No. **99-9003**



In The

# Supreme Court of the United States

STEVE A. HARRISON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

On Petition For Writ Of Certiorari
To The District Of Columbia Court Of Appeals

## BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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## INTEREST OF THE AMICUS

Amicus Curiae, the Cato Institute, respectfully submits this brief in support of the petition for writ of certiorari to the District of Columbia Court of Appeals.[1] The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited, constitutional government. To further those ends, Cato Institute scholars have published a number of works discussing the importance of trial by jury in the American system of criminal justice and other issues of civil liberties. See Lynch, *Rethinking the Petty Offense Doctrine, 4* KAN. J. LAW PUB. POL'Y 16 (Fall 1994).

*Amicus Curiae* has a substantial interest in supporting the petition for certiorari because the "petty offense" exception to the right to trial by jury, spawned in dicta from this Court and invoked by the District of Columbia Court of Appeals to deprive the Petitioner of trial by jury in this criminal case, conflicts with the plain language of the Article III right to trial by jury for "all crimes" and the Sixth Amendment guarantee of trial "by an impartial jury" in "all criminal prosecutions," and undermines the intended role of the jury as a bulwark of American liberty.

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[1] Pursuant to Supreme Court Rule *37.6, Amicus Curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

Article III, section 2 of the Constitution recognizes the right to trial by jury for "all crimes" except in cases of impeachment, and the Sixth Amendment guarantees to the accused the right to trial by "an impartial jury" in "all criminal prosecutions." Comments during the ratification of the original Constitution show. that the Framers intended an absolute right to trial by jury in all criminal prosecutions, just as the constitutional language says.

Despite that clear language, this Court – in dicta over a hundred years ago – suggested that the accused has no right to trial by jury in any criminal prosecution deemed "petty." That dicta has become ensconced in our constitutional jurisprudence without the Court having ever squarely addressed the plain language of the constitutional mandate.

But the Court has anomalously held that the ancillary procedures of the jury trial guaranteed by the Sixth Amendment – the rights to compulsory process, confrontation, and assistance of counsel, for example – must be afforded in all criminal prosecutions, whether "petty" or not. These ancillary procedures derive from the same Sixth Amendment language as the right to trial by jury itself, so the Court's Sixth Amendment jurisprudence is inconsistent and should be emended.

Finally, the limitation of the right to jury trial, contrary to the plain mandate of the Constitution, has led to predictable abuses. In the District of Columbia, for example, some citizens are being prosecuted on thousands of "petty" housing code charges. Even though they face years of imprisonment based on consecutive sentencing,

they cannot invoke their constitutional right to trial by jury because of the petty offense precedents. One landlord in the District was recently sentenced to six years of imprisonment based on cumulative charges, without the right to trial by jury. This Court should grant certiorari and reconsider the "petty offense" doctrine.

## ARGUMENT

### I. THIS COURT HAS NEVER SQUARELY ADDRESSED THE PLAIN LANGUAGE OF THE SIXTH AMENDMENT REQUIRING TRIAL BY JURY IN "ALL CRIMINAL PROSECUTIONS" IN CONSIDERING THE PETTY OFFENSE EXCEPTION, WHICH WAS SPAWNED THROUGH DICTA.

When interpreting the Bill of Rights, this Court has stressed that it must afford at least the protections inherent in the literal text of the Constitution. See, *Soldal* v. *Cook County, Illinois,* 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) (disconnection and towing of trailer was a "seizure" within the literal and legal meaning of the Fourth Amendment and so was subject to challenge for unreasonableness, despite claim that the Amendment only protected "privacy interests"); see *also* Monaghan, *Our Perfect Constitution,* 45 N.Y.U. L.REV. 353, 383-84 (1981) ("For the purposes of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration").

Here, the text of the Constitution could not be clearer. Article III, section 2 provides that "[t]he trial of

all crimes, except in cases of impeachment, shall be by jury." The Sixth Amendment grants the accused the right to trial by an "impartial jury" in "all criminal prosecutions." And that absolute language is particularly compelling when compared to the language of the Seventh Amendment right to jury trial in civil cases, in which the Framers explicitly included exceptions for trivial disputes and disputes that would not have been eligible for jury trial under common law. U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."). If the Framers intended to restrict the right to trial by jury in criminal prosecutions to "serious" cases, or cases that would have been eligible for jury trial at common law, they would have said so, as they did in the Seventh Amendment.

Indeed, in the ratification process for the unamended Constitution, when critics protested the lack of any express 'guarantee to trial by jury in civil cases, proponents responded that the Constitution intended to preserve the right in civil cases to the extent of the common law sub *silentio,* but expressly guaranteed the right to trial by jury in criminal cases because in criminal cases, there could be no exceptions to the right:

> As to criminal cases, I must observe that the great instrument of arbitrary power is criminal prosecutions. . . . That diversity which is to be found in civil controversies, does not exist in criminal cases. That diversity which contributes to the security of property in civil cases, would have pernicious effects in criminal ones. There is *no other safe mode to try these but by jury.* If any man had the means of trying another his own

> way, or were it left to the control of arbitrary judges, no man would have that security for life and liberty which every freeman ought to have.

Comments of Mr. Iredell to North Carolina Convention (July 29, 1788) (emphasis added) *in* THE COMPLETE BILL OF RIGHTS (Neil H. Cogan, ed. 1997) at *528-29.*

The "petty offense" exception to the right to trial by jury was spawned as dicta in an 1888 opinion of this Court. *Callan v. Wilson, 127* U.S. 540, 8 S. Ct. 1301, 32 L. Ed. 223 (1888) (holding that charge of criminal conspiracy triggered constitutional right to trial by jury, but misdemeanors that were not subject to jury trial at common law might not). Through subsequent opinions – many of them also citing the exception in dicta – the petty offense exception became ensconced in our constitutional jurisprudence without the Court ever squarely confronting the plain, absolute language of the Sixth Amendment guarantee, particularly in comparison to the limiting language of the Seventh Amendment. See, *Natal v. Louisiana,* 139 U.S. 621, 11 S. Ct. *636, 35* L. Ed. *288* (1891), *Schick v. United States, 195* U.S. 65, 24 S. Ct. 826, 49 L. Ed. 99 (1904). Justices of this Court have urged in the past that the Court grant certiorari to reconsider the exception in light of the clear mandate of the Constitution, but the Court has not yet done *so. Johnson v. Nebraska,* 419 U.S. 949, 95 S. Ct. 212, 42 L. Ed. 2d 169 (1974) (Douglas, J., dissenting from denial of certiorari).

In this case, the Petitioner preserved his challenge to the petty offense exception by arguing it in his appeal to the District of Columbia Court of Appeals, and then filed a timely petition for certiorari on the issue to this Court. *Amicus Curiae* respectfully submits that the right time and

the appropriate case to reconsider the exception have come.

## II. THE "PETTY OFFENSE" EXCEPTION TO THE RIGHT TO JURY TRIAL CONFLICTS WITH THE COURT'S OTHER RULINGS ON THE SCOPE OF SIXTH AMENDMENT RIGHTS.

During the ratification debates for the unamended Constitution, critics attacked the Article III provision for trial by jury of "all crimes" not because it went too far, but because it did not go far enough. They challenged the provision as inadequate to protect the rights of the accused because it did not specify the features of a fair jury trial. See Comments of Mr. Holmes to the Massachusetts Convention (January 30, 1788), *in* THE COMPLETE BILL OF RIGHTS (Neil H. Cogan ed., 1997) at p. 420 ("The mode of trial is altogether undetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet with his accuser face-to-face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told"). The Sixth Amendment was therefore incorporated into the Bill of Rights to specify the procedures for trial "by an impartial jury," which would apply "[i]n all criminal prosecutions." U.S. CONST. amend. VI (emphasis added). See also, *United States v. Woods, 299* U.S. 123, 142, 57 S. Ct. 177, 183, 81 L. Ed. 78 (1936) (recognizing that the Sixth Amendment was added to specify features of the right to jury trial already guaranteed by Article III).

This Court has held that all of these procedural features – except the right to jury trial itself – apply in all

criminal prosecutions, regardless of whether the offenses may be deemed petty. *Argersinger v. Hamlin, 407* U.S. 25, 27-28, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (Sixth Amendment rights to speedy trial, to be informed of the nature and cause of the accusation, to confrontation of adverse witnesses, to compulsory process, and to assistance of counsel all apply in prosecution of "petty offenses").

Thus, this Court's jurisprudence on the Sixth Amendment is inconsistent and illogical: the Court has preserved the ancillary procedures of the intended right to trial by jury "in all criminal prosecutions," but not the right itself. As Patrick Henry feared, "we amuse ourselves with the shadow, while the substance is given away." Comments to the Virginia Convention (June 12, 1788) *in* THE COMPLETE BILL OF RIGHTS (Neil H. Cogan, ed. 1997) at 539 (discussing need for a Bill of Rights to preserve more expressly "all the rights which are dear to human nature – trial by jury, the liberty of religion and the press, & c.")

## III. THE PETTY OFFENSE DOCTRINE HAS LED TO GROSS ABUSES.

As the Framers would have predicted, gross abuses have arisen from the weakening of the intended absolute right to trial by jury in criminal cases. Based on this Court's ruling in *United States v. Lewis,* 518 U.S. 322, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996), that the right to jury trial does not apply even if the consecutive sentence on multiple petty charges could exceed six months, prosecutors in the District of Columbia recently charged landlord

Andrew Serafin with 12,948 criminal violations of the District's housing code, carrying a possible cumulative sentence of 3,192 years' imprisonment – yet Serafin has no right to insist on a trial by jury under District of Columbia law or this Court's current constitutional jurisprudence. "Landlord Faces Criminal Charges," Washington Post, April 1, 2000 at Al. Another D.C. landlord, Kingsley Anyanwutaku, was recently sentenced to six years' imprisonment on 1,300 "petty" violations of the District's housing code, again without ever having the right to trial by jury. "Two Landlords Arrested in D.C.; Housing Crackdown Sends 'Strong Message' to Others, City's Lawyer Says," Washington Post, March 25, 2000 at B1. The "petty offense" exception has thus swallowed the rule of trial by jury for some alleged offenders.

## CONCLUSION

This Court should grant the petition for certiorari and reverse the decision of the District of Columbia Court of Appeals.

Respectfully submitted,

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