No. 13-10026

In the
Supreme Court of the United States

Joseph Jones, Desmond Thurston,
and Antwuan Ball

Defendant-Petitioners,
v.
United States
Plaintiff-Respondent.

On Writ of Certiorari To The United States Supreme Court

BRIEF FOR DEFENDANT-PETITIONERS

TEAM 21

Counsel for Defendant-Petitioners Joseph Jones, Desmond Thurston, and Antwuan Ball

March 9, 2015

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant's constitutional rights are violated when a sentencing court bases its sentence upon conduct, of which the jury acquitted him.

2. Whether it violates the Sixth Amendment for a federal district court to calculate the applicable U.S. Sentencing Guidelines range, and to impose a much higher sentence than the Guidelines would otherwise recommend, based upon its finding that a defendant had engaged in conduct of which the jury had acquitted him.

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STATEMENT OF THE CASE

Joseph Jones, Desmond Thurston, and Antwuan Ball were charged, in part, with crack cocaine distribution and participation in a crack cocaine distribution conspiracy. The United States District Court for the District of Columbia heard the case. The jury acquitted Mr. Jones, Mr. Thurston, and Mr. Ball of the conspiracy to distribute drugs, but convicted them of distributing small quantities of crack cocaine. At sentencing, the district court judge determined the Mr. Jones, Mr. Thurston, and Mr. Ball had engaged in the conspiracy to distribute drugs, despite the jury's acquittal of this conduct. The judge largely relied on that determination to sentence them to terms of 180, 194, and 180 months respectively, or fifteen to almost nineteen years. If the District Court had not considered the acquitted conduct, the recommended Sentencing Guideline range would have been 27 to 71 months, or two to six years. *Id.* at 1368.

Mr. Jones, Mr. Thurston, and Mr. Ball appealed to the District of Columbia Circuit of the United States Court of Appeals, but the appeals court affirmed the district court's reliance on acquitted conduct to enhance the sentences. Mr. Jones, Mr. Thurston, and Mr. Ball filed a petition for a writ of certiorari to the United States Supreme Court, which was approved on January 15, 2015.

STATEMENT OF FACTS

In 2005, a grand jury indicted Mr. Jones, Mr. Thurston, Mr. Ball, and fifteen alleged co-conspirators with narcotics and racketeering charges "arising from their alleged membership in the Congress Park Crew, a loose-knit group," said to run a market for crack cocaine in the Congress Park neighborhood in Washington, D.C.. *United States v. Jones,* 744 F.3d 1362, 1365 (D.C. Cir. 2014). Mr. Jones, Mr. Thurston, and Mr. Ball's trial on the charges, including distribution of crack cocaine and participation in a crack cocaine distribution conspiracy, began

in February 2007. *Id.* On November 28, 2007, the jury returned the verdict and acquitted Mr. Jones, Mr. Thurston, and Mr. Ball of the conspiracy charge, but convicted them of distribution. *Id.*

In May 2008, at Mr. Jones's sentencing, the "district court found by a preponderance of the evidence that his crimes were part of a common scheme to distribute crack cocaine in Congress Park." *Id.* The sentencing judge used these findings to determine the Federal Sentencing Guidelines recommended imprisonment of 324 to 405 months, or 27 to 33 years. The court imposed an actual sentence of 180 months on Mr. Jones. *Id.* at 1366.

Mr. Thurston and Mr. Ball were not sentenced at the same time as Mr. Jones. *Id.* From March 2008 to July 2010, both parties repeatedly filed motions requesting sentencing. *Id.* On October 29, 2010, roughly 35 months after the jury verdict, Mr. Thurston was sentenced to 194 months after the sentencing judge determined the Federal Guideline ranges as 262 to 327 months when taking into account the acquitted conspiracy conduct. *Id.* On March 17, 2011, Mr. Ball was sentenced to 225 months after the district court calculated the Federal Guidelines ranges as 292 to 365 months using the same acquitted conduct. *Id.* The district court reduced Mr. Thurston's sentence by twelve months and Mr. Ball's by fifteen, given the delay in sentencing after trial. *Id.*

If the District Court had not taken into account the acquitted conduct, the recommended Sentencing Guideline range for Mr. Jones, Mr. Thurston, and Mr. Ball would have been 27 to 71 months. *Id.* at 1368. This is a fraction of the ranges actually used by the sentencing judge. *Id.* Following their sentencing, Mr. Jones, Mr. Thurston, and Mr. Ball filed a timely appeal with the District of Columbia Circuit of the United States Court of Appeals. The appellate court upheld the enhanced sentences. As a result of the holding, Mr. Jones, Mr. Thurston, and Mr. Ball filed their petition for a writ of certiorari to the United States Supreme Court.

SUMMARY OF THE ARGUMENT

It is unconstitutional for the judge to consider conduct of which a defendant has been acquitted. This practice violates the defendant's due process rights from the Fifth and Fourteenth Amendments, the right to a trial by a jury of peers from the Sixth Amendment, and the Double Jeopardy Clause of the Fifth Amendment.

At sentencing, the judge has wide discretion to consider any evidence that he believes has been proved by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 157 (1997). Allowing judges to consider any evidence that is proved by a preponderance, which is a lower standard than what is required at trial, violates a defendant's right to due process. The principle of proof beyond a reasonable doubt is fundamental to our nation's history and traditions in criminal trials. The purpose of a jury is negated when judges are allowed to consider acquitted conduct at sentencing. Any facts that are necessary to impose a sentence are elements of a crime and must be given to the jury. Double jeopardy protects the defendant from the possibility of getting punished for the same crime twice. *Witte v. United States*, 515 U.S. 389, 396 (1995). When the judge at sentencing considers acquitted conduct, the defendant is being put at jeopardy of losing his liberty for the second time, for the same offense.

The Federal Sentencing Guidelines do not expressly address the use of acquitted conduct, therefore the use has been erroneously permitted through judicial opinions. Sentencing judges should not consider acquitted conduct to impose significantly higher or enhanced sentences because it is contrary to the historical value and meaning of the Sixth Amendment. Using acquitted conduct ultimately reduces the role of the jury and nullifies its verdicts, which is in complete discord with the intent of the Sixth Amendment. This Court should eradicate the flawed practice of using acquitted conduct in the sentencing phase.

ARGUMENT

I. A DEFENDANT'S DUE PROCESS RIGHTS ARE VIOLATED WHEN A SENTENCING COURT BASES ITS SENTENCE UPON CONDUCT OF WHICH THE JURY HAS ACQUITTED THE DEFENDANT.

The Federal Sentencing Guidelines' relevant conduct provisions provide for sentencing enhancements and separate offenses.[1] Sentencing enhancements are not defined in congressional statutes as crimes.[2] They reflect the manner in which the offense of conviction was committed and they are limited in extent.[3] Separate offenses are those that are defined in the criminal code and are historically treated as requiring full constitutional protection.[4] Elements of crimes and crimes themselves are entitled to full constitutional protection, including proof beyond a reasonable doubt.[5] Thus, conspiracy would be considered a separate offense and entitled to full constitutional protection.

At sentencing, the district court took into consideration conspiracy conduct of which Mr. Jones, Mr. Thurston and Mr. Ball had been acquitted. The court sentenced Mr. Jones, Mr. Thurston, and Mr. Ball to terms significantly higher than what would have likely been imposed upon them in the absence of the sentencing court's reliance upon the acquitted conduct. Accordingly, and rightfully, Mr. Jones, Mr. Thurston and Mr. Ball have appealed their sentences.

A. Relying on acquitted conduct at sentencing violated the Defendants' constitutional due process rights as provided by the Fifth and Fourteenth Amendments.

The main issue that arises with Mr. Jones, Mr. Thurston and Mr. Ball's case is the district court judge's consideration of conduct of which the defendants had been acquitted when

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[1] *PROPOSAL: The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1463, 1480 (Fall 2001).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 1479.

determining each of their sentences. A defendant's due process rights come from the Fifth and Fourteenth Amendments of the Constitution, and protects the accused from an overbearing government. U.S. CONST. amend. V, XIV

The United States Code states that "no limitation" shall be placed on the evidence that a judge may consider at sentencing. 18 U.S.C. §3661 (2006). The Supreme Court has ruled that a sentencing judge may apply the preponderance standard at sentencing; *See U.S. v. Watts*, 519 U.S. 148, 157 (1997) the judge may also consider inadmissible evidence and evidence concerning conduct of which the defendant has been acquitted by the jury. *Id.* at 154. The judge alone determines whether certain evidence was proved by preponderance. *Id.* at 157. However, an infringement on a defendant's due process right occurs when a defendant has been acquitted at trial, but is then sentenced for the same conduct of which he was acquitted. *In re Winship*, 397 U.S. 358, 363-64 (1970).

While due process is satisfied by the preponderance of evidence standard when a court considers un-adjudicated "other act" conduct at sentencing, it should not be applied to acquittals. *See Watts*, 519 U.S. at 157. Judges completely disregarding a jury's verdict is inherently unfair, especially because a lower standard of proof is used rather than what is required at trial.

In *Winship*, this Court was asked to consider whether a juvenile was a "delinquent" as a result of alleged misconduct on his part. *In re Winship*, 397 U.S. at 358-59. The issue was whether the Due Process Clause of the Fourteenth Amendment required that the hearing be treated with the same standards as a criminal trial. *Id.* at 359. This Court ultimately held that the Due Process Clause requires that every fact necessary to constitute a crime must be proven beyond a reasonable doubt. *Id.* at 364. The principle of proving guilt beyond a reasonable doubt is one that is imbedded throughout our nation's history; this notion is "basic in our law and

rightly one of the boasts of a free society. *Leland v. Oregon,* 343 U.S. 790, 802-03 (1952)(dissenting opinion). The Court in *Brinegar v. United States,* 338 U.S. 160 (1949) stated that "[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence which confined to that long experience in the common law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence of that standard." *Brinegar*, 338 U.S. at 174. This illustrates the idea that a criminal case must be proved beyond a reasonable doubt is so important and fundamental to our nation's idea of a fair trial that it was codified to ensure proper and lasting usage; a defendant should not be punished for commission of a crime when there is reasonable doubt as to his guilt, just because the judge may use a lesser standard of proof at sentencing. *See Winship,* 397 U.S. at 364.

Courts have held that the preponderance of evidence standard is appropriate when using acquitted conduct in applying the Sentencing Guidelines because the Sentencing Guidelines are no longer mandatory – just advisory. *U.S. v. White*, 551 F.3d 381, 384 (6th Cir. 2008). In *White*, the defendant was convicted of two counts, but acquitted of others. *Id.* at 382. The issue was whether the judge could look at the conduct underlying the acquitted counts to enhance the defendant's sentence. *Id.* The court held that this practice is constitutional as long as the sentence does not exceed the jury-authorized maximum. *Id.* It was analogized that because a defendant can be held liable in a civil proceeding by a preponderance of the evidence standard, then the use of that level of proof at sentencing is constitutional. *Id.* at 385. However, the difference between a civil and criminal proceeding is that in a civil proceeding, an injury is measured in damages rather than in the loss of the defendant's liberty, reputation and freedom. *Id.* at 386. It can hardly be argued that the loss of a person's liberty, reputation and freedom are not bigger concerns than the loss of money and material possessions. Comparing a criminal case to a civil case, especially

the requisite standards of proof, is like comparing apples to oranges. It is illogical and unfair to defendants who are at the risk of losing their liberty, reputation and freedom. The court recognizes the need for a higher standard of proof in criminal trials, yet allows the use of a lower standard at sentencing. *Id.* Allowing the lower standard of proof at sentencing is unconstitutional.

Mr. Jones, Mr. Thurston and Mr. Ball were punished for acts of which the jury acquitted them. The only reason they were punished with significantly higher sentences, is because other courts have found it to be constitutionally permissible. However, a judge is not **required** to rely on acquitted conduct at sentencing. *Id.* Courts are not convinced that relying on acquitted conduct, proved by a preponderance at sentencing, is constitutionally permissible. Not one case has said that judges **are required** to rely on acquitted conduct, thus showing that courts are harvesting some reservations about such an act. Judge Flaum from the Seventh Circuit Court of Appeals recognized the "disagreement among circuit courts about whether a sentence, like this one, is based almost entirely on acquitted conduct, violates due process when the district court applies a preponderance of evidence standard rather than requiring clear and convincing evidence." *U.S. v. Hurn*, 496 F.3d 784, 788 (7th Cir. 2007).

Putting all policy and legal implications aside, it seems inherently unfair that a defendant may be punished based on conduct of which he has been acquitted. The government can give the exclusionary rule a run around at sentencing; the government can, and most often will, present evidence at sentencing that is inadmissible at trial. This is comparable to having a lower burden of proof and no rules regarding evidence admissibility at trial. At sentencing, using the preponderance standard, the judge is the fact finder who then decides on the sentence to impose. By allowing the preponderance standard at sentencing, the judge is able to take into consideration a lot more evidence than is allowed at trial, including acquitted conduct. This

Court has stated that a defendant has the constitutional right to the highest standard of proof in all stages of the criminal justice system. *See Winship,* 397 U.S. at 364. Using the preponderance of evidence standard at sentencing goes directly against those statements.

At a criminal trial, if a jury acquits the defendant of an offense, the jury is declaring that there is a reasonable doubt as to his guilt. Allowing the judge to consider the conduct of which the defendant has been acquitted, the defendant is being punished for conduct of which reasonable doubt as to his guilt exists. The defendant is entitled to a presumption of innocence until proven guilty. *See Winship,* 393 U.S. at 363. It is inherent to our common law principles that a defendant will not be punished for acts of which he is not guilty. By allowing the judge at sentencing to consider evidence relating to the acquitted conduct by a preponderance standard when the jury has found a reasonable doubt as to his guilt, violates the defendant's right to be presumed innocent until proven guilty. The jury found the defendant to be innocent of the crime, yet the judge is going to punish him because he is entitled to a lower standard of proof. This defeats the purpose of the presumption of innocence, as well as violates the defendant's right to a jury trial, which is discussed in further detail below.

Due process is about fairness. *Spencer v. Texas,* 385 U.S. 554, 563-64 (1967). Fairness, by its definition, does not allow the courts to enhance a defendant's sentence based on conduct of which he had been acquitted. Justice Stevens stated the "notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to a punishment as if it had been proved is repugnant to [constitutional] jurisprudence." *Watts,* 519 U.S. at 170. Mr. Jones, Mr. Thurston and Mr. Ball have been treated unfairly. They withstood a very lengthy and stressful trial at which they were at risk of losing their liberty and freedom. They were acquitted of the distribution charges because the jury believed that the government had not proved their case

beyond a reasonable doubt. This Court provides for the highest standard of proof for the defendants in the criminal justice system. *See Winship,* 397 U.S. at 364. The Sentencing Guidelines prescribe a range of 27 to 71 months, or two to six years, for the conduct of which Mr. Jones, Mr. Thurston, and Mr. Ball were found guilty. *Jones,* 744 F.3d at 1368. When the sentencing judge considered the acquitted conspiracy conduct, he increased the ranges to 180 to 225 months. *Id.* Considering the acquitted conduct nearly **tripled** the prescribed sentencing range for Mr. Jones, Mr. Thurston, and Mr. Ball. It is inherently unfair for Mr. Jones, Mr. Thurston and Mr. Ball to be deprived of their liberty and freedom because the judge is able to use a lower standard of proof than what is required at trial.

B. Relying on acquitted conduct at sentencing infringes on a Defendant's Sixth Amendment right to a jury trial.

The Supreme Court has described the relationship between crime and punishment as an "intimate connection." *Alleyne v. United States,* 133 S.Ct. 2151, 2158-59 (2013). This Court referred to common law and various treatises in discussing this connection. At common law, the sentencing system left judges with very little discretion. *Id.* Once the jury determined the facts of the offense, the judge was left to proscribe a sentence based on those facts. *Id.* Early American law provided ranges that were directly linked to the facts constituting the elements of a crime. *Id.* This Court stated that such a direct "linkage of facts with particular sentence ranges . . . reflect the intimate connection between crime and punishment." *Id.* at 2159.

This Court continued to state that following these principles came the "practice of including in the indictment, and submitting to the jury, every fact that was a basis for *imposing* or increasing punishment." *Id.* (emphasis added). This statement further illustrates the defendant's right to a trial by a jury of his peers when charged with some offense, as supplied by the Sixth Amendment.

In *Apprendi*, the defendant shot up the home of an African American family and then made a statement that he did so because he did not want them to live in his neighborhood. *Apprendi v. New Jersey,* 530 U.S. 466, 469 (2000). New Jersey had a hate crime statute that provided for a sentence enhancement if found by a trial judge by a preponderance of the evidence. *Id.* at 468-69. The issue presented was whether the due process clause of the Fourteenth Amendment required that a jury on the basis of proof beyond a reasonable doubt find a factual determination that could increase the defendant's sentence. *Id.*

The *Apprendi* Court stated that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. *Apprendi,* 530 U.S. at 490. The Court in *Apprendi* then held that the "Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt." *Id.* at 484. These statements made by the Court implicate that any facts that are found necessary to **impose** a sentence are elements of a crime and must be given to the jury, under the authority of the Sixth Amendment.

Mr. Jones, Mr. Thurston, and Mr. Ball were each charged with conspiracy to distribute drugs and the distribution of small quantities of crack cocaine. After a lengthy trial, the jury acquitted the defendants of the conspiracy charge, but convicted them of the distribution charge. *Jones,* 744 F.3d at 1366. The sentencing judge relied upon the acquitted conspiracy charge when imposing a sentence. *Id.* at 1365. Using the principles relied upon by the Court in *Apprendi* and *Alleyne*, the sentencing judge was wrong in relying upon acquitted conduct at sentencing. The Court explicitly states that every fact that is the basis for *imposing* a punishment should be submitted to the jury. *Alleyne,* 133 S.Ct. at 2159. It is easily inferred that this is due to a citizen's right to a trial by a jury of their peers, as given to them by the Sixth Amendment. As is discussed in further detail below, an acquittal is given a degree of absolute finality. *Burks v. US,* 437 U.S.

1, 16 (1978). Therefore, a sentencing judge violates the defendant's right to a jury trial by relying on conduct of which the jury acquitted the defendants, since such acquitted conduct was the basis for imposing a punishment, which the jury has a duty to decide upon. A judge who relies upon such acquitted conduct is infringing on the defendant's right to a jury trial.

C. Taking into consideration at sentencing conduct of which the Defendant has been acquitted violates the Double Jeopardy Clause of the Fifth Amendment.

Mr. Jones, Mr. Thurston, and Mr. Ball were each acquitted by the jury of conspiracy to distribute drugs, yet the district court, at sentencing, found that each defendant had engaged in the conspiracy. *Jones,* 744 F. 3d at 1365. This Court has given the opinion that an acquittal of charges has the public interest of absolute finality. *Burks v. U.S.,* 437 U.S. 1, 16 (1978). However, the Court of Appeals restated precedent that the sentencing judge may rely on conduct established by a preponderance of evidence and that the sentence is constitutional as long as it does not exceed the statutory maximum. *Jones,* 744 F.3d at 1369. A sentencing judge should not be able to take into consideration conduct of which the jury has acquitted defendants since acquittals are regarded with such absolute finality. Allowing a sentencing judge to impose a sentence taking into consideration the defendant's acquitted conduct punishes the defendant for actions which the jury has found reasonable doubt as to guilt. This violates the double jeopardy clause.

The Fifth Amendment of the United States Constitution provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V. This is commonly referred to as the double jeopardy clause. The double jeopardy clause not only prevents a defendant from being punished for the same offense twice, but also protects the defendant from being put in *jeopardy* of being punished twice for the same offense. *Witte,* 515 U.S. at 396 (emphasis added). Thus, the double jeopardy clause provides the

defendant protection from being put on trial for previously acquitted conduct, as well as protection from the possibility of getting punished for the same offense twice.

The Supreme Court in *U.S. v. DiFrancesco,* 449 U.S. 117 (1980) stated that "[a]n acquittal is afforded special weight." *Id.* at 129. The "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried…."*Id.* The Supreme Court in *Burks v. U.S.* stated that it "necessarily afford[s] absolute finality to a jury's *verdict* of acquittal -- no matter how erroneous its decision." 437 U.S. at 16 (emphasis in original). This Court's statements in *Burks* and *DiFrancesco* illustrate the conclusiveness it holds for acquittals of criminal defendants; defendants acquitted of criminal charges may not be retried without violating the double jeopardy clause. When a judge takes into consideration that acquitted conduct at sentencing, the judge is effectively re-trying the defendant and making a determination without any deference to the jury's verdict. The defendant at sentencing is not entitled to confront or cross examine witnesses or present his own witnesses.[6] There is no evidentiary hearing, and the court is allowed to hear evidence that would be inadmissible at trial.[7] Such practice violates the double jeopardy clause because the defendant is being put at jeopardy for the loss of liberty and freedom for the same conduct, twice.

Jeopardy attaches in a federal criminal trial when the jury is sworn in and empaneled. *See Crist v. Bretz*, 437 U.S. 28 (1978). Thus, unless manifest necessity is proven, a defendant may not be charged and tried for the same offense a second time. *Id.* It has been said, "'the' 'primary purpose' of the [double jeopardy] clause was to 'preserve the finality of judgments.'" *DiFrancesco*, 449 U.S. at 128. As shown above, an acquittal is given absolute finality. *Burks*, 437 U.S. at 16. With the finality afforded an acquittal and the fact that jeopardy attaches at the

[6] *Supra*, note 1 at 1468.
[7] *Id.*

moment in which the jury is sworn, it appears that the double jeopardy clause prevents any further consideration of the acquitted conduct, including at sentencing.

The case *People v. Grant*, 595 N.Y.S.2d 38, 38 (N.Y. App. Div. 1993) involved a defendant who was charged with numerous counts. After a jury trial, the defendant was convicted of rape in the second degree, but had been acquitted of the rest of the charges against him. *Id.* At sentencing, the judge took into consideration behavior of which the defendant had been acquitted. *Id.* On appeal, the Supreme Court of New York found that the principles of double jeopardy, as well as their own state constitution, prohibited judges from considering acquitted conduct at sentencing. *Id.*

Five other state courts have held that a judge may not consider acquitted conduct at sentencing because it violates the defendant's constitutional rights. *See State v. Koons*, 189 V.T. 285 (2011); *Pavlac v. State*, 944 So.2d 1064 (2006); *People v. Phong Le*, 74 P.3d 431 (2003) (Judge Ney, dissenting); *State v. Davis*, 422 S.W.3d 458 (2014); *Borrell v. State*, 478 So.2d 1185 (1985); *State v. Guade*, 2012 Ohio 1423. Justice Kennedy stated that the "States are laboratories." *Hall v. Florida,* 134 S.Ct. 1986, 2001 (2014). Six states courts have held that this practice of relying on acquitted conduct when imposing a sentence violates constitutional provisions. If the states are laboratories, they are showing what they think is appropriate by banning the reliance on acquitted conduct at sentencing. It is time the federal courts started following in the footsteps of New York, Vermont, Florida, Colorado, Missouri, and Ohio.

The double jeopardy clause protects the defendant from the possibility of deprivation of life or limb for the same offense more than once. *See Crist*, 437 U.S. at 28. At the trial for Mr. Jones, Mr. Thurston and Mr. Ball, their life was in jeopardy for the charges of distribution and conspiracy. The jury acquitted Mr. Jones, Mr. Thurston and Mr. Ball of the conspiracy charge.

The sentencing judge then proceeded to use the evidence of the acquitted conspiracy charge when determining Mr. Jones, Mr. Thurston and Mr. Ball's sentences. At the time of sentencing, Mr. Jones, Mr. Thurston, and Mr. Ball were **once again** in jeopardy for the conspiracy charge, because the judge was hearing and considering the actions of which the three men had already been acquitted. Such consideration and reliance of the acquitted conspiracy charge at sentencing defeats the purpose of the double jeopardy clause – to protect a person from the possibility of deprivation of his liberty or limb twice for the same conduct.

II. THE DEFENDANTS' SENTENCES WERE PRIMARILY BASED ON ACQUITTED CONDUCT, CAUSING THE IMPOSITION OF SIGNIFICANTLY HIGHER SENTENCES, WHICH VIOLATED THE DEFENDANTS' SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

The use of acquitted conduct, at the very least, offends a defendant's Sixth Amendment right to a jury trial when it is used to enhance a sentence or impose a significantly higher term or imprisonment. This Court should declare the use of acquitted conduct in sentencing altogether a violation of a defendant's right to a trial by an impartial jury under the Sixth Amendment of the United States Constitution. It has been questioned whether the *Booker* decision should be interpreted to support this declaration. *United States v. Booker*, 543 U.S. 220 (2005). It is Mr. Jones's, Mr. Thurston's, and Mr. Ball's position that this Court should interpret *Booker* in this manner, so as to remedy such a repugnant practice of the current federal sentencing regime.

A. The Federal Sentencing Guidelines do not address the issue of using acquitted conduct. This has led to erroneous interpretation by the judiciary.

The United States criminal justice system imposes punishment upon defendants who are afforded the right to a trial by jury and a conviction by the standard of proof beyond a reasonable doubt. *See* U.S. CONST. amend. VI. However, under the current system, federal judges are permitted to enhance a defendant's sentence based on conduct from which he was acquitted at trial, if that conduct can be shown by a preponderance of the evidence. *Watts,* 519 U.S. at 157.

Acquitted conduct is an act for which defendant was criminally charged and formally adjudicated not guilty, typically by the finder of fact after trial.[8] This Court's ruling in *Watts* has precipitated constitutional concerns over the infringement of defendants' Sixth Amendment rights and lack of guidance on how much weight to give adjudicated conduct in the sentencing phase. *Id.* at 154. *Watts* has made permissible the use of acquitted conduct and un-adjudicated evidence. *Id.*

1. The use of acquitted conduct was criticized prior to the creation of the Federal Sentencing Guidelines. The history of their inception shows acquitted conduct was left unaddressed in the Guidelines.

Before the Federal Sentencing Guidelines were enacted, sentencing judges had virtually unlimited discretion to impose sentences and it was extremely difficult, if not virtually impossible, to discern the motivation behind a judge's sentence. *See United States v. Grayson,* 438 U.S. 41, 55 (1978) (Stewart, J., dissenting). The Supreme Court sanctioned the use of acquitted conduct in sentencing for the first time in *Williams v. New York*, 337 U.S. 241 (1949). Following this decision, federal judges developed a practice of individualized sentencing to reflect the circumstances surrounding the accused, not necessarily the crime accused. *Id.* at 247. The sentencing process hinged on judicial discretion in support of an indeterminate sentencing system. *See Mistretta v. United States*, 488 U.S. 361, 363 (1989). In response to criticism of a seemingly completely unchecked system, Congress enacted the Sentencing Reform Act of 1984. The Act established the United States Sentencing Commission, consisting of seven members appointed by the President and confirmed by Congress, to create the guidelines sentencing system. 28 U.S.C.A. § 991 (West 2010)(effective Oct. 13, 2008).

[8] *See* Barry L. Johnson, *If At First You Don't Succeed--Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 157 (1996); *see also* U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B) (2010) (stating that a defendant is to be held accountable for all criminal activity "whether or not charged as a conspiracy").

The Commission was appointed to construct a fairer sentencing system and to determine whether to adopt a charge offense or a real offense system of sentencing.[9] A charge offense system is one where a defendant's conviction is a direct result of his sentence.[10] Conversely, a real offense system permits sentencing judges to consider all aspects surrounding the offense on which the conviction is based.[11] The charge offense approach is systematic and direct, issuing a pre-determined punishment for a crime in which the defendant has been convicted.[12] It does not allow the sentencing judge to consider context or individualized factors, and is therefore too objective by not distinguishing between the individual defendants and their respective crimes. In contrast, the real offense system primarily focuses on the individual defendant and the surrounding circumstances for each crime.[13] This approach still presents a problem of unfettered judicial discretion by allowing the court to employ a lower standard of proof when choosing what conduct to consider when sentencing defendants.

The Commission ultimately created a system combining aspects of both approaches. The Federal Sentencing Guidelines incorporate relevant conduct, which a judge is permitted to consider at sentencing into section 1B1.3 and 1B1.4 of the Sentencing Guidelines. *Watts*, 519 U.S. at 151-52. The range of conduct a judge may consider at sentencing includes unlawful acts or omissions in relation to the offense of conviction deemed vital in determining the defendant's

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[9] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromise Upon Which They Rest*,17 HOFSTRA L. REV. 1, 8-9 (1988).
[10] U.S. Sentencing Guidelines Manual ch. 1, pt. A, subsec. 1 (2009) (defining a "charge offense" as a sentence being based "upon conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted").
[11] *Id.* (defining a "real offense" as a sentence being based "upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted").
[12] Breyer, supra note 3, at 9.
[13] *Id.* at 10.

culpability.[14] This definition encompasses uncharged and un-adjudicated conduct which occurred in relation to the defendant's conviction, but Guidelines do not expressly address the use of acquitted conduct at sentencing.[15]

2. The line of cases addressing constitutional concerns arising from the incorporation of the Guidelines has failed to address the Sixth Amendment violations that occur when acquitted conduct is used to enhance sentences.

In 2000, this Court considered a case involving a state hate crime statute authorizing increased maximum prison sentences based on a judge's finding by preponderance of evidence that the defendant acted with purpose to intimidate the victim. *Apprendi,* 530 U.S. at 490. This Court held other than the fact of prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt, and that the state statute violated the Due Process clause of the Fifth Amendment. *Id.* This case established that the sentencing structure in the federal court system does in fact present Sixth Amendment implications. This Court recognized the role of the jury as it relates to the facts that will be considered at sentencing. The rulings in *Watts* and *Apprendi* precipitated constitutional concerns over the infringement of defendants' Sixth Amendment rights and lack of guidance on how much weight to give adjudicated conduct in the sentencing phase. *Watts,* 519 U.S. at 154; *Apprendi*, 530 U.S. 466.

In an effort to clarify this issue, this Court considered whether the Federal Sentencing Guidelines violated the Sixth Amendment by allowing judges to consider issues that the government failed to prove beyond a reasonable doubt at trial in *Booker*. *Booker,* 543 U.S. at 245. In *Booker*, this Court issued two separate majority opinions; one opinion on the merits of the case, and another addressing the remedies. *Id.* at 220. This Court held the Federal Sentencing

[14] *See* U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B) (2010) (stating that a defendant is to be held accountable for all criminal activity "whether or not charged as a conspiracy").
[15] *Id.*

Guidelines violated the Sixth Amendment on the merits, and in the remedial opinion this Court declared the Guidelines to be valid as advisory to federal judges. *Id.* at 226. Unfortunately, *Booker* did not affect nor overrule the ruling in *Watts* allowing sentencing judges to use acquitted conduct to enhance a defendant's sentence. *Id.* at 240. As this Court did not address the issue of acquitted conduct in terms of the Sixth Amendment in *Booker*, the federal circuits have permitted the use of acquitted conduct by sentencing judges. *Id.* at 244.

The pre-*Apprendi* case that discusses limitations on a sentencing judge's discretion following an acquittal in terms of the Sixth Amendment is *Jones v. United States*, 526. U.S. 227 (1999). All of the circuit opinions upholding the use of acquitted conduct in the sentencing phase have ignored this case. However, in a dissenting opinion in *Rita v. United States*, Justice Souter suggested that *Jones*, instead of *Watts*, was the more faithful pre-*Apprendi* precedent upon which to ground a *Booker* Sixth Amendment analysis. *Rita v. United States*, 551 U.S. 338, 384-92 (2007)(Souter, J., dissenting). He also argues *Jones*, rather than *Apprendi*, was the genesis for this Court's revival of the Sixth Amendment right to jury-found facts in sentencing. *Id*.

In *Jones*, the defendant was convicted by a jury of carjacking and sentenced pursuant to a sentencing guideline that allowed increased penalties upon judicially found facts, which increased the maximum carjacking penalty from fifteen years to twenty-five years, based on the sentencing judge's finding of "serious bodily injury." *Jones*, 526 U.S. at 227. The Government argued in *Jones* that "serious bodily injury" was not required to be proven beyond a reasonable doubt to the jury because it was "only a condition for imposing an enhanced sentence . . . not an element of a more serious crime." *Rita*, 551 U.S. at 385 (citing *Jones*, 526 U.S. at 233). In *Rita*, Justice Souter viewed this as an "unsettling argument" because the nature of statutorily-created sentencing schemes can make liability for an enhanced penalty a more serious issue than

determination of guilt or innocence. *Id.* In *Jones*, the Court held acquitted conduct could not be used in sentencing, at least with respect to elements of the offense, under Sixth Amendment jury trial principles. *Jones,* 526 U.S. at 251-52. *Jones*, like *Apprendi* and *Booker*, is rooted in the fundamental importance of jury fact-finding. This Court stated:

> The question might be less serious . . . if the history bearing on the Framer's understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial factfinding to peg penalty limits. But such is not the history.

Jones, 526 U.S. at 244.

Unfortunately, this Court only addressed the federal statute in question, and not the broader Sixth Amendment implications for using acquitted conduct in the sentencing phase. However, this Court laid a reliable foundation in *Jones* for a Sixth Amendment sentencing revolution where the use of acquitted conduct in sentencing can be held in violation of the Sixth Amendment. Mr. Jones, Mr. Thurston, and Mr. Ball's present case provide this Court the opportunity to expand the ideas in *Jones*, and to definitively ban the use of acquitted conduct at sentencing as a violation of the Sixth Amendment.

B. The use of acquitted conduct to enhance sentencing is a contradiction to the history of the Sixth Amendment and the United States criminal justice system.

At the heart of the American legal system is the right of the accused to be judged by an impartial jury of his peers, as guaranteed by the Sixth Amendment of the Constitution. U.S. CONST. amend. VI. The right of a jury trial was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties."[16] The importance of the jury trial "has been enshrined since the Magna Carta." *Booker,* 543 U.S. at 239. The Framers

[16] 2 J. Story, *Commentaries on the Constitution of the United States* 540-41, n. 2 (4th ed. 1873); *see also* Duncan v. Louisiana, 391 U.S. 145, 151-154, (1968) (tracing the history of trial by jury).

of our Nation "understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." *Booker,* 543 U.S. at 238-39. In this case, the Sentencing Guideline range would have been **27 to 71 months** (roughly 2 to 6 years) without the use of the acquitted conduct. *Jones,* 744 F.3d at 1368. The actual sentences imposed on Mr. Jones, Mr. Thurston, and Mr. Ball were **180, 194, and 225 months** respectively (roughly 15 to 19 years). *Id.* at 1366.

By allowing the use of acquitted conduct at sentencing, the jury's role as fact-finder is undermined and the defendant's right to the highest standard of proof is effectively diminished. A conviction or acquittal based on the government having to prove evidence beyond a reasonable doubt becomes virtually meaningless if a criminal defendant may be subject to punishment at the discretion of the sentencing judge using a preponderance of the evidence standard. If a sentencing court can reject a jury's determination, what is the point of a trial? Allowing a judge to discredit a jury's determination of the facts by using acquitted conduct as a sentencing factor challenges the integrity of the criminal justice system.

The American Law Institute and American Bar Association have joined several states in the outcry against the use of acquitted conduct at sentencing. *United States v. White,* 551 F.3d 381, 395 (6th Cir. 2008) (Merritt, J., dissenting) (citing authority to show virtually all states have adopted conviction systems where uncharged conduct generally remains outside the parameters of the guidelines). Some states have even gone so far as to declare the use of acquitted conduct at sentencing unconstitutional. *See State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987); *People v. Rose,* 776 N.W.2d 888, 890-91 (M.I. 2010).

While the federal circuit courts have not yet declared the use of acquitted conduct unconstitutional, a handful of federal judges have expressed constitutional concerns with this

practice. *See United States v. Canania*, 532 F.3d at 777 (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 conduct 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.").

Given the vital and historical role played by the jury in our legal system, the placement of such a right in the country's founding documents, and the increasing concern voiced over the constitutionality of using acquitted conduct at sentencing, it is clear this Court should end the uncertainty and hold using acquitted conduct to enhance sentences goes against the integrity of the legal system and the Sixth Amendment.

1. Using acquitted conduct to impose higher sentences than the Guidelines would otherwise recommend violated the Defendants' Sixth Amendment rights and lessened the role of the jury in the legal process.

In light of the historical role of the right to trial by jury, it only makes the minimization of a jury's decision that much of a graver offense. In this case, the jury acquitted the defendants of the conspiracy conduct. *Jones*, 744 F.3d at 1366. The Sentencing Guidelines prescribed a range of **27 to 71 months** (roughly 2 to 6 years) for the conduct actually charged. *Id.* at 1368. When the district court judge considered the acquitted conspiracy conduct to impose terms ranging

from **180 to 225 months** (fifteen to nineteen years), he effectively nullified the jury's decision. This commonplace practice in the courts illustrates a terrifying pattern of undermining the legal process.

Courts justify the use of acquitted conduct under *Watts*, quoting statements that an acquittal is just an "acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt," and in the absence of specific jury findings, "no one can logically or realistically draw any factual finding inferences." *Watts*, 519 U.S. at 155. However, sentencing judges disregard jury finding even when there are specific findings. In cases where special verdicts have been returned by the jury or when the jury returns a verdict related to lesser included offenses, consideration of acquitted conduct equates to jury nullification unsupported by *Watts*.

In *United States v. Vaugn*, the sentencing judge rejected the jury's special verdict finding the defendant guilty beyond a reasonable doubt of possession of "at least fifty kilograms . . . but not more than 100 kilograms" of marijuana. *United States v. Vaughn,* 430 F.3d 518 (2nd Cir. 2005). The district judge attributed 544 kilograms of marijuana to the defendant at sentencing. *Id.* at 526. Similarly, in *United States v. Magallanez,* the jury determined the defendant was responsible for 50 to 500 grams, exposing him to a sentence of 63 to 78 months (5 to 7 years). Despite these findings, the sentencing judge attributed 1.21 kilograms to the defendant, thereby exposing him to a sentencing range of 121 to 151 months (10 to 13 years).

A jury's special verdict can assist sentencing judges in "logically or realistically draw[ing] . . . factual finding inferences," making the distinction in *Watts* between acquittal and innocence premised on the absence of special findings inapplicable. *Watts,* 519 U.S. at 155. It is clear that neither of the juries in the above referenced cases believed the defendants were

responsible for the higher quantities of the respective substances. The verdicts were clear and the defendants' acquitted conduct should not have been used at sentencing. This is the same dilemma faced by Mr. Jones, Mr. Thurston, and Mr. Ball in this case when the acquitted conspiracy conduct was used to impose significantly higher sentences.

Allowing the sentencing judge, merely by a preponderance of the evidence, to attribute additional conduct to significantly raise the sentence negated the purpose of the jury's verdict acquitting them of the conspiracy charge. Following this logic, the next step is to eliminate the facade of juries and just allow the trial judges to fashion sentences using their own judgment. Obviously this notion would be criticized as a complete contradiction of the history of the American legal system and intent of the Sixth Amendment, as should the use of acquitted conduct in sentencing.

Another situation where judicial nullification of jury findings occurs is when the jury refuses to find a defendant guilty of a higher level offense, and instead convicts on the lesser included offense. The United States District Court for the Southern District of Ohio handled a case where the government charged defendants with five counts of introduction of an unapproved new drug into interstate commerce. *United States v. Coleman,* 370 F. Supp. 2d 661 (S.D. Ohio 2005).

The jury found the defendants lacked the requisite intent required by statute to defraud, but it convicted the defendants of the lesser included misdemeanor offenses of introduction of an unapproved new drug into interstate commerce without intent to defraud. *Coleman,* 370 F. Supp. 2d at 663. The defendants faced several other charges, including misbranding drugs, failure to register a drug manufacturing facility, and conspiracy. *Id.* The jury acquitted the defendants of

conspiracy, and failed to find requisite intent on the other charges, reducing the convictions to the lesser included offenses without intent. *Id.* at 664.

At sentencing, the government argued *Watts* supported sentence enhancement for fraud if the government proved that fact by a preponderance of the evidence. *Id.* at 669. However, the court concluded that "considering acquitted conduct would disregard completely the jury's role in determining guilt and innocence." *Id.* at 672. This holding is consistent with protecting a defendant's Sixth Amendment right to a trial by jury. Unfortunately, the lower courts in the instant case were not so concerned with safeguarding the rights of the accused.

The pattern of disregarding the role and findings of the jury is contrary to the meaning of the Sixth Amendment. It contradicts the Framers' intent when they drafted the Bill of Rights. It is a pattern that this Court should set right with a reversal of the District of Columbia Circuit's decision that acquitted conduct may be used to impose significantly higher sentences on Mr. Jones, Mr. Thurston, and Mr. Ball.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals, District of Columbia Circuit, should be reversed.

Respectfully submitted,

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Team # 21