Case No. 13-10026

In The

Supreme Court of the United States

OCTOBER TERM, 2014

Joseph Jones, Desmond Thurston,

And Antuwan Ball,

Petitioners,

v.

United States,

Respondent.

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

BRIEF FOR PETITIONERS

TEAM 6

QUESTIONS PRESENTED

1. Does it violate the Sixth Amendment for a federal 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?

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

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STATEMENT OF FACTS

In 2005 Petitioners Joseph Jones, Desmond Thurston, and Antwuan Ball (Petitioners) were charged with conspiracy to distribute crack cocaine. *United States v. Jones*, 744 F.3d 1362, 1365 (D.C. Circ. 2013). Two years later, after a lengthy trial, a jury convicted Petitioners of distributing small amounts of crack cocaine, but acquitted them of conspiring to distribute the drug. *Id.* Defendant Jones' distribution conviction carried a maximum sentence of thirty years imprisonment, Petitioner Thurston's a maximum of twenty years imprisonment, and Petitioner Ball's a maximum of forty years imprisonment. *Id.* at 1365–66. According to the U.S. Sentencing Guidelines (Guidelines), though, the range of Petitioners' sentences for their distribution convictions would have been substantially less. *See Jones*, 744 F.3d at 1368–69.

At sentencing, however, despite the fact that Petitioners' were acquitted of conspiracy to distribute, the District Court nevertheless found by a preponderance of the evidence that Petitioners had in fact conspired to distribute crack cocaine. *Jones*, 744 F.3d at 1365. Based on this finding that the Petitioners engaged in a conspiracy, conduct for which the jury had acquitted them, Petitioners' sentencing ranges were greatly increased under the Guidelines: the Guidelines recommended a sentence of 324 to 405 months for Jones; 262 to 327 months for Thurston; and, 292 to 365 months for Ball. *Id*. at 1365–66. The District Court imposed an actual sentence of 180 months (fifteen years) on Jones, 194 months (approximately sixteen years) on Thurston, and 225 months (approximately nineteen years) on Ball. *Id*. The prison sentences Petitioners' received for their distribution convictions were thus substantially increased.

SUMMARY OF ARGUMENT

Since the seminal case, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court has reiterated that the Sixth Amendment right to a jury trial grants criminal defendants the right to have a jury determine their guilt or innocence as to every element of the crime with which they are charged. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (citing *U.S. v. Gaudin*, 515 U.S. 506, 510 (2000). In the aftermath of *Apprendi* and its progeny it is clear that a court violates a defendant's Sixth Amendment right when, at sentencing, it considers conduct for which the defendant was acquitted. Providing a defendant with a jury trial only to ignore at sentencing a determination the jury validly made constitutes a complete circumvention of the Sixth Amendment.

Furthermore, such conduct at sentencing violates a defendant's Fifth Amendment rights in two ways. Following *Apprendi*, this Court reiterated in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) that the Due Process Clause of the Fifth Amendment, in conjunction with the Sixth Amendment, requires that every fact which constitutes an element of a crime be proved beyond a reasonable doubt. Thus, when considering acquitted conduct under a lesser burden of proof at sentencing, a court not only circumvents the Sixth Amendment, but also denies defendants their Fifth Amendment right to due process of law. Finally, the Double Jeopardy Clause of the Fifth Amendment prevents the Government from relitigating any issue that was previously decided by a jury's verdict. *Yeager v. United States*, 557 U.S. 110 (2009). Therefore, when a sentencing court considers conduct of which a defendant was just acquitted, the Fifth Amendment is again violated as the defendant is twice placed in jeopardy of suffering punishment for the same offense.

ARGUMENT

I. A defendant's Sixth Amendment rights are violated when a court calculates the applicable US Sentencing guidelines range, and significantly increases the sentence based upon its finding that a defendant had engaged in conduct of which the jury had acquitted him?

The Sixth Amendment guarantees, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend VI. Accordingly, this right requires the prosecutor to submit all facts, other than the fact of a prior conviction, to a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000). The jury must then find the fact beyond a reasonable doubt before a judge may use the fact to increase the defendant's sentence. *Id.* Any fact, essential to increasing the minimum sentence range, must meet this requirement. *Ring v. Arizona*, 536 U.S. 584, 609 (2002), *Alleyne v. U.S.*, 133 S. Ct. 2151, 2158 (2013) (clarifying *Apprendi's* requirement extends to facts increasing the minimum or maximum sentence). There is no constitutionally relevant difference between elements of a crime and so-called "sentencing factors," "aggravating factors," or "sentence enhancements." *Ring*, 536 U.S. at 598-601. No matter how the legislature labels the fact, if it will raise the sentence range the defendant may be subject to, it violates the Sixth Amendment, if the jury does not first find the fact beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2158.; *U.S. v. Booker*, 543 U.S. 220, 230 (2005).

Notwithstanding these Sixth Amendment protections, the US Sentencing Guidelines (Guidelines) authorize sentencing judges to consider *any* information concerning the background, character, and conduct of the defendant. The guidelines explicitly state:

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."

U.S.S.G. 1B1.4; *see also* 18 U.S.C.A. § 3661 (2014). Initially, this Court, without the aid of full briefing or oral argument, extended this Guideline rule to allow sentencing courts to consider acquitted conduct, and further to increase sentences based on that conduct when the sentencing judge can find the defendant guilty of the acquitted conduct by a mere preponderance of the evidence. *U.S. v. Watts*, 519 U.S. 148, 149, 155 (1997). Since *Watts*, however, this Court has once again reiterated the important role of the jury in criminal sentencing by overturning numerous state courts' sentencing procedures, which like the Federal Guidelines, allowed judges to increase defendants' sentences based on conduct never brought before a jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000) (overturning New Jersey system allowing sentencing judge to enhance a sentence by finding by a preponderance that defendant motived by race); *Ring v. Arizona*, 536 U.S. 584 (2002) (overturning state sentencing procedure allowing sentencing judge to find aggravating factors and thereby increase defendant's sentence to death penalty); *Blakely v. Washington*, 542 U.S. 296 (2004) (overturning state sentencing procedure allowing judge to increase defendant's sentence based on judicial finding he acted with deliberate cruelty).

After consistently overturning similar state sentencing procedures, this Court once again reviewed the Federal Guidelines. *U.S. v. Booker*, 543 U.S. 220 (2005). The Court, extended *Apprendi's* holding to the Federal Guidelines' requiring the jury find the existence of any particular fact before the fact could be used to increase a defendant's sentence. *Booker*, 543 U.S. at 232. This right, the Court explained, is implicated whenever a judge seeks to impose a sentence that is not solely based on the facts reflected in the jury verdict or admitted by defendant. *Id*. In the second part of *Booker's* joint opinion, the Court however declined to overturn the entire Federal Guidelines scheme, but rather chose to "make the system advisory

while maintaining a strong connection between the sentence imposed and the offenders real conduct." *Id.* at 246.

The result of the dueling opinions issued in *Booker* is that lower courts are still required to consider the Federal Guidelines even though they are now advisory. *Id.* at 247; *Rita v. U.S.*, 551 U.S. 338, 381 (2007)(Scalia, J. dissenting). Lower courts have continued to use facts found by the sentencing judge, but not the jury, to increase sentences. While the Federal Guidelines provide a helpful tool, allowing a judge to consider *any* information, especially acquitted conduct, violates the Sixth Amendment because: (1) it allows a judge to exceed the bounds of his or her constitutionally delegated role, and (2) allows the judge to overpower the jury in determining the sentence.

A. *A defendant is denied his Sixth Amendment right to a jury trial when the judge interferes in the jury's constitutionally delegated role as finder of fact.*

Since deciding *Watts*, the Court has repeatedly undermined its per curiam opinion in *Watts* by reaffirming the Founders intent for the jury and judge to have distinctly different roles. *See Apprendi*, 530 U.S. at 476; *Ring*, 536 U.S. at 607; *Blakely*, 542 U.S. at 305–06; *Booker*, 543 U.S. at 230; *Alleyne*, 133 S. Ct. at 2158. The Founders intended a clear division of power, with the jury acting as a shield or circuit breaker between the judiciary and the accused. *Blakely*, 542 U.S. at 306–07. The Sixth Amendment requires that juries, not judges, find facts essential to the punishment. *Booker*, 543 U.S. at 232, 245 (applying *Apprendi* and *Blakely* to the Federal Sentencing Guidelines). A sentencing judge violates the Sixth Amendment whenever the court exceeds his or her constitutionally delegated role, and relies on judicially found facts to increase a defendant's sentence range. *Apprendi v. N.J.*, 530 U.S. 466, 481 (2000) (judge has discretion to consider factors in imposing a judgment *within the range* prescribed by statute.)(emphasis in original); *Blakely*, 542 U.S. at 303–04 (statutory maximum is sentence judge may impose

without any additional facts)(emphasis in original); *Alleyne*, 133 S. Ct. at 2163 (determining what punishment is available by law and setting a specific punishment *within the bounds of that law* are two different things.)(emphasis added).

The Founding Fathers intended the Sixth Amendment jury guarantee to act as the people's ultimate control in the judiciary, akin to the right to vote in electing the legislature. *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004)(citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981). In support of this proposition, the Federal Farmer stated, "it is essential in every free country, that common people should have a part and a share of influence in the judicial as well as in the legislative department." *Letters from the Federal Farmer* (IV), *reprinted in* 2 *The Complete Anti-Federalist* 249-50 (Herbert J. Sorting ed.1981)). To enable the people to have control over the judiciary, the Founders delegated power between the jury and the judge. *Duncan,* 391 U.S. at 155-56; *Blakely*, 549 U.S. at 306-07. The jury is responsible for making all factual findings, while the judge is limited to determining the sentence based solely on the jury's verdict. *Id.* The jury, not the judge, is therefore the designated fact-finder to determine the truth of every accusation essential to the punishment. *See Blakely*, 542 U.S. at 301-02.

More recently, this Court affirmed the right to a jury trial as "no mere procedural formality, but rather a fundamental reservation of power in our constitutional structure" equally important to the power to vote in controlling the legislative and executive branches. *Blakely*, 549 U.S. at 305-06 (citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storinged, 1981). The jury then, became a shield requiring the state to receive unanimous approval from twelve of the accused's equals and neighbors before the state could deprive him of his liberty. *Blakely* at 313. Allowing juries

power over the judiciary insures protection against unfounded criminal charges, an unresponsive government, corrupt or overzealous prosecutor, or the biased or eccentric judge. *Duncan,* 391 U.S. at 155-56.

In Petitioners' cases, the judge violated Petitioners' Sixth Amendment rights because he infringed on the jury's role as fact-finder. Yes, Petitioners were provided jury trials as required, but these trials were rendered worthless when the sentencing judge ignored the preceding jury verdict by setting aside its acquittal in favor of his own factual findings. *U.S. v. Jones*, 744 F. 3d 1362, 1365 (D.C. Cir. 2014). In each case, the Petitioners were acquitted by a jury of their peers regarding the conspiracy charge. *Id*. Ignoring the jury's reasonable doubt, the judge made his own findings, based on the lower preponderance of the evidence standard, Petitioners had engaged in the conspiracy of which they were charged. *Id*. at 1365–66. Based on this finding, the Court significantly increased the sentence range for each of the Petitioners above what they would have received under the guidelines for the underlying crime for which the jury had convicted them. *Id.* at 1366.

This Court has made clear the Founding Father's intended the jury to act as a shield between the accused and the state. However, this shield provides no defense at all when the judge can simply ignore the jury's findings in favor of his or her own. Not only does this undermine the democratic nature of the jury, it also allows the government a second bite at the apple. When the government fails to convince a jury, it has a second chance, and with a lower standard of proof, to find the defendant guilty. The jury then becomes nothing more than a low-level gatekeeper before the more important sentencing phase. The accused, like the Petitioners in this case, is then at risk of further loss of liberty without the express consent of his peers.

B. *A defendant is denied his Sixth Amendment protections when the judge imposes a sentence that exceeds the range authorized by the facts in the jury verdict.*

As a general rule, when an accused individual is charged with a crime, the prosecutor has a duty to prove each fact that constitutes an element of the crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000); *Blakely v. Washington*, 542 U.S. 296, 313 (2004); *Alleyne v. U.S.*, 133 S. Ct. 2151, 2158 (2013). Accordingly, before the government may deprive the accused of his liberty, the government must "first suffer the modest inconvenience of submitting its accusations to the unanimous suffrage of twelve of his equals and neighbors." *Id.* The judge has no power to sentence, until the jury returns a guilty verdict, or the defendant pleads guilty. *Ring v. Arizona*, 536 U.S. 584, 588 (2002)(a judge's authority derives wholly from the facts contained in the jury's verdict or admitted by the accused); *U.S. v. Booker*, 543 U.S. 220, 232 (2005). Additionally, a judge may not issue a sentence that exceeds the sentence authorized by the facts found by the jury. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2005)(citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000); *Ring*, 536 U.S. at 602.) A judge violates the Sixth Amendment when the judge relies on judicially found facts to increase a punishment beyond the range authorized by the jury. *Id.*, *Alleyne*, 133 S. Ct. at 2158.

Four years after *Apprendi*, the Court was asked to decide what the maximum sentence was in light of *Apprendi's* guarantee that all facts which increase the defendant's sentence must first be proven to a jury. *Blakely*, 542 U.S. at 303–04. A jury had convicted Blakely, under Washington law, of second-degree kidnapping. *Id.* at 299. Washington law classified Blakely's crime as a class-B felony, punishable by up to ten years in prison. *Id*. Washington, however, had enacted a sentencing scheme similar to the Federal Sentencing Guidelines. *Id*. Under the

Washington guidelines, Blakely's offense was punishable within a range of 49–53 months[1] in prison. At sentencing however, the sentencing judge determined Blakely had acted with deliberate cruelty and sentenced Blakely to 90 months in prison.

On appeal, Washington argued Blakely's 90-month sentence did not violate the Sixth Amendment because it was within the ten-year statutory maximum for class B felonies. *Id.* at 303–04. Rejecting this argument, the Court overturned Blakely's sentence because the judge relied on facts, Blakely's alleged deliberate cruelty, to increase the sentence beyond the guideline's sentence authorized in the jury verdict. *Id.* Ultimately, it did not matter that the enhanced sentence was below the 10-year maximum authorized for class-B felonies. *Id.*

Again, just a year ago, in *Alleyne v. U.S*, this Court addressed what facts must be heard by a jury. 133 S. Ct. at 2158. In *Alleyne*, the government charged defendant with multiple federal offenses including armed robbery and using or carrying a firearm in relation to a crime of violence. *Id.* at 2155. Alleyne and his accomplice were convicted by a jury on both counts. *Id.* Based on this conviction, the judge could sentence Alleyne to five years in prison. *Id.* at 2156. At sentencing, however, the government sought to increase Alleyne's sentence, arguing he had also brandished the gun, which increased the mandatory minimum sentence from five to seven years. *Id*. The district court, sitting without a jury, found Alleyne guilty of brandishing a gun and increased Alleyne's sentence to seven years in prison. *Id*.

Reiterating the decisions in *Apprendi* and its progeny, this Court overturned Alleyne's seven-year sentence. *Id*. at 2163–64. The Court held; any fact, which constitutes an element or ingredient of the charged offense, must be presented to the jury and found beyond a reasonable doubt. *Id*. at 2158. *Apprendi*, the Court said, mandates that a fact is an element of the offense, if

[1] Blakely's sentence range was determined as 13-17 months for second-degree kidnapping plus a 36-month firearm enhancement.

it will increase the punishment above what is otherwise prescribed. *Id*. Furthermore, facts that increase either the defendant's minimum or maximum sentence undoubtedly alter the prescribed range of sentences to which the defendant is exposed. *Id*. at 2160. Judge's do not have discretion to issue any sentence, the jury determines what punishment is available, and the judge is free to prescribe a punishment *within the bounds* the jury identified. *Id*. at 2163 (emphasis added). Since Alleyne's mandatory minimum was increased from five-years to seven-years, the facts necessary to authorize that increase must first have been found by a jury of his peers. *Id*. at 2163–64.

Petitioners, like Alleyne and Blakely before them, have had their sentences increased beyond what the jury authorized. *Jones v. U.S.* 44 F.3d 1362, 1365 (D.C. Cir. 2014). Furthermore, the facts justifying the increases constitute elements of separate crimes for which they were charged. *Id.* Here, a jury convicted each of the Petitioners for drug distribution. *Id*. Petitioners also faced conspiracy charges. *Id.* After hearing *all* of the evidence, the jury returned not guilty verdicts for each of the three Petitioners. *Id.*

21 U.S.C. § 841(b)(1)(B)(iii) and (C) authorize sentences for drug distribution up to 40-years. However, like the Washington statutes, not all sentences below 40-years are automatically authorized by the jury. *See Blakely v. Washington*, 542 U.S. 296, 303–04. The Federal Guidelines, like the Washington guidelines at issue in *Blakely*, authorize a sentence range for Petitioners' drug distribution charges well below the maximum sentence authorized by 21 U.S.C. 21 U.S.C. § 841(b)(1)(B)(iii) and (C). While it may be true that the Federal Guidelines are no longer mandatory, as were the Washington Guidelines in *Blakely*, federal courts are still *required* to consider the Guidelines when imposing sentences. *United States v. Booker*, 543 U.S. 220, 247 (2005); *Rita v. U.S.*, 551 U.S. 338, 381 (2007)(Scalia, J. dissenting)(emphasis added). Here, the

sentencing judge did not explicitly state Petitioners' pre-enhancement base guidelines range, but there is no question Petitioner's sentences were substantially increased at sentencing. *Jones v. U.S.* 44 F.3d 1362 (D.C. Cir. 2014), *cert. granted*, (U.S. Oct., 2014) (No. 13-10026). The judge, set aside the jury verdict on the conspiracy charge, finding Petitioners had in fact engaged in a conspiracy to distribute drugs. *Id*. at 1365–66. Relying on this judicially determined fact, the judge "imposed significantly higher sentences than would likely have been imposed upon them in the absence of the sentencing court's reliance upon the "acquitted conduct" in question."[2] *Jones v. U.S.* 44 F.3d 1362 (D.C. Cir. 2014), *cert. granted*, (U.S. Oct., 2014) (No. 13-10026).

Petitioners concede their actual sentences are less than those authorized by 21 U.S.C. § 841(b)(1)(B)(iii) and (C). Nevertheless, there remain the same problems the Court identified in *Alleyene* and *Blakely*. First, Petitioners' sentencing judge relied on facts not found by the jury to substantially increase the range of sentences Petitioners were subject to. Like *Blakely*, the jury verdict authorized a range of sentences under the required Federal Guidelines. The sentencing court, however, relied on the acquitted conspiracy conduct to increase that range by varying upward the range, moving Petitioners' range from between point A and point B to a substantially higher ranges. The maximum sentence under this "enhanced range" for Petitioners Jones and Thurston, actually exceeds the statutory maximum authorized by 21 U.S.C. § 841(b)(1)(B)(iii) and (C). But, from this enhanced range, the sentencing court then varied downward and settled on the sentences of 180 months and 182 months or approximately 15 years, for Jones and Thurston; and 194 months , seventeen and half years, for Ball. This upward variance in the applicable guidelines range is no different from the upward variance that this Court overturned in *Blakely*.

[2] See Sentencing Table included in Appendix 1, which clearly identifies the various sentences to which Petitioners were subjected.

Second, this shift upward in the Guidelines range effectively increases the minimum sentence, similar to what occurred in *Alleyne*. Here, the sentencing judge determined Petitioners' crimes were more serious than what the jury decided. In *Alleyne*, the judge used brandishing to increase, where here, the judge relied on higher quantities of drugs related to the conspiracy. In both cases, the judge felt the crime deserved to be sentenced more severely based on his determination that the underlying crime was more severe. In both cases, the result is the same. The judge increased the punishment above what was otherwise authorized for the convicted crime. Left undisturbed, Petitioners will spend substantially longer in prison than they would have, had the judge not considered the conspiracy conduct.

To be clear, Petitioner's do not challenge *all* judicial discretion in sentencing. Historically, judges have always had discretion to determine the sentence. *Id*. at 2163; *Apprendi v. N.J*., 530 U.S. 466, 481 (2000). But this power is not absolute. *Id*. The judge is only authorized "to impose a sentence *within the range* prescribed by statute." *Id*. Here, the judge exceeded his authority by substantially increasing Petitioners' sentences based on conduct for which the jury acquitted them. Allowing sentencing judges to consider *all* information, especially acquitted conduct, violates Petitioner's Sixth Amendment right because it encroaches on the powers delegated to the jury, allows for consideration of facts specifically rejected by the jury, and allows the judge to issue a sentence not authorized by the jury.

II. Protections afforded a defendant under the Fifth Amendment are violated when, at sentencing, a federal court bases its sentence upon conduct of which the defendant had been acquitted.

The Fifth Amendment to the United States Constitution provides several guarantees to criminal defendants. Two of these guarantees are paramount. First, "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

The Due Process Clause, in tandem with the Sixth Amendment, "requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 133 S.Ct. 2151, 2156 (2013). Second, "[n]o person . . . shall be subject for the same offence be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V. The Double Jeopardy Clause embodies a "deeply ingrained" and "vitally important" interest that the state should not be given multiple attempts to punish an individual for the same offense. *Yeager v. United States*, 557 U.S. 110, 117–18 (2009). Both of these Fifth Amendment protections are effectively circumvented when a sentencing judge considers conduct of which a defendant had been acquitted.

A. *A defendant is denied due process of law when a sentencing judge determines, under a lesser standard of proof, that he engaged in conduct of which he had been acquitted at trial.*

As the United States Supreme Court has affirmatively held, "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *In re Winship*, 397 U.S. 358, 364 (1970). Importantly, "the Due Process Clause protects the accused against conviction except upon proof *beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged*." *Id.* (emphasis added).

As the Supreme Court recently provided in *Alleyne*, 133 S.Ct. at 2156, "the substance and scope of this [due process] right depend[s] upon the proper designation of the facts that are elements of the crime." *Id.* at 2156. That is, "the touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt" is whether that fact constitutes an element of the charged offense. *Id.* at 2158. It has also been historically understood that when a fact considered during sentencing is essential to the punishment it constitutes an element of the offense and therefore must be submitted to a jury. *Id.* at 2158–59 (noting that the "linkage of facts with

particular sentence ranges" reflected the "intimate connection between crime and punishment"). Though there has been some confusion since the advent of the Federal Sentencing Guidelines, the Supreme Court has reiterated the continued validity of this historical understanding as essential to ensuring that due process is provided. *Apprendi v. New Jersey*, 530 U.S. 466, 482–83 (2000). The Court made it clear in *Alleyne*: when a fact increases the sentencing range, that increase "conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2162–63 (holding that facts which increase the mandatory minimum sentence are elements that must be proved beyond a reasonable doubt).

In the case at bar, there is no doubt that the particular facts found by the district court judge at sentencing, facts which indicated Petitioners' engaged in a "common scheme" to distribute drugs, were elements of a distinct crime that was separate and apart from Petitioners' distribution convictions. *United States v. Jones*, 744 F.3d 1362, 1366 (D.C. Circ. 2014). Indeed, as the D.C. Circuit noted throughout its opinion, these judge-found facts were elements of criminal conspiracy. *Id.* Moreover, they were essential to Petitioners' greatly increased punishment. Without the district court judge's finding at sentencing that Petitioners engaged in a conspiracy, the judge would not have significantly increased Petitioners' sentences. *Id.* at 1365 (providing that the district court sentenced Petitioners "to terms of imprisonment ranging from fifteen to nearly nineteen years" and these sentences were "based largely" on the finding that Petitioners' engaged in a conspiracy). Due process, therefore, required that these purported facts be proved beyond reasonable doubt.

Here, Petitioners were provided due process. The facts that allegedly demonstrated Petitioners' engaged in a conspiracy were submitted to a jury, which, having heard all the

evidence at trial, did *not* find beyond a reasonable doubt that Petitioners engaged in the charged conspiracy. *Id*. Despite this acquittal, at sentencing, the district court nevertheless found by a preponderance of the evidence that Petitioners had engaged in the charged conspiracy. *Id*. at 1366. Due process was thus provided to Petitioners at trial, yet ignored by the district court at sentencing. This is troubling. Though many federal courts have maintained that this sentencing practice is justified, the principal concern has yet to be addressed—due process ignored is due process denied.

First, the fact that 18 U.S.C. § 3661 (2014) provides that "[n]o limitation shall be placed on the information . . . a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" does not remedy this denial of due process. Even if this statute was intended to circumvent the requirement that elements of a crime be proved beyond a reasonable doubt, a legislative body cannot circumvent the Due Process Clause when it comes to facts that establish criminal guilt. *See United States v. Booker*, 543 U.S. 220, 230–31 (2005) (reiterating the fact that a legislative characterization of "critical facts" is irrelevant for constitutional purposes) (internal citations omitted). Moreover, though the Court in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) provided that a legislature may define certain facts as "sentencing factors" that a sentencing judge may consider under a lesser burden of proof, a legislature may not "remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Such critical facts must be established beyond a reasonable doubt. *Id.* As the Court has previously emphasized, "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice

in a civil case." *In re Winship*, 397 U.S. 358, 365 (1970) (internal quotations omitted). Thus, though Congress may have intended federal courts to consider whatever information it likes at sentencing, the due process clause requires that the veracity of some information be proved beyond a reasonable doubt.

Second, the fact that Petitioners' punishments fell below the statutory maximum sentence for the crime of distribution does not remedy the district court's troubling circumvention of due process. *See Jones*, 744 F.3d at 1365 (citing 21 U.S.C. § 841(b)(1)(B)(iii), (C) (2014)). Just because a particular sentence may fall within an untailored statutory sentencing range does not mean that the sentence is above constitutional scrutiny. Yes, a judge has broad discretion at sentencing. *Alleyne v. United States*, 133 S.Ct. 2151, 2163 (2013); *see* 18 U.S.C. § 3661 (2014). That discretion, however, is not so broad as to contravene a defendant's constitutional rights. *See United States v. Berry*, 553 F.3d 273, 280 (3rd Circ. 2009) (noting that judicial discretion is not boundless at sentencing and "beyond limitations of fairness and due process"). Primarily, judges cannot consider facts that constitute elements of a crime: "[w]hen a sentencing judge finds facts that could, in themselves, constitute an entirely free-standing offense under the applicable law . . . the Due Process Clause of the Fifth Amendment requires that those facts be proved beyond a reasonable doubt." *U.S. v. Faust*, 456 F.3d 1342, 1352 (11th Circ. 2006) (Barkett, J., specially concurring). As the court noted in *Alleyne*, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense. . . . It is no answer to say that the defendant could have received the same sentence with or without that fact." *Alleyne*, 133 S.Ct. at 2162.

Furthermore, simply pointing out that Petitioners' punishments were within the statutory range for the offense does not remedy the fact that, as a direct result of the district court's

circumvention of due process, Petitioners' punishments were substantially increased. Such a significant increase in the Sentencing Guideline range—an increase involving years of additional prison time—cannot be justified when the increase rests on judge-found facts that involve basic questions of legal culpability. *See United States v. Booker*, 543 U.S. 220, 232 (2005) (the "maximum sentence" under *Apprendi* is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*"). Traditional notions of justice demand that "factual findings by a sentencing judge ought to [reflect] the moral blameworthiness of an *already culpable* defendant." *Faust*, 456 F.3d at 1351–52 (internal quotations omitted). At sentencing, "our criminal justice system deviates from its preference for the highest standard of proof only when it comes to facts that do not—and could not—go to the basic question of legal culpability. . . ." *Id*. at 1352.

In *Rita v. United States*, 551 U.S. 338, 372 (2007), Justice Scalia noted that when a judge "imposes a sentence within an advisory Guidelines range that has been substantially enhanced by certain judge-found facts . . . . those judge-found facts . . . are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the [increased] sentence." He then made a critical point: "there is a fundamental difference, one underpinning our entire *Apprendi* jurisprudence, between facts that must be found in order for a sentence to be lawful, and facts that individual judges choose to make relevant to the exercise of their discretion." *Id*. at 373. He concluded, "[t]he former, but not the latter, must be found by the jury *beyond a reasonable doubt*. . . ." *Id.* (emphasis added).

Here, the increased Sentencing Guideline range under which Petitioners were subject went far above what the Sentencing Guidelines would have otherwise recommended for a baseline distribution conviction. And this increase was no small thing—it had a devastating

impact on the Petitioners. Rather than receive a substantially smaller amount of punishment, Petitioners instead received between fifteen and nineteen years imprisonment. *Jones*, 744 F.3d at 1365–66, 1368–69. That is, Petitioners each received *approximately ten additional years of imprisonment* because, at sentencing, the district court found by a preponderance of the evidence that Petitioners had engaged in the very conspiracy for which they had just been acquitted. *Id.*; *see also* Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 284–87 (2009) (examining two federal cases to demonstrate how considerations of acquitted conduct subjected defendants to the same sentence they would have received had they been convicted of the acquitted conduct, and noting that "[b]ecause of the dramatic impact that consideration of acquitted conduct can have on a defendant's liberty, it is by no means a trivial matter").

Moreover, had the district court's conspiracy finding at sentencing been removed, the recommended Guideline range would have been a "mere fraction of the sentences" Petitioners received. *Id.* There is little question that the judge-found facts that Petitioners' engaged in the acquitted conspiracy was the basis for Petitioners' substantially increased punishments without which the sentence would fail. Due process required, therefore, that the facts underlying this substantially increased punishment be proved beyond a reasonable doubt. Petitioners' due process protections, therefore, were completely undermined when, at sentencing, the district court judge found, under a lesser burden of proof, that Petitioners' committed a criminal act of which they were acquitted, and then used that determination to substantially increase Petitioners' punishment.

B. ***A defendant is twice placed in jeopardy of suffering punishment for the same offense when, at sentencing, a federal court bases its imposition of a significantly higher sentence on conduct of which the defendant had been acquitted***.

The Double Jeopardy Clause of the Fifth Amendment, U.S. CONST. amend V, embodies a "deeply ingrained" principle:

> [T]he State with all its resources and power should *not* be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Yeager v. United States, 557 U.S. 110, 117–18 (2009) (quoting *Green v. United States*, 355 U.S. 184, 187–88 (1957)) (emphasis added). After reaffirming this principle in *Yeager*, the Court reiterated that "the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Id*. at 119 (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)). The Court emphasized that a "jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is 'based upon an egregiously erroneous foundation,' its finality is unassailable." *Id*. at 122–23 (internal citations omitted). It would seem that such language should prohibit a sentencing court from considering conduct of which a defendant was acquitted. However, this is not so.

Twelve years prior to *Yeager*, in *United States v. Watts*, 519 U.S. 148, 157 (1997), the Court held that a "jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id*. at 157. The Court bolstered its holding by simply stating that an "acquittal on criminal charges does not prove that the defendant is innocent; it merely

proves the existence of a reasonable doubt as to his guilt . . . . Without specific jury findings, no one can logically or realistically draw any factual finding inferences. . . ." *Id.* at 155 (internal quotations omitted). *Watts* has subsequently become the opinion to which courts point when defendants, facing increased sentences based on acquitted conduct, raise a double jeopardy challenge (or any constitutional challenge for that matter). *See United States v. Mercado*, 474 F.3d 654, 657 (9th Circ. 2007) (providing list of circuit court decisions that have relied on *Watts* to justify the finding of acquitted conduct at sentencing).

Considering basic constitutional principles, however, it's clear that *Watts* was wrongly decided. After all, there can be little doubt that a defendant is in fact twice place in jeopardy of suffering punishment when a district court considers acquitted conduct at sentencing. *See* Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted conduct at Sentencing*, 76 Tenn. L. Rev. 235, 260 (2009) ("Several district courts and individual judges in the circuits have questioned the continued viability of *Watts*."); *see also United States v. Pimental*, 367 F.Supp.2d 143, 150 (D. Mass. 2005) (providing a now relatively famous and impassioned argument against considerations of acquitted conduct at sentencing: "*Booker* substantially undermines the continued vitality of [*Watts*] . . . . [W]hen a jury acquit[s] a defendant . . . one would have expected no additional criminal punishment to follow"). At the outset, the Court's decision in *Watts* is questionable. In *Booker*, Justice Stevens explicitly noted *Watts*' infirm foundation: "[*Watts*] did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented. . . ." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). The Court's opinion in *Watts*, therefore, did not adequately address the problem.

Furthermore, considering the inherent unfairness with the sentencing practice justified by *Watts* clearly demonstrates its invalidity. Justice Bright of the Eighth Circuit said it best:

> [U]nder the guise of 'judicial discretion,' we have a sentencing regime that allows the Government to try its case not once but twice. The first time before a jury; the second before a judge. Before the jury, the Government must prove its case beyond a reasonable doubt. But if it loses on some counts, that matters little. Free of the Federal Rules of Evidence, most constitutionally-imposed procedures, and the burden of proving any critical facts beyond a reasonable doubt, the Government gets the proverbial 'second bite at the apple' during sentencing to essentially retry those counts on which it lost. With this second chance of success, the Government almost always wins by needing only to prove its (lost) case by a preponderance of the evidence.

United States v. Canania, 532 F.3d 764, 776 (8th Circ. 2007) (Bright, J., concurring). *See also* Ngov, *supra*, at 288 (noting that this second "bite at the apple . . . skews the criminal justice system's power differential too much in the prosecution's favor," and following an acquittal, the "prosecution can perfect its case at sentencing" with the benefits of a lower standard of proof and a new trier of fact (citing Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 351 (1992)).

The above sentencing practice generated by the Court's decision in *Watts* is unconstitutional. *Watts'* holding, already on shaky foundations, is therefore untenable. When a court, at sentencing, can essentially convict a defendant of a crime for which he had just been acquitted, how can it not be said that the defendant was twice placed in jeopardy of punishment? Even though found innocent by the jury, the defendant was nevertheless deemed guilty by the judge.

CONCLUSION

Since *Watts*, the Court has repeatedly found that the Fifth and Sixth Amendment are violated when a sentencing judge relies on criminal conduct that was not found beyond a

reasonable doubt by a jury to increase a defendant's sentencing range. A sentencing judge's reliance on acquitted conduct to substantially increase Petitioners' sentences similarly violates the Fifth and Sixth Amendment. Petitioners therefore respectfully request that this Court overrule *Watts*, prohibit sentencing courts from relying on acquitted conduct as grounds for increasing a sentence, and remand Petitioners' cases to the district court for resentencing.

APPENDIX 1

TABLE OF
PETITIONERS' SENTENCES

Appellant	Statutory Maximum*	Enhanced/Modified Sentence Range	Sentence Received
Jones	30 yrs	324-405 months (27 – 34 yrs)	180 months (15yrs)
Thurston	20 yrs	262 – 327 months (22 – 27 yrs)	194 months (16 yrs)
Ball	5-40 yrs	292 – 365 months (24 – 30 yrs)	225 months (18.75 yrs)

***** *authorized by 21 U.S.C. § 841(b)(1)(B)(iii) and (C).*
** *increased range determined **after** judge considered acquitted facts.*