October Term 2013

SUPREME COURT OF THE UNITED STATES

No. 13-10026

JOSEPH JONES, ANTWUAN BALL & 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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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

Petitioners reply to the Government's Opposition to their petition for a writ of certiorari.

This is the quintessential proper vehicle for as-applied reasonableness review

This case presents the question of whether the Sixth Amendment requires as-applied reasonableness review where judge-made findings of acquitted conduct increased the Petitioners' Guidelines ranges by four times what the Guidelines provided absent that finding. The Government's description of Petitioners' claims as presenting a "particularly weak case"[1] to consider the as-applied doctrine of reasonableness review is meritless. To the contrary, this is a particularly strong case for certiorari: the issues were thoroughly briefed; the facts are compelling; the sentences are unjustifiable; the legal issues are pristine; and the time has come to instruct the appellate

[1] Brief in Opposition to Petition for Certiorari ("BIO") at p. 10.

courts that reasonableness review has constitutional dimensions -- just as initial guideline calculations[2] and determination of mandatory minimum sentencing terms.[3] Absent the judge-made findings that rejected the jury's decision to acquit, these sentences undeniably wouldn't remotely approach what they did.

A. The United States' reference to several denied certiorari *petitions misses the mark.*

The Government proffers a footnote reference to eight cases – only one of which involved acquitted conduct - in which *certiorari* was denied.[4] Apparently this is meant to imply that this case raises nothing different. But a denial of certiorari sets no precedent.[5] And an inspection of those cases dispels this implication.

1. Only one of those eight cases raised a claim of acquitted conduct being used to inflate a Guidelines range; the others all concerned uncharged conduct. Both practices present serious concerns. But there is a special problem where a judge -- a "lone employee of the state"[6] -- uses a lesser standard of proof than beyond a reasonable doubt to effectively reject jury

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2 *Peugh v. United States*, 133 S. Ct. 2072 (2013).

3 *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

4 BIO at 7 n.1 (citing *United States v. Garcia*, 132 S. Ct. 1093 (2012); *United States v. Culberson*, 131 S. Ct. 1674 (2011); *United States v. Taylor*, 131 S. Ct. 993 (2011); *United States v. Gibson,* 559 U.S. 906 (2010); *United States v. Marluta*,556 U.S.1207 (2009); *United States v. Marlowe*, 555 U.S.963 (2008); *United States v. Bradford*, 552 U.S. 1232 (2008); *Alexander v. United States,* 552 U.S. 1188 (2008)).

5 *Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985.)

6 *Blakely v. Washington,* 542 U.S. 296, 313-14 (2004).

findings which acquit a defendant and punishes that defendant as if she or he had committed the offense for which she was acquitted.

2. In four of the eight cases, the petitioner did not raise an as-applied claim or only surfaced it in a reply brief,[7] a near-surefire path to denial of *certiorari*.[8] (One case – *Marluta* – was the only one involving acquitted conduct.) Here, Petitioners raised the issue at sentencing, before the Court of Appeals, and before the District Court when seeking release pending appeal.[9]

Also, in one of those four cases, a Circuit judge urged that the as-applied doctrine be recognized but held that the particular facts did not justify it.[10] Here the Government never claimed and no court ever found that the same sentences would have been imposed and found reasonable but for the judge-made findings which punished Petitioners as if they had been convicted, rather than acquitted, of those charges.[11]

3. In two of the remaining four cases the petitioners made passing references (at most) to as-applied reasonableness review and neither stated

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7 BIO, *United States v. Gibson,* 2009 WL 5167215 (SGBRIEFS), at *4 (Dec. 23, 2009), BIO, *United States v. Marluta*, No. 08-731, at 31 n. 17 (March 23, 2009BIO, *United States v. Marlowe*, No. 07-1390, at 14 (August 4, 2008), BIO, *United States v. Bradford*, No. 07-7829, at 14-15 (January 25, 2008).

8 *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 8 (1993); *United States v. Williams,* 504 U.S. 36, 41 (1992).

9 Petition at 6-7.

10 *United States v. Conatser,* 514 F.3d 508, 528-532 (6th Cir. 2008) (Moore, J., concurring in part and concurring in the judgment), *cert. den'd sub nom. United States v. Marlowe,* 555 U.S.963 (2008). *But see id.* (Scalia, J., dissenting from denial of certiorari).

11 Petition at 2-3.

why their sentences were unreasonable nor what would have been reasonable absent consideration of uncharged conduct.[12] Petitioners have explained their reliance on the as-applied theory and its unassailable underpinnings, and provided unchallenged proof that reasonable sentences would have been a quarter of what they received.[13]

4. The facts of one of the two remaining cases did not make a compelling as-applied case. That claim distilled to whether 45 months of a 228-month sentence was excessive but the overall sentence was not primarily a function of the uncharged conduct.[14] Here acquitted conduct drove Petitioners' punishment, and their claims dovetail with the hypothetical facts Justices Scalia and Thomas posited as representative of an as-applied claim.[15]

5. In the final case, the petitioner briefed the as-applied theory below and drew a dissent from the denial of certiorari. His Guidelines range was 30-37 months; a judge-made finding of uncharged conduct yielded a 78-month

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[12] BIO, *United States v. Garcia*, No. 11-6626, at pp. 10-11 (December 12, 2011); BIO, *United States v. Culberson*, No. 10-7097, at 7 (February 16, 2011. Notably *Culberson* was scheduled for release within a year. BIO at 11. Absent this Court's interposition, Petitioners have 5-8 years to serve.

[13] Petition at 4-5 & 14-16a.

[14] Petitioner conceded throwing "Molotov cocktails" at a house and aiding and abetting firing pistols into an occupied house. Even without the cross-reference, the nine-year sentence for the relevant counts would not be unusually harsh. BIO, *Alexander v. United States,* 2008 WL 110235 (SGBRIEFS), *2-*3, *6 (Jan. 7, 2008).

[15] Petition at 10-11 (quoting *Rita v. United States,* 551 U.S. 338, 371-72 (2007) (Scalia, J., joined by Thomas, J., concurring)).

sentence.[16] Here, Petitioners' sentences are based on acquitted conduct and are quadruple the highest sentences imposed for the offense of conviction.[17]

6. Petitioners also are the first to compare their sentences with the post-*Booker* sentencing results for similarly-situated offenders. The Government is silent about the objective data's revelation about Petitioners' aberrant sentences.[18]

B. The Government's ipse dixit *descriptions of Petitioners' backgrounds and claims they could not meet the reasonableness standard are unsupported characterizations.*

Petitioners do not claim to have led blameless lives: they were, after all, convicted of isolated street-level sales of crack cocaine. But in painting this case as a purportedly poor vehicle for review, the Government's statement of facts principally mirrors its conspiracy theory, which the jury unanimously rejected.

1. It claims that Petitioners were members of a "loosely-knit gang" and "engaged in acts of violence against rival gangs." Ball, it contends, was "one of its leaders."[19] Next it devotes virtually a full page to spelling out the underlying charges. Only then does it concede that a jury (after an eight month trial) acquitted them of everything except Ball's single count of

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[16] Main Brief on Appeal, *United States v.* Taylor, No. 08-4837, at 21-24 (4th Cir.), *aff'd,* 368 Fed. App'x 350 (4th Cir. 2010); BIO, *United States v. Taylor*, No. 10-5031, at 5-9 (Dec. 8, 2010). *But see id.* (Scalia, J., dissenting from denial of certiorari).

[17] Petition at 5-6 & App. 14-16a.

[18] Petition for Certiorari ("Petition") at 5-6,14-16a.[18]

[19] BIO at 2.

distributing crack cocaine and Thurston's and Jones' two counts of distributing crack. Even then, it fails to disclose the amounts: for Ball, 11 grams, for Thurston and Jones, 2 grams or less.[20]

The Government's lengthy characterization of Petitioners and the charges brought[21] is a smokescreen to limit reasoned discussion of the Question Presented. One might look to Thurston, whose sentence fell in the middle of Petitioners' sentences. He received 194 months' imprisonment for a conviction that normally yields a 27-33 month term, and for which no one similarly situated during the post-*Booker* era received more than 51 months incarceration.[22] Moreover, the Government's extravagant claims made here about him were never found by a jury, apart from having sold a miniscule amount of crack.

2. This case reflects prosecutorial overcharging coupled with an effort at sentencing to punish Petitioners for acquitted conduct.[23] For instance, the nine counts of violence brought against Thurston did not survive a motion for judgment of acquittal, which the prosecution conceded.[24] And the Government says nothing about the district court's rejecting the prosecutor's

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[20] *Compare* BIO at 4 *with* Petition at 3.

[21] BIO at 2, 9-10.

[22] *Compare* Petition at 6, 14-16a *with* BIO (no discussion).

[23] Amicus Brief of Prof. Douglas Berman in Support of Petition for Certiorari at 3, 8-10.

[24] Tr. 8/1/07:18668.

seeking a weapons enhancement or that Thurston's criminal history category would have been a level lower had he been sentenced a day later.[25]

As for Ball, he was never charged with possessing a weapon when he made his crack sale and no evidence to the contrary was presented below. Nothing else the Government says here about him (or Jones) was proved to a jury, either, aside from the street-level sale.

C. The Government's references to the "statutory maximum" that each Petitioner faced and their below-Guidelines sentences are meaningless.

Before rebutting the Government's arguments against accepting review, a disconnect exists between certain claims made by the Government and sentencing practice. For instance it states that "[b]ased on the quantity of drugs in the counts of conviction and their respective criminal histories, petitioner Ball faced a maximum sentence of 40 years; petitioner Jones faced a maximum sentence of 30 years; and Petitioner Thurston faced a maximum sentence of 20 years."[26] This is meaningless.

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[25] The guidelines eliminated criminal history "recency" immediately after Thurston's sentencing. U.S.S.G. § 4A1.1(e).

[26] BIO at 4.

1. The undisputed fact put forth by Petitioners is that in the post-*Booker* era no one has been sentenced at the statutory maximum for the simple distribution offense of conviction. Persons in comparable situations received sentences no more than 1/4th of what Petitioners received.[27]

2. The Government asserts seven times that the Guidelines are "advisory."[28] "Advisory" means to make suggestions.[29] But the Guidelines are constraining to the extent that sentencing judges must calculate the applicable Guidelines before imposing sentences and cannot deviate from the ranges without explanations that are subject to appellate review. And this process undeniably has constitutional implications.[30]

3. The Government also makes much of Petitioners having been sentenced below the trial judge's calculations[31] - as if they received judicial mercy. It is not evidence of mercy where a judge overstates the Guidelines calculations fourfold and then imposes a sentence slightly below those inflated calculations. This presents a serious and persistent Sixth Amendment claim that warrants review.

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[27] Petition at p. 6. In practice for an offender such as Ball with a statutory maximum of 40 years the next-highest sentence was 64 months,1/8th of the statutory ceiling. For Jones, with a 30 year statutory maximum, the next-highest sentence was 51 months, about 1/7th of the statutory ceiling. For Thurston, with a 20 year statutory maximum, the nest-highest sentence was 51 months, 1/5th of the ceiling.

[28] BIO at 5, 7, 8, 9, 11.

[29] BLACK'S LAW DICTIONARY at 55 (B. Garner ed. 1999) ("advisory committee"); WEBSTER'S NEW COLLEGIATE DICTIONARY 18 (1977) ("giving advice").

[30] *Peugh v. United States,* 133 S. Ct. 2072, 2080-2082 (2013).

[31] BIO at 5.

D. The Government has not offered any cogent reasons to deny review.

It is not Petitioners' claim that sentencing discretion, to the extent it exists in the federal Guidelines system, necessarily offends the Sixth Amendment. The Government's one-page argument that judges nowadays have great sentencing discretion simply misses the mark.[32] Nor do Petitioners contend, contrary to the last two pages of the Government's brief,[33] that consideration of acquitted conduct necessarily is constitutionally offensive. While Petitioners are prepared to argue why that raises grave constitutional concerns, we recognize that the Court has permitted it in the context of a Double Jeopardy claim.[34] Our position focuses elsewhere.

1. Reasonableness review in a Guidelines system means something tangible: it is the outer limits of a sentence for an offense that is derived after first calculating a guideline range based on facts found by the jury (or admitted by the defendant).[35] When the actual punishment rests not on those facts, but on facts found by the judge, and the sentence could not be deemed reasonable in the absence of those findings, then as Justices Scalia

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[32] BIO at 8.

[33] *Id.* at 10-11.

[34] *United States v. Watts,* 519 U.S. 148 (1997). *But see id.,* 519 U.S. at 170-71 (Kennedy, J., dissenting).

[35] *United States v. Grier,* 475 F.3d 556, 577 & n. 21 (3rd Cir. 2007) (*en banc*) (Ambro, J., concurring) (citing and quoting Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1091 (2005) ("'Here was the huge surprise in *Blakely*: that a guideline presumption nested within broader statutory parameters should itself be understood as a statutory maximum.'").

and Thomas observed in their *Rita* concurrence, the sentence violates the Sixth Amendment.

2. Moreover, Petitioners explained by referring to the hypothetical given in *Rita* by Justices Scalia and Thomas, the facts of which this case so closely resembles - and to the real world of post-*Booker* sentencing - how drastically these sentences depart from what the law permits. Thus understood, the Government's claim that Petitioners supposedly could not meet the as-applied unreasonableness standard[36] is mystifying.

E. The Government's Position Disserves the Framers' Design

For purposes of an as-applied theory (or even for one dealing head-on with the constitutionality of any sentencing based on acquitted conduct), the problem is that sentencing a defendant based on acquitted conduct plainly departs from the Framers' design. A contemporary approach to interpreting the Constitution looks at Framers' intent and the values they meant to protect. That contemporary understanding is important because as John Marshall stated: "It is a constitution we are expounding."[37]

1. When one asks what interest and values were meant to be protected by the Jury Trial Guarantee, the answer is that its antecedents can be traced to the Magna Charta's assurance that "[n]o freeman shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the

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[36] BIO at 9-10.

[37] *M'Culloch v. Maryland,* 17 U.S. 316, 407 (4 Wheat.) (1819).

land."[38] Hence "the essential feature of a jury obviously lies in [its] interposition between the accused and his accuser,"[39] – the state.

At the same time, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[40] The Framers intended that "[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."[41]

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[38] Amicus Brief of Cato Institute & Rutherford Institute in Support of Petition for Certiorari at pp. 2, 2-5 (citations omitted). *Accord* F. Dwarris: A GENERAL TREATISE ON STATUTES: THEIR RULES AND CONSTRUCTION, WITH AMERICAN NOTES AND ADDITIONS 433 (P. Potter ed., Albany, NY 1871).

[39] *Williams v. Florida,* 399 U.S. 78, 100 (1970).

[40] *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968).

[41] *Id.*

Thus, as Chief Justice Roberts has explained:

> The Sixth Amendment therefore provided for trial by jury as a "double security, against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." J. Story, Commentaries on the Constitution of the United States §924, p. 657 (Abr. 1833); see also The Federalist No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton) (discussing criminal jury trial as a protection against "judicial despotism"). Our holdings that a judge may not sentence a defendant to more than the jury has authorized properly preserve the jury right as a guard against judicial overreaching. [42]

2. Once the jury acquits, the Sixth Amendment does not license the Government to punish the defendant as if a guilty verdict had been returned on that charge. "The jury could not function as the circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish."[43]

3. The foregoing reflects the fundamental policies in the Framers' intent, which fully support Petitioners' position. Conversely, the Government's position only makes sense if it is deemed constitutionally

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[42] *Alleyne v. United States,* 133 S. Ct. 2151, 2169 (2013) (Roberts, C.J., joined by Scalia & Kennedy, JJ, dissenting). The conception of the jury predates the Framing. "'[I]n settling . . . a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in…. Here therefore a competent number of sensible and upright jurymen … will be found the best investigators of truth, and the surest guardians of public justice.'" Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing,* 76 TENN. L. REV. 235, 279 (2009) (quoting 3 W. Blackstone, COMMENTARIES*,* 380).

[43] *Blakely v. Washington,* 542 U.S. 296, 306-07 (2004).

proper that persons acquitted of serious crimes should be punished anyway, provided the prosecution can convince a judge to accept findings that a jury unanimously rejected.

F. The vigorous debate in the Circuits justifies review.

The Government does not dispute the existence of a spirited debate in the Circuits over whether the as-applied doctrine states the law. It did not challenge Petitioners' references to decisions that have recognized in similar circumstances that sometimes there is a need for this Court to intervene in advance of an inter-Circuit conflict in order to spell out the law.[44]

Conclusion

The Court should review the Circuit Court's judgment.

Respectfully submitted,

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[44] Petition at 17-18.

Word Count Certification

I certify that this brief contains 2,992 words.

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