

No. 13-10026

**IN THE
SUPREME COURT OF THE UNITED STATES**

JOSEPH JONES, DESMOND THURSTON,
and ANTUWAN BALL,

Petitioners,

v.

UNITED STATES,

Respondent.

**On Writ of Certiorari to the
Supreme Court for the D.C. Circuit**

BRIEF FOR PETITIONERS

Questions Presented

1. Whether a defendant's constitutional rights are violated when a sentencing court based its sentence upon conduct of which the jury had acquitted him.
2. Whether is violates a defendant's Sixth Amendment right for a federal district court to calculate the applicable U.S. Sentencing Guidelines range to impose a much higher sentence than the Guidelines would otherwise recommend, based upon its finding that a defendant had engaged in conduct of which the jury had acquitted him.

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BRIEF FOR PETITIONER

OPINIONS BELOW

744 F.3d 1362 (D.C. Cir. 2014)

Team #10

STATEMENT OF THE CASE

In 2005, a grand jury charged the petitioners (Antwuan Ball, Joseph Jones, and Desmond Thurston) and fifteen named conspirators with narcotics and racketeering offenses arising from their membership in a loose-knit gang that ran a market for crack cocaine in Southeast Washington, D.C. *United States v. Jones*, 744 F.3d 1362 (D.C. Cir. 2014). The charges against the petitioners included crack distribution and participation in a crack distribution conspiracy. *Id.* The government presented evidence of recordings of petitioners selling crack and testimony from several cooperating witnesses who had purchased crack from petitioners. *Id.* The jury returned its verdict on November 28, 2007, acquitting petitioners of the conspiracy charges but convicting them of distribution. *Id.* Based on their criminal records, their maximum sentences were calculated as follows: Jones's conviction carried a maximum of thirty years, Thurston's a maximum of twenty years, and Ball's a maximum of forty years. *Id.* At sentencing, the district court found that their crimes were a part of a conspiracy to distribute crack, a crime they were charged with but acquitted of at trial. *Id.* Based primary on those findings, the court sentenced them to terms of imprisonment ranging from fifteen to nearly nineteen years. *Id.*

SUMMARY OF ARGUMENT

This Court is being asked to reverse the judgment of the D.C. Circuit, which held that the District Court did not clearly err in finding that the defendants had conspired to distribute crack cocaine for the purposes of sentencing when the jury had acquitted the defendants of that conduct. The issue in this case is whether a defendant's constitutional rights were violated when a sentencing court based its sentencing upon conduct of which the jury had acquitted him.

The use of acquitted conduct in calculating sentencing violates a defendant's constitutional rights because the judge eliminates the role of the jury. The Constitution and Bill

of Rights guarantee all Americans an absolute right to trial by jury. The jury serves a fundamental function in our justice system. It not only determines which facts are true but also applies the law to those facts and draws the ultimate conclusion of guilt or innocence. When a jury acquits a defendant of conduct and the judge uses that acquitted conduct in calculating his sentence, this violates a defendant's Sixth Amendment right to a jury trial because the judge used facts in calculating the sentence that the jury explicitly determined to be untrue. Any fact that a judge wants to use to increase a defendant's sentence should be submitted to the jury and proven beyond a reasonable doubt. Judges should not be permitted to determine if acquitted conduct happened by a preponderance of the evidence and then use that conduct to impose a sentence.

The use of acquitted conduct is permitted in all jurisdictions but is not mandated. The Sentencing Reform Act of 1984 was not implemented to dissolve the role of the jury. A defendant that is sentenced to a term outside of the Sentencing Guidelines has had his constitutional rights violated, specifically his Sixth Amendment right to a trial by jury. The jury system was imposed to prevent arbitrary sentences and to take the role of punishment out of the hands of one entity. The language and spirit of both the Sixth Amendment and the Sentencing Guidelines do not condone the use of acquitted conduct in the sentencing of criminal defendants.

ARGUMENT

I. The use of acquitted conduct in calculating sentencing violates a defendant's constitutional rights because the judge eliminates the role of the jury.

The Constitution and Bill of Rights guarantee an absolute right to trial by jury. *See* U.S. Const. Art. III, § 2, cl. 3, U.S. Const. Amend. VI. The Framers guaranteed all Americans this right "to guard against a spirit of oppression and tyranny on the part of rulers." Commentaries on the Constitution of the United States 540-41 (4th ed. 1873). To further the jury's purpose, before

an accusation is deemed true, it should “be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbors.” *United States v. Gaudin*, 515 U.S. 506 (1995), 510. The jury must unanimously agree on the accused’s guilt before he can be convicted of the crime. *Gaudin* at 510. The Framers of the Constitution knew from experience that a jury was necessary to “stand between the individual and the power of the government.” *Booker*, 543 U.S. at 237. However, the jury’s function is not only to determine which facts are true, “but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.” *Gaudin* at 514.¹

A. The use of acquitted conduct in calculating Sentencing violates a defendant’s Sixth Amendment right to a jury trial because the judge determines the sentence based on facts explicitly determined by a jury to be untrue.

Without an authorization from the jury, the judge does not have the authority to calculate a sentence. The jury must confirm the truth of every element of crimes of which the defendant is accused. *Booker*, 543 U.S. at 239. In fact, the Sixth Amendment is not satisfied if the jury’s verdict does not authorize the sentence. *Blakely*, 542 U.S. at 306. A jury must authorize a sentence through the verdict it reaches at trial. Without the authorization, a judge does not have the authority to sentence because “the judge’s authority to sentence derives wholly from the jury’s verdict.” *Apprendi*, 530 U.S. at 483 n. 10. If a court uses acquitted conduct to calculate a sentence, it “is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved,” and “they are facts comprising different crimes, each in a different count.” *United States v. Pimental*, 357 F. Supp. 2d 143, 152-53 (D. Mass. 2005). Ultimately, allowing acquitted conduct to be considered at sentencing undermines the jury’s role as a fact-finder. Juries provide impartial viewpoints from the community to determine the guilt or innocence of a defendant. Allowing a judge to discredit a

¹ See *United States v. Booker*, 543 U.S. 220, 230 (2005); *Blakely v. Washington*, 542 U.S. 296, 301-01 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

jury's verdict by using acquitted conduct in his sentencing determination challenges the integrity of the American legal system.

In the 19th century, the court system observed a change in sentencing. Judges once derived their sentencing determinations from statutes with fixed-term sentences depending on the crime. *Apprendi*, 530 U.S. at 481. Legislatures created statutes that allowed for more judicial discretion by providing judges with a range of sentencing possibilities instead of fixed-terms. *Apprendi*, 530 U.S. at 481. The purpose of this change was to reform rehabilitate those that committed crimes. *Williams v. New York*, 337 U.S. 241, 248-49 (1949). The Supreme Court gave judges an exponential amount of power and held that judges could rely on sources other than the facts determined by the jury at trial—even sources outside the courtroom—without offending the defendant's due process rights. *Williams*, at 248, 252.

However, with great power comes great responsibility and a huge potential for abuse. Tailoring sentences has come to mean increasing sentences. Judges justify these increases on the need to preserve the practice of individualizing punishments. Instead of using facts that are not proven beyond a reasonable doubt in sentencing to increase a defendant's sentence, courts should implement alternatives to prison like drug rehabilitation centers and good behavior credits. Lengthy sentences causes overcrowding in prisons and loss of individual liberty that could easily be prevented.

Furthermore, the Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution for the same offense after acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. X. Even though the sentencing phase is not a hearing on the merits of the case, judges should not be permitted to use

acquitted conduct because they would be reconsidering facts that were already adjudicated. The jury explicitly decided in the trial that the defendant did not commit the conduct, yet he is being punished for it at sentencing. Doing so puts the defendant in jeopardy twice—once before the jury that determined the verdict and another before the judge that decides his sentence. Although the defendant is not being punished for the acquitted conduct alone, he is receiving a heightened sentence because of that conduct.

B. The use of acquitted conduct to calculate a defendant's sentence violates his right to proof beyond a reasonable doubt when his liberty interest is at stake.

Every element of a criminal charge must be proved beyond a reasonable doubt under the Fifth Amendment Due Process Clause. *In Re Winship*, 397 U.S. 358 (1970). The Supreme Court recognized that the standard of reasonable doubt is necessary in the criminal justice system because the defendant is at risk of losing his liberty upon conviction. *Id.*, 397 U.S. at 363-64. If convicted, he would certainly be stigmatized by the conviction. *Id.* Our society puts such an immense value on freedom and liberty. A man should not suffer a loss of liberty and stigmatization of a crime when there is reasonable doubt about his guilt. *Id.*

Under the Relevant Conduct Provision of the United States Sentencing Guidelines, a sentencing court is required to consider “all acts and omissions... that were part of the same course of conduct or common scheme or plan as the offense of conviction” when determining the guidelines range for an offense. U.S. Sentencing Guidelines Manual § 1B1.3(a). The commentary of the rule clearly states that relevant conduct includes “conduct that is not formally charged or is not an element of the offense of conviction.” U.S. Sentencing Guidelines Manual § 1B1.3. cmt. Background (2000). The Supreme Court has held that sentencing courts may consider acquitted and uncharged conduct. *United States v. Watts*, 519 U.S. 148, 157 (1997); *Witte v. United States*, 515 U.S. 389, 402 (1995). However, the Supreme Court held in *Appendi*

v. New Jersey that “any fact (other than prior conviction) that increases the maximum sentence for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi*, 530 U.S. 466, 476 (2000). Every criminal defendant is entitled to two rights: every accusation must be confirmed by a unanimous jury, and the verdict must be based on proof beyond a reasonable doubt. *Apprendi*, 477-78. Any “facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense.” *Apprendi*, 483. Furthermore, the current rule give the state a second bite at the apple. After they failed to prove beyond a reasonable doubt that the defendant committed the alleged offense at trial, the judge is permitted to use that conduct in determining the defendant’s sentence. A conviction means nothing since judges have such large discretion and may punish defendants by the lowest standard of proof, a preponderance of the evidence.

The Supreme Court held in *Mullaney v. Wilbur* that the reasonable doubt standard applies to both facts that could prove guilt or innocence and facts that could increase punishment. *Mullaney v. Wilbur*, 421 U.S. 684, 679-99 (1975). The Court considered affirmed that a defendant is entitled to a finding of proof beyond a reasonable doubt in a jury trial under the Fifth and Sixth Amendments. *Apprendi*, 530 U.S. at 478. However the standard clearly applies equally to judicial factfinding. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). The Court has not clearly expressed what standard of proof a judge must use when determining facts that could potentially result in a defendant’s loss of liberty. *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

Determining whether uncharged or acquitted crimes existed by a preponderance of the evidence is extremely dangerous because it holds the state to a lesser standard than beyond a reasonable doubt when a defendant is exposed to a potential loss of liberty. The Guidelines require judges to consider uncharged, dismissed, and acquitted conduct when calculating a

defendant's sentence. Judges are to determine whether these facts exist under a preponderance of the evidence standard—a much lower standard of proof than beyond a reasonable doubt. “The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements... in resolving disputes regarding application of the guidelines to the facts of a case.” USSG § 6A1.3. When acting as a factfinder, judges should be required to come to conclusions beyond a reasonable doubt because the defendant's liberty is at stake. Having liberty at stake is exactly what activates the Fifth Amendment beyond a reasonable doubt requirement. Any element of a crime or sentencing factor that exposes a defendant to a harsher sentence based on conduct the jury has acquitted should be submitted to a jury and proven beyond a reasonable doubt.

II. It violates the Sixth Amendment for a Federal District Court to calculate the applicable U.S. Sentencing Guidelines Range, and to impose a much higher sentence than the guidelines would otherwise recommend, based upon its finding that a defendant had engaged in conduct of which the jury had acquitted him.

This is a question of first impression for this court. There has been a large amount of debate concerning this topic but there has yet to be a definitive decision or holding that answers this important question. There have been numerous decisions that question whether the use of acquitted conduct in sentencing violates the Sixth Amendment right to a jury trial but there is a case that is seen as the authority on this issue. *See U.S. v. Watts*, 519 U.S. 148 (1997) (discusses that every circuit has allowed the use of acquitted conduct for sentencing purposes). However, the court in *Watts* never addressed whether the use of this conduct was against the Sixth Amendment. *Watts* only stated that the practice of using acquitted conduct was common and has been done across numerous circuits. There must be a Sixth Amendment analysis of this practice to ensure that the spirit of the Sentencing Guidelines are met and no constitutional rights are

violated. Simply recognizing a practice with no analysis does not instill faith in the criminal justice system nor does it protect the rights of the people.

A. The Sentencing Guidelines were put in place to avoid arbitrary sentencing and to provide a realistic idea of an impending sentence for the charged defendant.

The Sentencing Reform Act of 1984 was created to spark reform in the manner that defendants were sentenced once found guilty of a crime. *See* 18 U.S.C.A. § 3551, et al. The Sentencing Guidelines were put in place to eliminate the arbitrary punishment of defendants. Defendants were to be given a realistic idea of the amount of time that they could face in prison. The guidelines were implemented so that defendants who committed the same crime under the same circumstances would be sentenced to the same amount of time and would not suffer from unreasonably different sentences. The guidelines also allow for the use of a defendant's character and background information in determining a sentence. There is no limit on the information about the defendant's background, character, or conduct that can be used by a court of the United States in determining a sentence. 18 U.S.C.A. § 3661. Reform is always needed and the instant case presents a very good example of why reform is necessary in the use of Sentencing Guidelines in the sentencing of criminal defendants.

B. The use of the Sentencing Guidelines violates the defendant's right to a trial by jury because the findings of the jury are often ignored when sentences are determined in favor of a punishment determined by the judge alone.

The language in 18 U.S.C.A. § 3661 seems to suggest that there is no limit to the number of proven facts about a defendant's background, character, or conduct that may be used against him when a sentencing court is determining his sentence. However, this idea is often ignored when it comes to the use of acquitted conduct. *Watts* laid the foundation that every circuit and jurisdiction has allowed a sentencing court to rely on conduct for which a defendant was acquitted when determining an appropriate sentence. *U.S. v. Watts*, 519 U.S. 148 (1997). No

court has found a holding that definitively answers the question of whether the current use of the Sentencing Guidelines violates a defendant's Sixth Amendment rights.

The Sixth Amendment grants a defendant the right to a trial by an impartial jury. U.S. Const. Art. III, § 2, cl. 3; U.S. Const. Amend. VI. The defendant's Sixth Amendment rights are not met when the sentence determined by the court is not authorized by the jury verdict alone.

Cunningham v. California, 549 U.S. 270, 290 (2007). In *Cunningham*, it was argued that the Sixth Amendment rights are not satisfied if the judge must find additional facts in order to impose a longer sentence. *Id.* This is the exact practice at issue here. A judge or sentencing court that relies on acquitted conduct is relying on additional information to increase the sentence of a defendant. Even more alarming is the fact that the acquitted conduct is not truly factual. The Supreme Court has held that every criminal charge must be proven beyond a reasonable doubt under the Due Process Clause of the Fifth Amendment. *In Re Winship*, 397 U.S. 358 (1970). Reasonable doubt is also the standard that must be reached for any fact, other than a prior conviction, that increases the maximum sentence of a crime. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). These facts must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Id.*

Although reasonable doubt is the burden of proof in every aspect of a criminal trial, the Sentencing Guidelines utilize a preponderance of the evidence standard. The Supreme Court has held that every circuit may use acquitted conduct at the sentencing of a defendant provided that the conduct is found by a preponderance of the evidence as stated in the Sentencing Guidelines. *See U.S. v. Watts*, 519 U.S. 148, 156 (1997) (citing USSG § 6A1.3). This is an illogical conclusion. The sentencing judge is required to derive his sentence wholly from the jury's verdict. *Blakely v. Washington*, 542 U.S. 296, 306. *Apprendi* further states that "[t]he judge's

role in sentencing is constrained at its outer limits by the facts alleged in the indictment AND found by the jury” *Apprendi*, 530 U.S. at 483 n. 10 (emphasis added). This statement means that even at the greatest extent of the judge’s power, he is still bound by the verdict of the jury. This established precedent renders the current use of the Sentencing Guidelines both illogical and unconstitutional. Yet another Supreme Court decision states that any fact other than a prior conviction that is necessary to exceed the maximum sentence authorized by either a guilty plea or a jury verdict must be admitted by the defendant or proven to the jury beyond a reasonable doubt. *U.S. v. Booker*, 543 U.S. 220, 244 (2005). Again, the jury’s verdict is considered the definitive basis for a defendant’s sentencing.

At the very core of the Sixth Amendment is the defendant’s right to a trial by jury. This is an express and expected right held by every defendant present in a court of the United States. The jury trial, in practice and in law, empowers the jury to determine the truth of the evidence presented in a trial to determine either guilt or innocence. The Supreme Court has stated that there are times where “jury fact-finding may impair the most expedient and efficient sentencing of defendants” *Booker*, 543 U.S. at 244. However, in the same case, the Supreme Court held that “the interest in fairness and reliability protected by the right to a jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly. *Id.* Again, the Supreme Court has established that the findings of the jury are the ultimate law in a court of the United States. This established principle goes against the current usage of the Sentencing Guidelines. In its current form, the common practice of the Sentencing Guidelines allows the judge to ignore the findings of the jury and impose an entirely different sentence. Acquitted conduct is, by definition, actions

and charges that were brought against a defendant and that the defendant found he was not guilty of for any number of reasons.

If the jury is the body that makes the ultimate decision in whether a defendant is innocent or guilty, there should not be a common practice, which allows a judge to ignore the jury's decision on certain charges and use this to punish the defendant even further. Unfortunately, this is the exact practice of the Sentencing Guidelines. This practice goes against the purpose for which the jury was created as well as the stated role of the jury in the new sentencing regime. The Supreme Court wrote that "the jury would still stand between the individual and the power of the government under the new sentencing regime." *Booker*, 543 U.S. at 237. The ability of the judge to ignore the jury's verdict infringes upon the role of the jury, which also infringes upon the Sixth Amendment rights of the defendant. Essentially, the jury trial becomes a public show that is put on to appease Sixth Amendment rights on the surface. In reality, the judge becomes the body that determines that charges that are the basis for the defendant's sentence.

Here the appellants, Jones, Ball, and Thurston, were all sentenced for time periods that exceeded the ranges set for the in the guidelines. It is undisputed that the sentences were significantly higher than those that are normally imposed upon a defendant who commits the same crime. It is also undisputed that this punishment was based upon the conspiracy conduct for which the jury acquitted the appellants. The judge went beyond the guidelines range and is required to give a sufficiently compelling reason to support the deviation from the guidelines that adequately explains the chosen sentence. *Gall v. U.S.*, 522 U.S. 38, 49 (2007). The only argument that the judge can make for the deviation is the reliance on the acquitted conduct. This reason is far from compelling as it diminishes the role of the jury; creates an arbitrary sentencing

precedent; and relies on conduct that is wholly based upon the judge's own reasoning at the expense of the jury's findings, which are supposed to be the final determination of fact.

A Sixth Circuit decision contained a dissent, which stated that the current allowance of a judge to rely on facts that were rejected by a jury in order to impose sentence degrades the rights of a jury and to a trial by jury. *U.S. v. White*, 551 F.3d 381, 393-94 (6th Cir. 2008) (Merritt, J. dissenting) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 478-79 (2000)); *see also Jones v. U.S.*, 526 U.S. 227, 245 (1999). The dissent in *White* went on to say that “[a]llowing the use of acquitted conduct at sentencing also eviscerates the jury’s longstanding power of mitigation, a close relative of the power of jury nullification.” *White*, 551 F.3d at 394; *see also Jones*, 526 U.S. at 245 (comparing the current sentencing system to that of the trial system in Great Britain during the colonial period). If the current implementation of the Sentencing Guidelines threatens the longstanding and treasured right to a trial by jury because the judge is allowed arbitrary sentencing, then the use of the guidelines must be reformed and the judge should not be allowed to interfere with the role of the jury.

C. A decision should be made concerning the use of acquitted conduct in sentencing that reflects the spirit of the Sixth Amendment and recognizes the vital role of the jury in the criminal justice system.

It cannot be overstated that courts are currently implementing the Sentencing Guidelines in a manner that impedes on the defendant's Sixth Amendment rights. A judge is given the authority to ignore a jury's findings of facts and impose a sentence that punishes a defendant for charges that the jury determined he did not commit. This occurred in the instant case with *Jones*, *Ball*, and *Thurston*, and has occurred in several other cases throughout the era of the Sentencing Guidelines.² The jury was intended to be the ultimate gatekeeper and the finder of fact in

² *See U.S. v. Watts*, 519 U.S. 148 (1997) (use of acquitted conduct to extend defendant's sentence); *see also U.S. v. White*, 551 F.3d 381 (6th Cir. 2008) (use of acquitted conduct by the judge cause the

criminal cases. The current use of the Sentencing Guidelines needs to be analyzed and reformed. Because no court has fully analyzed whether the use of acquitted conduct violates a defendant's Sixth Amendment rights, this court should lead the charge in providing a full analysis of a defendant's Sixth Amendment rights in the face of acquitted conduct.

It has already been shown that courts are already relying heavily on the actions of a single court. The Sixth Circuit decision in *Watts* has provided the basis for all circuits in their handling of acquitted conduct in criminal cases.³ This list of cases provides a small sample of the decisions that relied upon *Watts* to determine how to use acquitted conduct. However, this strict reliance on *Watts* was called into question by Justice Merritt of the Sixth Circuit in a dissent stating that *Watts* cannot be the endpoint of the analysis of the use of acquitted conduct in sentencing and that this practice "defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense." *U.S. v. White*, 551 F.3d 381, 392-96 (6th Cir. 2008). Justice Merritt's analysis should be followed. The jurisdictions of this nation have already proven to find the holdings of the Sixth Circuit to be binding and persuasive and this should hold true for Justice Merritt's analysis.

The Supreme Court of the United States determined that *Watts* did not apply to whether acquitted conduct could be used in sentencing a criminal defendant under the Sentencing Guidelines. *See U.S. v. Booker*, 543 U.S. 220, 240 (2005). *Watts* did not raise a Sixth Amendment issue but instead held that the Double Jeopardy Clause allowed a court to take acquitted conduct into account sentencing. *Id.* The Supreme Court did not answer this Sixth Amendment issue in *Apprendi* either because there, the Court was "only considering a statute"

imposition of a sentence fourteen years longer than would ordinarily be imposed); *see generally U.S. v. Booker*, 543 U.S. 220 (2005) (discussing the Supreme Court's involvement in the current legislation).

³ *See generally U.S. v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006); *U.S. v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005); *U.S. v. Ashworth*, 139 Fed. Appx. 525, 527 (4th Cir. 2005); *U.S. v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006) *U.S. v. Settles*, 530 F.3d 920 (D.C. Cir. 2008).

and “expressly declined to consider the [Sentencing] Guidelines.” *Id.* at 238. In a case from the same circuit as the instant case, the Sixth Amendment analysis was never fully established either because of the terms that were imposed. *See U.S. v. Settles*, 530 F.3d 920 (D.C. Cir. 2008) (acquitted conduct was used to determine sentence yet sentence imposed after consideration of acquitted conduct was still within statutory maximum). The Sixth Amendment has never been fully and properly analyzed.

It is also important that no circuit or jurisdiction requires the use of acquitted conduct. The language used is that every circuit allows for its practice. If this practice did not intrude on any rights and was the proper way for the verdicts of jury trials to be conducted, then it stands to reason that at least one circuit would require the use of acquitted conduct. The fact that there is no mandate in any jurisdiction is telling of the fact that there is something fundamentally wrong with the current practice. The jury is being ignored and defendants are being sentenced to arbitrary and extensive sentences.

The judge currently has the ability to impose a sentence of his choosing on a defendant whether they were found guilty of all charged crimes or not. The Sentencing Reform Act refers to punishments for defendants found guilty of the offense charged. 18 U.S.C. § 3552. Acquitted conduct is conduct that a jury finds that a defendant did not commit. Therefore, a judge’s decision to impose a sentence based upon acquitted conduct is impermissible and goes against the Sentencing Reform Act. Acquitted conduct should not be used in determining the sentence that a defendant should serve.

The Sentencing Reform Act, Constitution, and the historic use of the jury in criminal trials all show disdain for the use of acquitted conduct in the sentencing of criminal defendants. As the court for the Eastern District of Virginia reasoned: “laypeople would be shocked to find out that

U.S. citizens are routinely punished for crimes that they were acquitted or that their sentence could be multiplied fourfold.” *U.S. v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D.Va. 2006). The laws of the land are meant to protect the people and to provide transparency in how defendants are sentenced. Laypeople remain unaware of this practice of the court, which is another reason that reform is needed. Acquitted conduct should not be allowed in the sentencing of criminal defendants. The appellants Jones, Ball, and Thurston should not have been sentenced above the maximum years allowed and the same should be said of any defendant who is tried in a court of the United States.

CONCLUSION

Although acquittal does not mean that a defendant is innocent, it is illogical to allow acquitted conduct to be used to determine a defendant’s sentence. Because judges should not calculate sentences based on facts already determined by a jury, the court is constitutionally required to refrain from using acquitted conduct when calculating a defendant’s sentence. The current use of the Sentencing Guidelines impermissibly violates a defendant’s Sixth Amendment rights. It ignores the vital role of the jury in the sentencing of criminal defendants by allowing the judge to make arbitrary sentences based on facts that the jury did not find. Lowering the standard for acquitted conduct to preponderance as opposed to reasonable doubt is not a logical or constitutional action. The nationwide reliance on *Watts* is a mistake that must be fixed in order for the Sentencing Guidelines to conform to their true purpose. Thus, the opinion of the D.C. Circuit Court should be reversed.

RESPECTFULLY SUBMITTED this 9th day of March, 2015.

/s/ Team #10