In the Supreme Court of the United States

No. 13-10026

JOSEPH JONES,
DESMOND THURSTON,
AND
ANTWUAN BALL,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR PETITIONERS

Team No. 4
Counsel for Petitioners

March 2, 2015

QUESTIONS PRESENTED

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

2. Does it violate 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND LEGISLATIVE PROVISIONS

OTHER AUTHORITIES

BRIEF FOR PETITIONER

Petitioners Joseph Jones, Desmond Thurston, and Antwuan Ball respectfully request that this Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit, vacate their sentences, and remand for resentencing.

STATEMENT OF THE CASE

Federal prosecutors believed Jones, Thurston, and Ball were members of a violent drug conspiracy operating in the Congress Park neighborhood of Washington, D.C. The three men entered pleas of not guilty to all charges and placed their fates in the hands of a trial jury, which convicted them of minor drug sales but acquitted on a host of more serious charges, including conspiracy and murder. At their sentencings, the trial judge disregarded the jury's findings and imposed lengthy terms of imprisonment based upon the exact conduct of which Petitioners had been acquitted. The constitutional infirmity of this practice is the issue before this Court.

A. Trial

Petitioners Thurston and Ball were arrested, arraigned, and remanded without bail on a 73-count federal indictment in March 2005. J.A. 38, 40.[1] Jones was charged in a superseding indictment in November 2005 and has also been in custody since that time. J.A. 50. By the time of Petitioners' trial, 12 of the 18 indicted members of the "Congress Park Crew" had entered guilty pleas to single-count informations charging them with conspiracy to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. J.A. 642-43. Petitioners and three other defendants were tried on a 58-count superseding indictment, of which Counts One and Two—the

[1] Record citations are to the Joint Appendix ("J.A.") filed in Petitioners' consolidated appeal below, *United States v. Jones*, No. 08-3033 (D.C. Cir.). Trial and sentencing transcripts are separately paginated but located within Volume 3 of the Joint Appendix.

aforementioned narcotics conspiracy and a "Racketeer Influenced and Corrupt Organizations" (RICO) conspiracy, in violation of 18 U.S.C. § 1962(d)—were pivotal. J.A. 525-84.

The trial, before a jury in the U.S. District Court for the District of Columbia (Richard W. Roberts, *J.*), began with jury selection on February 13, 2007. J.A. 93. The government presented the testimony of 106 witnesses over the course of 64 trial days, with the defense case lasting an additional 14 days. The case was submitted to the jury on October 15, 2007, and deliberations were held over 14 days before a verdict was rendered November 28, 2007. J.A. 150-54.

All six defendants were acquitted of both charged conspiracies. J.A. 587-620. Jones was convicted of two drug sales, four months apart, involving a combined 1.7 grams of crack cocaine. J.A. 615, 1898. He was acquitted on two other counts of attempted murder. J.A. 616. Thurston was also convicted of two drug sales, over three years apart, one involving 1.5 grams of crack cocaine, the other "two ziplocks" of unspecified weight. J.A. 612, 1575-76. He was acquitted by the jury on two other counts charging similar drug sales; in addition, directed verdicts of acquittal had been entered at the close of the government's case on nine other counts charging him with three attempted murders and related firearms offenses. Trial Tr. 18,668 (Aug. 1, 2007); J.A. 2325 ("Those charges were dismissed, without opposition, because no evidence was presented in support of those allegations."). Ball was convicted of a single sale of 11.6 grams of crack cocaine, J.A. 592, 909. He was acquitted on nine other counts charging drug sales, firearms violations, and two separate murders over eight years apart. J.A. 588-93.

B. Sentencing

In memoranda filed in advance of sentencing, the government argued that Petitioners should be sentenced based on the crimes of which the jury had acquitted them, as well as the offenses of which they were convicted. Its position with respect to all Petitioners was that "the

jury acquitted on the conspiracy counts because they did not unanimously agree, beyond a reasonable doubt, with the government's theory of the partnership among the charged defendants." J.A. 649. Noting that the jury's acquittals on the RICO conspiracy charged in Count Two meant that it was unnecessary for them to record each predicate Racketeering Act as "proven" or "not proven," the government suggested, for instance, that

> [t]he jury never voted, one way or another, if Desmond Thurston dealt or possessed with intent to distribute over 1.5 kilograms of crack cocaine in Congress Park. They were never asked this question. Similarly, the jury never was asked to vote, one way or another, if Mr. Thurston committed [uncharged robberies and attempted murders]. They similarly never had to vote up or down on these issues.
>
> What remains, therefore, is an ample record before this Court to apply its discretion . . . in imposing the appropriate sentence . . . .

J.A. 649. The government asked Judge Roberts to consider at sentencing "evidence introduced to this Court—but not shown to the jury during trial—which further established the charged conspiracy in this case." J.A. 651. It also affirmatively supplemented the testimony it presented at trial, in several instances "proceeding by proffer" in the manner of a preliminary hearing. J.A. 657 ("The government can represent that sources and witnesses have informed the government that Mr. Thurston was still dealing crack cocaine in Congress Park during this time period."), J.A. 922-23 ("Despite preparing Mr. Pleasant to testify, the government ultimately decided—for tactical reasons having nothing to do with Mr. Pleasant's credibility—not to call Mr. Pleasant as a witness at trial.")

Petitioners filed timely pre-sentencing objections to the government's proposed consideration of acquitted conduct. J.A. 2124 (Jones) ("The government sought to put together a string of unrelated events in an effort to build a conspiracy case . . . . and take advantage of various evidentiary rules regarding evidence that otherwise would not have been available."); J.A. 1415 ("Sentencing Thurston for more than the two offenses of conviction, would promote

disrespect for the law because it conflicts with the jury's verdict."); J.A. 2262 (Ball) ("One would be hard-pressed to come up with a better example than this case for showing the injustice that can be accomplished through the use of acquitted conduct to fashion a criminal sentence.").

The district court by and large agreed with the government's assessment of the case it had made, and calculated each of Petitioners' offense levels under the federal Sentencing Guidelines based on the acquitted conspiracies and other conduct testified to at trial, but not found by the jury's verdict. Thurston Sent. Tr. 35 ("I respect and abide by th[e] verdict, but I cannot turn a blind eye to the narcotics conspiracy relevant conduct that I have found proven by clear and convincing evidence.") Judge Roberts set Jones' Guidelines offense level at 36, double the figure the court would have reached based only on his counts of conviction. J.A. 2137; Jones Sent. Tr. 51. Thurston's offense level was raised from 16 to 36, J.A. 1394; Thurston Sent. Tr. 37, and Ball's from 24 to 38, J.A. 2262; Ball Sent. Tr. 68.

Had Judge Roberts sentenced Petitioners at the *upper* limit of the Guidelines ranges that could have been determined based on conduct found by the jury's verdict alone, they would have received an average of 63 months' imprisonment; had he sentenced them at the *lower* bound of the Guidelines ranges he calculated using acquitted conduct, they would have received an average term of 292 months.[2] Ultimately, he departed downward from each of the aggravated Guidelines ranges, sentencing Jones to concurrent 180 month terms on both counts of conviction, Thurston to 194 months, also concurrent, and Ball to 225 months. J.A. 2297, 2442, 2511.

C. Appeal

Petitioners' direct appeals in the United States Court of Appeals for the District of Columbia Circuit were consolidated for briefing and argument. They argued, first, that the

[2] *See generally* U.S. Sentencing Commission, *Guidelines Manual* (hereinafter "U.S.S.G."), Ch. 5, p. 401 (Sentencing Table) (Nov. 2010).

sentences imposed were procedurally unreasonable because they were based on the district court's clearly erroneous credibility determinations of cooperating government witnesses whose testimony the jury's verdict necessarily rejected. *United States v. Jones*, 744 F.3d 1362, 1366-67 (D.C. Cir. 2014). Second, they challenged the substantive reasonableness of their sentences as "far exceed[ing] the norm for their crimes." *Id.* at 1368. These arguments were rejected.

The primary ground for Petitioners' appeal was that "their sentences violated their Sixth Amendment right to trial by jury because they were based, in part, on [their] supposed involvement in the very conspiracy that the jury acquitted them of participating in." *Id.* The court rejected this argument as well, writing that it was foreclosed by "binding precedent of this court" and by the Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*). *Id.* at 1369. The court dismissed Petitioners' citation to more recent Supreme Court case law—particularly "Justice Scalia's concurrence in *Rita v. United States*, 551 U.S. 338 (2007), which suggested that defendants should be permitted to challenge sentences that depend on judge-found facts to survive substantive reasonableness review," 744 F.3d at 1369—observing that "[n]o Supreme Court majority has ever recognized the validity of such challenges," *id.*

A petition for rehearing by the Court of Appeals *en banc* was denied. *United States v. Jones*, No. 11-3031 (D.C. Cir. June 3, 2014). This Court subsequently granted certiorari.

SUMMARY OF ARGUMENT

The use of conduct necessarily rejected by the jury's verdict as the basis for determining Petitioners' sentences violated their constitutional rights under the Fifth and Sixth Amendments.

I. The Sixth Amendment's guarantee of a jury trial is a right reserved to the people as a check on the power of the state to impose arbitrary punishment. The imposition of criminal punishment only upon proof beyond a reasonable doubt is a corollary to the jury trial right

secured by the Due Process Clause of the Fifth Amendment. This Court has consistently upheld a defendant's right to have every fact that increases the maximum punishment to which he is exposed submitted to a jury and proved beyond a reasonable doubt.

II. Petitioners' sentencings were conducted under the U.S. Sentencing Guidelines, which do not contemplate the use of acquitted conduct as a permissible basis for sentencing. This Court's cases since *United States v. Booker*, 543 U.S. 220 (2005), have established that a defendant's Guidelines range calculation, while no longer mandatory, is a substantive component of his sentence and has binding legal effect. Because Petitioners' Guidelines offense levels were determined based on conduct not found by their jury, they were exposed to increased penalties in violation of their Sixth Amendment jury trial rights.

ARGUMENT

I. The Use Of Acquitted Conduct As A Basis For Sentencing Violates A Criminal Defendant's Fifth Amendment Due Process and Sixth Amendment Jury Trial Rights

Petitioners were deprived of their Fifth Amendment rights to due process and Sixth Amendment rights to a jury trial when the sentencing judge, in order to impose increased sentences, made factual findings of conduct for which they had been acquitted by a jury. This practice subverts the protections of a jury trial as they have been understood since the framing, and is inconsistent with the line of Sixth Amendment sentencing jurisprudence developed by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

A. The Due Process Clause Requires Proof Of Guilt Beyond A Reasonable Doubt To Protect From Oppression By The Government

Trial by a lay jury is a right reserved to a criminal defendant both in the body of the Constitution and in the Sixth Amendment. U.S. Const. art. III, § 2, cl. 3; *id*. amend. VI. It has been incorporated against the states through the Due Process Clause of the Fourteenth Amend-

ment as being "among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)). Whether trial by jury in a particular case was the most reliable or efficient means of discovering facts and assessing criminal responsibility was a matter of indifference to the Framers, because the constitutional interest the right protected was more fundamental:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 156 (footnote omitted).

A necessary consequence of lay juries' role in "guard[ing] against a spirit of oppression and tyranny on the part of rulers," *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 540 (4th ed. 1873)), is that they sometimes produce outcomes contrary to state interests or otherwise unsatisfactory to state actors. This is a design feature, not a flaw. *Duncan*, 391 U.S. at 157 ("[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."); *Jones v. United States*, 526 U.S. 227, 245 (1999) (at common law, it was accepted that "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power"). The government oppression against which juries protect individual citizens, furthermore, can be executive, legislative, or judicial. *See Blakely v.*

Washington, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); *Apprendi*, 530 U.S. at 498 (2000) (Scalia, J., concurring) ("Judges, it is sometimes necessary to remind ourselves, are part of the State.").

A defendant's Sixth Amendment right to trial by jury is not satisfied by the jury's mere presence at trial as a fact-finding body auxiliary to the trial judge. Its "most important element [is] the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). The jury trial right also incorporates the exacting standard of proof beyond a reasonable doubt that is a requirement of due process in all criminal cases. *See In re Winship*, 397 U.S. 358, 364 (1970); *Sullivan*, 508 U.S. at 278 ("It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt.").

B. Acquitted Conduct As A Basis For Sentencing Violates The Sixth Amendment Rule Announced In *Apprendi v. New Jersey*

Apprendi v. New Jersey, 530 U.S. 466 (2000), ushered in an extended era of sweeping change in the Court's sentencing jurisprudence, predicated on an acknowledgment that the full protections owed to criminal defendants under the Sixth Amendment were more and more susceptible to the "erosion" warned of in *Jones*. *Apprendi*, 530 U.S. at 483 (quoting *Jones*, 526 U.S. at 247-48). In finding a Sixth Amendment violation at a stage of criminal proceedings not traditionally associated with the jury trial right, the *Apprendi* court recognized that "criminal law 'is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability' assessed." *Id.* at 485 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975)). In order for the jury trial right to be meaningfully preserved and exercised today, when sentencing

is a far more complicated and fact-bound endeavor than at the Founding, it was necessary "that [*In re*] *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 (internal quotation omitted).

Apprendi's formulation of the jury trial right at sentencing has been the touchstone of all subsequent cases challenging, on Fifth and Sixth Amendment grounds, statutory allocations of fact-finding power that diminish the role of the jury: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Though the constitutional principle was not at all new, but "rooted in longstanding common-law practice," the Court had until *Apprendi* failed to make an "explicit statement" of it. *Cunningham v. California*, 549 U.S. 270, 281 (2007).

In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court applied *Apprendi* to a state's guidelines sentencing system and concluded that the "prescribed statutory maximum" punishment was "the maximum sentence [the judge] may impose without any additional findings" not contained within the jury's verdict. *Id.* at 303. Justice Scalia's opinion for the Court succinctly stated the principle that animated the *Apprendi* rule:

> *Apprendi* . . . ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended. . . . The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the Crime the State *actually* seeks to punish.

Id. at 306-07. A plain reading of the rule elucidated in *Apprendi* and expounded in the Court's subsequent cases makes the practice of using acquitted conduct to increase punishment intuitively suspect. While a judge is entitled to decide *how* an offense will be punished, it is the

sole province of the jury to decide *which* offenses will be punished, and this decision is rendered when the jury delivers a guilty verdict, based on facts proved beyond a reasonable doubt.

Using acquitted conduct at sentencing, so that conviction on one offense allows a judge to punish for crimes that a jury rejected as a basis for punishment, trades away a basic constitutional protection and replaces it with just the sort of "mere preliminary to a judicial inquisition" that the Court warned of in *Blakely*. Here, a jury chosen in accordance with Petitioners' Sixth Amendment Vicinage Clause right heard months of testimony and deliberated over dozens of hours to arrive at a verdict that was almost completely set aside by Judge Roberts at sentencing. The "fundamental reservation of power" in the people, which the Framers understood the jury trial right to represent, *Blakely*, 542 U.S. at 305-06, cannot permit that result.

C. The Court's *Per Curiam* Holding In *United States v. Watts* Did Not Address A Sixth Amendment Sentencing Question And So Does Not Control This Case

Reviewing the common-law history of the right to jury trial in criminal law cases, this Court in *Jones v. United States* noted that "Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion." 526 U.S. at 247-48. It went on to warn that judge-found sentencing facts threatened just such an erosion:

> If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping . . . . It is therefore no trivial question to ask whether . . . setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.
>
> The question might well be less serious than the constitutional doubt rule requires if the history bearing on the Framers' understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial factfinding to peg penalty limits. But such is not the history.

Id. at 243-44. Justice Souter's opinion for the Court in *Jones* thus squarely framed and addressed the issues presented by the instant case. *See Apprendi*, 530 U.S. at 475-76 (observing that the

answer to the central jury-trial right question in *Apprendi* "was foreshadowed by our opinion in *Jones*"); *id.* at 490 ("[O]ur reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*.").

The principal authority relied upon by the government and the court below, in contrast, was not addressed at all in *Apprendi*. This is a reflection of the fact that the Court's *per curiam* affirmance, in *United States v. Watts*, 519 U.S. 148 (1997), of two federal sentences that were not challenged on Sixth Amendment grounds, is inapposite to the constitutional issues presented here. The *Watts* opinion not only does not control this case, it does not even operate as persuasive authority supporting the government's position on either of the questions presented. Two years after *Watts*, the Court in *Jones* obviously believed that "the Framers' understanding of the Sixth Amendment principle" would not have tolerated sentencing based on conduct acquitted at trial but found by a judge alone, and that the practice presented at the very least grave constitutional concerns. If, as the court below assumed without deciding, the question had in fact been resolved, without briefing or argument, in *Watts*, it stands to reason that the Court in *Jones* would have acknowledged that precedent.

There is no support in the Framers' understanding of the jury trial right or this Court's modern Sixth Amendment jurisprudence for the use of acquitted conduct as a basis for aggravated sentencing. The Court's holdings in *Apprendi*, *Blakely*, and other recent cases, barring the imposition of sentences founded on judicial findings not proven to a jury beyond a reasonable doubt, should apply *a fortiori* to bar sentencing based on judge-found facts that are inconsistent with a jury's verdict of acquittal.

II. The Calculation Of Petitioners' Federal Sentencing Guidelines Ranges Denied Them Their Sixth Amendment Right To Have All Facts Increasing The Penalty For Their Crimes Found By A Jury

The Guidelines promulgated by the U.S. Sentencing Commission do not contemplate the use of acquitted conduct at sentencing, and they expressly limit the consideration of unproven "relevant conduct" to the offenses on which a jury convicted the defendant. Judge Roberts' sentencing determinations, which disregarded the jury's verdict and drastically elevated Petitioners' Guidelines offense levels, increased the penalty to which Petitioners were exposed in violation of their Sixth Amendment rights.

A. The Sentencing Guidelines Nowhere Contemplate The Use Of Acquitted Conduct In Calculating A Defendant's Offense Level

The very first directive of Congress to the U.S. Sentencing Commission for the federal Guidelines was that they should be divided into "categories of offense behavior and offender characteristics." U.S.S.G. § 1A1.2 (Nov. 2014) (reproducing original 1987 "Introduction to the Guidelines Manual"). In this bipartite system, the Guidelines Offense Level—as opposed to the Criminal History Category, the calculation of which is not at issue in this case—is determined on the basis of the offense, which is explicitly defined as "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct)." *Id.* § 1B1.1 comment. n.1(H); *see id.* § 1B1.2(a) (defining "offense of conviction" as "the offense conduct charged in the count of the indictment or information of which the defendant was convicted"). The Guidelines' "Relevant Conduct" provision, to be sure, embraces a wider spectrum of acts and omissions than will typically be included in the statutory elements of an offense. Even "relevant conduct," however, is explicitly limited by § 1B1.3 to conduct "that occurred during the commission *of the offense of conviction*, in preparation *for that offense*, or in the course of attempting to avoid detection or responsibility *for that offense*." *Id.* § 1B1.3(a)(1) (emphases added); *see Witte v. United States*, 515 U.S. 389,

402-03 (1995) ("To the extent that the Guidelines aggravate punishment for related conduct outside the elements of the crime . . . , the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment").

The Guidelines elsewhere provide that a court "may consider, without limitation, any information concerning the background, character and conduct of the defendant." U.S.S.G. § 1B1.4 (citing 18 U.S.C. § 3661 (2012)). But this broader inquiry is to take place *after* the calculation, on a narrower basis, of the defendant's Guidelines range itself, for the limited purpose of "determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted." *Id.*; *see also id.* intro. cmt. ("For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure."). Thus conduct that is neither admitted by a defendant in a plea of guilty, nor submitted to a jury and proven beyond a reasonable doubt, may guide judicial discretion in selecting an appropriate sentence, but may not elevate "the starting point and the initial benchmark" for that individualized determination—which is the Guidelines range itself, *Gall v. United States*, 552 U.S. 38, 49 (2007).

B. The Guidelines, While Advisory After *United States v. Booker*, Are Of Binding Legal Effect For Sixth Amendment Purposes

That the original Sentencing Guidelines, belying their name, had "the force and effect of laws" was perceived shortly after their adoption. *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). Justice Scalia had only to point to the mandatory nature of the Guidelines then in effect to conclude that "[a] judge who disregards them will be reversed." *Id.* (citing 18 U.S.C. § 3742(a)(3), (b)(3) (1982, Supp. IV)). He was at that time alone in his belief that this violated the Sixth Amendment, but all members of the *Mistretta* Court agreed that it was

Congress's deliberate choice, in the face of an advisory option, that the Guidelines should be mandatory. 488 U.S. at 367 (majority opinion).

A decade later, in *Apprendi*, the Court would announce a sea change in its understanding of what the Sixth Amendment requires at sentencing. *See* I-B, *supra*, at 8-9. The doctrinal shift was extended to the federal courts in *United States v. Booker*, 543 U.S. 220 (2005), which held that sentencing Guidelines "mandatory and binding on all judges" were incompatible with *Apprendi*, despite provisions that allowed for both upward and downward departures should the sentencing judge "'fin[d] that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.'" *Id.* at 233-34 (quoting 18 U.S.C. § 3553(b)(1) (2000, Supp. IV)). Crucially, the *Booker* opinion rejected the availability of these departures as a "safety valve" for the constitutional problem:

> At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range.

Id. at 234.

This language unmistakably rejects a formalistic argument indistinguishable from that of the government here: that because the § 3553 factors and the availability of departures provide for an individualized determination of the actual sentence imposed in each case, a Guidelines range is not legally "binding" in the same sense as a statutory maximum, and so its calculation based on facts found only by a judge does not violate the Sixth Amendment. As the *Booker* Court recognized, to say that a sentencing judge was "bound only by the statutory maximum" was to ignore the reality that a defendant's Guidelines calculation was by far the most legally

significant component of his sentence, because it was the central basis not only for the term of months or years imposed, but for appellate review of the reasonableness of that sentence. Simply because a district judge prior to *Booker* had initial discretion to depart from the Guidelines on account of aggravating or mitigating circumstances, did not change the fact that a reviewing court would ultimately have to sanction every such departure as "legally permissible," or else vacate it and remand for resentencing in accordance with the Guidelines calculation. In every way that mattered, the legal boundaries of a defendant's sentence were the lower and upper terms of his Guidelines range, and not the statutory minimums and maximums applicable to his crime of conviction.

In its federal sentencing decisions after *Booker*, the Court continued to reject overly formalistic analyses and instead addressed the reality that for all practical (and constitutional) purposes, the Guidelines retain their binding legal effect within the sentencing process even after having been styled "advisory." This was borne out by empirical evidence demonstrating that the circuit courts of appeals operated as if the post-*Booker* Guidelines were discretionary at the upper end of a defendant's range but mandatory at the lower end, thus permitting a district judge to increase punishment beyond what the Guidelines called for, but effectively obliging her to begin her consideration of each sentence at the Guidelines minimum or else suffer reversal in the majority of cases.[3] In *Rita v. United States*, 551 U.S. 338 (2007), the Court attempted to correct this state of affairs by establishing a framework for appellate review according to substantive reasonableness. *Rita* permitted circuit courts of appeals to accord a presumption of

[3] *See* Brief *Amici Curiae* of the Federal Public and Community Defenders and the National Association of Federal Defenders in Support of Petitioners at 8a (Table), *Rita v. United States*, 551 U.S. 338 (2007) (Nos. 06-5618 & 06-5754), 2006 WL 3760844 (showing that in the first two years after *Booker*, 78.3% of downward departures from Guidelines ranges were reversed on the government's appeal, compared to just 3.5% of upward departures reversed on appeal by the defendant).

reasonableness to a district judge's sentence if it fell within the Guidelines range, correctly calculated. *Id.* at 347. At the same time, it forbade appellate courts from presuming that a sentence outside the Guidelines was *un*reasonable, *id.* at 354-55, and it barred sentencing judges from themselves presuming in the first instance that a sentence within the Guidelines would in all cases be reasonable, *id.* at 351.

The significance of *Rita*'s primary holding, though, is in the legal effect it bestowed on the Guidelines range, making it *the* benchmark against which the reasonableness of a sentence actually imposed is determined. After *Rita*, it is impossible to say that two defendants ordered to serve the same term of incarceration for the same offense—one sentenced within a Guidelines range elevated by judicial findings of fact, the other via upward departure from a Guidelines range based only on facts found by a jury—have received identical sentences. This system of reasonableness review treats the Guidelines range itself as a substantive component of the sentence, because it assigns different degrees of appellate deference based solely on adherence to or variance from the Guidelines. As a result, the calculation of a Guidelines range based on facts not proven to a jury increases the legally available punishment affixed to the crime, in violation of the Sixth Amendment. *See Rita*, 551 U.S. at 391 (Souter, J., dissenting) ("Only if sentencing decisions are reviewed according to the same standard of reasonableness whether or not they fall within the Guidelines range will district courts be assured that the entire sentencing range set by statute is available to them. And only then will they stop replicating the unconstitutional system by imposing appeal-proof sentences within the Guidelines ranges determined by facts found by them alone." (internal citation omitted)); *Gall*, 552 U.S. at 60 (Scalia, J., concurring) ("The door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the

advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.")

C. The Rationales Of This Court's Recent Sentencing Decisions Suggest That Acquitted-Conduct Guidelines Sentencing Violates The Sixth Amendment

The *Booker* Court, in correcting the constitutional error identified in *Apprendi* at the federal level, sought a solution "not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." 543 U.S. at 237. The advisory Guidelines system instituted by Justice Breyer's remedial opinion, *see id.* at 244-45, succeeded in that goal, but it did not entirely protect criminal defendants from the abrogation of their jury trial rights. Instead, the lesson of the sentencing cases decided by the Court in recent Terms—in which it has repeatedly and in a variety of contexts reversed criminal sentences based upon judicial "findings" not proven to a jury beyond a reasonable doubt—is that the basic constitutional right that *Apprendi* resuscitated is still in the process of being restored to health. The present case can only be properly understood in light of the Sixth Amendment holdings of the Court in *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and the major Sixth Amendment implications of *Peugh v. United States*, 133 S. Ct. 2072 (2013).

The Court in *Southern Union* was asked to determine whether the jury trial right of an organizational defendant had been abrogated by a criminal fine imposed at sentencing. The verdict form "stated that Southern Union was guilty of unlawfully storing liquid mercury 'on or about September 19, 2002 to October 19, 2004,'" the full time period alleged in the indictment, but was otherwise silent as to the length of the period the company was found to be in violation. 132 S. Ct. at 2349. The length of the period of unlawful storage was relevant to sentencing because the applicable statute imposed "'a fine of not more than $50,000 for each day of

violation.'" *Id.* (quoting 42 U.S.C. § 6928(d) (2012)). The sentencing judge, while assuming that *Apprendi*'s rule forbade her from imposing sentence based on facts not proven to the jury, nevertheless "found that, among other things, the 'clear and essentially irrefutable evidence' at trial supported" a reading of the verdict form to entail the jury's finding of guilt on all of the 762 days charged. *Id.* at 2360. Based on that calculation, which would permit a maximum fine of $38.1 million, she assessed fines totaling $18 million, or just under half the maximum. *Id.* Southern Union maintained that this violated *Apprendi* because "the only violation the jury necessarily found was for one day." *Id.* at 2349.

That the Court agreed with the petitioner in *Southern Union*, vacating the sentence imposed on Sixth Amendment grounds, *id.* at 2352, is itself relevant to the case presently before the Court. More significant, however, is the reasoning that it employed, because it shows continued progression on a jurisprudential path leading inexorably to the conclusion that acquitted-conduct sentencing, too, is constitutionally infirm. *Southern Union* stands for the proposition that the jury's fact-finding role as applied to sentencing is inviolate even where the only judge-found facts are entirely consistent with those necessarily contained in the jury verdict—in fact "irrefutable" in any reasonable view of the evidence presented, in the opinion of the sentencing judge. If, as *Southern Union* holds, the rule of *Apprendi* is violated by judicial findings that are consistent with a jury's verdict, this must be true *a fortiori* of judicial findings like those made by Judge Roberts here, which were in direct conflict with the jury's verdict, and effectively supplanted rather than supplementing it.

Southern Union foreshadowed a significant development in the following Term when it clarified the Court's understanding of what constitutes "the penalty" affixed to a crime for Sixth Amendment purposes. 132 S. Ct. at 2351 ("In stating *Apprendi*'s rule, we have never

distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s].'"). In *Alleyne v. United States*, the Court would finally acknowledge that the phrasing of *Apprendi*'s rule statement—attaching to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," 530 U.S. at 490—did not fully articulate the scope of the Sixth Amendment jury trial right. Without explicitly amending the wording of the rule, Justice Thomas's opinion in *Alleyne* superseded it:

> In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. . . . *Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter *the prescribed range of sentences to which a defendant is exposed* and do so in a manner that aggravates the punishment.

133 S. Ct. at 2158 (citations omitted) (emphasis added).

Alleyne thus establishes that an increase in the *minimum* penalty that might result from a crime, as well as the maximum, may not be accomplished by means of judge-found facts because the minimum too "alters the prescribed range of sentences to which a criminal defendant is exposed." *Id.* at 2160. But the overriding significance of *Alleyne* for this case in particular is its teaching that the "penalty" (or "punishment," or "sentence") affixed to a crime is not one of a finite number of fixed points (months or years of imprisonment) along a continuum. Rather, the penalty is the continuum itself: "[B]ecause the legally prescribed range *is* the penalty affixed to the crime, . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id.* (emphasis in original).

The rationale of *Alleyne*—and by extension, the entire line of post-*Apprendi* cases—in this respect is by no means limited to statutory "floors" and "ceilings." To the extent that the federal sentencing Guidelines themselves retain binding legal effect, the calculation of a

defendant's Guidelines offense level constitutes in part "the legally prescribed range [that] *is* the penalty affixed" to his crime. A district judge might sentence each of five defendants—all convicted of the same federal offense, all within the same Criminal History Category—to terms of 120 months' imprisonment; but if she arrives at 120 months by a different route each time, setting different total offense levels and fixing the term of imprisonment correspondingly higher or lower within (or outside of) the resulting Guidelines ranges, then she has imposed five different sentences. The disparate Guidelines calculations are statutorily-mandated and substantive components of the sentences, not merely procedural exercises, as they will determine the standard of appellate review by which the sentences are evaluated for both procedural and substantive reasonableness. The Court in *Alleyne* did not go so far as to acknowledge that the Guidelines have this quality of legality, but it did discard a recent precedent, *Harris v. United States*, 536 U.S. 545 (2002), simply "[b]ecause there is no basis in principle or logic to distinguish" the Sixth Amendment relevance of a potential sentence increased at its floor from one with a raised ceiling. 133 S. Ct. at 2163. A similar refusal to be bound by distinctions without sound basis in principle or logic, particularly at the expense of the deprivation of liberty of a criminal defendant, should see the Court place acquitted-conduct sentencing within the protection of its post-*Apprendi* doctrine.

Much as the reasoning of *Southern Union* foreshadowed that of *Alleyne*, *Alleyne* itself is closely linked in approach and outcome with a case argued one month after it and decided only one week before, *Peugh v. United States*, 133 S. Ct. 2072 (2013). Surprisingly, the two opinions contain no direct cross-references, but Justice Thomas in *Alleyne* does, in his review of common-law support for the rule there articulated, offer an example of a court "finding [an] *ex post facto* violation where a newly enacted law increased the range of punishment, even though defendant

was sentenced within the range established by the prior law." *Alleyne*, 133 S. Ct. at 2162 (citing *State v. Callahan*, 33 So. 931 (La. 1903)). The explanatory parenthetical serves equally well as a summary of the relevant facts in *Peugh*, where the petitioner, after a jury convicted him of multiple counts of bank fraud, was sentenced to a prison term of 70 months. *Id.* at 2079. This term was well under the statutory maximum of 30 years, *see* 18 U.S.C. § 1344 (2012), and at the bottom of Peugh's calculated Guidelines range of 70 to 87 months, 133 S. Ct. at 2079. His *ex post facto* argument derived from the fact that the bank fraud Guideline under which this range was calculated had taken effect in November 2009, before his May 2010 sentencing but nearly a decade after the crimes for which he was convicted had been completed. *Id.* at 2078.

The Court, in agreeing with the petitioner and vacating his sentence under the *Ex Post Facto* Clause, cited the sentencing rationale of the district judge, who "declined to give Peugh a downward variance, concluding that 'a sentence within the [G]uideline[s] range is the most appropriate sentence in this case.'" *Id.* at 2079. Though no statutory floors or ceilings were increased by the newer, harsher Guidelines, the *Peugh* Court recognized that at least since *Rita*—which pegged substantive sentencing review to the Guidelines and created a presumption of reasonableness on appeal, 552 U.S. at 347—any Guidelines increase was of legal significance, because "the Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it." *Id.* at 2083-84.[4]

[4] While the Court did not cite to specific figures within this data, they do support its point. Confining the inquiry to fraud-type offenses prosecuted, like Peugh's, in the Northern District of Illinois, the average lower bound of Guidelines calculations increased from 17 months (June 1996–April 2003) to 43 months (December 2007–September 2011), and the mean term of incarceration substantially tracked this increase, doubling from 16 months to 32 months. U.S. Sentencing Comm'n, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, Pt. C, p. 73 (Dec. 2012), *available at* http://bit.ly/1DG0Hld.

Proceeding inexorably from that observation was this even more crucial one: "Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*." *Id.* at 2083 (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (emphasis in *Peugh*)). As such, "[t]he Sentencing Guidelines represent the Federal Government's authoritative view of the appropriate sentences for specific crimes," *id.* at 2085, and the Court held that the stiffening of the range of possible sentences satisfied the *ex post facto* test of "whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes,'" *id.* at 2082 (quoting *Garner v. Jones*, 529 U.S. 244, 250 (2000)).

In the very last passage of her opinion for the Court, Justice Sotomayor attempted to cabin the immediate implications of *Peugh* to its specific *Ex Post Facto* Clause context, in the face of the government's contention that "[i]f the Guidelines are binding enough to trigger an *ex post facto* violation, the argument goes, then they must be binding enough to trigger a Sixth Amendment violation as well." *Id.* at 2087. The two inquiries, she maintained,

> are analytically distinct. Our Sixth Amendment cases have focused on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty. Our *ex post facto* cases, in contrast, have focused on whether a change in law creates a "significant risk" of a higher sentence; here, whether a sentence in conformity with the new Guidelines is substantially likely.

Id. at 2088. But the distinction between the defendant who is "legally eligible" for an aggravated sentence and the defendant "at significant risk" of one falls apart when one considers that the *Alleyne* Court simultaneously framed the Sixth Amendment test as whether "'facts [not found by the jury] increase the prescribed range of penalties *to which a criminal defendant is exposed*.'" *Alleyne*, 133 S. Ct. at 2160 (quoting *Apprendi*, 530 U.S. at 490 (emphasis added)). And there is

no historical or textual basis for understanding the *Ex Post Facto* Clause to prohibit placing defendants "at risk" of punishment more broadly than the Sixth Amendment, because the common-law understanding of an *ex post facto* law in the sentencing context was simply a "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798). The Court has since *Calder* "[b]uil[t] on Justice Chase's formulation . . . [and] given it substance by an accretion of case law," *Peugh*, 133 S. Ct. at 2081 (internal quotation marks omitted)—but this is in no way "analytically distinct" from, and in fact precisely parallels, how the Court's understanding of the Sixth Amendment jury trial right has developed, both before and after *Apprendi*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed, and Petitioners' sentences vacated and remanded for resentencing, to be conducted *de novo* by a different district judge. *See* 28 U.S.C. § 2106 (2012); *United States v. Wolff*, 127 F.3d 84, 88 (D.C. Cir. 1997) (reassignment to a different judge is appropriate where "the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind the previously-expressed views or findings determined to be erroneous").

The extraordinary circumstances of this case require one further remedy. Petitioners have been continuously incarcerated for 111 months (Jones) and 119 months (Thurston and Ball), and if resentenced in accordance with the Sixth Amendment, will likely be released immediately, having already served terms far in excess of their Guidelines ranges' upper limits. *See* J.A. 2340 (as of October 2009, Ball's "current incarceration is no longer supported by the

factual findings inherent in the jury's verdict"). Given these circumstances, the Court should exercise its § 2106 power to direct the district court to order Petitioners released on bail pending their resentencings. *See* 18 U.S.C. § 3143(b)(2)(B)(iv) (2012).

March 2, 2015

Respectfully submitted,

Team No. 4
Counsel for Petitioners