No. 13-10026

IN THE

SUPREME COURT OF THE UNITED STATES

Joseph Jones, Desmond Thurston,
and Antuwan Ball,

Petitioners,

v.

United States,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF FOR THE PETITIONERS
Team Number 16

QUESTIONS PRESENTED

Does a judge that calculates the applicable U.S. Sentencing Guidelines range to impose on a defendant a much higher sentence than the Guidelines would otherwise recommend violate the Sixth Amendment by basing that calculation on acquitted conduct?

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

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is reported as United States v. Jones at 744 F.3d 1362 (D.C. Cir. 2014).

STANDARD OF REVIEW

The D.C. Circuit erred as a matter of law when it affirmed the sentences of petitioners Ball, Jones, and Thurston. This Court reviews questions of law *de novo*. Salve Regina College v. Russell, 499 U.S. 225, 231–32 (1991).

STATEMENT OF THE CASE

This Court is being asked to reverse a judgment of the D.C. Circuit that upheld a sentence calculated using acquitted conduct and subsequently imposed on petitioners Ball, Jones, and Thurston.

In November of 2007, a jury acquitted defendants Antwuan Ball, Joseph Jones, and Desmond Thurston of conspiracy to distribute drugs. United States v. Jones, 744 F.3d 1362, 1365 (D.C. Cir. 2014). In their verdict, the jury rejected the government's conspiracy charge, but found Ball, Jones, and Thurston guilty of "distributing small quantities of crack cocaine." Id.; United States v. Ball, 962 F. Supp.2d 11, 13 (D.D.C. 2013) (convicting Ball under 21 U.S.C. § 841(a)(1) and § (b)(1)(B)(iii), and both Thurston and Jones under 21 U.S.C. § 841 (a)(1) and § (b)(1)(C)). The jury's guilty verdict amounted to distribution of 11.6 grams by Ball, 1.7 grams by Thurston, and 1.8 grams by Jones. Ball, 962 F. Supp.2d at 13.

Based on the convicted conduct, the Federal Sentencing Guidelines recommended a range of 27 to 71 months of imprisonment. Jones v. United States, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting) (critiquing the denial of petition for certiorari). However, the judge sentenced Ball to 225 months, Thurston to 194 months, and Jones to 180 months of imprisonment after adjusting downwards due to concerns with the severity of crack cocaine distribution and to remedy prejudice from delay. Jones, 744 F.3d at 1366.

On average, the judge increased the Defendants prison sentence 151 months, more than twelve years beyond the Guideline's recommended range for conduct that the jury returned a guilty verdict.[1] The sentencing judge imposed this twelve-year increase based on an independent conclusion found by a preponderance of the evidence that, despite the jury's finding to the

[1] The average increase of 151 months is based on the average recommended by the Sentencing Guidelines, 27 to 71 months (49 months), minus the average of the actual sentences of 180, 194, and 225 months (200 months).

opposite, the defendants were guilty of conspiracy to distribute. Jones, 744 F.3d at 1366. This led the judge to calculate the sentencing range, and to impose a sentence, as if all three defendants had been found guilty of the conspiracy. Id. at 1365–66.

On appeal of this sentence, the court below upheld the sentences. Id. The court reached this decision by citing to United States v. Watts. 519 U.S. 148 (1997) (per curiam) (finding the Due Process Clause is not violated when a sentencing judge considers acquitted conduct). The court noted that, "[a]lthough we understand why appellants find sentencing based on acquitted conduct unfair," since the Watts decision, "no subsequent decision by the Supreme Court or another circuit" had called the validity of acquitted conduct sentencing into question. Jones, 744 F.3d at 1369. The court, therefore, felt compelled to uphold the sentences. See Id. at 1370.

SUMMARY OF THE ARGUMENT

A criminal sentence that undermines a jury verdict violates the United States Constitution. Accordingly, this Court should reverse the court below and remand for resentencing.

First, the Sixth Amendment is violated when the government imposes a criminal sentence calculated using acquitted conduct. This Court has long protected a criminal defendant's jury trial right from erosion. Consistent with this Court's jurisprudence, a sentence cannot be imposed beyond what the jury's findings allow. Accordingly, allowing a sentencing judge to calculate a defendant's sentence by using acquitted conduct would allow for an end-run around the Sixth Amendment and an impermissible erosion of the right to a jury trial.

The jury trial right is not simply the right to present a case in front of a jury; it is the right to be sentenced in accordance with the jury's findings. Where, as here, the sentencing judge

calculates a sentence for conduct specifically rejected by a jury, the Sixth Amendment is violated.

Acquitted conduct sentencing violates not only the Sixth Amendment rights of Ball, Jones, and Thurston, but also the Eighth Amendment's ban on cruel and unusual punishment. Admittedly, this Court normally analyzes the rejection of a criminal defendant's jury rights through the Sixth Amendment. However, this Court's Eighth Amendment jurisprudence defines cruel and unusual punishment through the lens of the community, applying an evolving sense of decency, to secure the Constitutional right of a fair punishment for criminal conduct.

Acquitted conduct sentencing violates these principles of the Eighth Amendment by imposing a sentence that ignores the jury's verdict. First, a single sentencing judge, sitting alone, who opposes the verdict of the trial jury, imposes a punishment explicitly rejected by the community. Second, acquitted conduct sentencing eliminates the essential check on governmental power secured by the Constitution: the jury's verdict. Accordingly, the Eighth Amendment prohibits acquitted conduct sentencing as arbitrary punishment imposed without the jury's traditional check on the government's power to punish. Consistent with these constitutional rights, this Court should reverse the holding of the D.C. Circuit and remand for resentencing.

ARGUMENT

I. The Sixth Amendment prohibits imposing a sentence on a criminal defendant that is calculated using acquitted conduct.

The citizen's right to a jury trial, as protected by the Sixth Amendment, prevents a judge from using acquitted conduct when sentencing. A judicial determination of facts that contradicts a jury verdict and increases the sentence of a criminal defendant is contrary to the purpose of the Constitutional jury right and conflicts with this Court's Sixth Amendment jurisprudence.

Accordingly, this Court should reverse the D.C. Circuit's affirmation of the sentences of Ball, Jones, and Thurston as improperly calculated for using acquitted conduct.

A. Requiring that sentences be made consistent with the jury's verdict avoids an impermissible erosion of the Sixth Amendment right to a jury trial.

This nation has never existed without a fiercely guarded right to a jury trial. See Akhil R. Amar, America's Constitution 233 (2006). The first shared document of the United States, the Declaration of Independence, had its absence high on the list of reasons to rebel. The brief Articles of Confederation included the right. Article III of the federal Constitution includes the right to a jury trial in criminal cases, a right later extended and clarified by the Sixth Amendment. Indeed, recognized as one of this nation's fundamental rights, the jury-trial guarantee "was one of the least controversial provisions of the Bill of Rights." Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). Protecting the jury trial has thus long been a shared national value, and allowing a sentencing judge to ignore a jury's verdict would result in an end-run around the Sixth Amendment through erosion.

Permitting a judge to use acquitted conduct at sentencing would represent an impermissible erosion of the Sixth Amendment jury right. This Court has recognized the need to protect the jury trial right from not only gross denial, but also from erosion. Jones v. United States, 526 U.S. 227, 248 (1999). This stems from this Court's loyalty to the Founders' abhorrence to pre-revolution diminution of juries' power. Id. at 244–45. Near the time of revolution, English juries were systematically being stripped of their power in response to acquittals in the face of guilt and convictions of lesser-included offenses; verdicts rendered by the jury as a check on the "potential or inevitably severity of sentences." Id. As such, this "tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers' conception of the jury right." Id. at 244. Indeed the Founders' lodestar,

Blackstone, had himself warned that "convenient" methods of trial that revoked the jury's discretion would dangerously "sap and undermine" what he called "the grand bulwark" of liberty: the jury. 4 William Blackstone, Commentaries 342–44. In the face of an eroding jury trial right, the Founders' drafted this nation's foundational documents to protect trial by jury against similar decay.

Using this Constitutional background, this Court protected the jury's power from erosion in Jones v. United States. 526 U.S. 227 (1999). In Jones, the defendant was charged under a federal carjacking statute that had three tiers of punishment based on a defendant's conduct. Id. at 229. The trial court read the statute as consisting of one crime with three maximum penalties, two of them dependent on sentencing factors exempt from the jury. Id. After the jury found the defendant guilty of carjacking, the judge used discretion to impose a middle sentence of 25 years due to a finding of "serious bodily injury," even though the jury did not consider or find this fact. Id. at 230–31. On appeal, this Court reversed. Id. at 232. In addition to finding that the District Court had misread the statute, this Court refused to erode the jury's power to consider factors bearing significantly on sentencing. Id. at 248. Such a result, this Court reasoned, would be a "relative diminution of the jury's significance" and would raise Sixth Amendment concerns. Id. Referencing the Founders' distrust of removing power from the jury, this Court read the statute in a way to avoid handing significant sentencing discretion from jury to judge. Id.

Although Ball, Jones, and Thurston were granted the trappings of a trial by jury, their constitutional rights were violated when the judge imposed sentences based on charges for which a jury of their peers had decided to acquit. The judge violated the Sixth Amendment by imposing a sentence that directly contradicts the jury's verdict, representing precisely the result the Founders' sought to prevent: an erosion of the jury's power. Simply applying the formal process

of a jury trial and then reusing and renaming the charges for which the jury found no guilt undermines the jury's power as protected by the Sixth Amendment. In Jones this Court expressed this value by refusing to weaken the jury's role in criminal trials. Consistent with this value, this Court should continue to protect the Sixth Amendment guarantee of a jury-trial from erosion and reverse the judicially imposed sentence that contradicts the jury's verdict.

B. Reading the Sixth Amendment to prevent the judge from imposing a sentence based on acquitted conduct is consistent with this Court's Sixth Amendment jurisprudence.

When considering sentencing discretion in criminal cases, this Court has broadly interpreted the jury trial right of the Sixth Amendment. Over the course of its jurisprudence, this Court has closely guarded the jury right in a number of cases and, despite not yet hearing a case imposing a sentence within a statutory maximum based on acquitted conduct, should protect the jury verdict here to ensure the Sixth Amendment maintains its proper protective scope. Accordingly, this Court, consistent with its Sixth Amendment precedence, should reverse the holding of the D.C. Circuit.

1. This Court has not previously considered a Sixth Amendment challenge to acquitted conduct sentencing.

This Court has not yet considered the constitutionality of a sentence within a statutory range that is imposed by relying on acquitted conduct. In Apprendi v. New Jersey, this Court explained that any fact (other than a prior conviction) needed to support a sentence exceeding the maximum possible under the facts established either by a guilty plea or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. 530 U.S. 466, 476 (2000). Significantly, this Constitutional right was reaffirmed in United States v. Booker where this Court, relying on the Apprendi rule, transformed the Federal Sentencing Guidelines from mandatory to advisory. 543 U.S. 220, 224 (2005). Accordingly, appellate review of a sentence

based on judge-found facts is weighed for reasonableness. Id. at 261–63. This has come to mean that, unless a sentence is both substantively and procedurally reasonable, it can be reversed and remanded by a reviewing court. Id. In Rita v. United States, this Court held that a sentence imposed consistent with the Guidelines would be afforded a non-binding presumption of reasonableness. 551 U.S. 338, 347 (2007).

Yet, throughout the many decisions that have developed modern Sixth Amendment jurisprudence, at no point has this Court considered whether jury acquitted conduct can be relied on by a judge to calculate the relevant Guidelines range. In other words, this Court has not answered the question as to whether or not the Sixth Amendment allows a judge to determine a Guidelines sentencing range based on a fact that the jury has rejected.

Many lower courts have incorrectly relied on this Court's holding in United States v. Watts to grant judges the power to rely on acquitted conduct at sentencing. See, e.g., United States v. White, 551 F.3d 381, 384 (6th Cir. 2007). This is a prevalent misapplication of the case's holding. In Watts, a per curiam opinion written without full briefing or arguments and with two dissenting opinions, this Court did not consider a Sixth Amendment challenge to acquitted conduct sentencing but instead considered whether such a sentence violated the Double Jeopardy clause. 519 U.S. 148 (1997) (per curiam). Indeed, in the later Booker case, this Court explicitly limited the reach of Watts to the Fifth Amendment by noting that, in Watts, there had been no "contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." Booker, 543 U.S. at 240. This narrow reading of Watts allowed this Court to reach the Sixth Amendment challenge in Booker, and does not bind the Court from considering a Sixth Amendment challenge for acquitted conduct sentencing as at issue in this case.

2. Using acquitted conduct at sentencing to set a Guidelines range is a violation of the Sixth Amendment, consistent with this Court's guiding precedence.

A sentence calculated using acquitted conduct, even within a statutory range, is a violation of the Sixth Amendment right to a jury trial. In Blakely, this Court considered a sentencing statute that allowed a judge to use her discretion to choose among several possible sentences once a jury verdict of guilty had been reached. Blakely v. Washington, 542 U.S. 296, 303 (2004). In defending this law, the Government argued that the constitutionally sound statutory maximum, which a judge could not exceed after Apprendi, was the highest possible sentence that a jury's guilty verdict exposed the defendant to even though the judge made the final determination as to which sentence applied. Id. This Court was not persuaded, and instead held that such a sentencing scheme violated the Sixth Amendment. Id.

Accordingly, the "statutory maximum" sentence permissible under the Sixth Amendment "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." Id. at 303. The Constitutional sentencing limit, therefore, is drawn from facts consistent with the jury verdict. In so holding, this Court emphasized the jury's importance in preventing judicial overreach: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." Id. at 305–06.

This Court similarly applied this principle in Booker to declare a sentence unconstitutional where it was calculated in the Federal Sentencing Guidelines by reaching beyond the jury's factual findings. Booker 543 U.S. at 238. There, this Court again rejected an argument supporting a statute that exposed a defendant, after guilty verdict, to broad, judicially determined, sentencing ranges. Id. This argument was rejected because the language in Apprendi

was not narrowly controlling where it appeared to uphold sentences that fell within "statutory maximums." Id. Instead, foundational Sixth Amendment principles "unquestionably applicable to the Guidelines" mean that the maximum possible sentence a defendant can face consistent with the Sixth Amendment begins and ends with the jury's verdict, not where there exists a higher possible outcome under the over-arching sentencing scheme's statutory language. See Id. In Booker, this Court resolved the sentencing scheme's constitutional infirmity by severing statutory language that required the judge to impose sentences within the range mandated by the Guidelines. Id. at 245.

Despite this apparent remedy, and this Court's contemporaneous assumption it was curative, the Guidelines remain the driving force for sentencing. See id. at 233. Any judicially determined sentences, after Booker, are subject to review for reasonableness. See, e.g., Rita 551 U.S. at 347. To survive this review, sentencing judges are told they "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Gall v. United States, 552 U.S. 38, 49 (2007).

This means that a judge cannot reasonably impose a sentence, even within a permitted maximum of the controlling U.S. Code, without first calculating the Guideline range. Sentences within the Guidelines are presumptively reasonable. Rita, 551 U.S. at 347. However, sentences falling above or below the calculated Guidelines range must have a justification "sufficiently compelling to support the degree of the variance." Gall, 552 U.S. at 50. Accordingly, this Court validates a sentence only where it is both reasonable and not otherwise in violation of the Sixth Amendment.

In other words, the Constitutional line for an imposed sentence consistent with the principles of the Sixth Amendment is not a statutory maximum, but the maximum, which can be

upheld as reasonable, based on facts found by the jury or admitted by the defendant. This means that a judge cannot use acquitted conduct to impose a sentence that would otherwise be unreasonable under the Sentencing Guidelines.

The sentences of Ball, Jones, and Thurston were calculated based on the very same conduct for which the trial jury had acquitted them. Accordingly, their sentences are unconstitutional under both Blakely and Booker, which define the controlling constitutional maximum for a criminal sentence as one consistent with the *principles* eschewed in Apprendi, rather than statutory language. The Apprendi rule was drawn to prevent judicial overreach into the role of the jury, consistent with the Founders' views.

This principle undoubtedly extends to prevent a judge from applying conduct at sentencing for which a jury has explicitly decided to acquit. Apprendi's firm assertion, upheld in subsequent cases, is that a sentence is constitutional only where it is based on the facts decided by the jury verdict or admitted by the defendant. Here, rather than support it, the jury's verdict is directly contradicted by the judge's sentence. Further, not only did the defendants not admit to the conduct under which their sentence was calculated, they vigorously opposed the accusations in open court in front of a jury. The sentencing calculation, therefore, is precisely the judicial overreach that Apprendi prevents. If Apprendi's holding, as expanded under Booker and Blakely, is still good law, the sentences of Ball, Jones, and Thurston are in violation of this Court's interpretation of the Sixth Amendment and should be reversed.

II. The Eighth Amendment forbids acquitted conduct sentencing because it violates the evolving sense of decency standard and ignores the important check on governmental punishment: the jury.

The use of acquitted conduct to enhance the sentence of a defendant violates the Eighth Amendment's ban on cruel and unusual punishment. The tenet of justice embodied in the Eighth Amendment commands "that punishment for a crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U.S. 349, 367 (1910). This Court's Eighth Amendment jurisprudence focuses on two types of punishments that are cruel and unusual. First, the Eighth Amendment forbids individual sentences that are unconstitutionally excessive. See Solem v. Helm, 463 U.S. 277 (1983); Harmelin v. Michigan, 501 U.S. 957 (1991); Ewing v. California, 538 U.S. 11 (2003). In this first type of case, this Court analyzes all the circumstances of the individual case to determine whether the sentence is grossly disproportionate to the crime.

Second, in the categorical approach, the Eighth Amendment forbids punishments that unconstitutionally affect an entire class of offenders. See Graham v. Florida, 560 U.S. 48, 60–61 (2010). The Eighth Amendment categorical ban includes term of year of sentences, not just death penalty cases. See Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (banning life without parole for juvenile offenders who had committed homicide); Graham, 560 U.S. at 61–62 (banning life without parole for juvenile offenders that did not commit homicide). When a defendant is determined by this Court to fall into a protected category of offender, the Eighth Amendment forbids the unconstitutional punishment.

Acquitted conduct sentencing is prohibited by the Eighth Amendment under the categorical approach, which requires a categorical ban on specifically identified punishments that are deemed cruel and unusual. Just as life without parole is categorically unconstitutional for a broad class of juvenile defendants, acquitted conduct sentencing affects an entire class of offenders for a broad range of crimes. See Graham v. Florida, 560 U.S. 48, (2010). Thus, the categorical approach to the Eighth Amendment applies to acquitted conduct sentencing.

This Court's approach to identifying categorical prohibitions under the Eighth Amendment includes two steps. The first step looks to the community's view of a certain type of punishment, based on an evolving sense of decency. Atkins v. Virginia, 536 U.S. 304, 312–14 (2002). The evolving sense of decency standard looks to objective indicia of national consensus including legislative enactments and jury verdicts. Kennedy v. Louisiana, 554 U.S. 407, 421–422 (2008). If the community rejects a certain type of punishment, the Court moves to the second step, their own judgment. Id. at 434. At this step, the Court exercises independent judgment to consider the history, precedent, and the Court's own understanding of the Constitution and the rights it secures. Id. at 421.

Applying these steps, the use of acquitted conduct sentencing is categorically prohibited by the Eighth Amendment ban on cruel and unusual punishment.

A. Acquitted conduct sentencing is contrary to the evolving sense of decency standard.

The community, through its collective voice, provides the definition of cruel and unusual punishment. When the community rejects a certain type of punishment, the Eighth Amendment incorporates that value into its prohibition cruel and unusual punishment. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). This adoption by the Eight Amendment of the views of the community is known as the evolving sense of decency standard. See Kennedy, 554 U.S. at 419–20. To determine what punishments are categorically prohibited by the community's sense of decency, this Court utilizes objective evidence including jury decisions and legislative enactments. Atkins, 536 U.S. at 321. Here, objective evidence shows that the community rejects acquitted conduct sentencing. The community, as represented by the jury itself, and state legislatures through sentencing statutes, overwhelmingly reject acquitted conduct sentencing as contrary to the community's view of fair punishment.

1. By choosing to acquit, the jury, speaking for the community, rejects acquitted conduct sentencing.

The jury is the best indicator of the community's views in a particular case. A jury verdict "is a significant and reliable index of contemporary values because it is so directly involved." Gregg v. Georgia, 428 U.S. 153, 181 (1976). This makes the jury, in laying out a verdict, the litmus test for a community's views on proposed punishment because the jury "maintain[s] a link between contemporary community values and the penal system." 428 U.S. at 181 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)). Thus, the jury's judgment is essential to determine whether a certain type of punishment "is an appropriate penalty for the crime being tried." Coker v. Georgia, 433 U.S. 584, 596 (1977).

This Court has previously relied on jury verdicts to categorically invalidate punishments rejected by the jury. Data showing that "9 out of 10" juries in Georgia did not impose the death penalty for rape convictions led to a prohibition on the punishment in rape cases. Id. at 596–97. Similarly, the "overwhelming [evidence] that America juries . . . repudiated imposition of the death penalty" for non-homicide offenses categorically banned the punishment as unconstitutional for such cases under the Eighth Amendment. Edmund v. Florida, 458 U.S. 782, 793–94 (1982). The jury's vote, therefore, serves as a strong indicator of the community's views on a given punishment.

Acquitted conduct sentencing violates the community's evolving sense of decency, because of the jury's explicit rejection of the government's proposed punishment for a particular defendant. Unlike the Eighth Amendment cases discussed above, a statistical survey of jury decisions is unnecessary. Even more so than in Edmund or Coker, a jury that acquits speaks clearly to declare a particular punishment should not, in its views, be fairly imposed on a

defendant. There is no ambiguity: when a jury acquits, the community has spoken on the validity of a particular punishment.

The Eighth Amendment prohibits a punishment where the community has rejected it. When the community speaks, the government must listen. A failure to follow the jury's verdict severs the link between contemporary values and criminal punishment. By using conduct explicitly rejected by the jury, the sentencing judge ignored the community's vote of absolution and imposed a cruel and unusual punishment on Ball, Jones, and Thurston. Because the community's voice, as represented in trial by the jury, is essential to limiting the government's discretion to punish, acquitted conduct sentencing categorically violates the Eighth Amendment.

2. State legislatures overwhelmingly reject the use of acquitted conduct sentencing.

In addition to the jury's verdict, the community has spoken through state-level legislation, which does not mandate the use of acquitted conduct at sentencing. Although jury verdicts can be revelatory, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Atkins v. Virginia, 536 U.S. 304, 312 (2002) (internal citations omitted). This Court has relied on state legislative enactments to categorically forbid certain punishments under the Eighth Amendment even when "less than half" of the states had written laws prohibiting those punishments. See Miller, 132 S. Ct. at 2471–72 (holding that mandatory life without parole punishments for minors violated the Eighth Amendment). Further, a sentencing practice that is exceedingly rare at the state-level has been found to violate the Eight Amendment's evolving sense of decency standard. Graham, 560 U.S. at 66–67. Accordingly, sentencing decisions by state legislatures exemplify the broader community's views of a punishment and can be imported by this Court into the Eighth Amendment to determine what punishments are unconstitutional.

The overwhelming majority of states do not utilize the federal model of acquitted conduct sentencing. Nora V. Demleitner, et al., Sentencing Law and Policy 284 (2d ed. 2007). Indeed, only a handful of states even allow for acquitted conduct sentencing, and none mandate its use. See White, F.3d at 394, 395 n. 5 (citations omitted). Despite the federal courts' use of acquitted conduct at sentencing, "[v]irtually all states, in contrast to the federal system, have adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines." Phyllis J. Newton, Building Bridges Between the Federal and State Sentencing Commissions, 8 Fed. Sent'g Rep. 68, 69 (1995).

In other words, state legislatures, along with juries, reject acquitted conduct sentencing. This Court gives great weight to the community's views in defining cruel and unusual punishment. Where, as here, the community has spoken to explicitly reject a form of punishment, this Court uses that statement to draw the borders on what the government can use to punish consistent with the Eighth Amendment. Accordingly, acquitted conduct sentencing is prohibited by the Eighth Amendment as contrary to the community's views of fair punishment.

B. Acquitted conduct sentencing eliminates the jury's historical check on the government's power to punish.

Using acquitted conduct to calculate a sentence is not only contrary to the community's views on punishment, it violates the scope of the Eighth Amendment as recognized by this Court. The Eighth Amendment "must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." Kennedy, 554 U.S. at 420. When weighing a punishment against the Constitution, this Court both listens to the voice of the community and applies its judgment using its own understanding of the Constitution and the rights it secures. Graham, 560 U.S. at 48–49. Where a punishment is contrary to the rights secured by the Constitution, the Eighth Amendment prohibits it. Id. at 82. This Court has

recognized the jury's "historic function" to act "as a check against arbitrary or oppressive exercises of power" when balancing the government's power to punish. United States v. Powell, 469 U.S. 57, 65 (1984). Where, as here, the jury's check is removed from the calibration of punishment, the government acts with arbitrary and oppressive power. Thus, acquitted conduct sentencing violates the Eighth Amendment.

The jury is the gatekeeper to the government's power to punish. The Founders viewed juries as a narrow gate that "prosecutors and judges of the central government" must pass through "to reach the citizens of the States." George C. Thomas III, When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure, 100 Mich. L. Rev. 145, 149 (2001). In this way, the jury protects criminal defendants from arbitrary punishments doled out by judges sitting alone. This principle was espoused by James Iredell who, before becoming one of the first Supreme Court Justices, warned that there is "no other safe mode to try [crimes] but by a jury" in order to avoid submitting defendants to "the control of arbitrary judges." Neil H. Cogan, The Complete Bill of Rights 426 (1997). Similarly, John Adams emphasized that "no man can be condemned of life, or limb, or property, or reputation, without the concurrence of the voice of the people." 2 John Q. Adams, The Works of John Adams 253 (1850). Indeed, the jury's gatekeeping role is so fundamental that their power is cemented in no less than four places in the Constitution itself. See U.S. Const. art. III, § 2; U.S. Const. amend. V, VI, and VII.

Consistent with this constitutional value, once the jury votes to acquit, the government cannot punish as though the jury found guilt. A punishment based on acquitted conduct violates the protections repeatedly embedded in the Constitution by the Founders. When a jury decides

that specific charges levied against a defendant do not qualify for punishment, the Eighth Amendment prevents the government from making an end-run around that verdict.

Indeed, the punishment imposed by the sentencing judge on Ball, Jones, and Thurston ignored the jury's gatekeeping function by ignoring the jury-reached verdict. By doing so, the sentence represents an arbitrary wielding of government power left unchecked by the community, in violation of the Eighth Amendment. One juror, who heard this case at the District Court, spoke to the broader concerns of removing the check on the government's power to punish in a letter written to the judge he had sentenced using the acquitted conduct.

> It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice, and it is a very noble cause as you know, sir. We looked across the table at one another in respect and in sympathy. We listened, we thought, we argued, we got mad and left the room, we broke, we rested that charge until tomorrow, we went on. Eventually, through every hour-long tape of a single drug sale, hundreds of pages of transcripts, ballistics evidence, and photos, we delivered to you our verdicts.
>
> What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty. Had they shown us hard evidence, that might have been the outcome, but that was not the case. That is how you instructed your jury in this case to perform and for good reason.

United States v. White, 551 F.3d 381, 396–97 (6th Cir. 2008) (quoting May 16, 2008 Letter from Juror # 6 to the Honorable Richard W. Roberts).

This individual juror's concerns, though specifically addressing the sentences of Ball, Jones, and Thurston, fits soundly within the Founders' broader fear of granting the Government power to punish without the jury as gatekeeper. This fundamental belief, recognized at the founding and supported by the community's voice today, supports a rule that using acquitted conduct to justify a punishment is cruel and unusual in violation of the Eighth Amendment.

CONCLUSION

The jury's role in criminal trials is an essential principle of this nation's justice system. Consistent with that principle, as explained and applied through this Court's Sixth Amendment jurisprudence, no person should suffer criminal punishment for conduct that the jury has decided to acquit. Acquitted conduct sentencing, therefore, is a violation of the Sixth Amendment's guarantee of a jury trial and the Eighth Amendment's protection from arbitrary punishments. Accordingly, this Court should reverse the holding of the D.C. Circuit and remand for resentencing.

Respectfully Submitted,

Counsel for Petitioners
Team Number 16

March 6, 2015

CERTIFICATE OF COMPLIANCE

This document certifies that this brief was completed using Microsoft Word software, Times New Roman font, in 12-point type with one-inch margins.

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