Team #7

No. 13-10026

In The
Supreme Court of the United States

JOSEPH JONES, DESMOND THURSTON, AND
ANTWUAN BALL,
Petitioners,

V.

UNITED STATES,
Respondent

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

BRIEF FOR PETITIONERS JONES, THURSTON, AND BALL

Team #7
Counsel for Petitioners

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 IMPOSE A MUCH HIGHER SENTENCE THAN THE GUIDELINES WOULD OTHERWISE RECOMMEND, BASED UPON ITS FINDING THAT A DEFENDANT HAD ENGAGED IN CONDUCT OF WHICH THE JURY HAD ACQUITTED HIM?

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STATEMENT OF THE CASE

1. "When 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 and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without the fact." *Alleyne v. United States*, 133 S.Ct. 2151, 2162 (2013).

2. After a 2005 indictment charging a total of eighteen defendants in the United States District Court for the District of Columbia with narcotics and racketeering offenses, eleven charged co-conspirators pled guilty, and one was convicted at trial. *United States v. Jones*, 744 F.3d 1362, 1365 (D.C. Cir. 2014). In February 2007, Petitioners Joseph Jones, Antwuan Ball, and Desmond Thurston were tried together on charges of distribution of cocaine base (crack cocaine), conspiracy to distribute cocaine base, and participation in a racketeer influenced corrupt organization; Jones and Ball were also tried on various violent crime charges. *Id*. at 1365; fn.1. The jury convicted all three defendants of distribution and acquitted them of all other charges. The jury convicted Ball under 21 U.S.C. § 841 (a) (1) and (b) (1) (B) (iii) of one count of distribution of 11.6 grams of crack cocaine, Thurston under 21 U.S.C. § 841(a) (1) and (b)(1)(C) of two counts of distribution of a total of approximately 1.7 grams of crack cocaine, and Jones under 21 U.S.C. § 841 (a) (1) and (b) (1) (C) of two counts of distribution of a total of approximately 1.8 grams of crack cocaine. *United States v. Ball*, 962 F. Supp. 2d 11, 13 (D.D.C. 2013). Taking Petitioners' criminal records into account, Jones, Thurston, and Ball's convictions carried maximum penalties of thirty, twenty, and forty years, respectively. *Jones*, 744 F.3d at 1365.

3. At Petitioners' sentencing, the District Court found by a preponderance of the evidence, despite the jury having acquitted them of the conspiracy charges, that Petitioners' drug crimes were a part of a common scheme to distribute crack cocaine in which Jones could have foreseen sales of over 500 grams of crack by his co-conspirators and Thurston and Ball could have foreseen sales of over 1.5 kilograms. *Jones*, 744 F.3d at 1366. Based on these findings, the District Court determined that the U.S. Sentencing Guidelines recommended a sentence of 324 to 405 months (27 to 33.75 years) for Jones, 262 to 327 months (21.83 to 27.25 years) for Thurston, and 292 to 365 months (24.33 to 30.4 years) for Ball. *Id*. Varying below these ranges calculated based on acquitted conduct, the District Court sentenced Jones to 180 months (15 years), Thurston to 194 months (16.2 years), and Ball to 225 months (18.75 years). *Id*.

4. Petitioners appealed their sentences to the United States Court of Appeals for the District of Columbia Circuit, claiming that their sentences were procedurally and substantively unreasonable and were "unconstitutionally predicated upon acquitted conduct." *Jones*, 744 F.3d at 1365. The D.C. Circuit affirmed the District Court's judgment on March 14, 2014. *Id*. Petitioners then sought writ of certiorari in the Supreme Court of the United States, which the Court denied on October 14, 2014, *Jones v. United States*, 135 S.Ct. 8 (*denying cert. to*) (SCALIA, J., dissenting) (mem.) (2014), and then granted in an order released January 15, 2015. *Jones v. United States*, 135 S.Ct. 9 (*cert. granted*) (mem.) (2014).

SUMMARY OF ARGUMENT

Apprendi v. New Jersey, *United States v. Booker*, and related cases both resolved and created a host of constitutional questions regarding judicially found facts in sentencing. One of the most troublesome remaining issues concerns judges utilizing jury acquitted conduct to enhance a defendant's sentence when that conduct constitutes an element of a crime. There are a number of reasons why this continued practice violates this Court's precedent and constitutional doctrine. First, the practice allows judges to impose sentences that would have been substantively unreasonable but for a judicial finding of acquitted conduct, thus making the legality of such enhanced sentences turn on a judicial fact finding. This relationship between legally allowable punishment and judicial fact-finding violates defendants' Sixth Amendment rights by not having all facts that legally permit greater punishment found by a jury. Second, the murky dividing line between "elements" of crimes and "sentencing factors" creates a situation in which the *Booker* remedy does not solve the constitutional problem associated with the mandatory Sentencing Guidelines. Lastly, allowing the use of acquitted conduct in sentencing enhancements goes against the American legal system's traditional respect for the sanctity of jury verdicts.

In the instant case, Petitioners' sentences must be vacated because they are substantively unreasonable in relation to Petitioners' convicted conduct and because the sentences were unconstitutionally calculated on the basis of acquitted conduct. This brief will prove that sentences that would be substantively unreasonable compared to the convicted conduct on which they were based, which are imposed because of judicially found facts—as is the case here—violate defendants' Sixth Amendment rights.

This brief will then show that under the *Apprendi/Booker* reasoning, using acquitted conduct to enhance a sentence under the Sentencing Guidelines is as unconstitutional as enhancing the sentence through raising the statutory maximum. Finally, the brief will explain why it violates the Fifth and Sixth Amendment to allow a judge to enhance a defendant's sentence based on judicially found, but jury acquitted, facts.

Petitioners Jones, Thurston, and Ball respectfully request that the Court vacate their sentences and remand their case to the District Court for sentencing consistent with their constitutional protections.

I. ALLOWING SENTENCES THAT WOULD BE SUBSTANTIVELY UNREASONABLE BUT FOR A JUDICIAL FINDING OF ACQUITTED CONDUCT VIOLATES A DEFENDANT'S SIXTH AMENDMENT RIGHTS.

Petitioners' Sixth Amendment rights were violated when the District Judge calculated and imposed a far greater sentence than he otherwise would have after finding by a preponderance of the evidence that Petitioners were guilty of a charge of which their Jury had acquitted them. The United States Supreme Court has held that Courts of Appeals must review the "substantive reasonableness" of sentences both within and outside prescribed Guidelines ranges under an "abuse of discretion" standard, and may "take the degree of variance into account and consider the extent of a deviation from the Guidelines," when doing so. *Gall v. United States*, 552 U.S. 38, 47 (2007); *United States v. Booker*, 543 U.S. 220, 261-62 (2005). Substantively unreasonable sentences imposed based on a judicially found fact violate a defendant's Sixth Amendment right under *Booker*: "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id*., 543 U.S. at 244.

Courts of Appeals have pointed to considerable percentage differences between the sentence imposed and that which the defendant would have received but for a judicially found fact to determine that sentences were substantively unreasonable. *See e.g.*, *United States v. Poynter*, 344 F.3d 349, 351 (6th Cir. 2007); *In re Sealed Case*, 527 F.3d 188 (D.C. Cir. 2008). This Court has consistently supported these propositions, holding in *Nelson v. United States* that the District Court had erred in assuming a within-guidelines sentence was reasonable. *Id*., 555 U.S. 350 (2009).

In this case, Petitioners' Guidelines ranges were increased from 27 to 71 months (2.25 to 5.9 years) to ranges averaging 292.67 to 365.67 months (24.38 to 30.47 years) based on the District Judge's finding that they had indeed participated in the conspiracy of which the jury acquitted them. Petitioners ended up with sentences of 180, 194, and 225 months (15, 16.2, and 18.75 years). Under standards set forth in this Court, *see Gall*, 552 U.S. at 47, and interpreted in the Courts of Appeals, petitioners' sentences were substantively unreasonable in relation to their convicted conduct. Because the imposition was predicated upon the District Judge finding that Petitioners had engaged in conduct of which they were acquitted, Petitioners' substantively unreasonable sentences violated their *Booker* rights.

A. Allowing Substantively Unreasonable Sentences Based on Judicially Found Facts Violates a Defendant's Right to Have Any Fact Increasing Legally Prescribed Punishment Found by a Jury Because Substantively Unreasonable Sentences Would be Illegal But For the Judicially Found Facts.

1. Substantively unreasonable sentences, whether or not within the Sentencing Guidelines range, are illegal.

Substantively unreasonable sentences are illegal. *Jones*, 135 S.Ct. 8 (*denying cert. to*) (SCALIA, J., dissenting) (mem.); *Gall*, 552 U.S. at 49-50. In *Booker*, this Court concluded that, "the Courts of Appeals review sentencing decisions for unreasonableness." *Id*., 543 U.S. at 224.

This standard implies that if a Court of Appeals were to find a sentence unreasonable, it would then need to invalidate the sentence. *See Marlowe v. United States*, 555 U.S. 963, (*cert. denied*), (2008) (SCALIA, J., dissenting); *Rita v. United States*, 551 U.S. 338 (2007); *Gall*, 552 U.S. at 49-50; *Booker*, 543 U.S. at 224. For example, in *Nelson*, this Court held that the District Court had erred by presuming that a within-Guidelines sentence for conspiracy and possession of crack was reasonable, and that the Fourth Circuit had erred in affirming the sentence based on reasoning from *Rita*. *Nelson*, 555 U.S. 350, 351-52 (2009). District Courts cannot legally presume that within-Guidelines sentences are substantively reasonable. There is room for appellate courts to determine that a sentence, despite being within the Guidelines range, is substantively unreasonable.

2. Imposing an otherwise illegal sentence on the basis of a judge-found fact is unconstitutional.

a. A sentencing judge cannot increase a sentence beyond the statutory maximum nor increase the mandatory minimum for the crime of conviction based on a judicially found fact.

This Court explained in *Booker* that predicate facts—except for prior convictions—permitting an otherwise impermissible sentence must be found by a jury or admitted by the defendant. *Id*., 543 U.S. at 244. This means that sentencing judge cannot impose a sentence beyond the statutory maximum "authorized by the facts established by a plea of guilty or a jury verdict," *id*., based on a judicially found fact. Under this reasoning, any sentence equal to or under the statutory maximum for the crime of conviction can be based on a judge-found fact without violating the defendant's Sixth Amendment right to a jury trial.

However, this principle has limits. As explained in *Alleyne*, a sentencing judge cannot increase a mandatory minimum based on acquitted conduct. *Id*., 133 S.Ct. at 2153. The fact that the defendant could have received the same sentence without the judicial finding does not

resolve the question. *Id*., 133 S.Ct. at 2162. Sentences based on acquitted conduct that either exceed the statutory maximum or increase the statutory minimum are unconstitutional and illegal. Like substantively unreasonable sentences, sentences that exceed the statutory maximum or increase the statutory minimum are legally impermissible. As explained in *Alleyne*, "because 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*., 133 S.Ct. at 2160 (emphasis in original).

b. If a sentence would be substantively unreasonable without a judicially found fact, the judicially found fact is increasing the penalty to which defendant is *legally* exposed.

Because substantively unreasonable sentences are illegal, it follows that any judicially found fact that exposes a defendant to an otherwise substantively unreasonable sentence increases the penalty to which the defendant is legally exposed; without the factual finding, the sentence imposed would be illegal. A fact necessary to impose what would otherwise be a substantively unreasonable sentence must be found by a jury. So, a defendant's Sixth Amendment rights are violated when a judge calculates the applicable Sentencing Guidelines based on acquitted conduct *and* uses the factual finding as a basis for imposing a sentence that would be substantively unreasonable absent the finding.

C. <u>Significant Percentage Disparities Between the Sentence a Defendant Would Have Received Absent a Judicially Found Fact and the Sentence the Defendant Did Receive After the Finding Demonstrate Substantive Unreasonableness.</u>

Although this Court "dismissed the possibility of Sixth Amendment violations resulting from substantive reasonableness review as hypothetical and not presented by the facts of the case," in *Rita*, 135 S.Ct. 8, (*denying cert.*), (SCALIA, J., dissenting), the time has now come to decide the question. Not only does the instant case provide the exact sort of fact pattern missing

in *Rita*, Courts of Appeals have clarified the standards for substantive unreasonableness. As this Court pointed out in *Gall*, "when conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id*., 552 U.S. at 51.

In *Poynter*, the Sixth Circuit held that the defendant received a substantively unreasonable sentence based on the District Court's finding that he was a "repeat sex offender," despite not being charged with or convicted of this crime. *Id*., 495 F.3d 349, 350 (2007). The court applied a "proportionality principle" based on Guidelines ranges and the need to avoid unwarranted sentencing disparities. *Id*. at 352. The sentencing judge in *Poynter* found facts that increased the defendant's Sentencing Guidelines range from 97-121 months to 188-235 months, and then sentenced him to the statutory maximum of 720 months (60 years). *Id*. at 349-51. The Sixth Circuit held that: "Gauged by this proportionality principle and by our application of it in these cases, this 60-year sentence, a 206% upward variance from the top of the guidelines range, cannot be sustained." *Id*. at 353.

The *Poynter* court described a number of cases in which it had applied the proportionality principle. The Sixth Circuit had previously upheld a 177 percent upward sentencing variance, *United States v. Williams*, 214 Fed. Appx. 552, 556 (2007), and vacated a number of substantial downward variances. *See, e.g., United States v. Davis*, 537 F.3d 611, 616 (2008); *United States v. Borho*, 485 F.3d 904, 916 (2007). In those cases where the court held sentences substantively unreasonable under the proportionality principle, it expressed concern about the relationship between sentence variances and the explanations judges gave for making such variances. The larger the variance, the more comprehensive must be the sentencing court's justification for it under the 18 U.S.C. § 3553 factors. So it is clear that, at least in the Sixth Circuit, substantive

unreasonableness is determined by deciding both whether a sentence variance was justified in scale, and whether the sentencing court adequately explained a sentence's justification.

In the instant case, Petitioners' Guidelines ranges would have been 27 to 71 months without the judge finding they had participated in the conspiracy of which they were acquitted. *Jones*, 744 F.3d at 1368-69. The Judge calculated guidelines much higher and sentenced Petitioners to 180, 194, and 225 months. *Id*. Therefore they were legally exposed to sentences as much as ten times greater than those they would have received absent the judicial finding of conspiracy. If the judge had wanted to, he could have imposed sentences as much as 1,400 percent greater than those justified by Petitioners' convicted conduct under the Guidelines. In fact, Petitioners ended up with sentences between 216 and 733 percent above what their Guidelines would have been absent the judicial finding of acquitted conduct.

Applying the Sixth Circuit's proportionality principle, Petitioners' sentences are substantively unreasonable with regard to the Guidelines range justified by their convicted conduct. Because the Guidelines range calculated by the sentencing court after finding a conspiracy in the instant case would be deemed substantively unreasonable absent the judicially found fact, it follows that the judicially found fact was necessary to increase the punishment to which petitioners could legally be subjected. This violates *Booker*'s command that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id*., 543 U.S. at 244.

Petitioners' convicted conduct—distributing small amounts of cocaine base—did not authorize the Guidelines range to which the sentencing court exposed them. It was necessary for the judge to find that they had participated in a conspiracy in order to justify what would have

otherwise been substantively unreasonable within-Guideline sentences. Finding participation in a conspiracy legally permitted the Judge to impose otherwise substantively unreasonable sentences. As such, that fact being found by the Judge violated petitioners' Sixth Amendment right to trial by jury.

II. THE HISTORY OF USE OF ACQUITTED CONDUCT AND JUDICIALLY FOUND FACTS IN SENTENCING DEMONSTRATES THE COURT'S CONCERN WITH ITS CONSTITUTIONALITY.

Judges may not exceed a defendant's statutory maximum sentence based upon any fact, conduct or charge not proven to a jury beyond a reasonable doubt. *Booker*, 543 U.S. at 244. The *Apprendi* court determined that other than using a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Blakely v. Washington* further clarified this reasoning, holding that "the relevant 'statutory maximum' … is the maximum he may impose without any additional findings." *Id*., 542 U.S. 296, 303-04 (2004). In 2005, the divided *Booker* decision applied *Apprendi* to the then-mandatory U.S. Sentencing Guidelines. The merits majority in *Booker* concluded that the Guidelines infringed on a defendant's Sixth Amendment rights and trivialized the importance of a jury verdict. *Booker*, 543 U.S. at 232.[1] The remedial opinion rendered the Guidelines advisory. Eang L. Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 243 (2009). Judges could still use acquitted conduct in calculating a Guidelines sentence as long as they found the fact by a preponderance of the evidence. *United States v. Waltower*, 643 F.3d 572, 575 (2011).

[1] Though as Judge Fletcher notes in his dissent in *United States v. Mercado,* "In many ways, the consideration of acquitted conduct is a more direct repudiation of the jury verdict than is a sentence that exceeds the statutory maximum." *Id.*, 474 F.3d 654, 664 (9th Cir. 2007).

Although Respondent claims that *Booker* successfully cured any constitutional problem with judges increasing penalty ranges because of judicially found facts, many authorities contest this proposition. For instance, Judge Michael McConnell of the Tenth Circuit noted that "[t]he Booker opinions, taken in tandem, do not get high marks for consistency or coherence. . . . The most striking feature of the Booker decision is that the remedy bears no logical relation to the constitutional violation." Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 677 (2006). Legal scholars criticize the use of judge-found facts on both policy and consistency grounds. *See, e.g.,* Ngov, Peter Erlinder, "*Doing Time…"After The Jury Acquits: Resolving The Post-Booker "Acquitted Conduct" Sentencing Dilemma*, 18 S. CAL. REV. L. & SOCIAL JUSTICE 79 (2008) and Orhun Hakan Yalinçak, *"Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and "Pernicious?""*, 54 SANTA CLARA L. REV. 676 (2014).

III. IT IS A SIXTH AMENDMENT VIOLATION FOR JUDGES TO BE FINDERS OF FACT REGARDING "ELEMENTS OF THE CRIME."

A. Distinctions Between Elements of a Crime and Sentencing Factors are Erroneous; Effect, Not Form, Controls 'Relevant Conduct.'

The Sixth Amendment guarantees a defendant the right to a speedy and public trial by an impartial jury and the right to confront witnesses against him. US Const. amend. VI. Under the Sixth Amendment, any fact that exposes a defendant to a potentially enhanced sentence must be found by a jury beyond a reasonable doubt. *Booker*, 543 U.S. at 244; *Cunningham v. California,* 549 U.S. 270, 281 (2007). A jury must find a fact when the fact either raises the statutory maximum a defendant is exposed to or when the found fact constitutes an element of another crime. Therefore the essential question is what counts as "an element of the crime" versus a mere sentencing factor.

1. Distinguishing between elements of crimes and sentencing factors requires more than a formalistic, statutory approach.

Whether the relevant statute, the prosecution, or the judge labels a fact an element or a sentencing factor is not dispositive of whether or not it has to be subject to a jury determination; *Apprendi* expressly rejects such a formalistic approach. "The relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi,* 530 U.S. at 494. Thus, "when 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 and must be submitted to the jury." *Alleyne*, 133 S.Ct. at 2162. Regardless of what a judicially found fact is called, the effect for the defendant is the same: his sentence is increased. Whether labeled as "enhancement" or "punishment," a longer sentence restricts the defendant's freedom. Erica K. Beutler, "*A Look at the Use of Acquitted Conduct in Sentencing,"* 88 J. CRIM. L. & CRIMINOLOGY 809, 842 (Spring 1998).

In *Ring v. Arizona*, the government argued that because the defendant was convicted of first-degree murder, and Arizona law specified 'death or life imprisonment' as potential sentencing options, the judge could validly find an aggravating factor by a preponderance of the evidence and sentence him to death. *Ring*, 536 U.S. 584, 604-5 (2002). The Court found this argument untenable, because in actual effect, the judicial finding of an aggravated circumstance exposed the defendant to a greater punishment than was authorized by the jury's guilty verdict alone. As the Court ruled, "if Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting." *Id.* at 605. The analysis in *Ring* mirrors the current case: if the Judge had not found that Petitioners were involved in a conspiracy, thereby increasing the amount of cocaine base for which they were held responsible,

their sentences would not have reached the recommended 324 to 405 months. *Ball,* 962 F. Supp. 2d at 18; U.S. SENTENCING GUIDELINES MANUAL §3E1.1 (Nov. 2014).

2. A fact can be an element of the crime even if it does not raise the defendant's statutory sentencing range.

A fact can be an element of a crime even if it does not raise the defendant's potential statutory punishment. "[T]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' of the charged offense." *Alleyne,* 133 S.Ct at 2158. The jury must find beyond a reasonable doubt any fact that is an element of a crime, or another crime itself.

In the instant case, Petitioners were initially charged with conspiracy and possession with intent to distribute; in order to convict on the conspiracy charge, each of its several elements had to have been found beyond a reasonable doubt. 18 U.S.C. § 371. The jury acquitted the defendants of the conspiracy charge. Therefore, for the District Judge to find by a preponderance of the evidence that the defendants were guilty of conspiracy, he necessarily found the elements of conspiracy. Such a finding directly counters *Alleyne*, which mandates that elements of charged offenses be proven beyond a reasonable doubt.

In *Jones v. United States,* 526 U.S. 227, 233 (1999), when justifying why the judge should be allowed to find that the defendant caused "serious bodily injury," the government argued that though the fact raised the penalty range, it required no jury finding. This is because it was not itself "an element of a more serious crime" which would be subject to a defendant's right to a jury's verdict. In this case, conspiracy is not just an element of a more serious crime but is a crime unto itself. Therefore the government's own argument in *Jones* would seem to support the assertion that a judge may not find that the defendants committed another crime, even when ostensibly using it to enhance a sentence for a proven crime.

3. Using an 'effects approach' demonstrates that exposing a defendant to a conviction twice on the same charge is unconstitutional.

Respondent argues that when a defendant's acquitted conduct is considered at sentencing it is not to punish him for a crime for which he was not convicted, but merely to enhance the punishment for the crime he did commit. *United States v. Watts,* 519 U.S. 148, 151, 157 (1997).[2] However, Respondent fails to acknowledge that one reason such a formalistic approach was discredited in *Apprendi* is because a fact may be both an element of a crime and a specific offense characteristic. *See* Benjamin E. Rosenberg, "*Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*," 23 SETON HALL L. REV. 459, 469 (1993). Imagine that a jury acquits a defendant on the possession of a firearm but finds him guilty of possession of drugs. When sentencing the defendant on the drug conviction, the judge reexamines the question of whether the defendant had a firearm, as this is 'relevant conduct' under the Sentencing Guidelines. Whether or not the defendant possessed a firearm as a factual matter is therefore evaluated twice: by the jury, and then, despite acquittal, by the judge. Beutler, at 838. From an effects viewpoint, acquittal is now meaningless as the defendant's punishment is the same as it would have been if the defendant had been convicted of both charges from the start.[3]

B. <u>The Sentencing Guidelines Being Advisory Does Not Cure Their Sixth Amendment Violations.</u>

[2] It is also important to note that while *Watts* has not been formally overruled, it did not address Sixth Amendment concerns but instead solely focused on double jeopardy issues. *See Watts*, 519 U.S. at 154. The Court in *Watts* also did not have full briefing or oral argument before issuing their decision. Ngov, at 240. Lastly, some scholars argue that *Jones,* not *Watts,* is the more relevant pre-*Booker* case to consider when determining the role acquitted conduct should play in sentencing. Erlinder, at 82.

[3] *Booker* also undermines the continued vitality of *Watts*. "It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing." Ngov, at 260.

A judge may choose a sentence outside the Sentencing Guidelines, *Booker*, 543 U.S. at 232, but must still first calculate the Guidelines. The Guidelines range can have an anchoring effect. *Gall*, 552 U.S. at 49. "[T]he Guidelines should be the starting point and the initial benchmark." *Id.* Some critics argue that because the Guidelines are no longer mandatory, a judge may find a fact that enhances a defendant's sentence under the Guidelines without violating the Sixth Amendment. Ngov, at 264. However, although the Guidelines are now advisory, data shows that judges largely still follow them. *Id.* Additionally, the appellate review process of a district court's sentence presumes that any sentence within the calculated Guidelines range is 'reasonable,' which further incentivizes judges to continue to follow the Guidelines. *Gall*, 552 U.S. at 51. As the *Rita* dissent notes:

> "[A] presumption of Guidelines reasonableness would tend to produce Guidelines sentences almost as regularly as mandatory Guidelines had done, with judges finding the facts needed for a sentence in an upper subrange. This would open the door to undermining *Apprendi* itself, and this is what has happened today."[4]
>
> *Id.*, 551 U.S. at 390.

The dissent's observations proved prescient. In 2003, when the Sentencing Guidelines were mandatory, 92.5% of the defendants were sentenced within or above guideline range. Post *Booker,* in 2007-2008, 86.6% of the sentences were within or above the advisory guideline range. Ngov, at 308. This is only a 5.9% decrease in staying within the Guidelines. Fundamentally, the status quo of relying on the guidelines hasn't changed. Yalinçak, at 719.

The second problem with a discretionary approach to the Sentencing Guidelines, per the *Rita* dissent, is that the current appellate review standard incentivizes judges to choose a sentence within the Guidelines range because such a sentence is presumptively reasonable. Without a

[4] *See also United States v. Coleman,* 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005). "The jury is essentially ignored when it disagrees with the prosecution."

strong reason to risk reversal in Circuit Court, a district judge "will find it far easier to make the appropriate findings and sentence within the appropriate Guideline." *Rita*, 551 U.S. at 391. Even though the Guidelines are advisory, miscalculating the applicable sentencing range can be grounds for appeal as a procedural error. *Gall,* 552 U.S. at 51. Besides calculating the Guidelines correctly, a sentence falling outside of the Guideline range must "be supported by a justification that 'is proportional to the extent of the difference between the advisory range and the sentence imposed.'" *Id.* at 45. Therefore, in practice, the Guidelines ranges still play a predominant role in sentencing lengths.

The instant case reflects this reality. The judge first calculated the sentence range per the *Gall* rules, calculating them using his finding that the defendants engaged in a conspiracy. This finding significantly raised their offense level under the Guidelines; for example, Jones's offense level went from two counts of Level 12 to Level 32. U.S. SENTENCING GUIDELINES §2D1.1. Though the Guidelines were not mandatory, they anchored the judge's decision towards the higher end of the permissible statutory range.

C. The Jury is the Centerpiece Of the Criminal Justice System, Protecting a Defendant's Procedural and Substantive Rights.

1. At sentencing a defendant is procedurally at his most vulnerable.

Juries guarantee a federal defendant several procedural and substantive rights that he might not have otherwise. The jury is the traditional bulwark between the State and the defendant. Juries represent the will of the people, not just the will of an individual. *See Apprendi,* 530 U.S. at 477. But during sentencing, there are significantly fewer safeguards in place to protect a defendant's rights. The defendant is not entitled to confront witnesses and the rules of evidence do not apply, which means the judge can consider information not relevant, reliable and fair enough to be considered during the actual trial. Elizabeth T. Lear, "*Is Conviction*

Irrelevant?", 40 UCLA L. REV. 1179, 1203 (1993). As the Sentencing Guidelines state: "In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S. SENTENCING GUIDELINES §6A1.1, p.s.

2. Having a right to a jury protects the defendant from unfair machinations of the state.

The right of a defendant to a trial by jury is one of most fundamental reservations of power the Constitution. A jury determines far "more than actual truth, guilt, or innocence, its decisions represent a popular conception of a 'just verdict.'" *United States v. Pimental,* 367 F. Supp. 2d 143, 150 (D. Mass. 2005). Thus when a jury acquits a defendant, there is a significant amount of legitimacy riding on that verdict. The public treats a jury acquittal as a finding of fact, and expects the defendant to be free from any additional punishment. Nancy Gertner, "*Circumventing Juries, Justice: Lessons from Criminal Trials and Sentencing*", 32 SUFFOLK U. L. REV. 419, 433 (1999). To maintain citizens' faith in the legal system, it is in the Court's interest to not allow a judge's opinion to eclipse the view of the jury. A primary purpose of sentencing, as articulated in 18 U.S.C. § 3553(a), is to promote respect for the law and to provide just punishment for a convicted offense. *Id*. Telling the public that the judge is allowed to find the defendant complicit under a less demanding standard of proof when a jury acquitted him would seem to many as horribly unjust.

Protecting the jury's legal domain from encroachment is of fundamental Constitutional import—the "very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Blakely*, 542 U.S. at 308. The Framers were aware that the threat of judicial despotism was real, and that without the check

of juries, judges could sentence defendants to "arbitrary punishments upon arbitrary convictions." *Booker,* 543 U.S. at 238-9. Therefore, if the jury does not authorize the defendant's sentence via finding them guilty beyond a reasonable doubt, permitting judges to override that finding undermines the public's "control in the judiciary," as required by the Sixth Amendment. *Blakely*, 542 U.S. at 306. As the Fletcher dissent in *Mercado* notes,

> "the jury's ability to insulate defendants from the government—as the Constitution requires—is entirely dependent upon the integrity of its verdict. As the connection between verdict and punishment erodes, the significance of the jury's verdict is correspondingly diminished … Just because the jury has authorized a punishment does not mean that the jury has authorized any punishment."
>
> *Id.,* 474 F.3d at 663.

This is evident through reverse inference in *Oregon v. ICE.* The Court determined that the judge had not constitutionally overstepped his role in by sentencing the defendant consecutively rather than concurrently, partly because the jury has historically played no role in imposing multiple sentences. *Oregon v. ICE,* 555 U.S. 160, 161 (2009). It therefore follows that had the judge encroached on the jury's traditional role, this would have raised constitutional concerns for the court. Having the jury as the finder of fact in a trial is still an important component of a defendant's Sixth Amendment right; efforts should be made to keep the role of judge and jury separate and distinct.

3. Having a right to 'beyond a reasonable doubt' standard protects the defendant from unfair machinations of the state.

The blurring between judge and jury also raises standard of proof concerns. In sentencing, the standard of proof has significantly diminished from the trial standard of beyond a reasonable doubt to a preponderance of the evidence. Ngov, at 236. Respondent argues the preponderance standard at sentencing does not implicate the Sixth Amendment because a jury acquittal does not prove that the defendant is innocent, but rather shows that the jury could not

determine his guilt beyond a reasonable doubt. *See Watts,* 519 U.S., at 155. However, "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the fact finder of his guilt." Allowing a judge to supplant a jury's verdict by finding the acquitted fact by a preponderance of the evidence raises fundamental questions about who is the fact finder in our justice system. 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." Ngov, at 284. Permitting the state to bypass that standard through judicial enhancement eliminates the certitude of jury verdicts and obviates the defendant's Sixth Amendment rights.

IV. USING ACQUITTED CONDUCT RAISES DUE PROCESS AND DOUBLE JEOPARDY CONCERNS ABOUT REDUCTIO AD ABSURDUM RESULTS AND THE PROSECUTION GETTING A SECOND OPPORTUNITY TO SECURE PUNISHMENT FOR THE DEFENDANT.

When a sentencing court bases its sentence upon conduct for which the jury did not convict the defendant, a defendant's Fifth Amendment rights are also implicated. The Fifth Amendment guarantees the defendant will not be subject to "the same offense to be twice put in jeopardy of life or limb… nor be deprived of life, liberty, or property, without due process of law … " U.S. Const. amend. V. Fairness is a central concern of due process. Using acquitted conduct to enhance a sentence raises concerns partly because it is intuitively unfair. Beutler, at 840. As noted in Section III of this brief, the defendant having to face essentially two fact finders on the same issue could be seen as implicitly violating defendant's rights against double jeopardy under the Fifth Amendment, as discussed further below. There are many cases in which a defendant

has to serve the same amount of time regardless of whether the jury had acquitted him of an enhancing charge. That result is patently absurd under *reductio ad absurdum*.[5]

A. It Is Absurd For A Defendant To Serve The Same Amount Of Time Regardless Of Whether Or Not He Was Convicted Of The Second Offense.

Congress passed the Sentencing Reform Act of 1984 with the goal of promoting consistency and uniformity among sentences. It is emphasized that the judge's fact-finding can never increase a sentence beyond the range found by the jury through their conviction. *Rita,* 551 U.S. at 390. When judges use acquitted or uncharged conduct to determine a reasonable sentence, uniformity among defendants' sentences is lost. Not only did judicial fact-finding de-standardize sentences, but it became a tool for a judge who disagreed with a jury finding to circumvent its verdict. "Any time a judge disagreed with the jury's verdict, the judge could 'reconsider' critical elements of the offense to avoid the restrictions of the Guidelines and push the sentence to the maximum in effect punishing the defendant for an offense for which he or she had been acquitted." *United States v. Brady,* 928 F.2d 844, 851 (9th Cir. 1991). This trivializes the jury's role as fact-finder, and decreases the actual and perceived legitimacy of the American judicial system.

One of the worst cautionary tales is the case of *United States v Lombard.* Lombard was charged with murder in the Maine Superior Court and then acquitted. Later, the government indicted, and a separate jury convicted of illegal possession of firearm by a three-time convicted felon. *United States v. Lombard,* 72 F.3d 170, 172 (1st Cir. 1995). At sentencing for illegal possession, the district court found, by a preponderance of the evidence, that Lombard not only

[5] The *Kandirakis* Court explained that in *Blakely* when Justice Scalia, writing for the majority, supported the expansion of *Apprendi,* he noted that if use of acquitted conduct raised sentences to equal that the defendant would have received if found guilty, that would be a case of *reductio ad absurdum*. *United States v. Kandirakis*, 441 F. Supp. 2d 282, 302 (D. Mass. 2006).

possessed the firearm, but also had used it to commit the murders for which he was previously acquitted. *Id.* Consequently, Lombard received a sentence consistent with a murder conviction. Without consideration of the murders, Lombard's sentence would have been between 262-327 months. Instead, the District Court imposed a life sentence. *Id.* Sadly, the result in *Lombard* is typical.[6] As demonstrated, allowing sentencing enhancement using acquitted conduct in such cases is tantamount to permitting a judge to find the defendant guilty for sentencing purposes notwithstanding the verdict of acquittal. Beutler, at 838. It's absurd that a jury's acquittal means nothing in the face of judges using acquitted conduct to determine sentences.

B. It Implicates Due Process and Double Jeopardy For A Defendant To Face The Possibility of Penalty Twice for the Same Conduct.

A second potential issue is that the prosecution effectively gets two tries to convict the defendant, once during trial and once during sentencing. This raises a double jeopardy concern—defendants cannot have "the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Just as a judge should not have the opportunity to countermand a jury's determination, nor should a prosecutor be allowed to effectively have two shots at convincing the court of the defendant's guilt. Having both a judge and a prosecutor able to circumvent a jury's verdict violates a defendant's Fifth Amendment double jeopardy rights.

CONCLUSION

Petitioners' constitutional rights were violated because the sentencing court utilized its own fact finding power to determine that Petitioners were guilty of conduct of which they had been acquitted, and in so doing, imposed an otherwise illegal sentence on Petitioners. Therefore,

[6] *See, e.g. United States v. Juarez-Ortega, United States v. Magallanez, United States v. Duncan, United States v. Coleman,* in which the defendants were acquitted of a charge by the jury, but the judge disagreed with their verdict and thus treated the acquitted conduct as proven by a preponderance of the evidence. They all received sentences far higher than they would have without the judge using the acquitted sentence to calculate their Sentencing Guidelines.

Petitioners respectfully request that this Court vacate their sentences and remand to the District Court for proceeds consistent with their constitutional protections.