No. 08-1523

In the Supreme Court of the United States

ANTHONY LIONETTI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in sentencing petitioner in part on the basis of acquitted conduct.

2. Whether the district court committed reversible plain error in ordering petitioner to make restitution to the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not published in the *Federal Reporter* but is reprinted at 298 Fed. Appx. 212.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. A petition for rehearing was denied on January 8, 2009 (Pet. App. B1-B2). On March 31, 2009, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including June 7, 2009, and the petition was filed on June 8, 2009 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was found guilty of three counts of income tax evasion, in violation of 26 U.S.C. 7201. He was acquitted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and eleven counts of failure to account for and pay federal employment taxes, in violation of 26 U.S.C. 7202. Petitioner was sentenced to a term of imprisonment of 41 months and ordered to pay a fine of $7500 and restitution of $246,791. The court of appeals affirmed. Pet. App. A1-A10.

1. Petitioner is a New Jersey physician who specializes in the treatment of Lyme disease. Pet. App. A2; Pet. C.A. Br. 3. Beginning in 1994, he practiced his medical specialty as the president and sole shareholder of Lyme Disease Treatment Center, P.C. (Treatment Center). In 2000, petitioner formed another corporation, Tick Borne Disease Group, P.C. (Disease Group), which he owned and operated alongside the Treatment Center. Both the Treatment Center and the Disease Group were required by federal law to pay to the Internal Revenue Service (IRS) quarterly employment taxes withheld from the wages and salaries paid to their employees. Gov't C.A. Br. 2-3.

2. At trial, the government introduced evidence both that the Treatment Center and Disease Group had failed to pay their employment taxes and that petitioner had failed to pay his individual income taxes. According to the government, the Treatment Center had failed to pay employment taxes during 1999, as well as from 2001 to 2005, and the Disease Group had failed to pay such taxes during the last three quarters of 2001. Gov't C.A. Br. 3-4. The government calculated that the two medical

practices owed the IRS a total of approximately $2.1 million for the years 1999 to 2005. Pet. App. A2 n.2. The government likewise calculated that petitioner owed the IRS a total of $246,791 in unpaid personal income taxes for the years 1999 to 2001. *Ibid.*

Petitioner claimed at trial that he first became aware of any problem with the corporations' employment taxes in 2002 (when he was contacted as part of the IRS's criminal investigation) and with his personal income taxes in 2005 (when he was indicted for tax crimes). Gov't C.A. Br. 4. Petitioner contended that his business manager, Donald DuBeck, had been solely responsible for preparing his corporate and individual returns. Pet. App. A3; Gov't C.A. Br. 5. Petitioner blamed DuBeck for all of the unpaid taxes. Pet. App. A3; Pet. C.A. Br. 3.

3. Petitioner was found guilty of three counts of income tax evasion, in violation of 26 U.S.C. 7201. He was acquitted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and eleven counts of failure to account for and pay federal employment taxes, in violation of 26 U.S.C. 7202. At sentencing, however, in calculating the tax loss for which petitioner was responsible under Sentencing Guidelines § 2T1.1, the district court included the $2.1 million in unpaid federal employment taxes. Pet. App. A4; Gov't C.A. Br. 17. The court acknowledged that petitioner had been acquitted of the substantive counts related to the employment taxes, but found by a preponderance of the evidence that petitioner had engaged in employment tax fraud. *Id.* at 17-18. The court sentenced petitioner to a term of imprisonment of 41 months and ordered him to pay a fine of $7500 and restitution to the IRS of $246,791 for petitioner's unpaid personal income taxes. Pet. App. A4.

4. a. On appeal, petitioner argued in part that any involvement in the underpayment of federal employment taxes was not "relevant conduct" within the meaning Sentencing Guidelines § 1B1.3. Pet. C.A. Br. 42-46. In the alternative, petitioner argued that if such conduct were relevant, the district court's consideration of acquitted conduct at sentencing violated his Sixth Amendment jury trial right. *Id.* at 46-49. Petitioner did not challenge the district court's award of restitution.

b. The court of appeals affirmed petitioner's sentence. Pet. App. A1-A10. It held that "[t]he District Court found, by a preponderance of the evidence, that [petitioner] was responsible for the unpaid employment taxes because he knew from a prior bankruptcy filing that he owed employment taxes but still did not pay them." *Id.* at A8. According to the court, such a factual finding was "supported by the record" and "well within the [district court's] discretion." *Ibid.* As for petitioner's Sixth Amendment challenge, the court of appeals concluded that it was "without merit, because the 'Sixth Amendment [does not] automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence.'" *Ibid.* (quoting *Rita* v. *United States*, 551 U.S. 338, 352 (2007) (brackets in original)).

c. Petitioner requested rehearing by the panel and the en banc court, and argued for the first time that the district court had plainly erred in ordering restitution. The court of appeals denied rehearing. Pet. App. B1-B2.

ARGUMENT

1. a. Petitioner contends (Pet. 7-11) that the district court erred in sentencing him based in part on conduct for which he was acquitted. That contention is incorrect.

In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157.[1] The Court noted that, "under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" *id.* at 152 (citation omitted), and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion," *ibid.* Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles, its clear import is that sentencing courts may take acquitted conduct into account without offending the Constitution. See *id.* at 157. That principle pre-dated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines regime put into place by *United States* v. *Booker*, 543 U.S. 220 (2005).

This Court's decisions in *Booker* and subsequent cases confirm that there is no constitutional infirmity in a judge's basing the defendant's sentence, within the statutory maximum, on conduct that was not found by the jury. That is true whether the conduct was not charged at all or whether it formed the basis of charges on which the jury did not find the defendant guilty. As the Court explained in *Booker*:

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[1] Petitioner's alternate assertion (Pet. 24) that a sentencing court may not consider acquitted conduct unless such conduct is proved by a "'clear and convincing' standard" is thus squarely inconsistent with *Watts*, and petitioner does not cite any decision of a court of appeals adopting such a standard.

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

543 U.S. at 233 (citations omitted).

This Court reaffirmed in *Cunningham* v. *California*, 549 U.S. 270 (2007), that "there was no disagreement among the Justices" that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory. *Id.* at 285. And in *Rita*, the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." 551 U.S. at 352; see *id.* at 354 (noting *Booker*'s recognition that fact-finding by federal judges in application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding") (quoting *Booker*, 543 U.S. at 233).

In discussing the type of information that the sentencing court could consider under an advisory Guidelines regime, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes

upon a fact that a jury had found *unproved* (beyond a reasonable doubt)," *id.* at 251. As the Court recognized in *Watts*, such consideration is not unfair to a defendant because "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." 519 U.S. at 155 (quoting *Witte* v. *United States*, 515 U.S. 389, 401 (1995)). The rationale of *Watts*—that an acquittal establishes only that certain facts were not proved beyond a reasonable doubt, while facts may be considered at sentencing without satisfying that standard of proof—remains fully valid after *Booker*.

Further review of petitioner's acquitted conduct claim would be particularly unwarranted because there is no conflict among the courts of appeals on this issue. Since *Booker*, every court of appeals with criminal jurisdiction has held that a district court may consider acquitted conduct at sentencing.[2] This Court has repeat-

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[2] See *United States* v. *Perry*, 560 F.3d 246, 258-259 (4th Cir.), petition for cert. pending, No. 08-11019 (filed June 19, 2009); *United States* v. *White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied 129 S. Ct. 2071 (2009); *United States* v. *Settles*, 530 F.3d 920, 923-924 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 999 (2009); *United States* v. *Todd*, 515 F.3d 1128, 1137-1138 (10th Cir. 2008); *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 128 S. Ct. 2460 (2008); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, 128 S. Ct. 1737 (2008); *United States* v. *Fazio*, 487 F.3d 646, 659-660 (8th Cir.), cert. denied, 128 S. Ct. 523 (2007); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 128 S. Ct. 1736 (2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); *United States* v. *Faust*, 456 F.3d 1342, 1347-1348 (11th Cir.), cert. denied, 549 U.S. 1046 (2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006).

edly denied review in those cases, as well as in other cases presenting similar Sixth Amendment claims. See, *e.g.*, *Magluta* v. *United States*, 129 S. Ct. 2050 (2009) (No. 08-731); *Toepfer* v. *United States*, 129 S. Ct. 1000 (2009) (No. 08-469). There is no reason for a different result in this case.

b. Petitioner also contends (Pet. 11-23) that his acquitted conduct is not "relevant conduct" within the meaning of Sentencing Guidelines § 1B1.3, because the district court did not find that such conduct was criminal in nature. That contention does not merit review for several independent reasons. As a threshold matter, petitioner did not present his current argument to the court of appeals. See Pet. C.A. Br. 42-46. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioner's argument also rests on a mistaken factual premise. The district court found as a factual matter that petitioner's acquitted conduct was criminal in nature. Contrary to petitioner's assertion (Pet. 20-21), the court found that petitioner had a legal duty to pay employment taxes, and that he was aware of but willfully ignored such a duty. See C.A. App. A351-A352 ("[T]he court does find by a preponderance of the evidence that [petitioner] is, in fact, responsible * * * for more than two million dollars in tax losses."); *id.* at 352 ("[T]o argue he didn't know his obligation to pay these other taxes strains credulity."); *ibid.* ("Clearly he knew he had an obligation to pay these taxes. He clearly knew, and he just didn't do it."); *ibid.* ("So I do find by a pre-

ponderance of the evidence that he is responsible under the Sentencing Guidelines.").

Moreover, petitioner's failure to raise his claim below means that it would be subject at most to review for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). An error constitutes reversible plain error only if the defendant can show that (1) there was an error, (2) the error was obvious, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002). Petitioner does not attempt to explain how he could make those additional showings, and in any event the district court's factbound determination would not warrant this Court's attention.

2. Petitioner further contends (Pet. 24-31) that the district court plainly erred in ordering him to pay restitution of $246,791 for his unpaid personal income taxes. Because petitioner raised that claim for the first time in his petition for rehearing (which the court of appeals denied), it is reviewed for plain error. Even assuming that petitioner can demonstrate error that was obvious, any such error did not affect his substantial rights or seriously affect the fairness, integrity, or public reputation of the sentencing proceedings. *Cotton*, 535 U.S. at 625.

The district court had the authority to order restitution to the government as a condition of probation or supervised release. See 18 U.S.C. 3563(b)(2), 3583(d); Sentencing Guidelines § 5E1.1(a)(2); see also *United States* v. *Nolen*, 523 F.3d 331, 333 (5th Cir. 2008) ("[U]nder the current statutory scheme, restitution may be imposed if done so as a condition of supervised release in a criminal tax case, even in the absence of a prior defini-

tive determination or adjudication of the amount of taxes owed, and if limited to losses from the crime of conviction."); *United States* v. *Butler*, 297 F.3d 505, 518 (6th Cir. 2002) ("18 U.S.C. []§ 3563(b)(3) states that district courts may provide that a defendant 'make restitution to a victim of the offense' as a condition of probation. 18 U.S.C. § 3583(d) extends the possibility of such provision to supervised release."), cert. denied, 538 U.S. 1032 (2003).

At the sentencing hearing, petitioner acknowledged that he owed $246,791 in unpaid personal income taxes for the offenses of conviction. C.A. App. A347. The government then asked the district court to impose restitution for petitioner's unpaid personal income taxes as a condition of supervised release. See *id.* at A361("The Government is requesting that the Court order as a condition of Supervised Release that the defendant pay restitution in the amounts of the tax loss determined by the offenses of conviction $246,791.00."). The district court proceeded to impose restitution as the government had requested. *Id.* at A364 ("I do direct you pay restitution to the Internal Revenue Service in the amount of $246,791, which I find is the amount you willfully failed to pay, your first income tax obligation on this count, for which you stand convicted.").

To be sure, the court did not expressly say either during sentencing or in its judgment that it was imposing restitution as a condition of supervised release. C.A. App. A364; *id.* at A7. The court, however, imposed restitution during the portion of sentencing in which it imposed other conditions of probation or supervised release, *id.* at A364; and it did so in response to the government's request that restitution be made a condition of supervised release. In those circumstances, any error in

the court's judgment did not affect petitioner's substantial rights or seriously affect the fairness, integrity, or public reputation of the sentencing proceedings, because the court could have imposed restitution as a condition of supervised release.

Finally, petitioner procedurally defaulted any claim based on the putative sentencing error by raising it for the first time in his petition for rehearing before the court of appeals. According to that court, "an issue is waived unless a party raises it in its opening brief." *Tse* v. *Ventana Med. Sys., Inc.*, 297 F.3d 210, 225 n.6 (3d Cir. 2002) (quoting *Reform Party* v. *Allegheny County Dep't of Elections*, 174 F.3d 305, 316 n.11 (3d Cir. 1999)). The court of appeals has been clear that raising an issue for the first time in a petition for rehearing en banc fails to preserve the issue for subsequent review. *United States* v. *Cross*, 308 F.3d 308, 314 (3d Cir. 2002). Just as this Court may apply its own prudential doctrines to decline to consider an untimely claim, *Pasquantino* v. *United States*, 544 U.S. 349, 372 n.14 (2005), so too may a court of appeals apply its own prudential doctrines to foreclose consideration of an untimely claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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