ORAL ARGUMENT NOT YET SCHEDULED

NO. 08-3033
(Consolidated with Nos. 10-3108 & 11-3031)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH JONES, DESMOND THURSTON & ANTWUAN BALL,

Appellants.

On Appeal From the United States District Court For the District of Columbia

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus National Association of Criminal Defense Lawyers ("NACDL"), is a nonprofit corporation with a membership of more than 10,000 attorneys and 40,000 affiliate members in all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Amicus National Association of Federal Defenders, was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

Amicus American Civil Liberties Union of the Nation's Capital is the Washington, D.C. affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws.

Each of these *Amici* organizations include among their members trial lawyers and interested parties who are concerned, on a daily basis, with sentencing

issues in courts throughout the United States and its territories. They have an abiding interest in ensuring the integrity of our judicial system through fair, reasonable and constitutionally authorized sentences. *Amici* contend that the use of acquitted conduct to enhance criminal sentences subverts the function of juries in our adversarial system of criminal justice.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *United States v. Watts* was limited and held only that consideration of acquitted conduct at sentencing was consistent with the "clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte v. United States*, 515 U.S. 389 (1995)". 519 U.S. 148, 149 (1997) (per curiam) The Court never addressed, in *Watts, Witte,* or any other decision, whether the use of acquitted conduct was consistent with Fifth and Sixth Amendment principles governing standards of proof and requiring jury fact-finding at trial. As Appellants' brief discusses at length, subsequent Supreme Court jurisprudence has further defined those principles in the sentencing context. *See* Appellants' Br. at 27-37.

Nonetheless, this Circuit and numerous others have held that *Watts* applies even to constitutional questions that were not at issue in that case, and supposedly authorizes a sentencing judge, as the district court did here, to contravene the jury's verdict by punishing the defendant for the crimes that the jury found were not

proved beyond a reasonable doubt. This brief addresses the scope of the *Watts* decision, its subsequent treatment by federal courts and the flaws in the various rationales that have been offered for continuing application of that decision in the Sixth Amendment context.

This Court has addressed these constitutional issues in part in *United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006) and *United States v. Settles*, 530 F.3d 920 (D.C. Cir. 2008). However, since those decisions, the Supreme Court has clarified and very narrowly construed the scope of judicial discretion vis-à-vis the jury's fact-finding role: "[W]hile judges may exercise discretion in sentencing, they may not 'inflic[t] punishment that the jury's verdict alone does not allow.'" *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012) (quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004)). The decisions of this circuit, like decisions of other courts of appeals which have held that acquitted conduct may be considered at sentencing to enhance a sentence beyond the range authorized by the jury, cannot survive *Southern Union* and the Supreme Court's other recent Fifth and Sixth Amendment precedents.

Finally, the use of acquitted conduct to enhance Appellants' sentences rendered the sentences imposed here substantively unreasonable. But for Judge Roberts' consideration of acquitted conduct, Appellants' maximum sentence

exposure, as authorized by the jury's verdict, would have been one-fourth or one-fifth of the sentences they received.

ARGUMENT

I. THE HOLDING IN *WATTS* DOES NOT GOVERN THE SIXTH AMENDMENT ISSUES PRESENTED HERE

In the wake of *United States v. Booker* and *Rita v. United States*, circuit courts affirming the continued use of acquitted conduct to enhance criminal sentences rely on the Supreme Court's pre-*Apprendi* decision in *United States v. Watts*—which held that a sentencing court's consideration of acquitted conduct was not a violation of Due Process.[1] *Watts*, however, is readily distinguishable, because no challenge to the Sixth Amendment right to have a jury decide facts essential to the punishment was at issue there. Subsequently, in *Booker*, the Court noted this limitation on the scope of *Watts*, explaining that there was no

[1] *See e.g., United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (*en banc*); *United States v. Smith*, 261 F. App'x 921 (8th Cir. 2008); *United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007) (The "core principle of *Watts* lives on and [a] district court [may] constitutionally consider ... acquitted conduct"); *United States v. McIntosh*, 232 F App'x 752, 757 (10th Cir. 2007); *Dorcely*, 454 F.3d at 371; *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006) ("Post-*Booker*, the law has not changed ...; acquitted conduct, if proved by a preponderance of the evidence, still may form the basis for a sentencing enhancement"); *United States v. Jones*, 194 F. App'x 196, 197-98 (5th Cir. 2006); *United States v. Hayward*, 177 F. App'x 214, 215 (3d Cir. 2006); *United States v. Ashworth*, 139 F. App'x. 525, 527 (4th Cir. 2005) (*per curiam*); *United States v. Price*, 418 F.3d 771, 778-88 (7th Cir. 2005); *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005) ("[D]istrict courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct....").

"contention [in *Watts*] that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." *United States v. Booker*, 543 U.S. 220, 240 (2005). The Court continued, "*Watts* . . . presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us." *Id.* at 240 n.4.

A. Justice Breyer's Citation To *Watts* In *Booker* Does Not Make *Watts* Controlling Here.

While this should put to rest the notion that *Watts* approved the use of acquitted conduct under the Sixth Amendment, some courts have pointed to Justice Breyer's remedial opinion in *Booker*, which cites *Watts* in explaining relevant conduct rules and the goals of the Sentencing Guidelines.[2] But Justice Breyer's *Booker* opinion did not hold—or even suggest in dicta—that reliance upon acquitted conduct to *increase* the otherwise applicable Guideline range for an offense of conviction is consistent with the Sixth Amendment. In fact, Justice Breyer had noted in *Watts* that the Guidelines' treatment of acquitted conduct

[2] Justice Breyer noted that under the original Sentencing Guidelines, "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt)," and such conduct was appropriate to promote uniformity through relevant conduct sentencing. *Booker*, 543 U.S. at 251 (emphasis in original).

might be in tension with the jury trial right. *See Watts*, 519 U.S. at 159 (suggesting that the Commission revisit the issue "[g]iven the role that juries and acquittals play in our system") (Breyer, J., concurring); *see also id*. at 170 ("At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal, concerns noted by Justice Stevens and the other federal judges to whom he refers in his dissent.") (Kennedy, J., dissenting).

Justice Breyer's *Booker* remedial opinion cites *Watts* and similar cases to emphasize only the general use of pre-sentence reports to determine an accurate guideline calculation, and to reject the proposal that the Court add a requirement to the Guidelines whereby a sentencing court could not consider, in any way, facts other than those admitted or proved to a jury. 543 U.S. at 250-51. ("To engraft the Court's constitutional requirement onto the sentencing statutes, however, would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, *uncovered after the trial*.") (emphasis added).

Watts was therefore mentioned in a historical sense only and not, contrary to this and other circuit courts' expansive reading, as a resolution of the issue presented here: whether the Sixth Amendment permits enhanced sentencing based

on acquitted conduct. Indeed, the remedial portion of *Booker* could not have held that *Watts* once and for all decided that reliance upon acquitted conduct is consistent with the Sixth Amendment because, only 11 pages earlier, the Court specifically had observed that in *Watts* there was no "contention that the sentencing enhancement had exceeded the sentence authorized by the jury in violation of the Sixth Amendment." *Id.* at 240.

B. The Relevant Statutory Maximum, Even Under An Advisory Guidelines System, Is The Maximum Authorized By The Jury's Fact-finding.

Other courts attempting to reconcile *Watts* with the Supreme Court's subsequent Sixth Amendment jurisprudence have suggested that the Sixth Amendment does not prevent a district court from relying on acquitted conduct in applying an *advisory* guidelines system. "For Sixth Amendment purposes, the relevant upper sentencing limit established by the jury's finding of guilt is thus the *statutory* maximum, not the advisory Guidelines maximum." *Settles*, 530 F.3d at 923 (emphasis in original).[3]

[3] *See also White*, 551 F.3d at 384 ("In the post-*Booker* world, the relevant statutory ceiling is no longer the Guidelines range but the maximum penalty authorized by the United States Code"); *United States v. Grier*, 475 F.3d 556, 566 (3d Cir. 2007) (*en banc*) (same), *cert. denied*, 128 S. Ct. 106, 169 L.Ed.2d 77 (2007); *United States v. Jiminez*, 498 F.3d 82, 87 (1st Cir. 2007) (same); *United States v. Green*, 162 F. App'x 283, 284 (5th Cir. 2006) (*per curiam*) (same); *United States v. Crosby*, 397 F.3d 103, 109 n.6 (2d Cir. 2005) (same); *United States v. Duncan*, 400 F.3d 1297, 1303 (11th Cir. 2005) (same); *United States v. Smith*, 413 F.3d 778, 781 (8th Cir. 2005) (same).

But that view cannot be reconciled with the Supreme Court's own descriptions of the scope of the jury's role. In *Blakely*, the Court rejected the State's claim that the statutory maximum for Sixth Amendment purposes was 10 years – *i.e*., the maximum penalty imposed for so-called Class B felonies under Washington law. 542 U.S. at 303. Rather, the Court explained that for *Apprendi* purposes "the relevant 'statutory maximum' is not the maximum sentence a judge may impose *after* finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (quoting *Apprendi v. New Jersey*, 530 U.S. 466 , 488 (2000)) (emphasis in original).

Nor did *Booker* hold that under the admittedly "advisory" Guidelines, judicial fact-finding to impose a sentence within the statutory maximum set forth in the United States Code does not violate the Sixth Amendment. Instead, in *Booker*, the Court held that "when a trial judge exercises his discretion to select a specific sentence *within a defined range*, the defendant has no right to a jury determination of the facts that the judge deems relevant." 543 U.S. at 233 (emphasis added). Thus, if the jury's fact-finding supports imposition of a sentence within a defined range, then the Sixth Amendment will not stand as an obstacle to the imposition of a sentence within that "defined range." But "[w]hen a judge inflicts punishment that the jury's verdict *alone* does not allow, the jury has not found all the facts which the law makes essential to the punishment and that

exceeds his proper authority." *Blakely*, 542 U.S. at 304 (internal quotations and citations omitted).

C. Section 3661 Cannot Authorize A Sixth Amendment Violation.

This Court's earlier decision in *Dorcely* relied upon *Watts*'s construction of 18 U.S.C. § 3661 ("No limitation" is to be placed on what a judge might consider at sentencing). 454 F.3d at 372. That view wholly ignores the fact that neither the statute nor the Guidelines can authorize a Sixth Amendment violation. "Legislatures are free to enact statutes that constrain judges' discretion in sentencing—*Apprendi* requires only that such provisions be administered in conformance with the Sixth Amendment." *Southern Union Co*., 132 S. Ct. at 2356. Thus, neither *Dorcely* nor *Settles* addresses the Supreme Court's more precise and current definitions of what a jury conviction authorizes, namely, that "[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." *Southern Union Co*., 132 S. Ct. at 2348.[4]

[4] Should the panel nonetheless conclude that these intervening decisions of the Supreme Court do not permit review of *Dorcely* and *Settles*, *Amici* respectfully request the panel to consider this an invitation to recommend *en banc* consideration of that issue. Because Appellants also request "as-applied" substantive reasonableness review for their particular sentences, *see* Appellant's Br. at 45-50, the Court may reverse those sentences on that alternative ground as well.

Moreover, courts that rely on a distinction between "statutory" maximums and "guidelines" maximums to justify the use of acquitted conduct in enhanced sentencing ignore the Court's unequivocal pronouncements in *Rita*, and again in *Southern Union*, that any sentence must be based solely upon the facts found by the jury or admitted by the Defendant, and that consideration of facts not found by the jury unconstitutionally exposes a defendant to greater punishment. "[R]equiring juries to find beyond a reasonable doubt facts that determine the [sentence]'s maximum amount is necessary to implement *Apprendi*'s 'animating principle': the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Southern Union Co*., 132 S. Ct. at 2351 (citing *Oregon v. Ice*, 555 U.S. 160, 163 (2009)). The use of acquitted crimes to calculate an initial guideline range deprives a defendant of his Sixth Amendment right to a sentence wholly authorized by the jury's verdict. *See Cunningham v. California*, 549 U.S. 270, 290 (2007) ("If the jury's verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied."); *Blakely*, 542 U.S. at 306 (*Apprendi* "ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict"); *Apprendi*, 530 U.S. at 483 n.10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.") [5]

[5] *See also, United States v. Pimental*, 367 F. Supp. 2d 143, 152-53 (D. Mass. 2005)

In the present case, there is no dispute that the facts found by the jury supported imposition of an advisory Guidelines range of between 51-71 months for Appellant Ball, 27-33 months for Appellant Thurston and 33-41 months for Appellant Jones. Within those ranges, the district court had broad discretion to impose a sentence consistent with the Sixth Amendment. What the trial court could not do, however, was conclude that the Appellants were responsible for conduct of which they were acquitted by the jury to support the calculation of an entirely different "defined range," one that resulted in a nearly five-fold increase in Appellants' sentences. *See Booker*, 543 U.S. at 232 (the Sixth Amendment guarantees a "right to have the jury find the existence of 'any particular fact' that the law makes essential to [the defendant's] punishment" (quoting *Blakely* 542 U.S. at 301).

D. *Watts* Is Not Binding As A Matter Of Sixth Amendment Law.

The Government has urged that the appellate courts are duty-bound to apply *Watts* until it has been limited or overruled by the Supreme Court. This Court agreed in *Settles* that "Congress or the Sentencing Commission certainly could conclude as a policy matter that sentencing courts may not rely on acquitted

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(When a court uses *acquitted* conduct to calculate a Guidelines range, the court "is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved," and "they are facts comprising different crimes, each in a different count.").

conduct. But under binding precedent, the Constitution does not prohibit a sentencing court from relying on acquitted conduct." 530 F.3d at 924. Similarly, in *United States v. Mercado*, the Ninth Circuit agreed with the Government's position that *Watts* remained binding law based, in part, on prior circuit decisions stating that circuit courts are constrained to follow *Watts* even if it is in tension with the Supreme Court's later Sixth Amendment decisions.[6] *Amici* respectfully suggest that *Watts* is not binding because, as the Supreme Court said in *Booker*, it is not controlling on the issue of whether there is a Sixth Amendment violation in using judge-found facts at sentencing.

To be sure, "[i]f a precedent of th[e] [Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). But that rule does not operate here given the Supreme Court's express denial, in *Booker*, of the direct application of *Watts*. *Booker*, 543 U.S. at 240.

[6] *See, e.g.*, *United States v. Magallanez*, 408 F.3d 672, 685 n.1 (10th Cir. 2005) ("[I]t is not the place of an inferior court to overrule [*Watts*]"); *Vaughn*, 430 F.3d at 526 ("Courts of Appeal should continue to follow directly controlling precedent even where that decision appears to rest on reasons rejected in another line of decisions"); *United States v. Neal*, 177 F. App'x 220, 220 n.3 (3d Cir. 2006) ("[W]hether *Watts* survives *Booker* is not for a federal court of appeals to decide").

E. *Watts* Has Been Criticized On Sixth Amendment Grounds.

Those circuit court decisions relying on *Watts* post-*Booker* often have been accompanied by strong dissents and expressions of doubt. For example, in *United States v. Mercado*, Judge W. Fletcher, in dissent, explained that the courts mistakenly have assumed that "no Sixth Amendment problem exists as long as the sentencing court stays beneath the statutory maximum." 474 F.3d at 661. As discussed above, that assumption is mistaken because 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." *Blakely*, 542 U.S. at 303 (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

Likewise, in *United States v. Faust*, Judge Barkett, while acknowledging that she was bound by Eleventh Circuit precedent, concurred specially to express the view "that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment." 456 F.3d 1342, 1349 (11th Cir.) (Barkett, J., concurring specially), *cert. denied*, 549 U.S. 1046 (2006). Judge Barkett explained that "the holding of *Watts*, explicitly disavowed by the Supreme Court as a matter of Sixth Amendment law, has no bearing on [sentence enhancements based on acquitted conduct] in light of the Court's more recent and relevant rulings in *Apprendi*, *Ring*, *Blakely*, and *Booker*." *Id.* at 1349. In Judge Barkett's view, "it perverts our system of justice to allow a defendant to suffer

punishment for a criminal charge for which he or she was acquitted." *Id.* at 1350 (Barkett, J., concurring) (internal citation omitted). She described the practice as "reducing the jury's role to the relative importance of low-level gatekeeper." *Id.* at 1350.

Similarly, in the Sixth Circuit's *en banc* decision in *White*, Judge Merritt, joined by five other judges, wrote in dissent that the current system of permitting facts that were rejected by the jury to serve as the basis for the guideline calculation operates as an "incremental degradation" of the jury right, "sever[ing] the 'invariable linkage of punishment with crime' and "eviscerat[ing] the jury's longstanding power of mitigation, a close relative of jury nullification." 551 F.3d at 393-394 (Merritt, J., dissenting) (quoting *Apprendi*, 530 U.S at 478-79). Finally, concurring with the *en banc* Third Circuit *Grier* court—whose decision was limited to the issue of whether using acquitted conduct violated the Due Process clause—Judge Ambro observed that while he too believed the court to be bound by *Watts*, the better rule would be that: "constitutional protections apply not only to those facts that authorize the 'statutory maximum' (as phrased by *Apprendi*) . . . but to every fact (save prior convictions) identified by the law itself

as deserving of additional punishment, no matter what that fact may be called." *Grier*, 475 F.3d at 574 (Ambro, J., concurring).[7]

II. A DEFENDANT'S SENTENCING GUIDELINE CALCULATION SHOULD BE BASED SOLELY ON THE CRIME OF CONVICTION

While an appellate court may presume a within-Guidelines sentence to be reasonable, a sentence that would not be upheld as substantively reasonable but for the consideration of facts not found by the jury (or admitted by the defendant) violates the Sixth Amendment. *See Rita v. United States*, 551 at U.S. 338, 365 (2007) ("our remedial opinion in *Booker* . . . plainly contemplated that reasonableness review would contain a substantive component") (citing *Booker*, 543 U.S. at 260–264) (Stevens, J., concurring). Far from granting district courts *carte blanche* to find whatever facts they deem relevant to a criminal sentence, the Court's Sixth Amendment rulings make clear that "the door . . . remains open for a defendant to demonstrate that his sentence . . . would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall v. United States*, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring).

In *Rita* the Court examined whether the Sixth Amendment precluded appellate courts from granting a presumption of reasonableness to a district court

[7] *Grier* was accompanied by vigorous dissents, 475 F.3d at 589-600 (Sloviter & McKee, JJ., dissenting); *id.*, 475 F.3d at 604-613 (McKee & Sloviter, JJ., dissenting).

sentence that "reflects a proper application of the Sentencing Guidelines." 551 U.S. at 347. The Court concluded that Sixth Amendment does not prohibit "[a] *nonbinding* appellate presumption that a Guidelines sentence is reasonable." *Id*. at 353 (emphasis added). However, Justice Scalia and Justice Thomas concurred separately to emphasize that, under the federal Sentencing Guidelines, "sentences whose legality is premised on a judge's finding some fact (or combination of facts)" violates the Sixth Amendment. *Id.* at 371 (Scalia, J., concurring in part and concurring in judgment).

Justice Scalia, in a concurrence joined by Justice Thomas, highlighted the hypothetical situation where "the district court imposes a sentence *within* an advisory Guidelines range that has been substantially enhanced by certain judge-found facts." *Id*. (emphasis in original). In that example, the hypothetical defendant had an advisory Guidelines range between 33-41 months based on the facts found by the jury. Under the Guidelines, the district court could find additional aggravating facts that produce a higher advisory guidelines range of 235-293 months. In that circumstance, the "judge-found facts" are "not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence." *Id*. at 372. Thus, in the absence of judicial fact-finding, the "293-month sentence . . . would surely be reversed as unreasonably excessive." *Id*.

The facts and sentencing ranges in the present case are strikingly similar to the hypothetical "as-applied" Sixth Amendment violation described by Justice Scalia and Justice Thomas in *Rita*. There can be no doubt that the district court's reliance on acquitted conduct was an essential predicate for the sentence it imposed, and that, but for the court's "findings," the enhanced sentences would have been unsupportable under federal law. It was only the facts found by the district court that allowed it to impose greater sentences than ones premised "'solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" *Blakely*, 542 U.S. at 303 (quoting *Ring*, 536 U.S. at 602) (emphasis omitted). In that regard, this case cannot be distinguished from *Blakely*, *Booker*, and *Cunningham*. To this analytical framework, *Rita* added that sentencing decisions could be reviewed for substantive reasonableness, and appellate review "does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." *Rita*, 551 U.S. at 375.

Justice Scalia has urged the Supreme Court to apply *Booker* forthrightly when the reasonableness of the sentence depends on judge-found facts. For example, in *United States v. Conatser*, 514 F.3d 508 (6th Cir. 2008), *cert. denied sub nom. Marlowe v. United States*, 555 U.S. 963 (2008), a Sixth Circuit panel upheld a sentence that depended solely on the judge-found fact that the defendant

had possessed the "malice aforethought" required for second-degree murder. In dissenting from denial of certiorari, Justice Scalia described the outcome as "fall[ing] short of what we have held the right to trial by jury demands: 'Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the Defendant or proved to a jury beyond a reasonable doubt.'" *Marlowe* 555 U.S. at 963 (Scalia, J., dissenting from denial of certiorari) (quoting *Booker,* 543 U.S. at 244).

In this case, had the sentencing court imposed a sentence at the top end of the guidelines range for the crimes for which Appellants were convicted (51-71 months in Mr. Ball's case, for instance), their sentences would have been constitutional. But in light of the use of acquitted conduct to increase the range, the sentences are unconstitutional as applied. *See* Appellants' Br. at 48-49. Punishing a defendant for acquitted crimes undermines the essential role of the jury. The Supreme Court has called it an "absurd result" that a person could be sentenced "for committing murder, even if the jury convicted him only of illegally possessing the firearm used to commit it—or making an illegal lane change while fleeing the death scene." *Blakely,* 542 U.S. at 306.[8] And by sentencing for acquitted crimes,

[8] And yet, applying the same rule used by the district court here, a district court in Missouri recently sentenced a defendant based on the judge's finding that he was guilty of murder, even though the jury had convicted him only of being a felon in

the jury's verdict is, as a matter of perception and for all practical purposes, overturned. Sentences like those imposed upon Appellants surely would frustrate any conscientious juror who legitimately might wonder in the aftermath whether the jury's role was nothing but window dressing.[9]

The use of acquitted crimes to calculate a sentence range deprives a defendant of his right to have a jury confirm or reject every accusation. "An accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it

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possession of a firearm, and the Eighth Circuit affirmed. *United States v. Stroud*, 673 F.3d 854 (8th Cir. 2012), *petition for cert. filed* (U.S. Oct. 19, 2012) (No. 12-6877).

[9] "It would only confirm the public's darkest suspicions to sentence a man to an extra ten years in prison for a crime that a jury found he did not commit." *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) ("[M]ost people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted."), *vacated*, 271 F. App'x 298 (4th Cir. 2008). *See also United States v. Canania*, 532 F.3d 764, 778 & n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting a letter from a juror as evidence that the use of acquitted conduct is perceived as unfair and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); *United States v. Coleman*, 370 F. Supp. 2d 661, 668 (S.D. Ohio 2005) ("A layperson would undoubtedly be revolted by the idea that, for example, a 'person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.'"); *Cf. Settles*, 530 F.3d at 923-24 ("[W]e understand why defendants find it unfair" and "[m]any judges and commentators have similarly argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system.").

is no accusation in reason." *Southern Union Co.*, 132 S. Ct. at 2354-55. And all nine justices in *Booker* agreed that, at least as to the elements of crimes of which the defendant is accused, the jury must confirm the truth of every accusation. 543 U.S. at 239; *id*. at 327-28 (Breyer, J., dissenting). Indeed, the Framers could not have intended to guard against governmental oppression through criminal juries with ultimate power to confirm or reject the truth of every accusation, and to partially acquit to lessen unduly harsh punishment, *see Jones v. United States*, 526 U.S. 227, 247 (1999)—only to allow a judge to then effectively nullify the jury's acquittal. Doing so eviscerates the "fundamental reservation of power" in the jury and prevents it from "exercis[ing] the control that the Framers intended." *Blakely*, 542 U.S. at 306. And doing so by ignoring the "[e]qually well founded . . . companion right to . . . proof beyond a reasonable doubt" is no answer. *Apprendi*, 530 U.S. at 478. Like other "'inroads upon the sacred bulwark of the nation,'" the use of acquitted crimes to calculate the guideline range is "'fundamentally opposite to the spirit of our constitution.'" *Booker*, 543 U.S. at 244 (quoting 4 Blackstone 343-44).

CONCLUSION

For the foregoing reasons and those advanced by Appellants, the Court should reverse the district court's judgment and remand for resentencing.

January 16, 2013

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the foregoing *Amici* Brief of the National Association of Criminal Defense Lawyers, the National Association of Federal Defenders and the American Civil Liberties Union in support of Appellants contains 5,007 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2), and complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

This brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 pt. typeface and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this sixteenth day of January, served the foregoing document upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system and courtesy copies of the forgoing document have been sent via U.S. Mail, to the following parties:

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