No. 13-10026

In the
SUPREME COURT OF THE UNITED STATES

JOSEPH JONES,
DESMOND THURSTON,
ANTUWAN BALL,

Petitioners-Appellants,

v.

THE UNITED STATES,

Respondent-Appellee.

On Writ of Certiorari
to the United States Court of Appeals for the District of Columbia Circuit
No. CR 08-3033

The Honorable Griffith

BRIEF OF THE PETITIONERS-APPELLANTS, JOSEPH JONES, DESMOND THURSTON AND ANTUWAN BALL

Team 12

Attorneys for the
Petitioner Appellants,
Joseph Jones,
Desmond Thurston and
Antuwan Ball.

Questions Presented

1. Are a defendant's constitutional rights violated when a sentencing court bases its sentence upon conduct of which the jury had acquitted him?

2. Does it violate 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?

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Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. No. 13-10026) is reported at 744 F.3d 1362. The court's order affirmed the decision of the United States District Court for the District of Columbia to impose sentencing terms, which took into account acquitted conduct.

Constitutional Provisions and Statutes Involved.

The Fifth Amendment to the Constitution of the United States: See Appendix I.

The Sixth Amendment to the Constitution of the United States: See Appendix I.

Section 1B1.3(a) of the United States Federal Sentencing Guidelines, 18 U.S.C. § 1B1.3(a): See Appendix I.

Section 1B1.4 of the United States Federal Sentencing Guidelines, 18 U.S.C. § 1B1.4: See Appendix I.

Statement of the Case

In 2005, Joseph Jones (Jones), Antwuan Ball (Ball), Desmond Thurston (Thurston) (hereinafter Petitioners) and fifteen others were indicted alleging narcotics and racketeering offenses involving the Congress Park Crew in Southeast Washington, D.C.[1] In February 2007, the Petitioners and other co-defendants (not party to this appeal) proceeded to trial on charges of crack cocaine distribution and participation in crack cocaine distribution conspiracy.[2] At trial, the government introduced evidence involving recordings, testimony from purchasers of crack from the Petitioners and testimony of cooperating witnesses and members of the alleged conspiracy.[3] On November 28, 2007, a jury found Petitioners guilty, beyond a reasonable doubt,

[1] United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir. 2014). The Congress Park Crew was a gang operating out of the Southeast of the District of Columbia for a period of roughly thirteen years. Id.
[2] Id.
[3] Id.

of distributing cocaine base, also known as crack, but acquitted them of participation in a crack distribution conspiracy.[4]

At Petitioner Jones' sentencing, the court found beyond a preponderance of the evidence, that he was party to a conspiracy to distribute over 500 grams of crack cocaine.[5] Based on the judge found facts and convicted conduct, the district court imposed a 180 month sentence for Jones—within the 30-year maximum statutory sentence and varying below the 324 to 405 months recommended by the United States Sentencing Guidelines (U.S.S.G.).[6] At sentencing, the judge attributed his downward departure from the U.S.S.G. to Jones' background, criminal history and concerns about the severity of punishment for crack cocaine offenses.

Similarly to Jones' sentencing, the court found, by a preponderance of the evidence, that Petitioners Thurston and Ball were party to a drug distribution conspiracy foreseeably involving over 1,500 grams of crack cocaine. The district court sentenced Thurston to 194 months—within the 20-year maximum statutory sentence and varying below the 262 to 327 month range recommended by the U.S.S.G.[7] Ball received an actual sentence of 225 months from the district court—within the five to 40-year statutory range and 292 to 365 months recommended under the U.S.S.G.[8] At both Thurston's and Ball's sentencing, the judge echoed the reasoning in Jones' sentence for the downward variance in their cases.[9]

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[4] Id.
[5] Id. at 1365-66.
[6] Id.
[7] Id.
[8] Id.
[9] Id. at 1366. Downward adjustments in Petitioners' sentences also included a 12-month reduction for Thurston and 15-month reduction for Ball to account for any prejudice that resulted from the delay in their sentencing for the respective periods of time, due to a derivative action taken by a co-defendant (not party to this petition), that the court thought might affect Petitioners' convictions.

Summary of the Argument

The use of acquitted conduct to enhance a criminal sentence violates Petitioners' Due Process rights, because doing so disregards the presumption of innocence attached to the Petitioners and allows fact-finding by the preponderance of the evidence, below the standard of proof required in criminal proceedings. The last four decades of jurisprudence, including the Supreme Court decisions and federal statutes have had the effect of restricting the sentencing judges' unlimited discretion in what information they could use to set criminal punishment, where such discretion violated criminal defendant's Fifth Amendment Due Process rights. Petitioners assert that because acquitted conduct was rejected by the jury, as not proved beyond a reasonable doubt, the court finding the facts of acquitted conduct by the preponderance of the evidence in order to increase the Petitioner's sentence violates the Apprendi-Ring-Blakely-Booker line of Supreme Court precedents and is not authorized by the United States Sentencing Guidelines.

The Petitioners' Sixth Amendment right to a jury was violated when the district court increased its sentence based upon acquitted conduct because the court's reliance on acquitted conduct subvert the jury's determination that the government failed to prove these facts beyond a reasonable doubt. Particularly, consideration of acquitted conduct as the basis for an increase in sentence contradicts precedent set out in Blakely and Booker. Additionally, Petitioners find as a matter of law, it is substantively unreasonable to consider acquitted conduct as relevant conduct for purposes of sentencing.

The Argument

I. The Petitioners Fifth Amendment Due Process rights were violated when district court based its sentence upon conduct of which the jury had acquitted them, because a) the

presumption of innocence, which attached to the Petitioners with regard to the alleged conduct remained intact after the acquittal; b) sentencing judges' wide discretion has been found to violate defendants' constitutional rights and the law has been evolving to bracket this discretion; and c) the district court imposed criminal punishment based on the facts that the Court found by the preponderance of the evidence.

a. Presumption of Innocence, a Basic Component of Fair Trial Protected by the Due Process Clause, Remains Intact after Acquittal:

The jury convicted Petitioners Jones, Thurston and Ball of distributing small quantities of crack cocaine, but acquitted them of conspiracy to distribute drugs.[10] Thus, the Petitioners were guilty, in the eyes of society, only of the cocaine distribution offense. According to the jury of the Petitioners' peers, the state failed to prove beyond a reasonable doubt that the criminal conduct of conspiracy had occurred. Because the Petitioners were found not guilty of the conspiracy to distribute drugs, they retained their presumption of innocence of that charge at the end of the trial.

The presumption of innocence has long been recognized as a fundamental liberty right at common law and is protected by the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment.[11] Since Taylor v. Kentucky 436 U.S. 478, 490 (1978), this Court has

[10] Jones, 744 F.3d at 1370.

[11] See Coffin v. United States, 156 U.S. 432, 453 (1895) (stating that, the existence of the presumption of innocence in favor of the accused is "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law"). See also Estelle v. Williams, 425 U.S. 501, 503 (1976) (observing that, the presumption of innocence "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice"). See also Taylor v. Kentucky, 436 U.S. 478, 490 (1978) (holding that the trial court's refusal to give instruction on the presumption of innocence resulted in a violation of petitioner's right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment).

recognized that the jury must be explicitly instructed on the presumption of innocence in order to protect the defendant's Due Process right to a fair trial.[12]

In United States v. Watts, 519 U.S. 148 (1997) (per curiam), the Court explained that "an acquittal on criminal charges does not prove that the defendant is innocent" (citation omitted). The Court also asserted that, it's unknown, which facts the jury rejected or accepted as true when it returned a not guilty verdict.[13] Petitioners do not quarrel with the truth of these propositions. However, the proof of innocence was never required in our justice system in order to avoid the guilty verdict. To require that defendant proves his innocence before he can walk out of the courthouse a free man, is an impermissibly high burden for an individual defendant to sustain. Requiring that defendant proves his innocence before the Court, turns the presumption of innocence on its head and is contrary to the fundamental principles of liberty and justice that are at the foundation of the American society.

Petitioners in the instant case maintain that they are innocent of the drug conspiracy charges, based on the jury acquittal of that charge, a presumption that our society fully recognizes. In our criminal justice system, punishment is imposed based on the finding of guilt.[14] Allowing the judge to take acquitted conduct as the basis upon which to increase punishment, just after the jury have stated that they don't believe the defendant is guilty of the conduct, subverts the jury's role. In the words of Justice Stevens, "[t]he notion that a charge that

[12] Taylor, 436 U.S. at 490 (holding that the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment).
[13] Watts, 519 U.S. at 155.
[14] See Ball v. United States, 470 U.S. 856, 861-62 (1985) (emphasizing that, criminal sentence is a "necessary component of a 'judgment of conviction'").

cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [constitutional] jurisprudence."[15]

b. Sentencing Judges Discretion Is Constrained by Defendant's Due Process Rights

Historically, Judges have enjoyed wide discretion in what facts they could consider at sentencing. However, over the past four decades, the law has developed to define and bracket this discretion, in part, because application of broad judicial discretion yielded inconsistent sentences throughout the criminal justice system, and in part, because in some instances broad judicial discretion was found to violate defendants' Fifth and Sixth Amendment constitutional rights.[16]

i. United States Sentencing Guidelines

A. In 1970, Congress passed a statute codifying the tradition of wide judicial discretion at sentencing in 18 U.S.C. § 3661, which states that: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[17] The United States Sentencing Guidelines ("U.S.S.G."), implemented in 1984, incorporated 18 U.S.C. § 3661 into U.S.S.G. § 1B1.4, which provides: "In determining *the sentence to impose within the guideline*

[15] Watts, 519 U.S. at 170 (Stevens, J., dissenting).

[16] See Furman v. Georgia, 408 U.S. 238 (1972) (mandating that where discretion is afforded a sentencing body, including judges, on the imposition of a death penalty, that discretion must be directed and limited so as to minimize the risk of arbitrary and capricious action), see also Gregg v. Georgia, 428 U.S. 153 (1976); See Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (holding that the sentence may not refuse to consider, as a matter of law, any relevant mitigating evidence in imposing a death sentence), see also Lockett v. Ohio, 438 U.S. 586 (1978); 18 U.S.C. §3553 (2012); Apprendi v. New Jersey, 530 U.S. 466 (2000) (Stevens, J.); Ring v Arizona, 536 U.S. 584 (2002) (Ginsburg, J.); Blakely v. Washington, 542 U.S. 296 (2004) (Scalia, J.); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 U.S. 270 (2007); Rita v. United States, 551 U.S. 338 (2007) (Breyer, J.); Gall v. United States, 552 U.S. 38 (2007) (Stevens, J); Alleyne v. United States, 133 S. Ct. 2151 (2013) (Thomas, J.).

[17] 18 U.S.C. § 3661 (2012).

range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661."[18] U.S.S.G. § 1B1.4 distinguishes between the information that a court may consider in imposing a particular sentence within the guideline range, from the factors that determine that applicable guideline sentencing range. The latter are identified in U.S.S.G. § 1B1.3(a), the "relevant conduct" section.[19]

B. "Relevant conduct" section, which was first mandatory, but since the decision in United States v. Booker, 543 U.S. 220 (2005) became advisory along with the rest of the guidelines,[20] directs the sentencing judge to determine the applicable guidelines sentencing range based on individual and joint conduct implicated by "the offense of conviction."[21] Once that sentencing range is determined, then the Court may take into account all other conduct described by § 1B1.4, which is unlimited, "unless otherwise prohibited by law," to determine the exact sentence and whether departures from the guidelines range are warranted.[22]

ii. United States Sentencing Guidelines do not authorize calculating the sentencing range based on acquitted conduct.

The Petitioners assert that the sentencing court may not determine the Guidelines sentencing range based on acquitted conduct, because the "relevant conduct" section of the

[18] Id. app. § 1B1.4 (2012).
[19] Id. § 1B1.3(a) (2012).
[20] Booker, 543 U.S. at 245 (Breyer, J., delivering the opinion of the Court in part) (holding that the provisions that make the U.S.S.G. mandatory are unconstitutional).
[21] 18 U.S.C. app. § 1B1.3(a) (2012).
[22] Id. § 1B1.4 (2012).

guidelines, § 1B1.3, includes criminal conduct related to the offense of *conviction*. On the contrary, acquitted conduct is conduct alleged in the indictment that has not been proven at trial.

Petitioners were subjected to a 10-month jury trial, during which the government had unfettered discretion to put on the evidence to make its case that the Petitioners were guilty of the commission of two crimes: distribution of crack cocaine and conspiracy to distribute crack cocaine. At the conclusion of the trial, the offense of criminal conspiracy was not proved by the government beyond a reasonable doubt. Therefore, in this case, the only offense of conviction is the offense of drug distribution; and conduct related to drug distribution, not to conspiracy, should be included in the sentencing range under U.S.S.G. § 1B1.3.

iii. The opinion below is based on United States v. Watts, which is not dispositive on the issue of using acquitted conduct at sentencing.

The District of Columbia Circuit Court of Appeals argues that acquitted conduct can be included in calculating the guidelines sentencing range based on several precedents.[23] Of those, only United States v. Watts is binding on this Court.

A. Prior to Watts, this Court did not have an occasion to decide the precise issue whether basing a sentence on the acquitted conduct violated the U.S. Constitution.[24] Yet, the Watts opinion was un-briefed, un-argued, and issued per curiam, prompting Justice Kennedy to dissent from the majority holding.[25]

B. This Court based its majority opinion in Watts principally on two pillars: first, its holding in Williams v. New York, 337 U.S. 241 (1949), a case decided 35 years before the enactment of the Guidelines; and second, on 18 U.S.C. § 3661, which was incorporated into U.S.S.G. § 1B1.4.

[23] Jones, 744 F.3d at 1369.
[24] Watts, 519 U.S. at 170 (Kennedy, J., dissenting).
[25] Id.

(1) The Watts Court argued, both with respect to Williams and 18 U.S.C. § 3661, that the long standing practice during sentencing was to consider all conduct that informed the Judge about Defendant's "life and characteristics," *even conduct that did not result in a conviction.*[26] The Watts majority did not address Justice Stevens' dissenting argument that § 3661 was incorporated into §1B1.4, which is not the section that describes what conduct District courts may consider when calculating the sentencing range, § 1B1.3 is. Consequently, Justice Stevens argued that § 3661 expansive language should not be used to justify including acquitted conduct into the calculation of the sentencing range under the guidelines. Instead of addressing Justice Stevens' argument, the Watts majority simply asserted that § 1B1.3 "directs sentencing courts to consider all other related conduct, whether or not it resulted in a conviction."[27]

(2) This formulation by the majority obfuscates rather than clarifies the issue.[28] The category of conduct "that does not result in a conviction" is broad. For example, it includes conduct with which the Defendant was never charged. In fact, it is the *uncharged conduct* that the § 1B1.3 section of the Guidelines specifically directs the Courts to consider, while acquitted conduct is not mentioned.[29]

(3) Petitioners contend that there is a vast difference between the conduct that was never charged, and conduct that was charged, indicted and rejected by the jury, based on reasonable doubt that such conduct had taken place.[30] Conduct that was never charged has unknown tendency to be true or not, the facts and

[26] Watts, 519 U.S. at 151 (emphasis added).
[27] Id. at 153-54.
[28] See id. at 170 (Kennedy, J., dissenting).
[29] 18 U.S.C. app. § 1B1.3(a) (2012).
[30] Petitioners also note that the issue of uncharged conduct is not before the Court in the instant case.

circumstances comprising this conduct have never been vetted in an adversarial court proceeding before a jury. Acquitted conduct has. And while the Petitioners do not dispute that it is impossible to know which facts underlying the acquitted conduct the jury rejected, and which they did not, Petitioners contend that the lack of such knowledge should *preclude, rather than allow***,** the use of all of the acquitted facts in further judicial proceedings against the Defendant, contrary to what the majority in Watts has held.[31]

c. Judicial determination that conduct underlying acquittal has occurred by the preponderance of the evidence violates Petitioners' Due Process rights.

i. "Beyond a reasonable doubt" is the standard of proof required in criminal proceedings.

The requirement that criminal guilt be proven "beyond a reasonable doubt" was a well-established concept in common law. And since 1970, this standard of proof has been expressly mandated by this Court to establish guilt in all criminal prosecutions in In re Winship, 397 U.S. 358 (1970). The Winship Court held that Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[32] The highest standard of proof in criminal prosecutions is the principal instrument for reducing the risk of convictions resting on factual error.[33] "Beyond a reasonable doubt" embodies the core values at the heart of the American judicial system, in the words of Justice Harlan, "it is far worse to convict an innocent man than to let a guilty man go free.[34]

[31] See Watts, 519 U.S. at 155.
[32] Winship, 397 U.S. at 364.
[33] Id. at 363.
[34] Id. at 372 (Harlan, J., concurring).

ii. But for being charged with multiple offenses, acquitted conduct could not have been used against the Petitioners.

The issue arises when criminal punishment is nonetheless imposed on defendants, based upon facts that were not found by proof beyond a reasonable doubt at sentencing, as in the instant case. The three Petitioners were charged with one count of drug distribution and one count of conspiracy to distribute drugs. The government failed to prove the conspiracy charge beyond a reasonable doubt and the Petitioners received acquittals in this offense. Yet, at sentencing, the lower court, by a "preponderance of the evidence" standard, found that a conspiracy nonetheless existed, notwithstanding the jury's verdict and used the acquitted conduct to sentence the three Petitioners to 180, 194 and 225 months in prison, respectively.[35] These sentences were substantially higher for each Petitioner, than the usual length of incarceration of 21 to 71 months for the offense of conviction, because the acquitted conduct of conspiracy was taken into consideration.[36] Had conspiracy been the only charge against Petitioners they would have incurred no punishment, as they were acquitted. Additionally, this acquitted conspiracy charge would not have been counted in sentencing for any other possible criminal convictions in subsequent years. However, because in this case, there were two charges and Petitioners were acquitted of one, but convicted of the other, the conduct which was the basis of the acquitted charge was counted in sentencing for the conviction. Such aggregation of conduct of conviction and acquitted conduct violates the Petitioners presumption of innocence as discussed above, and subverts the role of the jury.

[35] Jones, 744 F.3d at 1366.
[36] Id. at 1369.

iii. Allowing finding of facts that increase Petitioners' criminal sentence by the preponderance of the evidence violates the principles articulated in Apprendi-Ring-Blakely-Booker line of precedents.

Petitioners assert that allowing the Court to increase criminal punishment applied to defendant based on the facts found by the preponderance of the evidence, violates the principles articulated by this Court in the line of cases that began with Apprendi v. New Jersey, 530 U.S. 466 (2000) (Stevens, J.). In Apprendi, this Court dealt with the question of statutory maximums and ruled that "other than the fact of a prior conviction, 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*."[37] In Ring v Arizona, 536 U.S. 584 (2002) (Ginsburg, J.), a case on sentencing that followed Apprendi, the Court clarified that "statutory maximum" is the maximum sentence a judge may impose solely based on the facts reflected in the jury verdict or admitted by the defendant.[38] And if defendant's authorized punishment is contingent on the finding of a fact, that fact must be found by a jury beyond a reasonable doubt.[39] In United States v. Booker, 543 U.S. 220 (2005) (Stevens, J.), this Court further explained that Apprendi "expressly declined to consider the Guidelines" because only the narrow question about the statutory maximums was posed, but those principles are "*unquestionably applicable to the Guidelines*."[40] Finally, in Blakely v. Washington, 542 U.S. 296 (2004) (Scalia, J.) the Petitioner's sentence was calculated based on a finding of an aggravating factor, "acting with deliberate cruelty," which constituted an "additional fact" required to be found by a jury beyond

[37] Apprendi, 530 U.S. at 490 (Stevens, J.) (emphasis added).
[38] Ring, 536 U.S. at 602 (Ginsburg, J.) (quoting Apprendi, 530 U.S. at 482-483).
[39] Id.
[40] Booker, 543 U.S. at 238 (Stevens, J.) (quoting Apprendi, 530 U.S. at 497) (emphasis added).

a reasonable doubt, per Apprendi.[41] Justice Scalia summed up the spirit behind the Apprendi-Ring-Blakely-Booker line of cases succinctly: "*all facts essential to imposition of the level of punishment that the defendant receives* -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury *beyond a reasonable doubt*."[42]

In the instant case, the sentencing court found the facts constituting the acquitted conduct of conspiracy to distribute crack cocaine by the preponderance of the evidence in order to increase the Petitioner's incarceration terms. In doing so, the sentencing court relied on Watts and the application of the Guidelines that seemingly allowed it "unlimited discretion" with regard to the facts that it could take into account. However, this application of acquitted conduct, as an additional fact found by the Judge by the preponderance of the evidence in order to increase Petitioner's sentences, runs contrary to Apprendi-Ring-Blakely-Booker Court's jurisprudence. Criminal sentence is the actual punishment that the defendant receives, measured in months and determined based on the complex set of rules. However, the application of the Guidelines cannot violate the fundamental principles articulated in the U.S. Constitution and defended by this Court over the past four decades in its jurisprudence that, basing punishment on acquitted conduct violates the Due Process clause; that the appropriate standard of proof to determine any fact that increases the criminal defendant's punishment is "beyond a reasonable doubt"; and that the appropriate factfinder of those facts, without which the punishment would not be increased, is the jury.

II. The Petitioners' Sixth Amendment right to a jury was violated when the district court increased its sentence based upon acquitted conduct because a) the court's reliance

[41] See Blakely, 542 U.S. at 305 (Scalia, J.).
[42] Ring, 536 U.S. at 610 (emphasis added).

on acquitted conduct subverts the jury's determination that the government failed to prove these facts beyond a reasonable doubt; b) this contradicts Blakely and Booker precedents and; c) it is substantively unreasonable to consider acquitted conduct as relevant conduct for purposes of sentencing.

a. The court's reliance on acquitted conduct to increase Petitioners' sentences violates the Sixth Amendment as it subverts the jury's determination in applying facts that the government failed to prove beyond a reasonable doubt.

i. Juries safeguard defendants' liberty; increasing the sentence based solely on judge-found facts violates the spirit of the Sixth Amendment and the holdings in the line of precedents from Apprendi to Alleyne.

Prior to the Apprendi, Ring, Blakely, Booker, Alleyne line of cases, judges could consider facts apart from those determined by a jury with no Sixth Amendment bar so long as it was within the statutory range.[43] The history of allowing for a high level of deference to judges at sentencing dates back to the very inception of colonial America.[44] However, the notion of protecting one's freedom and surmounting only the highest standard before taking that freedom, not only shares the same pedigree as judicial discretion in the United States, it is embedded in the bedrock of our constitutional democracy.[45] As applied in criminal proceedings, no greater threat exists to one's liberty, than imprisonment and as such, the Founding Fathers amended the United States Constitution to require "in all criminal prosecutions, the… right to a speedy and public trial, by an impartial jury…"[46]

[43] Apprendi, 530 U.S.at 481-82 (discussing the court's history on deference at sentencing).
[44] Id. at 481.
[45] Id. at 481-82.
[46] U.S. Const. amend. VI.

Petitioners received higher sentences than authorized by the jury's guilty verdicts.[47] Delivering a sentence beyond the range attributed to the convicted conduct is in direct violation of the Sixth Amendment and this Court's precedents. In Apprendi and Alleyne the defendant's sentence was increased solely based on judge-found facts by a preponderance of the evidence, thereby increasing either the ultimately applied minimum or maximum statutory range of sentence, respectively. In both cases this Court determined that this was a violation of the defendants' right to a jury trial.[48]

A. In the instant case, the facts of the acquitted conduct were not proved beyond a reasonable doubt and, therefore the upward adjustment in Petitioners' sentences was in violation of the rule in Apprendi-Ring-Blakely-Booker. This Court's legal evolution from Apprendi through Booker emanates from the Sixth Amendment.[49] In Apprendi, the Court held that facts germane to an increase in sentence beyond the statutory maximum must be submitted to a jury to find beyond a reasonable doubt.[50] This reasoning, as the court laid out in the Jones v. United States 526 U.S. 227 (1999) dicta one year prior, stems from the Sixth Amendment: "'under the… notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'"[51]

B. In Ring, aggravating factors found beyond a reasonable doubt, considered *only at sentencing by a judge*, were insufficient to increase a defendant's punishment from life

[47] Jones, 744 F.3d at 1365.
[48] Apprendi, 530 U.S. at 476-477; Alleyne, 133 S. Ct. at 2160.
[49] Apprendi, 530 U.S. at 476.
[50] Id. at 490.
[51] Apprendi, 530 U.S. at 476 (quoting Jones, 526 U.S. at 243, n. 6).

imprisonment to death because the aggravating factors were not put to a jury.[52] Though sentencing the defendant to death was within the statutory maximum, Justice Ginsburg refined the Apprendi holding to define "statutory maximum" to mean only the maximum sentence as authorized by jury-found facts.[53]

C. Two years later, this Court considered a similar matter in Blakely, where the sentencing judge found aggravating factors that increased the punishment imposed on defendant beyond the prescribed Washington State guideline range but still within the statutory maximum.[54] Justice Scalia delivered the opinion of the court, holding that facts dispositive to the increase in defendants' punishment beyond the prescribed guideline range, must be found by a jury, beyond a reasonable doubt, to survive a Sixth Amendment challenge.[55] The Court's reasoning on the Sixth Amendment argument is most adeptly described in this quote from Justice Scalia:

> "…the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings…in this case [the judge] could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea."[56]

Analogous to Petitioners' argument in the instant case, but for the sentencing judges' findings by a mere preponderance of the evidence, Blakely would have received a lesser sentence.[57]

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[52] Ring, 536 U.S. at 588 (emphasis added); this Court's jurisprudence makes clear that the maximum sentence that a judge may impose must be based solely on facts reflected in the jury verdict or admitted by the Defendant (see Ring, 536 U.S. at 602; "'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting Apprendi, 550 U.S. at 483); Harris v. United States, 536 U.S. 545, 563 (2002) (plurality opinion); cf. Apprendi, 550 U.S. at 488, (facts admitted by the defendant).
[53] Ring, 536 U.S. at 602.
[54] Blakely, 542 U.S. at 299-300.
[55] Id. at 304-314.
[56] Blakely, 542 U.S. at 303-304.
[57] See supra notes 4-8.

D. Following the Blakely decision, this Court applied the same reasoning in Booker and held that the United States Sentencing Guidelines ("U.S.S.G") are advisory.[58] The U.S.S.G. are analogous to the Washington State Sentencing Reform Act, which provided the statutory basis in Blakely,[59] therefore, precedence would dictate that any increase in sentencing beyond the maximum guideline range based on the jury's conviction, would be unconstitutional.

ii. Allowing the use of acquitted conduct at sentencing relegates the jury's role to that of a "low-level gatekeeper," where a finding of guilty beyond a reasonable doubt by a jury on lesser offense could open the door to a finding by a preponderance of the evidence by a judge that a greater offense also took place and to increase the sentence accordingly.

Allowing the use of acquitted conduct in sentencing in the instant case, created the exact situation that Jones warned about, where the jury by finding guilt on some criminal offense merely opens the door for the judicial finding indicative of much greater criminal culpability.[60] This relegates juries to low-level gate-keepers, rather than the "bulwark" between the accused and the state.[61]

As the Jones Court predicted the problems in Apprendi, there are foreseeable scenarios that may trouble this Court should the instant case end favorably for the Respondent. For example, if this Court were to rule Petitioners' Sixth Amendment rights were not violated by the lower courts' consideration of acquitted conduct in increasing punishment at sentencing, then the government may employ the following tactic: indicting an individual with crime A, knowing

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[58] Booker, 543 U.S. at 233.
[59] See Blakely, 542 U.S. at 307-305; see Booker 543 U.S. at 233 (stating the majority's view that no Sixth Amendment distinction exists between Blakely and Booker).
[60] Jones, 526 U.S. at 233-34 (quoting the majority, "If a potential penalty might rise from…a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping…").
[61] 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873).

sufficient evidence exists to clear the reasonable doubt standard, but waiting to present evidence of crime B until sentencing, knowing evidence of crime B falls short of the reasonable doubt standard, however, the judge need only find that defendant "committed the crime" by a preponderance of the evidence. This scenario exemplifies a future where the jury acts as a low-level gatekeeper and runs counter to the very purpose of requiring the state to present evidence beyond a reasonable doubt in criminal cases—to ensure the state is meeting a standard reflective of the gravity of losing one's liberty.

b. Blakely and Booker support the finding that Petitioners' Sixth Amendment rights were violated.

The sentences received by Petitioners, even though within statutory range, are much higher than they would have received, if the Court did *not* rely on judge-found facts by the preponderance of the evidence. Blakely and Booker speak directly to the issue at hand in the instant case. In Blakely, the judge sentenced the defendant to a term 90-months, more than three years higher than the 49 to 53 month range prescribed by the underlying offence.[62] In Booker, the baseline offense prescribed a Guidelines range of 210 to 262 months but on the basis of judge-found facts, the defendant was exposed to a higher range ultimately awarding him a 300 month sentence.[63] In both of these cases the judge increased the defendant's incarceration based merely on judge-found facts by a preponderance of the evidence and in both cases the majority opinion succinctly held that practice to be in violation of the Sixth Amendment.[64] "[A]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum

[62] Blakely, 542 U.S. at 299-300.
[63] Booker, 543 U.S. at 227.
[64] See Booker, 543 U.S. at 233; see Blakely, 542 U.S. at 304-14.

authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[65]

Though Justice Stevens, acknowledged in Booker that if the guidelines were advisory, there may not be a Sixth Amendment violation, the Guidelines still heavily influence a judge's decision at sentencing.[66] Additionally, in a spirited Booker dissent, Justice Stevens asserted that the court's holding to make the Guidelines advisory amounted to judicial overstepping, arguing the structure of the Guidelines implementing a mandatory determination of sentencing ranges coupled with judicial discretion within those ranges do not raise Sixth Amendment issues.[67] However, in looking back at the holding in Blakely, joined by Justice Stevens, the court noted "'Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.'"[68] The court seems to make it clear, even before Booker, that whether a sentencing range is advisory or mandatory, the judge must structure those ranges based on the facts reflected by the jury verdict.

In the instant case, the lower court did not establish guideline ranges in accordance with the convicted offense, but rather calculated the sentencing ranges based on both the convicted and acquitted conduct. Considering acquitted conduct when determining the sentencing range subverts the jury's verdict, thereby robbing the Petitioners of their Sixth Amendment rights. Blakely and Booker are prime examples where the court overturned sentences with facts analogous to the case in chief—defendant was convicted of a crime, the sentencing judge handed down a heavy sentence, the upward adjustment in sentencing was justified by facts not found by

[65] Booker, 543 U.S. at 244 (quoting Justice Stevens' majority opinion).
[66] Id. at 272 (Stevens, J., dissenting).
[67] Id. at 273.
[68] Blakely, 542 U.S. at 305, note 8.

the jury but by one judge's determination, and this Court consistently ruled that practice in violation of the Sixth Amendment. Petitioners ask that this Court, continues that tradition.

c. It is substantively unreasonable to consider acquitted conduct as relevant conduct for purposes of sentencing.

In the eyes of the Founding Fathers, facts that may increase a defendant's exposure to punishment must be proved beyond a reasonable doubt to a jury to satisfy the Sixth Amendment (unless the facts are admitted by the defendant or involve a prior conviction as Nichols v. United States, 511 U.S. 738 (1994) (Rehnquist, J.) allows).[69] A comprehensive review of jurisprudential history and basic tenants of United States law led this Court to admit that exclusive judicial fact finding as a basis for increasing one's maximum punishment raises serious constitutional questions.[70] With those considerations in mind, it would be substantively unreasonable for a judge to increase one's sentence solely based on acquitted conduct and thereby amounts to abuse of discretion by the sentencing judge.

For example, a scenario raising such serious constitutional questions is found in Cunningham v. California, 549 U.S. 270, 281 (2007), where California's determinate sentencing structure leaves the judge to decide between a low, medium and high sentence solely based on judicial fact-finding.[71] The Court points to both consistent holdings under the Sixth Amendment, and "longstanding common-law practice" requiring "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely a preponderance of the evidence"[72] A system like California's determinate sentencing structure at issue in Cunningham, sets up substantively unreasonable

[69] Apprendi, 550 U.S. at 483.
[70] Jones, 526 U.S. at 239-252.
[71] Cunningham, 549 U.S. at 274.
[72] Id. at 281.

sentences when judicially found facts amount to the sole basis for increasing a sentence from the medium range to the higher range—in that case, a difference of four years.[73]

The Sixth Amendment question before the Court hinges on "...whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)."[74] In the instant case, Petitioners find that but for the consideration of acquitted conduct at sentencing, the court handed down a substantively unreasonable sentence that otherwise would be forbidden as a matter of law. The facts of this case stipulate that Petitioners' sentences were much higher than what was warranted based the convictions rendered by a jury.[75] It is substantively unreasonable for a judge to prescribe a penalty five to six times higher than the underlying convicted offense level, especially when the U.S.S.G. authorizes a variance of 25 percent on either side of the Guidelines range.[76]

Conclusion

The Court must rule that U.S.S.G. § 1B1.3(a) is unconstitutional as applied to criminal defendants, whose sentences have been enhanced by the sentencing court's reliance on acquitted conduct, as it violates defendants' Fifth Amendment and Sixth Amendment rights. The Petitioners' sentences should be reversed and remanded for resentencing based on the facts found by the jury beyond a reasonable doubt or admitted by the Petitioners.

[73] Id. at 274; see Rita, 551 U.S. at 372 (Scalia, J., joined by Thomas, J., concurring in part and concurring in judgment) (discussing substantively unreasonable sentences).
[74] Rita, 551 U.S. at 352 (quoting Blakely 542 U.S. at 303-304).
[75] The U.S.S.G. range for Petitioners range from 21-72 months but their actual sentences were 180, 194 and 225 months, respectively. See Jones, 744 F.3d at 136, 139.
[76] Gall, 552 U.S. at 47.

Appendix I

The Fifth Amendment to the U.S. Constitution, states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the U.S. Constitution, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1B1.3(a), Relevant Conduct (Factors that Determine the Guideline Range), of the U.S.

Sentencing Guidelines, 18 U.S.C. §1B1.3(a), states:

> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
> (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
> (4) any other information specified in the applicable guideline.

Section 1B1.4, Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guideline**s)**, of the U.S. Sentencing Guidelines, 18 U.S.C. §1B1.4, states:

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

Section 3661, Use of Information for Sentencing, of the United States Code, U.S.C. 18 § 3661, states:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.