constitutional line true in a series of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("*Apprendi*"). In *Apprendi* and its progeny, this Court restored the Framers' vision by reaffirming that juries must find all facts essential to a lawful sentence.

Over the past 18 years, this Court has applied the *Apprendi* rule in a variety of contexts, reaffirming the jury's critical role in capital sentencing, striking down entire state and federal sentencing guideline schemes, and invalidating some types of mandatory minimum sentencing schemes. But one prominent potential breach in the Sixth Amendment jury trial right remains that threatens the jury's historic function even more than the New Jersey sentencing scheme in *Apprendi* or any of the other Sixth Amendment cases this Court has decided in the past 20 years. Despite *Apprendi*'s seemingly clear mandate that sentencing judges must impose sentences in line with the essential facts that the jury found, the federal courts of appeals continue to permit sentencing judges to impose a punishment that is based on criminal

charges that the jury actually rejected. Such a practice seems antithetical to the view of the Sixth Amendment embodied in the *Apprendi* line of cases.

Indeed, it is surprising the Court has not yet plugged this apparent gap in the jury trial right. But perhaps this question remains undecided because the correct answer seems obvious and inherent in the *Apprendi* rule: If sentencing judges cannot go beyond a jury's verdict, they certainly cannot *contravene* a jury's verdict and still comply with the Sixth Amendment's guarantee.

The lower courts, however, appear to have uniformly missed this seemingly obvious corollary of the *Apprendi* rule based on a misreading of the *per curiam* decision in *United States v. Watts*, 519 U.S. 148 (1997). *Watts* was a Fifth Amendment case from another era, issued without even the benefit of full briefing. It does not provide license under the Sixth Amendment for the lower courts to continue to permit sentences like the one here, in which a trial court expressly rejects a jury's verdict of acquittal and imposes a substantially harsher sentence based on allegations the jury rejected.

But because that is precisely what the lower courts have continued to do for the past two decades, only this Court can resolve whether *Watts* permits sentencing courts to create such a large chink in the armor of the jury trial right. The time has come for the Court to do so, as it appears that no matter how many times, and in how many contexts, this Court reaffirms the nature of the jury trial right as described in *Apprendi*, the lower courts will continue to read *Watts* as exempting those rules when it comes to jury acquittals. This Court should grant

the petition to confirm that the Sixth Amendment right to a jury trial prohibits judges from basing sentences on charges for which juries have acquitted criminal defendants.

ARGUMENT

I. THE *APPRENDI* LINE OF CASES CONFIRMS THE JURY'S FUNDAMENTAL SIXTH AMENDMENT ROLE IN FINDING FACTS ESSENTIAL TO PUNISHMENT

As this Court has confirmed over the past two decades, the Sixth Amendment right to a jury trial is the pillar of our criminal justice system, as it enshrines the founders' vision of the jury as a "protection against arbitrary rule." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968). The Framers "appreciated the danger inherent in allowing 'justices named by the crown' to 'imprison, dispatch or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure.'" *Alleyne v. United States*, 570 U.S 99, 127 (2013) (Roberts, C.J., dissenting) (quoting in part, 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (alteration omitted)). Disregarding the jury's acquittal for the purpose of sentencing ignores the jury's historic role in our criminal justice system. In fact, colonial and early-American juries were often *the* sentencing authority, not the Court. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. of Crim. L. and Criminology 691, 692 (2010). The punishment was directly tied to the findings of the jury, which could mitigate a sentence by refusing to convict or

convicting the Defendant of a lesser offense. *Id.* at 692—94. The Founders envisioned this powerful role for the jury based on their inherent skepticism of government power and their commitment to popular sovereignty as a check on this power. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 869-75 (1994).

Because of the jury's crucial role in protecting individual rights, "trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'" *Apprendi*, 530 U.S. at 477 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)). Moreover, as the Court has explained, the Sixth Amendment's "core concern" is to reserve critical facts for determination by the jury and this concern applies equally to fines, incarceration and capital punishment. *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012).

And where a jury rejects the truth of the government's accusations by acquitting, that decision is "accorded special weight" under the Constitution. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *United States v. Scott*, 437 U.S. 82, 91 (1978) ("[T]he law attaches particular significance to an acquittal."). A jury's awesome power to acquit is unreviewable by prosecutors or judges. Indeed, "we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision . . . ." *Burks v. United*

States, 437 U.S. 1, 16 (1978). Insulating a jury's verdict of acquittal maintains the jury's constitutional role as a crucial independent check on governmental power.

This Court has recently reaffirmed this critical historic role of the jury in its decision in *United States v. Haymond*, 139 S. Ct. 2369 (2019): "Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *Haymond*, 139 S. Ct. at 2375 (plurality opinion) (internal citations omitted). An infringement on this role and the rights guaranteed by the Sixth Amendment is no more pernicious because it was authorized by legislative action, as it was in *Haymond,* than when it is based on jurisprudence, as it is in this case.

Despite the Framers' vision of juries' constitutional role, by the turn of the twenty-first century, state and federal legislatures had granted judges more and more authority to punish defendants beyond the bounds of a jury's verdict. The jury's status as a bulwark citizen power, in which only individuals with no dependence on the Crown resolved disputed criminal charges, had fallen into doubt. A host of "modern" sentencing schemes had undermined this protection by allowing judges to impose draconian sentences that went well beyond any facts jurors had found at trial. That was the setting in which this Court confronted what would become the *Apprendi* line of cases.

Beginning in *Apprendi*, this Court decided a series of cases designed to eradicate the ahistorical

practice of allowing sentencing judges to increase punishments based on essential facts that are well-beyond anything a jury had found at trial. *Apprendi* and later cases returned the jury to its rightful place "as a bulwark between the State and the accused at the trial for an alleged offense." *S. Union Co.*, 567 U.S. at 367 (citing *Oregon v. Ice*, 555 U.S. 160, 168 (2009)).

The Court's initial foray into this area, *Apprendi v. New Jersey*, involved facts introduced at sentencing (about the accused's racial bias) that the fact-finder would not have been permitted to consider at trial. *Apprendi*, 530 U.S. at 470-71. In defending the sentencing scheme, New Jersey argued that racial bias during the commission of the offense was merely a "sentencing factor" to describe facts not found by the jury that may be considered by a sentencing court because they are not subject to the jury trial guarantee. *Id.* at 491. *Apprendi* rejected this argument and began restoring the Sixth Amendment's role in our criminal justice system by delineating the principle that "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* at 483 n.10.

Apprendi involved a sentence that exceeded the maximum permitted by the New Jersey statute in the absence of various sentencing facts. After *Apprendi*, government litigants sought to limit its holding to that scenario, i.e. where the judicial fact-finding that resulted in a sentence that otherwise would have exceeded the statutory maximum. But this Court made clear in subsequent cases that *Apprendi* was not limited to that single scenario.

Instead, the *Apprendi* rule applies whenever judicial fact-finding at sentencing functionally exceeds the reach of the jury's verdict. *See Blakely v. Washington*, 542 U.S. 296 (2004) (invalidating mandatory state sentencing guidelines that permitted increases only where judge found certain facts beyond jury verdict); *Ring v. Arizona*, 536 U.S. 584 (2004) (striking down a capital sentencing scheme that permitted judges, not juries, to find aggravating facts essential to a death sentence) *United States v. Booker*, 543 U.S. 220 (2005) (invalidating federal sentencing guideline scheme that authorized increased sentences based on judicial fact-finding); *Cunningham v. California*, 549 U.S. 270 (2007) (state aggravating factor scheme invalidated for similar reasons); *S. Union Co. v. United States*, 567 U.S. at 346 (prohibiting a district court from imposing a criminal fine exceeding the one authorized by the jury's verdict itself); *Alleyne v. United States*, 570 U.S. 99 (2013) (invalidating federal law that permitted judge to find facts that trigger mandatory minimum sentence).

Over the last two decades, the Court has thus repeatedly directed sentencing courts to adhere to the Sixth Amendment by ensuring any sentence imposed derives from the jury's verdict and does not functionally exceed what would have been permitted by that verdict. These decisions are irreconcilable with a rule that permits a sentencing judge to impose a punishment that is formulated by expressly crediting an acquitted charge. Such a rule fundamentally disrespects the jury's essential fact-finding role under the Sixth Amendment, as described in this Court's *Apprendi* jurisprudence. This Court has not hesitated to apply these

principles when faced with legislative efforts to circumvent the jury. *See Haymond*, 139 S. Ct. 2369 (2019). It must now apply *Apprendi's* reasoning to its own jurisprudence for the Court's silence on this issue has been misinterpreted as explicit approval by the lower courts.

II. *WATTS* HAS PREVENTED THE LOWER COURTS FROM RECOGNIZING THE OBVIOUS IMPORT OF *APPRENDI*

Despite the clear import of the *Apprendi* line of cases on sentences based on acquitted charges, federal courts continue to sentence criminal defendants on acquitted charges by purporting to follow a *per curiam* Fifth Amendment double jeopardy case, *United States v. Watts*, 519 U.S. 148 (1997). But *Watts* merely held that a sentencing court did not violate the Fifth Amendment's double jeopardy clause by considering acquitted offenses. *Id.* No Sixth Amendment challenge was raised or considered in *Watts*. *See id.*; *see also Booker*, 543 U.S. at 240. Indeed, this Court later highlighted that *Watts* faced no "contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." *Booker*, 543 U.S. at 240. Instead, *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us . . . ." *Id.* at 240 n.4.

Yet, for some reason, lower federal courts still read *Watts* to foreclose Sixth Amendment challenges. *See United States v. White*, 551 F.3d 381,

384-86 (6th Cir. 2008) (*en banc*); *United States v. Mercado*, 474 F.3d 654, 656-59 (9th Cir. 2007) (collecting cases from every circuit, except Sixth); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States v. Farias*, 469 F.3d 393, 399-400 (5th Cir. 2006); *United States v. Faust*, 456 F.3d 1342, 1348 (11th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. Ashworth*, 139 F. App'x 525, 527 (4th Cir. 2005) (*per curiam*).

Watts, even if read in a limited fashion as deciding purely a Fifth Amendment double jeopardy issue, is of questionable lineage. The decision appears to reflect now-outdated notions of judge and jury fact-finding and to diminish the importance of a jury's acquittal. Thus, even on its own terms, *Watts'* reasoning appears dubious. But the lower courts have extended *Watts* to the Sixth Amendment context and, in doing so, brought that decision into square conflict with this Court's *Apprendi* line of cases. *See* Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 2-3 and n.14 (2016) ("The federal appellate courts have been unanimous in holding that reliance on acquitted conduct to enhance an offender's sentence is still permissible under the now-advisory [Sentencing] Guidelines.") (citing *United States v. White*, 551 F.3d 381, 384-86 (6th Cir. 2008) (*en banc*)); *see also* James J. Bilsborrow, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 Wm. & Mary L. Rev. 289,

316 and n.199 (2007) (commenting that the "circuits have resoundingly . . . authoriz[ed] the continued consideration of acquitted conduct so long as a judge does not use such conduct to increase an offender's sentence beyond the statutory maximum authorized in the United States Code") (citing *United States v. Campbell*, 491 F.3d 1306, 1314 (11th Cir. 2007)).

It is impossible to reconcile the lower court's dismissive view of the jury's function with the Court's own descriptions of the *Apprendi* rule: "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham*, 549 U.S. at 281. "A person accused of a crime . . . would be at a severe disadvantage . . . amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship*, 397 U.S. 358, 363 (1970) (internal quotations omitted). The Government cannot be allowed to extinguish the presumption of innocence for all crimes based on a conviction for one discrete offense. Such incompatible rules serve to undermine the Sixth Amendment and send confusing signals to our criminal justice system about the nature and scope of the jury trial right.

III. THIS COURT SHOULD GRANT THE PETITION TO CONFIRM THAT THE JURY TRIAL RIGHT BANS JUDGES FROM BASING SENTENCES ON CHARGES FOR WHICH JURIES HAVE ACQUITTED CRIMINAL DEFENDANTS

It is vital that this Court undertake to resolve this confusion by granting the Petition. Throughout the Court's *Apprendi* jurisprudence, the most dominant theme is the overarching purpose of the Sixth Amendment: ensuring that the jury trial is not "a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004). This case, however, embodies a recurring scenario that stands these notions on their head—one in which the jury trial was indisputably a "mere preliminary" to a judicial inquisition of the facts that the State actually sought to punish.

Some state courts have already recognized the problems with acquitted conduct sentencing, including a few Courts that have explicitly relied on this Court's reasoning in *Apprendi* and its progeny. *See People v. Beck,* --- N.W. 2d ---, 2019 WL 3422585 (Mich. July 29, 2019) (relying on *Apprendi* to hold that "[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed the very same crime."); *see also State v. Jones*, 845 N.W. 2d 285 (Minn. 2008) (relying on *Apprendi* to hold that sentencing judges may not depart from the sentencing guidelines based on conduct for which the defendant was acquitted); *Bishop v. State*, 486 S.E. 2d 887 (Ga. 1997) (indicating that a court may consider aggravating conduct for sentencing

purposes unless there has been an acquittal); *State v. Marley*, 364 S.E. 2d 133 (N.C. 1988) (holding judges may not consider acquitted conduct as aggravating factors at sentencing); *State v. Cote*, 530 A. 2d 775 (N.H. 1987) (holding that it is error for a court to consider evidence related to acquitted charges at sentencing).

As Petitioner demonstrates, moreover, this case presents an ideal scenario for resolving this issue. The issue was fully litigated below, and the facts provide a compelling example of the way continued reliance on acquitted charges at sentencing can effectively nullify a jury's acquittal. The judge expressly considered this conduct in imposing sentence, and in fact expressly disregarded the jury's acquittal in doing so. This fact-finding, contrary to the jury's verdict, dramatically increased the Petitioner's sentence.

It seems highly unlikely that the Framers who adopted the Sixth Amendment intended to guard against governmental oppression through criminal juries with ultimate power to confirm or reject the truth of every accusation, and to partially acquit to lessen unduly harsh punishment, *see Jones v. United States*, 526 U.S. 227, 247-48 (1999), only to allow a judge to nullify the jury's acquittal at sentencing. If sentencing judges cannot go beyond a jury's verdict, it would appear they cannot *contravene* a jury's verdict and still comply with the Sixth Amendment guarantee of a jury trial.

The Sixth Amendment on its face, and as construed by the *Apprendi* cases, envisions the jury serving as a critical protection against judicial overreaching. But cases like this one repudiate that

notion and disrespect the jurors' service to their community. Such verdicts give prosecutors substantial incentives to take weak cases to trial, while at the same time inducing defendants to accept unjust plea bargains, because the stakes of fighting unjust charges at trial are just too high since having a jury refuse to convict on a particular count or in a particular case does not limit the government's ability to rely on their unproven allegations at a sentencing for any other crime. In short, important and far-reaching public policy interests attach to any judicial decision to effectively nullify a jury's verdict. It is important for this Court to resolve, once and for all, whether such consequences can co-exist with the vibrant Sixth Amendment jury trial right adopted by the Framers and described by the Court in its *Apprendi* line of cases.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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