No. 13-10026

# In the
# Supreme Court of the United States

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 District of Colombia

**Brief for Petitioner**
Team 9

## QUESTIONS PRESENTED

1. Whether a defendant's constitutional rights are violated when a sentencing court gives a sentence based upon conduct of which they jury had acquitted him?
2. Whether a district court violates the Sixth Amendment when it incorporates acquitted conduct into the calculation of a defendant's Sentencing Guideline range and imposes a much higher sentence than the guidelines would otherwise recommend based upon the same?

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## STATEMENT OF FACTS

In 2005, a grand jury charged Joseph Jones, Desmond Thurston, Antuwan Bell, and fifteen other named coconspirators with narcotics and racketeering offenses arising out of gang-related activities. *United States v. Jones*, 744 F.3d 1362, 1365 (D.C. Cir. 2014). Jones, Thurston, and Bell proceeded to trial in February 2007 on charges including crack cocaine distribution and participation in a crack cocaine distribution conspiracy. *Id.* The jury acquitted petitioners of the conspiracy charge but convicted them of distribution. *Id.*

At petitioners' sentencings however, the district court found by a preponderance of the evidence that petitioner Jones' crimes were part of a larger crack cocaine distribution conspiracy. *Id.* Although petitioners' Guideline range without consideration of the acquitted conduct was between 27 and 71 months, the district court calculated his range as between 324 and 405 months. *Id.* at 1366. Jones was ultimately sentenced to 180 months imprisonment. *Id.* Similarly, Thurston's Guideline range jumped to between 262 and 327 months and Bell's increased to between 292 and 365. *Id.*

On appeal, the United States Court of Appeals District of Columbia Circuit upheld both the district court's unilateral action as well as petitioners' sentence. *Id.* at 1370. While noting that petitioners made a strong contrary argument based on Justice Scalia's concurrence in *Rita v. United States*, 551 U.S. 338 (2007), the appellate court felt constrained by Supreme Court precedent to affirm the sentences. *Jones*, 744 F.3d at 1369.

## SUMMARY OF ARGUMENT

When a judge takes judicial notice of acquitted conduct and sentences a defendant in consideration of the same, she violates that defendant's constitutional rights. First, the defendant's right to a trial by jury is violated because the judge is allowed to inflict punishment based upon her own determination of guilt. Second, the defendant's right to be held liable for a crime only upon a determination of guilt beyond a reasonable doubt is violated because the judge may find facts by a preponderance of the evidence. Finally, the defendant's right to be free from double jeopardy is violated because the government is able to levy its resources against the defendant a second time, despite a jury acquittal. This Court should create a bright-line rule that a judge may not take judicial notice of acquitted conduct, and remand for resentencing.

Under this Court's Sixth Amendment jurisprudence and the system of substantive reasonableness review, "there will inevitably be *some* constitutional violations." *Rita*, 551 U.S. at 374 (Scalia, J., concurring). The Sixth Amendment transgression hypothesized by Justice Scalia in *Rita* occurred in the calculation of petitioners' Guideline ranges and sentences. The district court imposed sentences well above the maximum permitted by the jury's verdict alone—decisions that are "unreasonable" because they infringe upon the Sixth Amendment. Additionally, the district court further violated the spirit of the Sixth Amendment when considering conduct on which the jury returned a verdict of not guilty, thereby eroding both the protections granted defendants by the Constitution and the critical role the jury plays in our criminal justice system.

## ARGUMENT

### I. A JUDGE VIOLATES A DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN SHE CONSIDERS ACQUITTED CONDUCT IN RENDERING A SENTENCE

When a judge disregards a jury's acquittal and imposes a higher sentence than she otherwise would have based on that acquitted conduct, she violates that defendant's constitutional rights. To safeguard the fundamental individual rights guaranteed by our Constitution, this Court should recognize the violation and remand petitioners to the District Court for re-sentencing. In doing so, it would be upholding values that provide the foundation of our common law heritage: the right to trial by jury, the prohibition against double jeopardy, and the right to have every levied criminal charge levied proven beyond a reasonable doubt.

Recent case-law has not only eroded these traditional values but has fully disregarded a defendants rights under our Constitution. One decision that is particularly egregious, *United States v. Watts*, 519 U.S. 148 (1997), grants federal judges the ability to consider acquitted conduct when sentencing. *Watts* and its progeny contravene common law foundations as deep as the Magna Carta and as revered as the Framers' intent to ensure liberty through protection from governmental tyranny. That the Court would consider these foundations anew, despite a contrary and recent trend in its jurisprudence, is not surprising. For an individual to have her sentence increased because of conduct that the jury has acquitted her of "leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and re-evaluated . . . ."[1] *United States v. Baylor*, 97 F.3d 542, 550 (D.C. Cir. 1996). The petitioners recommend that the Court return to this nation's common law roots, reevaluate *Watts*, and mend the jagged scar of sentencing based on acquitted conduct.

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[1] Judge Wald's statement was made in the context of sentencing under the Federal Sentencing Guidelines.

When a judge considers acquitted conduct and imposes a sentence based upon the same, she contravenes (A) the right to a trial by jury and its associated guarantees, (B) the Due Process guarantee that punishment for a crime will only ensue upon a finding of guilt beyond a reasonable doubt, and (C) the constitutional protection against double jeopardy. Contrary to arguments by the government, (D) a rule prohibiting judicial recognition of acquitted conduct is workable and enforceable. This Court should reverse *Watts*, interpret its progeny as applying only to uncharged conduct, announce a bright-line rule that judicial recognition of acquitted conduct is unconstitutional, and remand petitioners for new sentencing hearings.

### A. When a Judge Sentences Based on Acquitted Conduct, She Contravenes the Defendant's Right to a Trial by Jury and its Associated Guarantees

With foundations as deep as the Magna Carta, the right to have a jury make the ultimate determination of guilt has "an impressive pedigree." *See Duncan v. Louisiana*., 391 U.S. 145, 151–154 (1968); *United States v. Gaudin*, 515 U.S. 506, 510 (1995). The right is in place to "guard against a spirit of oppression and tyranny . . . .," *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (citing 2 J. Story, Commentaries on the Constitution of the United States 540–541 (4th ed. 1873)), and to protect the individual's liberty from unjustified government interference. *Singer v. United States*, 380 U.S. 24, 31 (1965). This Court's dedication to preserving this right, *see, e.g.*, *In re Winship*, 397 U.S. 358 (1970), *Apprendi*, 530 U.S. 466, *Blakely v. Washington*, 542 U.S. 296 (2004), *United States v. Booker*, 543 U.S. 220 (2005), affirms that a jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure . . . meant to ensure [the people's] control in the judiciary." *Blakely*, 542 U.S. at 305–06 (citations omitted). The framers were resolute that the right to trial by jury should remain inviolable. *Patton v. United States*, 281 U.S. 276, 297 (1930), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78 (1970).

Allowing a judge to base a defendant's sentence on acquitted conduct permits the judge to override the will of the jury—essentially to re-find facts that have already been rejected by the constitutional trier of fact. For a judge to disregard the jury's finding and unilaterally impose his own verdict only serves to remove the most important barrier between government overreach and the individual. A system in which the government, through the hand of a judge, is allowed to deprive people of their liberty without public accountability is not that envisioned by the Framers—in fact, jury trials were guaranteed in criminal cases even before the enactment of the Sixth Amendment. *See* U.S. Const. art. III, § 2, cl. 3; *Singer*, 380 U.S. at 31. Judicial recognition of acquitted conduct to impose a sentence violates this essential constitutional function.

The government argues that allowing judicial recognition of acquitted conduct does not violate the right to a trial by jury because judges have long had latitude to consider additional facts at sentencing. Indeed, ever since *Williams v. New York*, 337 U.S. 241 (1949), where this Court first affirmed a sentencing judge's ability to consider uncharged conduct and evidence not admitted at trial, the inviolable right of a trial by jury has been under fire. In *Williams*, the defendant was found guilty by a jury of murder in the first degree for killing a fifteen year old girl during a burglary. *Id.* at 242. The jury recommended life imprisonment. *Id.* The judge, however, reviewed the defendant's probation report, criminal history, and other information—which may have included psychiatric, mental, physical, and other evaluations from the probation department. *Id.* at 242–43. The judge also considered the details of the crime, the number of burglaries—about 30—that the defendant had allegedly committed in the same area, and the defendant's "'morbid sexuality.'" *Id.* at 244. The court concluded that the defendant was a "menace to society," and imposed a death sentence contrary to the jury's recommendation. The defendant appealed, arguing that the judge should not have been allowed to consider the

additional conduct. This Court began by noting that the case presented a "serious and difficult question." *Id.* The opinion nevertheless held that a sentencing judge has "wide discretion in the sources and types of evidence used to assist him in determining . . . punishment . . . .," *Id.* at 246, and affirmed both the constitutionality of the practice as well as the death sentence.

While *Williams* does grant judges wide latitude in considering uncharged, un-admitted conduct, it does not allow judges to take judicial notice of acquitted conduct. In fact, *Williams* was not concerned with judges considering acquitted conduct at all; the judge in *Williams* did not consider acquitted conduct that he had observed at trial, nor is there any indication that he considered acquitted conduct on the defendant's criminal history.[2] The supplemental information the judge used was provided by the parole department. Accordingly, *Williams* regarded out-of-court information only. The Court held that when "a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence," *Id.* at 252 (1949), a resulting sentence is constitutionally valid.

If cases like *Williams* put the right to a jury trial under fire, this Court's decision in *United States v. Watts* has placed it under siege. In *Watts*, this Court held, for the first time, that a sentencing judge can consider acquitted conduct when imposing a sentence. *Watts*, 519 U.S. at 157. *Watts* involved the resolution of two cases. In one case, the defendant had been convicted by a jury of possession of cocaine with intent to distribute and acquitted of using a firearm in connection to the offense. *Id.* at 149–150. In the other case, the defendant was convicted of one count of aiding and abetting with intent to distribute cocaine, and acquitted on another count of

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[2] While it is possible that some of the conduct detailed in defendant Williams' criminal history was acquitted conduct, this is not the tone of the opinion: as for the thirty burglaries in the vicinity, "[t]he appellant had not been convicted of these burglaries although the judge had information that he had confessed to some and had been identified as the perpetrator of some of the others." *Williams*, 337 U.S. at 241.

the same. *Id.* at 150. The judges, however, found that the defendants had engaged in the conduct of which they had been acquitted, and imposed higher sentences accordingly. *Id.* at 149–151. In upholding the sentences in *Watts*, this Court incorrectly relied on *Williams* for the proposition that there was no basis for prohibiting certain kinds of evidence at sentencing. *Id.* at 151–52. While it is true that *Williams* stands for the proposition that judges may consider out-of-court facts, even facts that resulted in charges that did not turn into convictions, it does not stand for the idea that judges may consider acquitted conduct.

Additionally, it is essential to point out that the right to trial by jury encompassed other significant constitutional rights. These include the right to confront witnesses, *see, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004), the right to refuse to incriminate oneself, *see, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966), and the right to a public trial. U.S. Cont. amend. VI. When a judge takes notice of acquitted conduct and imposes a higher sentence because of it, a defendant is cheated out of his right to a trial by jury. The right to trial by jury is a right of "surpassing importance" for a multitude of reasons. *Apprendi*, 530 U.S. at 476. This Court's holding in *Watts* is based on an overextension of *Williams*—it should not bar this Court from prohibiting conduct that violates the letter and spirit of the Sixth Amendment.

### B. When a Judge Sentences Based on Acquitted Conduct, She Contravenes the Due Process Guarantee that Punishment for a Crime will only Ensue upon a Finding of Guilt Beyond a Reasonable Doubt

It is a longstanding common law rule that an individual be punished for a crime only upon a finding of guilt that has been subject to a high degree or persuasion. *Winship*, 397 U.S. at 361 (citing C. McCormick, Evidence s 321, pp. 681–682 (1954)). The common law formulation, "beyond a reasonable doubt," dates to the earliest years of our nation. *Id.* Due Process guarantees "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient

proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Allowing judges to punish individuals for crimes that the jury has expressly found to have fallen short of the reasonable doubt standard blatantly contravenes this Due Process right.

The government's argument is that allowing judges to punish individuals for acquitted conduct poses no Due Process problem because a jury verdict of 'not guilty' is not a finding of innocence as to the conduct. The argument goes that as a finding of 'not guilty' is not a finding of 'innocence,' the defendant may very well have committed the charged crime, and therefore a judge should be allowed to consider this conduct and punish a defendant for it. The Court seemed to adopt this interpretation in *Watts* when it stated that it was impossible to know why the jury rejected a finding of guilt. *Watts*, 519 U.S. at 155. While it is true that a jury's finding of 'not guilty' is in some ways ambiguous because it does not indicate what element the government failed to prove, it is pedantic for the government to argue that a finding of 'not guilty' is not a finding of innocence. A finding of 'not guilty' is equivalent to a finding of innocence in essence and spirit, and technically as a matter of strict legal theory. That a finding of 'not guilty' equates to a finding of innocence in a colloquial sense needs no explanation: the fact that a quick Google search of the phrase "not guilty" returns an explanation in its own separate box, "innocent, especially of a formal charge," demonstrates the colloquial meaning. Google, Search phrase: 'not guilty,' google.com (last visited March 8, 2015).

Beyond the common meaning of the term 'not guilty,' an acquittal is equivalent to a finding of innocence in strict legal theory. There are two reasons supporting this assertion. First, a finding of 'not guilty' is a finding of innocence categorically. A common opening in a defense attorney's *voir dire*, directed at the venire after the judge has read the charges, begins: "if you

[the jury] had to go back into the jury deliberation room right now and decide if my client was guilty or innocent, what would you decide?" The incorrect answers are variations of "it depends" or "I'd have to see the evidence." The correct answer, of course, is "not guilty." This is because under our common law framework, a defendant is legally innocent until proven guilty, and juries around the nation are daily told the same. *See, e.g.*, Fifth Circuit District Judges Association Pattern Jury Instructions Committee, *Pattern Jury Instructions, Criminal Cases* 4 (2012), *available at* http://www.lb5.uscourts.gov/juryinstructions/fifth/crim2012.pdf; Eighth Circuit Judicial Committee on Model Criminal Jury Instructions, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* 5 (2014), *available at* http://juryinstructions.ca8.uscourts.gov/Manual_of_Model_Criminal_Jury_Instructions.pdf. Only upon a verdict of 'guilty' does a defendant lose this fundamental legal presumption. Therefore, a defendant adjudicated 'not guilty' is necessarily also innocent. Indeed, assuming that the jury has been properly informed of the law—that a defendant is innocent until proven guilty—those jury members understand that a verdict of 'not guilty' is a verdict of 'innocent.'

Second, a finding of 'not guilty' is, by definition, also a finding of innocence. To be adjudicated 'guilty' transfigures the defendant into a legal state: the state of being criminally liable. Conversely, to be adjudicated 'not guilty' is to affirm the defendant's legal state of innocence. This is because crimes are necessarily legal, not factual, realities. It may be helpful to remember what it means to 'commit' a crime. Setting aside pleas of guilty, a crime is necessarily a combination of a set of elements the legislature determined constitute a criminal action and a determination beyond a reasonable doubt that those condemned behaviors occurred. Crimes, as legal conclusions, only occur upon the concurrence of both. In other words, a crime can fail to come into existence in one of two ways: there is no crime because the legislature has failed to

define its elements, or a criminal action never occurred because no jury found facts satisfying the delineated elements. Therefore, it is erroneous to argue, as the government does, that a person can be guilty of having committed a crime even though acquitted, and that punishment for the same is justifiable.

When a judge punishes an individual for conduct of which he is has been adjudicated 'not guilty' the judge circumvents a defendant's Due Process guarantee to be punished only upon a finding of guilt beyond a reasonable doubt. Far from being justifiable, this practice contravenes the will of the jury and threatens the viability of our criminal justice system as a whole.

### C. When a Judge Sentences Based on Acquitted Conduct, She Contravenes the Constitutional Protection Against Double Jeopardy

The Fifth Amendment to the Federal Constitution states that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Among other things, the guarantee against double jeopardy protects the defendant against prosecution for the same offense after acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989) (citing *Ball v. United States*, 163 U.S. 662 (1896); *Ex parte Nielsen*, 131 U.S. 176 (1889); *Ex parte Lange*, 85 U.S. 163 (1873). When a judge considers acquitted conduct during a sentencing hearing, a defendant's Fifth Amendment right against double jeopardy is violated because the defendant is exposed to prosecution for the same offense twice—once before acquittal, and once after.

The government argues that the sentencing phase of a prosecution is not an independent proceeding and that allowing judicial recognition of acquitted conduct is not in tension with the Fifth Amendment. This is not a principled argument for why judges should be allowed to consider acquitted when sentencing.

A sentencing hearing is unequivocally a distinct proceeding from the trial, where the State marshals its resources against the defendant and places her in jeopardy. Black's Law Dictionary defines "prosecute" as "[t]o institute and pursue a *criminal action* against (a person)." PROSECUTE, Black's Law Dictionary (10th ed. 2014) (emphasis added). It defines "criminal action," in turn, as "[a]n *action* instituted by the government to punish offenses against the public." ACTION, Black's Law Dictionary (10th ed. 2014) (emphasis added). Finally, an "action" is "[a] civil or criminal judicial proceeding." ACTION, Black's Law Dictionary (10th ed. 2014). A sentencing hearing, therefore, is an independent prosecution by definition because when the government initiates a sentencing hearing it "institute[s] and pursue[s] a criminal judicial proceeding" against the defendant. *Id.* In the case of a sentencing hearing following the acquittal of a charge at trial, the defendant suffers double jeopardy if the same conduct is re-prosecuted. In fact, commentators defending the use of acquitted conduct have likened a sentencing hearing to a separate legal proceeding—albeit a civil proceeding due to the preponderance standard. *See* Michele M. Jochner, *Acquitted of the Crime, but Still Doing Time? What Watts Does to Constitutional Protections*, 13 Crim. Just. 18, at 21 (Spring 1998).

To permit a judge to impose punishment based on acquitted conduct is to allow the State two bites at the proverbial apple of prosecution. Despite the failed first hearing—the trial—the defendant finds herself in the position of having to defend against resources levied against her again by the prosecution. This is a violation of the double jeopardy clause.

### D. A Rule Prohibiting Judges from Considering Acquitted Conduct would Protect Defendants' Constitutional Rights

A rule prohibiting judges from considering acquitted conduct would be workable for trial judges, enforceable by appellate courts, and would restore fairness to federal sentencing proceedings. The government argues that a rule prohibiting judges from considering acquitted

would be unworkable, unenforceable, and would not protect constitutional rights. These arguments ignore judges' expertise and training, the capacity of appellate attorneys, and the indirect effect of a rule prohibiting a consideration of acquitted conduct in the context of the courtroom. In fact, a rule that judges take no judicial notice of acquitted conduct would be exactly the opposite: (1) workable, (2) enforceable, and (3) would protect constitutional rights.

**1. A Rule that Judges Take No Judicial Notice of Acquitted Conduct would be Workable for Trial Judges**

The government argues in favor of allowing judges to consider acquitted conduct on the grounds that it is impractical to restrict them from doing so. It argues that in order to have a functional criminal justice system, judges must be able to choose from within a range of punishments, that judges must consider some facts to help distinguish between different defendants' punishments, and that a rule precluding judges from considering acquitted conduct would bar this kind of consideration. This argument underestimates judges' abilities as trained trial arbiters. Judges are trained and regularly do set aside their observations for judicial hearings. They instruct jurors to disregard facts and testimony during jury trials, and they disregard suppressed, irrelevant, prejudicial, and other inadmissible evidence during bench trials. Given judges' ability to set aside their observations for motions, bench trials, evidentiary rulings, and other proceedings, it is strange to argue that judges would be unable to disregard acquitted conduct at the sentencing.

In addition, this argument only applies to cases in which the sentencing judge sat during the trial for the acquitted conduct. In most cases a judge will become aware of acquitted conduct only through a defendant's criminal history—not through having observed the evidence personally. It would not be difficult for judges to set aside consideration of charged but acquitted conduct in the criminal history during sentencing. Also, even if a defendant were charged with

two counts and acquitted on one, it quite often is the case that the judge giving the sentence is different from the judge that presided over the trial.

### 2. A Rule that Judges Take No Judicial Notice of Acquitted Facts would be Enforceable

The government argues that a rule prohibiting reflection of acquitted conduct in the sentence would be unenforceable. The argument is that a judge will consider acquitted conduct when making his sentence even though he knows he may not, give a higher sentence than he otherwise would, and simply not make a record of it. The higher sentence on appeal could not be reversed because the sentence ruling was discretionary. First, this argument assumes a certain measure of bad faith on the part of judges that certainly does not apply to all judges. Second, this argument underestimates adequate representation on appeal. If this Court makes a rule that acquitted conduct cannot influence a sentence, defense attorneys around the nation will begin reviewing sentence hearings—usually not terribly long—to determine if there are any comments made by the judge that can be interpreted as demonstrating recognition of acquitted conduct. Any such comments, in combination with a higher-than-average sentence, would be grounds for a new sentence hearing and could be argued as such by appellate defense counsel. A sentencing record with impermissible consideration of acquitted conduct would be an easy target for defense counsel on appeal to secure a fair and constitutional re-sentencing.

### 3. A Rule that Judges Take No Judicial Notice of Acquitted Facts would Protect Constitutional Rights

The government's arguments that a rule prohibiting judicial recognition of acquitted conduct would be unworkable and unenforceable generally reference an argument that such a rule would not actually protect individuals' constitutional rights. When determining the utility of a rule, however, one must not fixate too closely on appellate enforcement as the marker for its

influence. Not only appellate enforcement, but the threat of appellate enforcement, will prevent judges from considering acquitted conduct at sentencing. Just as some prosecutors with a legitimate belief that a particular minority juror should be peremptorily stricken may feel constrained by the fear of an embarrassing *Batson* challenge, so too many judges will overcompensate when acquitted conduct has come to their attention in order to avoid a sentencing reversal on appeal. In addition, barring judges from considering acquitted conduct will alter defense and prosecution strategies, and the relationship of trial counsel to the court at sentencing. Permitting a judge to consider acquitted conduct allows the prosecution to argue acquitted conduct during sentencing. Any capable prosecutor will take advantage of this opportunity, emphasizing the conduct's demonstration of moral depravity, dangerousness, or tendency to recidivism. Prohibiting consideration of acquitted conduct, on the other hand, will take this arrow out of the prosecutor's quiver. Likewise, any competent defense counsel will not lose an opportunity to remind the judge that any indication consideration of acquitted conduct could be grounds for a re-hearing.

A rule prohibiting judicial recognition of acquitted conduct would be workable and enforceable. It would protect constitutional rights and protections at sentencing because judges would be wary of sentencing in such a way as to suggest an impermissible consideration, and prosecutors would be unable to argue acquitted conduct—either in the defendant's criminal history or conduct evidence for which the judge had personally observed—during the sentencing.

This Court should overrule *Watts* for its mistaken reliance on *Williams*. In its place, it should adopt a bright-line rule that judges may not take judicial notice of acquitted conduct at sentencing, and remand petitioners to the lower court for resentencing. In doing so, this Court

would return to a jurisprudence championing the foundational common law values of trial by jury, the beyond a reasonable doubt standard, and the prohibition of double jeopardy.

## II. A DISTRICT COURT VIOLATES THE SIXTH AMENDMENT WHEN IT INCORPORATES ACQUITTED CONDUCT INTO A DEFENDANT'S SENTENCING GUIDELINE RANGE AND IMPOSES A MUCH HIGHER SENTENCE THAN THE GUIDELINES WOULD OTHERWISE RECOMMEND

Under the Sixth Amendment, it is unconstitutional for a judge to impose, based on unilateral judicial fact-finding, a sentence that exceeds the maximum authorized solely by the jury's verdict. *Apprendi*, 530 U.S. at 476; *see* U.S. Const. amend. VI. While this Court's jurisprudence has protected criminal defendants, the Federal Sentencing Guidelines are currently merely "advisory." *See Booker*, 543 U.S. at 261. Federal sentences must nevertheless be reasonable. *Id.* As it stands, however, "[n]o one knows . . . how advisory Guidelines and 'unreasonableness' review will function in practice." *Id.* at 311 (Scalia, J., dissenting).

In *Rita v. United States*, 551 U.S. 338 (2007), Justice Scalia attempted to provide a framework for "reasonableness" review by positing a hypothetical scenario. *Id.* at 371–72 (Scalia, J., concurring). Although the majority criticized Justice Scalia for his need to rely on hypotheticals to illustrate the possibility of an "unreasonable" within-Guideline range sentences, *see id.* at 353, this hypothetical has come to pass. At petitioners' sentencings, the district court calculated far greater Guideline ranges and imposed far higher sentences than could be supported by the jury's verdict alone. In fact, the judge went further by casting aside the jury's verdict when finding that petitioners had been involved in a conspiracy—a charge they had been specifically acquitted of at trial.

As the Sixth Amendment protects defendants from impermissible judicial fact-finding during sentencing, the court violated petitioners' constitutional rights when taking acquitted conduct into account when calculating their Guideline ranges. Petitioners will demonstrate that

(A) this Court's Sixth Amendment jurisprudence safeguards against the judicial conduct at issue here; (B) judicial fact-finding that increases a defendant's Guideline range and eventual sentence is impermissible as it is substantively unreasonable; and (C) judicial consideration of acquitted conduct in the calculation of a Guideline range flies in the face of the paramount values protected by the Constitution. The *Booker* abuse-of-discretion standard of review should be applied to reverse petitioners' sentences as flagrant violations of the Sixth Amendment. When viewed through the lens of this Court's Sixth Amendment jurisprudence, the district court's use of acquitted conduct violated the Constitution. Petitioners are therefore entitled to new sentencing proceedings and fair sentences that accurately reflect the jury's verdict.

### A. The Supreme Court's Sixth Amendment Jurisprudence: Protecting Defendants From Impermissible Judicial Fact-Finding During Sentencing

Over the past thirty years, this Court's jurisprudence has expanded the Sixth Amendment right to a jury trial into aspects of criminal sentencing. As the Court has noted, "[o]ur 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." *Peugh v. United States*, __U.S.__, 133 S. Ct. 2072, 2088 (2013). While "broad sentencing discretion" does not necessarily violate the Sixth Amendment, *Alleyne v. United States*, __U.S.__, 133 S. Ct. 2151, 2163 (2013), judicial fact-finding may nevertheless result in the imposition of unconstitutional sentences that exceed the maximum permitted solely by the jury's verdict.

#### 1. The Court's Early Cases: Moving Away from Unilateral Judicial Fact-Finding

While the Court has permitted legislatures some discretion in defining their State's criminal code, limitations have steadily been imposed on what could be found by the sentencing judge without input from the jury. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court held that Pennsylvania could constitutionally allow judges to make factual determinations that

raised an applicable mandatory minimum sentence. *Id.* at 91. The Court did however indicate that the result might be different if the enhancement had exposed the defendant to a greater or additional punishment. *Id.* at 88. A challenge was subsequently brought concerning this exact hypothesized scenario—initiating the Court's more recent and protective Sixth Amendment jurisprudence. In *Jones v. United States*, 526 U.S. 227 (1999), the district court had unilaterally determined that Jones had caused serious bodily harm, despite that fact not having been presented to or found by the jury. *Id.* at 231. As the Court noted, a sentencing court could not erode the jury's function to the point where the verdict was merely a moot determination of the basic facts that had no practical effect on punishment. *Id.* at 244. The Court's trajectory was clearly marked—future cases would safeguard a defendant's vital Sixth Amendment rights.

**2. The Court's Sixth Amendment Jurisprudence Protects Against Judicial Usurpations of the Jury's Traditional Function**

Beginning with *Apprendi v. New Jersey*, the Court has sharply limited the role unilateral judicial fact-finding can play when imposing a criminal sentence. In New Jersey, a second-degree offense carried a sentencing range of five to ten years imprisonment. *Apprendi*, 530 U.S. at 470. However, a sentencing judge was, on his own initiative, statutorily permitted to find a "hate crime" enhancement which increased the maximum penalty to twenty years. *Id.* Following a sentencing hearing, the judge sentenced Apprendi to twelve years for the crime with the judicially-found "hate crime" enhancement. *Id.* at 471.

The Court held that, although the "hate crime" factor was labeled as a mere "sentencing enhancement," the New Jersey statute was not allowed to escape constitutional scrutiny. *Id.* at 490. Justice Stevens ruled that, under the Sixth Amendment, "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.* As the statutory maximum, based solely on the plea agreement,

was ten years, the "sentencing enhancement" that permitted the imposition of a twelve year sentence could neither be removed from the purview of the jury nor allowed to be established by a lesser showing than the beyond a reasonable doubt standard. *See id.*

The *Apprendi* Sixth Amendment sentencing protections were next expanded to sentencing guideline ranges in *Blakely v. Washington*. In Washington, Class B felonies carry a maximum penalty of ten years. *Blakely*, 542 U.S. at 299. However, under the Washington sentencing guidelines, a lessened standard range of 49-53 months was calculated when taking into account Blakely's particular case and criminal history. *Id.* at 300. Washington law permitted a judge to impose a sentence beyond the standard range if the court found an aggravating factor. *Id.* at 299. At Blakely's sentencing proceeding, the judge imposed a ninety month sentence after finding that Blakely had acted with "deliberate cruelty." *Id.* at 300.

Under *Blakely*, the "'statutory maximum' for *Apprendi* purposes 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*." *Id.* at 303. In other words, under the Sixth Amendment, the maximum penalty is that which the judge could impose without any additional, judicially-determined findings. As the judge could not have found the "deliberate cruelty" enhancement on the basis of the guilty plea alone, Blakely's Sixth Amendment rights were violated through the imposition of a sentence that exceeded the maximum guideline range. *Id.* at 304.

The Court next applied *Apprendi* and *Blakely* to the Federal Sentencing Guidelines in *Booker*. Booker, after being convicted of possession with intent to distribute fifty grams of cocaine base, had a sentencing range of 210-262 months. *Booker*, 543 U.S. at 227. However, the sentencing judge found by preponderance of the evidence that Booker had possessed an additional 500 grams of cocaine. *Id.* This resulted in new Guideline range of 360 months to life.

*Id.* As the Federal Guidelines were mandatory, the sentencing judge was bound to impose a minimum of thirty years, almost ten years longer that the range supported by the jury verdict. *Id.*

The Court held that "[t]here is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases." *Id.* at 234. Accordingly, the Court reaffirmed the rule from *Apprendi* and *Blakely*: "[a]ny 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.* at 243. *Booker* went on, however, to remedy the Sixth Amendment violation in the federal system. Instead of striking down the entire Guidelines regime, the Court declared the system merely "advisory." *Id.* at 245. As such, federal sentencing courts were directed to consider Guideline ranges when tailoring sentences to the particular defendant. *Id.*

Despite its attempt to remedy the federal system's Sixth Amendment issues, the Court has subsequently reaffirmed the *Apprendi* rule barring judges from fact-finding that increases the maximum penalty beyond what is permitted solely by the jury's verdict. *See Cunningham v. California*, 549 U.S. 270, 281 (2007). In stark contrast to this general rule, *Booker* "necessarily stands for the proposition that it is consistent with the Sixth Amendment for the imposition of an enhanced sentence to be conditioned on a factual finding made by a sentencing judge and not by a jury." *Id.* at 310 (Alito, J., dissenting). *Cunningham*, however, restated the *Apprendi* bright-line rule that a sentencing judge cannot make findings that expose a defendant to a sentence beyond the maximum permitted by the jury's verdict. *Id.* at 281. There is an inherent contradiction between the two cases, as the Court declared a California sentencing scheme unconstitutional that was essentially the same as that prescribed in *Booker*. *See id.* at 311 (Alito, J., dissenting).

### 3. A Reasonable Sentence Under *Booker* Must Comply With this Court's Sixth Amendment Jurisprudence in *Apprendi* and *Blakely*

While crafting a novel remedy for the federal system, *Booker* did not foreclose all Sixth Amendment challenges to federal sentences. Under *Booker*, a sentence may be reviewed under an abuse-of-discretion standard described as "review for 'unreasonable[ness].'" *Booker*, 543 U.S. at 261. The "abuse-of-discretion standard directs appellate courts to evaluate what motivated the district judge's individualized sentencing decision." *Rita*, 551 U.S. at 364 (Stevens, J., concurring). As the Court noted, "[i]n sentencing . . . district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable." *Id.* at 354. While within-Guideline range sentences may be presumptively reasonable, *id.* at 353, the calculation of a defendant's Guideline range has not been granted any such support. The *Booker* standard ultimately results in an appellate court reviewing "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007).

The Court has however not dealt with the intricacies of reasonableness review concerning the calculation of a defendant's Guideline range. Justice Scalia has provided a highly analogous hypothetical to the present case. *Rita*, 551 U.S. at 372 (Scalia, J., concurring). He imagined a scenario where a defendant had an advisory range of 33-41 months but, following a number of judicially-found enhancements, the range catapulted to 235-293 months. *Id.* As Justice Scalia wrote, "[w]hen a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts . . . are not merely facts that the judge finds relevant . . . [but] are the legally essential predicate for his imposition of the 293-month sentence." *Id.* Without the additional findings of fact, a 293-month sentence would "surely be reversed as unreasonably excessive." *Id.* Justice Stevens noted that Justice Scalia's "hypothetical case should be decided if and when it arises." *Id.* at 366 (Stevens, J., concurring).

Underpinning Justice Scalia's argument is the premise that "there is a fundamental difference . . . 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 (Scalia, J., concurring). The former, not the latter, are subject to the rule in *Blakely*. *See id.* Justice Souter was in agreement with this reasoning, writing that "if judicial fact-finding necessary for an enhanced sentencing range were held to be adequate in that face of a defendant's objection, a defendant's right to have a jury standing between himself and the power of the government to curtail his liberty would take on a previously unsuspected modesty." *Id.* at 386 (Souter, J., dissenting). As such, while within-Guideline sentences are generally reasonable, a judge may nevertheless abuse-their-discretion while calculating that range. Accordingly, under *Apprendi*, *Blakely*, and *Booker*, this Court should hold that a federal judge violates the Sixth Amendment when imposing a sentence based on a Guideline range that required the judge to make additional findings of fact that increase the range beyond the maximum permitted by the jury's verdict.

### B. The District Court Imposed Substantively Unreasonable Sentences and Violated Petitioners' Sixth Amendment Rights because the Sentences went Far Beyond the Maximum Permitted by the Jury's Verdict

Petitioners' sentences are substantively unreasonable and therefore violate the Sixth Amendment. Even considering that, post-*Booker*, the federal Sentencing Guidelines are merely advisory, this Court has held that sentences may nevertheless be challenged under a "reasonableness" standard of review. This necessarily implies that sentences may still run afoul of the Sixth Amendment. As petitioners received substantially longer sentences than could have been imposed based solely on the jury's verdict, the sentencing judge abused his discretion.

As an example, without the acquitted conduct Jones' Guideline sentencing range would have been 27-71 months. When considering the acquitted conduct, the Guideline range increased

colossally to 324-405 months. It is true that this Court's "Sixth Amendment cases do not automatically forbid a sentencing court to take account of facts not determined by a jury and to increase the sentence in consequence." *Id.* at 351. However, the judicially-determined increase in Jones' range is unreasonable under *Booker*. *See id.* at 374 (Scalia, J., concurring).

As is evident from Jones' Guideline ranges before and after the judicial fact-finding, the initial Guideline range would neither have countenanced the low end of his eventual range nor his 180 month sentence. In fact, that sentence is more than twice as long as the 71 month maximum. Justice Scalia forecast this exact scenario as a constitutional problem in *Rita*. The Justice hypothesized a scenario where, following judicial fact-finding, a maximum 41 month sentence was transformed into a minimum of 293 months. *Id.* at 372. As Justice Scalia wrote, without those additional judge-found facts, the longer sentence would have been unreasonably excessive under *Booker*. *Id.* Jones finds himself in an identical situation—a 180 month sentence without the judge-made conspiracy finding would be unreasonable considering the maximum advisory range of 71 months. This reasoning also applies to both Thurston and Bell's sentences.

This Court should therefore define "unreasonable" so to include a substantive component that looks at the factors upon which a defendant's Guideline range was based. This is consistent with both *Booker* and this Court's protective Sixth Amendment jurisprudence. Although the Court has previously held that it is permissible for a reviewing court to presumptively assume that within-Guideline range sentences are reasonable, some Sixth Amendment protection must cover the initial calculation of that range. For the "reasonableness" standard of review to have any import, it must take into account the initial calculation of the Guideline range in addition to the eventual sentence. To hold otherwise would be too allow sentences to be presumed reasonable that blatantly contradict the spirit of the *Apprendi* bright-line rule. "Reasonableness"

review must include some Sixth Amendment protection—safeguarding defendants against overzealous judges substituting their own judgment for that of a jury's.

The *Apprendi* rule is centered on concerns of the "tail wagging the dog" or distaste for sentencing enhancements dictating punishment far more than the jury's verdict. *See Apprendi*, 530 U.S. at 495. Justice Souter has spoken to these concerns noting that "in prosecutions under these statutory schemes, the most serious issue in the case might well be not guilt or innocence of the basic offense, but liability to the substantially enhanced penalty." *Rita*, 551 U.S. at 386 (Souter, J., dissenting). This is squarely the case here. Jones' eventual Guideline range, when taking into account the acquitted conduct, was three times more than the maximum allowed based on the jury's verdict. Even though his sentence, 180 months, was far below the minimum advised by Jones' Guideline range, it was still more than twice as much as the maximum without the conspiracy finding. The same reasoning applies to Thurston and Bell. The Court's concerns in its earlier cases are fully implicated here, and should be considered before district courts are allowed unlimited discretion to manipulate Guideline ranges based on conduct found solely by the sentencing judge, without input from the defendant's constitutionally guaranteed jury.

Although *Booker* declared the federal Sentencing Guidelines merely advisory, the potency of that decision has been significantly cast into doubt by *Cunningham*. Although *Cunningham* dealt with the California sentencing scheme, the structure was substantially similar to the post-*Booker* federal system. *See Cunningham*, 549 U.S. at 298 (Alito, J., dissenting). The Court nevertheless declared the California system unconstitutional, reaffirming the *Apprendi* rule in the process. *Id.* at 294. As Justice Alito noted, *Cunningham* is not entirely consistent with the *Booker* remedial decision. *Id.* at 311 (Alito, J., dissenting). The *Apprendi* rule barring sentences that exceed the maximum permitted solely by the jury's verdict should be re-implemented in the

federal system as an element of "reasonableness" review. It should accordingly be an abuse-of-discretion for a sentencing judge to inflate a defendant's Guideline range beyond the maximum authorized by the jury's verdict through his own judicial-fact-finding. This would result in stronger Sixth Amendment protections, starting with the repudiation of the practice that led to petitioners' unconstitutional sentences.

Petitioners' sentences are, in essence, exactly those which were roundly rejected in *Apprendi* and *Blakely* as in violation of the Sixth Amendment. However "advisory" the federal Guidelines may be, a defendant should nevertheless be entitled to some constitutional protections in their calculation. The Guidelines remain highly persuasive to sentencing courts—district judges are in fact commanded to consider the Guideline range when imposing a sentence. *See Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (noting that "[w]hile the products of the Sentencing Commission's labors have been given the modest name "Guidelines," they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed.") (citations omitted). Petitioners' excessive sentences should be declared "unreasonable" under *Booker* as the sentencing judge increased the guideline ranges beyond what was permitted based on the jury's verdict, thereby violating the Sixth Amendment as interpreted by this Court.

### C. The District Court Imposed Substantively Unreasonable Sentences and Violated Petitioners' Sixth Amendment Rights because the Sentences were Based on Acquitted Conduct

Petitioners' sentences violated the Sixth Amendment in another manner—the district court's consideration of acquitted conduct. Although this Court has previously found that a sentencing judge may find, by a preponderance of the evidence, that acquitted conduct indeed occurred, *Watts*, 519 U.S. at 156, such a finding is inappropriate considering the Court's more

recent Sixth Amendment case law. The practice should be further re-examined in the context of "reasonableness" review.

A major concern across this Court's Sixth Amendment jurisprudence has been the "relative diminution of the jury's significance." *Jones*, 526 U.S. at 248. As noted in *Booker*, "[a]s the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed." *Booker*, 543 U.S. at 236. The Court has tasked itself with "the issue of preserving an ancient guarantee under a new set of circumstances." *Id.* at 237. Overall, the Sixth Amendment case law has focused on "the need to preserve Sixth Amendment substance." *Id.*

To allow acquitted conduct to substantially raise both a defendant's Guideline range and subsequent sentence flies in the face of these noble goals. Petitioners' jury returned a not guilty verdict on the conspiracy charges. The sentencing judge, in direct contradiction of the jury's verdict, nevertheless found a conspiracy by a preponderance of the evidence, and factored his finding into petitioners' Guideline range. As the Court noted, safeguarding against any "threat to the jury's domain as a bulwark at trial between the State and the accused" has been amongst the core concerns of its Sixth Amendment jurisprudence. *Oregon v. Ice*, 555 U.S. 160, 169 (2009). What could more erode this noble policy than a decision that, in essence, completely disregards a jury's verdict and imposes punishment as if the defendant had in fact been convicted at trial?

"Unreasonableness" may be judged in reference to the sentencing factors put forth in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 261. A sentencing judge is supposed to consider elements including "the nature and circumstances of the offense" and "to promote respect for the law." 18 U.S.C. § 3553(a)(1), (2)(A). These paramount interests are offended when a judge considers acquitted conduct as that decision essentially disregards a jury's determination of both fact and

law. Further, judges are directed to consider the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). As another defendant found guilty—similar to petitioners—of solely the underlying offense would have had a maximum advisory Guideline range of 71 months, petitioners' Guideline ranges and sentences were clearly well-beyond the norm.

Although technically permitted by *Watts*, to allow a district court judge to consider acquitted conduct when calculating a Guideline range violates the Sixth Amendment as articulated by this Court. What could be more damaging to the right to a jury trial than for a defendant to exercise that right, only to have a judge completely disregard the jury's decision. This goes far beyond the typical *Apprendi* scenario where the jury was not asked to make a determination concerning the sentencing enhancement. Here, the jury was asked—and made a decision to acquit. To allow a sentencing judge to then cast aside that verdict reduces the jury's role to a mere procedural technicality. Simply put, this Court should find that this practice violates the Sixth Amendment as it erodes the value and efficacy of our jury system.

## CONCLUSION

For the above stated reasons, this Court should reverse the judgment of the Court of Appeals for the District of Columbia Circuit and remand for new sentencing proceedings.