

No. 13-10026

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

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JOSEPH JONES, DESMOND THURSTON, AND ANTWAN BALL,  
PETITIONERS,

V.

UNITED STATES,  
RESPONDENT.

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*ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE PETITIONER**

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TEAM 14

March 9, 2015

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### **QUESTIONS PRESENTED**

1. Whether the sentencing court violated the petitioners' constitutional rights when it disproportionately enhanced defendants' sentences based on unconvicted conduct of a more serious criminal crime.
2. Whether the sentencing court violated the petitioners' Sixth Amendment rights when it used acquitted conduct to calculate the Guidelines range.

## **TABLE OF CONTENTS**

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	2
I. DISPROPORTIONATE JUDICIAL RELIANCE ON UNCONVICTED CRIMINAL CONDUCT AT SENTENCING VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS, DOUBLE JEOPARDY, AND TRIAL BY JURY .....	2
A. Judicial Fact-Finding Resulting in a Disproportionate Increase at Sentencing Violates Due Process.....	3
1. <u>McMillan</u> Only Permits Judicial Fact-Finding that Does Not Result in a Disproportionate Impact at Sentencing .....	3
2. This Case Utterly Fails the Best Available Standard for Determining When Enhancements Exceed <u>McMillan</u> .....	4
B. Acquitted Conduct May Only Be Used Insofar as it Provides Context for the Baseline Offense .....	6
C. Sentences that Are Substantively Unreasonable Absent Reliance on Acquitted Conduct Violate the Sixth Amendment.....	8
1. The Constitutional Role of the Jury as Determiner of Culpability Must Not Be Abrogated by Any Branch of Government .....	8
2. This Court Has Repeatedly Reaffirmed its Commitment to the Founders’ Mandate that the Jury Function as the Sole Determiner of Factual Foundations for Punishment .....	10
3. The District Court’s Extremely Disproportionate Reliance on Acquitted Conduct of a More Serious Crime Is Incompatible with the Sixth Amendment .....	11
II. ANY USE OF ACQUITTED CONDUCT TO CALCULATE THE APPLICABLE GUIDELINES RANGE VIOLATES THE SIXTH AMENDMENT.....	11

A.	Other than a Prior Conviction, the Jury Must Find All Facts Required to Aggravate the Defendant’s Sentence .....	12
1.	An Increase in the Guidelines Range Increases the Defendant’s Sentencing Exposure.....	12
2.	Sixth Amendment Analysis Focuses on the Effect of Fact-Finding, Not Formalistic Labels.....	14
B.	Use of Acquitted Conduct to Calculate the Guidelines Range Violates the Sixth Amendment .....	15
1.	Improper Calculation of the Guidelines Range Does Not Warrant the Presumption of Reasonableness and Violates the Sixth Amendment.....	16
2.	Sentencing Courts Must Adequately Explain Departures from the Appropriately Calculated Guidelines Range .....	17
C.	Requiring the Jury to Find All Facts Necessary to Increase the Guidelines Range Will Decrease Sentencing Disparity .....	18
	CONCLUSION.....	20

## **TABLE OF AUTHORITIES**

### **CASES**

<u>Alleyne v. United States</u> , 133 S. Ct. 2151 (2013).....	passim
<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000) .....	passim
<u>Blakely v. Washington</u> , 542 U.S. 296 (2004) .....	10, 12
<u>Duncan v. Louisiana</u> , 391 U.S. 145 (1968).....	8, 9
<u>Jones v. United States</u> , 526 U.S. 227 (1999) .....	10
<u>McMillan v. Pennsylvania</u> , 477 U.S. 79 (1986) .....	3, 5, 6, 14
<u>Ring v. Arizona</u> , 536 U.S. 584 (2002) .....	14
<u>Rita v. United States</u> , 551 U.S. 336 (2007).....	15, 16, 17
<u>United States v. Allen</u> , 488 F.3d 1244 (10th Cir. 2007) .....	7
<u>United States v. Booker</u> , 543 U.S. 220 (2005).....	passim
<u>United States v. Concepcion</u> , 983 F.2d 369 (2d Cir. 1992) .....	18
<u>United States v. Dare</u> , 425 F.3d 634 (9th Cir. 2005) .....	18
<u>United States v. Fisher</u> , 502 F.3d 293 (3d Cir. 2007) .....	4
<u>United States v. Gall</u> , 552 U.S. 38 (2007) .....	15, 16, 17
<u>United States v. Graham</u> , 275 F.3d 490 (6th Cir. 2001) .....	4
<u>United States v. Jones</u> , 744 F.3d 1362 (D.C. Cir. 2014).....	passim
<u>United States v. Jordan</u> , 256 F.3d 922 (9th Cir. 2001) .....	4, 5, 6, 18
<u>United States v. Kikumura</u> , 918 F.2d 1084 (3d Cir. 1990), <u>overruled by United States v. Fisher</u> , 502 F.3d 293 (3d Cir. 2007).....	4
<u>United States v. Kwong-Wah</u> , 966 F.2d 682 (D.C. Cir. 1992) .....	4
<u>United States v. Lombard</u> , 72 F.3d 170 (1st Cir. 1995).....	4, 18
<u>United States v. Mergerson</u> , 4 F.3d 337 (5th Cir. 1994).....	4
<u>United States v. St. Julian</u> , 922 F.2d 563 (10th Cir. 1990) .....	4
<u>United States v. Staten</u> , 466 F.3d 708 (9th Cir. 2006) .....	5
<u>United States v. Townley</u> , 929 F.2d 365 (8th Cir. 1991).....	4
<u>United States v. Trujillo</u> , 959 F.2d 1377 (7th Cir. 1992).....	4
<u>United States v. Watts</u> , 519 U.S. 148 (1997) .....	5, 6, 7, 17
<u>United States v. White</u> , 551 F.3d 381 (6th Cir. 2008) (Merritt, J., dissenting) .....	9
<u>Williams v. New York</u> , 337 U.S. 241 (1949) .....	10

### **CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. VI .....	10
U.S. Const. art. III, § 2 .....	10

### **STATUTES**

18 U.S.C. § 3553(a) .....	16, 18
18 U.S.C. § 3553(a)(6).....	18
18 U.S.C. § 3661 .....	16
21 U.S.C. § 841(b)(1)(B)(iii), (C).....	1
28 U.S.C. § 991(b) .....	18
28 U.S.C. § 991(b)(1)(B) .....	18, 19

## OTHER AUTHORITIES

Gerald Leonard & Christine Dieter, <u>Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing</u> , 17 Berkeley J. Crim. L. 260 (2012) .....	7
The Federalist No. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).....	9

## **STATEMENT OF THE CASE**

Petitioners Joseph Jones, Desmond Thurston, and Antwuan Ball were indicted by a grand jury in 2005. United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir. 2014). The charged offenses included, *inter alia*, conspiracy to possess with intent to distribute and distribution of controlled substances, including crack cocaine, and conspiracy to participate in the affairs of a racketeer influenced and corrupt organization. Id. On November 28, 2007, petitioners were convicted of distribution, but acquitted of all other charges, including the conspiracy charge. Id. The statutory maximum sentence for the distribution conviction varies based on the defendant's criminal record; Jones faced a maximum term of imprisonment of thirty years, Thurston a maximum of twenty years, while Ball's conviction carried a minimum term of five years and maximum of forty years. See 21 U.S.C. § 841(b)(1)(B)(iii), (C); Jones, 744 F.3d at 1365. The U.S. Sentencing Guidelines range for the crime of conviction was between 27 and 71 months, based on petitioners' criminal history levels. Jones, 744 F.3d at 1368-69. At sentencing, however, the district court found by a preponderance of the evidence that Jones, Thurston, and Ball had each participated in the conspiracy of which they had been acquitted, and increased the Guidelines range to between 262 and 405 months. Id. at 1365-66. As a result of that judicial finding, the district court sentenced Jones to a term of 180 months, Thurston to 194 months, and Ball to 225 months. Id. at 1366.

## **SUMMARY OF ARGUMENT**

The district court disproportionately enhanced petitioners' sentences by relying on acquitted conduct. The acquitted charges the district court relied upon were substantially more serious than the crime of which petitioners were convicted. This sentencing procedure was not

only highly inappropriate, but also violated three distinct constitutional principles: the general right to due process, the bar against double jeopardy, and the guarantee to trial by jury.

Petitioners' Sixth Amendment right to a jury trial was further violated by the sentencing judge's use of acquitted conduct to calculate the applicable Guidelines Range and impose a much higher sentence than would otherwise have been permitted. The jury must find all facts necessary to increase the sentencing ceiling. An increase in the applicable Guidelines range increases a defendant's sentencing exposure. Because Sixth Amendment analysis focuses on the effect of fact-finding, *any* fact tending to aggravate the defendant's sentence must be found by the jury, regardless of whether it is labeled as an element of the offense. Sentencing courts are required to calculate the appropriate Guidelines range, and sentences within that range are accorded a presumption of reasonableness. However, a Guidelines range based in large part on acquitted conduct is not properly calculated. The sentencing court must justify any departure from the properly calculated Guidelines range. Finally, the robust application of the Sixth Amendment jury trial right will decrease unwarranted sentencing disparities.

### **ARGUMENT**

#### **I. DISPROPORTIONATE JUDICIAL RELIANCE ON UNCONVICTED CRIMINAL CONDUCT AT SENTENCING VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS, DOUBLE JEOPARDY, AND TRIAL BY JURY.**

Judicial discretion is broad, but it cannot be unlimited. By basing petitioners' sentences primarily and overwhelmingly on acquitted conduct, the district court judge violated three distinct limitations found in this Court's precedent. First, the district judge's findings had an extremely disproportionate impact on the sentences, violating petitioners' due process rights. Second, the district judge based the enhancement on specific factual findings that can only serve to establish a separate offense, violating double jeopardy jurisprudence. Finally, petitioner's



sentences seek to punish a more serious crime, distinct from their crimes of conviction. This violates their Sixth Amendment right to trial by jury.

A. Judicial Fact-Finding Resulting in a Disproportionate Increase at Sentencing Violates Due Process.

While McMillan allowed judicial fact finding at sentencing, its holding was grounded in the principle that judicially found facts may not disproportionately impact the defendant's sentence. As such, a preponderance of the evidence standard for sentencing facts may only be used so long as the tail of the findings does not "wag the dog of the substantive offense." McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). The court below exceeded this limitation. As a result, this court violated petitioners' due process rights by using a preponderance of the evidence standard.

1. McMillan Only Permits Judicial Fact-Finding that Does Not Result in a Disproportionate Impact at Sentencing.

In McMillan, this Court addressed a due process challenge against a statute allowing the judge to impose a mandatory five-year minimum upon finding by a preponderance of the evidence that the defendant "visibly possessed a firearm during the commission of the offense." McMillan, 477 U.S. at 82 n.1. The Court disagreed with the defendant's assertion that due process required the state to prove possession beyond a reasonable doubt. Id. at 84. The court found that while due process requires the state to prove certain elements of a crime beyond a reasonable doubt, the gun enhancement "did not exceed those limits." Id. at 86. The court looked to several aspects of the statute to arrive at this conclusion, such as the fact that it "neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense calling for a separate penalty." Id. at 87-88. The Court reasoned the statute did not violate due process because it gave "no impression of having been tailored to permit [judicial findings] to be a tail which wags the dog of the substantive offense." Id. at 88. A preponderance of the evidence

standard was sufficient because the sentence overall was substantiated by the underlying conviction.

2. This Case Utterly Fails the Best Available Standard for Determining When Enhancements Exceed McMillan.

Several circuits have acknowledged that preponderance of the evidence may not be sufficient to satisfy due process where judicial enhancements weigh disproportionately on the overall sentence.<sup>1</sup> The First, Third, and Ninth Circuits have all found specific enhancements that exceeded McMillan, while the remaining circuits have yet to encounter a case presenting a conflict with due process. E.g., United States v. Lombard, 72 F.3d 170, 184 (1st Cir. 1995); United States v. Kikumura, 918 F.2d 1084, 1100–01 (3d Cir. 1990), overruled by United States v. Fisher, 502 F.3d 293, 295 (3d Cir. 2007); United States v. Jordan, 256 F.3d 922, 928 (9th Cir. 2001). The First and Third Circuits’ tests for establishing this kind due process violation are of little use, since both were premised on the then-mandatory nature of the Federal Sentencing Guidelines. E.g., Lombard, 72 F.3d at 184-85; Kikumura, 918 F.2d at 1100–01. After the Guidelines were made advisory, these circuits abandoned their tests with little or no discussion. See, e.g., United States v. Fisher, 502 F.3d 293, 305 (3d Cir. 2007) (overruling United States v. Kikumura, 918 F.2d 1084, 1100–01 (3d Cir. 1990)). Conversely, the Ninth Circuit’s standard “focus[es] on the actual effect a given fact had on the sentence that the district court ultimately

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<sup>1</sup> See, e.g., United States v. Kwong-Wah, 966 F.2d 682, 687 (D.C. Cir. 1992) (leaving open possibility that extraordinary circumstances may warrant clear and convincing standard, but finding that the six-level increase at issue there “does not present the enormous disparity involved in Kikumura”); United States v. Mergerson, 4 F.3d 337, 344 (5th Cir. 1994); United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir. 1992); United States v. Townley, 929 F.2d 365, 370 (8th Cir. 1991) (suggesting, without deciding, that due process may require that facts supporting an 18-level increase in the defendant’s offense level based on uncharged relevant conduct be established by clear and convincing evidence); United States v. St. Julian, 922 F.2d 563, 569 n.1 (10th Cir. 1990). But see United States v. Graham, 275 F.3d 490, 517-18 n.19 (6th Cir. 2001) (criticizing Kikumura and holding that a higher standard of proof is not required simply because enhancement will increase sentence by 250 months).

imposed, not on whether the district court was required to give a fact it found the effect it did,” and thus remains relevant with the current Guidelines. United States v. Staten, 466 F.3d 708, 720 (9th Cir. 2006).

McMillan’s concern was not whether a statute might require a disproportionate enhancement, but whether the statute “[had] been tailored to *permit*” disproportionate enhancements. McMillan, 477 U.S. at 88. In this regard, the Ninth Circuit’s test is far more faithful to McMillan. Even if judges can choose whether or not to apply the enhancement, “facts found by the district court may still have an actual disproportionate impact on the sentence ultimately imposed, [such that] due process concerns . . . have not evaporated” following Booker. Staten, 466 F.3d at 720. In evaluating these due process concerns, the Ninth Circuit looks to six factors.<sup>2</sup>

The Ninth Circuit’s test is helpful in identifying which specific factors might indicate that a sentence violates the spirit of McMillan. With respect to two of these factors, the district court’s sentence in this case is contrary to the language of McMillan itself. By allowing the judge to punish petitioners for the acquitted count of conspiracy, these sentences “relieve the prosecution of its burden of proving guilt” of that conspiracy. McMillan, 477 U.S. at 87; cf. United States v. Watts, 519 U.S. 148, 155-56 (1997) (finding that the government may relitigate the issue of acquitted conduct at sentencing). Additionally, as will be discussed in more detail in

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<sup>2</sup> “(1) whether ‘the enhanced sentence fall[s] within the maximum sentence for the crime alleged in the indictment;’ (2) whether ‘the enhanced sentence negate[s] the presumption of innocence or the prosecution’s burden of proof for the crime alleged in the indictment;’ (3) whether ‘the facts offered in support of the enhancement create new offenses requiring separate punishment;’ (4) whether ‘the increase in sentence [is] based on the extent of a conspiracy;’ (5) whether ‘the increase in the number of offense levels [is] less than or equal to four;’ and (6) whether ‘the length of the enhanced sentence more than double[s] the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence.’” United States v. Jordan, 256 F.3d 922, 928 (9th Cir. 2001) (quoting United States v. Valensia, 222 F.3d 1173 (9th Cir. 2000)).

the following section, the sentences “create[] a separate offense calling for a separate penalty.” McMillan, 477 U.S. at 88. McMillan based its holding specifically in its finding that the sentence was still primarily substantiated by the original conviction and not outweighed by preponderance findings. Id. at 87-91. The obvious corollary of this principle is that where preponderance findings outweigh the original conviction, McMillan offers no protection for judicial discretion.

Petitioners’ sentences violated all but the first of these six factors. By comparison, the Ninth Circuit found that a sentence violating only two factors exceeded the limits of due process. Jordan, 256 F.3d at 933. These sentences punish petitioners for a far more serious criminal act than the one for which they were convicted. At the very least, in terms of due process, a finding based on a preponderance of the evidence should not be enough to sustain these sentences.

B. Acquitted Conduct May Only Be Used Insofar as it Provides Context for the Baseline Offense.

In Watts, this Court upheld the use of acquitted conduct at sentencing against objections based on due process and double jeopardy. Watts, 519 U.S. at 156-57. According to the Watts Court’s reasoning, the consideration of acquitted conduct in question did not punish the defendant for the crime for which he was already tried and acquitted. Instead, acquitted conduct worked to “increase his sentence because of the manner in which he committed the crime of conviction.” Id. at 154. Neither double jeopardy nor due process applied because the defendant was “punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment.” Id. at 155 (quoting Witte v. United States, 515 U.S. 389 (1995)). The relevant conduct involved in Watts was acceptable precisely because it worked to determine the manner in which the underlying conviction was carried out, and not to punish for the sentencing fact itself. While this Court upheld the use of acquitted conduct in that case, the necessary

finding according to its holding was that the acquitted conduct was used only to provide context for the convicted offense – not to establish its own distinct offense. Id.; accord Alleyne v. United States, 133 S. Ct. 2151, 2162 (2013).

In short, “[u]sing unconvicted conduct to contextualize the conviction is appropriate, but punishing an offender for the unconvicted conduct is not.” Gerald Leonard & Christine Dieter, Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing, 17 Berkeley J. Crim. L. 260, 264 (2012). The entirety of Watts’ holding is meaningless unless it prevents enhancement by “findings that redefine the offense, . . . render[ing] the enhancement a punishment for some offense different from the offense of conviction.” Id. at 287. The most obvious example of this kind of forbidden finding is a judicial finding that has no possible relation to determining the level of seriousness for the convicted crime—for example, a drug charge conviction enhanced with evidence of the defendant’s contemplation of raping and murdering young girls is unconstitutional. United States v. Allen, 488 F.3d 1244, 1248 (10th Cir. 2007) (holding that such sentencing procedure violated defendant’s due process rights and criticizing prosecutors for utilizing this tactic in an attempt to punish defendant for a crime for which they had insufficient evidence to convict). The more grievous form of this kind of improper enhancement, however, is exactly what occurred in this case – use of judicial findings that operate as an element to a separate, more serious offense. See Alleyne, 133 S. Ct. at 2162-63. Such findings violate due process precisely because they operate as the dividing line between the convicted crime and the more serious, unconvicted crime.

In the present case, petitioners were convicted under 21 U.S.C. § 841(b)(1)(B)(iii) and (C). Jones, 744 F.3d at 1365. By this statute’s definition, the judicial findings of conspiracy and the connected finding that petitioners participated in the sale of over 500 grams of crack can

serve only to punish a more serious offense, entirely distinct from that of which petitioners were convicted. For this reason, the lower court's sentences exceed the limitations inherent in Watts, thus violating the principles of due process and double jeopardy.

C. Sentences That Are Substantively Unreasonable Absent Reliance on Acquitted Conduct Violate the Sixth Amendment.

In drafting the Sixth Amendment, the founders were specifically concerned about governmental abuse of the criminal justice system. Thus, the jury's role as the ultimate determiner of culpability is sacrosanct and must remain wholly beyond the reach of governmental intrusion. This court's precedent has repeatedly reaffirmed its commitment to protecting the constitutionally prescribed role of the jury. The district court's reliance on acquitted conduct at sentencing is incompatible with the founders' view and this Court's precedent.

1. The Constitutional Role of the Jury as Determiner of Culpability Must Not Be Abrogated by Any Branch of Government.

"The right to a jury trial [has] been enshrined since the Magna Carta." United States v. Booker, 543 U.S. 220, 239 (2005). This guarantee was not taken lightly. "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" Duncan v. Louisiana, 391 U.S. 145, 154 (1968) (quoting Thompson v. State of Utah, 170 U.S. 343 (1898)). Nor was it controversial. Unlike most of the topics the Founders deliberated over, the jury-trial guarantee was universally accepted. After the Constitutional Convention, Hamilton wrote:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Later, it “was one of the least controversial provisions of the Bill of Rights.” *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000). Notably, the right to trial by jury in criminal cases is the only guarantee that appears both in the Constitution as well as the Bill of Rights.

Thus the Founders viewed the jury-trial right in criminal cases as “fundamental to our system of justice.” *Duncan*, 391 U.S. at 153. The right was universally accepted because “[t]he Framers of the Constitution understood the threat of ‘judicial despotism’ that could arise from ‘arbitrary punishments upon arbitrary convictions’ without the benefit of a jury in criminal cases.” *Booker*, 543 U.S. at 238-39 (quoting The Federalist No. 83 (Alexander Hamilton)). Jury trials had the specific and important purpose of serving as a procedural restraint against the judiciary. Thus, it was imperative to the Founders’ vision of justice that judges remain powerless to circumvent the role of the jury as the ultimate decider of guilt. “The Declaration of Independence took George III to task for ‘obstruct[ing] the Administration of Justice’ by ‘depriving us in many cases of the benefit of Trial by Jury,’ which included punishing colonists after the jury had acquitted them.” *United States v. White*, 551 F.3d 381, 393 (6th Cir. 2008) (Merritt, J., dissenting). This same mistrust of judicial power remains at the heart of our jury-trial guarantees:

“[T]o guard against a spirit of oppression and tyranny on the part of rulers,” and “as the great bulwark of [our] civil and political liberties,” trial by jury has been understood to require that “the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.”

*Apprendi*, 530 U.S. at 477 (citations omitted) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873)). Thus, while a “sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law,” *Williams v. New*

York, 337 U.S. 241, 246 (1949), such discretion was never intended to supersede the mandated constraints of a jury-determined conviction. The broad, unqualified language of the Constitution and the Bill of Rights testify the extent to which the Founders valued this right. U.S. Const. art. III, § 2 (“The trial of all crimes . . . shall be by jury”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury”).

2. This Court Has Repeatedly Reaffirmed its Commitment to the Founders’ Mandate that the Jury Function as the Sole Determiner of Factual Foundations for Punishment.

This Court has continually limited judicial discretion where it perceives a risk that sentencing practice might effectively abrogate the jury’s constitutional role as the sole determiner of the underlying crime warranting punishment. In Jones, this Court read a jury requirement into a statute out of a concern that the alternative reading would allow judges to punish defendants for a more serious crime than the one jurors had convicted him of. Jones v. United States, 526 U.S. 227, 249 (1999). In that case, this Court was particularly disturbed by the possibility that with such unfettered judicial discretion, “the jury’s role would correspondingly shrink . . . to . . . low-level gatekeeping.” Id. at 243-44. In Apprendi, this court extended the constitutional domain of the jury to any fact that could increase a maximum punishment. Apprendi, 530 U.S. at 490. Again, the governing concern behind this Court’s decision was that the jury should determine precisely which criminal act warrants punishment: “practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt.” Id. at 482-83.

In Blakely and Booker, this Court again extended this principle, barring the legislature from redefining the statutory maximum in a way that allows a judge to usurp the jury’s



determination of guilty facts. Blakely v. Washington, 542 U.S. 296, 303-04 (2004); Booker, 543 U.S. at 233. Most recently, this Court held in Alleyne that the jury must establish any fact increasing the mandatory minimum sentence for a crime. Alleyne, 133 S.Ct. at 2162. In overturning Alleyne's sentence, this Court emphasized that "when a finding of fact alters the legally prescribed punishment so as to aggravate it" even when the aggravation comes only from an increase in a the minimum prescribed sentence, the fact "must be submitted to the jury." Id. This requirement for judicial fact finding "preserves the historic role of the jury as an intermediary between the State and criminal defendants." Id. at 2161.

3. The District Court's Extremely Disproportionate Reliance on Acquitted Conduct of a More Serious Crime Is Incompatible with the Sixth Amendment.

Petitioners were charged with distribution and conspiracy. The jury returned a verdict of conviction for distribution, but refused to convict petitioners of the more serious crime of conspiracy. The judge sentenced petitioners for the more serious crime. This sentence was nothing less than the very act of jury nullification for which the Founders castigated George III – the same jury nullification that led them to include a jury-trial guarantee in the Constitution in the first place. Furthermore, this court's precedent makes clear that sentencing courts may not punish defendants for a more serious crime than that of conviction. Alleyne, 133 S. Ct. at 2162-63. The lower court's sentence directly contravenes that precedent, violating petitioners' Sixth Amendment rights.

**II. ANY USE OF ACQUITTED CONDUCT TO CALCULATE THE APPLICABLE GUIDELINES RANGE VIOLATES THE SIXTH AMENDMENT.**

The sentencing court's use of acquitted conduct to calculate the applicable guidelines range, and increase the petitioners' sentences, violated their Sixth Amendment jury-trial rights. This Court has repeatedly held that, other than the fact of a prior conviction, any additional

finding necessary to increase the sentence to which the defendant is exposed must be found by the jury, beyond a reasonable doubt. E.g., Appendi, 530 U.S. at 484. Additionally, a properly calculated Guidelines range may not be based on acquitted conduct. Finally, requiring sentencing judges to abide by the jury’s verdict will decrease unwarranted sentencing disparities.

A. Other than a Prior Conviction, the Jury Must Find All Facts Required to Aggravate the Defendant’s Sentence.

This Court recently reaffirmed its holding that the Sixth Amendment jury-trial right applies to the sentencing phase of a criminal trial. Alleyne, 133 S. Ct. at 2160 (reaffirming the Appendi holding). Any fact necessary to increase the sentencing exposure of the defendant must be proved to a jury beyond a reasonable doubt. Id. Further, any attempt to distinguish between sentencing facts and elements is not dispositive; instead, the jury must find any facts necessary to increase a defendant’s sentence. Id. at 2162-63.

1. An Increase in the Guidelines Range Increases the Defendant’s Sentencing Exposure.

For Appendi purposes, “the relevant statutory maximum is . . . the maximum [t]he [judge] may impose *without* an additional findings.” Blakely, 542 U.S. at 304 (emphasis in original). Although the Blakely court dealt with state law, a year later the same reasoning was also applied to federal law. Booker, 543 U.S. at 238-39 (Stevens, J., delivering the opinion of the Court in part) (determining that because the Guidelines were not at issue in Appendi, that decision’s reference to *statutory* maximum is not controlling). In Booker, judge-found facts increased the sentence faced by the defendant by ten years. Id. at 227. In his opinion for the court, Justice Stevens found that “regardless of whether the legal basis of the accusation is in a statute or in [the Sentencing Guidelines], . . . the principles behind the jury trial right are equally applicable.” Id. at 239.

More recently, this Court broadened the Apprendi ruling, holding that the Sixth Amendment jury trial protections extend not only to an increase in the maximum sentence, but also to any mandatory minimum terms. Alleyne, 133 S. Ct. at 2160. The Alleyne court emphasized as essential that “the aggravating fact produced a higher range,” and reasoned that as a result, the fact must be submitted to a jury. Id. at 2162-63. Although the Alleyne court was concerned with a statutory, rather than Guidelines, minimum, the reasoning used applies equally to a Guidelines case. Id. at 2161. Regardless of whether a defendant “*could have* received the same sentence with or without the fact,” not submitting the aggravating fact to a jury was a violation of the defendant’s Sixth Amendment rights. Id. (emphasis added). The Alleyne court also stressed that it was not reducing the discretion of the judge to “select a sentence *within* the range authorized by law.” Id. at 2163. Because the jury had not found the aggravating fact, the range calculated based on the additional fact was not authorized. Id.

The fact that the Guidelines are promulgated by a Commission nominally within the judicial branch is of little importance to this Court’s Sixth Amendment analysis, and does not implicate separation of powers concerns. Booker, 543 U.S. at 237, 241 (Stevens, J., delivering the opinion of the court in part). Instead, Justice Stevens analogized the Guidelines to the Federal Rules of Evidence, emphasizing that Congress may delegate to the judiciary non-adjudicatory functions central to its mission. Id. at 242-43 (internal citations omitted). Importantly, the Commission is “properly thought of as exercising . . . legislative power” and it lacks judicial authority and the ability to perform adjudicatory functions. Id. at 243. Thus, the Commission is recognized as an “independent agency that exercises policy making authority delegated to it by Congress,” so an appropriate Sixth Amendment analysis treats the Guidelines similarly to statutes within the United States Code. Id.

The sentencing court below dramatically increased the Guidelines ranges for petitioners' sentences based on its own finding that they had engaged in conduct of which the jury acquitted them. Based solely on the crime of conviction, petitioners would each have been sentenced to a term of imprisonment between 27 and 71 months under the appropriate Guidelines range. Jones, 744 F.3d at 1368-69. Although the final sentences were below the statutory maximum, they were between three and seven times higher than the verdict-authorized sentences. The Alleyne court made clear that the mere fact that a defendant "*could have* received the same sentence" under the statutory regime does not mitigate the constitutional violation of allowing a judge-found fact to aggravate the sentence. Alleyne, 133 S. Ct. at 2161.

2. Sixth Amendment Analysis Focuses on the Effect of Fact-Finding, Not Formalistic Labels.

The Booker Court's analysis was primarily concerned with "the need to preserve Sixth Amendment substance" rather than formalism. Booker, 543 U.S. at 237 (Stevens, J., delivering the opinion of the Court in part). Although the Court introduced a distinction between elements of a crime and sentencing facts, McMillan, 477 U.S. at 87, later Sixth Amendment analysis cast doubt upon the validity of this approach. Apprendi, 530 U.S. at 494 n.19 ("When . . . used to describe an increase beyond the maximum authorized statutory sentence, [the sentencing factor] is the functional equivalent of a greater offense than the one covered by the jury's guilty verdict."). Two years later, the Court, relying on Apprendi, reemphasized that "the characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question 'who decides,' judge or jury." Ring v. Arizona, 536 U.S. 584, 605 (2002).

Rather than according importance to the label given to a particular fact, "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates

that the fact is an element of a distinct and aggravated crime.” Alleyne, 133 S. Ct. at 2162-63. Thus, the validity of the distinction made in McMillan has been called into question. Alleyne, 133 S. Ct. at 2164, 2166 (Sotomayor, J., concurring) (explaining that the majority opinion overrules McMillan). Regardless of whether the McMillan distinction itself remains good law, the test to determine whether the judge or jury must find a particular fact is whether the “finding of fact alters the legally prescribed punishment so as to aggravate it.” Alleyne, 133 S. Ct. at 2162 (Thomas, J., majority opinion).

Here, the determination that petitioners engaged in a conspiracy had the effect of increasing their sentences from no more than 71 months to at least 180 months. Jones, 744 F.3d at 1366. The increases were based entirely on the sentencing judge’s finding by a preponderance of the evidence that petitioners had engaged in the charged conspiracy, despite the jury’s verdict of acquittal. Id. at 1365. That judge-found fact impermissibly aggravated the sentence faced by the petitioners. Because a jury did not find the aggravating fact, petitioners’ Sixth Amendment right to a jury trial was violated. See Alleyne, 133 S. Ct. at 2162.

B. Use of Acquitted Conduct to Calculate the Guidelines Range Violates the Sixth Amendment.

Sentencing courts are required to take the Sentencing Commission’s recommendations into account when calculating a defendant’s sentence. United States v. Gall, 552 U.S. 38, 51 (2007). However, the sentencing court must follow the proper procedure to calculate the Guidelines range. Id. Only then does a within-Guidelines sentence merit a presumption of reasonableness. Rita v. United States, 551 U.S. 336, 347 (2007). If a sentencing judge determines that he or she must make a significant departure from the Guidelines, the judge must explain why that departure is appropriate. Gall, 552 U.S. at 50.

1. Improper Calculation of the Guidelines Range Does Not Warrant the Presumption of Reasonableness and Violates the Sixth Amendment.

The district courts “should begin *all* sentencing proceedings by calculating the applicable Guidelines range.” Gall, 552 U.S. at 49 (emphasis added) (citing Rita, 551 U.S. at 347-48). In order for its sentence to be deemed appropriate, the sentencing court must have “committed no significant procedural error.” Gall, 552 U.S. at 51. Additionally, the sentencing court must consider the factors outlined in 18 U.S.C. § 3553(a),<sup>3</sup> and must not base its sentence on “erroneous facts.” Id. In order to ensure that sentencing judges are able to make individualized sentences, Congress has required that “no limitation shall be placed on the information concerning the background, character, and conduct” of the defendant. 18 U.S.C. § 3661. However, both this statute and the sentencing court’s calculation of the Guidelines range must comport with the Sixth Amendment. See Apprendi, 530 U.S. at 494. Consideration of acquitted conduct is therefore inappropriate. A finding that the defendant engaged in such conduct, and a subsequent increase in the Guidelines range, by definition “expose[s] the defendant to a greater punishment than that *authorized by the jury’s guilty verdict*.” Id. (emphasis added).

Sentences within the correctly calculated Guidelines range are granted a presumption of reasonableness on appellate review. Rita, 551 U.S. at 347. There is no corresponding presumption of unreasonableness. Id. at 354-55. The rationale for the presumption is that when the judge and Guidelines agree on a sentence, it is most likely reasonable. Id. at 351. This rationale falls apart, however, when the Guidelines range is increased due to judicial fact-finding. See Rita, 551 U.S. at 369, 372 (Scalia, J., concurring). This is especially true when the jury

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<sup>3</sup> 18 U.S.C. § 3553(a) requires sentencing courts to consider the nature and circumstances of the offense and the history and character of the offender; the need to reflect the seriousness of the crime, to promote respect for the law, and to provide just punishment; deterrence; protection of the public; the needs of the defendant, including medical care and training; the Guidelines recommendation; the need to avoid sentencing disparities; and the need to provide restitution.

acquitted the defendant of the very conduct relied upon by the judge. See Alleyne, 133 S. Ct. at 2162 (holding that aggravating facts must be found by the jury beyond a reasonable doubt).

The present case illustrates quite clearly Justice Scalia’s concerns that under the advisory Guidelines regime, judge-found facts may become “legally necessary to justify the sentence.” Rita, 551 U.S. at 369 (Scalia, J., concurring). The sentencing court below did not properly calculate the Guidelines range, but instead based its calculation on acquitted conduct. Jones, 744 F.3d at 1365-66. Instead of a sentencing exposure between two and six years, petitioners faced a tenfold increase to a Guidelines range between twenty-one and thirty-three years. Id. at 1365-66, 1368-69. This substantial increase was based on the judge’s determination that petitioners had engaged in the very conspiracy for which the jury returned a verdict of acquittal. The present case fulfills Justice Scalia’s fear of an unreasonably lengthy sentence authorized solely by judge-found facts. Rita, 551 U.S. at 371 (Scalia, J., concurring) (“For every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant.”). By relying on acquitted conduct, the judge obviates the role of the jury and violates the Sixth Amendment.

## 2. Sentencing Courts Must Adequately Explain Departures from the Appropriately Calculated Guidelines Range.

District court judges are required to provide an explanation for the sentence imposed, with a justification for any departure from the Guidelines range. Gall, 552 U.S. at 51 (“If . . . an outside-Guidelines sentence is warranted, [the judge] must . . . ensure that the justification is sufficiently compelling to support the degree of the variance. . . . [A] major departure should be supported by a more significant justification than a minor one.”). Although this Court has not issued a ruling on the matter, it has acknowledged the possibility that “in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and

convincing evidence.” Watts, 519 U.S. at 156. When a sentencing judge relies on relevant conduct, the defendant’s sentence is not based on the offense of conviction, but is rather based “directly [on] conduct as to which the defendant has not been . . . convicted on proof beyond a reasonable doubt.” Lombard, 72 F.3d at 186; see also United States v. Concepcion, 983 F.2d 369, 389 (2d Cir. 1992) (“[W]e doubt that, with respect to conduct of which the defendant was acquitted, the Commission intended so extreme an increase [from one year to twenty-two years].”). The Sixth Amendment conflict is further aggravated when the judge bases the sentence on acquitted conduct. Additionally, as discussed *infra*, judicial findings that have an extremely disproportionate impact at sentencing violate due process. See United States v. Dare, 425 F.3d 634, 642 (9th Cir. 2005); Jordan, 256 F.3d at 929.

Petitioners faced a potential tenfold increase in their sentencing exposure due to judge-found facts. Although a jury had already acquitted them of the conduct required for the sentencing enhancement, the judge found that petitioners had in fact engaged in a conspiracy. Petitioners’ sentences were based directly on conduct of which the jury had not convicted them. As such, petitioners’ sentences violated the Sixth Amendment.

C. Requiring the Jury to Find All Facts Necessary to Increase the Guidelines Range Will Decrease Sentencing Disparity.

Congress has passed several statutes relating to the purposes of sentencing, and factors that sentencing judges should consider. E.g., 18 U.S.C. § 3553(a) (listing considerations for the sentencing judge); 28 U.S.C. § 991(b) (listing considerations for the Sentencing Commission in creating the Guidelines). Among the factors highlighted as important is “the need to avoid unwarranted sentence disparities among defendants with similar conduct *who have been found guilty of similar offenses*.” 18 U.S.C. § 3553(a)(6) (emphasis added); see also 28 U.S.C. § 991(b)(1)(B) (requiring that sentencing policies “provide certainty and fairness . . . avoiding



unwarranted sentencing disparities among defendants with similar records *who have been found guilty of similar criminal conduct.*” (emphasis added)). Judges retain discretion to allow for individualized sentencing that reflects “mitigating or aggravating factors not taken into account” by the established procedures. 28 U.S.C. § 991(b)(1)(B). Justice Breyer, in the remedial majority opinion in Booker, recognized that “Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.” 543 U.S. at 250 (citing 28 U.S.C. §§ 991, 994). The desire to decrease sentence disparity extended to the use of “real conduct,” *i.e.*, the manner in which the defendant committed the offense. Id. at 250-51. Examination of real conduct was necessary because statutory definitions of offenses encompass a broad range of conduct, and are accompanied by similarly broad allowed terms of imprisonment. Id.

Despite the unquestionably broad grant of discretion to sentencing judges, “[t]he founders . . . were not prepared to leave [criminal justice] to the State” resulting in “the jury-trial guarantee [being] one of the least controversial provisions of the Bill of Rights.” Appendi, 530 U.S. at 498 (Scalia, J., concurring). The Booker Court also recognized the importance of “the interest in fairness and reliability protected by the right to a jury trial.” 543 U.S. at 244 (Stevens, J., delivering the opinion of the court in part). Allowing judicial findings that defendants engaged in *acquitted* conduct eliminates the reliability protected by the jury trial, and leads to disparities in the sentences of defendants *convicted* of the same criminal conduct. Simply put, “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” Appendi, 530 U.S. at 490.

In the present case, petitioners were convicted of distributing small amounts (11 grams or less) of crack cocaine. Jones, 744 F.3d 1365. They were acquitted of engaging in conspiracy. Id. However, their sentences were drastically increased, based on a finding by the judge that they had engaged in the very conspiracy of which the jury acquitted them. As a result, instead of reflecting the sentence deemed appropriate for distribution of small amounts of cocaine—between twenty-seven and seventy-one months—petitioners’ sentences more closely resembled a sentence based on a guilty verdict for *both* distribution *and* conspiracy.

### **CONCLUSION**

The sentencing court’s disproportionate reliance on acquitted conduct at sentencing violated petitioners’ constitutional rights. Further, the use of acquitted conduct to calculate the Guidelines range violated petitioners’ Sixth Amendment rights. For the foregoing reasons, the order from the Court of Appeals for the District of Columbia Circuit should be reversed, and this case should be remanded for resentencing.