No. 13-10026

In The Supreme Court Of The United States

JOSEPH JONES, DESMOND THURSTON,
AND ANTUWAN BALL

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether a defendant's constitutional rights are violated when a sentencing judge considers acquitted conduct to increase the defendant's sentence?
2. Whether a district judge violates a defendant's Sixth Amendment right to a trial by jury when he embarks on a fact-finding mission in direct contravention of the jury's ruling which then serves as the primary basis for the imposition of a substantially higher and substantively unreasonable sentence?

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported in 744 F.3d 1362, rehearing *en banc* denied June 3, 2014. Additionally, the opinion of this Court initially denying certiorari is reported in 135 S. Ct. 8.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides, in relevant part, that: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. This echoes the language found in Article III, § 2 stating that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury."

STATEMENT OF THE CASE

Initially, Joseph Jones ("Jones"), Desmond Thurston ("Thurston"), and Antwuan Ball ("Ball") (collectively "Defendants") were indicted, along with twelve others, on narcotics and racketeering offenses which were alleged to stem from their involvement with a group known as the "Congress Park Crew." *United States v. Jones*, 744 F.3d 1362, 1365 (D.C. Cir. 2014). On November 28, 2007, at the close of trial, a jury found Defendants guilty "of distributing *small* quantities of crack cocaine," between two (2) and eleven (11) grams. *Id.* (emphasis supplied). Notably, the jury acquitted Defendants of any conspiracy charges relating to the distribution. *Id.*

At sentencing for Jones, "the district court found by a preponderance of the evidence that" he had participated in a "common scheme to distribute crack" and that "he could foresee sales of over 500 grams of crack by his *coconspirators*." *Id.* (emphasis supplied). As a result, the proper sentencing guideline was found to be between 324 and 405 months' imprisonment. *Id.* at 1365-66. Ultimately, the district court sentenced Jones to a term of 180 months. *Id.* at 1366.

Despite requests to the contrary, Thurston and Ball were not sentenced for roughly three (3) years following the jury verdict. *Id.* As it had with Jones, the district court found that they had participated in a "conspiracy to distribute crack" and could "foresee that their coconspirators would distribute at least one-and-a-half kilograms of crack." *Id.* Accordingly, "Thurston's Guideline's range [w]as 262 to 327 months and Ball's [w]as 292 to 365 months." *Id.* Thurston received a 194 month sentence and Ball was sentenced to 225 months, both of which were adjusted to account for the delay in sentencing. *Id.* Similar convictions without considering the acquitted conduct would result in sentences ranging between twenty-seven (27) and seventy-one (71) months of incarceration, under the federal guidelines.

Dissatisfied with the district court's ruling that they had "formed an agreement with members of the Congress Park Crew to distribute crack" in light of the jury's explicit finding of an acquittal of that crime, Defendant's timely appealed to the United States Court of Appeals for the District of Columbia. *Id.* Conducting a "clear error" review of the district court's ruling, on March 14, 2014, the D.C. Circuit affirmed the Defendants' sentences. *Id.* at 1370.

Thereafter, Defendants petitioned this Court for a writ of certiorari, which was initially denied on October 14, 2014. *See* Order of January 15, 2015, *Jones v. United States*, No. 13-10026, *available at* http://wings.buffalo.edu/law/bcls/pdf/2014-problem.pdf. However, this Court has now decided to "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment – or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas, J., and Ginsburg, J., dissenting); *see also* Order of January 15, 2015, *Jones v. United States*, No. 13-10026 (granting certiorari).

SUMMARY OF THE ARGUMENT

Constitutional rights enshrined in the Fifth and Sixth Amendments "require[] that each element of a crime" must either be "proved to the jury beyond a reasonable doubt," or the subject of a defendant's admission. *Alleyne v. United States,* 133 S.Ct. 2151, 2156, (2013). This Court has held that an element of a crime includes any fact that serves to ultimately increase the defendant's penalty, *Apprendi v. New Jersey,* 530 U.S. 466, 483, n. 10, 490 (2000), and all elements "*must be found by a jury*, not a judge," *Cunningham v. California,* 549 U.S. 270, 281 (2007) (emphasis supplied).

To that end, a sentence must be passable when judged by a standard of "substantive reasonableness" or it will be set aside. *Gall v. United States,* 552 U.S. 38, 51 (2007). Here, the district judge's determination that the Defendants participated in a conspiracy was an "element" of the crime and could only have properly been found by the jury following trial or through an admission. The fact that the district judge wholly disregarded an on-topic jury verdict belies the argument that the sentence itself is reasonable as it is patently *unreasonable* for a judge to subvert the province of the jury by effectively vacating its verdict for sentencing purposes. *Id.*

Lastly, a ruling from this Court finally condemning the "Kafka-esque, repugnant, uniquely malevolent, and pernicious" practice that is acquitted conduct sentencing will serve to further legitimize the criminal justice system while preventing a draconian scarlet letter from being engrained in our history. *See* Orhun Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and Pernicious?*, 54 SANTA CLARA L. REV. 676 (2014). Indeed, holding such disdainful actions unconstitutional would serve to bring sentencing practices in line with this Court's current Sixth Amendment jurisprudence, namely *Apprendi*, *Allyene*, *Booker* and its progeny. *Alleyne,* 133 S. Ct. 2151; *United States v. Booker*, 543 U.S. 220 (2005); *Apprendi,* 530 U.S. 466.

ARGUMENT

III. THE SENTENCES OF MR. JONES, MR. THURSTON, AND MR. BALL ARE UNREASONABLE BECAUSE THEY DEPEND ENTIRELY UPON THE TRIAL JUDGE'S FINDING OF A CONSPIRACY, DESPITE AN ACQUITTAL OF THAT CRIME BY JURY, WHICH VIOLATES THE DEFENDANT'S DUE PROCESS RIGHT TO HAVE EACH AND EVERY ELEMENT OF A CRIME PROVEN BEYOND A REASONABLE DOUBT.

An element of a crime is different from a sentencing factor and is defined by the resulting increase in the sentence imposed above that of what the jury verdict specifies. *Alleyne*, 133 S. Ct. at 2155. A fact that substantially increases punishment is an element of a crime and thus is

constitutionally required to be proven beyond a reasonable doubt. *Patterson v. New York*, 432 U.S. 197, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 703-704 (1975); *In re Winship*, 397 U.S. 358, 362 (1970). To subject a defendant to a lower standard of proof when finding an element of a crime eradicates his due process protections. *Winship*, 397 U.S. at 362.

a. The Finding of a Conspiracy was a Finding of Elements of a Crime, not a Sentencing Factor, because it increased the Penalty for the Convicted Crime and Thus needed to be Proven Beyond a Reasonable Doubt.

This Court should find that decision of the trial judge is unreasonable because the trial judge's finding of a conspiracy was a finding of a crime, not merely a sentencing factor, evidenced by the substantial augmentation of the sentencing guidelines for each petitioner. An "element" of a crime, as opposed to a "sentencing factor," is any fact that, by law, increases the penalty for a crime. *Alleyne*, 133 S. Ct. at 2155; *Booker*, 543 U.S. at 233; *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi*, 530 U.S. at 483; *Jones v. United States*, 526 U.S. 227, 252 (1999); *McMilllan v. Pennsylvania*, 477 U.S. 79, 86 (1986).

In the venue of sentencing, the differentiation between a "sentencing factor" and an "element of a crime" determine what facts must be proven beyond a reasonable doubt. Their distinction from one another first took prevalence in *McMilllan*, 477 U.S. at 86. The *McMillan* Court distinguished between "sentencing factors" and "elements of a crime" in order to reject a constitutional challenge to a law that provided minimum mandatory sentences if the judge found that, by a preponderance of the evidence, the defendant "visibly possessed a firearm." *Id.* at 81. The Court deemed a "sentencing factor" to be a fact that was not charged in the indictment or proven to the jury beyond a reasonable doubt that the judge could consider by a preponderance of the evidence. *Id.* at 81–82. There, possessing a firearm was statutorily defined as a sentencing factor and not an element of a crime that needed to be submitted to a jury. *Id.* at 86.

However, four justices dissented, including Justice Stevens and Marshall who would have held that facts that attach additional criminal penalties are "elements" of a crime, not sentencing factors. *Id.* at 94, 103 (Marshall, Stevens, JJ., dissenting). Justice Stevens explained that a fact is an "element of a crime," and thus needs to be proven beyond a reasonable doubt, when the "State threatens to stigmatize or incarcerate an individual for engaging in prohibited conduct." *Id.* at 98 (Stevens, J., dissenting). In *McMillan*, the state law required a greater term for incarceration for visible gun possession; therefore, it was prohibited conduct and an "element of a crime." *Id.* at 103. Justice Stevens relied on *Mullaney,* in which this Court explained that due process protections would be undermined, if the state could evade the beyond-a-reasonable-doubt proof requirement by "redefin[ing] the elements that constitute different crimes, [and] characterizing them as factors that bear solely on the extent of punishment." 421 U.S. at 698. Justice Stevens concluded that "the constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely 'ups the ante' for the defendant," when the finding mandated punishment greater than would have been imposed without the finding. *McMillan*, 477 U.S. at 103-104 (Stevens, J., dissenting).

After *McMillian*, this Court has continuously affirmed that facts that increase the prescribed range of penalties are "elements of a crime," and not "sentencing factors." For example, in *Jones*, this Court held that a federal carjacking statute established additional elements of a crime because it increased maximum penalties from fifteen years to twenty five years after a finding of personal injury by a preponderance of the evidence by the judge. 526 U.S. at 252. The Court explained that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a

reasonable doubt." 526 U.S. at 233. Moreover, "[i]t is at best questionable whether the specification of facts sufficient to increase a penalty range . . . was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit." *Id.* In *Jones*, this Court made it clear that subsequent to an acquittal, the facts in the proof of the elements of the acquitted offense should be foreclosed from later consideration by a judge at sentencing. *See generally id.*[1]

A year later, this Court revisited the issue in *Apprendi*, where it held that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. 530 U.S. at 490 ("facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense"). The Court noted that "[a]t stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law. . ." *Id.* at 477. In *Apprendi*, the defendant was sentenced to twelve years imprisonment under a statute that increased the maximum term of imprisonment from ten years to twenty years if the judge found that the defendant committed the crime with racial basis. *Id.* at 470. The Court explained that the relevant inquiry to differentiate a "sentencing factor" from an "element of a crime" is "one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.

[1] It is important to note that *Jones* is the controlling case when questioning the constitutionality of acquitted conduct. Almost unanimously, the circuits apply this Court's decision in *U.S. v. Watts*, 519 U.S. 148, 155–57 (1997) in applying the "preponderance of the evidence standard" to acquitted conduct; however, *Jones* was never overruled or abrogated, and still requires that sentencing factors that are "elements of a crime" be proven beyond a reasonable doubt. *Jones*, 526 U.S. at 233. *Jones* permits a sentencing court to consider facts that were not central to the previous jury acquittal, while protecting the integrity of the jury verdict by preventing the sentencing court's reliance on facts which were integral to the jury verdict. *See id.*

However, the Court clarified that its holding "is not to suggest that the term 'sentencing factor' is devoid of meaning." *Id.* A sentencing factor is "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." *Id.* (emphasis in original). On the other hand, "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id*. The Court concluded that this "[i]ndeed, [] fits squarely within the usual definition of an 'element' of the offense." *Id.* In reviewing the defendant's sentence, the Court noted that:

> As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect [the defendant] from unwarranted pains should apply equally to the two [crimes] that [the state] has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

Id. at 491–92; *see also McMillan*, 477 U.S. at 103–04 (Stevens, J., dissenting) ("the constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely 'ups the ante' for the defendant," when the finding mandated punishment greater than would have been imposed otherwise). The central holding of *Apprendi* is clear: if a finding of fact is necessary to *expose* a defendant to longer prison sentences, that fact is an "element of a crime" and must be proven beyond a reasonable doubt. *Id.* (emphasis added). Based on this logic, the reciprocal holds true as well: facts that are not related to the proof of the elements of a crime are available for the judge to determine by a preponderance of the evidence, and, thus, may use that finding to increase or decrease the sentence of the defendant *within the range authorized by the jury of the convicted offense*. *Id*. at 494 (emphasis in original).

After *Apprendi*, an "element of a crime" was "any particular fact" that the law makes essential to the defendants punishment. *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002); *see also Alleyne*, 133 S. Ct. at 2159 ("If a fact was by law essential to the penalty, it was an element of the offense."). In *Ring*, this Court held that it was impermissible for "the trial judge, sitting alone" to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. *Id.* The Court reasoned that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602.

Later, in *Blakely*, this Court held that the application of state law to increase a defendant's sentence from 49-to-53 months to 90 months violated his right to have the jury find the existence of "any particular fact" that the law makes essential to his punishment. *Id.* 301; *see also Alleyne*, 133 S. Ct. at 2159 ("If a fact was by law essential to the penalty, it was an element of the offense"). This right is infringed upon when a judge imposes a sentence that is not limited to the "facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303.

As a result of the growing constitutional issues in *Blakely*, in 2005, this Court's decision in *Booker* held that the Federal Sentencing Guidelines are advisory, not mandatory. 543 U.S. at 233. The Court explained that "[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to different sets of facts, their use would not implicate the Sixth Amendment." *Id.* However, *Booker* did nothing to limit the practice of acquitted-conduct sentencing. In fact, post-*Booker*, judges had increased discretion – they were no longer bound by the Federal sentencing guidelines.

Due to this increased discretion, most recently, in *Alleyne*, this Court reexamined "elements of a crime" and "sentencing factors" post-*Booker*, and reaffirmed the decision of *Apprendi* and its progeny. 133 S. Ct. at 2158. In *Alleyne,* the trial judge increased the defendant's minimum mandatory sentence from five years to seven when he made a finding, by a preponderance of the evidence, that the defendant "brandished" a firearm. *Id.* at 2156. The *Alleyne* Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt," and that the defendant's constitutional rights, namely the Sixth Amendment, were violated. *Id.* at 2156. The Court reasoned that based on precedent and common law history, "it is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed;" therefore, "it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id.* at 2160 (citing *Apprendi*, 530 U.S. at 490, 501). "Moreover, it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment. Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id.* at 2161. (emphasis in original). Therefore, the Court concluded that "[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. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2162-63.

As *Apprendi* noted, the historical foundation for "these principles extends down centuries into the common law.'"[2] 530 U.S. at 477. "At common law, the relationship between crime and punishment was clear." *Alleyne*, 133 S. Ct. at 2158. "The substantive criminal law tended to be

[2] For a full common law history of the direct relationship between crimes and offenses, *see Apprendi*, 530 U.S. at 501-509 (Thomas, J., concurring) (detailing the practice of the American courts from the 1840's onward).

sanction-specific" in that "it prescribed a particular sentence for each offense," and "[t]he judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)." *Apprendi*, 530 U.S. at 479. The common law system left little discretion to the judges: "once the facts of the offense were determined by the jury, the 'judge was meant simply to impose [the prescribed] sentence.'" *Alleyne*, 133 S. Ct. at 2158 (citing Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700 – 1900, p. 36–37 (A. Schioppa ed. 1987); 3 W. Blackstone, Commentaries on the Laws of England 396 (1768) ("The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law")). "While some early American statutes provided *ranges* of permissible sentences . . . the ranges themselves were linked to particular facts constituting the elements of the crime." *Id.* at 2158. "This linkage of facts with particular sentence ranges (defined by both the minimum and the maximum) reflects the intimate connection between crime and punishment." *Id.* at 2159.

This common law connection between crime and punishment is further affirmed by the definition of "crime." *See id.* A "crime" is defined as "consisting of every fact which is in law essential to the punishment sought to be inflicted . . . or the whole of the wrong to which the law affixes . . . punishment." *Id.* (internal citations omitted); *see also* 1 J. Bishop, New Criminal Procedure § 84, p. 49 (4th ed. 1895) ("that wrongful aggregation [of elements] out of which the punishment proceeds"); J. Archbold, Pleading and Evidence in Criminal Cases p.128 (5th Am. ed. 1846) (a crime is any fact that "annexes a higher degree of punishment"). "Numerous high courts agreed that this formulation 'accurately captured the common-law understanding of what facts are elements of a crime.'" *Alleyne*, 133 S. Ct. at 2159 (quoting *Apprendi*, 530 U.S. at 511–

12). Consistent with these common law definitions, "[i]f a fact was by law essential to the penalty, it was an element of the offense." *Id.*

Here, the sentences of Mr. Jones, Mr. Thurston, and Mr. Ball are all unreasonable and violate petitioners' due process rights because the trial judge made a finding of a crime merely by a preponderance of the evidence. The finding by the trial judge of a conspiracy was a finding of all of the elements that make up the criminal charge of a conspiracy. It is evident from the record that this was a finding of elements of a crime, because it increased the range of the petitioners' sentences far beyond what the sentence would have been without the acquitted conduct. *See Alleyne*, 133 S. Ct. at 2156 ("[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt"); *Apprendi*, 530 U.S. at 490 ("facts that expose a defendant to a punishment greater than the otherwise legally prescribed were by definition 'elements' of a separate legal offense"); *Jones*, 526 U.S. at 233; *McMillan*, 477 U.S. at 98 (Stevens, J., dissenting). If the conspiracy was not factored into their sentences, petitioners would only be subject to a sentencing guideline range "between 27 and 71 months, a mere fraction of the sentences they received." *Jones*, 744 F.3d at 1368–69. Mr. Thurston's guideline range was increased to 262-to-327 months and he was sentenced to 194 months; Mr. Ball's guideline range was increased to 395-to-365 months and he was sentenced to 225 months; and Mr. Jones' guideline range was increased to 324-to-405 months and he was sentenced to 180 months. *Id.* at 1366. These sentences "are significantly higher than would likely have been imposed upon them in the absence of the sentencing court's reliance upon the 'acquitted conduct.'" R. 2. These increases in guidelines, that nearly triple the specified range without the finding of a conspiracy, confirm that the trial judge's factual finding of a conspiracy was a finding of an additional crime and all the elements that make up that crime.

See Alleyne, 133 S. Ct. at 2162 ("the aggravating fact produced a higher range, which . . . conclusively indicates that the fact is an element of a distinct and aggravated crime.").

Moreover, the common law history relied upon in *Apprendi* and the following cases supports the conclusion that a substantial increase in a sentence based on a fact yields that the fact is an element of a crime, not a "sentencing factor." The trial judge's finding of a conspiracy is a finding of a "crime" in its common law definition as it was essential to the increase in the sentence guidelines. *See Apprendi*, 530 U.S. at 2159 (A "crime" is defined as "consisting of every fact which is in law essential to the punishment sought to be inflicted."). Additionally, the finding of the conspiracy was essential to the substantial increase in the guidelines, making it a finding of a crime and the elements the crime entails. *See id.* ("[i]f a fact was by law essential to the penalty, it was an element of the offense.").

In conclusion, the sentences of the petitioners are unreasonable because they violate their due process rights. The finding of a conspiracy needed to be proven beyond a reasonable doubt as it was a "crime" and the encompassing elements due to its substantial increase in the sentencing guidelines.

b. The Fifth Amendment and Due Process Requires that Judicial Fact-finding at Sentencing of Elements of an Acquitted Crime be Found beyond a Reasonable Doubt.

This Court should find that the trial judge's finding of a conspiracy must have been proved beyond a reasonable doubt, not by a preponderance of the evidence, because it was an acquitted crime, not a sentencing factor. Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. U.S. CONST. amend. V, XIV; *U.S. v. Gaudin*, 515 U.S. 506,

522–23 (1995); *Patterson*, 432 U.S. at 197; *Mullaney*, 421 U.S. at 703–04; *Winship*, 397 U.S. at 358.

The Fifth Amendment to the U.S. Constitution guarantees that no person will be deprives of liberty without "due process of law." In the criminal context, this means that the state must bear the heavies burden of proof when convicting someone of a crime: proving criminal activity beyond a reasonable doubt. *In re Winship*, 397 U.S. at 362. This Court in *Winship* explained that:

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.

Id. (internal citations omitted). This Court has long held that "proof of a criminal charge beyond a reasonable doubt is constitutionally required." *See id.* (citing numerous cases that illustrate the requirement of the beyond a reasonable doubt standard); *see also Gaudin*, 515 U.S. at 510 (due process "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."). Adherence to this principle of awarding the accused the highest burden of proof "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1969)). In holding that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when charged with a criminal conviction, this Court noted that "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. Most importantly, "[t]he standard provides

concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.* (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Further, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[3] *Id.* at 364. In an infamous quote, Justice Harlan explained that the requirement of a finding beyond a reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring).

In the purview of sentencing, this Court explained that due process prevents a judge or state from manipulating its way around the *Winship* requirement. *See Mullaney*, 421 U.S. at 703-04. In *Mullaney*, a Maine statute presumed that a defendant who acted with an intent to kill possessed the "malice aforethought" necessary to constitute the State's murder offense, and thus increase the term of imprisonment to life. However, the statute permitted "a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter," which would then reduce the maximum sentence of life to twenty years). *Id.* at 703. The Court held "that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 704. The *Mullaney* court noted that "[n]ot only are the interests underlying *Winship* implicated to a greater degree in this case, but in one respect the protection afforded those interests is less here" because "the State has affirmatively shifted the burden of proof to the defendant." *Id.* at 700–701. The

[3] In *Apprendi*, this Court made it clear that *Winship's* due process and associated jury protections extend, to some degree, "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Apprendi*, 530 U.S. at 484 (citing *Almendarez v. Torres*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

Court concluded that this is in direct contradiction to *Winship* and qualified this shifting of proof as an "intolerable result" and violated the constitutional requirement that each and every element of a crime be proven beyond a reasonable doubt. *Id.* at 703.

In *Patterson*, this Court reaffirmed these due process protections and the limits on the ability to reallocate, circumvent, or avoid these protections by reallocating the burden of proof. *See Patterson*, 432 U.S. at 215. In *Patterson*, the defendant was charged with second-degree murder and asserted an affirmative defense of "extreme emotional disturbance." *Id.* at 198–99. A finding of "extreme emotional disturbance" would reduce the crime from second-degree murder to manslaughter. The Court held that due process requires that all elements of a crime be proven beyond a reasonable doubt, but proof of nonexistence of an affirmative defense is not required, though there is a limit on what a state can classify as an "affirmative defense" in order to shift the burden of proof. *Id.* The Court reasoned that "[t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime." *Id.* at 205–06.

Here, the trial judge found a conspiracy by a preponderance of the evidence, not beyond a reasonable doubt. *Jones*, 774 F.3d at 1365–66. Most notably, the trial judge tried to circumvent the protection of due process by labeling the finding of a conspiracy a "sentencing factor," violating the protections of the U.S. Constitution, *Winship*, *Mullaney* and *Patterson*. Finding a conspiracy merely by a preponderance of the evidence contradicts *Winship's* requirement that "the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt wither innocent men are being condemned." *Winship*, 397 U.S. at 364. The doubt is self-evident – the jury acquitted Mr. Jones, Mr. Thurston, and Mr. Ball of the charge of conspiracy,

yet the judge increase their sentences based on his finding of a conspiracy at a lower standard of proof. *Jones*, 774 F.3d at 1365–66

Moreover, this contradiction between verdict and judge is a clear circumvention of the protections of *Mullaney* and *Patterson*. The judge has essential shifted the burden to the defendant to prove that there was *not* a conspiracy as opposed to making the state prove a conspiracy *beyond a reasonable doubt*. Clearly, there was a reasonable doubt, because the jury acquitted all petitioners of conspiracy charges. To subsequently make a finding of a conspiracy, at a lower standard of proof, runs afoul to the protections awarded in the U.S. Constitution, *Winship*, *Mullaney* and *Patterson.*

In conclusion, the trial judge violated the due process rights of the petitioners when he found a crime by a preponderance of the evidence, a standard of proof much lower than that which is constitutionally required in criminal convictions.

IV. THE PROPER FUNCTION OF THE JURY IS TO INSULATE AND PROTECT THE INDIVIDUAL DEFENDANT FROM THE OVERARCHING POWER OF THE STATE TO CURTAIL THE LIBERTY OF ITS CITIZENS, HOWEVER THE CONSIDERATION OF ACTS WHICH THE DEFENDANT HAD BEEN ACQUITTED OF BY A JURY RELEGATES HIS SIXTH AMENDMENT RIGHTS AS AN ILLUSORY PROTECTION AND AFFORDS ONLY SUPERFICIAL RESTRAINT UPON THE POWERS OF THE STATE IN DIRECT VIOLATION OF THE CONSTITUTION.

d. The Role of the Jury, as Guaranteed by the Constitution, is to Undertake a Fact-finding Mission, Which is not Properly Usurped by Judicial Officers Post-Trial.

The fundamental American system of requiring proof of guilt "beyond a reasonable doubt" stems from the centuries old adage "it is better that ten guilty persons escape than one innocent suffer." Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1566 (1981) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES, 27). As this Court has stated, "a society that values the good

name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re* Winship, 397 U.S. at 363. A citizen has the right to know "*ex ante*, those circumstances that will determine the applicable range of punishment and to have those circumstances proved beyond a reasonable doubt." *Harris v. United States*, 536 U.S. 545, 577 (2002) (Thomas, J., dissenting).

The vehicle chosen to deliver an ultimate verdict on guilt or innocence, utilizing the aforementioned standard, is the jury. *See* U.S. CONST. amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right to … trial, by an impartial jury"); *see also Duncan v. Lousiana*, 391 U.S. 145, 151–54 (1968) (providing a history of the right to jury trial for criminal cases dating back to the Magna Carta, in 1215). Indeed, "if judicial fact-finding ... were held to be adequate [to justify increased sentencing], a defendant's right to a have a *jury* standing between himself and the power of government to curtail his liberty would take on a previously unsuspected modesty." *Rita v. United States*, 127 S. Ct. 2456, 2485 (2007) (Souter, J., dissenting) (emphasis supplied). Ultimately, such a practice, of judicial fact-finding of acquitted conduct, cannot be harmonized with the maxim of criminal law that no one shall be imprisoned except following the judgment of his peers. *See* U.S. CONST. amend. VI. What's more, "the history bearing on the Framer's understanding of the Sixth Amendment principle [does not] demonstrate[] an accepted tolerance for exclusively judicial fact-finding to peg penalty limits." *Jones*, 526 U.S. at 244.

As Justice Souter so eloquently went on to identify, "the jury right would be trivialized beyond recognition if that traditional practice [referring to judicial fact-finding pertaining to sentencing ranges] could be extended to the point that a judge alone ... could find a fact necessary to raise the upper limit of a sentencing range." *Id.* at 2486. Not surprisingly, Justice

Kennedy expressed similar concerns stating "it should be said that to increase a sentence based on conduct underlying a charge *for which the defendant was acquitted* does raise concerns about undercutting the verdict of acquittal," and thereby usurping the proper role of the jury in our criminal justice system. *United States v. Watts*, 519 U.S. 148 , 170 (1997) (Kennedy, J., dissenting) (emphasis supplied). The heart of that criminal justice system is the defendant's right to be judged by an impartial jury of his peers, a system which bypasses this bedrock principle serves only to seriously undermine the integrity of our legal system. *See* Elizabeth T. Lear, *Is Conviction Irrelevant?*,40 UCLA L. REV. 1179, 1185 (1993) ("The Constitution places the jury at the heart of the criminal justice system as the 'fundamental guarantor of individual liberty.'").[4]

As "the public pronouncement [of an acquittal] serves to vindicate the defendant's innocence and, at least to some extent, alleviate the damage done to his reputation" it is only logical that a court subsequently imposing a sentence should respect that determination. *United States v. Canady*, 126 F.3d 352, 363 (2d Cir. 1997). After all, it is only through that jury's ultimate guilty determination that a court's right to sentence is legitimized, to ignore the acquittal

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[4] See Jim McElhatton, *A $600 drug deal, 40 years in prison; Acquitted of murder, convicted of drug deal, Antwuan Ball faces a decades-long sentence*, WASHINGTON TIMES, June 29, 2008, available at: http: //www.washingtontimes.com/news/2008/jun/29/a-600-drug-deal-40-years-inprison/?page=1. (Article notes that requested sentence based "partly on charges that were never filed or conduct the jury either rejected outright or was never asked to consider.") One juror who had served at the trial for either months wrote the district judge prior to sentencing stating:

> 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.

May 16, 2008 Letter from Juror # 6 to The Honorable Richard W. Roberts, available at: http://video1.washintontimes.com/video/docs/letter.pdf.

calls out the integrity of our system and disregards the substantial risk of stripping innocent people of their liberty. *See McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979) ("[Courts] must give exonerative effect to a not guilty verdict if anyone is to respect and honor the judgments coming out of our criminal justice system.").

e. Allowing the Sentencing Judge to Engage in a Carte Blanche Review of the Charges Addressed by the Jury to Fashion a Sentence Drastically Exceeding the Appropriate Guideline Relegates Sixth Amendment Protections Guaranteed by the Jury to a Formality That Does Not Properly Limit the Government's Power.

The protections afforded to defendants under the Sixth Amendment are effectively trampled when a district judge, at sentencing, proceeds to find that defendants committed a crime which a jury of their peers had acquitted them of following trial. The current practice, condoned by the courts of appeals, eviscerates a defendant's Sixth Amendment rights because whenever a fact presents the potential for increased punishment it shall be construed as an element of the crime which *must* be found by the *jury* beyond a reasonable doubt not, as is currently the case, by a lone district judge utilizing the most meager of standard of proof to defy and disregard the proper jury verdict as a means of maximizing "reasonable" sentencing. *See Rita*, 551 U.S. at 369 (Scalia, J., concurring); *Gall*, 552 U.S. at 60; *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 296; *Apprendi*, 530 U.S. at 466; *see also United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) ("In my view, the Constitution forbids judges—Guidelines or no Guidelines—from using 'acquitted conduct' to enhance a defendant's sentence because it violates his or her due process right to notice and usurps the jury's Sixth Amendment fact-finding role."); *United States v. Mercado,* 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v. Faust*, 456 F.3d 1342, 1349

(11th Cir. 2006) (Barkett, J., concurring) ("I strongly believe . . . that sentence enhancements based on acquitted con- duct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *United States v. Pimental,* 367 F. Supp. 2d 143, 153 (D. Mass. 2005) ("To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic.").

This Court's treatment of the Sixth Amendment over the last decade and a half has shown a staunch commitment to protecting the principles intended to be bestowed by our Founders in its adoption, which is furthered by Petitioner's position here. In *Booker*, this Court held that the Sixth Amendment indeed bars a judge from imprisoning a defendant for a term greater than the law's maximum penalty for the convicted crimes unless there were aggravating factors present which were found by the jury or admitted by the defendant. 543 U.S. at 244–45. Also, the Court determined that all sentences must be reasonable. *Id.* at 260. Thereafter, in *Rita*, the reasonableness standard was reaffirmed and expounded upon. 551 U.S. at 352–53. In a concurring opinion, Justice Scalia noted that "some judge-found fact or combination of facts had th[e] effect [of increasing sentencing]—and that suffices to establish a Sixth Amendment violation." *Id.* at 378 (Scalia, J., concurring joined by Thomas, J.). Justice Scalia championed a doctrine in which appellate courts seek to determine whether the sentence would be reasonable as applied *only to those facts found by the jury. Id.* To proceed otherwise would be to proceed under a system that "contains the same potential for Sixth Amendment violation." *Id.* at 384. Similarly, in *Cunningham v. California*, Justice Alito, dissenting, noted that "there must be some sentence that represents the least onerous sentence that would be appropriate in a case in which the statutory elements … are satisfied but in which the offense and the offender are as little

deserving of punishment as can be imagined." 549 U.S. 270, 310 (2007). Taken together, Justices Alito and Scalia, joined by Thomas, Kennedy, and Breyer respectively, set forth a regime in which sentences should only be upheld where the facts found by the jury ensure that that sentencing is reasonable, without the judge later, in clear disregard of the jury verdict, finding another crime committed and pushing the sentence to the utmost realm allowed by the law. *See id.* at 310; *Rita*, 551 U.S. at 369–70.

In *Blakely*, this Court again annunciated that all pertinent facts for sentencing need to be either found by a jury or stipulated to by the defendant and noted that "to the extent that [a] claimed judicial power infringes on the province of the jury" it is void, in striking down a sentence that was above the statutory maximum. 542 U.S. at 308. What's more, the Court noted that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Id.* The penultimate protection afforded by the Sixth Amendment is the protection from judicial and governmental overreach as it relates to a citizen's liberty. *Id.* at 308–13. Likewise, in *Apprendi*, this court noted that "[t]he historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a [higher] penalty." *Apprendi*, 530 U.S. at 482–83. The Court also cautioned that "that the jury right could be lost not only by gross denial, but by erosion." *Id.* at 483 (quoting *Jones*, 526 U.S. at 247–48).

Here, the Court should acknowledge that "reasonableness" does not support a judge disregarding a jury verdict and usurping what is their sacred, and constitutionally protected, role as fact finders. When an appellate court merely gives its stamp of approval due to the fact that

sentencing is within the range allowed by statute its wholly misses the mark set of the Sixth Amendment jurisprudence forward by Justices Scalia and Alito. *Cunningham*, at 310 (Alito, J., dissenting); *Rita*, 551 U.S. at 369–70 (Scalia, J., concurring). In this case the district judge blatantly disregarded the jury verdict and sentenced the Defendants as if they had participated in a conspiracy. *Jones*, 744 F.3d at 1365. In doing so, the lower court severed "[t]he historic link between verdict and judgment" that serves as the bedrock of the Sixth Amendment, *Apprendi*, 530 U.S. at 482–83, and essentially convicted the Defendants of crimes for which they had been acquitted. *Alleyne v. United States*, 133 S. Ct. 2151, 2167 (2013) (Breyer, J., concurring). Such conduct cannot be sanctioned in a legal system that places a preeminent value on jury trials as a check to the power of government to punish. *Blakely*, 542 U.S. at 308. Therefore, if a fact, like whether or not the Defendants participated in a conspiracy, will threaten a defendant with a longer sentence it must be found by the jury after trial and not solely by a judge at sentencing.

To allow the present practice to continue would fail to heed to words of caution offered in both *Apprendi* and *Jones* that "the jury right could be lost … by erosion." *Apprendi*, 530 U.S. at 483; *Jones*, 526 U.S. at 247–48. Sentencing indeed implicates Sixth Amendment protections, *Booker*, 543 U.S. at 268, and the district judge here plainly ignored those protections by finding that the Defendants had participated in a conspiracy and accordingly increasing their sentences from between 27 and 71 moths to between 180 and 225 months of imprisonment. *Jones*, 744 F.3d at 1365. This judicial fact-finding quite literally robbed the defendants of liberty for years, without having a jury of their peers find them guilty beyond a reasonable doubt. *Contra* U.S. CONST. amend. VI; *Cunningham*, at 281; The Declaration of Independence para. 1 (U.S. 1787). Repeatedly, this Court has been disturbed by the use of uncharged and acquitted conduct in sentencing which essentially removes the fundamental check on governmental power provided

for in the Constitution. *Blakely*, 542 U.S. at 306–07; *Booker*, 543 U.S. at 273. This case is a prime example of how that concern has been allowed to fester in the federal system despite the guaranteed assurances found in the Constitution. *See* U.S. CONST. amend. VI; *Jones*, 744 F.3d at 1366 (judge ignoring jury verdict to impose exceedingly high sentence). Indeed, despite being approved, the practice of acquitted conduct sentencing has no shortage of critics within the federal judiciary. *See United States v. Burns*, 577 F.3d 887, 902 (8th Cir. 2009) (*en banc*) (Colloton, Loren, Riley, Gruender, JJ, dissenting); *United States v. White*, 551 F.3d 381, 393-394 (6th Cir. 2008) (*en banc*) (Merritt, Martin, Daughtrey, Moore, Cole, Clay, JJ., dissenting); *United States v. Baylor*, 97 F.3d 542, 550-51 & n. 2 (D.C. Cir. 1996) (Wald, J., concurring); *United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J, dissenting); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.) ("Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result.") (footnote omitted), *vacated by*, 271 Fed. Appx. 298 (4th Cir. 2008).

Consequently, Petitioner respectfully requests that this Court vacate the rulings of the lower courts and hold their sentences to be unreasonable as the process of judicial fact-finding of acquitted conduct is unconscionable and directly violates Defendant's Sixth Amendment protections.

f. Courts Should be Barred from Considering Factors That the Jury Expressly Ruled Upon Based Upon Common Law Principles and *Jones*.

In *Jones*, the Court noted "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" and "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue." *Jones*, 526 U.S. at 248. As such, application of basic principles presented

by *res judicata, see Brown v. Felsen*, 442 U.S. 127, 131 (1979), provide a solution to the problem of jury-found facts and judicially-found facts.

Under such a regime, those facts, or elements of the offense, which the jury delivered a verdict upon would be removed from the judge's discretion to rule upon at sentencing. This would still permit the judge to account for other facts and issues not raised at trial and for which the defendant never faced ultimate adjudication. Indeed, the application of the "beyond a reasonable doubt" standard by the jury should serve as a bar to a judge later reviewing the same facts by a constitutionally inferior standard. *See United States v. Hurn*, 496 F.3d 784, 789 (9th Cir. 2007) (identifying possible problem with such a low standard and instead utilizing "clear and convincing" evidence standard). Application of the *res judicata* standard would foreclose those crimes that the government tried to, or could have, attempted to prove at trial. *See Rita*, 127 S. Ct. at 2475–76 (Scalia, J., concurring) (discussing the scope of *res judicata*).

Indeed, if such a system were in place at the Petitioner's sentencing hearings below, the judge would have been foreclosed from finding that they had participated in a conspiracy, as the jury had acquitted them of such conduct. *Jones*, 744 F.3d at 1365. This standard would protect the role of the jury, the defendant's rights, and the integrity of our criminal justice system.

CONCLUSION

The practice of allowing judges to consider acquitted crimes during the sentencing phase of a defendant's trial is offensive to multiple constitutional doctrines and should be accordingly ended by this honorable Court. As such, Petitioners request this court to vacate the orders of the lower courts and to remand for sentencing consistent with such an opinion.

Respectfully submitted,
/s/ Team 18
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Counsel for Petitioner