

No. 13-10026

IN THE
Supreme Court of the United States

JOSEPH JONES, DESMOND THURSTON
& ANTWUAN BALL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF OF CATO INSTITUTE AND
RUTHERFORD INSTITUTE AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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June 26, 2014

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INTEREST OF *AMICI CURIAE*¹

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because the protections of the Sixth Amendment are part of the constitutional bulwark of liberty.

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because it is committed to ensuring the continued vitality of the Sixth Amendment's guarantee to a jury trial in criminal cases and that all persons charged with criminal offenses are put at risk for increased punishment only on the basis of facts

¹ The United States has consented to the filing of this *amicus* brief and expressly does not oppose its filing based upon failure to provide ten days notice. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

found by a jury of their peers employing the venerable “beyond a reasonable doubt” standard.

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be granted for the reasons set forth in the petition and in Justice Scalia’s concurrence in *Rita v. United States*, 551 U.S. 338, 375 (2007). However, amici would like to point out an additional reason for granting the writ. The current standard as exemplified by the remedial opinion in *United States v. Booker*, 543 U.S. 220 (2005), stands in contrast to the history and structure of the Sixth Amendment.

The history of the Sixth Amendment can be traced back to Article 39 of the Magna Carta. Article 39, like the Sixth Amendment, states that “[n]o freeman shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.”

This historical basis cannot be reconciled with the sentencing guidelines’ current treatment under the remedial opinion in *Booker*. The remedial opinion in *Booker* permits a judge to ignore the findings of the jury and sentence a convicted criminal to a sentence based on facts found by the judge, up to the statutory maximum of the jury’s sentence. The jury’s role in determining the facts behind an imprisonment has thus gone from a central role to a minimal one.

But this is not the only originalist problem with the remedial *Booker* opinion. The ex post facto clause also comes from an American understanding of Article 39, and yet the caselaw has diverged so that the treatment of particular laws under the two clauses have diverged. Given that the Magna Carta requires that imprisonment be determined not only “by the lawful judgment of [one’s] peers” but also by the “law of the

land,” there can be no historical justification for treating the sentencing guidelines as “law” under the ex post facto clause but not the Sixth Amendment.

On top of the originalist reasons for not treating the two differently, the logical basis for the divergent treatment is also unsustainable. The concept that the Sixth Amendment is only concerned with when a given finding of fact is required to make a defendant legally eligible for a more severe penalty is inconsistent with existing Sixth Amendment caselaw. And, as Justice Scalia has pointed out, the remedial *Booker* opinion fails even that flawed test, if “legally eligible” is to be given any significant meaning.

In order to return the Sixth Amendment to its original meaning, and to harmonize the Sixth Amendment and the ex post facto clause, the Court should apply its *Miller v. Florida* test to determine whether the sentencing guidelines are “law” for purposes of the Sixth Amendment. Having already found that the guidelines are law for the ex post facto clause, the Court should vacate the petitioners’ sentence as unconstitutional.

ARGUMENT

The Sixth Amendment was born out of an American understanding of the English Magna Carta. While that does not mean that English law is binding upon American courts in interpreting the Sixth Amendment, the American understanding of the Magna Carta is critical to a correct interpretation of the Sixth Amendment. The historical background of the Sixth Amendment also informs the Sixth Amendment's relationship with other constitutional provisions that have evolved from the Magna Carta, including the ex post facto clause.

I. The Right to a Jury and the Prohibition on Ex Post Facto Laws Derive from Article 39 of the Magna Carta.

The Magna Carta, as set forth in 1215, states in relevant part:

No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.²

These forty-one words inspired most of the individual rights found in the original Constitution, including the Bill of Rights. *See Hurtado v. California*, 110 U.S. 516, 531-32 (1884) (“the provisions of Magna Charta were incorporated into bills of rights”); *see also* Kent’s Commentaries on American Law, Part IV, Lecture XXIV, at 7-11.³

The relationship between the Magna Carta and the right to a jury trial is straightforward. *See, e.g., Sparf v. United States*, 156 U.S. 51, 114 (1895). The right to a jury, as initially consecrated in Article III and then reaffirmed in the Sixth Amendment, guarantees that a freeman will not suffer a criminal sentence except by the lawful judgment of his peers.

But from Article 39 comes another constitutional principle as well: the principle of *nullum crimen, nulla poena sine praevia lege poenali* (“[There exists] no crime [and] no punishment without a pre-existing penal law [appertaining]”), from which the American

² MAGNA CARTA Art. 39 (1215), available at <http://www.constitution.org/eng/magnacar.htm>.

³ Available at <https://archive.org/stream/commentariesona00holngoog#page/n24/mode/2up>.

prohibition of *ex post facto* laws derives. See *Stefan Glaser, Nullum Crimen Sine Lege*, 24 J. of Comp. Legis. & Int'l L. 29, 29-30 (1942) (stating that many commentators “affirm an English” origin to the principle in American law, but noting that “[o]thers deny the English origin of the principle”).

That this principle derives from Article 39 is not as straightforward, as England’s criminal law mostly originated from the common-law, and until forced by its modern European treaty obligations, those laws of Parliament were by default retroactive to the first day of the session the law was passed. But as the Supreme Court recognized in *Hurtado*, the Magna Carta in England created “guaranties against the oppressions and usurpations” of the King, and was not designed to “provide security against their own body or in favor of the Commons by limiting the power of Parliament.” 110 U.S. at 531. Thus, the Magna Carta did not protect against “bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation” as inconsistent with “the law of the land.” *Id.*

When the Magna Carta’s rights were considered for the United States, however, they became “limitations upon all the powers of government, legislative as well as executive and judicial,” as the constitutions of the United States and the various states “protect[ed] the rights and liberties of the people against the encroachments of power delegated to their governments.” *Id.* Thus, the “broad and general maxims of liberty and justice” found in Article 39 “held in our system a different place and performed a different function from their position and office in English constitutional history and law,” and “would receive and justify a corresponding and more comprehensive

interpretation.” *Id.* at 532; *see generally* H. D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 Colum. L. Rev. 1, 30-33 (1917) (explaining relationship of “*per legem terrae*,” i.e., “by the law of the land,” and the Constitution, including the ex post facto clause).

So in the United States, the principle of *nullum crimen sine lege* derives (at least in part) from Article 39 of the Magna Carta, the same source from which the Constitutional right to a jury derives. *See* Kent at 11-14 (explaining that the “right of personal security is guarded by provisions which have been transcribed into the constitutions in the country from [the] Magna Carta, and other fundamental acts of the English Parliament,” including the ex post facto prohibition). This is why, in *Hurtado*, the Supreme Court referenced ex post facto laws as something permitted under English law, but prohibited under an American understanding of the Magna Carta. 110 U.S. at 531.

So an originalist understanding of the Sixth Amendment, as well as the ex post facto clause and other provisions of the Constitution that derive from Article 39, must be read in light of their common ancestry: the prevention of criminal sanction without resort to the “lawful judgment of his peers or by the law of the land.” *See also* *Smith v. Doe*, 538 U.S. 84, 97 (2003) (noting that the *Mendoza-Martinez* factors share a common ancestry from the “Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses” (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)); *Flemming v. Nestor*, 363 U.S. 603, 612-613 (1960) (test for definition of “punishment” same under Sixth Amendment and ex post facto clauses).

II. The Remedial Opinion in *Booker* Failed to Adequately Consider the Sixth Amendment's English Roots.

According to the remedial opinion in *Booker*, the remedy of making the guidelines “advisory” derives from a desire to avoid giving the prosecutor more discretion:

Such a system would have particularly troubling consequences with respect to prosecutorial power. Until now, sentencing factors have come before the judge in the presentence report. But in a sentencing system with the Court's constitutional requirement engrafted onto it, any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely. Prosecutors would thus exercise a power the Sentencing Act vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment.

543 U.S. 220, 256-57 (2005). Regardless of the policy merits of this position, it is inconsistent with the Sixth Amendment as viewed by the Magna Carta.

This is because, throughout the opinion, *Booker* criticizes the role of the jury in the guise of criticizing the role of the prosecutor. Under *Booker*, the prosecutor's role is reduced to proving that the defendant committed some crime sufficient to move the case to sentencing. Upon that finding, it becomes up to the judge to determine exactly what bad acts the defendant did (by looking at the presentence report and making his own factual findings), and sentence him in accordance to the facts found by the judge. This

is not an accidental result of *Booker*, but the actual design: “A system that would require the jury, not the judge, to make the additional ‘566 grams’ finding is a system in which the prosecutor, not the judge, would control the sentence.” *Id.* at 257.

But the end result is inconsistent with the maxim that no one be imprisoned except by the lawful judgment of his *peers*. The direct result of the *Booker* opinion is expressly that a person, who a judge believes committed bank robbery, but was only found by a jury to have committed illegal gun possession, will be imprisoned by the judge’s determination, and not the jury’s. *Id.* at 253. While the (sometimes, as in petitioner’s case, outrageous) statutory maximums of the crime as defined by the factual underpinnings of the jury’s verdict serve as a happenstance outer limit of the sentence under the Sixth Amendment, the sentence is determined—absent the additional but limited discretion of the judge—by the judge’s factual determinations, not the facts found by the jury. Thus, the mere fact that the jury may find a defendant guilty of a crime that typically results in, say, probation, does not culminate the trial, but is merely prologue to sentencing. Sentencing then becomes the real trial, with the judge being given *carte blanche* to engage as factfinder.

This is constitutionally improper. Instead, the conviction must fall or stand with the jury to be “the lawful judgment of his peers.” *Compare with Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (“Any possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.”) (Footnote omitted); *see also*

Harris v. United States, 536 U.S. 545, 577 (2002) (Sixth Amendment “protect[s] the criminal defendant's constitutional right to know, *ex ante*, those circumstances that will determine the applicable range of punishment and to have those circumstances proved beyond a reasonable doubt”) (Thomas, J., dissenting), *overruled by Alleyne v. United States*, 133 S. Ct. 2151 (2013); *Rita*, 551 U.S. at 376 (“It makes no difference whether it is a legislature, a Sentencing Commission, or an appellate court that usurps the jury's prerogative.”) (Scalia, J., concurring). The remedial opinion’s decision in *Booker* is inconsistent with the Magna-Carta rooted Constitutional concern regarding the risk that the state will shortchange the democratic nature of the jury system and allow a defendant to be imprisoned without the input of his peers. *Rose v. Clark*, 478 U.S. 570, 578 (1986) (all facts, even “overwhelmingly” correct facts, must be found by a jury under the Sixth Amendment) (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968) (other citations omitted)).

The Supreme Court has already acknowledged the inconsistency of judge-found sentencing facts and the historical roots of the jury in English and early American law. *See* 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), *quoted by Blakely v. Washington*, 542 U.S. 296, 301 (2004); *see also Apprendi*, 530 U.S. at 479-80 (2000) (explaining that under an originalist understanding of the role of judge and jury, the jury was to find all the facts, and the judge merely to impose the sentence mechanically or use his pardon power to commute the sentence downwards) (citations and footnotes omitted). The Supreme Court should take the final logical step in its analysis, and find that the remedial opinion in *Booker*

does not satisfy the constitutional requirements of the Sixth Amendment.

III. The Court’s Decision in *Peugh* is Inconsistent with the Remedial Decision in *Booker*.

There is another originalist problem with the remedial *Booker* decision. The decision creates an untenable inconsistency as to what constitutes a legal sanction “by the lawful judgment of his peers” under the Sixth Amendment, and the “law of the land” under the ex post facto clause. But since both clauses have the same historical roots, there is no reason for this inconsistency. The inconsistency should be resolved by applying the test for determining whether a law implicates the ex post facto prohibition in *Miller v. Florida*, 482 U.S. 423 (1987), and *Peugh v. United States*, 133 S. Ct. 2072, 569 U.S. ---- (2013), in resolving whether a sentencing factor is sufficiently determinate to require Sixth Amendment protection.

Peugh held that applying an increase in the sentencing guidelines during the time between when a crime is committed and an individual is sentenced violates the ex post facto clause. *Id.* at 2078. *Peugh* began its analysis by noting that the ex post facto law applies to “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Id.* at 2077-78 (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798) (emphasis deleted in *Peugh*)). From the start, *Peugh* recognized the serious substantive effects of the sentencing guidelines range.

Peugh went on to recognize that the sentencing guidelines “impose a series of requirements on sen-

tencing courts that cabin the exercise of that discretion,” so that an increase in the sentencing range creates a “significant risk” of a higher sentence. *Id.* at 2084. For this reason, the guidelines were sufficiently mandatory under *Miller*, *id.* at 2082-83, which in turn applied the ex post facto clause to rules which “make[] more onerous the punishment for crimes committed before its enactment.” 482 U.S. at 435 (quoting *Weaver v. Graham*, 450 U.S. 24, 36 (1981)). Because of this, the sentencing guidelines are not mere “guideposts,” *see Peugh*, 133 S. Ct. at 2086; *Miller*, 482 U.S. at 435, but instead sufficiently “exert controlling influence on the sentence that the court will impose” to require conformation with the ex post facto prohibition. 133 S. Ct. at 2085.

But what of the fact that the guidelines raise no Sixth Amendment concern? *Peugh* rejected the comparison, claiming that “Sixth Amendment cases have focused on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty.” *Id.* at 2088. “[E]x post facto cases, in contrast, have focused on whether a change in law creates a ‘significant risk’ of a higher sentence; here, whether a sentence in conformity with the new Guidelines is substantially likely.” *Id.* Given the historically similar roots of the two Constitutional provisions, this distinction is unwarranted—both should simply look to when an increased punishment is sufficiently concrete that liberty requires the factual basis for that increased punishment to be made by a jury and in accordance with the principle of *nullum crimen sine lege*.

In fact, *Peugh*’s attempt to differentiate the two clauses further shows the patent flaws in the *Booker* remedial opinion. Under the remedial *Booker* opinion, because the guidelines are technically advisory, the

maximum sentence a defendant is legally eligible for is the statutory maximum. But in the pre-*Booker* world, the defendant has already made himself eligible for the statutory maximum by committing the statutory crime. The fact that the sentencing guidelines would compel a judge to enter a lesser “within limits” sentence does not change this fact. Instead, it merely requires the court to defend his choice of sentence as compared to the guidelines by citing to the judge’s factual determinations. What *Blakely v. Washington*, 542 U.S. 296 (2004), said about a mandatory scheme is no less true about the *Booker* remedial scheme; the “subjectivity of” determining whether the impact of the factual finding made by the judge goes “too far” so that it “exceed[s] the judicial estimation of the proper role of the judge” is “obvious.” *Id.* at 307. And, as Justice Scalia pointed out in his *Rita* concurrence, it is legal sophistry to say that the act of a single sale of 11 grams of crack cocaine could potentially subject a defendant such as petitioner Ball to a sentence of over eighteen years: “Were the district judge explicitly to find *none* of [the aggravating criminal acts] and nevertheless to impose a [225 months] sentence (simply because he thinks [a single distribution of 11 grams of crack cocaine] merits [three] times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.” *Rita*, 551 U.S. at 372 (emphasis original).

Finally, the Court itself repudiated the *Peugh* grounds for distinguishing between the Sixth Amendment and the ex post facto clause shortly thereafter in *Alleyne*. *Alleyne* explained that “[i]t is no answer to say that the defendant could have received the same sentence with or without that fact.” 133 S. Ct. at 2162. Instead, as *Alleyne* put it, “the aggravating fact produced a higher range, which, in turn, conclusively

indicates that the fact is an element of a distinct and aggravated crime.” *Id.* at 2162-63; *see also id.* at 2162 (citing *State v. Callahan*, 109 La. 946, 33 So. 931 (1903), an ex post facto case, in support of position that increase in “the range of punishment” violates Sixth Amendment).

Alleyne’s separate defense of the *Booker* solution to the Sixth Amendment problem posed by increased sentences based on judge-found facts fares no better. According to *Alleyne*, the decision is “consistent with the broad discretion of judges to select a sentence within the range authorized by law.” *Id.* at 2163. This would be correct if the judge’s discretion was broad. But, as a practical matter, the discretion to sentence *outside the range* authorized by judge-found facts is not “broad.” As *Peugh* itself explained, that discretion was narrow. The guidelines “impose a series of requirements on sentencing courts that cabin the exercise of that discretion. Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences.” *Peugh*, 133 S. Ct. at 2084.

Thus, the test for applying the Sixth Amendment should not turn on a technical meaning of whether the sentencing guidelines are mandatory or advisory, but the degree in which the resulting proscribed range of punishment is mandatory or advisory. This is the *Miller* test, and it should be adopted equally for the Sixth Amendment as it should be for the ex post facto clause.

CONCLUSION

The Court should accept certiorari to determine whether the Sixth Amendment analysis should be read in light of this Court’s decision in *Miller*. If so,

then it must find the maximum sentence allowable under the guidelines for facts found by the jury the applicable “maximum sentence” for Sixth Amendment purposes under *Peugh*, at least for facts related to the crime. The Court can leave the question of whether facts related to the defendant that increase the range can be found by the judge, *see Cunningham v. California*, 549 U.S. 270 (2007) (Kennedy, J., dissenting), to another day.

Respectfully submitted,

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June 26, 2014