

No. 13-10026

**In the
SUPREME COURT OF THE UNITED STATES
Spring Term 2015**

**Joseph Jones, Desmond Thurston,
and Antuwan Ball,
Petitioners**

v.

**United States,
Respondent.**

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

BRIEF FOR THE PETITIONERS

Team No. 2
Counsel for the Petitioners

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

- I. Whether the Sentencing Court violated Petitioners' constitutional rights when it voluntarily based its sentence upon conduct of which the jury had acquitted Petitioners.
- II. Whether Petitioners' Sixth Amendment rights were violated when the District Court calculated the applicable U.S. Sentencing Guidelines range, and imposed a significantly higher sentence than the Guidelines recommends, based solely upon its finding that Petitioners engaged in conduct of which the jury had acquitted Petitioners.

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The opinion of the United States District Court for the District of Columbia, (No. 1:05-cr-00100-16) is unpublished. The opinion of the U.S. Court of Appeals of the District of Columbia Circuit is available at *United States v. Jones*, 744 F.3d 1362 (2014). The opinion of the U.S. Court of Appeals of the District of Columbia Circuit, is reproduced in Appendix A.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S. CONST. amend. V, VI, and VIII; 18 U.S.C. § 3553; and U.S.S.G. § 1B1.3. These statutes are reproduced in Appendices B, C and D respectively.

STANDARD OF REVIEW

“We use a two-step analysis to review sentences.” *Jones*, 744 F.3d at 1366 (citation omitted). “[P]urely legal questions are reviewed *de novo*; factual findings are to be affirmed unless ‘clearly erroneous’; and we are to give ‘due deference’ to the district court’s application of the guidelines to facts.” *United States v. Kim*, 23 F.3d 513, 517 (D.C. Cir. 1994). “Because due process protects a defendant’s interest in fair sentencing, we review the district court’s application of the standard of proof at sentencing for harmless error beyond a reasonable doubt.” *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000). “A finding of fact is clearly erroneous if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *Red Lion Hotels Franchising, Inc. v. MAK, LLC.*, 663 F.3d 1080, 1087 (9th Cir. 2011).

STATEMENT OF THE CASE

In 2005, a grand jury charged Petitioners and fifteen named co-conspirators with narcotics and racketeering offenses. *Jones*, 744 F.3d at 1365. Eleven co-conspirators pled guilty and one was convicted at a trial of his own, while Petitioners proceeded to trial in February 2007 on charges of crack distribution and participation in a crack distribution conspiracy. *Id.* On November 28, 2007, the jury acquitted Petitioners of conspiracy but convicted Petitioners of distribution. *Id.* Petitioner (Jones) was sentenced to 180 months. *Id.* at 1366. Petitioner (Thurston) was sentenced on October 29, 2010 to 194 months. *Id.* Petitioner (Ball) was sentenced on March 17, 2011 to 225 months. *Id.* Petitioners timely appealed their sentences. *Id.* The United States Court of Appeals for the District of Columbia affirmed the District Court's decision. *Id.*

STATEMENT OF THE FACTS

In 2005, a grand jury charged Petitioners and fifteen named co-conspirators with narcotics and racketeering offenses arising from Petitioner's alleged membership in the Congress Park Crew, a loose-knit gang that operated an enterprise for crack cocaine in the Congress Park neighborhood of Southeast Washington, D.C. for nearly thirteen years. *Id.* at 1365. Petitioners proceeded to trial in February 2007 on charges that included crack cocaine distribution and participation in a crack distribution conspiracy.¹ *Id.* The government provided evidence including recordings of Petitioners engaging in sales of crack and testimony from several cooperating witnesses, including members of the alleged conspiracy and individuals who purchased crack from Petitioners. *Id.*

¹ The government also charged Jones and Ball with various crimes and all three Petitioners with participation in a racketeer influenced corrupt organization. These charges were not included in the appeal due to jury acquittal; but it is important to note, the District Court did not rely on the alleged conduct underlying them at sentencing. *U.S. v. Jones*, 744 F.3d 1362, 1365 (2014).

On November 28, 2007, Petitioners were acquitted of conspiracy to distribute crack cocaine but convicted of distributing small quantities of crack cocaine. *Id.* Based on Petitioners' criminal records, Jones's conviction carried a maximum sentence of thirty years imprisonment and Thurston's a maximum of twenty years. Because of the larger quantity of crack involved, Ball's conviction carried a minimum of five years and maximum of forty-years. *Id.*

At Jones's sentencing in May 2008, the District Court found by the preponderance of the evidence that Jones's crimes were part of a common scheme to distribute crack in Congress Park and that Jones could foresee sales of over 500 grams of crack by his co-conspirators. *Id.* Based on these findings, the District Court determined that the U.S. Sentencing Guidelines recommended a sentence of 324 to 405 months imprisonment. *Id.* at 1366. Subsequently, the Court then imposed an actual sentence of 180 months. *Id.*

Thurston was sentenced on October 29, 2010. *Id.* Like Jones, the District Court found by the preponderance of the evidence that Thurston's crimes were part of a common scheme to distribute crack in Congress Park and that Thurston could foresee sales of over 500 grams of crack by his co-conspirators. *Id.* Based on these findings, the District Court calculated Thurston's Guidelines range as 262 to 327 months. *Id.* Subsequently, the Court then imposed an actual sentence of 194 months. *Id.*

Ball was sentenced on March 17, 2011. *Id.* Like Jones, the district court found by the preponderance of the evidence that Ball's crimes were part of a common scheme to distribute crack in Congress Park and that Ball could foresee sales of over 500 grams of crack by his co-conspirators. *Id.* Based on these findings, the district court calculated Ball's Guidelines range as 292 to 365 months. *Id.* Subsequently, the court then imposed an actual sentence of 225 months. *Id.*

SUMMARY OF THE ARGUMENT

I. The District Court's decision to impose higher sentences based on a finding of conduct that all Petitioners were acquitted of violated Petitioners' Sixth Amendment right to trial by jury. Allowing sentencing courts to aggravate sentence ranges by factoring in acquitted conduct, as it did in this case, opens the door for judges to abuse their discretion and goes outside of the afforded protections. The District Court's decision to consider acquitted conduct when determining Petitioners' sentence is incongruent with the aim of providing just punishment for the convicted offense. This Court earlier decided that it is a violation of a defendant's Sixth Amendment right to a trial by jury for there to be a judicial determination increasing a sentence beyond the jury-authorized sentencing range, which occurred in the present case. Therefore, district court's decision to aggravate Petitioners' sentences based on acquitted conduct is an impermissible violation the Sixth Amendment.

II. In addition, the District Court's decision to enhance Petitioners' sentences as a result of relying upon acquitted violated due process under the Fifth Amendment and subjected Petitioners to double jeopardy. Prior precedent mandates that due process requires the sentencing court to submit all facts to a jury to be proven beyond a reasonable doubt if it is the basis for an increase in punishment, unless it is a prior conviction. Here, the court significantly increased Petitioners' sentences by relying solely on a fact that was not a prior conviction, nor was it proven beyond a reasonable doubt; in fact, the jury acquitted Petitioners of the conduct. The District Court deprived Petitioners of their liberty and seized their right to a trial by jury when it punished Petitioners for crimes in which they have been found innocent.

III. Finally, the District Court's decision to impose significantly higher sentences upon Petitioners than would have been imposed in the absence of the Court's reliance upon acquitted

conduct is a violation of Petitioners' rights under the Eighth Amendment of the United States Constitution. The Eighth Amendment protects persons against cruel and unusual punishments, which also encompasses the expectation that the punishments received will be proportionate to the convicted unlawful conduct. The District Court convicted Petitioners of nonviolent offenses; and the harsh sentences imposed are grossly disproportionate and warrant reversal. The jury acquitted Petitioners of conspiracy to distribute cocaine. Thus, the District Court's decision to impose a significantly harsher sentence based, not on the crime convicted but, solely on the acquitted conspiracy charge is a violation of the Eighth Amendment and cruelly unfair.

ARGUMENT

I. PETITIONERS' SIXTH AMENDMENT RIGHT WAS VIOLATED WHEN THE DISTRICT COURT IMPOSED A MUCH HIGHER SENTENCE THAN THE GUIDELINES WOULD OTHERWISE RECOMMEND BASED ON ITS FINDING THAT PETITIONERS ENGAGED IN CONDUCT OF WHICH THE JURY HAD ACQUITTED THEM.

The District Court's disregard for Petitioners' acquittals violated Petitioners' Sixth Amendment right to trial by jury by allowing the judge to factor in acquitted conduct as a sentencing factor. Petitioners were entitled to trial by jury, in which the final say as to Petitioner's guilt was to be determined solely by the jury. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" U.S. CONST. amend. VI. The purpose of Petitioners' trial by jury is "[T]o guard against a spirit of oppression and tyranny on the part of rulers, and as the great bulwark of [our] civil and political liberties." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). In favor of Petitioners, "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." *Blakely v. Washington*, 542 U.S. 296, 308 (2004). In order for Petitioners' charges (by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, the indictment must allege all elements of a crime. *Id.* at 500 (Thomas, J., concurring). This Court has held that the right to a jury trial is guaranteed in the District of Columbia. *Callan v. Wilson*, 127 U.S. 540 (1888). This Court held, "Unanimity in jury verdicts is required where the Sixth [] Amendment [] applies." *Andres v. United States*, 333 U.S. 740, 748 (1948).

Petitioners' acquitted charge of conspiracy was used as a "sentencing factor" that ultimately led to the increase in the total time of incarceration. The term "sentencing factor" was first used in *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986). *McMillan* created the distinction between "elements" and "sentencing factors" to reject a constitutional challenge to Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Const. Stat § 9712 (1982). *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). The law provided that if the judge found, by a preponderance of the evidence, that the person visibly possessed a firearm in the course of committing specified felonies; then a mandatory five year minimum sentence was to be imposed. *Id.* at 81. The *McMillan* court "found that the Commonwealth had permissibly defined visible possession as a sentencing factor, rather than an element." *Alleyne v. United States*, 133 S.Ct. 2151, 2156 (2013). In the Court's view, this did not violate the Constitution; however, "*McMillan* did not address whether legislatures' freedom to define facts as sentencing factors extended to findings that increase the maximum term of imprisonment," which is the question Petitioners seek to be answered by this Court. *Id.* at 2157.

This Court has "[E]xplained that there was no principled basis for treating a fact increasing the maximum term of imprisonment differently than the facts constituting the base offense," which is what the District Court incorrectly disagreed with. *Id.* [T]he essential Sixth Amendment inquiry for Petitioners is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, (such as Petitioners foreseeing sales of over 500 grams of crack cocaine) the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. *Id.* at 2162.

Petitioners request attention be paid to the evolution of this issue within this Court. In *Watts*, this Court held in the affirmative that sentencing courts could consider the conduct of a

Petitioner's underlying charges of which he has been acquitted. *United States v. Watts*, 519 U.S. 148, 155 (1997). As a result, the consideration of acquitted conduct became discretionary. Almost ten years later this Court in *Booker*,² decided that the Guidelines are advisory and not mandatory because the Guidelines may have resulted in the unconstitutional sentencing that Petitioners are victims of. The Court in *Booker* also decided that where the Sentencing Guidelines allowed judges to enhance sentences using facts not reviewed by juries, violated the Sixth Amendment right to trial by jury. *United States v. Booker*, 543 U.S. 220 (2005). This opened the door for the District Court to abuse its discretion during the sentencing of Petitioners that went beyond the protection afforded by due process. The commentary to U.S.S.G § 1B1.3 states: "Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." U.S.S.G § 1B1.3, comment., backg'd.

Here, in this case, Petitioners were formally charged with conspiracy to distribute crack cocaine. Although not an element of the offense of conviction, conspiracy to distribute crack cocaine has the same underlying elements as distribution of crack cocaine. The minimal difference is the act of distributing with others as oppose to solo acts. In *Apprendi*, this Court held that "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;" and in Petitioners' case, due process should be extended to the length of sentencing. *Apprendi, supra*. Petitioners were acquitted of conspiracy to distribute crack cocaine; however it is known that an acquittal serves not to clear the defendant of guilt but as an "acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt"

² *United States v Booker*, 543 U.S. 220 (2005).

Watts, 519 U.S. at 155. Despite the former, the District Court should be compelled to respect the findings of the jury or verdicts delivered by juries become advisory. “Without specific jury findings, no one can logically or realistically draw any factual finding inferences. . . .” *Watts*, 519 U.S. at 155. If the jury’s determination of fact in Petitioners’ case is disregarded by sentencing courts as only advisory, the Sixth Amendment of the U.S. Constitution becomes advisory. The disassembling of the Constitution by lower courts will then begin. Considering Petitioners’ acquitted conduct is incongruent with the sentencing factors of promoting respect for the law and providing just punishment for the offense. *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006); *see* 18 U.S.C. § 3553(a)(2)(A) (2000). Additionally, allowing the District Court to determine the adequate punishment, either outside or inside Sentencing Guidelines, allows the District Court to encroach upon the legislative powers designated to law makers who determine sentencing ranges for criminal offenses. “While the products of the Sentencing Commission’s labors have been given the modest name ‘Guidelines’ . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed.” *Watts*, 519 U.S. at 160. In this case, the District Court disregarded the guidelines and even though it attempts to mitigate its error by delivering sentences below the guidelines; its holding should be reversed.

In *Apprendi*, this Court held that the Due Process Clause of the Fourteenth Amendment requires that any fact, other than a prior conviction, authorizing an increase in the statutory minimum “must be submitted to a jury [] and proved beyond a reasonable doubt,” which was not done in Petitioners’ case. *Apprendi, supra*.³ Four years later, this Court in *Blakely* held that a judicial determination increasing the sentence beyond the jury-authorized sentencing range

³ The 14th Amendment Due Process Clause provides essentially the same protection from the state as the 5th Amendment Due Process Clause provides protection from the Federal Government.

violates the Sixth Amendment right to trial by jury, even when the final sentence is within the larger statutory range. *Blakely v. Washington*, 542 U.S. 296 (2004). The ruling in *Blakely* is still current law and must be followed. Based on Petitioners' criminal records, Jones's conviction carried a maximum sentence of thirty years imprisonment, and Thurston's a maximum of twenty years. Because of the larger quantity of crack cocaine involved, Ball's conviction carried a minimum of five years and a maximum of forty years. Even though "the final sentence is within the larger statutory range," the sentence is beyond the jury-authorized sentencing range, thus violating the Sixth Amendment. Our case presents the analogous issue decided in *Blakely*.

When determining relevant conduct, we have repeatedly emphasized that the sentencing judge should not automatically hold each defendant accountable for the total amount of cocaine involved in the conspiracy, but must instead make individualized findings as to the specific amount of drugs "each appellant might have reasonably foreseen his or her agreed-upon participation would involve."

United States v. Graham, 83 F.3d 1466, 1479 (D.C. Cir. 1996).

Here, Petitioners' were each attributed sales of over 500 grams of crack cocaine, which is estimated total amount the conspiracy distributed. Petitioners had their Sixth Amendment right to jury trial violated when the District Court judge became the jury by determining a fact that was charged in the original indictment.

II. PETITIONERS' RIGHTS UNDER THE FIFTH AMENDMENT WERE VIOLATED WHEN THE DISTRICT COURT USED ACQUITTED CONDUCT TO ENHANCE THE PETITIONERS' SENTENCES.

A. The District Court's sentence enhancement, based on conduct the Petitioners were acquitted of, is a violation of due process.

The District Court violated Petitioners' due process rights under the Fifth Amendment of the United States Constitution because it consciously disregarded the jury's acquittal of Petitioners' conspiracy charges when determining proper sentences. The Fifth Amendment of

the United States Constitution states in pertinent part, “be subject for the same offence to be twice put in jeopardy of life or limb, . . . nor be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. “[P]roof of a criminal charge beyond a reasonable doubt is constitutionally required” in order to convict someone of a criminal charge. *In re Winship*, 397 U.S. 358, 362 (1970). “As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.” *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941). The most harmful effect of sentencing on the basis of acquitted conduct that “violates those fundamental conceptions of justice which . . . define the community’s sense of fair play and decency,” is the impractical requirement that Petitioners’ must prove their innocence under two entirely different standards at once. *Dowling v. United States*, 493 U.S. 342, 353 (1990); *See also In re Winship*, 397 U.S. at 367 (emphasizing the practical “difference between the reasonable-doubt and preponderance standards”).

The law surrounding the due process of law is well-settled that a jury must be convinced of Petitioners’ guilt. Justice Frankfurter stated that “[i]t’s the duty of the Government to establish guilt beyond a reasonable doubt. This notion – basic in our law and rightly one of the boasts of a free society – is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’” *Leland v. Oregon*, 343 U.S. 790, 802-803 (1970). “Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the fact finder of his guilt.” *In re Winship*, 397 U.S. at 364. Further, this Court has held that “due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime.” *Apprendi*, 530 U.S. at 499. This Court held that the Due Process Clause requires that any fact that increases the penalty for a crime beyond the prescribed statutory

maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 466.

The District Court in this case, substituted the set of facts found by the jury for that of its own, which it is proscribed from doing. In making this decision, the District Court failed to observe the fundamental fairness inherent to the concept of justice, which is this Court's understanding of a direct violation to Petitioners' due process. In order for Petitioners to comply with the District Court's application of the laws, they must be found innocent by the jury and the sentencing court; both applying two significantly different legal standards. Moreover, the fact that the sentencing is only required to apply a much lesser standard than the jury, preponderance of the evidence, when considering acquitted conduct makes it often impractical to satisfy both standards simultaneously. At sentencing, the District Court found that all three Petitioners had engaged in the conspiracy acquitted by the jury and, through this determination, enhanced Petitioners' prison sentences. "In 'essence' of a conspiracy offense 'is in the agreement or confederation to commit a crime,'" a fact that must be determined by the jury, which was not. *United States v. Felix*, 503 U.S. 378, 390 (1992) (internal citations omitted).

Enhancements based on the extent of a conspiracy are on a fundamentally 'different plane' than enhancements based on uncharged or acquitted conduct. Due process concerns with regard to the former are satisfied by a preponderance of the evidence standard because the enhancements are based on criminal activity for which the defendant has already been convicted.

United States v. Armstead, 552 F.3d 769, 777 (2008).

In this case, however, the enhancement was not based on criminal activity in which Petitioners were already convicted of, but instead, on a conspiracy charge that Petitioners had been acquitted of. Under the authority of U.S.S.G. § 1B1.3, the sentencing court is instructed to consider "relevant conduct" in determining Guideline ranges. U.S.S.G. § 1B1.3. The lower court

was misspoken when it considered the total amount of crack cocaine (over 500 grams) in the conspiracy “relevant conduct.” If the jury was unable to find Petitioners operated in a conspiracy, the link between Petitioners and alleged co-conspirators is broken. The District Court’s decision to factor in the conspiracy Petitioners were indicted and acquitted nullifies the voice of the jury.

This case is similar to *United States v. Dorcelly*, 454 F.3d 366 (D.C. Cir. 2006). In *Dorcelly*, the appellant was convicted of making a false statement to the FBI and acquitted of conspiracy to commit money laundering and conspiracy to defraud the government. *Id.* The U.S. District Court for the District of Columbia sentenced appellant to 24 months’ incarceration and ordered him to pay restitution, taking into account the appellant’s role in the conspiracies notwithstanding his acquittal on those offenses. *Id.* The United States Court of Appeals for the District of Columbia affirmed the sentence of 24 months but vacated the order of restitution due to the fact that appellant was acquitted of the conspiracy charges. *Id.* Sentencing guidelines do not permit judges to adjust length of sentence to reflect degree of certainty by which court estimates amount of drugs. *See United States v. Davis*, 715 F. Supp. 1473, 1479 (C.D. Cal. 1989). The Court of Appeals failed to follow precedent in this case by deciding differently here than in *Dorcelly*. “While stare decisis is not inexorable command, particularly when interpreting the Constitution, doctrine of stare decisis carries such persuasive force, even in constitutional cases, that departure from precedent must be supported by some special justification.” *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Therefore, alternatively, if this Court finds that prior precedent favors Respondent over Petitioner, this Court is presented with special justifications to rule differently.

The District Court's reliance on *McMillan v. Pennsylvania*⁴ was misplaced. "[T]he defendant's minimum sentence was enhanced on the basis of a fact proved by a preponderance of the evidence." *United States v. Watts*, 519 U.S. 148, 166 (1997). In *McMillan*, the maximum sentence was not changed; the sentence actually imposed was within the Guideline range that would have been available to the judge even if the sentencing factor was not proven. *Id.* However in this case, the sentences imposed were significantly higher than the Guidelines would have allowed without evidence of additional offenses. *Id.*

The District Court's decision to enhance Petitioners' sentences based on acquitted conduct exposes Petitioners to deprivation of liberty and violates Petitioners' Fifth Amendment right. "If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham." *Paul v. Davis*, 424 U.S. 693, 714 (1976) (Brennan, J., dissenting).

B. The District Court's use of acquitted conduct during sentencing exposed Petitioners to double jeopardy and therefore violated the Fifth Amendment

The District Court's subsequent review and determination of fact, unfounded by the jury, violated Petitioners' Fifth Amendment double jeopardy right because it essentially prosecuted Petitioners for the same offense they were already tried and acquitted of. The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Fifth Amendment double jeopardy guarantee most principally serves as "a restraint on courts and prosecutors" as it "protects [a defendant] against a second prosecution for the same offense after acquittal." *Brown v. Ohio*, 432 U.S. 161, 164-65 (1977).

⁴ *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

The sentencing judge's consideration of the same acquitted facts that were tried and submitted to the jury, which gave rise to the prosecuted offense are a violation of Petitioners' Fifth Amendment double jeopardy rights. The Court in *Watts*, abrogated the Ninth Circuit's decision in *United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991) where the *Brady* court stated, "[I]t does not follow that the Guidelines permit a court to reconsider facts during sentencing that have been rejected by a jury's not guilty verdict." *Watts*, 519 U.S. at 154. This Court stated in *Watts*, "[S]entencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Id.* Here, this is not the case. Petitioners' sentences were enhanced because the District Court found, based on the preponderance of the evidence, that Petitioners had participated in the very conspiracy Petitioners were acquitted of. Even after Petitioners' acquittals, the District Court's consideration of the same conduct giving rise to the conspiracy charges is essentially the same as prosecuting them of that same offense. Despite the jury's finding, Petitioners are also required to be found innocent, by a preponderance of the evidence, by the sentencing court as well. This practice of the law leaves Petitioners receiving punishment for a crime in which they were all found innocent.

Based on the foregoing facts, the District Court's decision to significantly enhance Petitioners' sentences based solely on acquitted conduct violates Petitioners' Fifth Amendment double jeopardy right. Allowing sentencing courts to re-deliberate the facts to a different standard for guilt, would be to allow an unconstitutional precedent to be set.

III. PETITIONERS' SENTENCE ENHANCEMENTS, IMPOSED BY THE DISTRICT COURT, AS A RESULT OF FACTORING ACQUITTED CONDUCT, SUBJECTED PETITIONERS TO CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT.

The District Court violated Petitioners' Eighth Amendment rights by significantly enhancing their sentences after factoring in acquitted conduct. The Eighth Amendment of the United States Constitution protects against cruel and unusual punishment. U.S. CONST. amend. VIII. The final clause prohibits not only barbaric punishments but also sentences that are disproportionate to the crime committed. *Solem v. Helm*, 463 U.S. 277, 284 (1983). This Court mandated that a criminal sentence must be proportionate to the unlawful crime for which the defendant has been convicted. *Id.* at 290. This Court recognizes what is known as the principal of proportionality in sentencing. *Weems v. United States*, 217 U.S. 349 (1910). "An inference of gross disproportionality arises in circumstances where both the 'gravity' of the offense is slight and the 'harshness of the penalty' is severe." *Helm*, 463 U.S. at 291-292 (internal citations omitted). This Court previously reached a decision regarding the disproportionality of punishment when compared to the offense or crime convicted. *See O'Neil v Vermont*, 144 U.S. 323 (1892). The defendant was convicted of the illegal sale of liquor and fined \$6,638.72, where if unpaid by a set date, would be converted to confinement of hard labor for 19,914 days.⁵ *Id.* at 330. This Court found no error, only dismissing the issue by noting that the Eighth Amendment was inapplicable to state prosecutions in any event. *Id.* at 336-37. Justice Field, however, dissented on the basis of dismissal and was eager and prepared to employ the Eighth Amendment standard to the facts presented before this Court. He thought it germane to compare the punishment imposed for the defendant's convicted crime to that for other offenses in the jurisdiction. Justice Field wrote:

Had he been found guilty of burglary or highway robbery, he would have received less punishment than for the offences of which he was convicted. It was six times as great as any court in Vermont could have imposed for manslaughter, forgery or perjury. It was

⁵ This sentence in excess of fifty-four years was arrived at by a conversion ratio of three days for each dollar, as fixed by state statute.

one which, in its severity, considering the offences of which he was convicted, may justly be termed both unusual and cruel.

Id. at 339 (Field, J., dissenting).

In the present case, Petitioners were convicted of distributing of small quantities of crack cocaine. The convictions were for non-violent offenses in which the very underlying factor that led to such a disproportionate sentence was the conspiracy charge, which Petitioners were acquitted of. The use of sentence enhancements has created a funneling system of long-term mass incarceration for small, petty offenses or even felonies that would normally carry a justifiable sentencing range. “This is conduct that shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172 (1952). Therefore, the use of acquitted conduct to enhance Petitioners’ sentences should not be tolerated within our justice system.

In *Rummel*, this Court was confronted with the issue of whether a mandatory life sentence under a recidivist statute for three relatively minor offenses constituted cruel and unusual punishment under the Eighth Amendment. *Rummel v. Estelle*, 445 U.S. 263 (1980). The defendant was convicted and sentenced to life imprisonment with the possibility of parole in 12 years, under Texas’ recidivist statute for three nonviolent felonies totaling the approximate amount of \$230. *Id.* Although *Rummel* dealt with a recidivist statute, the ruling of the Court is greatly broader in scope. The defendant in *Rummel* was given a lengthy sentence based on convictions obtained through proper due process, and the fact the defendant violated Texas’ recidivist statute. *Id.* In this case, the sentencing court went beyond basing its decision on convictions properly obtained through due process. Consequently, Petitioners were given substantially longer sentences than the convicted crime suggests based solely on the sentencing judge factoring in acquitted conduct, the conspiracy to distribute cocaine.

Petitioners' sentences are severely harsh due to the fact that they were convicted of distributing crack cocaine, a nonviolent offense. With the ongoing skepticism in regards to the negative effects of the government's "war on drugs," this Court must focus attention on the lengthy prison terms ordered for nonviolent narcotic sales. Petitioners and similarly situated persons are frequently being subjected to lengthy prison terms (some as their first offense) for small narcotic sales. The jury, the finder of fact in our case did not find evidence to support the allegation that Petitioners operated within a conspiracy to distribute crack cocaine; so the sentence for conspiracy delivered in place of a sentence for small distribution is without merit and cruelly unfair.

CONCLUSION

For the foregoing reasons, Petitioners respectfully requests this Court to reverse the lower courts' decisions, vacate the sentence, remand to the District Court for resentencing, and find that enhancing Petitioners' sentences by relying on acquitted conduct is an unconstitutional violation of Petitioners' rights under the Eighth, Fifth, and/or Sixth Amendments of the United States Constitution.

Respectfully submitted,

/s/ Team 2

Team
Counsel for Petitioners

Appendix A

Appendix B

Appendix C

Appendix D

