

No. 13-10026

In the Supreme Court of the United States

JOSEPH JONES, DESMOND THURSTON, AND ANTWUAN BALL,
PETITIONERS

v.

UNITED STATES, RESPONDENT

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

BRIEF FOR THE PETITIONER

TEAM 15

Questions Presented

1. Were the petitioners' constitutional rights violated when the sentencing court increased his sentence based upon conduct the jury acquitted him of committing?
2. Did the district court violate petitioners' Sixth Amendment right to a jury trial when it used acquitted conduct to calculate a higher United States Sentencing Guidelines range and impose a higher sentence than petitioners would have otherwise received?

Table of Authorities

Constitutional Provisions

U.S. Const. amend V.....	4
U.S. Const. amend. VI.	17

Cases

<i>Alleyne v. United States</i> , 133 S. Ct. 2151, 2158 (2013).....	10, 11, 12, 15
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224, 251 (1998).	5
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 483 (2000).....	<i>passim</i>
<i>Blakely v. Washington</i> , 542 U.S. 296, 303 (2004).....	<i>passim</i>
<i>Cunningham v. California</i> , 549 U.S. 270, 290 (2007).....	25
<i>Dowling v. United States</i> , 493 U.S. 342, 349 (1990).....	11, 14
<i>Ex parte Lange</i> , 85 U.S. 163 (1874).	4, 13
<i>Freeman v. United States</i> , 131 S. Ct. 2685, 2695 (2011)	23
<i>Gall v. United States</i> , 552 U.S. 38, 49 (2007).	22, 23
<i>Harris v. United States</i> , 536 U.S. 545, 563 (2002).	7
<i>In re Winship</i> , 397 U.S. 358, 362 (1970).	2, 4, 5, 12
<i>Jones v. United States</i> , 526 U.S. 227, 243-44 (1999)	6
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79, 86 (1986).....	9, 10, 12
<i>Mistretta v. United States</i> , 488 U.S. 361, 374 (1989).....	20
<i>Patterson v. McLean Credit Union</i> , 494 U.S. 164, 172 (1989).	15
<i>Price v. Georgia</i> , 398 U.S. 323 (1970).	4, 13
<i>Ring v. Arizona</i> , 536 U.S. 584, 602 (2002);.....	7
<i>Rita v. United States</i> , 551 U.S. 338, 347 (2007).....	23
<i>United States v. Booker</i> , 543 U.S. 220, 236 (2005).	<i>passim</i>
<i>United States v. Grubbs</i> , 585 F.3d 793, 798-99 (4th Cir. 2009).	9
<i>United States v. Jones</i> , 744 F.3d 1362, 1365 (D.C. Cir. 2014).....	<i>passim</i>
<i>United States v. Mercado</i> , 474 F.3d 654, 656-58 (9 th Cir. 2007)	20
<i>United States v. Pimental</i> , 367 F. Supp. 2d 143, 150 (D. Mass. 2005).	16
<i>United States v. Putra</i> , 78 F.3d 1386, 1394 (9th Cir. 1996)	14
<i>United States v. Settles</i> , 530 F.3d 920, 923-24 (D.C. Cir. 2008).	9
<i>United States v. Watts</i> , 519 U.S. 148 (1997)	<i>passim</i>
<i>United States v. White</i> , 551 F.3d 381, 384-86 (6th Cir. 2008).	20
<i>Witte v. United States</i> , 515 U.S. 389, 396 (1995).	4, 5, 13, 15

Statutes

18 U.S.C. § 3553(a) (2012).....	23
18 U.S.C. § 3553(b)(1) (2000).....	22
21 U.S.C. § 841(b) (2012).	20
28 U.S.C. § 994(b) (2012)	20
28 U.S.C. §§ 991-92 (2012).....	20

Rules

United States Sentencing Commission, <i>Guidelines Manual</i> § 1B1.3(a)(2) (Nov. 2011) ..	9, 22
--	----------

Table of Contents

Questions Presented	i
Table of Authorities	ii
Table of Contents	iii
Statement of the Facts	1
Summary of the Argument.....	2
Argument	4
I. The district court’s use of acquitted conduct to increase the petitioners’ sentences violated the Due Process Clause and the Double Jeopardy Clause of the Fifth Amendment.	4
A. The Due Process Clause requires that any fact that increases the potential penalty of a crime be found beyond a reasonable doubt.	5
B. Using the petitioners’ acquitted conduct to find a common scheme by the preponderance of the evidence violated the petitioners’ Due Process rights.	7
1. Elements of the crime must be found beyond a reasonable doubt.	9
2. In <i>Apprendi</i> , this Court declared that a fact that increases a sentencing range is an element, not a sentencing factor.	10
3. The “common scheme” facts are elements because they raise the petitioners’ potential punishment.	12
C. This Court should overturn <i>Watts</i> and declare that using acquitted conduct to increase a defendant’s punishment is a violation of the Double Jeopardy Clause.	13
II. The district court’s use of acquitted conduct to increase the applicable Guidelines range violated the petitioners’ Sixth Amendment right to a jury trial.....	16
A. The Sixth Amendment requires any fact that increases the penalty for a crime beyond the statutory maximum to be submitted to a jury and proved beyond a reasonable doubt.	16
1. The range of sentences a court may impose depends entirely upon the facts reflected in the jury’s verdict or admitted by the defendant.....	18
2. The “statutory maximum” for Sixth Amendment purposes is the applicable Guidelines range based solely upon the facts reflected in the jury’s verdict or admitted by the defendant.	19
B. This Court should provide defendants the opportunity to challenge their sentences on the ground that they violate the Sixth Amendment “as-applied.”	24
Conclusion	26

Statement of the Facts

In 2005, a grand jury indicted eighteen individuals, including Joseph Jones, Desmond Thurston, and Antwuan Ball, the petitioners, with conspiracy to sell narcotics and racketeering. *United States v. Jones*, 744 F.3d 1362, 1365 (D.C. Cir. 2014). The government claimed the petitioners were part of the “Congress Park Crew,” a gang that sold crack cocaine in Congress Park for almost 13 years. *Id.* The petitioners went to jury trial in February 2007, and the jury returned the verdicts on November 28, 2007. *Id.* The petitioners were convicted of distribution of crack cocaine, but they were acquitted of all conspiracy charges. *Id.* Under the Sentencing Guidelines, the petitioners’ Guidelines ranges should have been between 27 and 71 months based upon their convictions for distribution of crack cocaine. *Id.* at 1368-69.

The district court, however, found “by a preponderance of the evidence that [the] crimes were part of a common scheme to distribute crack in Congress Park.” *Id.* at 1365. Based on these findings, the district court increased Mr. Jones’ Guidelines range to 324 to 405 months. *Id.* at 1366. Then, the district court increased Mr. Thurston’s Guidelines range to 262 to 327 months. *Id.* Finally, the district court increased Mr. Ball’s Guidelines range to 292 to 365 months. *Id.* Eventually, the district court sentenced Mr. Jones to 180 months, Mr. Thurston to 182 months, and Mr. Ball to 210 months. *Id.* at 1365-66. The petitioners appealed on several grounds: the constitutionality of their sentences, the constitutionality of using acquitted conduct in sentencing, and the procedural and substantive reasonableness of their sentences. *Id.* at 1366, 68. The appellate court

rejected all of their arguments and affirmed their sentences. *Id.* at 1370. This Court granted certiorari to address the constitutionality of petitioners' sentences.

Summary of the Argument

A district court's use of acquitted conduct at sentencing violates the Constitution of the United States for two reasons. First, it violates Due Process and Double Jeopardy under the Fifth Amendment. Second, it violates a defendant's right to a jury trial under the Sixth Amendment.

A district court violates a defendant's Fifth Amendment Due Process right when it increases the defendant's punishment on the basis of acquitted conduct the court nevertheless finds by a preponderance of the evidence at sentencing. The Fifth Amendment's Due Process Clause requires every element of a crime to be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970). Under *Apprendi v. New Jersey* and *United States v. Booker*, this requirement includes any fact that alters the Sentence Guideline range. *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000); *United States v. Booker*, 543 U.S. 220, 236 (2005). By using the acquitted conduct of being part of a conspiracy to increase the petitioners' sentences, the judge violated the petitioners' Fifth Amendment due process rights.

Additionally, the Court should overturn *United States v. Watts*, 519 U.S. 148 (1997), and declare the use of acquitted conduct an unconstitutional violation of a defendant's Fifth Amendment Double Jeopardy rights. The Double Jeopardy Clause protects defendants from having the state attempt to criminally punish them twice for the same conduct. *Watts* reasoned that acquitted conduct did not violate Double Jeopardy because the conduct only needed to be found by a preponderance of the evidence and

therefore was not explicitly rejected as untrue by the jury. *Id.* at 156. However, *Apprendi* and *Booker* require the facts increasing the punishment to be found beyond a reasonable doubt. *Apprendi*, 530 U.S. at 483; *Booker*, 543 U.S. at 236. Therefore, when a jury acquits the individual of the alleged conduct, the jury is explicitly rejecting the conduct as not being proven beyond a reasonable doubt. Allowing judges to increase a sentence using facts from acquitted conduct is a violation of Double Jeopardy because it attempts to twice punish the defendants criminally for the same conduct.

Furthermore, when a district court uses acquitted conduct to impose a greater sentence than it otherwise would, it defies the defendant's Sixth Amendment right to a jury trial. The Sixth Amendment right to a jury trial guarantees that "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." *Apprendi*, 530 U.S. at 490. "The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Under the post-*United States v. Booker* federal sentencing scheme, the statutory maximum for *Apprendi* purposes remains the applicable Guidelines sentencing range based upon the facts reflected in the jury verdict or admitted by the defendant. Because acquitted conduct is rejected by the jury as not proved beyond a reasonable doubt, a district court necessarily violates the *Apprendi-Blakely* rule when it calculates a higher Guidelines range based upon acquitted conduct.

Argument

I. The district court's use of acquitted conduct to increase the petitioners' sentences violated the Due Process Clause and the Double Jeopardy Clause of the Fifth Amendment.

The Fifth Amendment assures that “[n]o person shall be...deprived of life, liberty, or property, without due process of law.” U.S. Const. amend V. This includes a defendant’s right to have every element of a crime proven beyond a reasonable doubt. *Winship*, 397 U.S. at 362. This Court has explained that any fact that would increase a sentence must be found beyond a reasonable doubt: this includes both the elements of the crime establishing the punishment and any fact that would change that sentence range. *Apprendi*, 530 U.S. at 471, 476. When a judge uses facts that have only been found by a preponderance of the evidence, the judge violates the defendant’s Fifth Amendment Procedural Due Process rights. *Id.* at 476. Because the judge in this case found the “common scheme” by a preponderance of the evidence and used those facts to increase the petitioners’ sentences, the sentences are unconstitutional as a violation of Fifth Amendment Due Process.

Additionally, the Fifth Amendment declares that “[n]o person shall...be subject for the same offence to be twice put in jeopardy of life or limb....” U.S. Const. amend. V. This Court has explained that not only was the Clause created to “prevent the criminal from being twice punished for the same offence as from being twice tried for it,” *Witte v. United States*, 515 U.S. 389, 396 (1995) (quoting *Ex parte Lange*, 85 U.S. 163 (1874)), but it was also created to “protect[] a criminal defendant from being twice put in jeopardy for such punishment.” *Witte*, 515 U.S. at 396 (citing *Price v. Georgia*, 398 U.S. 323 (1970)). Therefore, not only does the Double Jeopardy Clause protect against a second

punishment, it protects against “*attempting a second time to punish criminally*, for the same offense.” *Id.* Using acquitted conduct to increase a sentence a second attempt to punish a defendant and is, therefore, a violation of the double jeopardy rights.

A. The Due Process Clause requires that any fact that increases the potential penalty of a crime be found beyond a reasonable doubt.

This Court has extended the protections of the Fifth Amendment to sentencing by requiring that any fact which increases the potential penalty of a crime be found beyond a reasonable doubt. *Id.* From the nineteenth century, it has been assumed that the Due Process Clause requires proof beyond a reasonable doubt for criminal charges. *Winship*, 397 U.S. at 362. This Court removed any doubt by holding in *Winship*, “[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction exception upon *proof beyond a reasonable doubt of every fact necessary* to constitute the crime with which he is charged.” *Id.* at 364 (emphasis added). Although the reasonable doubt standard has been accepted as applied to facts presented at trial, its application during sentencing has been less clear.

This Court clarified its applicability by stating that the procedural protections of due process are invoked whenever “a defendant faces punishment beyond that provided by statute...[because] it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened.” *Apprendi*, 530 U.S. at 484. This Court has explained *Winship*’s due process protections expand to ““determinations that [go] not to a defendant’s guilt or innocence” but also to determinations that “simply [go] to the length of his sentence.”” *Id.* (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

In *Jones v. United States*, the Court applied these protections to facts that increase a defendant's potential maximum penalty. 526 U.S. 227, 243-44 (1999). In *Jones*, the court dealt with the United States Code which defined the elements of carjacking with a weapon and prescribed a punishment of no more than 15 years. *Id.* at 230. However, if the judge found by a preponderance of the evidence that there had been serious bodily injury or death, the judge could increase the punishment to 25 years or life imprisonment, respectively. *Id.* The Court avoided addressing the due process concerns by classifying the substantial injury fact as an element, not a sentence enhancement. *Id.* at 240-41. In doing so, the Court explained that “under the Due Process Clause of the Fifth Amendment...any fact (other than prior conviction) that increases the maximum penalty for a crime must be...proven beyond a reasonable doubt.” *Id.* at 243 n. 6.

The Court approached the constitutionality of raising the sentence in *Apprendi v. New Jersey*. 530 U.S. at 489. In *Apprendi*, the judge found by a preponderance of the evidence that the offense was committed as a hate crime and increased the sentence range from five to ten years to ten to twenty years. *Id.* at 468. In its opinion, this Court reaffirmed *Jones* and held that any fact “[o]ther 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.*” *Id.* at 489 (emphasis added).

This Court clarified these protections in *Blakely* by defining “statutory maximum” for Fifth Amendment purposes. 542 U.S. at 403-04. In *Blakely*, the Court declared that under a guidelines scheme, the “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.” *Id.* at 303. *See also Ring v. Arizona*, 536 U.S. 584, 602 (2002); *Harris v. United States*, 536 U.S. 545, 563 (2002). This established the *Apprendi-Blakely* rule that the “statutory maximum” should be viewed as the range the guideline gives based on the specific facts found in the jury verdict: it should not be interpreted solely to mean the maximum provided by the statute. *Blakely*, 542 U.S. at 403-04.

Although *Apprendi* and *Blakely* were state sentencing schemes, this Court unequivocally applied the *Apprendi-Blakely* rule to the Sentencing Guidelines in *Booker*. *Booker*, 543 U.S. at 226-27. Therefore, *Booker* confirms that any fact that is used to increase the Federal Sentencing Guidelines range must be found beyond a reasonable doubt. 543 U.S. at 244 (“Accordingly, we reaffirm our holding in *Apprendi*. Any fact...which is necessary to support a sentence exceeding the maximum authorized by the facts [must be] established...beyond a reasonable doubt”).

B. Using the petitioners’ acquitted conduct to find a common scheme by the preponderance of the evidence violated the petitioners’ Due Process rights.

The judge violated the petitioners’ constitutional rights when he found a “common scheme to distribute crack” by a preponderance of the evidence. Following *Booker*, a defendant’s Sentencing Guidelines range must be entirely supported by facts that are found beyond a reasonable doubt. 543 U.S. at 244. If a judge uses facts that have been found by a preponderance of the evidence to increase that punishment, then the defendant’s Fifth Amendment procedural due process rights have been violated.

Petitioners Jones, Thurston, and Ball were indicted in 2005 for conspiracy to distribute narcotics. *Jones*, 744 F.3d at 1365. The state put on evidence that the petitioners were involved in a crack distribution conspiracy by providing recordings of the petitioners involved in crack sales and the testimony of those who had bought crack

from the petitioners. *Id.* The jury acquitted the petitioners of all conspiracy charges. *Id.* But when the district court sentenced them, the district court found by a preponderance of the evidence that petitioners Jones, Thurston, and Ball were part of a “common scheme to distribute crack.” *Id.* Because of the common scheme, the judge increased their sentencing ranges under the Sentencing Guidelines. *Id.*

The use of the acquitted facts tripled the Guideline range the judge used. *Id.* at 1365-66. Without the common scheme, the petitioners would each have faced a Guideline range of 27 to 71 months. *Id.* at 1368-69. With the scheme, the judge calculated Mr. Jones’s range to be 324 to 405 months, Mr. Thurston’s range to be 262 to 327 months, and Mr. Ball’s to be 292 to 365 months. *Id.* at 1366. Because the common scheme was found by a preponderance of the evidence, Mr. Jones’ went from a maximum range of 71 months to a minimum range of 324 months, increasing his potential punishment four and a half times. *Id.* at 1362, 1368-69. Mr. Thurston’s potential range increased three and two-thirds times and Mr. Ball’s increased over four times. Although the final sentences each petitioner received were below the final Sentencing Guideline range the district judge calculated,¹ the petitioners’ Fifth Amendment rights were violated when the judge increased their sentencing ranges.

Following *Booker*, for the judge to increase the sentencing ranges, the facts used to do so must be found beyond a reasonable doubt by a judge. Instead, the district court judge “found by a preponderance of the evidence that [their] crimes were part of a common scheme.” *Id.* at 1365. In doing so, the petitioners’ constitutional rights were

¹ Ultimately, Mr. Jones received a sentence of 180 months; Mr Thurston received a sentence of 182 months; and Mr. Ball received a sentence of 210 months. All of which are sentences outside of the original 27 to 71 month range that should have been used. *Jones*, 744 F.3d at 1366.

violated. The petitioners should be resentenced within the Guidelines based solely facts found beyond a reasonable doubt.

1. Elements of the crime must be found beyond a reasonable doubt.

Courts that allow acquitted conduct to be used to increase a sentence frequently explain that the increase is from a sentence factor, not an additional element. *Watts*, 519 U.S. at 148; *See, e.g., Jones*, 744 F.3d at 1369; *United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009); *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008). In *McMillan v. Pennsylvania*, this Court declared that certain factual issues could be categorized as “sentencing factors” rather than elements of the crime and that a judge could, therefore, find those facts by a preponderance of the evidence during a post-trial hearing. 477 U.S. 79, 86 (1986). This was upheld in *United States v. Watts*. 519 U.S. at 156. This Court declared that acquitted conduct may be used at sentencing and found by a preponderance of the evidence because of sweeping language within the Sentencing Guidelines that states that conduct that “is not an element of the offense of conviction may enter into determination of the applicable guideline sentencing range.” *Id.* at 153 (citing United States Sentencing Commission, *Guidelines Manual* § 1B1.3(a)(2) (Nov. 2011)).

The issue for courts interpreting *McMillan* became whether a fact was being used a sentencing factor or an element. *Apprendi*, 530 U.S. at 471-85. The *Apprendi* Court declared that a state cannot categorize an essential fact as a “sentencing factor” to avoid proving it beyond a reasonable doubt. *Apprendi*, 530 U.S. at 494 (“Despite what appears to us the clear ‘elemental’ nature of the factor here, the relevant inquiry is not of form, but of effect – does the required finding expose the defendant to greater punishment than

that authorized by the jury's guilty verdict?"). Therefore, a court can determine whether a fact is functioning as a sentence enhancement or an element.

The court in *McMillan* allowed the factor to be found by a preponderance of the evidence because as applied it "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty: [rather] it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *McMillan*, 477 U.S. at 87-88. The *Apprendi* Court reaffirmed that a "sentencing factor" describes "a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range authorized* by the jury's finding that the defendant is guilty of a particular offense." *Apprendi*, 530 U.S. at 494, n. 19 (emphasis added).

2. In *Apprendi*, this Court declared that a fact that increases a sentencing range is an element, not a sentencing factor.

In *Apprendi*, the Court provided a clearer distinction between sentencing factors and elements. *Apprendi*, 530 U.S. at 494, n. 19. The Court declared that "a fact is by definition an element of the offense...if it increases the punishment above what is otherwise legally prescribed," *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013); *Apprendi*, 530 U.S. at 521 (Thomas, J. concurring) and that a judge was limited to punish "according to the jury facts alone." *Apprendi*, 530 U.S. at 483. Even if the state labeled the fact a sentence enhancement, if it increased the maximum sentence, the court will treat it as an element. *Id.* at 494, n. 19 ("When the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence...it fits squarely within the usual definition of an 'element' of the offense.") (internal cites omitted).

The Federal Sentencing Guidelines were still mandatory when *Apprendi* was decided, and a judge calculated the legally prescribed punishment by calculating the original sentencing range. *Booker*, 543 U.S. 220 at 236. Therefore, if a fact changed the Guidelines range, it was an element and must be proven beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2158 (explaining that “*Apprendi*’s definition of ‘elements’ necessarily includes not only facts that increase the ceiling, but also those that increase the floor [level of legally prescribed punishment]”).

By requiring the beyond a reasonable doubt standard, the Court limited when the preponderance of the evidence standard may be used in sentencing. *Apprendi*, 530 U.S. at 476 (holding that facts increasing a penalty must be found beyond a reasonable doubt, not by a preponderance of the evidence). In *Watts*, the Court permitted acquitted conduct to be used if it has been found beyond a preponderance of the evidence. 519 U.S. at 156. The Court reasoned that this was acceptable because ““an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.”” *Id.* (quoting *Dowling v. United States*, 493 U.S. 342, 349 (1990)). The *Apprendi* Court raised the standard of proof at sentencing to facts that raise a defendant’s possible punishment. *Apprendi*, 530 U.S. at 476. Therefore, it limits the use of *Watts*. If the fact increases the legally prescribed punishment (the Guidelines range), then it is an element and must be proven beyond a reasonable doubt. *Booker*, 543 U.S. at 244. If the fact is used in determining the sentence within the range prescribed by the crime, then it is not an element and may be found by a preponderance of the evidence under *Watts*. 519 U.S. at 154-55. Because the

finding of a “common scheme” changes the otherwise legally prescribed punishment, it is an element and must be found beyond a reasonable doubt.

3. The “common scheme” facts are elements because they raise the petitioners’ potential punishment.

The district court judge unconstitutionally found by a preponderance of the evidence that the petitioners were involved in a “common scheme.” *Jones*, 744 F.3d at 1365. Originally, the petitioners’ potential sentence was 27 to 71 months, based on the facts found by the jury. *Jones*, 744 F.3d at 1369. The judge increased the range, not just the sentence within the range, for all three petitioners based upon that common scheme. Therefore, the judge increased the petitioners’ prescribed sentence beyond the statutory maximum for the crime and the facts used to do so are elements under *Apprendi*. *Alleyne*, 133 S. Ct. at 2158. In order for the increase to be constitutional, these facts must be found beyond a reasonable doubt. *Apprendi*, 530 U.S. at 477; *Winship*, 397 U.S. at 364.

In order for the district judge to constitutionally use the acquitted conduct, it must serve only as a sentence factor and therefore be able to be found by a preponderance of the evidence under *McMillan*. *McMillan*, 477 U.S. at 83. Under this rubric, the district judge could have considered the conduct when determining a sentence for petitioners within the prescribed range (27 to 71 months), but could not go beyond it. Because the judge found the conduct by a preponderance of the evidence, the judge violated the petitioners’ constitutional rights by relying on the conduct to raise the sentencing range rather than to justify a sentence toward the high end of the 27 to 71 month range. The petitioners should be resentenced with the maximum sentencing range based solely on the facts the jury found beyond a reasonable doubt.

C. This Court should overturn *Watts* and declare that using acquitted conduct to increase a defendant’s punishment is a violation of the Double Jeopardy Clause.

The Fifth Amendment protects defendants from the state attempting to punish them criminally twice for the same offense. U.S. Const. amend. V (“[N]or shall any person be subject for the *same offence to be twice put in jeopardy* of life or limb...”)(emphasis added). This Court’s recent due process precedent heightens the standard of proof during sentencing, thereby rendering *Watts* logically irreconcilable with *Apprendi* and *Booker*. See *Apprendi*, 530 U.S. at 490; *Booker*, 543 U.S. at 244. *Contra Watts*, 519 U.S. at 156. Therefore, the Court should overturn *Watts* and declare it a violation of the Double Jeopardy Clause to use acquitted conduct to increase a sentence beyond its original sentencing range.

This Court has explained that not only was the Double Jeopardy Clause created to “prevent the criminal from being twice punished for the same offence as from being twice tried for it,” *Witte v. United States*, 515 U.S. 389, 396 (1995) (quoting *Ex parte Lange*, 85 U.S. 163 (1874)), but it was also created to “protect[] a criminal defendant from being twice put in jeopardy for such punishment.” *Witte*, 515 U.S. at 396 (citing *Price v. Georgia*, 398 U.S. 323 (1970)). Therefore, not only does the Double Jeopardy Clause protect against a second punishment, it protects against “*attempting a second time to punish criminally*, for the same offense.” *Id.*

When the state argues for an increased sentence based on acquitted conduct, the state attempts to punish the defendant criminally for a second time based on the same event. The state attempted to punish the petitioners during the original trial. When the judge considered conduct that the jury had acquitted petitioners of committing to increase

their punishment beyond the base sentencing range (the legally prescribed punishment), the state used the same conduct to punish the petitioners criminally for a second time. In doing so, the district court violated the petitioner's Double Jeopardy rights.

Watts was decided before the Court strengthened the defendant's due process rights during sentencing in *Apprendi* and *Booker*. Because of this, *Watts* is irreconcilable with recent due process precedent and the Court should overturn it as a Double Jeopardy violation. In *Watts*, the Court allowed acquitted conduct found by a preponderance of the evidence to be used to increase a defendant's sentence because the evidence was not explicitly rejected by a jury and therefore could be found under another standard of proof. 519 U.S. at 156. Because of the lower standard of proof, Double Jeopardy does not prevent the state from relitigating the conduct. *Id.* Specifically, the Court explained that an "acquittal can only be an acknowledgment that the government failed to prove an essential element beyond a reasonable doubt," *Id.* at 155 (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996)) therefore the acquittal "does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Watts*, 519 U.S. at 156 (quoting *Dowling*, 493 U.S. at 349). However, *Apprendi* and *Blakely* raise the standard of proof required to beyond a reasonable doubt, therefore rendering the *Watts* rationale moot for defending against Double Jeopardy claims.

Acquitted conduct has explicitly *not* been found beyond a reasonable doubt. Therefore, when a jury rejects the conduct by acquitting the individual on the charge, the jury is providing a finding of fact about the conduct. The jury is declaring that the state has failed to meet its burden of proof and it is refusing to find that the defendant

committed the actions at all. Because the jury refused to find that the individual committed the action, the jury is also explicitly refusing to punish the defendant. In the present case, the jury explicitly refused to find that the petitioners had been involved in a conspiracy to sell crack. *Jones*, 744 F.3d at 1365. Allowing a judge to use these facts to increase the sentence violates the Double Jeopardy Clause by allowing the state to attempt to criminally punish the defendant for conduct that a jury concluded the state could not prove was committed at all. *Witte*, 515 U.S. at 396.

Although *Watts* has been called into question, it has not been explicitly overturned. *Booker*, 543 U.S. at 240, n. 4 (explaining that *Watts* “did not even have the benefit of a full briefing or oral argument, [so i]t is unsurprising that we failed to consider fully the issues presented.”). However, *Apprendi* has seriously eroded *Watts*’ rationale, and when a decision’s “‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law” *stare decisis* is not compelled. *Alleyne*, 133 S. Ct. at 2164 (Sotomayor, J. concurring). Although *stare decisis* strongly prefers compliance, precedent is “not sacrosanct [and may be overturned] where the necessity and propriety of doing so has been established.” *Patterson v. McLean Credit Union*, 494 U.S. 164, 172 (1989). Therefore, this is the type of case where *stare decisis* should not prevent this Court from overturning bad precedent: *Watts*.

Watts’s justification for allowing acquitted conduct to be considered in sentencing was because sentencing facts only had to be found by a preponderance of the evidence, a lower standard of proof. *Watts*, 519 U.S. at 155-56. However, *Apprendi* and *Booker* increase the standard of proof for sentencing facts that increase the possible punishment to that of an element: beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *Booker*, 543

U.S. at 244. The holdings in these cases are logically incompatible and should be reconciled. *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) (holding that the Court’s logic post-*Apprendi* “substantially undermines the continued vitality of ... *Watts* both by its logic and by its words.”) In order to cure this incompatibility, the Court should overturn *Watts* and declare use of acquitted conduct to increase the punishment at sentencing to be a violation of the Double Jeopardy Clause, thereby upholding *Apprendi*’s and *Booker*’s beyond a reasonable doubt standard and only allowing the state one opportunity to seek punishment of a defendant.

II. The district court’s use of acquitted conduct to increase the applicable Guidelines range violated the petitioners’ Sixth Amendment right to a jury trial.

When a district court uses acquitted conduct to impose a greater sentence than it otherwise would, it violates a defendant’s jury trial right to have “any fact that increases the penalty for a crime beyond the prescribed statutory maximum...submitted to a jury and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. “Statutory maximum,” under this rule, refers to the applicable Guidelines range based solely upon the facts reflected in the jury’s verdict or admitted by the defendant. Thus, when the district court increased petitioners’ Guidelines range after finding they had participated in a “common scheme,” even though the jury acquitted each of them of the conspiracy charge, it violated petitioners’ Sixth Amendment right to a jury trial.

A. The Sixth Amendment requires any fact that increases the penalty for a crime beyond the statutory maximum to be submitted to a jury and proved beyond a reasonable doubt.

The Sixth Amendment commands, “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...” U.S. Const. amend.

VI. Modern Sixth Amendment Jurisprudence has reinforced the age-old principle that the truth of each and every accusation should be “confirmed by the unanimous suffrage of [the defendant’s] equals and neighbors.” *Apprendi*, 530 U.S. at 477. In *Apprendi*, this Court gave teeth to that principle. It held that “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.” *Id.* at 490. This rule recognizes the importance of the jury by curtailing unconstitutional judicial factfinding at sentencing.

In *Apprendi*, this Court struck down a New Jersey statute that provided for an increased sentencing range for offenders found to have engaged in a “hate crime.” *Id.* at 468-469. The defendant was charged and pled guilty to possession of a firearm for an unlawful purpose. *Id.* This offense carried a statutory range of imprisonment of five to ten years. *Id.* However, at sentencing, the judge found by a preponderance of the evidence that Apprendi had engaged in a “hate crime.” *Id.* The defendant never admitted to the facts relied upon by the court in making that finding. *Id.* New Jersey Statute provided an extended term of 10-20 years for this finding. *Id.* Because this finding increased the maximum penalty the defendant could receive, the *Apprendi* Court struck down the statute as it called for a violation of the Sixth Amendment right to have those facts submitted to a jury and proved beyond a reasonable doubt.

In this case, the district court committed an even more egregious violation of the petitioners’ right to a jury trial. The offense of commission authorized a Guidelines range of 27-71 months. *Jones*, 744 F.3d at 1368. This range reflects the jury’s judgment of guilt combined with Congress’ definition of the penalty for this crime. At sentencing, the district court unilaterally found acquitted conduct to be true by a preponderance of the

evidence, not beyond a reasonable doubt. *Id.* at 1365. Upon this baseless authority, the district court imposed sentences of 180, 182, and 205 months—approximately 10 years greater than it otherwise could have. *Id.* at 1366. By imposing these sentences, the district court undermined the basic principle in *Apprendi*.

At bottom, *Apprendi* stands for the preservation of the “historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal limits provided.” *Apprendi*, 530 U.S. at 482. Judicial factfinding at sentencing, which leads to penalties outside the statutory range, severs the link between verdict and judgment. Congress defines the offense and the corresponding punishment. The jury determines guilt or innocence. It is the task of the court to employ what discretion is left to impose a sentence. In this case, the jury’s verdict of acquittal forbade judgment on the conspiracy count. Under the guise of assessing “relevant conduct,” the judge overturned the jury’s verdict and violated petitioners’ Sixth Amendment right to a jury trial.

1. The range of sentences a court may impose depends entirely upon the facts reflected in the jury’s verdict or admitted by the defendant.

Two years after *Apprendi*, this Court defined the relevant “statutory maximum” for the purposes of the *Apprendi* rule. *See Blakely*, 542 U.S. at 296. “The ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 542 U.S. at 303. It is not the “maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *Id.* at 303-04. This rule emphasizes the longstanding tenet of common law: “an accusation which lacks any particular fact which the law makes essential to the

punishment is...no accusation within the requirements of the common law, and it is no accusation in reason.” *Id.* at 301-02. Punishment defines the consequence for the commission of a crime. To impose punishment, a court must rely on the facts reflected in the jury verdict or admitted by the defendant. *Id.* at 303. The *Blakely* rule reinforces the historic link between verdict and judgment by limiting judicial discretion to impose sentences within the legal limits derived from those facts reflected in the jury verdict or admitted by the defendant.

Here, the district court severed that link. The facts reflected in the jury’s verdict authorized a Guidelines range of only 27-71 months. *Jones*, 744 F.3d at 1368. Yet, the district court increased that range based upon facts not found by the jury beyond a reasonable doubt. *Id.* at 1365. An application of *Blakely* to the modern federal sentencing structure yields the conclusion that the Guidelines are the relevant statutory maximum for *Apprendi* purposes. Thus, the district court violated the *Apprendi-Blakely* rule here when it raised the Guidelines range on the basis of acquitted conduct.

2. The “statutory maximum” for Sixth Amendment purposes is the applicable Guidelines range based solely upon the facts reflected in the jury’s verdict or admitted by the defendant.

The Guidelines range calculated solely from the facts reflected in the jury verdict or admitted by the defendant represents the functional statutory maximum for *Apprendi* purposes. As stated above, the *Apprendi* rule rests on the principles underlying the Sixth Amendment right to a jury. The Sixth Amendment stands for the preservation of the “historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal limits provided.” *Apprendi*, 530 U.S. at 482. These “legal limits” referred to in *Apprendi* are the Congressional definitions of the

penalties for substantive crimes. *See, e.g.*, 21 U.S.C. § 841(b) (2012). Under the modern federal sentencing structure, the Guidelines define the sentencing range for offenses, not the range in the United States Code.

Through its enactment of the 1984 Sentencing Reform Act, Congress delegated its power to define the penalty ranges for specific offenses to the United States Sentencing Commission (Commission). *See* 28 U.S.C. §§ 991-92 (2012). “Congress directed the Commission to develop a system of ‘sentencing ranges’ applicable ‘for each category of offense involving each category of defendant.’” *Mistretta v. United States*, 488 U.S. 361, 374 (1989) (quoting 28 U.S.C. § 994(b) (2012)). In *Mistretta*, this Court held that Congress’ delegation of power to the Commission was constitutional. *Id.* at 412. It follows that, in the federal system, the Guidelines sentencing range constitutes the “legal limits” within which a judge may exercise discretion at sentencing. Under *Blakely*, this Guidelines range must be the range calculated “*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 542 U.S. at 303.

In this case, therefore, the district court had discretion to sentence the petitioners within their initial Guidelines range of 27-71 months. *Jones*, 744 F.3d at 1368. However, the court considered acquitted conduct and increased the petitioners’ Guidelines ranges. *Id.* at 1365. It then based petitioners’ sentences off of this increased range. *Id.* at 1366. This practice is in clear violation of this Court’s Sixth Amendment jurisprudence. *See Blakely*, 542 U.S. at 303. However, the circuit courts have consistently upheld such a practice on the ground that after *United States v. Booker*, the Guidelines are now advisory. *See United States v. White*, 551 F.3d 381, 384-86 (6th Cir. 2008); *United States v. Mercado*, 474 F.3d 654, 656-58 (9th Cir. 2007) (collecting decisions from every

numbered circuit but the Sixth). In reality, *Booker* did not alter the nature of the federal sentencing structure.

Although *United States v. Booker* breathed life into the principles of the Sixth Amendment, the aftermath of the decision has shown that as-applied violations of the Sixth Amendment right to a jury have squeaked through the cracks. This brief will first discuss the decision itself. Next, it will show that the Guidelines remain *de facto* mandatory in sentencing practice today and are therefore the “statutory maximum” for *Apprendi* purposes.

In *United States v. Booker*, this Court ruled that the *Apprendi-Blakely* rule applies to the Guidelines, and, therefore, the Guidelines cannot be mandatory and satisfy the requirements of the Sixth Amendment simultaneously. 543 U.S. at 220. Under the mandatory scheme, the applicable sentence range for a defendant effectively represented the statutory maximum for the purposes of the Sixth Amendment. *Id.* at 233. Further, certain provisions within the Guidelines required a district court to examine “relevant conduct” at sentencing. *See* USSG § 1B1.3. This relevant conduct raised a defendant’s sentencing range under the Guidelines. *Booker*, 543 U.S. at 235. Thus, a district court was sometimes required to make judicial findings of fact at sentencing, which would increase a defendant’s sentence above the base Guidelines range. This practice clearly violated the *Apprendi-Blakely* rule by surpassing the maximum sentence authorized by the jury’s verdict on the basis of judicially-found facts. *Id.*

This Court’s solution was to render the Guidelines advisory by excising the section of 18 U.S.C. § 3553(b)(1) (2000) that required district courts to abide by the Guidelines. *Booker*, 543 U.S. at 259. Furthermore, this Court abrogated the *de novo*

review on appeal set forth in 18 U.S.C. § 3742(e). *Id.* In its place, this Court established the standard of “unreasonableness.” *Id.* at 261. Essentially, appellate courts must determine “whether the sentence ‘is unreasonable’ with regard to 3553(a)” under a totality of the circumstances. *Id.*

Petitioners’ case shows why *United States v. Booker*’s declaration that the Guidelines are advisory did not protect offenders from Sixth Amendment violations in all cases. The advisory nature of the Guidelines did not prevent the district court from finding additional facts at sentencing to justify the higher sentence it imposed. This Court should recognize the practical consequences of *Booker*, in order to protect the Sixth Amendment right to a jury trial for the petitioners and those similarly situated.

Booker’s effort to render the Guidelines advisory has been overshadowed by this Court’s subsequent clarification as to the role the Guidelines play in sentencing procedure. *See Peugh*, 133 S. Ct. at 2083. In the wake of *Booker*, a district court is still required to consult the Guidelines: “A district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Gall v. United States*, 552 U.S. 38, 49 (2007). A district court must also consider the arguments of the parties and the factors set forth in 18 U.S.C. § 3553(a) (2012). However, if a district court significantly departs from the Guidelines, this departure “should be justified by a more significant justification than a minor one.” *Gall*, 552 U.S. at 50. “Failing to calculate the correct Guidelines range constitutes procedural error.” *Id.* at 51.

These requirements mean that the Guidelines serve as the fundamental starting point for all federal sentencing. Even where the sentencing judge chooses to vary from the Guidelines, the judge uses the guidelines as a starting point, and they remain “in a real sense the basis for the sentence.” *Peugh*, 133 S. Ct. at 2083 (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2695 (2011)). That a district court may impose a sentence outside of the Guidelines range does not “deprive the Guidelines of force as the framework for sentencing. Indeed, the rule that an incorrect Guidelines calculation is procedural error ensures that they remain the starting point for every sentencing calculation in the federal system.” *Peugh*, 133 S. Ct. at 2083.

Additionally, the standard of review on appeal of federal sentences incentivizes district courts to impose within-Guidelines sentences. As noted above, *Booker* replaced the former *de novo* review with the “unreasonableness” standard. However, circuits may presume that a within-Guidelines sentence is reasonable. *Rita v. United States*, 551 U.S. 338, 347 (2007). Failure to correctly calculate the applicable Guidelines range is a ground for reversal as procedural error. *Gall*, 552 U.S. at 51. In sum, the “post-*Booker* sentencing regime puts in place procedural ‘hurdles’ that, in practice, make the imposition of a non-Guidelines sentence less likely.” *Peugh*, 133 S. Ct. at 2083-84. The reality of this regime is that the Guidelines remain *de facto* mandatory.

In this case, it is clear that the Guidelines served as the basis for the petitioners’ sentences. Even considering the twelve- and thirteen-month reductions Thurston and Ball received due to the delay in their sentencing, the district court clearly based these reductions on the higher Guidelines range it calculated based on the acquitted conduct. *See Jones*, 744 F.3d at 1365. If the district court had started these reductions from the

appropriate Guidelines range based upon the offense of conviction, the petitioners' sentences would have been drastically smaller. As this case shows, violations of the Sixth Amendment right to a jury still occur under the post-*Booker* sentencing structure. To remedy these violations, this Court should provide for as-applied challenges to the constitutionality of sentences.

B. This Court should provide defendants the opportunity to challenge their sentences on the ground that they violate the Sixth Amendment “as-applied.”

Although *United States v. Booker* did not eliminate Sixth Amendment violations at sentencing in the federal system, there is a narrow remedy for this defect. This Court should adopt the as-applied challenge outlined in Justice Scalia's concurrence in *Rita v. United States*. 551 U.S. 368-83. This remedy will allow defendants to challenge the constitutionality of their sentences without upsetting the federal sentencing structure.

In *Rita*, Justice Scalia points out that, under the advisory Guidelines, judge-found facts will sometimes be legally necessary to justify a sentence above the Guidelines range. *Id.* at 369. By legally necessary, he means that without the judge-found facts, the sentence would not survive review for substantive unreasonableness on appeal because they would be in violation of the Sixth Amendment. *Id.* Under such a system, some violations of the Sixth Amendment are inevitable. *Id.* at 370. By failing to address these scenarios so far, the “Court has reintroduced the constitutional defect that *Booker* purported to eliminate.” *Id.* Petitioners' case is precisely the type of case Justice Scalia was referring to.

But for the district court finding petitioners' to be part of a “common scheme” to distribute crack cocaine, the sentences it imposed would be substantively unreasonable.

Petitioners' Guidelines ranges based solely on the facts reflected in the jury verdict were between 27-71 months. *Jones*, 744 F.3d at 1368. After finding that petitioners were members of the "Congress Park Crew," the court increased their Guidelines ranges to 262-327, 292 to 365, and 324 to 405 months. *Id.* at 1365-66. The court then departed downward from these higher ranges to account for the substantial delay in sentencing, and general concerns related to the harsh penalties for crack cocaine offenses. *Id.* Regardless of this downward departure, petitioners' sentences were based off of this higher Guidelines range. This higher range remained "in a real sense the basis for the sentence." *Peugh*, 133 S. Ct. at 2083. Therefore, the district court must provide a reasonable basis for calculating this range. It is clear that a district court could not impose a substantively reasonable sentence under this higher range without finding that petitioners' were involved in a "common scheme," a fact expressly rejected by the jury's acquittal.

This result invariably violates the rules set forth in *Apprendi* and *Blakely*. If a sentence will only be upheld as reasonable because of a judicially-found fact, that sentence violates the Sixth Amendment right to have any fact that would increase the penalty beyond the statutory maximum submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Further, in *Cunningham v. California*, this Court cautioned, "if the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." 549 U.S. 270, 290 (2007). This Sixth Amendment requirement harkens back to the early requirements of the common law discussed above. In *United States v. Booker*, this Court noted, "More important than the

language used in our holding in *Apprendi* are the principles we sought to vindicate...They...have their genesis in the ideals our constitutional tradition assimilated from the common law." *Booker*, 543 U.S. at 238. This Court must maintain the historic link between the jury's verdict and judgment. To do this, Court should expressly provide for "as-applied" challenges to the constitutionality of sentences.

Conclusion

When a district court finds acquitted conduct by a preponderance of the evidence at sentencing, it violates the defendant's right to due process of law, subjects the defendant to double jeopardy, and undermines the jury's manifest power to issue unreviewable acquittals. This Court should reverse the circuit court and remand petitioners' case for resentencing under the Guidelines range supported by the jury's verdict without consideration of the acquitted conduct.