October Term 2013

SUPREME COURT OF THE UNITED STATES

No. ___

ANTWUAN BALL, JOSEPH JONES & DESMOND THURSTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Petitioners were convicted by a jury of selling very small quantities of drugs and acquitted of charges that they had conspired to sell a much larger quantity of drugs. Their Guidelines sentencing ranges based on the drug quantities as to which they were convicted were 51-71 months for Ball, 33-41 months for Jones, and 27-33 months for Thurston. However, the trial court concluded -- contrary to the jury's verdict -- that Petitioners were guilty of the conspiracy charges and therefore sentenced them based on the drug quantities that were at issue in those charges. As a result, Ball was sentenced to 225 months, Jones was sentenced to 180 months, and Thurston was sentenced to 194 months. The Government never disputed that but for the district court's reliance on the acquitted conduct, these sentences would not be sustained as reasonable. Although Petitioners argued that the sentences were unconstitutional under the Sixth Amendment "as applied" theory articulated by Justice Scalia (joined by Justice Thomas) in his concurrence in *Rita v. United States*, 551 U.S. 338, 369-74 (2007), both the trial court and the court of appeals below refused to follow that mode of analysis.

The question presented is whether Petitioners' sentences violated their rights under the Sixth Amendment.

List of Parties

Those individuals who appeared in the criminal proceedings brought in the District Court for the District of Columbia by the United States of America are:

Antwuan Ball
David Wilson
Gregory Bell
Burke Johnson
Joe Langley
Gerald Bailey
Jasmine Bell
Raymond Bell
Newett Vincent Ford
Lucious Fowler
Arthur Handon
Marcus Smith
Desmond Thurston
Phillip Wallace
Mary McClendon
Joseph Jones
Dominic Samuels
Daniel Collins

The following parties appeared before the Court of Appeals as *amici curiae* supporting Petitioners: the National Association of Criminal Defense Lawyers, the National Association of Federal Defenders and the American Civil Liberties Union of the Nation's Capital.

The following parties are before the Court: Antwuan Ball, Desmond Thurston and Joseph Jones, Petitioners, and the United States of America, Respondent.

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SUPREME COURT OF THE UNITED STATES

No. ____

ANTWUAN BALL, JOSEPH JONES & DESMOND THURSTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Antwuan Ball, Desmond Thurston and Joseph Jones respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Court of Appeals for the District of Columbia Circuit's opinion (Pet. App. 1a-13a) is reported at 744 F.3d 1362 (D.C. Cir. 2014).

JURISDICTION

The Court of Appeals entered its judgment on March 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides: " In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

INTRODUCTION

This petition asks the Court to confirm that the Sixth Amendment as-applied doctrine of reasonableness review set forth in Justices Scalia concurrence in *Rita v. United States* (joined by Justice Thomas),[1] governs the review of sentences which would be deemed unreasonably lengthy in the absence of judge-made factual findings.

The underlying facts present a paradigm of the constitutional concerns that Justices Scalia and Thomas identified in *Rita*. Petitioners were convicted of selling between 2 and 11 grams of crack cocaine. The Sentencing Guidelines recommended sentences of between 27 to 71 months' imprisonment for their offense. But Petitioners received prison terms of quadruple the high end of their respective Guidelines calculations, based on a judge-made finding that they had engaged in a far-reaching narcotics conspiracy – a charge that the jury had acquitted them of committing. Those judge-found facts were "the legally essential predicate" for Petitioners' sentences, which are the demonstrable outliers meted out for the offense of conviction.[2] Yet the Government never contended and no court ever found

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[1] 551 U.S. 338, 369-374 (2007).

[2] *Rita,* 551 U.S. at 372 (Scalia, J., joined by Thomas, J., concurring).

that those sentences would have been reasonable in the absence of the trial judge's findings.

Although the constitutionality of basing sentences on acquitted conduct has been questioned in general,[3] Petitioners seek certiorari here on a distinct question: does "[t]he door . . . remain[] open" for a defendant to demonstrate that a sentence would not be "upheld but for the existence of a fact found by the sentencing judge and not by the jury[?]"[4]

STATEMENT OF THE CASE

1. Petitioners were indicted for violations of the federal drug conspiracy and distribution statutes (21 U.S.C. §§ 841, 846); RICO conspiracy (18 U.S.C. § 1962(d)), firearms laws (18 U.S.C. § 924(c)), and District of Columbia local offenses. After an eight-month trial, at which the Government presented 106 witnesses, and two weeks of deliberation, a jury acquitted Petitioners of all charges except for distributing "street-level" quantities of crack cocaine.

The Guidelines base offense levels for Ball's conviction for a sale of 11 grams of crack were between 51-71 months; 33-41 months for Jones's conviction for selling 2.0 grams of crack; and 27-33 months for Thurston's selling 1.6 grams

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[3] *E.g., United States v. White,* 551 F.3d 381, 393-394 (6th Cir. 2008) (*en banc*) (Merritt, Martin, Daughtrey, Moore, Cole & Clay, JJ., dissenting); *United States v. Canania,* 532 F.3d 764, 776-77 (8th Cir. 2008) (Bright, J., concurring); *United States v. Mercado,* 474 F.3d 654, 658 (9th Cir. 2007) (B. Fletcher, J., dissenting); *United States v. Baylor*, 97 F.3d 542, 550-51 & n. 2 (D.C. Cir. 1996) (Wald, J., concurring specially); *United States v. Boney,* 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J, dissenting in part); The Constitution Project Sentencing Initiative,"Recommendations for Federal Criminal Sentencing in a Post-Booker World," 18 FED. SENT. REP. 310 (2006).

[4] *Gall v. United States,* 552 U.S. 38, 60 (2007) (Scalia, J., concurring). *See also Marlowe v. United States,* 555 U.S. 963, 968 (2008) (Scalia, J., dissenting from denial of certiorari).

of crack.[5]

2. The Government sought sentences of 480 months for Ball, 324-405 months for Thurston, and 360 months for Jones, largely based on a theory that their "Relevant Conduct" for Guidelines purposes should include participation in the conspiracy charges for which they were acquitted.[6]

When word of that proposal circulated, the jury foreperson wrote the trial judge a letter that was subsequently referred to in several appellate decisions. After stating that "[i]t seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves," the foreperson pointed out: "It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty."[7]

3. Petitioners contended before the district court that the Sixth Amendment prohibited the court from punishing them on the basis of

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[5] Petitioners' Main Brief on Appeal, p. 11, *United States v. Jones, et al.,* (D.C. Cir., filed July 11, 2013).

[6] Government Sentencing Memorandum (Ball) at 46 (Feb. 29, 2008) (District Court Docket #1228); Government Sentencing Memorandum (Thurston) at 28 (Feb. 20, 2008) (Dkt. #1226); Government Reply Sentencing Memorandum (Jones) at 3 (April 29, 2008) (Dkt. #1251).

[7] *United States v. White,* 551 F.3d at 396-97 (Merritt, Martin, Daughtrey, Moore, Cole & Clay, JJ., dissenting) (quoting May 16, 2008 Letter from Juror # 6 to The Honorable Richard W. Roberts). *See also United States v. Canania,* 532 F.3d at 778 n.4 (Bright, J., concurring) (same).

acquitted conduct.[8] Ball and Thurston further urged that the Sixth Amendment as-applied doctrine precluded inflating their base offense levels by incorporating the conspiracy finding that the Government was promoting.[9]

The district court, however, factored the "conspiracy" into Petitioners' sentencing and did not consider the as-applied doctrine. It sentenced Ball and Thurston as if they had conspired to distribute in excess of 1.5 Kilograms of crack and sentenced Jones as if he had conspired to distribute 500 grams of crack.

The Sentencing Commission's data base[10] demonstrates that Petitioners' sentences were four times higher than *anyone* has received in the post-*Booker* era using the 2007-2010 *Guidelines Manual* for selling 2 grams or less of crack (Jones and Thurston) and 10-15 grams of crack (Ball).

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[8] Ball Memorandum in Aid of Sentencing at 14-15, 20 (D.D.C., filed May 1, 2008) (Dkt. #1252); Jones Memorandum in Aid of Sentencing at 14 (D.D.C., filed April 25, 2008) (Dkt. #1225); Thurston's Reply Memorandum in Aid of Sentencing at 1-2 & n.2 (D.D.C., filed March 26, 2008) (Dkt. #1231).

[9] Ball Memorandum in Aid of Sentencing at 16-17 (Dkt. #1252); Thurston Reply Memorandum in Aid of Sentencing at 2 & n.2 (Dkt. #1231).

[10] *See Peugh v. United States*, _ U.S. _, 133 S. Ct. 2072, 2084 (2013) (citing Commission data).

Range for Offense of Conviction[11]	Sentence	Next Highest Sentence[12]
Ball: 51-71 months	225 months	64 months
Thurston: 27-33 months	194 months	51 months
Jones: 33-41 months	180 months	51 months

4. These sentences also drastically exceeded the norm for crack offenders. In Fiscal Year 2011, when Petitioners received such very lengthy sentences after being convicted of relatively minor offenses, the average offender received 104 months' imprisonment; the median was 84 months.[13]

5. Pursuant to 28 U.S.C. §1291, Petitioners timely appealed their sentences to the Court of Appeals for the District of Columbia Circuit. Petitioners, now joined by amici, challenged the constitutionality of sentencing based on acquitted conduct.[14] They also emphasized that under

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[11] Ball Sentencing Memorandum at 14; Thurston Sentencing Memorandum at 2; Jones Presentence Report, at 30, ¶ 131.

[12] Appendix A (App. 14a-16a). This calculation excludes a weapons adjustment and, in Ball's case, a Role in the Offense adjustment. No one contended and the district judge did not find that any petitioner possessed a weapon or recruited or directed a criminally complicit person in the offense(s) of conviction. As to Ball, of the 320 comparator sentences for his single conviction of distribution, only 4 exceeded 60 months; the highest was 64 months. For Thurston, whose sentence was adjusted for the conspiracy only, none of the 65 comparators' sentences exceeded 51 months. Jones's calculations are based on his final Criminal History score of 5; excluding the weapons adjustment none of his 45 comparators' sentences exceeded 51 months.

[13] United States Sentencing Commission, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2011 at 4, 7 (Sept. 2012.

[14] Petitioners' Main Brief on Appeal at 9-45; Petitioners' Reply Brief at 5-15 (D.C. Cir., filed July 11, 2012); Petitioners' Response to Government's Surreply at 4-11 (D.C. Cir., filed Aug. 28, 2013). *Accord* Brief of Amici Curiae at 4-15, 19-21 (D.C. Cir., filed Jan. 16, 2013).

the Sixth Amendment as-applied standard of review, the judge-made conspiracy finding was constitutionally flawed.[15]

Ii is undisputable that without the judge-created conspiracy finding Petitioners' sentences would not have been found reasonable. The Government made no claim otherwise before the Court of Appeals.[16]

Nor did the district court say anything different, although it had additional opportunity to say so. While the case was pending on appeal, Petitioners sought release on conditions and advanced a Sixth Amendment as-applied theory. In denying relief, the trial judge did not state that he would have imposed the same sentences but for his conspiracy finding.[17]

6. The Court of Appeals declined to apply the as-applied doctrine. The panel declared that "[a]lthough we understand why appellants find sentencing based on acquitted conduct unfair," circuit precedent dictated that "'the relevant upper sentencing limit established by the jury's finding of guilt is . . . the *statutory* maximum, not the advisory Guidelines maximum corresponding to the base offense level.'"[18] The circuit court then commented

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[15] Main Brief on Appeal at 45-51; Reply Brief at 19-28; Response to Government's Surreply at 11-12. *Accord* Brief of Amici Curiae at 17-19.

[16] *See* Government Brief in Opposition at 71-72, 91-92 (D.C. Cir., filed July 17, 2013).

[17] *United States v. Ball*, 962 F.Supp.2d 11, 18-21 (D.D.C. 2013).

[18] *See United States v. Jones,* 744 F.3d at _ (slip op. at 9-11) (emphasis original) (citations omitted) (9a-11a).

that "[w]hatever the merits of Justice Scalia's argument, it is not the law."[19] It did not state that Petitioners' sentences would have been substantively reasonable absent the district court's conspiracy findings.[20]

REASONS FOR GRANTING THE PETITION

This case presents a key question under the "*Booker*-ization" of the federal sentencing system: whether defendants retain a Sixth Amendment right to a jury determination of a fact on which a district court relies to impose a sentence that would be "reasonable" under the Sentencing Reform Act and *Booker* only if that fact is true. This is sometimes called an "as-applied" Sixth Amendment argument because it asks whether a sentence would be reasonable as applied to the facts found by the jury.

The Court of Appeals erred in concluding that the as-applied doctrine is not the law. It misunderstood the nature of post-*Booker* reasonableness review.[21] This Court should confirm that reasonableness review means something and that Justices Scalia and Thomas's concurrence in *Rita* accurately stated the law.

I. THE DECISION BELOW IS WRONG.

1. Under determinative-type sentencing schemes, the Sixth Amendment demands that any fact (other than a prior conviction) that increases the "prescribed range of penalties to which a criminal defendant is

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[19] *See id.,* 744 F.3d at _ (slip op. at 10-11) (10a-11a) (citing *Rita v. United States,* 551 U.S. at 375 (Scalia, J., joined by Thomas, J., concurring).

[20] *Jones,* 744 F.3d at _ (slip op. at 9-11) (10a-11a).

[21] *United States v. Booker*, 543 U.S. 244 (2005).

exposed" must be treated as an element to be found by the jury or admitted by the defense.[22] "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives –whether the statute calls them elements of the offense, sentencing factors or Mary Jane – must be found by the jury beyond a reasonable doubt."[23]

In the first of two decisions issued in *United States v. Booker*, the Court declared the federal sentencing guidelines, which had required the selection of particular sentences in response to differing sets of facts, to be an unconstitutional usurpation of the jury's fact-finding function.[24] In the second, "Remedial" opinion, the Court resolved the guidelines' Sixth Amendment infirmity by making them "effectively advisory."[25] In addition, the Court established a standard of "review for unreasonable[ness]."[26] This paradigm contemplates that the Sentencing Commission will "continue to

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[22] *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000) (internal quotation marks omitted). *See also Southern Union Co. v. United States,* 132 S. Ct. 2344, 2348 (2012) ("[t]he Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence."); *Cunningham v. California,* 549 U.S. 270, 275 (2007); *Ring v. Arizona,* 536 U.S. 584, 588-89 (2002); *Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("*Apprendi* carries out th[e] [constitutional] design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict;" *id*. at 303 ("Our precedents make clear . . . that 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.").

[23] *Ring,* 536 U.S. at 610 (Scalia, J., concurring).

[24] *United States v. Booker,* 543 U.S. 220, 233 (2005).

[25] *Id.,* 543 U.S. at 245.

[26] *Id.,* 543 U.S. at 261.

modify its Guidelines" and "encourag[e] what it finds to be better sentencing practices" and "thereby promote uniformity in the sentencing process."[27] The circuit courts of appeal, in turn, are expected to review district judges' sentencing decisions in a manner directed at "iron[ing] out sentencing differences."[28]

2. Subsequently, Justices Scalia and Thomas observed in *Rita* that Sixth Amendment issues will arise when a sentence is reasonable "only because [of] additional judge-found facts" – "aggravating facts, not found by the jury, that distinguish the case from the mine run . . . ."[29] Absent constraints, there will "inevitably be some constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts."[30]

To illustrate their point, Justices Scalia and Thomas referred to "the common case in which the district court imposes a sentence within an advisory Guidelines range that has been substantially enhanced by certain judge-found facts." If a defendant with a criminal history of I were to be convicted of robbery, the Guidelines range would be 33 to 41 months. If,

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27 *Booker,* 543 U.S. at 263.

28 *See id*. In *Gall v. United States*, the Court subsequently described appellate reasonableness review of sentencing decisions as governed by the "familiar abuse-of-discretion standard . . . ." 552 U.S. at 46.

29 *Rita,* 551 U.S. at 369-70 (Scalia, J., joined by Thomas, J., concurring).

30 *See id.,* 551 U.S. at 374.

however, the district court found that the defendant discharged a firearm, inflicted serious bodily injury upon a victim, and stole more than $ 5 million, the Guidelines range skyrockets to 235 to 293 months.[31] They then reasoned:

> [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, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find none of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.[32]

The *Rita* majority did not dispute that analysis but responded that the scenario was "not presented by [that particular] case."[33] But the majority was not all of one mind, for Justice Stevens, joined by Justice Ginsburg, wrote separately to state that an as-applied challenge should be "decided if and when [a non-hypothetical] case arises . . . ."[34]

3. While no appellate court has endorsed the as-applied doctrine,[35] a body of dissenting and concurring opinions, supported by scholarly research, has urged its recognition. This is exemplified most clearly by dissents issued

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[31] *Rita,* 551 U.S. at 371-72 (Scalia, J., joined by Thomas, J., concurring).

[32] *Id.,* 551 U.S. at 372.

[33] *See id.,* 551 U.S. at 353 (majority).

[34] *Id.,* 551 U.S. at 365-66 (Stevens, J., joined by Ginsburg, J., concurring).

[35] *See Jones,* 744 F.3d at _ (slip op. at 11) (11a) (citing *United States v. Norman*, 465 F. App'x 110, 120-21 (3rd Cir. 2012) (collecting cases).

in several circuit opinions that questioned decisions that had declined to follow Justices Scalia and Thomas's analysis in *Rita.* For example, five judges dissenting in the *en banc* Sixth Circuit opinion in *United States v. Vonner* recommended adopting the as-applied doctrine because "because of the potential for a violation of the Sixth Amendment in extreme cases . . . . "[36] Four judges dissenting in the *en banc* Eighth Circuit decision in *United States v. Burns* agreed that that some sentences which would be "upheld only on the basis of additional judge-found facts" would violate the Sixth Amendment.[37] And the Chief Judge of the Second Circuit, dissenting from the panel decision in *United States v. Broxmeyer,* wrote that these situations present "vexing constitutional questions."[38]

Those federal courts of appeals which declined to accept the as-applied doctrine of Sixth Amendment reasonableness review have eschewed tackling its underlying reasoning. For instance, the Ninth Circuit and the Fourth

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[36] 516 F.3d 382, 411-12 (6th Cir. 2008) (*en banc*) (Moore, Martin, Daughtrey, Cole, & Clay, JJ., dissenting) *See also United States v. Phinazee*, 515 F.3d 511, 527 (6th Cir. 2008) (Merritt, J., dissenting) ("as-applied Sixth Amendment challenges . . . are still available"); *United States v. Conatser,* 514 F.3d 508, 530-31 (6th Cir. 2008) (Moore, J., concurring in part) (recognizing as-applied doctrine but finding sentence reasonable without judge-made findings).

[37] 577 F.3d 887, 902 (8th Cir. 2009) (*en banc*) (Colloton, Loren, Riley, & Gruender, JJ, dissenting).

[38] 699 F.3d 265, 302 (2nd Cir. 2011) (Jacobs, C.J., dissenting). *See also* Robert Allen Semones, *A Parade of Horribles: Uncharged Relevant Conduct, the Federal Prosecutorial Loophole, Tails Wagging Dogs in Federal Sentencing Law,* 46 U.C. DAVIS L. REV. 313, 344 & n. 198 (2012); Steven F. Hubachek, *The Undiscovered Apprendi Revolution: The Sixth Amendment Consequences of an Ascendant Parsimony Provision*, 33 AM. J. TRIAL ADVOC. 521, 527-32 (2010); David C. Holman, *Death by a Thousand Cases: After* Booker, Rita, and Gall*, the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 288-289 (2008) (agreeing with Justice Scalia's conclusion in *Rita*).

Circuits held that as-applied claims are "'too creative for the law as it stands'" yet failed to explain why that might be.[39] Likewise the Seventh Circuit held that "[w]hile [the as-applied Sixth Amendment] argument is not without its advocates, it is not the law."[40] But like its counterparts, that court did not explain *why* Justices Scalia and Thomas's reasoning might be unsound.

3. In fact, Justices Scalia and Thomas's *Rita* concurrence is consistent with constitutional principles, whereas the Court of Appeals erred in clinging to the belief that a sentence that does not surpass the outer statutory ceiling is immune from Sixth Amendment scrutiny. The maximum reasonable sentence under any given set of facts found by the jury is also a "statutory ceiling" under the Sentencing Reform Act.

There are two reasons why this is so. First of all, in the post-*Booker* sentencing process courts cannot sentence at the default statutory maximum in every case. Instead courts must impose "reasonable" sentences.[41] "If reasonableness review is more than just an empty exercise," then as Justice Alito, joined by Justices Kennedy and Breyer, confirmed in dissenting in *Cunningham v. California*, "there inevitably will be *some* sentences that,

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[39] *United States v. Treadwell*, 593 F.3d 990, 1017-18 (9th Cir. 2010) (quoting *United States v. Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008)).

[40] *United States v. Ashqar*, 582 F.3d 819, 825 (7th Cir. 2009).

[41] *Booker,* 543 U.S. at 261-62. Some sentences imposed at the statutory ceilings have been found unreasonable. *See, e.g., United States v. Ofray-Campos,* 534 F.3d 1, 42-44 (1st Cir. 2008) (480-month maximum sentence substantively unreasonable where guidelines were 188-235 months); *United States v. Ortega-Rogel,* 281 Fed. App'x 471 (6th Cir. 2008) (24-month maximum sentence unreasonable; range was 8-14 months); *United States v. Doe*, 128 Fed. Appx. 179, 181 (2nd Cir 2005) (vacating sentence).

absent any judge-found aggravating fact, will be unreasonable," for in the post-*Booker* era "a sentencing judge operating under a reasonableness constraint must find facts beyond the jury's verdict in order to justify the imposition of at least some sentences at the high end of the statutory range."[42]

Second, the Sixth Amendment imposes constraints on what it takes for a sentence to be found reasonable. In order to "give intelligible context to the right of jury trial," "juries must find all the facts of the *crime* the state *actually* seeks to punish."[43] This principle flows inexorably from the jury's relationship with the sentencing process at the time of the Framing. Because the common-law jury exercised *de facto* control over sentencing,[44] the jury's "fact-finding was the 'pivotal event'" in a prosecution.[45] "[A] judge's task [was] simply to apply the sentence dictated by the jury's verdict."[46]

Reconciling the common-law jury's functional role in determining the facts necessary to impose a sentence in a Guidelines-centric era is not

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42 *Cunningham v. California,* 549 U.S. at 309 n.11 (Alito, J., joined by Kennedy & Breyer, JJ., dissenting) (emphasis original).

43 Douglas Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. LAW 37, 56 & n. 76 (2006) (quoting *Blakely,* 542 U.S. at 305, 307) (first emphasis added by authors).

44 *United States v. Kandirakis*, 441 F.Supp. 2d 282, 311 (D. Mass. 2006); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L. J. 1097, 1124 & n. 204 (2001).

45 James J. Bisborrow, *Note: Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 WILLIAM & MARY L. REV. 289, 297 (2007).

46 Berman & Bibas, 4 OHIO ST. J. CRIM. LAW at 55-58; Bisborrow, 49 WILLIAM & MARY L. REV. at 297.

invariably simple. But in this case it is not difficult to prove that Petitioners' sentences are tainted by Sixth Amendment error of the sort identified in the *Rita* concurrence and the *Cunningham* dissent.

For one thing, the underlying sentencing process sidestepped the jury foreperson's letter. In so doing it marginalized the jury's role as "the people's voice in the judiciary"[47] and "the means by which 'the people' were injected into the affairs of the judiciary."[48]

More importantly, Petitioners' sentences were driven quite openly by judge-made findings – that Petitioners had committed an entirely differing crime with differing elements.[49] That sort of sentencing invites constitutional mischief. This is easily demonstrated by the trial judge's conspiracy finding. Putting aside the fact that the judge's determination was rejected by the jury, the judge-made finding yielded drastically higher base offense levels and sentences than Petitioners otherwise legally could have received. As the table in the Appendix reveals, in the post-*Booker* era no federal court of which we are aware has punished an offender convicted of distributing such a modest amount of crack cocaine to any term of

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47 *Kandirakis*, 441 F.Supp.2d at 312 (citing Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY at 236-37 (2005)).

48 Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PENN. L. REV. 33, 57 (2003).

49 *See Alleyne v. United States*, __ U.S. _, 133 S. Ct. 2151, 2166-2167 (2013) (Breyer, J., concurring).

imprisonment remotely close to 180 months, the amount meted out to Jones, much less Ball's 225-month sentence.

These extreme sentences, not being based on a jury's fact-finding and being multiples of the norm for the offense of conviction, simply subvert the Sentencing Reform Act's "basic aim of ensuring similar sentences for those who have committed similar acts in similar ways."[50] In constitutional terms, Petitioners' outlier sentences are "arguably even more problematic than the sentence in the [*Rita*] hypothetical because the jury actually acquitted the [Petitioners] of the conduct that led to more than half of [their] sentence, but the Sixth Amendment violation is identical."[51] The judge-made factual finding of a conspiracy is "essential to the punishment" that was imposed.[52]

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE QUESTION PRESENTED IS IMPORTANT AND RECURRING AND THIS CASE IS AN IDEAL VEHICLE TO RESOLVE IT.

This Court needs to answer the question presented in order to resolve an important concern generated by *Booker*. The court of appeals below declined to endorse the Sixth Amendment as-applied doctrine simply because a majority of this Court has not yet considered the issue on the merits. It is time to do so and formally adopt the as-applied doctrine.

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[50] *Booker,* 543 U.S. at 252.

[51] *United States v. White,* 551 F.3d at 390 (Merritt, J., Martin, Daughtrey, Moore, Cole & Clay, JJ., dissenting).

[52] *Blakely,* 542 U.S. at 301-02.

1. The Court declared in *Cunningham* that subsequent opinions would define the scope of reasonableness review.[53] This case pivots on an important issue of reasonableness review that has arisen on a recurring basis, and will continue to do so absent Court review.[54] The Court should resolve the issue presented, just as it has settled other controversies arising under the Sentencing Guidelines in order to provide guidance to the lower courts.[55]

2a. Not to decide this important issue also will promote a perverse result by allowing the Government the leeway to use its power in a manner that offends the jury trial guarantee. Unless this issue is decided, the Government will retain the unfettered ability to link a factually weak charge of a serious offense with a relatively strong charge of a modest offense -- or perhaps not even formally charge the more serious offense -- knowing that so long as it prevails at trial on the lesser charge that it still can in effect punish the defendant for the far more severe offense. The Government need only persuade a trial judge to make a factual finding under a lesser standard of

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[53] 549 U.S. at 293 n.15.

[54] *Carlson v. Green,* 446 U.S. 14, 17 (1980)*; Baggett v. Bullitt,* 377 U.S. 360, 366 (1964). A recently-filed petition for writ of certiorari raises the constitutionality both of including acquitted conduct in sentencing and the as-applied doctrine. *United States v. Baquedano,* 535 Fed App'x 487 (6th Cir. 2013), *pet. for cert. filed,* No. 13-9965 (April 28, 2014).

[55] *See, e.g., Nelson v. United States*, 555 U.S. 350 (2009) (Guidelines are not to be presumed reasonable); *Spears v. United States*, 555 U.S. 261 (2009) (district courts may vary from Guidelines based on policy disagreements); *Kimbrough v. United States*, 552 U.S. 85 (2007) (same); *Gall v. United States*, 552 U.S. at 49-52 (establishing three-step procedure to govern sentencing proceedings); *Rita v. United States*, 551 U.S. at 347 (courts of appeals may, but are not required to, apply a presumption of reasonableness to a within-guideline sentence that reflects a proper application of the Guidelines).

proof than a reasonable doubt that the defendant committed a different offense with differing elements. As a result, the crime the defendant will actually be punished for is something substantially different from the offense of conviction. The ultimate sentence will bear no relationship to the sentencing range that is supposed to result from committing the offense of conviction. Allowing that pernicious practice to prevail so long as the sentence does not exceed the outer statutory ceiling would thwart the courts' "responsibility to ensure that sentences are based on sound judgment, lest we return to the 'shameful' lack of parity . . . which the Guidelines sought to remedy."[56]

2b. This case is an ideal vehicle to resolve the issue left unresolved in *Rita*. Not only are the facts so plainly within the Sixth Amendment as-applied doctrine's ambit, but Petitioners squarely raised the claim, briefed it and argued it at each level of the proceedings below.[57]

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[56] *United States v. Cavera*, 550 F.3d 180, 224 (2ndCir. 2008) (*en banc*) (Sotomayor, J., concurring in part and dissenting in part) (internal citation omitted).

[57] *Cuyler v. Sullivan,* 446 U.S. 335, 341 (1980); *Francis v. Henderson,* 425 U.S. 536, 538 & n.3 (1976).

CONCLUSION

The underlying sentences reflect a serious, recurrent and unconstitutional sentencing practice. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX