

No. 13-10026

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In the  
**Supreme Court of the United States**

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October Term 2014

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JOSEPH JONES, DESMOND THURSTON

AND ANTUWAN BALL,

*Petitioners,*

v.

UNITED STATES,

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES SUPREME COURT**

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BRIEF FOR RESPONDENT

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*Counsel for the Respondent*

March 9, 2015

Team 1

## **QUESTIONS PRESENTED**

- I. Whether a federal judge may consider conduct of which the jury had acquitted the defendant in determining an appropriate sentence.
- II. Whether, in a sentencing proceeding under 18 U.S.C. § 3551, a federal judge has authority to increase a sentence of imprisonment based on facts not found by a jury nor admitted by defendant consistent with the Sixth Amendment as interpreted in United States v. Booker, 543 U.S. 220 (2005).

## **TABLE OF CONTENTS**

QUESTIONS PRESENTED.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
DISPOSITIONS BELOW.....	1
STATEMENT OF THE CASE.....	2
Procedural History.....	2
Statement of the Facts.....	3
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	5
<b><u>I. A SENTENCING COURT DOES NOT VIOLATE A DEFENDANT’S CONSTITUTIONAL RIGHTS WHEN IT CONSIDERS CONDUCT OF WHICH THE DEFENDANT WAS ACQUITTED</u></b> .....	5
A. Under The Federal Sentencing Guidelines, Judges Must Consider All Relevant Facts And Circumstances In Determining An Appropriate Sentence, Including Acquitted Conduct.....	6
B. The Preponderance Of The Evidence Standard Is The Correct Standard To Apply When Considering Acquitted Conduct At Sentencing.....	9
<b><u>II. AN INCREASE IN A DEFENDANT’S SENTENCE THAT IS BASED ON FACTS NOT FOUND BY THE JURY NOR ADMITTED BY THE DEFENDANT AND BELOW THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION IS CONSISTENT WITH THE SIXTH AMENDMENT</u></b> .....	11
A. Under <u>United States v. Booker</u> , Determinate Sentencing Systems That Mandate An Increase In Sentencing, Rather Than A Sentencing Judge’s Exercise Of Discretion, Raise Constitutional Issues.....	12
1. <u>Determinate sentencing systems that automatically increase a defendant’s sentence based on additional findings of fact not found by a jury or admitted by the defendant are unconstitutional</u> .....	12
2. <u>Under the Guidelines, sentencing courts have the flexible discretion to increase a defendant’s sentence based on facts found by a preponderance of the evidence.</u> .....	14

<b>B. The Constitutionality Of Sentence Enhancements Is Measured By The Statutory Maximum For The Crimes Of Conviction, Not The Recommended Guidelines Maximum.....</b>	<b>16</b>
1. <u>Under <i>Booker</i> and <i>Watts</i>, sentences that are increased within the statutory range are consistent with Sixth Amendment requirements.....</u>	<b>16</b>
<b>C. Strict Procedural And Statutory Requirements Ensure That Judicial Fact-Finding, Which Increases A Sentence Is Limited And An Increase In Penalty Is Constitutionally Warranted.....</b>	<b>17</b>
<b>D. Finding That A Sentence Enhancement Based On Acquitted Conduct Violates The Sixth Amendment Would Require This Court To Overrule <u>Booker</u> And <u>Mistretta</u>.....</b>	<b>18</b>
<b>CONCLUSION.....</b>	<b>20</b>

## **TABLE OF AUTHORITIES**

### **SUPREME COURT CASES**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000).....	12,13,14,16
<u>Blakely v. Washington</u> , 542 U.S. 296 (2004).....	13,16
<u>Bower v. Synar</u> , 478 U.S. 736 (1986).....	18
<u>Cunningham v. California</u> , 549 U.S. 270 (2007).....	13
<u>Dowling v. United States</u> , 493 U.S. 342 (1990).....	9
<u>Gall v. United States</u> , 552 U.S. 38 (2007).....	<i>passim</i>
<u>Jones v. United States</u> , 135 S. Ct. 8 (2014).....	1
<u>Mistretta v. United States</u> , 488 U.S. 361 (1989).....	4,5,18
<u>Pepper v. United States</u> , 131 S. Ct. 1229 (2011).....	13,15
<u>Peugh v. United States</u> , 133 S. Ct. 2072 (2013).....	6,17,18
<u>Rita v. United States</u> , 551 U.S. 338 (2007).....	11,15,17,18
<u>United States v. Booker</u> , 543 U.S. 220 (2005).....	<i>passim</i>
<u>United States v. One Assortment of 89 Firearms</u> , 465 U.S. 354 (1984).....	9
<u>United States v. Tucker</u> , 404 U.S. 443 (1972).....	15
<u>United States v. Watts</u> , 519 U.S. 148 (1997).....	7,9,16

### **CIRCUIT COURT CASES**

<u>United States v. Armendariz</u> , 451 F.3d 352 (5th Cir. 2006).....	17
<u>United States v. Armstrong</u> , 165 Fed. App'x 768 (11th Cir. 2006).....	15
<u>United States v. Ashworth</u> , 139 F. App'x 525 (4th Cir. 2005).....	7
<u>United States v. Butler</u> , 416 F. App'x 856 (11th Cir. 2011).....	11
<u>United States v. Crisp</u> , 454 F.3d 1285 (11th Cir. 2005).....	17
<u>United States v. Duncan</u> , 400 F.3d 1297 (11th Cir. 2005).....	7
<u>United States v. Farias</u> , 469 F.3d 393 (5th Cir. 2006).....	7
<u>United States v. Fisher</u> , 502 F.3d 293 (3d Cir. 2007).....	10
<u>United States v. Gaytan</u> , 74 F.3d 545 (5th Cir. 1996).....	11

<u>United States v. Gobbi</u> , 471 F.3d 302 (1st Cir. 2006).....	7
<u>United States v. Grier</u> , 475 F.3d 556 (3rd Cir. 2007).....	10,11
<u>United States v. Hayward</u> , 177 F. App'x 214 (3d Cir. 2006).....	7
<u>United States v. High Elk</u> , 442 F.3d 622 (8th Cir. 2006).....	7
<u>United States v. Hopper</u> , 177 F.3d 824 (9th Cir. 1999).....	10
<u>United States v. Hurn</u> , . 496 F.3d 784 (7th Cir. 2007).....	8
<u>United States v. Ibanga</u> , 271 F. App'x 298 (4th Cir. 2008).....	8
<u>United States v. Jones</u> , 744 F.3d 1362 (D.C. Cir. 2014).....	1,3
<u>United States v. Jordan</u> , 256 F.3d 922 (9th Cir. 2001).....	9
<u>United States v. Magallanez</u> , 408 F.3d 672 (10th Cir. 2005).....	7
<u>United States v. Marston</u> , 517 F.3d 996 (8th Cir. 2008).....	15
<u>United States v. Mercado</u> , 474 F.3d 654 (9th Cir. 2007).....	7
<u>United States v. Meyer</u> , 452 F.3d 998 (8th Cir. 2006).....	18
<u>United States v. Munoz</u> , 233 F.3d 1117 (9th Cir. 2000).....	10
<u>United States v. Paradis</u> , 289 F. App'x 66 (6th Cir. 2008).....	11
<u>United States v. Reuter</u> , 463 F.3d 792 (7th Cir. 2006).....	11
<u>United States v. Shatley</u> , 448 F.3d 264 (4th Cir. 2006).....	17
<u>United States v. Smith</u> , 445 F.3d 1 (1st Cir. 2006).....	17
<u>United States v. Valenzuela</u> , 484 F. App'x 243 (10th Cir. 2012).....	11
<u>United States v. Vaughn</u> , 430 F.3d 518 (2d Cir. 2005).....	7,10
<u>United States v. Villareal-Amarillas</u> , 562 F.3d 892 (8th Cir. 2009).....	11
<u>United States v. Washington</u> , 11 F.3d 1510 (10th Cir. 2008).....	11
<u>United States v. White</u> , 551 F.3d 381 (6th Cir. 2008).....	7,8
<u>United States v. Wright</u> , 873 F.2d 437 (1st Cir. 1989).....	10

## STATUTES

18 U.S.C. § 3551 (1984).....	5
18 U.S.C. § 3553 (2010).....	6,13,19

18 U.S.C. § 3557 (1987).....	15
18 U.S.C. § 3661 (1987).....	15,19
28 U.S.C. § 991 (2008).....	5

#### MISCELLANEOUS

United States Sentencing Commission, <i>National Comparison of Sentence Imposed and Position Relative to the Guidelines Range</i> , 2013 Annual Report, Tbl. N.....	18
United States Sentencing Guidelines Manual (2014).....	5,6,9

### **DISPOSITIONS BELOW**

The opinion of the United States Court of Appeals, District of Columbia Circuit is reported in United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir. 2014). This Court denied Petitioner's request for a *Writ of Certiorari*, which is reported in Jones v. United States, 135 S. Ct. 8 (Oct. 14, 2014). This Court reversed its earlier Order and granted the Petition for *Writ of Certiorari*, which was filed on January 15, 2015. No. 13-10026.

## **STATEMENT OF THE CASE**

### **PROCEDURAL HISTORY**

Petitioners, Joseph Jones, Desmond Thurston, and Antuwan Ball were convicted of distribution of crack cocaine in the United States District Court for the District of Columbia. The jury acquitted Petitioners of conspiracy to distribute drugs. At sentencing, the court considered all relevant conduct, including that of which the defendants were acquitted to determine appropriate sentences. Petitioners appealed their sentences to the District of Columbia Circuit Court, objecting to the District Court's consideration of the acquitted conduct at sentencing. They argued that their sentences should have been based solely on conduct for which they were convicted and consideration of any other conduct violated their constitutional rights. Petitioners contended that their sentences would have been far lower had the court not considered the acquitted conduct.

The Circuit Court found no errors in the District Court's holdings. On March 14, 2014, the Circuit Court affirmed the Petitioners' sentences. The court correctly reasoned that binding precedent established that consideration of acquitted conduct does not violate the Constitution when such conduct is established by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime of conviction. Petitioners requested the United States Supreme Court for *Writ of Certiorari*. On October 14, 2014, this Court denied Petitioners' request. This Court reversed the denial and granted the petition on January 15, 2015.

### STATEMENT OF THE FACTS

In 2005, a grand jury indicted 18 defendants, including Petitioners, with narcotics and racketeering offenses. United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir. 2014). The charges resulted from the defendants' involvement in a gang, known as the Congress Park Crew. Id. The gang occupied Congress Park in Washington, D.C. for approximately thirteen years, running a market for crack cocaine. Id. Eleven of the indicted defendants pled guilty and one was convicted at his own trial. Id. In February 2007, the remaining defendants, including Petitioners, proceeded to trial. Id. The government presented witnesses, including those who purchased crack cocaine from the defendants and fellow co-conspirators. Id. The government also presented recordings of the defendants engaging in the sale of crack cocaine. Id. At the conclusion of trial, the jury convicted the defendants of distribution of crack cocaine, but acquitted the defendants of conspiracy to distribute drugs. Id.

At sentencing, the court found by a preponderance of the evidence that the defendants conspired to distribute crack cocaine in Congress Park. Id. The United States Sentencing Guidelines called for a sentence of 324 to 405 months' imprisonment for Defendant Jones. Id. at 1366. However, the court sentenced Jones to only 180 months, well below the Guidelines recommendation. Id. The court calculated Defendant Thurston's guideline range to be 262 to 327 months, and Defendant Ball's range to be 292 to 365 months. Id. However, the court sentenced Thurston and Ball to 194 months and 225 months, respectively. Id. These sentences were also well below the Sentencing Guidelines recommendation.

## **SUMMARY OF THE ARGUMENT**

This Court should uphold the decision of the United States Court of Appeals, District of Columbia Circuit, and find that the Sixth Amendment permits federal judges to consider conduct of which the defendant was acquitted, and to increase that sentence in consequence. This Court's precedent has long recognized that judges can consider acquitted conduct at sentencing. In order to impose appropriate and individualized penalties, sentencing courts must maintain its well-established power to inquire into all relevant facts and circumstances when imposing a sentence. At times, facts neither found by the jury nor admitted by the defendant constitute relevant conduct and factor into a sentence determination. So long as no procedural error is committed and the judge finds the facts by a preponderance of the evidence, no constitutional violation occurs.

Under the advisory Guidelines, a judge's consideration of acquitted conduct to significantly increase the defendant's sentence is consistent with the Sixth Amendment. So long as the sentence remains below the statutory maximum for the crime of conviction and the judge satisfies all procedural requirements, judges have the flexible discretion to enhance a defendant's sentence based on acquitted conduct. The Federal Sentencing Guidelines are a constitutional sentencing tool as advisory, and Congress retains sole authority to amend its requirements. Should this Court find a constitutional violation, United States v. Booker and United States v. Mistretta must be overruled.

## ARGUMENT

### **I. A SENTENCING COURT DOES NOT VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN IT CONSIDERS CONDUCT OF WHICH THE DEFENDANT WAS ACQUITTED.**

The Federal Sentencing Guidelines (“Guidelines”) are the product of the United States Sentencing Commission, a body created by the Sentencing Reform Act of 1984 (“SRA”). 18 U.S.C. § 3551 (1984); 28 U.S.C. § 991 (1987). Congress enacted the Guidelines because it concluded that such a system would be successful in reducing disparities in sentencing, while retaining the flexibility needed to adjust for unanticipated factors arising in each case. 28 U.S.C. § 991(b)(1)(B) (2008). Congress aimed for uniformity in the sentencing system by imposing the Sentencing Guidelines. Id.

The Sentencing Commission gathered extensive empirical data to develop a comprehensive tool that judges could utilize during sentencing. U.S. Sentencing Guidelines Manual § 5A (2014). The Guidelines provide a suggested range of sentencing for offense levels. Id. Each offense level correlates with a specific offense (or “base offense”) and can be increased if the specific offense involves an aggravating circumstance. Id. at § 3A. Offense levels run from 1 to 43. Id. at § 5A. There are also six Criminal History Categories (expressed in roman numerals from I to VI). Id. The higher the offense level or Criminal History Category, the higher the guideline range (from a low of 0-6 months to “life”). Id.

Today, the Sentencing Guidelines are advisory, permitting judges to disregard the Guidelines entirely if they deem it appropriate. United States v. Booker, 543 U.S. 220 (2005). Prior to 2005, the Sentencing Guidelines were mandatory. Mistretta v. United States, 488 U.S. 361, 367 (1989) (“the Sentencing Commission's guidelines [are] binding on the courts”). In Booker, this Court departed from its previous restriction by severing the provision that forced

sentencing courts to strictly comply with the Guidelines when imposing a sentence. 543 U.S. at 223. By rendering the Guidelines advisory, this Court found the remaining statute consistent with the Constitution as well as fulfillment of Congress’s intent to prevent disparities. *Id.* The advisory nature of the Guidelines gives judges broad discretion in sentencing and the Supreme Court has “never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.” *Id.* at 233. While the district courts are not obligated to apply the Guidelines, they must consult them when sentencing. *Id.* at 264. Thus, the Guidelines act as an initial benchmark for sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007). Overall, this system “requires a court to give respectful consideration to the Guidelines, but it permits the court to tailor the sentence in light of other statutory concerns as well.” *Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013) (internal quotations omitted).

**A. Under The Federal Sentencing Guidelines, Judges Must Consider All Relevant Facts And Circumstances In Determining An Appropriate Sentence, Including Acquitted Conduct.**

The Guidelines require the sentencing court to consider all “relevant conduct” in imposing sentences, whether or not that conduct resulted in a conviction. *See* § 1B1.3; 18 U.S.C. § 3553(a) (1987). Section 3553(a) lists seven factors that a sentencing court must consider.<sup>1</sup> Because the Guidelines are merely instructive, it is not only permissible but essential for a court to calculate the defendant’s sentence in consideration of all the available facts. A defendant who

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<sup>1</sup> The first factor is a broad command to consider “the nature and circumstances of the offense and the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). The second factor requires the consideration of the general purposes of sentencing, including: “the need for the sentence imposed—

“(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

“(B) to afford adequate deterrence to criminal conduct;

“(C) to protect the public from further crimes of the defendant; and

“(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” § 3553(a)(2).

The third factor pertains to “the kinds of sentences available,” § 3553(a)(3); the fourth to the Sentencing Guidelines; the fifth to any relevant policy statement issued by the Sentencing Commission; the sixth to “the need to avoid unwarranted sentence disparities,” § 3553(a)(6); and the seventh to “the need to provide restitution to any victim,” § 3553(a)(7).

commits an offense in a particularly brutal fashion should have an opportunity to avail himself of a lesser sentence because the judge did not account for all available facts. The advisory Guidelines provide judges the opportunity for more individualized sentencing that is consistent with the offense. Furthermore, this system fulfills Congress's intent by granting judges flexibility to consider specific factors in each case.

This Court's precedent holds that a sentencing judge may consider uncharged or acquitted conduct in determining an appropriate sentence, so long as that conduct has been proved by a preponderance of the evidence and the sentence imposed does not exceed the statutory maximum for the crime of conviction. United States v. Watts, 519 U.S. 148, 156 (1997). As long as the sentence is at or below the statutory maximum set by the jury's verdict, the sentencing court does not violate the defendant's rights by looking to other facts, including acquitted conduct. See e.g. United States v. Gobbi, 471 F.3d 302 (1st Cir. 2006); United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005); United States v. Hayward, 177 F. App'x 214 (3d Cir. 2006); United States v. Ashworth, 139 F. App'x 525 (4th Cir. 2005); United States v. Farias, 469 F.3d 393 (5th Cir. 2006); United States v. White, 551 F.3d 381 (6th Cir. 2008); United States v. High Elk, 442 F.3d 622 (8th Cir. 2006); United States v. Mercado, 474 F.3d 654 (9th Cir. 2007); United States v. Magallanez, 408 F.3d 672 (10th Cir. 2005); United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005).

Acquitted conduct goes directly to the nature of the offense and is material when calculating an appropriate sentence. In Watts, police discovered cocaine base, two loaded guns, and ammunition in the defendant's house. 519 U.S. at 148. A jury convicted the defendant of possessing cocaine base with intent to distribute, but acquitted him of using a firearm in relation to a drug offense. Id. 149–50. The district court determined that the acquitted conduct was

proven by a preponderance of the evidence and added two points to the defendant's base offense level in accordance with the Guidelines. Id. This Court held, "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. Thus, consideration of acquitted conduct is constitutionally permissible during sentencing.

Consideration of acquitted conduct that leads to significantly longer sentences is still constitutional despite the notable enhancement. In United States v. Hurn, a jury acquitted the defendant of possession of cocaine base with intent to distribute, but found him guilty of possession of powder cocaine with intent to distribute. 496 F.3d 784, 785 (7th Cir. 2007). The defendant's sentencing range was raised from 27–33 months to 16–20 years based on the distribution counts of which he was acquitted. Id. at 786. Following Booker and Watts, the Seventh Circuit upheld the sentence and found consideration of the acquitted conduct valid. Id. at 789; See also White, 551 F.3d 381 (affirming a 22-year sentence that was nearly doubled based only on the consideration of defendant's acquitted conduct).

The Fourth Circuit has gone even further to hold that the court commits procedural error by excluding acquitted conduct from the information it considers in the sentencing process. United States v. Ibanga, 271 F. App'x 298, 301 (4th Cir. 2008). In Ibanga, the jury convicted the defendant of conspiracy to launder money and acquitted him of drug trafficking charges. Id. at 299. The sentencing court found that the prosecution had proven the drug trafficking charges by a preponderance of the evidence but would not consider the acquitted conduct. Id. at 300. The Fourth Circuit vacated the sentence and held that the district court "committed significant procedural error by categorically excluding acquitted conduct from the information that it could consider in the sentencing process." Id. at 301. The court explained that no limitation should be

placed on the information relating to the offense, specifically acquitted conduct. Id. To hold otherwise would overturn years of precedent set by this Court and undermine the current sentencing system.

**B. The Preponderance Of The Evidence Standard Is The Correct Standard To Apply When Considering Acquitted Conduct At Sentencing.**

“[A]cquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.” United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984). An acquittal does not act as a finding of fact by the jury that the defendant is innocent of the crime, but that the government did not meet its burden. In 1991, the Sentencing Commission amended its policy statement commentary, adding that “use of a preponderance of the evidence standard is appropriate to meet the due process requirements and policy concerns in resolving disputes regarding application of the Guidelines to the facts of a case.” § 6A1.3 U.S.S.G. (1987) (amended 1991). This Court favored the Commission’s standard, holding that a sentencing court could consider acquitted conduct if it was proved by a preponderance of the evidence. Watts, 519 U.S. at 156. The government is not “precluded from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. Id. (quoting Dowling v. United States, 493 U.S. 342, 349 (1990)). Thus, a sentencing court is not prohibited from considering acquitted conduct under a lower standard of proof.

While the Ninth Circuit has occasionally held that due process requires that the evidence be clear and convincing, all other circuit courts have continued to use the preponderance of the evidence standard. The Ninth Circuit applied the clear and convincing standard in United States v. Jordan, 256 F.3d 922 (9th Cir. 2001). In Jordon, the defendant pled guilty to bank robbery and the district court enhanced the defendant’s sentence for conduct to which the defendant did not plead guilty, including firearm possession and abduction. Id. at 924. The Ninth Circuit found that

sentence enhancements require a higher standard of proof than preponderance of the evidence when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction. Id. at 927. The Ninth Circuit vacated the sentence and remanded to the district court, holding that the conduct relating to firearm possession and abduction must be proven by clear and convincing evidence due to the disproportionate effect the conduct had on the sentence. Id. at 930.

However, the Ninth Circuit explained that the disproportionate impact test is not a bright-line rule. Id. at 928. Instead, the court should look at the “totality of the circumstances” without considering any one factor as dispositive. Id. The Jordan court noted that there is “uncertainty within our circuit about when the disproportionate impact test applies.” Id. Consequentially, this test has been applied arbitrarily throughout the Ninth Circuit. Compare United States v. Munoz, 233 F.3d 1117, 1127 (9th Cir. 2000) (holding that a nine-level upward adjustment in sentence levels for uncharged conduct was sufficiently disproportionate to require the district court to apply the clear and convincing evidence standard to the factual findings), with United States v. Hopper, 177 F.3d 824, 833 (9th Cir. 1999) (holding the defendant’s resulting four-level increase in sentence is not an exceptional case that requires clear and convincing evidence).

Unquestionably, the clear and convincing standard is the minority view among the circuit courts. See, e.g., United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989) (preponderance standard satisfies due process); Vaughn, 430 F.3d at 525 (“[w]e reiterate that, after Booker, district courts’ authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment”); United States v. Fisher, 502 F.3d 293, 305 (3d Cir. 2007) (“[u]nder an advisory Guidelines scheme, district courts should continue to make factual findings by a preponderance of the evidence”) (*quoting United*

States v. Grier, 475 F.3d 556, 561 (3rd Cir. 2007); United States v. Gaytan, 74 F.3d 545, 558 (5th Cir. 1996) (it is “well-established that the preponderance standard is the applicable standard for sentencing purpose”); United States v. Paradis, 289 F. App’x 66, 70 (6th Cir. 2008) (“[t]his circuit faithfully applies the preponderance standard [and] . . . we are bound by this precedent”); United States v. Reuter, 463 F.3d 792, 793 (7th Cir. 2006) (preponderance of the evidence standard does not violate due process); United States v. Villareal-Amarillas, 562 F.3d 892, 897 (8th Cir. 2009) (“due process never requires applying the clear and convincing evidence standard to judicial fact-finding at criminal sentencing”); United States v. Valenzuela, 484 F. App’x 243, 249 (10th Cir. 2012) (“the Due Process Clause does not require sentencing facts in the ordinary case to be proved by more than a preponderance standard”) (quoting United States v. Washington, 11 F.3d 1510, 1516 (10th Cir. 2008); United States v. Butler, 416 F. App’x 856, 859 (11th Cir. 2011) (the sentencing court’s findings must be proved by a preponderance of the evidence). Thus, regardless of the impact that the considered conduct has on sentencing, the standard should always be preponderance of the evidence.

**II. AN INCREASE IN A DEFENDANT’S SENTENCE THAT IS BASED ON FACTS NOT FOUND BY THE JURY NOR ADMITTED BY THE DEFENDANT AND BELOW THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION IS CONSISTENT WITH THE SIXTH AMENDMENT.**

The Sixth Amendment does not prohibit a sentencing court from considering facts not found by the jury nor admitted by the defendant to increase the sentence in consequence. Rita v. United States, 551 U.S. 338, 352 (2007). Under the post-*Booker* Guidelines system, district judges may impose a higher sentence based on conduct that the defendant was acquitted of so long as it is established by a preponderance of the evidence. *Id.* For ten years, Sixth Amendment precedent of this Court and of all circuit courts of appeals has consistently adopted this understanding.

This discretion is consistent with Appendi, Booker, and this Court’s interpretation of the Sixth Amendment when applying their principles. Under the current advisory Guidelines, sentencing judges must maintain their long-recognized authority to determine an appropriate and individualized penalty. In limited cases, a judge may find that a penalty above the recommended range is warranted because of facts found by a preponderance of the evidence. However, strict constitutional, procedural, and statutory requirements ensure that the enhanced penalty does not deprive the defendant of any constitutional rights.

**A. Under United States v. Booker, Determinate Sentencing Systems That Mandate An Increase In Sentencing, Rather Than A Sentencing Judge’s Exercise Of Discretion, Raise Constitutional Issues.**

Mandatory sentencing systems that restrict a district judge from exercising broad discretion to impose an individualized and appropriate sentence violates the Sixth Amendment. Both state and federal case law demonstrate that judges who imposed impermissible sentence enhancements did so when operating under determinate sentencing systems.<sup>2</sup> Because the Guidelines are advisory, judges may permissibly enhance a sentence based on conduct that the defendant was acquitted of without constitutional deprivation and consistent with Booker and Appendi.

1. Determinate sentencing systems that automatically increase a defendant’s sentence based on additional findings of fact not found by a jury or admitted by the defendant are unconstitutional.

Appendi principles are specific to statutory schemes that are procedurally inadequate. “If a *state* makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact, must be found by a jury beyond a reasonable doubt.” Appendi v. New Jersey, 530

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<sup>2</sup> Judicial authority to consider sentencing factors and enhance the penalty is identical amongst state procedures and Federal Sentencing Guidelines. Booker, 543 U.S. at 233.

U.S. 466, 482–83 (2000) (emphasis added). In Apprendi, a New Jersey statute classified the possession of a firearm for an unlawful purpose as a second-degree offense, which carried an imprisonment range between five and ten years. Id. at 468. Under a separate hate crime law, a defendant could receive an extended prison term of 10 to 20 years, which required the trial judge to find additional facts of racial motivation. Id. at 468–69.

New Jersey’s statutory scheme was unconstitutional because it allowed the imposition of a higher sentence based upon judicial finding(s) made post-trial, in a separate proceeding, and proven by a preponderance of the evidence standard. Id. at 491–92. This determinate system automatically triggered the state’s enhancement scheme and doubled the defendant’s maximum authorized sentence upon a judge’s factual finding. Id. at 474. Thus, the constitutional defect was not the judge’s determination, but New Jersey’s statutory enhancement procedure.

Before Booker, the SRA constrained sentencing courts’ discretion by making the Guidelines mandatory, and by identifying specific factors that courts must consider in exercising their discretion. Pepper v. United States, 131 S. Ct. 1229, 1241 (2011) (discussing 18 U.S.C. §§ 3553(b)(1) and 3553(a)). This system was unconstitutional because it required judges to find additional facts in order to impose a longer sentence, rather than allow judges who incidentally find additional facts decide whether or not an increase in sentencing was appropriate. Booker, 543 U.S. at 223–24. Once the mandatory provisions were excised and severed, the SRA satisfied constitutional requirements. Id. at 223.

Courts continue to vacate unconstitutional sentences imposed under mandatory state systems, finding them incompatible with the Sixth Amendment and flexible sentencing that Booker conceptualized. See Cunningham v. California, 549 U.S. 270 (2007) (discussing Blakely v. Washington, 542 U.S. 296 (2004)). In Cunningham, California’s determinate sentencing

scheme was invalidated because it granted the trial judge sole authority to find sentencing facts, which exposed a defendant to a sentence above the statutory maximum. 549 U.S. at 274–75. Under this system, judges were not free to exercise their discretion to select a specific sentence within a defined range. Id. at 273. Instead, the state legislature adopted three fixed sentences with no ranges in-between. Id. Consequently, a judge was restricted from imposing any sentence between 6 and 16 years but forced to select 12, unless additional facts that were not presented to a jury were found. Id. at 274.

Booker’s logic was grounded in Apprendi, which ruled “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 543 U.S. at 231 (quoting Apprendi, 530 U.S. at 490). Once the Guidelines became advisory in nature, they fell “outside the scope of Apprendi.” Id. at 223–24. Nothing in Booker’s entire analysis addressed a judge’s unconstitutional use of acquitted conduct or judicial fact-findings made during sentencing. It was relevant to the defendant’s sentence yet was not incorporated into Booker’s remedial holding. This Court focused solely on the sentencing scheme, and thoroughly explained what provisions of the Act were unconstitutional and why. Consequently, the sentence enhancements based on facts found by a preponderance of evidence and below the statutory maximum must also fall outside Apprendi.

2. Under the Guidelines, sentencing courts have the flexible discretion to increase a defendant’s sentence based on facts found by a preponderance of the evidence.

Today, the Guidelines system and Sixth Amendment precedent allow judges to consider all relevant facts, including conduct that the defendant was acquitted of, and increase the sentence if appropriate. The Guidelines are the “starting point and the initial benchmark” for a sentencing court. Gall, 552 U.S. at 49. A sentencing judge “should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” Id. Following arguments

by both parties as to the appropriate penalty, the judge may not assume the calculated sentence is reasonable, but must make an individualized assessment. Rita, 551 U.S. at 351. Since 1970, no limitation exists on a judge's consideration of information in determining the sentence to impose within the guidelines range or whether to depart from the Guidelines. 18 U.S.C. § 3557 (re-codified as 18 U.S.C. § 3661 (1987)). Thus, Congress expressly preserved the "traditional discretion of sentencing courts to 'conduct an inquiry broad in scope'" by incorporating specific and unlimited language into the Guidelines. Pepper, 131 S. Ct. at 1240 (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)). This re-codification affirms a judge's vast grant of power.

In consideration of the 3553(a) factors, a judge may choose to depart upward from the recommended range based on a judge's finding of facts by a preponderance of the evidence, including acquitted conduct. See Gall, 552 U.S. at 49–50. Every circuit court has adopted this principle. See e.g., United States v. Armstrong, 165 Fed. App'x 768, 772 (11th Cir. 2006) (recognizing that the use of acquitted conduct enhancements in an advisory guidelines system is constitutional); United States v. Marston, 517 F.3d 996, 1007 (8th Cir. 2008) (finding no Sixth Amendment violation even though judicial fact-finding increased the defendant's sentence).

Post-*Booker*, sentencing courts are still required to make appropriate findings of fact to calculate the sentencing range prescribed by the Guidelines. Thus, Booker did not change the procedure by which sentencing facts are found under the Guidelines. Sentencing courts will calculate and consider the exact same guideline range that it would have applied under the pre-*Booker* mandatory guidelines regime. See Gall, 522 U.S. at 47–50.

The decisions in Apprendi and Blakely came before the Guidelines were upheld as constitutional in its current advisory structure. Under the post-*Booker* Guidelines, sentence enhancements do not implicate Apprendi, and its rule is no longer directly applicable to a judge's

imposition of an increase in sentence based on acquitted conduct so long as those facts are found by a preponderance of the evidence and no procedural error is committed.

**B. The Constitutionality Of Sentence Enhancements Is Measured By The Statutory Maximum For The Crimes Of Conviction, Not The Recommended Guidelines Maximum.**

The statutory maximum for the crime(s) of conviction must remain the constitutional ceiling for Sixth Amendment purposes. Sentencing courts may increase a defendant's penalty based on conduct underlying the acquittal charge so long as found by a preponderance of the evidence and procedurally sufficient. See Watts, 519 U.S. at 154–56.

1. Under *Booker* and *Watts*, sentences that are increased within the statutory range are consistent with Sixth Amendment requirements.

Sixth Amendment precedent has never doubted a sentencing judge's authority to exercise "broad discretion in imposing a sentencing within a statutory range." Booker, 543 U.S. at 233. Neither does the Constitution prohibit judges to exercise their discretion and to consider various factors in "imposing a judgment within the range prescribed by statute." Apprendi, 530 U.S. at 481. This Court has reaffirmed the principle that judges have long exercised such discretion in imposing a sentence within statutory limits in each individual case. Id.

In Blakely, this Court relied on Apprendi to find that under Washington's sentencing system, a defendant's penalty enhancement of three years above the statutory maximum violated the Sixth Amendment. See 542 U.S. 296. In Booker, this Court held that Blakely applies to the Guidelines and, therefore, the Sixth Amendment is violated when a district court imposes a mandatory sentence under the Guidelines that is greater than the maximum authorized by the facts found solely by the jury verdict. 543 U.S. at 241.

Because the Guidelines may be ignored entirely, district courts may increase a defendant's penalty outside the recommended range until reaching the statutory ceiling. This is consistent with Appendi because the judge, not the system, departs upward from the recommended range in order to impose an appropriate penalty. Thus, a sentence within the advisory Guidelines range is reasonable so long as the penalty does not exceed the statutory maximum for the crime(s) of conviction.

**C. Strict Procedural And Statutory Requirements Ensure That Judicial Fact-Finding, Which Increases A Sentence Is Limited And An Increase In Penalty Is Constitutionally Warranted.**

It is not the length of the sentence, but the *process* used to determine the length that may offend the Sixth Amendment. United States v. Shatley, 448 F.3d 264, 267–68 (4th Cir. 2006) (emphasis added). Should a federal judge decide that a sentence outside the recommended Guideline range is warranted, she must consider the extent of the deviation and guarantee that it is sufficiently justified. Gall, 522 U.S. at 50. Upon concluding that a sentence is appropriate, the judge must explain the penalty sufficient to allow “for meaningful appellate review and to promote the perception of fair sentencing.” Id. (discussing Rita, 511 U.S. at 356–58). Circuit courts have also adopted the position that an outside Guidelines sentence requires a justification proportional to the degree of variance. Rita, at 511 U.S. at 353 (discussing United States v. Smith, 445 F.3d 1, 4 (1st Cir. 2006); United States v. Armendariz, 451 F.3d 352, 358 (5th Cir. 2006); United States v. Crisp, 454 F.3d 1285, 1291–92 (11th Cir. 2005)).

A sentence that varies from the Guidelines may be reasonable so long as the sentencing court committed no procedural error. Gall, 522 U.S. at 56. Procedural error includes the failure to calculate the correct Guidelines range and treating the Guidelines as mandatory. Peugh, 133 S.Ct. at 2080 (discussing Gall, 522 U.S. at 51). The relevant question then becomes whether the

sentencing judge abused his discretion in determining that the 3553(a) factors supported the penalty and justified a substantial deviation from the Guidelines range. Gall, 522 U.S. at 56; see also United States v. Meyer, 452 F.3d 998 (8th Cir. 2006) (upholding defendant's sentence that was increased 50% from the guidelines range in applying higher burden of variance justification). However, district judges will occasionally make substantive mistakes when sentencing, and impose unreasonable sentences. Rita, 551 U.S. at 354. Circuit courts of appeals exist to correct such mistakes upon appellate review. Id.

The post-*Booker* Guidelines created procedural obstacles that, "in practice, make the imposition of a non-Guidelines Sentence less likely." Peugh, 133 S.Ct. at 2083–84. Statistics reveal that since Booker, less than one-fifth of cases have imposed sentences outside the recommended Guidelines absent a government motion. Id. at 2084. In 2013, only 2.1% of total cases were sentenced above the Guidelines range, while 46.6% were sentenced below range. See United States Sentencing Commission, *National Comparison of Sentence Imposed and Position Relative to the Guidelines Range*, 2013 Annual Report, Tbl. N.

**D. Finding That A Sentence Enhancement Based On Acquitted Conduct Violates The Sixth Amendment Would Require This Court To Overrule Booker And Mistretta.**

Should this Court find that a judge's consideration of acquitted conduct that increases a defendant's sentence under the Guidelines violates the Sixth Amendment, Booker and Mistretta must be overruled. The Guidelines are a constitutional delegation of power to the Sentencing Commission and do not violate separation of powers. See Mistretta, 488 U.S. at 380–84. "When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." Mistretta, 488 U.S. at 384 (citing Bower v. Synar, 478 U.S. 736 (1986)).

This Court found the Guidelines constitutional when it freed sentencing judges to impose discretionary sentences. Booker, 543 at 233. Today, the Guidelines serve as the only numerical benchmark for judges in selecting an appropriate sentence because sentencing courts must consider various facts and circumstances. 18 U.S.C. § 3553(a). Thus, the only practical means for a sentencing court to fulfill Congress's intent consistent with Booker is through their judicial discretion under the Guidelines. In the ten years since Booker, the Supreme Court and all circuit courts have protected the judge's ability to exercise their constitutional discretion. To find a constitutional violation, Booker's remedial holding would be obsolete.

However, a remedial holding similar to Booker is unsustainable. The only way that this Court could uphold Booker and the Guidelines would be to write specific language into the statute itself. Because § 3661 is an unlimited grant of judicial discretion, and § 3553(a) encompasses all relevant facts and circumstances, including acquitted conduct, an express limitation must be written into the Guidelines. This would exceed the power of the judiciary, commandeering the legislative power of Congress, which this Court has already acknowledged as being within the exclusive power of the legislature. This would also result in a direct conflict with Booker. This Court has recognized that through the Commission, Congress is in the best position to continuously develop a sentencing system that responds to sentencing disparities and constitutional concerns. The judiciary must respect this power and allow Congress to adapt the Guidelines as it sees fit.

### **CONCLUSION**

For the foregoing reasons, Respondent respectfully requests this Court to affirm the decision of the United States Court of Appeals, District of Columbia Circuit.

Respectfully Submitted,

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Team 1

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