No. 13-10026

IN THE

Supreme Court of the United States

JOSEPH JONES, DESMOND THURSTON & ANTWUAN BALL.

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

BRIEF OF LAW PROFESSOR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

June 26, 2014

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QUESTION PRESENTED

Were the petitioners' Sixth Amendment jury trial rights violated when a judge significantly aggravated the calculated Guideline sentencing range based on alleged offense "facts" expressly rejected by the people through jury verdicts of not guilty and then sentenced them to terms of imprisonment far beyond the norm for the offense of conviction.

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INTERESTS OF THE *AMICUS CURIAE*

Amicus is a law professor who teaches, conducts research, and practices in the fields of criminal law and sentencing in the United States.[1] He has a professional interest in ensuring that federal sentencing statutes are interpreted and applied in a manner that coherently advances their purposes and is consistent with longstanding constitutional principles and with contemporary function in the criminal law.

REASONS FOR GRANTING THE PETITION

Antwuan Ball, Joseph Jones and Desmond Thurston, after federal agents accused them of involvement in a violent conspiracy, denied their guilt and exercised their "right to a speedy and public trial, by an impartial jury." U.S. Constitution, Amendment VI. Facing serious criminal allegations, Petitioners were entitled to rely upon "constitutional protections of surpassing importance," *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), by exercising trial rights "designed to guard against a spirit of oppression and tyranny on the part of the rulers." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Invoking "the jury's historic role as a bulwark

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[1] All parties have consented to the filing of this amicus brief and expressly do not oppose its filing based upon failure to provide ten days notice. Letters of consent to the filing of this brief executed by all parties have been lodged with the Clerk of the Court pursuant to Rule 37.2. In accord with Rule 37.6, *amicus* states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

between the State and the accused at the trial for an alleged offense," *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2351 (2012), Petitioners required federal prosecutors to "suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of [Petitioners'] equals and neighbours." *Blakely v. Washington*, 542 U.S. 296, 306, 313-14 (2004).

After a lengthy trial and weeks of jury deliberation, the people exercised suffrage in this case by acquitting Antwuan Ball, Joseph Jones and Desmond Thurston of all conspiracy charges; the jury's unanimous vote after a full and fair trial resulted in Petitioners' conviction only of low-level drug distribution charges involving small quantities of crack cocaine. But, perhaps displeased by how the citizenry here functioned "as a circuitbreaker in the State's machinery of justice," *id.* at 306, federal prosecutors at Petitioners' sentencing asserted that offense facts to be used in required Guideline calculations could and should be discovered through judicial inquisition with no regard given to the jury's verdict. Such an effort to nullify at sentencing the jury's findings suggests a prosecutorial view of the Sixth Amendment as mere procedural formality, even though this Court has often made clear that the reach and application of jury trial rights should not be driven by "Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." *Booker v. United States*, 543 U.S. 220, 237 (2005).

Relying on this Court's pre-*Apprendi* decision in *United States v. Watts*, 519 U.S. 148 (1997), and the remedy adopted in *Booker*, which sought to preserve substantively useful and procedurally

sound components of the Federal Sentencing Guidelines, lower courts often fail to recognize the Sixth Amendment problems resulting from judicial Guideline sentencing enhancements based on alleged offense "facts" which, as in this case, were *expressly rejected by the people through a jury verdict*. Here the district judge embraced the prosecutors' allegations that Petitioners were part of a conspiracy despite a jury verdict directly to the contrary and that determination tripled or quadrupled the Guideline ranges for Petitioners. The people's role in determining the truth of the prosecutors' accusations was ignored at sentencing; Petitioners' acquittal by a jury on all major charges was rendered irrelevant to the lengthy prison sentences they received.

Sentencing rules permitting substantive circumvention of the jury's work enables overzealous prosecutors to run roughshod over the traditional democratic checks of the adversarial criminal process the Framers built into the U.S. Constitution. When applicable rules allow enhancement based on any and all jury-rejected "facts," prosecutors can brazenly charge any and all offenses for which there is a sliver of evidence, and pursue those charges throughout trial without fear of any consequences when seeking later to make out their case to a sentencing judge. When acquittals carry no real sentencing consequences, prosecutors have nothing to lose (and much to gain) from bringing multiple charges even when they might expect many such charges to be ultimately rejected by a jury. Prosecutors can overcharge defendants safe in the belief they can renew their allegations for judicial reconsideration as long as the jury finds that

the defendant did *something* wrong. Indeed, piling on charges makes it more likely that the jury will convict of at least one charge, thus opening the door for prosecutors to re-litigate all their allegations before the judge. Under such practices, the sentencing becomes a trial, and the trial becomes just a convenient dress rehearsal for prosecutors.

Whatever theories may have once propped up lower court rulings permitting Guidelines ranges to be significantly enhanced by jury-rejected, judge-discovered facts are no longer viable after two recent rulings by this Court. In *Peugh v. United States*, 133 S. Ct. 2072 (2013), this Court confirmed that Guideline ranges, even though now only advisory, still have consequential "force as the framework for sentencing" and thus are subject to constitutional limitations on how they are calculated and applied. *Id.* at 2083-84. In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), this Court overturned a prior holding that had failed to recognize that the constitutional protections of the Fifth and Sixth Amendments apply fully not only to facts raising maximum sentences, but whenever the law creates a "linkage of facts with particular sentencing ranges … regardless of what sentence the defendant *might* have received if a different range had been applicable." 133 S. Ct. at 2159-62. These recent rulings—especially when read with this Court's assertion that the "core concerns" of Sixth Amendment jurisprudence are "encroachment [at sentencing] by the judge upon facts historically found by the jury [and] any threat to the jury's domain as a bulwark at trial between the State and the accused," *Ice v. Oregon*, 555 U.S. 160, 169 (2009)—confirm that lower courts should not

disregard the constitutional problems inherent in aggravated sentences based on Guideline ranges significantly enhanced by jury-rejected, judge-discovered facts.

The Petitioners contend, as several Justices have already observed, that the Sixth Amendment is implicated whenever a legal rule (in this case, substantive reasonableness review) makes judge-discovered facts necessary for a lengthy sentence. Amicus further highlights that this case presents the narrowest and most troubling instance of such a Sixth Amendment problem—namely express judicial reliance on so-called "acquitted conduct" involving jury-rejected, judge-discovered offense facts to calculate an enhanced Guideline sentencing range and thereby justify an aggravated sentence. By allowing prosecutors and judges to nullify jury findings at sentencing such as in the case at bar, the citizen jury is "relegated to making a determination that the defendant at some point did something wrong," and the jury trial is rendered "a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-07.

Though various forms of judicial fact-finding within structured sentencing systems may raise constitutional concerns, this case only concerns the uniquely serious and dangerous erosion of Sixth Amendment substance if and when Guideline ranges are enhanced by facts indisputably rejected by the jury. It may remain possible "to give intelligible content to the right of a jury trial," *Blakely*, 542 U.S. at 305-06, by allowing broad judicial sentencing discretion to be informed by Guidelines calculated

based on facts never contested before a jury. But when a federal judge significantly enhances a prison sentence based expressly on allegations indisputably rejected by a jury verdict of not guilty, the jury trial right is rendered unintelligible and takes on a meaning that could only be advanced by a Franz Kafka character and not by the Framers of our Constitution.

I. THE SIXTH AMENDMENT'S ESSENTIAL CHECK ON GOVERNMENT POWERS IS EVISCERATED IF GUIDELINE RANGES CAN BE SIGNIFICANTLY ENHANCED BY JURY-REJECTED FACTS.

In case after case involving questions about the reach and application of the Sixth Amendment, this Court has consistently and repeatedly stressed that the "right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). *Accord Batson v. Kentucky,* 476 U.S. 79, 86 (1986) ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."); *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Allenye*, 133 S. Ct. at 2161; *Southern Union*, 132 S. Ct. at 2351; *Ice*, 555 U.S. at 169; *Booker*, 543 U.S. at 237-39; *Blakely*, 542 U.S. at 305-06; *Apprendi*, 530 U.S. at 477; *Jones v. United States*, 526 U.S. at 244-248 (1999); *Gaudin*, 515 U.S. at 510. Indeed, in this Court's most recent exploration of Sixth Amendment jury trial rights, even those Justices writing separate opinions stressed that the Sixth Amendment needs to be

interpreted "as a protection for defendants from the power of the Government." *Allenye*, 133 S. Ct. at 2168 (Roberts, C.J., dissenting); *see also id.* at 2167 (Breyer, J., concurring) ("At the very least, the Amendment seeks to protect defendants against the wishes and opinion of the government."); *id*. at 2169-71 (Roberts, C.J., dissenting) (emphasizing "the jury right as a guard against judicial overreaching" by serving as a "barrier between the defendant and the State").

This Court's oft-repeated proclamations about the importance of "the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense," *Southern Union*, 132 S. Ct. at 2351, ring disturbingly hollow for Petitioners and other defendants as they discover, after being vindicated by jury verdicts of not guilty on serious charges, that prosecutors will seek, and judges will calculate, enhanced Guideline sentencing ranges based expressly on jury-rejected, judge-discovered "facts" relating to acquitted offenses. Petitioners and other defendants are rightly left to wonder just what kind of "bulwark" or "safeguard" or "barrier" the Sixth Amendment truly provides for the accused if and when prosecutors and judges can effectively nullify key jury findings at sentencing. From the Petitioners' perspectives, their jury trials served not as a mechanism to "prevent oppression by the Government," *Duncan*, 391 U.S. at 155, but rather as prosecutors' means to enjoy the first of two distinct chances to convince either of two courtroom decision-makers that the Petitioners should be severely punished based on questionable accusations.

In this case, given the conspiracy allegations repeated by the Government from indictment through sentencing, federal prosecutors had apparently convinced *themselves* that Petitioners were guilty of a range of crimes. But Petitioners contested the charges at trial, and a jury of "equals and neighbours" determined that the vast majority of the prosecutors' accusations were lacking and legally insufficient to justify criminal liability on conspiracy charges. By asserting their innocence and invoking "a fundamental reservation of power [to the people] in our constitutional structure," *Blakely*, 542 U.S. at 306, Petitioners here exercised their constitutional rights the face of the most significant form of Executive Branch Government powers and demanded that federal prosecutors prove up their accusations against them "at public trial, by an impartial jury." U.S. Constitution, Amendment VI. Prosecutors thereafter were unable to satisfactorily prove to "the people" that Petitioners should be held criminally responsible for what the Government had come to believe they did.

Yet, after traditional adversarial testing of prosecutors' accusations resulted in not guilty jury verdicts on all conspiracy charges, federal prosecutors at sentencing still sought to snatch a severe judicial sentencing victory from the jaws of a jury trial defeat by urging the district judge to rely on jury-rejected facts to significantly increase the prescribed Guideline sentencing ranges for the Petitioners. As astutely noted by the foreman of the jury that acquitted Petitioners in a letter to the judge prior to sentencing, prosecutors here ultimately desired that "these defendants [be] sentenced not on the charges for which they [were]

found guilty but on the charges for which [prosecutors] would have liked them to have been found guilty." Petition for Writ of Certiorari at 4.

Importantly, the perniciousness of allowing judges to impose aggravated sentences expressly based on Guideline ranges enhanced by jury-rejected facts extends beyond the harms to acquitted defendants like Petitioners and to the citizens who served on the jury that acquitted them. Allowing acquitted conduct Guideline enhancement *enhances* prosecutorial powers at each major stage of a criminal prosecution because it provides prosecutors with significant benefits (and no obvious costs) from always alleging and pursuing any and every viable criminal charge at their disposal among "the sprawling scope of most criminal codes." *Blakely*, 542 U.S. at 311:

First, **at the outset of prosecutions**, prosecutors can allege and pursue every possible statutory charge when indicting defendants in order to increase plea bargaining leverage because they knowing there will be no real sentencing consequences even after a jury acquittal on most charges. Indeed, the prospect of future acquitted conduct Guideline enhancements requires competent federal defense attorneys in multi-count cases to inform their clients that securing a jury acquittal on many charges at trial may produce little or no Guideline range benefit but likely still will result in the defendant losing any sentencing credit for accepting responsibility. It is little wonder plea bargaining now "is the criminal justice system," *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), when sentencing rules require defense attorneys to advise clients that pleading guilty even to some suspect

government charges may result in a better sentencing outcome than if a jury were to reject these charges at a trial. *See generally* Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013).

***Second*, as a case proceeds to trial**, prosecutors can continue to pursue any and every possible statutory charge through trial knowing there will be no real sentencing consequences after any jury acquittal on some or most of the charges, as happened here. Doing so, even if the evidence supporting many charges may be weak or suspect, enables prosecutors to increase the chances that a jury will be drawn into "making a determination that the defendant at some point did something wrong." *Blakely*, 542 U.S. at 306-07. The more charges that prosecutors pursue against a defendant at trial, the more likely it becomes that the defendant will be convicted on at least one charge. *See generally* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. Rev. 621, 627–28 (2004) ("The 'compromise' and 'decoy' effects predict that when the jury is presented with more than one guilty option, the percentage of defendants found not guilty of both offenses will be lower than the percentage of defendants found not guilty when there is just one charge.") And in those not-uncommon cases in which a defendant's guilt on a relatively minor charge may not be seriously contested, prosecutors get the added benefit and luxury of the jury trial serving as a dress rehearsal for its later judicial sentencing presentation concerning "the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-07.

***Third*, as a case proceeds to sentencing**, prosecutors can and often will become even more aggressive in the offense allegations and accusations they lodge against a partially-acquitted defendant while persistently telling judges (and the authors of a presentence report) that they are duty-bound to wholly disregard any and all jury acquittals. Rather than reflect upon and respect the democratic judgment that a jury verdict represents, prosecutors are permitted and prompted by judicial use of acquitted conduct Guideline enhancements to question and undermine the jurors' efforts and to minimize the meaning and value of the citizenry's deliberative process and perspective. In this case, as we have seen, the foreman of the jury that acquitted Petitioners even wrote to the judge to say it is 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." Petition for Writ of Certiorari at 4.

This case ultimately highlights all these troubling facets of enhanced Executive Branch Government power in full effect: federal prosecutors secured many advantages and benefits from pursuing multiple and varied serious criminal charges against Petitioners—advantages and benefits that included increasing the government's plea bargaining leverage while compounding the defense's challenges in mounting a full defense—and then still sought greatly enhanced punishments based on all these charges despite the jury's unanimous conclusion that Petitioners should be acquitted on nearly all of them. Rather than show respect for the jury's work and verdict at sentencing,

federal prosecutors at sentencing sought to nullify the jury's votes and silence the people's voice.

A criminal justice system that demonstrates genuine respect for the "jury's historic role as a bulwark between the State and the accused" would require a sentencing judge to reject any prosecutorial contention that a judge could or should significantly enhance Guideline sentencing ranges based on alleged offense facts that were clearly and indisputably rejected by a jury's verdicts of not guilty. The Sixth Amendment should be applied here to prevent a judge from aggravating a Guideline range based on alleged offense "facts" that were *expressly rejected by the people through a jury verdict*; only such an application of the Sixth Amendment would ensure that the "right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new [post-*Booker*] sentencing regime." *Booker*, 543 U.S. at 237.

II. THE ENDURING IMPORTANCE AND CONTROLLING INFLUENCE OF GUIDELINE RANGES AFTER *BOOKER* HEIGHTEN THE SIXTH AMENDMENT PROBLEMS OF ENHANCEMENTS BASED ON JURY-REJECTED FACTS.

Though this Court's pre-*Apprendi* decision in *United States v. Watts*, 519 U.S. 148 (1997), seemed to countenance enhanced sentences based on jury-rejected, judge-discovered facts, a number of sentencing courts after *Apprendi* and *Blakely*

recognized enduring constitutional concerns that arose whenever Guideline sentencing calculations involve "expressly considering facts that the jury not only failed to authorize [but] facts which the jury expressly disapproved." *United States v. Pimental*, 357 F. Supp. 2d 143, 152-53 (D. Mass. 2005). *Accord United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006); *United States v. Coleman*, 370 F. Supp. 2d 661, 668 (S.D. Ohio 2005). Nevertheless circuit courts have generally believed that the distinctive remedy adopted in *Booker*, which generally avoids Sixth Amendment violations at sentencing by making the Guidelines advisory rather than mandatory, was sufficient to take care of any constitutional problems resulting from a judge's reliance even on offense "facts" clearly rejected by a jury verdict of not guilty.

But as this Court has clarified the functioning of the *Booker* remedy in a series of follow-up rulings, it has also detailed and reiterated that Guideline calculations still play a central and foundational role in all federal sentencing proceedings: **(1)** a district court must begin all sentencing proceedings by calculating the applicable Guidelines range and then use this range as "the starting point and the initial benchmark" for its sentencing decision-making, *Gall v. United States*, 552 U.S. 38, 49 (2007); **(2)** any major departure from the Guidelines needs to "be supported by a more significant justification than a minor one," *id.* at 50; **(3)** any "failure to calculate the correct Guidelines range constitutes procedural error," *Peugh*, 133 S. Ct at 2080; and **(4)** on appeal, a within-Guidelines sentence may be presumed reasonable. *Rita v. United States*, 551 U.S. 338, 347 (2007). In other words, even in the post-*Booker*

federal sentencing scheme, sentencing decisions still "are anchored by the Guidelines," which retain "force as the framework for sentencing" and "exert controlling influence on the sentence that the court will impose." *Peugh*, 133 S. Ct at 2083-85.

As the *Peugh* ruling stressed, because the Guidelines retain real legal force even after *Booker* and because district judges remain required to calculate Guideline ranges in every federal sentencing, the process and functional impact of Guideline calculation and application is still subject to significant constitutional limitations. Put more directly in light of this Court's most recent Sixth Amendment ruling, because judicial findings that support Guideline enhancements still meaningfully "alter the prescribed range of sentences to which a defendant is *exposed* and do so in a manner that aggravates the punishment," *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013) (emphasis added), there are still Sixth Amendment problems inherent in Guideline calculations expressly based on a judge's reliance on offense "facts" clearly rejected by a jury verdict of not guilty.

In this context, it is valuable to recall the discussion of the Sixth Amendment's "core concern" in the only recent case that limited the reach and application of *Apprendi* and its progeny. In *Ice v. Oregon* this Court stressed that the "animating principle [of *Apprendi*'s rule] is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." 555 U.S. 160, 168 (2009). Unlike the fact-finding at issue in *Ice*, the judicial fact-finding at sentencing which aggravated the Petitioners'

punishment in this case, as even the jurors themselves came to understand, clearly did involve an "encroachment here by the judge upon facts historically found by the jury" and stand as a "threat to the jury's domain" and an "erosion of the jury's traditional role." *Id.* at 169-70. Consequently, if this Court is truly willing to "take[] pains to reject artificial limitations upon the facts subject to the jury-trial guarantee," *id.* at 172 (Scalia, J., dissenting), this Court should take up Petitioners' case in order to again ensure that the "right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will] still stand between the individual and the power of the government." *Booker*, 543 U.S. at 237.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

June 26, 2014

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